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# Formation of The Contract

## Offer and Acceptance

Essential Ingredients: (1) Offer and acceptance (2) certainty of terms (3) intention to create legal obligations

### 1. Offer

#### a. Offer and Invitation to Treat

##### Canadian Dyers Association Ltd v Burton (1920), 47 O.L.R 259 (H.C.)

Intention of the parties - Words and Actions used to determine if offer (lower crt – new cases + regs)

Older case, statute can modify

Ratio: A mere statement or quotation of price does not constitute an offer (invitation to treat). Courts will consider the language used and the context, in addition to subsequent actions of both parties when determining whether an offer was made.

Facts: P writes to D for best price on house. D responds with lowest price. A year later P writes they would like to take the previous price, but possibly lower. D replies stating that this is the lowest he will accept. P treat as offer and accept, send cheque for $500 and ask that Deed be drawn up. D retains cheque, sends draft deed and suggests an early closing date (action = offer).

Legal Rule: For a valid K, there must be an offer and acceptance

##### Pharmaceutical Society v Boots, [1953]1 All E.R. 482 (C.A.)

Daywood case where woman swaps the price tags

(Self Serve Store) Goods on display are an invitation to treat (Foreign)

Ratio: Goods on display are an invitation to treat, the customer makes the offer, and the cashier (agent of the owner) accepts at the cash register in self-service store.

Facts: Self-serve pharmacy with legal requirement that sale of certain drugs occur under supervision of pharmacist. P argued that placing goods out an offer, and placing in receptacle acceptance (thus sale would not be under supervision). This view was rejected.

##### Carlill v Carbolic Smoke Ball Co, [1893] 1 Q.B. 256 (C.A.)

If one makes extravagant promises, that they benefit from, those promises should be binding

If the ad has all the details necessary for an offer, it can be an offer

And intention to be bound

Advertisements usually invitations to treat, but can be offers if construed as such. (English Binding)

Ratio: “It is an offer to become liable to anyone who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement”

* Advertisement = usually invitations to treat unless a reasonable person would think otherwise
* Mere **puffs** are when reasonable person would not intend legal consequences. The details given show it is not a mere puff.
* The determination of a serious contract will be determined from the words and actions.

Facts: Vendors of “The Carbolic Smoke Ball” placed an add offering a 100L reward “to any person who contracts [the flu or related illness], after having used the ball three times daily for 2 weeks according to the printed directions.." They further noted 1000L had been deposited to show sincerity. The plaintiff bought a ball and used it as directed but caught the flu.

#### b. Communication of Offer

##### Williams v Carwardine (1833), 110 E.R. 590 (K.B.) - Binding

Offer must be communicated 🡪 Fulfilling conditions of advertisement (offer to the world) can = K

Ratio: There can be a contract with any person who performed the necessary conditions in an advertisement. All that is necessary to fulfil the contract is to know of the reward before giving the information. **Motive does not matter**.

Facts: Handbill with 20£ reward for information that led to conviction on brothers murderer. Williams testified out of fear for her safety, but knew of reward before testifying (inferred because all over town).

Lost dog example with unknown reward – should you get it?

##### R v Clarke, (1927), 40 C.L.R. 227 (Aust. H.C.) – dougs thinks it’s iffy

Must know of offer to accept it (Foreign – Australia)

Ratio: One cannot accept an offer one doesn’t know exists, or that one has forgotten exists.

* Both knowledge of offer and intent to accept the offer must be present when the conditions of the offer are performed (in acceptance by conduct) – i.e. you should be acting in reliance upon the proclamation.
* Communication of assent from the offeree to the offerer, by action or words required for acceptance

Analysis: In contrast with Williams v Carwardine, court held that defendant was not entitled to reward because he didn’t act in reliance of the offer and did not intend to accept it. 🡨 Policy reasons

Facts: Clarke gives evidence for a murder case after parties arrested without knowledge of a reward for the information. Claims reward after performing the conditions.

### 2. Termination of Offer

#### a. Revocation

##### Byrne v Van Tienhoven (1880), 5 C.P.D. 344

Revocation must be communicated (No Post Office Rule for Revocation) (English Binding)

Ratio: Revocation must be communication to the offeree so that the offeree has knowledge of the revocation. The postal rule does not apply to the revocation.

Facts: D mail offer to P on Oct 1 (to sell 1000 tin plates), received by P on Oct 11. P accept via telegram on Oct 11 and via letter Oct 15. Oct 8 D mailed revocation letter which was not received by offeree until Oct 20. D had already sold plates to a 3rd party. Sued for breach of contract (failure to deliver)

- absurdity 🡪 no person who accepted an offer via mail would know their position until they waited such a time as to be sure no withdrawal had been posted.

##### Dickinson v Dodds, (1876), 2 Ch. D. 463 (C.A.)

To keep offer open use **option contract** with considera.

Can withdraw offer at any time prior to acceptance since no contractual obligation. (English Binding)

Ratio: An offeror is free to withdraw their offer at any point until the offeree has accepted it, so long as the offeree has not provided any sort of consideration. An offeree must have knowledge of a revocation, but explicit communication is not required (may be implied by the circumstances).

Facts: Clear on the law, but iffy facts. D makes P offer to buy house but P did not immediately accept, P heard house had been sold, handed D the acceptance.

#### b. Unilateral Contract

##### Carlill v Carbolic Smoke Ball Co

Advertisement can create a unilateral contract where acceptance by actions.

Ratio: An advertisement can constitute a unilateral contract, which can be accepted by fulfilling the conditions of the contract; no formal acceptance required. The offerer can determine how acceptance of offer will be made.

Offer can be revoked up till the point when someone approaches to accept, by giving notice to revoke

##### Errington v Errington and Woods, [1952] 1 All E.R. 149 (C.A.)

Once you start performing a unilateral, cannot revoke unless conditions not met. (Foreign + Denning)

Ratio: Once the other party starts to perform, and the offeror knows this, an offeror can only revoke a unilateral contract if the offeree doesn’t live up to their side of the contract. (**Restitution** 🡨 soruce of obligation)

Facts: Father buys house for son and inlaw to live in under license. Deal that house will be theirs if they pay installments until debt paid off. Father dies, widow tries to revoke offer. (Lord Denning)

#### c. Rejection and Counter-Offer

**Hyde v Wrench** establishes counter-offer = rejection (firmly established)

##### Livingstone v Evans, [1925] 4 D.L.R. 769 (Alta. S.C.)

Anything other than an unconditional yes = Counter-offer is a rejection of offer (can’t later acc w/o cons)

Ratio: A counter-offer constitutes a rejection of an offer and that offer cannot be later accepted unless there is consent from the original offeror (standing by original price/ambiguous language = consent)

Facts: D writes to P offering to sell land for $1800 on terms. On same day P wires response “send lowest cash price. Will give $1600 cash..”. D replies via wire “cannot reduce price”. P immeadiately writes back and accepts the offer. 🡨 Althouh counter-offer is a rejection of original offer 🡪 “cannot reduce price” thought to be a renewal of the offer. Holding for the P.

#### d. Lapse of Time

##### Barrick v Clark, [1951] S.C.R. 177

Lapse of time determined by many different factors (reasonable time an issue that is implied in offer)

There needs to be a legal reason for a lapse – implicit revocation, etc.

Ratio: The reasonable time to accept an offer can be determined from the conduct and language of the two parties, the nature of the goods and other reasonable indications

Legal Rules:

* Offer remains open only for the time stated in the offer, or, if no time is stated, for a reasonable time having regard to the nature and circumstances of the offer provided that it has not in the meantime been withdrawn (can be implied)
* A letter asking for offer to remain open does not enlarge reasonable time (reasonable time could only be increased with a reply)
* Factors 🡪 demand for the land, proximity to the closing date, words used in the context of the offer (“immeadiate” or “as soon as possible”) 🡨 look at how the world looks at time of offer to determine implicit time limit.

Facts: Clark offers to buy land, Barrik replies with counter-offer, Received by Clarkes wife (Clarke on hunting trip) who writes asking for an extension, no reply. Barrik meantime sells to 3rd party. Clarke returns and sends acceptance.

### 2. Acceptance

#### a. Acceptance

##### Livingstone v Evans – Other Province (Alta)

A mere inquiry is not a count-offer (can just be answered and offer still open), unless it contains an offer

A counter-offer constitutes a rejection of an offer and that offer cannot be later accepted unless with consent from the original offeror (standing by original price/ambiguous language = consent)

##### Butler Machine Tool v Ex-cell-o Corp, [1979] 1 All E.R. 965 (C.A.) – Foreign + Denning

Only authority for why last shot idea is bad law

Offers are killed by materially different counter-offers

Ratio: **One** party offers (makes the entire offer), the other accepts (a materially different counter-offer kills off the original offer) – if there are two complete offers, there may be two complete K’s.

Offeror has a lot less say if your terms

Facts: Butler (seller) sends form with terms and conditions to buyer. Buyer respond with their own form which stipulates same info as in the quotation, but with their own terms and conditions, and a tear off slip to be signed and returned. Sellers complete form and agree to terms. (Dennings First/Last Shot – Bad)

Analysis: The buyers form was a counter offer that killed off the earlier offer, and the seller accepted.

#### b. Communication of Acceptance (Election)

##### Felthouse v Bindley (1862), 142 ER 1037 (Ex Ch)

Silence does not amount to communication (English Binding)

Ratio: Acceptance has to be communicated (explicitly or through action) in order for it to be binding. Cannot impose obligations on unwilling party.

Facts: Nephew and uncle have misunderstanding over price for horse. Uncle writes nephew and offers the difference. States that if he doesn’t hear back by a certain time, he will assume deal is made. Without making a reply, nephew asks auctioneer to set aside horse, but it is accidentally sold. No contract made – absence of notification of rejection does not amount to acceptance

“If a person chooses to make extravagant promises then it probably pays him to do so and the extravagant promise is no reason in law to be bound”

Brogden v Metropolitan Ry Co – if notice of acceptance req’d, it is received with notice of performance of the condition before offer revoked.

##### Carlill v Carbolic Smoke Ball Co

* The need for communication of acceptance can be waived by the offeror (acceptance by action)
* The offeror can determine how acceptance will be made

##### Brinkibon v Stahag Stahl, [1982] 1 All ER 293 (HL)

Contract formed where and when the acceptance is received (Foreign)

K can stipulate whose law is to apply to govern the K.

Ratio: Contract is formed where/when acceptance is communicated to offeror/received

Legal Rule:

* Acceptance sent by telex treated as instantaneous communication, which means the contract is only complete when the acceptance is received by the offeror (within reasonable limits it will be considered received when it reaches machine – middle of the night versus office hours)

Facts: Appellants desire to sue the supplier (an Austrian company) in england for breach of contract – to do so they must obtain leave to serve a writ (have to show contract made in jurisdiction). Made in Vienna.

##### Household Fire v Grant, (1879), 4 Ex. D. 216 (C.A.) (Authority of Postal Acceptance)

Expands Post Office Rule (English Binding)

Ratio: Post office rule applies to communicating an offer even if the letter is not received by the offeror

* \*\*Offeror may choose to make acceptance on the actual communication to himself \*\*

Post Office Rule: as soon as the letter of acceptance is delivered to the post office, the K is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.

Facts: Negotiated to purchase shares, letter confirming him as SSH never reaches him, now claiming he is not a SSH because company went into liquidation and creditors trying to sue. (Post office rule applied)

##### Holwell Securities v Hughes, [1974] 1 All E.R. 161 (C.A.)

Limits Post Office Rule (#1 when expressed acc has to reach offeror or #2 Creates absurdity) (Foreign)

Ratio: Post office rule does not apply where it is explicity stated to not apply, or in situations where acceptance must reach the offeror for there to reasonably be a meeting of the minds.

* Doesn’t apple when the PA would produce “Manifest inconvenience and absurdity”
* The post office rule “does not apply if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other

Facts: -Option for P to buy property, stipulated that in order to exercise the option it had to be “notice in writing” to the intending vendor within a time frame. Notice Letter sent via post, but never received by D.

Notice must be an intimation to someone – a notice which is not received is not functioning as a notice

## B. Certainty of Terms

Missing Terms or Ambiguity 🡪 Courts can **(1)** Sever (hard to do if price bundled) **(2)** Interpret – read in **(3)** Rectify (get courts to change)

##### May & Butcher v R (Implied Terms) 🡪 Agreement to Agree not Enforceable

[1934] 2 K.B. 17 (H.L.) – Decided in 1929 - Only used to interpret SOGA (the court really didn’t want a k)

Ratio: A term yet to be determined means that there is no contract if it is an essential term; it is simply an agreement to agree and is not enforceable. The court cannot read terms into an incomplete contract.

Facts: Suppliants enter into contract to buy old tentage from the government. No quantity or price is set out. State that price shall be agreed upon from time to time. Delivery agreed on by the parties.In event of dispute, goes to arbitration. Arbitration not binding if no K. Sale of goods act supposed to save K, but interpreted narrowly. Holding: No K

A Contract to make a K is not a K

Only authority on price

Commentary: Difference between Hillas & May seems to be commercial setting.

##### Hillas v Arcos (1932), 147 L.T. 503 (H.L.)

Contract to negotiate enforceable (cannot have a K to enter into a K) (English Binding)

Ratio: A contact to negotiate can be enforceable. The courts should intervene to determine the terms of agreement through context and intentionality of the parties

Facts: Contract with arcos to purchase 22,000 standards of timber with a specific condition to have the option of entering into a contract to purchase 100,000 units the following year at a 5% discount. Arcos refused to sell in the following year.

Analysis: The words are to be interpreted so the subject matter is preserved not destroyed.

* Commonplace in many commercial settings for matters of detail to be adjusted in course of perform.
* As contract proceeds, consultations and concessions may be needed
* If differences arise, the standard of what is reasonable can be applied by the court.
* Court is not to make a K for the parties, or go outside the words they have used, except where reasonable implications can be made.

##### Foley v Classique Coaches Ltd, [1934] 2 K.B. 1 (C.A.)

Tries to reconcile Hillas and May 🡪 Goes with Hillas (Gas Price Benchmarkable) (English Binding)

Ratio: Agreement to agree on price was certain enough since the parties had been performing for 3 yrs

Facts: D agreed to purchase piece of land from P (owned gas station adjacent to land). Sale was made “subject to” D entering into a supplemental agreement to purchase all gas off the P (at a price agreed to by the parties in writing from time to time). Had an arbitration clause. After 3 years, D decided to buy petrol elsewhere. Court agreed they had a contract 🡪 they had acted on it for 3 years.

Analysis: May and Butcher decided on the facts. Court held there was a K 🡪 acted on it for 3 years.

##### Empress v Bank of Nova Scotia, [1991] 1 W.W.R 537 (BCCA)

Meaning to promise to negotiate, but doesn’t impose a contract

Ratio: If a clause was clearly intended and understood to have legal effect by both parties, the courts will try, wherever possible, to give the clause the proper legal effect.

* Court implies requirement to negotiate in good faith and not withhold agreement unnecessarily 🡪 the landlord must not rent to anyone at a rate less than the bank is willing to pay.
* Clauses where it says the rent it to be ’agreed’ are usually not enforceable.
* Clauses where rent is to be established by a formula, but no machinery is supplied for applying formula – courts will apply the machinery (ex machinery could be arbitration clause).
* Clauses where machinery is set out but formula is defective – machinery used to cure the defect in the formula.

Facts: Empress seeks to have BNS ejected. Lease contained a renewal clause which states that the rental shall be the market rental at the time as agreed to by the parties. When negotiating bank imposed a fixed fee and higher rate. Judge gives sufficient meaning to deny writ of repossession.

##### Mannpar Enterprises v Canada

No CL obligation to negotiate in good faith 🡪 must be in K

Ratio: There is no common law obligation to negotiate in good faith; it must be in the contract, either expressly or impliedly. Promise to negotiate does not impose a K.

* “Renegotiate” does not promise a future agreement

Facts: Remote area, Manpar had K for extraction of sand and gravel from Indian Reserve, under K to pay rent and royalty and do reclamation work. Permit provide for renewal after 5 years (subject to satisfactory performance and renegotiation of rent and royalty). Manpar gives notice of intent to renew. First nations not happy and don’t want to renew.

Analysis: He distinguished Empress Towers Ltd. v Bank of Nova Scotia on the facts: there was **no general market rate** in this case, no element of objectivity, and no way to calibrate the value at hand.

A. Empress says there has to be a benchmark, no benchmark in Manpar

B. Empress used the promise to negotiate in good faith as a defense, whereas Manpar tried to use as a sword.

## C. Intention to Create Legal Relations

Note this is a dated authority and should be used with caution. Have to consider equality rights, and issues surrounding separation (want legally binding)

##### Balfour v Balfour, [1919] 2 K.B. 571 (Eng. C.A.)

Agreements between spouses not intended to create legal relations (English Binding)

Ratio: The common law does not regulate mutual promises between spouses that are not intended to be enforced by the courts (implied intention in family matters not to be legally bound)

Facts: Husband and wife go to England, wife stays behind for medical treatment. Husband promises to send an allowance but renegs. She commences divorce proceedings. No K found.

##### Rose and Frank v JR Crompton Bros, [1923] 2 K.B. 261 (C.A.) - Dated

Express intention not to create legal relations (English Binding)

Ratio: There is a strong presumption that business agreements are intended to create legal consequences, however if there is a clear and definite expression to the contrary, there is no reason in public policy why effect should not be given to their intentions.

Note: Once delivery made and accepted it would give rise to legal consequences as to payment.

Facts: Rose (P) the sole agents in US for distribution of paper products for Crompton (D). There had been a contractual relationship, but signed a new document with a clause that noted their intentions not to be bound by the courts.

- Gift arrangements are not binding

# Enforceability Issues

## A. Making Promises Bind – Seals and Consideration

### 1. Nature of Consideration and Seals

##### Royal Bank v Kiska - Seal

Seal can create legal obligations without consideration (BC Law)

Ratio (coming from dissent): Seal can still be used to create formal legal obligations without consideration. Seal must come from **or** be acknowledged by the promisor.

* Neither the words “given under seal” nor the formula of “signed, sealed and delivered” suffice, even when taken collectively to make a signatory chargeable under a sealed instrument when it has not in fact been executed under seal.
* Inclusion in the printed form of the bracketed word “seal” is not sufficient formality; it is merely an invitation to place a seal at the spot.
* Neither wax nor impression is any longer obligatory – gummed wafer enough

Facts: P brings action against D on a guarantee he signed. At time of signature, no wafer seal was attached to guarantee, but word seal was printed on document next to signature box.

##### Thomas v Thomas – Consideration

Considera-tion must go to promisor, but value can go to 3rd party

Consideration must be valuable in the eyes of the law (can also be a detriment) (English Binding)

Ratio: Consideration means something which is of some value in the eye of the law, moving from the promisee. Consideration need not be adequate. Motive (goodwill, honor) is **not** consideration.

Facts: husband expresses wish to leave dwelling house to wife, dies, executor refuses to execute conveyance. Keeping premises in good repair and £1 rent/year considered good enough = binding K.

### 2. Forbearance (Bona Fide Compromises)

##### Callisher v Bischoffsheim (1870), L.R. 5 Q.B 449 (Eng. Q.B.) - Binding

Forbearance can be good consideration with a bona fide legal claim (has to be at time of acceptance)

Ratio: Forbearance to take action, where legitimacy of action is fairly believed, constitutes good consideration. Test: (1) Bona fide believes in what they are asserting (2) the belief has to be that they have a fair chance of success.

* For a seal to be binding, (1) it must be affixed/acknowledged by the promisor and (2) has to understand what the act of sealing means (understand what’s in K and that they will be bound)
* Different than consideration which must be given by the promisee

### 3. Past Consideration

##### Eastwood v Kenyon, (1840), 11 Ad. & E. 438

Past Consideration is No Consideration (Consideration should be fresh) (English Binding)

Ratio: Past consideration is not good consideration for a new promise made after a benefit was conferred (or not conferred at the promisor’s request). | Promise made (without capacity) and repeated/ratified when regaining capacity will be binding.

Facts: D promised to discharge debt owed by his wife to a third party. 3rd party had taken loan to pay for her schooling and other needs as her guardian. Holding = no K (for the D)

##### Lampleigh v Brathwait (1615), 80 E.R. 255 (K.B.) – Emergency Case

Action taken at request, reward reasonably expected, a promise to pay will be binding (English Binding)

Ratio: Where a past benefit was conferred at the beneficiary's request, and where a reward would reasonably be expected, the promisor would be bound by his promise.

Facts: D slays a person. D under sentence of death asks P to obtain a pardon. P through much difficulty and labour obtains a kings pardon for D. Afterwards, in consideration for the efforts, the D promised to pay P 100 lbs

Analysis: The Court of the King's Bench held that there was an implied understanding (i.e**. implied** assumpsit, or "assumption" of obligation) that a fee would be paid.

### 4. Pre-Existing Legal Duty

##### Pre-existing legal duty = promising to do what you already bound to do

1. **Public Duty** – promise to do what you are already bound to do for a public duty (ie. Enforcing the law)
2. **Third Party** – promise to do what you are already bound to do for a third party (pao on v lau yiu long)
3. **Promisor** – promise to do what you already promised the promisor

**\*\*These situations are not good consideration except for the following exceptions\*\***

#### a. Duty Owed to a Third Party

##### Pao On v Lau Yiu Long – Hong Kong (Persuasive, but not Binding)

Pre-existing legal duty can be valid consideration – Duty owed to a third party

Ratio: A promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. Reusing a previous obligation to a 3rd party is further detriment to promisor and creates new obligation.

Facts: P agrees to sell shares to Fu Chip in exchange for 4M shares in Fu Chip (as part of this deal, P agrees to hang onto 60% of stock in order to prevent its depression); P wants protection in case the stock price goes down, so gets indemnity agreement with D; when P realizes they won’t receive benefits if the price goes up, they re-negotiate a new indemnity deal; D will buyback the shares at a min of $2.50 each if stock goes lower by xx date.

•Stock crashes to $0.36, D won’t buyback

•2 separate contracts: (1) P + Fu Chip, (2) P and D (indemnity deal)

Analysis: The consideration for the guarantee was the promise to perform according to the other contractual agreement signed by the parties.

An act done before the giving of a promise to make a payment or confer some other benefit can sometimes be consideration for the promise.

1. Act must have been done at promisors request

2. the parties must have understood the act was to be remunerated either by payment or the conferment of some other benefit.

3. Payment or benefit must be legally enforceable had it been promised in advance

Inserting a new person creates a new detriment to who owes, and a new benefit to who is to receive.

Pao On can be seen as a precursor to Greater Frederickton with the idea of economic duress. This case could have also been argued on economic duress.

#### b. Duty Owed to the Promisor

##### Gilbert Steel v University Construction (Ont)

Unenforceability of Gratuitous promises in the context of post-contractual modification

Ratio: Promise to pay more is not enforceable without consideration (see Greater Fredericton for new proposition). It would have been enforceable if both parties clearly agreed to rescind the old agreement and used its forbearance as consideration for the new one.

Facts: P entered into written contract with D to sell steel at fixed price; P announced increase in price – made a new contract; had another oral agreement about a price increase with 2 new clauses, but these weren’t mentioned later. Was there consideration for this new contract? P argued ‘good price’ was consideration – No (Gilbert Steel Loses)

##### Greater Frederiction Airport v NAV Canada (NB)

Post Contractual Modifications

Ratio: A post-contractual modification, unsupported by new consideration (past consideration from the K is sufficient), may be enforceable as long as it is established that the variation was not procured by economic duress.

Facts: Airport agreed to pay more under pre-existing agreement (duress found)

Note: *If there is a peppercorn for consideration in the first contract – may not work for the modification – looking for substantial initial consideration (they are all about not using artificial consideration to get there)*

* First step: Address the idea of recision of the contract, is there a new contract?
* Second Step: Look for new consideration (can something be found or invented)
* Third Step: If step 2 fails, use NAV Canada to say that no new consideration is actually required
  + Then have to move on to economic duress
* If that doesn’t work, can this promise be enforced by estoppel? That is where you say that Nav Canada and Steel both say that you can’t use estoppel (Shield Not a Sword)

##### Foakes v Beer, (1884), 9 App. Cas. 605 (HL) (Significant Case)

Payment of lesser amount cannot serve as satisfaction of larger (w/o consideration or seal)

Ratio: Payment of a lesser amount cannot serve as satisfaction of a larger amount.

Facts: R held judgment against A and agreed to take $500 down and payments in exchange in forbearance; when paid in full, R sued A for interest. Consideration? No

##### Foot v Rawlings, [1963] SCR 197

Accord and Satisfaction (Peppercorn)  
Ratio: Taking less for debt is ok as long as there is accord and satisfaction. The consideration can be very little, such as different form of payment.

Analysis: Post-dated cheques were good consideration for the agreement to forbear action – as long as D continues giving cheques, P’s right to sue is suspended.

Facts: A owed R money. R was old and wanted to enjoy that money. Offered a deal whereby the A would pay a lower monthly fee at a lower interest rate in exchange for providing 6 months of post-dated cheques. If this was performed R would not sue. A followed deal, after cashing a cheque, R decided to sue for balance. Appeal allowed

##### Law and Equity Act s 43

*Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.*

* Based on equity principle of actual reliance (need to have actually relied on promise)
* Needs to be expressly accepted by creditor
* In satisfaction 🡪 s 43 can only be used once the payment has been completed (not good for future payments)

**4 Ways Around Foakes v Beer**

1. Put agreement under seal
2. Situations covered by s 43
3. Structure the new arrangement for Accord and Satisfaction (pay less & something is different such as time/place/payment/additional) –Foot v Rawlings
4. Estoppel – in certain circumstances you cannot go back on your word (even if K binding)

* Doesn’t overrule Foalkes and Beer 🡪 need to fit within act precisely.

## B. Estoppel - Making Promises Bind

**There needs to be a clear express promise** -

Promise should be free of ambiguity, ambiguity resolved in favour of promisor

Effect of PE is suspensory – it does not permanently eliminate the availability of prior (contractual) rights.

* Can retract promise with reasonable notice
* Suspends strict legal rights rather than precludes enforcement

##### Central London Property v High Trees House, [1947] 1 KB 130 – Landmark Case

Creation of Promissory Estoppel

Ratio: Promises (without seal or consideration) are binding when made with the following conditions (1) Intended to create legal relations, (2) To the knowledge of the person making the promise, was going to be acted on by the other party, and (3) Other party acted on it. (Detrimental Reliance)

•The promise can be extinguished if the prevailing conditions no longer exist or if the promisor gives reasonable notice.

•It cannot be used as a cause of action.

Facts: Lease conditions changed due to WWII breaking out and reduced tenancy, when conditions improved P decides rent should go back up. Proceedings asking for £625 which represented the different between the orginal and reduced rate for 3 quarters from 1945 onward.

##### John Burrows v Subsurface Surveys (SCC)

Friendly gesture does not give rise to estoppel (Waivers) – waiving rights in past ≠ waiving future

Ratio: In order for a promise to be capable of being relied upon and having estoppel available as a defense, it must be a promise or assurance intended to alter the legal relations between the two parties (needs evidence of a negotiation). A friendly gesture does not create a binding agreement, and if it is relied upon, estoppel will not be available as a defense.

Facts: Debt with acceleration clause for late payments, D continuously late but P did not invoke the clause (passive conduct), disagreement occurs and P invokes clause and sues for full amount. Ruling For Appellant (P)

Analysis: Friendly Indulgences ≠ Intention; when there is no consideration or deed, any relaxation of the terms must be clear and unequivocal. Estoppel only applies when there is an intent to change relations and promise leads the other party to believe so.

##### D&C Builders v Rees, [1966] 2 QB 617 – Clean Hands (must be fair)

Contractual modification may be binding at equity without consideration, but cannot create an injustice.

Ratio: Estoppel can be used to suspend strict legal rights and preclude enforcing them.

Creditor barred from legal rights only where there has been a true accord, under which the creditor voluntarily agrees to accept a less sum in satisfaction, and the debtor acts/relies on that accord by paying the lesser sum and the creditor accepts it (even with no consideration), it is inequitable for the credit to later demand the balance (equity). Qualification: Creditor is barred from legal rights only when it would inequitable to insist on them. 🡨 No person can insist on a settlement procured by intimidation/duress.

Facts: Contractor (P) does work, D owes money, P in financial trouble, D offers ultimatum price and P has no choice but to accept. There was satisfaction with no accord. In fact intimidation was used. Ruling for P.

##### Combe v Combe, [1951] 2 KB 215 (CA)

Promissory Estoppel as a Shield Only – can only be used to modify pre-existing legal relation

Ratio: Promissory estoppel can only be used as a **shield** (defense when someone is claiming the promise they made did not have consideration and is therefore not binding), not as a **sword** (The high trees principle does not create a new cause of action, only prevents a party from insisting on strict legal rights when it would be unjust for him to enforce them).

* Can be part of a cause of action & should only be used where a pre-existing legal relationship

Facts: Husband doesn’t make divorce payments he promised; wife tries to sue using PE as a sword.

##### Waltons Stores v Maher (1988), 62 ALJR 110 (HC)

Australian Exception of Promissory Estoppel as Sword - Caution

Ratio: If the plaintiff acts to their own detriment, in reliance on the allusions of the unconscionable party, equity law has the capability to intervene

Facts: Maher demoed buildings based on reliance of promise from Waltons. Waltons knew this, but decided not take lease later after demo had begun. Was Walton estopped from backing out? Yes

##### M(N) v A(AT) (2003), 13 BCLR (4th) 73 (BCCA)

Considers Waltons but decides case doesn’t meet bar for PE anyways

Ratio: For PE have to intend to create legal relations

Facts: A moves to Van to live with M on promise that he pays of mortgage, A unable to get job, M goes back on promise but gives a $100K promissory note for mortgage, evicts her. Seeks to use PE as sword, judge warm to the idea, but doesn’t meet Waltons bar (no intention to create a legal relationship)

## C. Privity - Enforcement by and Against Whom

1. **Transfer of the Obligation** - Use Civil Law Vertical Privity Rule: when A sells to B, A sells a guarantee. When B sells to C, B sells the guarantee as well. Therefore, C can bring an action for breach of k with A

→ Ie: turns personal obligations into real obligations

→ Persuasive only in common law (has not been accepted as of yet)

1. Constructive **Trust** (Horizontal Privity): When A requires B to act for the benefit of C – the k can be converted into a trust. Thus there would be a fiduciary duty between B and C (this is a very strong duty – much stronger than a k)
2. **Agency** (vertical privity): A is the principal. A enters into an agency k with B. B acts as the agent for A. When B makes a k with C, the k is effectively between C and A and there is no k between B and C.

→ The interests of A and B must NOT conflict (ex: Dunlop)

1. **Collateral Contract** – That when K1 comes into existence a K2 is formed with the 3rd party, can be very artificial (may have never met and negotiated, may be a stretch to find consideration) – no class authority
2. **Specific Performance**: parties to the k can go to court to require specific performance (cannot be damages because the parties to the k have no incurred any harm). But C cannot bring this action (ex: Beswick)

Father can’t sure because no damages, **son could have bought obligations from him**

### 1. Third Party Beneficiaries

##### Tweddle v Atkinson – Horizontal Privity (English Binding)

Third parties cannot enforce K, if not party to it

Ratio: No stranger to the consideration can take advantage of a contract, although made for his benefit.

Facts: Tweedles son marries daughter of William Guy 🡪 parents of both promised them a marriage portion orally 🡪 parents entered into an MOU 🡪 Guy transferred $ to Tweedle, Tweedle to give ½ $ to son, if he didn’t son was entitled to sue under MOU. Son assented. No consideration moved from son.

##### Dunlop Pneimatic Tyre v Selfridge’s – Vertical Privity (English Binding)

Only parties to a K can sue for breach 🡪 agency still requires consideration flowing from the principle

Ratio:

* Only a person who is party to a contract can sue on it
* If a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by to the promisor or to some other peerson at the promisor’s request.
* A principal not named in the contract may sue upon it if the promisee really contracted as his agent (still must have given consideration directly or through agent)

Facts: A sells tires to B with agreement not to sell less than list. B sells to C with a similar clause. C sells tires below list. No damages suffered by B, so even if they sued, no remedy.

### 2. Circumventing Privity

#### a. Specific Performance

##### Beswick v Beswick (CA) -

Denning tries to allow third parties to enforce contracts made for their benefit where they have a legitimate interest to enforce it. Treats privity as a rule of procedure. (Overruled by HL)

##### Beswick v Beswick (HL) - 1968

Can sue under contractual relations for equitable remedy (Foreign)

Ratio: Privity is not just a rule of procedure (as per Denning), as a third party you cannot sue. However, you can sue as the administrator of the estate for specific performance.

Facts: Business transferred to nephew with agreement that he will support his wife. Nephew renegs. Wife sues as executor and as third party. Can’t as third party, but can get specific performance as executrix.

#### b. Trust – Not Examinable

#### c. Agency

Argued in Dunlop, however, if B an agent, then they do not have a K with C (need a second K)

### 3. Exception to Privity

##### London Drugs v Keuhne & Nagel, [1992] 3 SCR 299 - Employment

Relaxes Privity Requirement to Allow Employees to Benefit from Liability Exclusion Clauses in Contracts Between Employer and Customer

Ratio: The test for employees being party to a contract made by their employer (only as a shield):

* the limitation of liability clause must (either expressly or implied) extend its benefit to employees seeking to rely on it
* the employees seeking the benefit must have been acting in the course of their employment **and** must have been performing the very services provided for in the contract between the employer and the plaintiff when the loss

Facts: P’s transformer dropped by D’s warehousemen; company had $40 limitation clause. Can employees obtain benefit of the clause? Yes

##### 

##### Fraser River Pile & Dredge v Can-Dive Services – General (SCC)

Test for privileged exceptions to Privity with 3rd party beneficiaries (removes employee exemption from London Drugs) – use for subrogation clauses

Ratio: Principled exception to the doctrine of privity determined by the intentions of the parties to the K  two requirements:

(1) Did the parties to the K intend to extend the benefit to the third party seeking to rely on the provision? and

(2) Are the activities carried out by the third party, the very activities contemplated as coming within the scope of the contract in general, or the provision in particular?

Facts: Barge owned by Fraser River sinks while chartered to Can-Dive, Fraser has an insurance contract where the insurer waived right of subrogation against any charterer/extended coverage to affiliated companies. Insurer paid Fraser, and Fraser agreed to sue Can-Dive in negligence and waive any right to the waiver of subrogation clause. The insurer then sued Can-Dive. Can Can-Dive Rely on Clause? Yes.

*Analysis*: At the point where Can-Dives rights crystalized it became for all intents and purposes a party to the K. Any modification or negotiation AFTER this, would have to include Can-Dive. Could alter before.

## D. Formal Pre-Requisites for Enforcement

### Parol Evidence Rule

##### Gallen v Allstate Grain Co (1984 BCCA)

Parol Evidence Rule

Ratio: Oral representation was admissible on the basis that the doc didn’t contain the whole agreement (“one K theory”), or that the document contained one complete agreement but that the oral term formed the basic part of another complete agreement (“two K theory”)

Facts: Farmer on the basis of oral assurances (that it will smother the weeds) buys buckwheat, but it is overgrown by weeds and the crops are destroyed. The written K has a clause which says that no warranty for the productiveness or other matter pertaining to the seed sold (aka they are not responsible)

Analysis: **Parole evidence rule** of substantive law (established in Hawrish v Bank of Montreal): a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement.

Consumer situations with stronger party 🡪 may have a form contract that appears complete, and agents give certain assurances and promises which are not put in writing 🡪 application of the parol evidence rule here would be problematic (Anderson JA says such clauses will be narrowly construed)

**8 Rules from Gallen**

1. When a written K is clearly and demonstrably made, reason requires the oral one, contradicting it was never made.
2. Principle is not absolute (principle in Hawrish not a tool for the unscrupulous to dupe the unwary – standard forms).
3. Hawrish, Bauer both allude evidence could be presented - Principle is not absolute
4. If K created because of oral misrepresentation = written K cannot stand
5. Point one does not apply with equal force when oral representation adds, subtracts or varies the agreement recorded in the form (compared to contradicting)

* Adding to 🡪 Subtracting/Varying (wholly reasonable) 🡪 contradicting (wholly unreasonable)

1. There is a strong presumption that a document that looks like a K is to be treated as the whole K 🡪 this strongest when the oral representation is contrary to the document 🡪 less strong when it only adds to the document
2. Presumption is strongest in individually negotiated documents, less strong in printed forms
3. Presumption less strong when a specific oral agreement contradicts a general exemption or exclusion clause to oral representations (vs specific rep to specific provision which would be stronger)

# Cheat Sheet

|  |  |
| --- | --- |
| Case Name | Ratio |
| Canadian Dyers Association | * For a valid K, there must be an offer and acceptance * Mere quotation of price is not an offer, only an invitation to treat * It is a question of INTENT at the time. Courts will look at language in light of circumstances that is used and the subsequent actions of both parties to determine whether it is a mere quotation or a true offer to sell. |
| Pharmaceutical Society | Goods on display are an invitation to treat, the customer makes the offer, and the cashier (agent of the owner) accepts at the cash register in self-service store. |
| Carlill v Carbolic Smoke Ball  Carlill also says a unilateral K can be revoked right up to point of acceptance. | * Advertisement = usually invitations to treat unless a reasonable person would think otherwise * Mere puffs are when reasonable person would not intend legal consequences. The details given show it is not a mere puff. * The determination of a serious contract will be determined from the words and actions. * Advertisement can create a unilateral contract where acceptance by actions. |
| Williams v Carwardine | There can be a contract with any person who performed the necessary conditions in an advertisement. All that is necessary to fulfil the contract is to know of the reward before giving the information. Motive does not matter. |
| R v Clarke | One cannot accept an offer one doesn’t know exists, or that one has forgotten exists. |
| Byrne v Van Tienhoven | Revocation must be communicated (No Post Office Rule for Revocation) |
| Dickinson v Dodds | Can withdraw offer at any time prior to acceptance (explicit communication not alwys req’d) |
| Errington v Errington and Woods | Once the other party starts to perform, and the offeror knows this, an offeror can only revoke a unilateral contract if the offeree doesn’t live up to their side of the contract. |
| Livingstone v Evans | A counter-offer constitutes a rejection of an offer and that offer cannot be later accepted unless there is consent from the original offeror (standing by original price/ambiguous language = consent) |
| Barrick v Clark | The reasonable time to accept an offer can be determined from the conduct and language of the two parties, the nature of the goods and other reasonable indications |
| Butler Machine Tool v Ex-cell-o Corp | One party offers, the other accepts (a materially different counter-offer kills off the original offer) |
| Felthouse v Bindley | Acceptance must be communicated. Silence does not amount to communication |
| Carlill | * The need for communication of acceptance can be waived by the offeror (acceptance by action) * The offeror can determine how acceptance will be made |
| Brinkibon v Stahag Stahl | Contract formed where acceptance communicated |
| Household Fire v Grant | Expands Post Office Rule (authority for PR) |
| Holwell Securities v Hughes | Limits Post Office Rule |
| May & Butcher | Agreement to Agree not Enforceable |
| Hillas v Arcos | Contract to negotiate can be enforceable |
| Foley v Classique Coaches Ltd | Tries to reconcile Hillas and May 🡪 Goes with Hillas (Gas Price Benchmarkable and been performing for 3 years) |
| Empress v Bank of Nova Scotia | Meaning to promise to negotiate, but doesn’t impose a contract |
| Mannpar Enterprises v Canada | There is no common law obligation to negotiate in good faith; it must be in the contract, either expressly or impliedly. Promise to negotiate does not impose a K. |
| Balfour v Balfour | Agreements between spouses not intended to create legal relations |
| Rose and Frank v JR Crompton Bros | Express intention not to create legal relations |
| Royal Bank v Kiska | Seal can create legal obligations without consideration |
| Thomas v Thomas | Consideration must be valuable in the eyes of the law (flow from promisee to promisor) |
| Callisher v Bischoffsheim | Forbearance can be good consideration |
| Eastwood v Kenyon | Past Consideration is No Consideration |
| Lampleigh v Brathwait | Where a past benefit was conferred at the beneficiary's request, and where a reward would reasonably be expected, the promisor would be bound by his promise. |
| Pao On v Lau Yiu Long | Pre-existing legal duty can be valid consideration – Duty owed to a third party |
| Gilbert Steel | Unenforceability of Gratuitous promises in the context of post-contractual modification |
| Greater Frederiction | Post Contractual Modifications require no new consideration |
| Foakes v Beer | Payment of lesser amount cannot serve as satisfaction of larger (w/o consideration or seal) |
| Foot v Rawlings | Taking less for debt is ok as long as there is accord and satisfaction. The consideration can be very little, such as different form of payment. |
| Law and Equity Act s 43 | Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation. |
| High Trees House | Promises (without seal or consideration) are binding when made with the following conditions (1) Intended to create legal relations, (2) To the knowledge of the person making the promise, was going to be acted on by the other party, and (3) Other party acted on it. (detrimental reliance) |
| John Burrows v Subsurface Surveys (Waivers) | Waiver of rights is only valid where the parties have entered in to some form of negotiation which leads the other party to suppose that the strict rights under contract would not be enforced. It is not enough to take advantage of “indulgences granted … from the other |
| D&C Builders v Rees | Contractual modification may be binding at equity without consideration, but cannot create an injustice. (Clean hands) |
| Combe v Combe | Promissory Estoppel as a Shield Only. Can be part of a cause of action to establish terms. |
| Waltons Stores v Maher | Australian Exception of Promissory Estoppel as Sword - Caution |
| M(N) v A(AT) | Considers Waltons but decides case doesn’t meet bar for PE anyways (need intent to create legal relations) |
| Tweddle v Atkinson | Third parties cannot enforce K, if not party to it |
| Dunlop Pneimatic Tyre | Only parties to a K can sue for breach  agency still requires consideration flowing from the principle |
| Beswick v Beswick | Can sue under contractual relations for equitable remedy |
| London Drugs v Keuhne & Nagel | The test for employees being party to a contract made by their employer (only as a shield):   * the limitation of liability clause must (either expressly or implied) extend its benefit to employees seeking to rely on it * the employees seeking the benefit must have been acting in the course of their employment and must have been performing the very services provided for in the contract between the employer and the plaintiff when the loss |
| Fraser River Pile & Dredge | Principled exception to the doctrine of privity determined by the intentions of the parties to the K 🡪 two requirements:  (1) Did the parties to the K intend to extend the benefit to the third party seeking to rely on the provision? and  (2) Are the activities carried out by the third party, the very activities contemplated as coming within the scope of the contract in general, or the provision in particular? |
| Gallen v Allstate Grain Co | Oral representation was admissible on the basis that the doc didn’t contain the whole agreement (“one K theory”), or that the document contained one complete agreement but that the oral term formed the basic part of another complete agreement (“two K theory”) |

# Quick Reference Charts

## Formation – Creating the Contract

|  |  |  |
| --- | --- | --- |
| **Ingredient** | **Importance** | **Issues to Consider** |
| Offer | * Indicates readiness to enter a contract, if other agrees * Sets the terms of the contract | * Complete enough to form a contract * Indicates readiness to be bound? * To whom is offer made? * Has offer been terminated? * Revocation * Rejection * Lapse of time |
| Acceptance | * Agreement to be bound by terms in the offer * Timing is important: (Brinkibon) * Creates contract * Time for assessment of consideration, damages, mistake, etc.   -Waiver of communication? (Carbolic) | * Is it an unqualified “yes”? (Livingstone) * Has it been communicated? |
| Consensus ad idem | - both parties agree at same time to the particular contract | - Is such simultaneous, subjective agreement even needed in common law? |
| Intention to Create Legal Relations | - Shows intention of parties to have a legally binding agreement (*Balfour v Balfour; Rose and Frank v JR Compton Bros*) | - is there a public policy reason for allowing or not allowing no i.c.l.r. in given contexts?  🡪 divorce, power differential, most business transactions are intended to be legally binding |
| Certainty of Terms | - Identifies clearly what was agreed | - Can terms be implied to help clarify? (Foley) |
| Written Record | * Sometimes required by statute * Useful for evidentiary purposes * Parol Evidence Rule (*Gallen v Allstate*) | - Is the written record complete? |

Parole Evidence Rule:

Hawrish v Bank of Montreal – guarantor signs agreement on verbal understanding that only for existing and debt and that he would be released when a joint guarantee received from directors. The still called upon his debt after joint guarantee received.

- A collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement

## Enforcing Promises:

|  |  |
| --- | --- |
| **Who Can Be Involved?** | |
| 1. Who was a party to the contract? – privity of contract (Tweedle)  2. Circumventing privity:   * action by a contracting party to benefit a third party (Beswick) * argue one party is agent for third party (Dunlop) * argue there is a second “collateral”, contract * “buy” contract position by taking assignment of it * interpret contract as trust to benefit third party   3. Exceptions to Privity:   * Statutory Exception * Third parties allowed to use some contractual defenses to tort claims (*Fraser River Pile & Dredge*) | |
| How to enforce the Promise? | |
| A. | **Through Contract Devices:**  1. Seal   * if person who makes promises affixes a seal (*Royal Bank v Kiska*)   2. Consideration   * if person who gets promise gives consideration at time of agreement, including a fresh action or return promise creating new duty. (*Thomas v Thomas*) |
| B | **Through Promissory Estoppel**  Limitation on use:   * Only to modify existing obligation *(Combe v Combe)* * Must be equitable *(D&C Builders v Rees)* * Might not be permanent *(High Trees House)* |