Contents

[A. Introduction 2](#_Toc374278394)

[A. Offer & Acceptance 3](#_Toc374278395)

[1. Offer 3](#_Toc374278396)

[Offer and Invitation to Treat 3](#_Toc374278397)

[Canadian Dyers Association Ltd. v. Burton (1920), 47 O.L.R. 259 (H.C.) 3](#_Toc374278398)

[Pharmaceutical Society v. Boots Ltd., [1953] 1 All E.R. 482 (C.A.) 4](#_Toc374278399)

[Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256 (C.A.) 4](#_Toc374278400)

[Communication of Offer 5](#_Toc374278401)

[Williams v. Carwardine (1833), 4 B. & Ad. 621, 110 E.R. 590 (K.B.) 5](#_Toc374278402)

[R. v. Clarke (1927) Aust. H.C. 5](#_Toc374278403)

[2. Termination of Offer 5](#_Toc374278404)

[Revocation 5](#_Toc374278405)

[Byrne v. Van Tienhoven (1880), 5 C.P.D. 344 6](#_Toc374278406)

[Dickinson v. Dodds (1876), 2 Ch. D. 463 (C.A.) 6](#_Toc374278407)

[Unilateral Contracts 7](#_Toc374278408)

[Errington v. Errington and Woods [1952] C.A. 7](#_Toc374278409)

[Rejection and Counter-Offer 7](#_Toc374278410)

[Livingstone v. Evans [1925] Alta. S.C. 7](#_Toc374278411)

[Lapse of Time 8](#_Toc374278412)

[Barrick v Clark [1951] S.C.R. 177 8](#_Toc374278413)

[3. Acceptance 8](#_Toc374278414)

[Acceptance 8](#_Toc374278415)

[Butler Machine Tool v. Ex-cell-o Corp [1979] 1 All E.R. 965 (C.A.) **BAD LAW** 8](#_Toc374278416)

[Communication of Acceptance 8](#_Toc374278417)

[Felthouse v. Bindley (1862), 11 C.B. (N.S.) 869, 142 E.R. 1037 (Ex. Ch.) 9](#_Toc374278418)

[Brinkibon Ltd. v. Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH [1983] (H.L.) 9](#_Toc374278419)

[Household Fire & Carriage Accident Insurance Co v. Grant (1879), 4 Ex. D. 216 (C.A.) 9](#_Toc374278420)

[Holwell Securities v. Hughes [1974] 1 W.L.R. 155, [1974] 1 All E.R. 161 (C.A.) 10](#_Toc374278421)

[B. Certainty of Terms 10](#_Toc374278422)

[May and Butcher Ltd. v. R., [1934] 2 K.B. 17 (C.A.) 10](#_Toc374278423)

[Hillas and Co. v. Arcos (1932) H.L. 11](#_Toc374278424)

[Foley v. Classique Coaches Ltd., [1934] 2 K.B. 1 (C.A.) 11](#_Toc374278425)

[Empress Towers Ltd. v. Bank of Nova Scotia, [1991] 1 W.W.R. 537 11](#_Toc374278426)

[Mannpar Enterprises Ltd. v. Canada, [1999] BCJ No. 850 11](#_Toc374278427)

[C. Intention to Create Legal Relations 12](#_Toc374278428)

[Balfour v. Balfour, [1919] 2 KB 571 (Eng. C.A.) 12](#_Toc374278429)

[Rose and Frank Co. v. J.R. Crompton and Bros. Ltd., [1923] 2 KB 261 (CA) 12](#_Toc374278430)

[A. Making Promises Bind – Seals & Consideration 13](#_Toc374278431)

[1. Nature of Consideration and Seals 13](#_Toc374278432)

[Royal Bank v. Kiska, [1967] 2 OR 379 13](#_Toc374278433)

[Thomas v. Thomas (1842), 2 QB 851 14](#_Toc374278434)

[2. Forbearance 14](#_Toc374278435)

[Callisher v. Bischoffsheim (1870), LR 5 QB 449 14](#_Toc374278436)

[3. Past Consideration 14](#_Toc374278437)

[Eastwood v. Kenyon (1840), 113 ER 482 (QB) 14](#_Toc374278438)

[Lampleigh v. Brathwait (1615), Hobart 105, 80 ER 255 (KB) 15](#_Toc374278439)

[4. Pre-Existing Legal Duty 15](#_Toc374278440)

[Duty Owed to a Third Party 15](#_Toc374278441)

[Pao On v Lau Yiu Long, [1980] AC 614 (PC) 15](#_Toc374278442)

[Duty Owed to the Promisor 16](#_Toc374278443)

[Gilbert Steel Ltd. v. University Const. Ltd. (1976) ONCA 16](#_Toc374278444)

[Greater Fredericton Airport Authority Inc. v Nav Canada [2008] 17](#_Toc374278445)

[Foakes v. Beer (1884) 17](#_Toc374278446)

[Foot v Rawlings, SCC 18](#_Toc374278447)

[B. Making Promises Bind – Estoppel 18](#_Toc374278448)

[Central London Property Trust Ltd. v High Trees House 19](#_Toc374278449)

[John Burrows Ltd v Subsurface Surveys Ltd [1968] 19](#_Toc374278450)

[D & C Builders Ltd v Rees 19](#_Toc374278451)

[Combe v Combe [1951] 2 KB 215 20](#_Toc374278452)

[Walton Stores (Interstate) Pty. Ltd v Maher (1988), HC 20](#_Toc374278453)

[M (N) v A (AT) (2003), BCCA 20](#_Toc374278454)

[C. Enforcement By and Against Whom – Privity 21](#_Toc374278455)

[1. Third-Party Beneficiaries 21](#_Toc374278456)

[Tweddle v Atkinson (1861), QB 21](#_Toc374278457)

[Dunlop Pneumatic Tyre v Selfridge [1915] HL 21](#_Toc374278458)

[2. Circumventing Privity 22](#_Toc374278459)

[Specific Performance 22](#_Toc374278460)

[Beswick v Beswick [1966] CA, [1968] HL 22](#_Toc374278461)

[Trust 22](#_Toc374278462)

[Agency 22](#_Toc374278463)

[3. Exceptions to Privity 22](#_Toc374278464)

[London Drugs Ltd v Kuehne & Nagel International Ltd [1992] SCC 22](#_Toc374278465)

[Fraser River Pile & Dredge v Can-Dive Services [1999] SCC 23](#_Toc374278466)

[D. Formal Pre-Requisites for Enforcement 23](#_Toc374278467)

[1. Writing Requirements 23](#_Toc374278468)

[2. Parol Evidence Rule 23](#_Toc374278469)

[Gallen v Allstate Grain Co [1984] SCC 24](#_Toc374278470)

Background to the Law of Contract

# A. Introduction

* **Contracts**: entered into willingly by two **parties**, generally about the transfer of property (mainly personal)
* Expectations in contracts are “promises”, but not all future-looking (e.g. spontaneous sales)
* If contract broken, then either an **order of specific performance** (i.e. do what you promised to do) or provision of **damages** (monetary compensation)
* Law of contract takes into account both the jurisdiction in which the contract was made and any other jurisdictions whose law the contract could be governed by
* **Law of Obligations**: One party has a duty (or obligation) to do something for another, who has the right to have that something done
	+ **Primary obligation** (promise that was broken) v **Secondary** (remedy)
	+ **Express** (explicitly agreed on by parties) v Implied (others added on by law)
		- **Impositions** (implications) recently getting replaced by law of restitution
* **Law of restitution**: where one party is unjustly enriched or benefited at another’s expense; entirely equitable in nature (doesn’t exist in common law)
	+ Remedy: **Restitutionary** compensation
	+ Quasi-obligation imposed on the relationship of two individuals as a result of an agreement they willingly entered into
* **Common law**: set of traditional or commonly accepted laws “received” from England years ago
	+ “Common law” = combination of the rules set aside by the common law and equity courts of England
		- **Equity** consider justice and fairness more than the “automatic” way of contracts
		- Common law requires damages as a remedy for a broken contract; Equity requires order of specific performance
		- Equity must follow the law: first see how CL would assess damages, then if the law of equity is applicable/desirable, E > CL
* Impromptu nature of CL is “straitjacketed” into a rigid category but left flexible enough to allow different rules to apply in different jurisdictions; But the laws themselves categorized historically after they had been created

Formation of the Contract

# A. Offer & Acceptance

## 1. Offer

* **Bilateral contract**: Offer is made by one party, but contract details obligations that both have
	+ Example: A makes promise E to B, and B also makes a promise I to A
	+ If promise I is to pay in one year, then B enters into a debt to A upon creation of contract
	+ Upon creation of contract, B owns promise E, and since it’s property it can be sold by B
	+ Promises ARE enforceable because of the existence of the other promise
* Since contract comes into existence immediately upon acceptance, it doesn’t matter if there’s no performance called for right away; it’s still a legally binding contract
	+ But it’s harder to enforce, and the promises aren’t necessarily binding until the performances actually begin (e.g. if one promise is to build in 10 years)
	+ Sale of tangible property = sale; sale of intangible property = **assignment**
* **Contract A/Contract B** situation: Many bidders submit invitations to tender to one party, so they’re Invitations to Treat interpreted as Offers A; whoever that party chooses to conduct business with (Acceptance A), they will form a new contract with by making Offer B (a legit offer to enter into a contract)
	+ Obligations in Contract A to unsuccessful bidders did not survive creation of Contract B with the one successful bidder (prevents third-party interference)
* Even though offer and acceptance make up a contract, other factors could affect its legality
	+ Example: If A misrepresented the background and functionality of a bicycle, and then B offers up a large sum of money for it that A accepts, there is no breach of contract (offer: cash; acceptance: giving the bike), though B can sue for compensation/damages for the misrepresentation
	+ If B doesn’t care about bike’s background, A didn’t rely on that representation, so it’s not legally relevant

### Offer and Invitation to Treat

* **Invitation to treat**: not an actual offer, but could help outline some of the specifics and background of the offer
	+ E.g. Display of price, advertisement, putting something up for auction, communications
* Details of eventual contract are clear in a communication or can be reasonably figured = Offer
	+ Vague areas or ambiguity = most likely the parties aren’t ready for an offer
* If treating a communication as an offer would lead to an absurdity (e.g. ads for a limited amount of a product result in more customer “acceptances” than supply), then that communication is just an invitation to treat

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

|  |  |
| --- | --- |
| Facts | D’s solicitor had sent a draft deed and agreed to close on the deal to sell the land, but then changed his mind and returned P’s $500 cheque.  |
| Issue | Was there an offer and was it accepted? |
| Discussion and Analysis  | - P’s responses show that he treated D’s last reply as an offer, so P’s subsequent response established a contract; D sending the deed, and not saying “your letter is an offer I do not accept”, implied that D thought of it as a contract- Knowing timing when contract was made is important, since information, statutes, terms of agreement, state of mind may all change |
| Ratio | Apply an objective test of the words and actions of the parties involved to determine if they constitute an offer or an invitation to treat. |
| Holding | P won. Remedy was most likely an injunction/order of specific performance. |

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

|  |  |
| --- | --- |
| Facts | Pharmacist was only at the counter, and according to legislation he must supervise the offer and acceptance of payment for any poisonous drugs. P/A; D/R. |
| Issues | What constitutes acceptance? When is the K of sales finalized between a customer and a pharmacy? |
| Discussion and Analysis  | - P: sales contract is completed as soon as the customer places the desired items in the receptacle (it shows intent to buy), = acceptance; sign in window or pricetag = offer- Court: Displaying item in a store is an invitation to treat |
| Ratio | Picking up an item in a store is not an acceptance of an offer to sell; it’s an offer by the customer to buy, but the actual sales contract is set when the offer to buy is accepted by the seller at the cashier. |
| Holding | Appeal dismissed. |

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

* If this was interpreted as a bilateral contract: K made when P bought the smoke ball (fulfilling her promise), and D couldn’t cancel the contract unilaterally

|  |  |
| --- | --- |
| Facts | On the basis of the D’s advertisement about the fail-proof remedies of the smoke balls (or receive 100L), P bought them and used them 3x a day. She still caught the flu. P/R; D/A. |
| Issue | Is an advertisement for a product an offer for a contract to people who view it? |
| Discussion and Analysis  | - D: Too vague: No time limit for catching influenza; not reasonable to pay 100L to each person with the ball who catches the flu anytime after inhaling*Court: How would the reasonable person interpret it (i.e. to make people use the ball and increase its popularity; protection only good when ball was used)*- D: Too extravagant: not intended as a promise (**puff**)*Court: Since 1000L already placed in a bank, public should understand this as an offer which was ready to be acted upon (promise was made, so D’s bound by it)* - D: There was no consideration for the promise, just conditions*Court: P using smoke ball = taking consideration = D benefits from more sales*- D: No notice of acceptance of the contract*Court: P stepped forward with the right condition and fulfilled the mode of acceptance intimated by D’s ad, so notification was dispensed with.*- D: Couldn’t have intended to make a contract with the whole world*Court: K made with the limited portion of public who perform the condition* |
| Ratio | An advertisement is a continuing offer and a unilateral contract, created the moment a select few of the public fulfil the condition on the faith of the advertisement (following the indicated method of acceptance). Notification of acceptance thus occurs concurrently with the notification of the performance. Whoever makes extravagant promises must be bound by the law. |
| Holding | Yes. A guarantee in an ad is an intention to create legal obligations. |

### Communication of Offer

* **Express communication**: words, oral or written
* **Implied communication**: actions, inaction/silence (like lapse of reasonable time), conduct
* Offer gets legal significance when both parties are a part of it
* Meet all the conditions of the offer 🡪 Sufficient transmission to party of communication that conditions are completed (which can be an action) = Acceptance of offer 🡪 There is an obligation

#### Williams v. Carwardine (1833), 4 B. & Ad. 621, 110 E.R. 590 (K.B.)

* **Nominate reports** at this time; named after the people who recorded them

|  |  |
| --- | --- |
| Facts | D’s brother was found murdered; he was last seen in company of P. In the first examination, she gave no information about a suspect, so D posted handbills across Hereford offering a 20l reward for anyone with information on the murderer. Having been beaten by the murderer and near death, P reported him to the authorities. D wouldn’t reward her though. P/R; D/A. |
| Issue | Is the plaintiff entitled to rewards if she had entered into the contract without that as a motive? |
| Discussion and Analysis  | - D: since P wasn’t induced by the reward to divulge her information, the law did not imply a contract- Jury: P wasn’t motivated by D’s offered reward to divulge information to him |
| Ratio | Despite not being induced by an offer to provide information, still doing so is performing the condition to relay acceptance of the offer. |
| Holding | Yes. P is entitled to recover the 20l promised. |

#### R. v. Clarke (1927) Aust. H.C.

|  |  |
| --- | --- |
| Facts | Treffene and Coulter murdered some people. A proclamation of reward was issued a month later. A month later, D gave false information to screen T&C. As he believed himself a suspect, he caved and 4 days later gave the real information to the authorities. He says he did not do it for the reward. The courts convicted T&C, and Inspector convinced D to go for the reward. P/A; D/R. |
| Issue | Was there a contract established even though there was no cognizant assent? |
| Discussion and Analysis  | - No **consensus of mind** (i.e. D assents to Crown’s offer), and D was not acting on the faith of the proclamation nor was motivated by it |
| Ratio | There is a requirement for intent in order to enter a contract. |

## 2. Termination of Offer

* Termination of offer by offeror: **revocation**
* Offer gives the offeree an **election**: irrevocable choice to accept or reject
	+ If offer revoked, no election for offeree if they haven’t already accepted
* Termination of offer by offeree: **rejection**
* Even if there’s no revocation or rejection, an offer can still be terminated if it **self-expires** (e.g. “You have three days to respond to my offer.”), or if a reasonable amount of time has elapsed

### Revocation

* Revoked as long as there is communication; doesn’t have to be direct; can be implied by circumstances
* To ensure that an offer stays open for the stated period, the parties can enter into an **option contract** (in exchange for valuable consideration, will keep the offer open)
	+ This consideration is generally in the form of payment/deposit
* In the case of some unilateral contracts, if the offeror knows that the offeree is working through completing the stipulated actions for the offer, then the offeror cannot revoke the offer
	+ *Daulia*: Implied obligation for the offeror to not prevent the offeree from satisfying the conditions
* Revocation not effective until communicated to the offeree; second-hand revocations or agents also acceptable

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

|  |  |
| --- | --- |
| Facts | Oct 1: D mailed offer to sell to P; received on Oct 11Oct 11: P accepted offer by telegram, then confirmed by letter on Oct 15Oct 8: D mailed revocation of offerOct 20: P received revocation, but had already sold goods to 3rd party |
| Issue | Is it a breach of contract if an offer was revoked before it was accepted, but the revocation letter was not received until after the acceptance was communicated? |
| Discussion and Analysis  | - Cannot say that revocation letter was in effect any time before Oct 20, when it was received by P- Complete contract was entered into on Oct 11, when offer accepted by P- Not just or convenient for P to not be able to assume that offer has been accepted upon mailing the acceptance, since he has no way of knowing that there was a revocation letter on its way |
| Ratio | Accepting an offer without knowing it was revoked allows one to act as if the contract was binding on both parties. Contract is in place as soon as the acceptance is mailed out; not dependent on when it’s received by the offeror. Post office is NOT an agent in this case. |
| Holding | It is a breach of contract for failure to deliver. |

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

* **Agent** is somebody who can legally act for and bind another person; acts for a **principal**
	+ In *Dickinson*, Mr. Berry is an agent for D, but mother-in-law isn’t
	+ Contracts (K), statutes/regulations, and ostensible authority (if it’s reasonable to interpret that someone is an agent for somebody else) can bind certain people as agents
* Can have limited agency: e.g. Post Office can be an agent only for the acceptance of the offer, and not for acceptance of a revocation by the offeror

|  |  |
| --- | --- |
| Facts | Jun 10: D offered to sell to P; mentioned in letter than offer is open til Jun 12, AMJun 11, PM: P informed by D that D was selling to Allan (other D); officially sold to Allan in a formal contract, with deposit paidJun 11, eve: P left formal acceptance of offer to sell, but document never received by D as middleman (mother-in-law) lost itJun 12, AM (before deadline): P gave D duplicate of acceptance letter, but D declined it saying it was too late and he’d already sold the property |
| Issue | Is there a binding contract with an original offeree if the offeror, while the offer remains open, enters into a contract of sales with another buyer? |
| Discussion and Analysis  | - P construed D’s letter on Jun 10 as offer to sell, but no law that binds him to follow that time frame- No K if P came through with acceptance after D sold the property to someone else; P wouldn’t be entitled to recover damages for non-delivery of the property |
| Ratio | Once the person to whom the offer was made knows that the property has been sold to someone else, it’s too late for him to accept the offer. |
| Holding | No binding contract between P and D. |

### Unilateral Contracts

* **Unilateral contract**: only one side has obligations, and that side usually makes the offer
	+ E.g. In a purchase, the act of bringing cash brings the contract into existence
	+ There could be ambiguity in the offer about what constitutes acceptance
* Only in unilateral contracts can an offeror not revoke an offer once the offeree starts work on completing the conditions for the acceptance of that offer
* Unilateral contracts don’t have returning promises (for consideration), so harder to enforce
	+ Advantages: no obligations; Disadvantages: not enforceable
	+ To solve these problems, A can make offers and in order to accept, B has to perform certain tasks (they’re not promises or obligations, just **prerequisites**)

#### Errington v. Errington and Woods [1952] C.A.

|  |  |
| --- | --- |
| Facts | A’s late husband promised R a house he’d purchased, as long as they made the weekly payment. They had been making the regular payments when the father died, and then A wanted to evict them from the house they’d been living in. A/P: widow; R/D: son and daughter-in-law |
| Issue | Can an offer be revoked once the offerees are already in the middle of satisfying the conditions that would signify acceptance? |
| Discussion and Analysis  | - The couple never bound themselves to pay the weekly instalments, so they are in a position analogous to purchasers without being purchasers themselves- After death, Errington’s widow (A) was his successor in title- Denning: This is unilateral K; promise of the house once D finish paying off the mortgage |
| Ratio | - Can’t revoke unilateral contract once offeree entered on performance of the act.- Father’s position during lifetime carries over to after his death too. |
| Holding | Appeal dismissed. No order of possession should be made. |

### Rejection and Counter-Offer

* Can effect a rejection through making a **counter-offer**, and then the original offer can only be resurrected by the original offeror
* Asking questions about whether some terms can be modified is a **request for clarification**, not a counter-offer and thus not a rejection or termination of offer
* Can occur implicitly through actions (e.g. I offer to wash your car, but you sold it), or through silence/inaction
* Example: Offer to sell 1000 t of fish, offeree says to take 400 t, that’s not a **corresponding acceptance** since it wasn’t within the scale of the offer

#### Livingstone v. Evans [1925] Alta. S.C.

|  |  |
| --- | --- |
| Facts | D offered to sell land to P for $1,800. P received offer and wrote back counter-offer of $1,600. D replied “cannot reduce price”. P replied and accepted the offer. |
| Issue | Was P’s counter-offer in law a rejection of D’s offer? |
| Discussion and Analysis  | - *Hyde v. Wrench* (1840): Making a counter-offer is a rejection of the original offer- P’s wired message of $1,600 was a counter-offer, that also came with a new offer clearly meant to be answered only if counter-offer was rejected- D’s “cannot reduce price” not a rejection of the counter-offer (leaving the contract dead at that point), but **a revival of the original offer** |
| Ratio | D’s telegram showed he stood by his original offer of $1,800 (*Cowan v. Boyd*). |
| Holding | There was a bonding K for the sale of the land to P, of which he’s entitled to specific performance. |

### Lapse of Time

* Late acceptance still cool if the offeror says so

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

|  |  |
| --- | --- |
| Facts | D offered to buy P’s land. They couldn’t agree on price. When D was away and unable (until Dec 10) to respond to P (last message received Nov 20), P sold the land to Hohmann who offered him full price for land (offer made Nov 28, accepted Dec 3). D (after back on Dec 10) angry that P didn’t hold the deal open until P heard back from D. D sought specific performance. R/D: Clark; A/P: Barrick |
| Issue | Did the offer lapse by effluxion of time? What constitutes “reasonable time”? |
| Discussion and Analysis  | - Reasonable time to consider offer to sell farmland longer than average (since less price fluctuation)- Offer received by D on Nov 20 (wife opened and responded in his name)- P’s last letter to D (Nov 20) showed urgency, didn’t want delay; yet D delayed- Offer remained open for acceptance until the reasonable time had elapsed; since request for extension invalid if P didn’t confirm it, P had no obligation to keep it open beyond original date, Jan 1- If P had accepted H’s offer before a reasonable time had elapsed, and D communicated his own acceptance within the reasonable time, D can sue- Just not enough time by Dec 10 to accept the offer, communicate it, prepare an agreement, and pay the rest of the sum before the deadline of Jan 1 |
| Ratio | The reasonable time to accept an offer is determined from the parties’ conduct and language, the nature of the goods, and other reasonable indications. |
| Holding | SCC appeal allowed. D did not accept P’s offer within a reasonable time. |

## 3. Acceptance

### Acceptance

#### Butler Machine Tool v. Ex-cell-o Corp [1979] 1 All E.R. 965 (C.A.) **BAD LAW**

|  |  |
| --- | --- |
| Facts | P quoted a price for a tool, and this offer came with terms and conditions that would supplant any that D might have in their order. One term was to allow price change under a formula, so P claimed D owed extra money. P/seller: Butler; D/buyer: Ex-Cell-O |
| Issue | Is a counter-offer a continuation of the original offer or is it the start of a new contract with new terms and conditions? |
| Discussion and Analysis  | - D’s order (May 27) tried to be acceptance of P’s offer (made on May 23) but was actually a rejection of the offer 🡪 thus a counter-offer 🡪 kills original offer |
| Ratio | P’s letter on Jun 5 was an acceptance to that counter-offer, shown by the acknowledgement that P signed and returned to D; this counter-offer from D did not include the price variation clause. |
| Holding | Appeal allowed. The counter-offer is the start of a new contract. |

### Communication of Acceptance

* Communication brings a contract into existence; relied upon for K to be considered legit
* Motive may not be important for acceptance (*Williamson*)
* Generally, acceptance is considered once an instantaneous message reaches the machine, not when the offeror reads it; but this changes with constraints placed in the offer
* If indistinct communication of an acceptance, failure to ask for clarification will make it binding

#### Felthouse v. Bindley (1862), 11 C.B. (N.S.) 869, 142 E.R. 1037 (Ex. Ch.)

|  |  |
| --- | --- |
| Facts | Jan 2: Uncle P said to nephew P that if he hears no more about price, he considers the horse sold to him at set price. Nephew made no reply.Feb 25: D was instructed to reserve the horse, but forgot and sold it.Feb 27: Nephew told uncle, and uncle sued D. |
| Issue | Was the horse vested in P at the time of the sale? |
| Discussion and Analysis  | - Appeal court decided that there was no complete contract on Jan 2, since nephew hadn’t communicated his acceptance of P’s offer to P, or done anything to bind himself to the sale; just intending it is not enough |
| Ratio | Silence cannot be taken as acceptance. |
| Holding | No it was not. Rule for D to enter a nonsuit was made absolute. |

#### Brinkibon Ltd. v. Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH [1983] (H.L.)

|  |  |
| --- | --- |
| Facts | May 3: R telexed with a counter-offer from Vienna. This was followed by opening a letter of credit, said to have amounted to an acceptance by conduct.May 4: A telexed an acceptance from London. A/buyers: Brinkibon; R/sellers: Stahag Stahl |
| Issue | In international communications, what should be considered the location of the creation of the K? |
| Discussion and Analysis  | - By post/telegram: acceptance complete when put in hands of London post office- By telephone: acceptance complete when heard by offeror in Vienna- R: acceptance by conduct occurred with the May 3 counter-offer, so London should be where the contract was made; refuted since letter of credit that embodied this “acceptance” was opened in Vienna, and all UK-only activity was between buyer and his agents |
| Ratio | *Entores*: Telex = instantaneous communications (akin to telephone). Acceptor is in better position to have the responsibility of ensuring that his message is received, since he is doing the sending. |
| Holding | Acceptance by telex is effective on receipt. The contract was made when and where acceptance was received (so May 4 in Vienna). Appeal denied. |

#### Household Fire & Carriage Accident Insurance Co v. Grant (1879), 4 Ex. D. 216 (C.A.)

|  |  |
| --- | --- |
| Facts | Sep 30, 1874: D applied for shares in P’s company, intending to pay to the bankers 5l over the course of the following year. App given to Kendrick, P’s agent.Oct 20: P’s secretary made out the letter of allotment for D and posted it to his residence, and entered his name on the register of shareholders. The letter never reached D. He never paid the 5l, but was credited for commission in P’s books.1877: Once P went into liquidation, official liquidator applied for this sum from D, though D declined to pay on the grounds that he was no shareholder. P/R; D/A. |
| Issue | When is acceptance considered to be complete if it is communicated by post? |
| Discussion and Analysis  | - Onus is on D to find out why his mail never arrived- It isn’t practical or convenient to always wait until the acceptor has received notice that his letter of acceptance reached its destination before acting upon that acceptance. |
| Ratio | - **Postal Acceptance Rule**: With the post office acting as an agent for both parties, acceptance is considered complete once the letter is delivered there as it’s the mutually contemplated and agreed upon medium of communication chosen by the parties. (AUTHORITY) |
| Holding | When it is accepted by the post office from the acceptor. Appeal denied. |
| Misc. | CA dissent: Posting the letter is just another attempt at communication, but it doesn’t bind because it never reaches the offeror. |

#### Holwell Securities v. Hughes [1974] 1 W.L.R. 155, [1974] 1 All E.R. 161 (C.A.)

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| Facts | P wanted to buy the land from D, and sent a letter to D with their acceptance. D never received it, so the sale never went through. P/A: Holwell; D/R: Hughes |
| Issue | Did P exercise an option to purchase the premises by posting a letter to D that D never received? |
| Discussion and Analysis  | - A notice which cannot impinge on anyone’s mind is not functioning as such- Since the letter went astray, P didn’t do what the agreement asked them to do (i.e. “notice in writing” of the acceptance) |
| Ratio | Posting of a letter does not equal exercising the option. Postal Acceptance Rule does not apply. |
| Holding | Appeal dismissed. |

# B. Certainty of Terms

* There must be a requisite **certainty of terms** in order for a contract to actually exist
* If an important matter is missing and it was needed to make the contract work the way it’s supposed to, then the contract can fail for **lack of certainty**
* Sometimes missing elements can indicate just a preliminary agreement, and there needs to be a formal contract signed later in order for the terms to be binding (*Bawitko Investments*)
* *Raffles v Wichelhaus*: The contract indicated the name of a boat, but there were two at harbour with the same name, so the contract was void due to ambiguity on a crucial aspect
* *Consolidated Bathurst*: Where words may bear two constructions, the one that yields a fairer result should be the interpretation taken of the parties’ intentions
* Goal of interpretation of poorly laid out contracts is to advance the true intents of the parties at the time they entered into the contract
* **Severance**: splitting one contract into two distinct ones (e.g. a contract to sell a bike and a boat)
* If you’re faced with an ambiguous contract: first try severance 🡪 interpret what there is (**construction**) 🡪 Add in clarifications
* **Canons of construction**: these principles of interpretation embody conceptions of what reasonable people would assume in drafting a contract
* Example of the ambiguity of “subject to” clauses: If K says that B will pay A only after delivery, then B can enforce payment only once the **condition precedent** (the delivery) has been met; Before that K is premature
* Some clauses have been put in for no reason (**nullity**), but the rest of the contract survived
* A promise to negotiate in the future, negotiate in good faith, or to use best efforts usually isn’t contractually relevant since it’s too uncertain, and damages are impossible to estimate (*Courtney and Fairbairn Ltd. v. Tolaini*)
	+ Recent decisions have seen courts give meaning to an obligation to act in good faith (*Gateway Realty*) or a bare obligation to negotiate (*Northland Fleet Services*)

#### May and Butcher Ltd. v. R., [1934] 2 K.B. 17 (C.A.)

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| Facts | Surplus tentage was offered on sale from D to P, but there was no set price. |
| Issue | Was there a set price, or a set principle of construction out of this document? |
| Discussion and Analysis  | - P meant for the price to be agreed on by themselves later (so not following one of the provisions in 10(1)), but that never happened; Instead they’re supposed to pay a reasonable price- The court added words to clarify the contract |
| Ratio | An essential term yet to be determined means that there is no contract; it is simply an agreement to agree and is not enforceable. The court cannot read terms into an incomplete contract. |
| Holding | There was no price set between the parties. As such, the contract became void. |

#### Hillas and Co. v. Arcos (1932) H.L.

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| --- | --- |
| Facts | P accused D of breach of contract for supplying timber. They believed they had K. |
| Issue | Should a contract deemed “inartistic” nevertheless be saved from the failure of uncertainty? |
| Ratio | Maxim: Words should be interpreted so as to make the thing they relate to effective rather than perish. To say that a lack of certainty of terms would make a contract automatically void is extreme. |
| Holding | Yes. Make your best efforts to interpret what’s been written down, and then add the term that would clarify the uncertainty. **Preferred** over *Butcher*. |
| Misc. | \*House of Lords: Overturned the appeal decision in favour of P\* |

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

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| Facts | P sold land to D, subject to supplemental agreement for D to purchase all the petrol their business requires from P at a price to be agreed upon by the parties from time to time. After 3 years, D sought to buy petrol elsewhere and tried to repudiate the agreement. P sought an injunction from D buying petrol elsewhere. P/R: Foley service station; D/A: Classique, operators of a fleet of motor coaches |
| Issue | Was there an enforceable and effective contract? |
| Ratio | - An agreement to make an agreement does not constitute a contract. - The wrongful repudiation of a contract by one party relieves the other party from the performance of any conditions of the contract. - Part performance will indicate that a contract is binding (**reliance interest**).  |
| Holding | Appeal fails. There was an effective and enforceable K, even without definite price set for petrol. |

#### Empress Towers Ltd. v. Bank of Nova Scotia, [1991] 1 W.W.R. 537

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| Facts | P and D, the landlord and the tenant, wanted to negotiate at market value to reach a renewal of their contract as allowed by the original contract, but there was a failure to agree on what the market rate should be. P sought a writ of repossession. D used the contract as a defence. P/A; D/R. |
| Issue | Was the renewal clause void either for uncertainty or as an agreement to agree? |
| Discussion and Analysis  | - D claimed that P had not fulfilled its obligation to negotiate a lease renewal- P tried to sell to 3rd party at a rate that D was willing to pay = not in good faith! |
| Ratio | The requirement for mutual agreement for a new term carried with it an implied term that P will negotiate in good faith with D to reach an agreement on the market rental rate (benchmark). |
| Holding | It wasn’t. The promise to negotiate should have some meaning. The writ of possession was denied. |

#### Mannpar Enterprises Ltd. v. Canada, [1999] BCJ No. 850

* *Mannpar* can be reconciled on the basis that a term can be too vague to be used by P to get damages (i.e. cannot be used as a cause of action), but not too uncertain that it can’t be used as a defence (*Empress*)

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| Facts | There was a failure to agree on a renewal of a contract for removing and selling sand and gravel. |
| Issue | Was the renewal clause void for uncertainty? |
| Ratio | There is no common law obligation to negotiate in good faith; it must be in the contract expressly or impliedly. (No benchmark, **distinguished** from *Empress*) |

# C. Intention to Create Legal Relations

* Arguments: Parties are still in the negotiating stage (lack of certainty of terms); Potential lack of capacity
* Courts unlikely to order a specific performance

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

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| Facts | Wife and husband were about to live apart so husband (D/A) told wife (P/R) he would leave her a 30l allowance every month. Afterwards, he suggested that they better remain apart (i.e. no more money), so she wanted restitution of conjugal rights and obtained an order for alimony. |
| Issue | Was this a valid contract that P could sue upon? |
| Discussion and Analysis  | - D: Since they’re married, it wasn’t a true contract, and inception of this arrangement never included the intent that it could be sued upon (It’s outside the realm of K)- D: If this is a true K and she can sue him for not paying her allowance, he can sue her for failing to perform the obligations she had promised (either expressed or implied) to use the money for |
| Ratio | The common law does not regulate the form of agreements between spouses. |
| Holding | Appeal allowed. Wife got no money. |

#### Rose and Frank Co. v. J.R. Crompton and Bros. Ltd., [1923] 2 KB 261 (CA)

* **Memorandum of understanding**: sort of like a gentleman’s agreement; stage before a contract

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| Facts | P were the agents in the US for distributing D’s paper products. They had vague but legally binding agreements, including a clause that says it’s not a legal document but with the stipulation that both parties honourably pledge themselves to conducting this business with good faith. Then D refused to fulfil P’s orders and terminated the agency agreement. |
| Issue | Was this a binding agreement? |
| Ratio | Agreements made based on honour are not legally binding. |
| Holding | Appeal dismissed. Not a binding agreement. No legal remedy for non-delivery. |
| Misc. | Procedural History: Trial decision: Held that the agreement was bindingCA: Reversed the trial judgment\*KB: P appealed\*HL: Later reversed the judgment of CA (agreement is binding) |

Enforceability Issues

* Holding a hostage/property in exchange for someone keeping their word = **collateral**
* **Nonfeasance**: not doing something; a breach of a promise
* **Injury** example: A agrees to buy B’s pigs; if B doesn’t deliver those pigs, it’s not doing something (so a contractual issue); if B delivers but something’s funny with the pigs, it’s doing something poorly (so a tort issue)
* **Assumpsit**: Where I’m taking it upon myself to do something for you; A promise made in writing

# A. Making Promises Bind – Seals & Consideration

* In a formal contract written by the promisor B and featuring the promise, the seal is a **specialty**, and this contract is a deed or a **charter**
	+ Promisee A has to give consideration for that promise; e.g. ***quid pro quo***
	+ Specific type of deed: **indentures** (each party would have a copy)
* A piece of paper with writing on it is an **instrument**
* If there is no paper documenting the K, there could still be an informal K that is a **bargain**

## 1. Nature of Consideration and Seals

* **Consideration**: intended price paid at a time a contract was entered into and for the promise
	+ Flows from promisee and gives value to promisor’s promise, makes it enforceable under contract law
	+ Act by P from which D derives benefit, or any labour sustained by P with consent of D
	+ Doesn’t matter if it causes a detriment or benefit to either party; can be both
	+ Even if the promise gives benefits to a third party, it’s still considered as consideration
	+ Not enforceable if a pre-existing legal duty, vague (e.g. “promise to be nice”), or a gift
	+ Can be implied
* ***Nudum pactum***: a bare promise, not enforceable due to lack of sufficient consideration
* Doctrine of **freedom of contract**: as long as there is value in a consideration, we’re in business
* **Failure of consideration**: relates to the failure in performing under a contract, not related to its creation stage or binding nature of the promises
	+ Most basic breach: One person does nothing that he promised to do
	+ **Condition**: One thing can only happen if another happens first; “If X, then Y”
	+ Conditions and consideration can overlap, but there is no contract (and as such no consideration) until the pre-conditions have been met (e.g. in *Carlill*)
* Consideration is not **Motive**; reasons are set down to clarify representations that have been made, but motive = consideration only where A desires what B will give in exchange for A’s promise in the contract
* Bilateral K example: A promises to pay B $1000 to drive A’s children to school if it rains and until tulips bloom.
	+ Consideration for A’s promise: driving A’s children to school
	+ Consideration for B’s promise: paying B $1000
	+ But this is not in effect until the **condition precedent** is met (“if it rains”); if it doesn’t rain, they don’t have a contract, and the promises aren’t enforceable
	+ Obligation ends when the tulips bloom (**condition subsequent**)
* **Concurrent conditions** are all supposed to happen at the same time, and they’re all independent of each other
* **Adequacy** is rarely relevant; it’s just important that there is a consideration, not the value of it
* Distinction between presence or absence of consideration and the failure to consider

#### Royal Bank v. Kiska, [1967] 2 OR 379

* Guarantee type of contract: creditor/lender (A) who lends money to a debtor/borrower (B) (this establishes a contract), and the guarantor (C) has a contract of **guarantee** with A (the guarantee)
	+ C made a promise to pay B’s debt
	+ Promisor is the only one who can put the seal on the contract

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| Facts | P brought an action on a guarantee signed by D. When it was signed, no wafer seal was attached to the guarantee, but the word “seal” was printed on the document next to where D signed. P thought it wasn’t binding. |
| Issue | Was this guarantee binding? |
| Discussion and Analysis  | - There’s been a relaxation of the ancient CL requirements of a waxed impression, so that neither wax nor seal is now obligatory |
| Ratio | Consideration is required for a guarantee to be binding, regardless of the type of seal used. |
| Holding | The guarantee was binding. There was consideration. |
| Misc. | Dissent: The word “seal” isn’t formal enough. An intention to execute a sealed document cannot be binding if there is no seal affixed. |

#### Thomas v. Thomas (1842), 2 QB 851

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| Facts | John in his will appointed brother Samuel and D as his executors. Before he died, he expressed in front of witnesses that his wife should have either his house or 100L. She paid rent of 1L/year and promised to keep it in repair to ensure possession. After Samuel died, D ejected P out of possession of the house. P/R: Eleanor, wife of deceased; D/A: Benjamin, working with deceased’s brother. |
| Issue | Was P’s respecting her dead husband’s wishes (motive) showing sufficient consideration? Is willing the house considered a voluntary gift? |
| Discussion and Analysis  | - The agreement entered into by the executors and P to pay yearly rent showed that this was not a mere gift, and it is sufficient consideration- Her 1L/year was paid to the estate (i.e. to the promisor, who was the executor), which was consideration; wouldn’t have been the case if she’d paid to landlord since there was no added burden on her part to pay landlord |
| Ratio | Consideration must have value in the eyes of the law. A nominal rent has value; motive is insufficient |
| Holding | Appeal dismissed. |

## 2. Forbearance

* **Forbearance**: promise to not do something

#### Callisher v. Bischoffsheim (1870), LR 5 QB 449

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| Facts | P claimed that the Government of Honduras owed him money. D had tried to make a deal to deliver certain debentures to P in exchange for P’s promise to forbear taking legal action to enforce this claim; then D failed to deliver. |
| Issue | Can a promise for forbearance be valid consideration? |
| Discussion and Analysis  | - There was no claim by P against the Honduras Govt which could be prosecuted successfully, but this does not vitiate the contract they had and does not destroy the validity of the consideration |
| Ratio | If a party *bona fide* believes in what it’s asserting, and that it has a fair chance of success at winning its legal claim, then a forbearance to take this action can be considered to be good consideration. |
| Holding | Judgment for P. The promise counts as consideration. |

## 3. Past Consideration

* Example: B has 2 creditors (to whom he owes debts), collects property to distribute to them
	+ B’s Chums 1 2 3 have done good things in the past, B gives them reward money to make them creditors
	+ Effectively, this dilutes the amount available for the claims of the original creditors

#### Eastwood v. Kenyon (1840), 113 ER 482 (QB)

* Sarah made the promise when she had capacity (i.e. not a minor and not a married woman)

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| Facts | Sarah was left her father’s heir and P, while raising and educating her, borrowed money from Blackburn, to whom he gave a promissory note. When Sarah came of age, she promised P she would pay the amount of the note; she did pay Blackburn 1 year’s interest. After she married D, he also promised P he would pay the amount of the note. When he did not, P sued him on his promise.P: guardian of Sarah; D: husband of Sarah |
| Issue | Is a promise sufficient to form a contract? Is past consideration valid? |
| Discussion and Analysis  | - There was nothing more than a benefit voluntarily conferred by P and an express promise made by D to repay the money. |
| Ratio | Gratuitous promises are insufficient to form a contract. Past consideration is no consideration at all. |
| Holding | Ruling against P. There was no contract. |

#### Lampleigh v. Brathwait (1615), Hobart 105, 80 ER 255 (KB)

* The payment (or promise to pay) needs to be explicitly stated, and explicitly linked to the request for help earlier

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| Facts | D killed a guy, and then asked P to obtain for him a King’s pardon as it was an emergency. P worked hard at it. Much later, D promised to give P 100L for doing this, but then he did not. |
| Issue | Can a promise to pay after a request has been fulfilled be binding? |
| Discussion and Analysis  | - P: Seemed like D did no labour to obtain the pardon- D: There was nothing given in return for that promise- Court: The past action was a request that D pays for later, so it’s valid |
| Ratio | There was prior request and a promise to pay, so it is a sufficient contract. |
| Holding | Yes it can. Judgment for P. **Exception** to *Eastwood* in emergency situations. |

## 4. Pre-Existing Legal Duty

* If A makes Promise X to B and B’s Promise Y in return is a **pre-existing legal duty**, it’s one of these types:
	+ Promise Y = A “public duty” (e.g. obey the law, tell the truth under oath, police officer to carry out police duties); no consideration since B is doing what he’s bound to do by law
	+ Promise to do Y for C [where B already owes C the duty Y]
	+ Promise to do Y for A [where B already owes A duty Y]
* **Tripartite problem** with three parties:
	+ Law recognizes that 3rd party B can benefit from A and C’s promise and consideration
	+ To prevent A and B from hiding something, planning something unlawful, or a contract being formed under duress, consideration can be considered insufficient
* Just because a promise will likely be broken doesn’t make the consideration for that promise less permissible
* Arguments to get around pre-existing legal duties:
1. State the rule then do away with it (*Pao On*)

2. Change the facts slightly in a way so that the rule doesn’t relate to you anymore

3. Go to statute for rescue

4. Back up and go down some other path that isn’t the road of contract (e.g. estoppel)

### Duty Owed to a Third Party

#### Pao On v Lau Yiu Long, [1980] AC 614 (PC)

* **Linchpin** = has obligations to two different parties = “A” = Pao On (Shing On is his private corp.)

- “C” = Lau (in the tripartite model), majority shareholders in Fu Chip

- “B” = Fu Chip, a public company

* P and FC had a contract to transfer enough shares to FC that they get principal control of Shing On’s building, in exchange for P getting FC shares. In order to not flood the market with FC shares, P promised to not sell 60% of the shares for a year afterwards, in exchange for D agreeing to buy back P’s shares after a year. That K sucked, so P and D agreed to replace it with a new contract: D promises to **indemnify** any loss that P incurs; in consideration, P promises to transfer Shing On shares to Fu Chip. P wouldn’t complete the main K without it. When shares did fall < $2.50, P tried to enforce the guarantee agreement. D countered that it wasn’t valid because there was only a past consideration, under a promise by P to D to perform their existing contract.
* This case created the doctrine of **economic duress**; if it exists, the promise is unenforceable

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| Issue | Was there past consideration? |
| Discussion and Analysis  | - Court: contractual obligations already existing between P and Fu Chip for P to not sell 60% of the shares counted as consideration for D’s promise of indemnity to P (*Lampleigh* cited)- D: economic duress, and the consideration is illegal for being against public policy (abuse of a dominant bargaining position)- Inserting a new person creates a new detriment to who owes and a new benefit to who receives. |
| Ratio | An agreement to do an act which the promisor is under an existing obligation to a third party to do may amount to valid consideration. The promisee obtains the benefit of a direct obligation. |
| Holding | Yes there was and it was valid. The promise of indemnity is upheld as consideration. P wins. |

### Duty Owed to the Promisor

* Accord and satisfaction example: B promises to accept less money for A’s product, and in exchange A is giving less and giving something new; This promise is enforceable
	+ **Accord**: agreement to compromise on an indebtedness
	+ **Satisfaction**: consideration that flows from A in exchange for the accord
* S. 43, ***Law and Equity Act***: “**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.”
	+ Elements:

1. Actual part performance

2. Expressly accepted (not implicit): actions ok; preferably in writing

3. In satisfaction of a greater obligation

* + For equity to work, there needs to be **actual reliance** on the promise
	+ Actual part fulfillment of the terms of an obligation before it’s breached makes it ok to extinguish the older obligation
	+ Couldn’t be used in *Foot v Rawlings* since post-dated cheques (promise to accept less) aren’t meant to extinguish the previous promise, just change the method of payment
* Enforcing acquisition and transfer of land: through common law, through equity (by order of specific performance), or through proprietary estoppel

#### Gilbert Steel Ltd. v. University Const. Ltd. (1976) ONCA

* Argument about consideration: Repeal of the pre-existing agreement was consideration for the new oral agreement; but Court saw it as an agreement of a new price, not mutual abandonment

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| Facts | P sells steel to D at a set price. After 2 deliveries, P increased the price. P wrote new contract with D to supply steel for the first building. Then P again raised the price, and worked out how to pay it with D in a binding oral agreement. P/A: Steel co.; D/R: University construction |
| Issue | Is there sufficient consideration to find a binding agreement? |
| Discussion and Analysis  | - D: Past consideration is insufficient; before the oral agreement was made, P was already obliged to deliver steel at the last price agreed upon in written contract- P: Promise of a good price on the second building = consideration to D’s promise to pay the increased price on the first |
| Ratio | A prior duty owed to a promisor is not sufficient consideration. |
| Holding | Appeal dismissed. |

#### Greater Fredericton Airport Authority Inc. v Nav Canada [2008]

* *Williams v Roffey Bros*: Economic duress lessens the need for a rigid adherence to consideration.
* *Stilk*: Performance of a pre-existing obligation does not qualify as fresh or valid consideration and therefore such an agreement to vary an existing contract is unenforceable.

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| Facts | D was replacing the govt’s ASF agreement with P. D thought it made more sense to replace a portion of the existing instrument landing system with new distance measuring equipment rather than move it to a new runway. D refused to relocate the ILS to the new runway unless P agreed to pay for new DME. P promised by way of letter, signed under protest, to pay the acquisition costs of the DME. D acquired DME, but P refused to make the payment. |
| Issue | Is the promise by P to pay for DME legally binding? |
| Discussion and Analysis  | - Challenges *Gilbert Steel*, but adopts its view on estoppel and accepts its view on what can be consideration; rejects requirement for there to be consideration in order for these changes to exist- D: If P wanted these services, P would have to pay more; there was an agreement to pay more- This is pre-existing consideration, which is fine; it’s found in the contract- Appeal court: D promised nothing in return for P’s promise to pay for the DME that it was not already contractually bound to pay for under the ASF agreement. |
| Ratio | A post-contractual modification, unsupported by consideration, is enforceable if it is established that the variation was not procured by economic duress. **Distinguishes** *Gilbert Steel*. |
| Holding | Appeal dismissed. P doesn’t have to pay. |
| Misc. | Procedural History: Arbitration: ASF agreement did not entitle D to claim reimbursement for DME; subsequent letter created new contract entitling D to reimbursement for the acquisition cost of DMEQueen’s Bench: P appealed; arbitrator’s ruling overturned\*NBCA: D appealed\* |

#### Foakes v. Beer (1884)

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| Facts | P owed D money. The two parties entered into an agreement in Dec 1876 (not under seal) that P would pay £500 immediately and £150 every 6 months until he had paid off the debt and in return D wouldn't take any action. By Jun 1882, P has paid off the entire principal and sought leave to proceed on the judgment. D claimed she was entitled to interest because the debt was not paid off immediately. P claimed there was a contract with no mention of interest which D claimed was invalid because she did not receive any consideration. P/A; D/R. |
| Issue | Is partial payment of a debt sufficient consideration for the contract made between the two? |
| Ratio | Payment of a lesser amount cannot serve as satisfaction of a larger amount. |
| Holding | Appeal dismissed.  |

#### Foot v Rawlings, SCC

* Both the promissory notes and the post-dated cheques are mechanisms of payment, negotiable instruments, but they’re treated differently

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| Facts | P owed D money. Old agreement was to pay using a series of promissory notes. Payment had begun. New agreement for payment of the remaining debt was by post-dated cheques every month, and if that was done there would be no action taken. P substantially complied with the terms of the agreement, but D sued P for the balance of his debt after cashing in his Nov 1960 cheque. P/A; D/R. |
| Issue | Was there sufficient consideration in the substituted contract for it to be binding? |
| Discussion and Analysis  | - SCC: P giving post-dated cheques = good consideration for D’s agreement to forbear action = collateral- So long as P kept this action up, D suspended his right to sue (aka **promised to accept less**); so his action brought in Dec 1960 was premature and should have been dismissed |
| Ratio | - Accepting terms that benefit the creditor for convenience can be consideration.- A negotiable instrument such as a cheque, or an object of a value less than the debt, can be consideration even if the amount is less than the cash debt. |
| Holding | Appeal allowed, with costs. |

# B. Making Promises Bind – Estoppel

* **Estoppel** is a way of holding A to his word, if he had told B something which B then acted on; using reliance to hold A to a promise, doesn’t matter if A didn’t know there’s that reliance
	+ Remedy would depend on how great your reliance was, in equity
* **Agreement estoppels**: Estoppel by deed, estoppel by convention
* **Reliance estoppels**: Estoppel by representation, promissory estoppel, proprietary estoppel
* **Estoppel by representation** is only enacted when A makes a statement of fact that B relies on
	+ E.g. A has 5 cars. He offers $100 to B to wash all the cars. B sees 7 but washes 5. A sues for breach of contract. B can raise estoppel by representation (hold him to the lie) because A made it seem as if all the cars = 5, so B can hold him to the lie that there were only 5 to wash to get compensated for the labour.
	+ But if B saw that there were 7 and told A he won’t fulfill the contract, B can elect to go down the avenue of misrepresentation (and hold him to the truth).
	+ Never in and of itself a cause of action (because all it does is establish a fact as true)
* **Proprietary estoppel**: A led B to believe that B owns or already owns an interest in land (untrue)
	+ Usually comes in one of two contexts:
		- a. acquiescence (A sees B building on A’s land, but doesn’t stop him)
		- b. not in writing (A tells B that the piece of land yonder is B’s)
	+ Equity gives you the bare minimum needed to satisfy your right to remedy
* **Promissory estoppel**: Cannot use it as the sole basis for cause of action
	+ If A told B to wash 5 cars, B only washed 3 and A said that was ok, A cannot later sue B for breach of obligation since B relied on A’s statement. A also cannot deny B the $100 reward he was promised after A relieved him of the duty of washing the last 2 cars. B instead can sue A for failure to pay.
	+ **Presumptively suspensory** (not permanent). If the unfairness is removed, the two in a contract can continue with a valid contract
* Election: not a real estoppel; compulsory binary decision that binds the decider
* **Laches**: delays

#### Central London Property Trust Ltd. v High Trees House

* Denning’s big vision for estoppel: There are cases where a deliberate promise was made intending to create legal contract and it was acted upon, so it’s binding.
* Denning’s small vision: Despite absence of consideration, a smaller acceptance of payment keeps the contract binding; In Canada, focus is on this version.

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| Facts | 1937: D leased a block of flats for a rate £2,500/year from P. Due to the war and heavy bombing of London, occupancy rates were drastically lower than normal.1940: Both made an agreement in writing to reduce rent by half. However, neither party stipulated the period for which this reduced rental was to apply. Next 5 years: D paid the reduced rate while the flats began to fill and by 1945, the flats were back at full occupancy. P sued for payment of the full rental costs from June 1945 onwards. |
| Issue | Were the plaintiffs estopped from alleging the rent exceeded £1,250/year? |
| Discussion and Analysis  | - Denning: If P had tried to sue for full rent from 1940 onwards, they would fail since they’d already made a promise not to act on their legal rights, and they couldn’t change their mind later once D acted upon belief in that promise- Denning: this is not estoppel by representation |
| Ratio | If a party makes a promise and the other party relies upon the promise the original promisor cannot take back the promise at a later stage. |
| Holding | Judgment for P. |

#### John Burrows Ltd v Subsurface Surveys Ltd [1968]

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| Facts | P agreed to sell all of the shares in his company to his friend Whitcomb, in the name of D. Of the cost, $42,000 was to be a promissory note paid annually for 10 years with 6% interest. D was late on a few payments, but P did not take any action. Eventually their relationship turned sour, and when D was late on another payment P demanded the full $42,000 in payment, as per the condition in the contract stating this was the remedy for late payments. P/R; D/A. |
| Issue | What is necessary for estoppel to apply? |
| Discussion and Analysis  | - D claimed estoppel- Cannot rely on the Court being able to infer that less will be accepted |
| Ratio | In order for a promise to be capable of being relied upon and having estoppel available as a defence, it must be a promise or assurance intended to alter the legal relations between the two parties. A friendly gesture is not binding. |
| Holding | Appeal allowed. |

#### D & C Builders Ltd v Rees

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| Facts | D employed P to work on his premises. D paid part of the sum owed, and when there was 482L left, he did not pay. He did not respond to P’s messages, and then he fell ill. His wife offered 300L in settlement in total, and P had to accept since otherwise they would go bankrupt. P brought a receipt to D’s wife to sign, and she demanded that he add “in completion of the account”. P went to their solicitors who sued D for the balance. D argued that there was bad workmanship and no binding settlement. P/R; D/A. |
| Issue | Are P entitled to enforce the full debt despite accepting D’s settlement? |
| Discussion and Analysis  | - No true accord; D’s wife essentially held P to ransom |
| Ratio | No reason in law or equity why the creditors shouldn’t enforce the full amount of debt due to them. |
| Holding | Appeal dismissed. |

#### Combe v Combe [1951] 2 KB 215

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| Facts | D agreed to pay P £100 per year after they split up. P claims she agreed to forego her rights for recovery in divorce court in consideration of this. D did not pay the £100, and P sued claiming that he was estopped from ceasing his promise because she had relied on it. P/R: Mrs. C; D/A: Mr. C |
| Issue | Can estoppel be used as a cause of action? |
| Discussion and Analysis  | - A plea of detrimental reliance is not a valid basis for enforcing an otherwise gratuitous promise.- **Sword v Shield** analogy: estoppel is a shield |
| Ratio | Estoppel is only a defence, not a cause of action where one did not exist before. |
| Holding | Appeal allowed. |

#### Walton Stores (Interstate) Pty. Ltd v Maher (1988), HC

* Merging equity and estoppel together 🡪 **equitable estoppel**
* Did not merge proprietary estoppel and promissory estoppel in the sense of remedies received
* Says different things from *Gilbert Steel* and *Greater Fredericton*, but no court in Canada has applied this case yet

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| Facts | D owned property. P negotiated to lease it if D demolished an existing building on the property and erected a new one for P. Nov: D informed P that the lease must be concluded within two days. P did not object to any amendments. D began demolition.Later in Nov: P had some reservations and (having been informed it was not bound by the agreement yet) instructed its solicitors to ‘go slow’ but did not talk to D. P shortly thereafter became aware that demolition was proceeding.Jan: With the building 40% complete, P informed D it did not wish to proceed. D sought enforcement |
| Issue | Can a promissory estoppel enforce directly in the absence of a pre-existing relationship a non-contractual promise on which the promisee has relied to his detriment? |
| Ratio | A promissory estoppel can directly enforce a non-contractual promise on which the promisee has relied to his detriment. |
| Holding | Appeal dismissed. P is estopped from retreating to its implied promise to complete the contract. |
| Misc. | Procedural History: Original trial: D succeededAppeal: D succeeded again\*Higher Court of Australia: P appealed again\* |

#### M (N) v A (AT) (2003), BCCA

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| Facts | P promised to pay the balance outstanding on D’s UK home mortgage if she moved to Canada to live with him with a view to marriage. D quit her job and moved to Vancouver. P did not pay off her mortgage and instead loaned her a $100,000 promissory note to apply to her mortgage. A week later, P evicted D. P/R; D/A. |
| Issue | Did the trial judge err in refusing to enforce he promise on which D relied to her detriment? |
| Discussion and Analysis  | - Lack of mutuality- No evidence showing that P intended his voluntary promise to pay the balance outstanding to be binding |
| Ratio | It doesn’t meet the bar set by *Walton Stores* since there is no intention to create legal relations (no legal relationship at the time of the promise), so cannot use Promissory Estoppel as a sword. |
| Holding | Appeal dismissed. |

# C. Enforcement By and Against Whom – Privity

* One must be “**privy**” to be a part of a K; be the offeror or offeree, promisor or promisee
	+ If you are not privy to a contract, you cannot enforce it nor can it be enforced against you
* **Horizontal privity** example (*Lyons v Consumers Glass*): If baby C is injured after a contract of sales between A and Mama B for a bottle that exploded, C still has action in torts (but whose fault? Manufacturers, not shop)
	+ Mother had no damages, so can’t sue
	+ Could interpret B (mother) as the baby C’s agent
* **Subrogation**: If A and B have a contract and B owes A debt, C can subrogate (step into) A’s shoes and take over the issue in A’s name; common in insurance
* **Assignment**: C can buy out A’s obligation and take A’s position in terms of being owed by B
* **Novation**: C involves B in changing B’s obligation to A

## 1. Third-Party Beneficiaries

#### Tweddle v Atkinson (1861), QB

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| Facts | P was getting married to D’s daughter. P’s father and D made a mutual agreement in writing to give them money. D didn’t pay, so P sued his father-in-law’s estate. |
| Issue | Was there an enforceable promise that P, the third party, could act on? |
| Discussion and Analysis  | - No damages- Horizontal privity |
| Ratio | - No stranger to the consideration can take advantage of a contract, although made for his benefit.- Action of assumpsit requires more consideration than natural love and affection. |
| Holding | No enforceable promise involving P. Judgment for D. |

#### Dunlop Pneumatic Tyre v Selfridge [1915] HL

* **Vertical privity**: A and B have contract, and B and C have contract, but C and A can’t sue each other because they don’t have a contract together

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| Facts | P (manufacturer) had K with Dew (distributor), including promise by Dew not to sell to trade buyers below P-approved list price. Dew also promised to get buyers to pay fine to P. D (trade buyer) bought tires from Dew and made promise to Dew not to sell below price, or else pay fine to P. D sold below the P-specified price anyways and didn’t pay the fine. P sought damages and an injunction. D argued there was vertical privity. P/A; D/R. |
| Issue | Can P sue D even though no contractual relationship exists between them? |
| Discussion and Analysis  | - Dew had no loss so no damages to claim- P did not forbear in anything since he had no action against Dew- P: Dew was agent for them, so P and D had a direct contract; Court ruled that Dew couldn’t do that because then he’d entering a K on his own behalf AND on P’s behalf (as his agent)- Also, if Dew was P’s agent, P had to have provided consideration for D’s promise (which P didn’t) |
| Ratio | The only exception to the rule (only parties can sue for a breach of K) is if a party named in the contract was acting as an agent of an unnamed party; in this case, the unnamed party can be sued. |
| Holding | Appeal dismissed with costs. |

## 2. Circumventing Privity

### Specific Performance

#### Beswick v Beswick [1966] CA, [1968] HL

* Damages and debt are both examples of A’s loss, but not directly because of B (due to third party), but debt is easier to seek action on (its remedy is pretty much an order of specific performance)

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| Facts | P’s husband Peter and D, his nephew, signed an agreement to transfer Peter’s business to D, with Peter staying on as consultant for a weekly fee, and after his death his widow P would continue to receive 5L/week. After Peter died, D paid P the first 5L and then stopped. |
| Issue | Can the third party P enforce the contract? |
| Discussion and Analysis  | - CA: P sues both as a third party (beneficiary of the agreement) and as the executor of her husband’s estate (i.e. as contracting party)- HL: Allowing P, as administrator of her husband’s estate, to enforce the provision of the agreement for her personal benefit would be just |
| Ratio | Cannot sue for breach of a K she’s not part of, even if she is the benefactor with a legitimate interest to enforce it. But she can sue for specific performance as executor on her husband’s behalf. |
| Holding | Specific performance is the correct remedy. HL appeal dismissed. |
| Misc. | Procedural History: Original trial: Action dismissed; P can’t enforce the agreement\*CA: P appealed and won order of specific performance\*\*HL: D appealed\* |

### Trust

* **Trust** in a privity context: A, the settlor, has a contract with B the trustee, and B owes fides (“trust”)/fiduciary obligation to C, the beneficiary

### Agency

* A and B appear to have a contract, but B was actually dealing on behalf of C (the **principal**), so A and C are the ones who have a contract
* **Consignment** is a type of agency (seller/consignor/principal A leaves goods with this agent/consignee B to help him sell to the buyer C)
	+ Title passes through B to C from A, and B has no rights against the other two

## 3. Exceptions to Privity

#### London Drugs Ltd v Kuehne & Nagel International Ltd [1992] SCC

* Needed to explain how a limitation in the employer’s contract with P could be applied to (and actually is originally meant to benefit) the third party employees

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| Facts | P delivered their transformer to D’s employer K&N for storage until it was to be used. In transfer, D (i.e. B&V, employees) negligently dropped the machine causing $33,000 damage. There was a clause in P and D’s contract stating that the “warehouseman’s liability was limited to $40” unless specifically stated otherwise (no such statement) P sued for negligence and breach of K. P/A; D/R. |
| Issue | Did D owe P a duty of care? Could D obtain the benefit of their employer’s contractual limitation of liability clause? |
| Discussion and Analysis  | - Court: If there was a rule from employers’ contract that D would like to use for defence, D can do so |
| Ratio | The test for employees being party to a contract made by their employee:1. Limitation of clause must (expressly or impliedly) extend benefit to employee2. The employees must have been acting in the course of their employment performing the services provided for in the contract when the loss occurred. |
| Holding | Yes. Yes. Both appeals dismissed. |
| Misc. | Procedural History: BCSC: D liable for full damages, K&N liable only for $40CA: D appealed, got their liability reduced down to $40\*SCC: P appealed CA ruling, D cross-appealed by arguing they should be completely free of liability\* |

#### Fraser River Pile & Dredge v Can-Dive Services [1999] SCC

* **Crystallization of interest**: freezing a legal interest at a point in time; comes from equity

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| Facts | P owned a ship that sank while it was under charter by D due to D’s negligence. P recovered from their insurance company, who in turn sued D. However, there was a clause in the contract between P and their insurance company stating that the insurance company could not bring actions against any charterers of P. But P made an additional agreement to waive the right of subrogation. |
| Issue | Can D benefit from and/or bring action to enforce the limitation of liability clause in the contract between P and their insurance company? |
| Discussion and Analysis  | - SCC: Relaxing the doctrine of privity since contract explicitly states that charterers (e.g. D) will be exempted from liability- D was explicitly mentioned in contract and was doing the appropriate activity, so covered by the limitation clause and therefore cannot be sued by the insurance company- P was acting as D’s agent when they excluded them from liability |
| Ratio | *London Drugs* test applies to all third parties, not only employees of one of the parties. |
| Holding | Appeal dismissed. |
| Misc. | Procedural History: Original trial: D found liableCA: D appealed; trial decision overturned\*SCC: P appealed\* |

# D. Formal Pre-Requisites for Enforcement

## 1. Writing Requirements

* Writing is now seen as evidence for a contract, not as the contract itself; CL doesn’t require it
* First possibility: May be a prerequisite for being able to prove/enforce a contract
* Second possibility: If writing is not required but there is some written evidence, it could be helpful to a case

## 2. Parol Evidence Rule

* **Parol Evidence Rule**: When parties have intended terms in writing in their K, that evidence occupies the field; court will not accept any oral terms that either contradict or supplement it
* Detailed contracts are now the norm, require **operative terms**, which contain obligations such as a breach of K
	+ **Inoperative terms**: if they turn out to not be true, there is no breach of K (e.g. recitals: misrepresentation, mistake, damages)
* PER doesn’t apply to misrepresentation or implied terms, and can be excluded by statutes
	+ Can bring in as many implied terms as you’d like, and they could be considered part of the contract according to the PER if the court applies it
	+ If you argue that the writing contains a mistake, then you can get the court to revise the contract, so that the PER works in your favour

#### Gallen v Allstate Grain Co [1984] SCC

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| Facts | D gave oral representation to P. P signed contract with D. Representation was wrong about the grain crop. |
| Issue | Is the oral evidence admissible? If so can it vary or contradict the signed contract? |
| Ratio | Oral evidence is permissible if the oral representation was a warranty before the contract was signed. The PER is more of a principle than a rule. |
| Holding | Yes. Appeal dismissed. |