**LAW 211 – CONTRACTS (ANNE UTECK)**

**INTENTION TO CREATE LEGAL RELATIONS**

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| **Balfour v Balfour (1919)****F:** Wife and husband went to England. Husband went to Ceylon for work. Wife got sick so she stayed in England. Husband promised to give her 30 pounds per month until he returned. He didn’t return and suggested they stay separated. **I:** Is husband’s promise to pay legally enforceable? **D:** No it isn’t. **A:** Husband and wife making promises to each other should not be considered contracts because they such parties did not intend that they should be attended by legal consequences. It would create absurd amount outcome and overflow of cases in Court.**R: In cases of closely associated parties, it will be presumed not to intend legal relations, in the absence of clear evidence to the contrary** |

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| **Rose and Frank Co. v. JR Compton and Bros Ltd. (1923)****F:** P were agents for D’s company. P signed document – arrangement between P and D is not a legal agreement bound by legal jurisdiction, but an honourable pledge. D refused to fulfill some of P’s orders and terminated agreement. **I:** Can parties explicitly state that an agreement shall not be legally binding? **D:** No.**A:** Judges stated **that business and commercial agreements are generally assumed to intend binding contracts** when making such agreements, however, if they expressly state their intentions in an agreement that they do not wish to be bound by the courts, this decision should be respected.**R: One can explicitly write into the contract that the agreement should not be bound legally.** |

**OFFER/INVITATION TO TREAT**

**Invitation to deal/treat: indication of willingness to receive an offer; invitation for others to make offers**

**What constitutes an offer: an indication of a willingness to enter into a contract on certain terms**

* **The test of whether it is an offer or an indication to treat is an objective one**

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| **Canadian Dyers Association Ltd. v Burton (1920)****F:** P asked for quote for D’s property. D responded $1650 was the lowest he was willing to sell at. P sent in a $500 deposit. P sent back draft deed and suggested closing date. D later sent back $500 to P and said there was no contract. **I:** Did the words/actions of D constitute an offer? **D:** Yes it did. **A:** A mere quotation does not constitute an offer – it is an invitation to treat. However, in this case, “lowest willing to sell” suggests that it is more than a quotation – a statement of a price they are willing to sell for. After receiving deposit, instead of denying sale, they sent out draft deed and a suggested closing date. The specific words used in this case were critical in making this decision.**R: Quotation is merely an invitation to treat, not an offer. Apply objective test of the words and actions of the parties involved to determine if they constitute an offer or invitation to treat.** |

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| **Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.** **F:** 2 customers purchased drugs/poison off of shelf from D’s store. P requires the sale of this drug to be in the presence of a pharmacist. Pharmacist stationed near the poisons and cashier; supervised sale. P claims purchase is complete if and when customer places item in receptacle. Thus, there was no supervision of sale of poison, which would violate P’s regulations. **I:** What is the official point of sale in self-serve shops? **D:** Sale is at the cashier. Acceptance is when you pay money to cashier. **A:** If POS was when item placed in receptacle, they would be bound to pay for item despite perhaps wanting to switch – this doesn’t make sense. **R: Display of goods is an invitation to treat; customer makes offer to purchase; store decides to accept offer at the cash register** |

**ADS AND UNILATERAL OFFERS**

**A unilateral contract is a contract in which the act is exchanged for a promise**

* **Acceptance of the offer is the completion of the action required by the offer**

**In general, an ad is treated as an intention to treat, an opening to accept the terms of the contract**

**Bilateral contract is a promise in exchange for a promise**

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| **Carlill v Carbolic Smoke Ball Co. (1893)****F:** Ad by D stated 100 pounds would be given to anyone who uses smoke ball according to instructions + if they still contract influenza. P bought one, used according to instructions and caught influenza. P sues D for breach of contract. **I:** Did the ad amount to an offer? **D:** Yes it did. **A:** D argues offer is too vague (no time limit, encompasses whole world, too much potential money). Court **read ad in plain meaning the way it would be interpreted by the ordinary person** – there was clear intention for ball to be purchased, used and circulated, they stated that 1000 pounds would be put in the bank which can be understood as having the intention to pay, as opposed to just a puff. This is not an offer made with the world – contract is made with strict population who fulfills condition.**R: In a unilateral offer, notification of performance is notification of acceptance.**  |

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| **Goldthorpe v Logan (1943)****F:** P wanted removal of hair on face, saw D’s ad. P was told by D’s employee that hairs could definitely be removed permanently with guaranteed results. This was unsuccessful. **I:** Was there a contract present, if so, was there a breach? **D:** Yes, contract present + breach of contract. D must pay sum of procedure + damages. **A:** Wording of the ad suggested that payment resulted in safe and permanent removal of hairs + guaranteed satisfactory results. Classic vendor seeking buyer relationship – that is how public would understand it. Further absolute promises guaranteeing results by employee – may be seen as another offer. P’s acceptance communicated to D through conduct.**R: An ad can still be considered an offer if it can be interpreted that way by the general public.** |

**COMMUNICATION OF OFFER**

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| **Blair v Western Mutual Benefits Assn. (1972)****F:** D made resolution among board to provide P with two years pay for retirement if she ever retired. Board member dictated minutes of the meeting to P, since she was stenographer. P transcribed and delivered them to president, who then signed. D did not communicate to P that this was an offer. **I:** Did the minutes of the meeting constitute communication of offer to P? **D:** There was no offer communicated + no evidence of intention to create legal obligations. **A:** Without clear communication and indication that resolution was an offer, we cannot assume intention to create legal obligations. All that was done was internal act of minutes of a meeting being dictated by stenographer for data entry. **R: There must be clear and deliberate communication of the offer as an offer in order to be considered an offer that can lead to legally binding contract.** |

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| **Williams v Carwardine** **F:** Handbill published by D – reward for information that leads to discovery of the murderer of his brother on conviction. P, who was wife of killer, made a voluntary statement providing info that led to conviction because she thought she would die soon. **I:** Is her fulfillment of condition of the offer considered valid acceptance even if her motive to do so was not for the offer? **D:** Yes **A:** P performed necessary condition for the unilateral offer for 20 pounds, thus entitled to recover it. Ad amounted to general promise to give sum of money to any person who shall give info that might lead to conviction.**R: It does not matter what the motive of the action is. If performance is completed on a unilateral offer, that is sufficient to enforce contract.** |

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| **R v Clarke****F:** Crown offers reward for arrest/conviction responsible for murder. C provides info that leads to conviction. He was not aware of the reward/offer. **I:** Must an offeree know of the offer when performing the act of acceptance? **D:** Yes, thus, no contract formed. **A:** Distinguished from **Carwardine** because in that case, the informer knew of the offer when she gave the information. In this case, C admitted to either forgetting about it or didn’t think about when he gave info to Crown = No knowledge at time of acceptance.**R: Although motive does not matter, you must have knowledge of the offer at the time of performing conditions of the offer or before valid acceptance can be made.**  |

**BIDS AND TENDERS**

**Tendering process:**

* **Starts with call for tenders 🡪 tender sets out nature of project, rules for submission of tenders 🡪 submission of tenders 🡪 selection of successful bid 🡪 enter into contract with successful bid**
* **There are 2 contracts – one is for the tender and one is for the building (Contract A/B analysis)**

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| **R v Ron Engineering (1981)****F:** D submitted tender to build project + tender cheque deposit. Tendering rules: deposit required, deposit irrevocable after closing bids, withdrawal of tender within 60 days of closing of tender means you forfeit deposit, must enter into contract to build project within 7 days of being notified of successful bid. D sent in tender lower than intended. D asked, after close of tendering process, to attempt to change the offer. D does not begin construction within 7 days. D wants deposit back. **I:** When is the contract completed? Is there a contract completed during the tendering process? **D:** P allowed to keep the deposit. **A:** Courts changed tendering analysis and declared that there are two contracts (A/B analysis): one for the tender and one for the building contract. Accepting contract A binds the contractor to enter into contract B. Deposit used to ensure performance of contractor of its obligations under Contract A.**R: Bids become irrevocable at once if filed in conformity with the terms and conditions under which the call for tenders was made.** **Contract A is for the tender. Contract B is for the building contract.**  |

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| **MJB Enterprises Ltd. v. Defence Construction (1951)****F:** D invited tenders for construction project. Tender documents had privilege clause – lowest or any tender shall not necessarily be accepted. 4 tenders received; contract given to Sorochan. Sorochan, however, submitted a bid suggesting an alternative cost, inconsistent with original tendering documents. P believes they should be awarded contract because alternative cost invalidated their tender. **I:** Does privilege clause in tender documents allow owner calling for tenders to disregard the lowest bid in favour of any other tender, including a non-compliant one? **D:** Yes, lowest bid can be disregarded; however, you cannot accept a non-compliant bid. Contract given to P. **A:** It is difficult to accept that any contractors would submit tender unless it is understood by all that only a compliant tender would be accepted. The rationale for tendering process is to replace negotiation with competition. If owner allowed to simply accept a non-compliant bid, exposing oneself to the risk of competition makes little sense. Contractor submitting a tender must submit a valid tender and is not at liberty to negotiate over the terms. Accepting non-compliant bid breaches Contract A, but no obligation to give to lowest bid due to privilege clause. However, circumstances in this case make it seem like it would have been simply given to lowest offer.**R: A privilege clause is only compatible with accepting compliant bids. In the absence of a privilege clause, you are most likely to be bound to accept the lowest offer.** |

**Contract A: offer to conduct a fair and transparent bidding process in exchange for an irrevocable bid**

**ACCEPTANCE**

**Acceptance: statement or act given in response to an offer and occurs when offeree agrees to enter into a contract proposed by the offeror**

* **Acceptance must match the offer – mirror image rule; must be positive act/statement; clear willingness to enter into a contract**

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| **Livingstone v Evans (1925)****F:** D offers to sell land for 1800. P says he will give 1600. D “cannot reduce price”. P accepted original offer. D sells land to someone else instead. P claims his acceptance created a binding contract. Suing for performance of contract. **I:** Was Evans’ counter-offer a rejection of Livingstones’ offer? Was the “cannot reduce price” a renewal of the original offer? **D:** Yes, counter offer = rejection. “cannot reduce price” revived original offer. **A:** Hyde v Wrench – **counter-offer is a rejection and offeree cannot accept original proposal**. “Cannot reduce price” was not a rejection – clearly talking about price of original offer, thus seems to say that he is still standing by his original offer; still open to acceptance. **R: Counter offer constitutes a rejection. An offer can be renewed after a counter-offer through ambiguous language + intermediate dealings between the parties**  |

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| **Butler Machine Tool Co. v. Ex-cell-o corp. (1979) – Battle of the forms****F:** In response to inquiry by D, P quoted a price for a tool – an offer + terms and conditions that stipulated they were to prevail over any terms and conditions in buyer’s orders. One of the conditions allowed P to vary price at time of delivery. D replied with purchase order – subject to own terms and conditions, differing form P – static price. On D’s order form, there was a slip that invited P to accept order on terms and conditions stated thereon. P completed and returned slip to D w/ letter stating that order was entered in accordance with P’s original offer. P delivered and varied price of tool. D believes their order should prevail – fixed price. **I:** Whose terms and conditions was contract based on? **D:** It was based on terms and conditions of D **A:** Look at all documents between parties and from the conduct of the parties, determine whether agreement reached on all material points. Terms and conditions of both parties are to be construed together. Signing of the slip by P seems to be the decisive document – makes it clear that contract was on buyers’ terms and not on sellers’ terms.**R: In a battle of forms, generally the last shot wins.** **Another way to analyze battle of forms is taking the documents as a whole and “applying an objective test of the conduct and language”**  |

**COMMUNICATION OF ACCEPTANCE**

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| **Household Fire & Carriage Accident Insurance co. v. Grant (1879)****F:** D sent an offer to buy shares of company. Company accepts and mails letter of allotment to D. Letter doesn’t reach D. Company goes into liquidation. P wants money from D. D refuses – says he is not a shareholder. **I:** Was a contract formed even if Grant did not receive the communication of acceptance/letter? **D:** Yes, contract was formed. **A:** Post office treated as common agent of both parties. Allowing contract to not be concluded until acceptance actually reaching offeror increases risk of fraud and considerable delay in commercial transactions. Acceptor would never be entirely safe in acting upon his acceptance until notice. There is rational for protecting the offeree: Offeror is the master of the offer and can control the offer (eg. They can state that they must receive notice of acceptance).**R: Creation of the postal acceptance rule: contract is completed upon mailing and posting of acceptance letter, not when it reaches the destination, even if the other party doesn’t “receive” it.**  |

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| **Holwell Securities v Hughes (1974)** **F:** P accepted 6 month option to buy D’s property by posting a letter. Letter was never received. P sues D for performance of contract. Option clause on contract said “it shall be exercisable by notice in writing to the intending vendor”. **I:** Does explicitly stating that notice in writing is required relieve one of obligations of the postal acceptance rule? **D:** Yes – pretty much anything can be explicitly put into the contract. **A: “**Notice” is a means of making something known. Thus, intending vendor had to be fixed with the information contained in the morning – P was not able to fulfill this term of the agreement.**R: Postal rule does not apply in situations where a notification of acceptance has been specified.****Postal acceptance rule also may not be applied if, looking at all circumstances, negotiating parties cannot have intended that there be a binding agreement until acceptance was communicated (outcome leads to absurdity)** |

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| **Brinkibon v. Stahag Stahl Und (1983) REVIEW** **F:** P, from London, telexed acceptance of a contract offer to purchase steel from D, who is located in Austria. P wants to sue D for breach but regulations state that buyers must show contract was made within jurisdiction. **I:** When and where is contract formed when it is between two parties in different jurisdictions? **D:** Contract is held in Austria. P does not meet criteria to sue because contract was not within jurisdiction. **A:** Entores v. Miles Far East – in cases of instantaneous communication and where it appears to be within mutual intention of parties that contractual exchange should take place in this way, contract is completed when acceptance is received by the offeror. Telex is instantaneous communication (no delay)**R: In cases of instantaneous communication, contract is complete at the location when and where the** **acceptance is received by the offeror.**  |

**Electric Commerce Legislation – default rules**

* **Message is deemed sent when it leaves the sender’s control**
* **Message is received when it reaches an information system that is in the control of whom it is sent**

**Parties can still choose to make rules that are different than this**

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| **Rudder v Microsoft Corp (1999) – Electronic agreements** **F:** P brings class action to D for breach of contract. D files for permanent stay of proceedings because of “forum selection clause” that said that the agreement is governed by the laws of Washington, USA. P argues that since they only read parts of agreement, they did not have notice of forum selection clause. **I:** Should a clause that was not seen by a party still bind them to consent? **D:** Yes, stay of proceedings entered. **A:** Sarabia v Oceanic Mindoro – forum selection clause should be given deference; allows for commercial certainty and show respect to freedom of contract – choices should be respected unless strong cause to override. Agreement is provided in computer readable form through computer disk or internet on MSN website; it requires you to press “I accept” twice, once being “without limitation”; no physical differences between terms that make one more difficult to read than other; requiring scrolling is equivalent to flipping multi-page contract. **R: If offeree has reasonable notice of terms of contract, then whether or not offeree has read them or not, contract has been formed if sign/ click ‘I agree’****Scroll bar is analogous to turning the page** |

Negative option billing

* Mail order programs – you receive the order at home and then you have to pay for it; if you don’t opt out, you are charged for those specialty services
* Government made legislation to regulate – this is now illegal if there is no consent
* Silence of the buyer cannot be seen to infer consent

**TERMINATION OF OFFER**

**If an offer isn’t accepted, it can end if: Revocation, lapse of time, rejection or counter-offer**

**An offer can be revoked anytime before acceptance by simply notifying the offeree**

* **However, this must be communicated before acceptance**

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| **Dickinson v Dodds (1876) – Leading decision** **F:** On Wed, D offers to sell land by letter to P, stating it is open until 9 am on Fri. On Thurs, P hears that D was agreeing to sell to someone else. P sues for performance. **I:** Is the statement that offer remains open until 9 binding? **D:** No. Case found in favor of D. **A:** There was no acceptance yet, therefore, no contract. The promise to leave the offer open was gratuitous. Hearing and knowing D was negotiating with someone else sufficient communication of revocation since it was a reliable source.**R: Offeror is free to withdraw offer at any point until acceptance, as long as offeree has not provided any sort of consideration.****Revocation is effective even if it is communicated indirectly to offeree (such as through a third party).**  |

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| **Byrne v Van Tienhoven (1880)****F:** Oct 1-D mailed offer to sell P 1000 boxes of tin plates at fixed price. Oct 8-D mails revocation of offer. Oct 11-Offer was received by P and accepted by telegram. Oct 15-P resells items to third party. Oct 20-Revocation received by P. P sues for non-performance. **I:** Was offer revoked in time? **D:** No. Decision found in favor of P. **A:** Uncommunicated revocation is for all practical purposes and in law no revocation at all. Postal acceptance rule applies for the acceptance in this case. However, the rule does not apply for revocation**R: Offer can be revoked at any time before acceptance as long as it is communicated to the offeree. Postal acceptance rule does not apply to revocation.** |

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| **Errington v Errington and Woods (1952)****F:** Father bought a house for D (son and daughter in law). Paid down payment as present – left 500 pounds mortgage to be paid by D. Father left house in his name. Promised to give property when mortgage is fully paid. D made regular payments. Father passed away and estate transferred to P. P sues for possession of the house. **I:** Can a unilateral contract be revoked once performance has been commenced? **D:** No. Decision in favor of D. **A:** No express promise by D to pay installments, so court cannot imply those terms. Father’s promise was a unilateral contract and would only be revocable if D did not make the payments. Once performance has started, offeror cannot revoke the offer.**R: Offeror can only revoke unilateral contract if offeree did not live up to their side of the bargain. Cannot revoke if substantial performance has been completed. – one payment not be sufficient** |

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| **Barrick v Clark (1951)****F:** Oct 30-D made offer for land, asked to reply by telegram. Nov 15-P writes back with counteroffer. Nov 20-Offer received by D but he’s away on camping trip. Wife receives letter and asks P to hold offer open. P does not respond. Dec 3-P sold property to third party. Dec 10-D accepts after return. **I:** What is reasonable amount of time offer is left open for? **D:** D did not accept offer in reasonable time. Decision in favor of P. **A:** Fields could not be used until spring, however, D’s actions implied he wanted to get the sale done quickly (asking for telegram, requesting decision as soon as possible). P did not respond to D’s wife’s letter so not bound to keep offer open. P also wrote that he hoped D replies as soon as possible.**R: 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.****Offer can lapse in two ways: explicit stipulation or if offer contains no expiry date, then it lapses in a reasonable time** |

**JUDICIAL CONTROL OF STANDARD FORMS & EXCLUSION CLAUSES (INCORPORATION)**

**Always start analysis with the L’Estrange case – when a document containing contractual terms is signed, then, in the absence of fraud/misrepresentation, party signing it is bound**

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| **Tilden Rent-A-Car v Clendenning (1978) – exemption clause****F:** D rented car from P. D signed contract without reading and thought he had full coverage. P knew D did not read. D got into accident and tried to recover damages by insurance coverage. P argues there was an exemption clause and D signed it. **I:** Is exemption clause valid? **D:** Exemption clause not valid **A:** Clause was inconsistent with overall purpose of contract; contract signed in hurried, informal manner; D took no steps to alert P despite knowing P did not read; exemption clause on reverse side of contract; small print; in terms of Estrange, there was not true acceptance of the contract **R: When there are unusual or particularly onerous terms on a standard form contract, party seeking to enforce contract must take reasonable steps to provide notice – otherwise, no meeting of the minds**  |

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| **Karroll v. Silver Star Mountain Resorts Ltd. (1988)****F:** P participating in ski competition. P signed waiver releasing D of liability for any injuries. During race, collision with another skier. P sues D for negligence. **I:** Is the indemnity/exclusion clause valid? **D:** Yes, it is binding on Karroll. **A:** Two step test: (1) would reasonable person know that P did not intend to agree to release she signed? + (2) in these circumstances, D failed to take reasonable steps to bring to attention of P; (1) release consistent with purpose of contract; release was short, easy to read, in capital letters, no fine print, fit on one page; P knew it bounded legal rights; release was common to these types of races – reasonable person would believe P agreed to terms + (2) reasonable notice given – short contract, given opportunity to read**R: Requiring that party must draw attention to an exclusion of liability clause is not a general principle but one of limited applicability; depends on effect of clause in relation to nature of contract; length and format of contract; time available for reading contract**  |

Sports case considerations: experience in sport, how familiar they are with particular facility, how clear or ambiguous waiver language is

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| **Thornton v Shoe Lane Parking Ltd. (1971)****F:** On outside, there was “at owner’s risk” + ticket prices. P paid + received ticket from machine. P parked. Ticket had time + “subject to conditions on premises”. Exemption clause posted inside parking garage. Upon return, P was putting goods in trunk before but got in accident + had serious injuries. Trial judge found P and D 50/50 responsible. D appeal – argues that exemption clause excuses liability. **I:** Is exemption clause inside garage valid/part of contract? **D:** No **A:** Offer was at entrance. It cannot be altered by any words printed on ticket after payment made. Notice must be brought to all terms and conditions, not enough for ticket to say “subject to conditions”. Megaw – concurring – focuses exclusively on P not receiving reasonable notice vs. formation of contract prior to conditions delivery.**R: With automatic ticket machines, contract formed when ticket is received. Conditions not seen until after this time are not binding since contract has already been agreed upon.** |

**CONSIDERATION**

**Peppercorn Theory:** If something of value is exchanged in return of something of lesser value, then the contract is still enforceable. The Courts won’t look at the adequacy of the consideration; whether the deal was fair. Only that consideration is present. In some circumstances though, if the disparity is so great to “shock the conscience”, consideration will not be found.

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| **Thomas v Thomas** **F:** JT died, leaving P a widow. JT’s will appointed brothers as executors. Before death, JT orally expressed desire for his wife to have leasehold for home and its contents as long as she does not remarry. After death, brothers entered into an agreement with P “in consideration of JT’s desires” where P would take possession of the house and in return, maintain it and pay 1 euro/year. Brother later wanted to evict P, claiming no consideration. **I:** What consideration does she give to the executor? **D:** 1 pound – contract is enforceable – sufficient consideration **A:** Promise to not remarry did not constitute good consideration, but the payment of 1 euro per year does. Agreement is thus binding. **R: Consideration must be something of value in the eyes of the law moving from the promisee.**  |

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| **Brantford General Hospital v Marquis Estate (2003)****F:** M signed pledge to donate 1 million to P – 200,000 installments over 5 years. Discussions around new building, M wanted her husband’s name to remain on unit. She made one payment of 200,000 before passing away. Estate refused to pay out remainder of pledge. **I:** Was the pledge an enforceable contract/was there sufficient consideration? **D:** No binding contract existed. **A:** Hospital argues naming of critical care unit after M’s wife was good consideration. But, evidence shows that it was hospital that proposed naming the unit, no mention of naming promise in the pledge document, naming still required formal approval from board of directors. It wasn’t important to M.**R: A bare promise unsupported by consideration is not enforceable.****For the court to find consideration, it must have been agreed upon by the promisor as a condition of, or to be in return for, the promisor’s promise.** |

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| **Dalhouse College v Estate of Boutilier (1934)****F:** Boutillier promised to pay D 5000 in university fundraising campaign to “improve the efficiency of the teaching, to construct new buildings and to otherwise keep pace with the growing need of its constituency” + signed subscription “in consideration of the subscription of others”. B couldn’t pay, acknowledged intent to pay when he could afford to. B died. P claims against his estate for enforcement. **I:** Was there consideration between both parties? **D:** No. There was no evidence to show consideration was given expressly or impliedly. **A:** The fact that others signed separate subscription papers for same common object does not itself constitute legal consideration. No benefit or detriment for B. **R: A bare promise by way of a pledge or donation cannot be converted into a binding legal obligation unless there is some form of consideration attached – Consideration has to be requested by promisor (it has to be a term)** |

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| **Wood v Lucy, Lady Duff-Gordon (1917)****F:** D was celebrity – attached name to products to help sell them in return for payment. D employed P – gave him exclusive rights to license out her name in exchange for 50% of profits. After contract signed, she did her own dealings using her name and did not pay P. P sued. **I:** Was there consideration in their contract even if there was no express promise? **D:** Yes, consideration existed implicitly. **A:** D argues she did not request anything from P + P is not bound by anything, thus no contract. Court says that although he did not explicitly promise to use reasonable efforts to market her designs, such a promise can be implied – implied promise to use reasonable efforts to bring profits and revenues.**R: Where a contract suggests that the promisee has undertaken obligations, even if imperfectly expressed, the courts will imply such obligations on the promisee to give business efficacy to the deal.** |

**PAST CONSIDERATION**

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| **Eastwood v Kenyon (1840)****F:** John Sutcliffe died and left P as the guardian to his infant daughter, S. P borrowed money to pay for S's education. During infancy, S promised to pay him back when she became of age and paid one year's interest to him. S then married D who also promised to pay P back. D failed to do so and P sued. D wasn’t able to make any payments and Eastwood sued him on his promise. **I:** Was there good consideration? **D:** No, this was an unenforceable promise to repay. **A:** The consideration was past and executed long before the express promise to pay was made. Loan taken out followed by promise to pay. **R: A moral obligation does not, on its own, constitute good consideration.**Note: Generally speaking, infants’ contracts are not enforceable. However, if an adult guardian provided the necessities of life for them + infant promise to pay back after full age, then consideration can be found (**Cooper v Martin**) |

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| **Lampleigh v Brathwait (1615)****F:** D killed a man unlawfully, asked P to ride to the King to petition for a pardon. P successful. D promised to pay 100 euros to P but never paid. P sued. D argued that since service had already been performed, no consideration. **I:** Is the contract unenforceable because of past consideration? **D:** No. Since D request the action, even though action was completed prior to promise to pay, D held liable because it was implied in the terms. **A:** The Court held that there was an implied understanding that a fee would be paid.**R: An act done before a promise is made can be good consideration where the act was requested by the promisor and it was understood that payment would be made**  |

**PRE-EXISTING DUTY (PROMISOR)**

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| **Pao On v Long (1980)****F:** P agrees to sell shares of his company in exchange for D’s company with conditions that P would not sell shares for a year with some conditions. P later refused to complete main agreement unless new subsidiary agreement was made between P and D. D agreed. P attempted to enforce the new subsidiary agreement but D argues there was no consideration + contract procured by duress. **I:** Was there consideration or economic duress? **D:** Courts found in favour of P. **A:** Past consideration argument disposed: a promise to perform a pre-existing duty to a third party can be good consideration. The main agreement was between the two companies. Second agreement as with D. For duress, there must be something beyond mere commercial pressure; there must be a coercion of will vitiating consent. **R: Pre-existing consideration is good consideration to a THIRD PARTY if (1) Act done at promisor's request; (2) Parties understood act to be remunerated/conferment of some benefit; (3) Promise must have been capable of legal enforcement had it been promised beforehand** |

**Promises to pay more**

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| **Stilk v Myrick (1809)****F:** P contracted to work on ship owned by D for 5 euros/month with promise to do anything needed in voyage regardless of emergencies. 2 crewmen left shit part way through voyage. D promised to split wage of two men between remaining crew, including P. D refused to pay; argued that D had pre-existing duty to work in emergencies for same amount of pay **I:** Are shipmen entitled to the increased wages promised by D? **D:** No they are not. **A:** Before they set sail, they undertook to do all that they could under all emergencies. Desertion of part of the crew considered an emergency just as much as their death. No new consideration for promise. **R: A promise to perform or performance of a pre-existing contractual duty already owed to the contractual promisee does not constitute good consideration to support another promise to the same promisee.** Note: If the crew had quit and ship captain made new agreement, outcome may have changed. |

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| **Gilbert Steel Ltd. v University Construction Ltd. – Leading decision on promises to pay more – need fresh consideration** **F:** P enters into contract with D to deliver steel for certain price. Steel prices increased. P and D enter into amended contract reflecting increased price. Further increases in steel prices 🡪 P and D enter into oral agreement to reflect new steel prices again. D accepts delivery of steel with invoices, refuses to pay new prices. P sues. **I:** Was there valid consideration? **D:** D wins. Oral contract was void for want of consideration. **A:** P argues that a promise for “good price” for steel on the second building was consideration and argued for **Novation: a discharge of the initial contract and entering into a new agreement,** and that there was an implicit rescinding of the original agreement. Courts rejected this argument: good price is too vague + held that agreement was simply a variation of the old contract 🡪 thus, there was no consideration. In order for novation, both parties must clearly intend to rescind the prior contract.**R: A prior duty owed to the promissor or variation of an existing contract is not legally sufficient consideration. You can rescind an initial contract and modify it into a new contract to get around the consideration issue, but there must be clear intent from both parties.** |

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| **Williams v Roffey Bros** **F:** D entered into contract with owner for renovation project. D hired P as subcontractors. P had financial trouble partly because agreed upon price was too low + problems in supervision of work force. D became concerned that P might no complete work on time (potential liability to owners under agreed damages clause if renovation not done on time). D promised to pay extra to P. D made an initial extra payment but didn’t fully pay promised amount. P stopped work, claimed breach of contract. **I:** Can there be sufficient consideration for a pre-existing duty? **D:** P provided sufficient consideration because D received practical benefit. Contract should be enforced. **A/R:** **New Rule of Consideration: practical benefit coupled with economic duress.****1) There must be a pre-existing contract between A and B.** **2) B does not believe A will perform.****3) B promises more money to A for A to do the very thing they are already bound to do.****As a result, B gets a practical benefit. If the promise wasn’t made under duress, practical benefit equals consideration** |

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| **Greater Fredericton Airport Authority v Nav Canada (2008)****F:** P requested D to relocate equipment to the runway being extended. Rather than relocating, D though it made better economic sense to replace portion of existing equipment with new one. D refused to relocate equipment unless P agreed to pay for it. P wrote to D indicating it would pay, but under protest. D completed the work. P refused to pay. Submitted to arbitration and P had to pay. Decision overturned by Queens Bench.**I:** Was there sufficient consideration to find that a contract was created or the existing contract modified? Was the promise obtained under economic duress? **D:** Court says no consideration because duty was already pre-existing duty owed. **A:** P argues there was no consideration + made under economic duress. Court says that consideration must move from promisee to promisor; consideration in this case was what D was contractually obligated to do – install the equipment. No consideration found. Concluded that promise by P was procured under economic duress and therefore unenforceable. **R: A variation to an existing contract, unsupported by fresh consideration (in the technical old doctrinal sense), may be enforceable provided that it was not procured under economic duress** |

**Note:**

**Contractual modification unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.**

***Stilk*** (no consideration), ***Gilbert*** (suggest there are ways around notion of **Stilk**: abandonment of original contract, obtaining something different), ***Williams and Roffey***(modernizes the notion of consideration under ***Stilk*** in that it looks for whether there was a practical benefit and it was extracted under economic duress. ***Nav Canada*** suggests maybe moving away from the rigid application in **Stilk**, however, it was done in obiter. Decision was made based on the fact that there was economic duress.

Starting point is **Stilk** 🡪 then look at whether there was a threat or if facts indicate that there was a renegotiation (**Roffey bros, Gilbert Steel, Nav Canada)**

* Economic duress is where the promisor (victim) had no practical alternative but to acquiesce the promise of the promisee who exercises coercion (**Nav Canada**)
	+ Threshold conditions for economic duress:
		1. Exerting pressure by making implicit threat to breach contract by withholding performance unless contractual variation – must be extracted from pressure in the form of a demand or threat
		2. Coerced party is left with no practical alternative but to comply
	+ Once these are met, look at consent (eg. **Nav Canada** – letter said “under protest”)
		1. They may look at whether there was consideration

**PRE-EXISTING DUTY (PART PAYMENT/PROMISES TO ACCEPT LESS)**

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| **Foakes v Beer (1884) – Starting analysis in context of pre-existing duties + debt/accepting lesser sum****F:** F owed the B £2,090 19s after court judgment. B agreed she would not take any action against F for the amount owed if he would sign an agreement promising to pay an initial sum of £500 and pay £150 twice yearly until whole amount paid back. F was in financial difficulty and, with the help of his solicitor, drew up an agreement for B to waive any interest on the amount owed. She signed. F paid back the principal but not the interest. Then B sued F for the interest. **I:** Is partial payment of a debt sufficient consideration for the original contract? **D:** Interest payments were held to be due. **A:** Doctrine in Pennel’s case followed. A promise to pay less than the total amount of a debt, in installments, is not really a contract because there was no valid consideration. **R: An agreement to accept less than you are owed is not binding unless there is some consideration (payment of a lesser sum in satisfaction of a larger amount does not constitute consideration)** |

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| **Re Selectmove (1995)****F:** Selective Ltd. failed to submit payroll deductions from employees to the Crown over an extended period of time. As a result, July 15, 1991, tax collector went to speak to them and found out they were in financial difficulty. They proposed to pay current deductions as they came and 1000 per month for arrears. Collector indicated he would have to get approval from superiors, and a few months later, Crown demanded payment in full of 24,650. Despite this, company submitted its current obligations in part and made seven 1000 payments. Oct 1991, they ended up laying off all their employees and sold the work-in-progress to another company. Crown sought liquidation order for the company and the payment of the arrears in the amount of 17466.60. Selectmove argued that the Crown had accepted the agreement on July 15. **I:** Was the repayment schedule proposal enforceable? **D:** There was no acceptance. Even if there was, there was no consideration. Appeal dismissed. **A:** Applied **Foakes v Beer** despite counsel arguing to apply **Roffey Bros** by saying that a promise to perform an existing condition can amount to good consideration provided that there are practical benefits (more likely to recover more from not enforcing debt against company with financial difficulties than from putting company into liquidation).**R: A promise to vary a contract by accepting less requires fresh consideration, which is not supplied solely where the promisor receives a practical benefit from the performance of the existing obligation** |

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| **Foot v Rawlings (SCC)****F:** F owed R a large sum of money under a series of promissory notes. R offered to lower the amount/month and the interest rate that F would have to pay him. F agreed and gave R a series of post-dated cheques. It was agreed that if any of the cheques bounced, the interest rate and the sum of monthly payments would revert to their 'actual' amounts. Thus, the agreement implied that as long as the necessary payments were being made, R would not take any action against F. Although F had been complying with this agreement for over a year, R sued for the balance of his debt. **I:** Was there sufficient consideration in the substituted contract for it to be binding? **D:** Appeal allowed. New agreement may continue and the respondent cannot sue unless the appellant fails to keep up the payments. **A:** As long as F continued with payments, the giving of the several post-dated cheques constituted good consideration. **R: So long as payment is to occur in a different manner than required under original obligation, payment of a lesser sum will constitute good consideration (eg. Payment of a lesser sum before the due date or providing post-dated cheques).**Note: Exception to Foakes v Beer. Substitution of something else may be of more benefit to the creditor even where it is objectively of lesser value such that it will constitute good consideration in satisfaction of an existing debt.  |

**Judicature Act, RSA 2000, c J-2, s. 13(1)**

1. Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation
	1. When expressly accepted by a creditor in satisfaction, or
	2. When rendered pursuant to an agreement for that purpose though without any consideration

**PRIVITY**

Privity of contract is often viewed through the doctrine of consideration

* In order to sue or be sued, there needs to be consideration
* Privity of contract rule sometimes seems be unfair; most jurisdictions have abolished this doctrine
* In Canada, the doctrine can be avoided on some narrow apparent exceptions

General principle, third party beneficiary has no right to enforce obligation of promisor

The doctrine of privity applies in Canada to prevent two types of persons from enforcing a contract

1. A person who is a complete stranger to the contract has no legal right to enforce the promise of any party to that contract
2. The third party beneficiary – the person identified and intended by the promisor and promise to receive all or part of the benefit of the agreed upon performance

This second aspect is quite controversial, with the Canadian provinces being alone in their retention of the formal general prohibition on enforcement of a contract by a third party beneficiary

The earlier cases barring the third party were all concerned with an absence of consideration on the part of the third party

* Thus, there is an argument over whether or not the privity rule is just another way of saying that consideration must move from the promisee

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| **Provender v Wood (1630)**Wood agreed with Provender's father to pay £20 to Provender after Provender and Wood's daughter were married. Wood did not pay and Provender brought action. The Courts found in favor of Provender. **The court held that "the party to whom the benefit of a promise accrews may bring his action."** |

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| **Tweddle v Atkinson (1861)** **F:** JT, father of WT, agreed with WG to pay WT some sums of money after marrying WG’s daughter. Written agreement contained clause which specifically granted WT the power to sue for enforcement of the agreement. WG died, and the estate would not pay. WT sued. **I:** Does WT have standing to sue for enforcement of the contract? **D:** No, because they are a stranger to the contract.**R: Third parties to a contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it (even if contract was for their benefit)****Natural love and affection is not sufficient consideration in the eyes of the law** |

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| **Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co (1915)****F:** P, a tire manufacturer, made contract with Dew to sell tires on discounted price on condition that they would not resell the tires at less than listed price + any reseller from Dew would have to agree to not sell at lower price + 5 euros damage if tire sold below listed price. Dew sold tires to D and told them the conditions. D sold tires below listed price. P brought action against this.**I:** Can P sue D even though no contractual relationship existed between them?**D:** No, P cannot sue D because they were not parties to the same contract.**A:** Appeal fails based on privity, consideration (P did not give consideration to D for the contract to be completed; consideration by way of discount was given to Dew, not D)**R: Only parties to a contract can sue for a breach of contract****The only exception to this rule is if a party named in the contract was acting as an agent of an unnamed party; in this case, the unnamed party can sue** |

**THIRD PARTY BENEFITS – TRUSTS**

Trusts are a creation of equity because the common law only recognized legal ownership of property, which meant others were out of luck if it was meant to benefit them

* Puts legal ownership into hands of a trustee who holds it for the benefit of the beneficiary
* If a third party beneficiary of a contract can successfully claim that a promisee intended to establish a trust for the benefit of a third party, then beneficiary can enforce the promise based on laws of trust

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| **Beswick v Beswick (CA 1966)** **F:** PB and his nephew reached agreement that uncle would transfer business to him and in exchange, he would pay PB’s widow $5 per week. Nephew made one payment and stopped. Aunt seeks to enforce contract. Aunt was administrator/executor of PB’s estate.**I:** Does she have the ability to enforce the contract, contrary to the privity rule (third party)?**D:** Yes, she can, but she cannot bring the action in a personal capacity.**A:** This case is one way around the privity doctrine. It can be seen as someone who is a party to the contract (PB and his estate) taking action to obtain satisfaction for a third person (PB’s wife, who also happens to be the administrator of the estate). She can sue in her capacity as administrator, but not in personal capacity.**R: One possible away around the privity rule is if the third party benefitting from the contract is the administrator of the estate of one of the parties of the contract.** |

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| **Vandepitte v Preferred Accident Insurance Co.****F:** Father has insurance policy available to any legal driver operating his car. Daughter did not have insurance contract. While driving she got into accident with V. Outcome of accident was damages owing for injuries to V. Father refused to pay. V went to insurance company directly (provision of the Insurance Act) to enforce payment/sue for the owing. PAI argues there was no contract between them and the daughter; contract was with father. V argues there was a relationship created between them in both agency and trust.**I:** Is there an agency or trust relationship which entitles V to recover from the insurance company?**D:** Appeal dismissed. No trust was created. **A:** There was no intention for daughter to enter into contract of insurance. No agency because there was no intention from the father to include daughter on policy, daughter never accepted any insurance made on her behalf, and no consideration.There is no evidence to suggest that father intended to create a trust with PAI for daughter.**R: There must be clear intention to create a trust in order for a trust relationship to be found.****A beneficiary of a trust, however, can sue on a contract made by the trustee for their benefit.** |

**THIRD PARTY BENEFITS – AGENCY**

If the promisee is actually contracting as agent on behalf of a third party, doctrine of privity simply has no application. Promisor and third party are the contracting parties – it is a direct contractual relationship.

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| **McCannell v Mabee Mclaren Motors** **F:** S is car manufacturer that distributes to other dealers. Dealers agree to sell cars within specified territory, McC and MMM both entered into sales contract with S.* If dealers sell care outside of their specified territory, they would pay part of the profit on that sale to the dealer whose territory the customer was taken

MMM sold car within McC’s area and McC sues for breach of contract.**I:** Can the parties/separate dealers take action against one another?**D:** Yes, the contract exists between the parties.**A:** Court holds that S is acting as agent to create a contract between each dealer – creating privity between them. Test for agency:1. Agent brings parties together
2. The contracting parties recognize that agency has been created; a formal designation is not necessary

Each dealer entered into contract with every other dealer in terms of that particular term of selling outside one’s territory **R: The principal can sue when an agent is the promisee.**  |

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| **New Zealand and Shipping Co. v. AM Satterthwaite & Co.****F:** Ajax is a manufacturer that sold a drill to D through agency of Federal Navigation (FN). Contract had several exclusion/limitation clauses in reference to liability of damages. The stevedores were NZ Shipping, which is the parent company of FN. As NZ unloaded drill, they damaged it due to negligence. D brought action against NZ. NZ relied on limitation clause vs. D argues NZ was not a party to the contract, thus cannot rely on the clause. D did not get their own insurance.**I:** Does the limited liability clause in the bill of lading apply to the stevedores?**D:** Yes, liability clauses applies to the sevedores. **A:** Sets out the test for agency. The subsidiary relationship between NZ and FN met the test: exemption was designed to cover the whole carriage from unloading to discharge, regardless of who performed it; contract makes it clear they are acting as agent to stevedores; they do have the authority to act as agent. This decision is made in the interest of ensuring an efficient global market – owners should have been insured since they knew the true value of goods. **R: Test for agency; if**1. **Party is meant to be covered by provisiosn**
2. **Promisor is clearly acting as agent for the party and**
3. **Promissor has authority to do this**

**Then, consideration moves from party through agent to promisee** **Agency agreements still need consideration** |

**THIRD PARTY BENEFITS – EMPLOYMENT**

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| **London Drugs Ltd. V. Kuehne & Nagel International Ltd. (1992) SCC****F:** LD delivered a transformer to the respondents for storage until it was to be used. In transfer, two employees of D negligently dropped the machine causing $33,955.41 of damage. There was a clause in the contract stating that the "warehouseman's liability was limited to $40" unless specifically stated otherwise. No further statements had been made. LD was aware of the clause and chose not to get insurance. The employees were found liable in trial, but their appeal was allowed at the Court of Appeal and London Drugs appealed to the Supreme Court. **I:** Were the employees covered under limitation of liability clause?**D:** Yes, LD’s appeal fails. **A:** LD argues that both employees were not parties to the contract, therefore should not be covered under limitation clauses. Court says that commercial reality and common sense requires privity doctrine to be reconsidered 🡪 to follow strict privity rule would frustrate sound commercial practice and justice and ignores practical realities of insurance coverage. Employees did owe duty of care + were negligent but set out a test that allowed employees to be excluded from liability.**R: An exception to privity rule in employment settings:**1. **The limitation of liability clause must either expressly or impliedly, extend its benefit to the employees seeking to rely on it and**
2. **The employees must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the other party when the loss occurred.**

**If both of these provisions are met, then employees are excluded from liability 🡪 limited to employment situations + can only be used as a shield + this doesn’t affect previous exceptions to privity rule** |

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| **Edgeworth Construction Ltd v. N.D. Lea & Associates Ltd. (1993) SCC****F:** P was engaged in the business of building roads in British Columbia. In 1977, it bid on a contract to build a section of highway in the Revelstoke area. Its bid was successful, and P entered into a contract with the province for the work. P alleges that it lost money on the project due to errors in the specifications and construction drawings. It commenced proceedings for negligent misrepresentation against the engineering firm which prepared those drawings, D, as well as the individual engineers who affixed their seals to the drawings. **I:** Is D exempt from liability due to the intervention of the Ministry and their liability clause?**D:** No, they are not exempt. Case found in favor of P. **A:** Liability for negligent misrepresentation arises where a person makes a representation knowing that another may rely on it and the P in fact relies on the representation to its detriment. These facts establish a prima facie case of action against D. Court does not accept argument that the Ministry assumed all risks previously held by D. When P performed construction, it relied on D + courts did not find any express or implied protection of D in the contract (thus, doesn’t conflict with **London Drugs** + unlike in **London Drugs**, D could have drawn up their own contract protecting themselves from liability.**R: Employees who are not “powerless” will not benefit from an employer’s exemption****Liability clause must indicate intention to exempt a party from liability (affirms London Drugs)** |

**PROMISSORY ESTOPPEL**

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| **Central London Property Trust v High Trees House (1947)****F:** P granted lease, under seal, of 99 years for block of flats to D at 2500/year. Due to war conditions + low occupancy rate, P wrote to D “confirming arrangement made between us” that reduced ground rent to 1250/year. D paid reduced rent over five year, after which occupancy of flats was full. P sued for full rental costs going forward + arrears. **I:** Did the arrangement for lower pay constitute an agreement that the reduced rent would be for the remainder of the whole lease? **D:** Judgement for P. No, lower pay was temporary to cover wartime period and low occupancy rates. **A:** P’s promise to lower the rent was prima facie unenforceable because it lacked consideration. Promissory estoppel does not work in this case because lack of intent – promise was understood by all parties that reduced rent would only apply during prevailing conditions at the time. Reduction ceased to apply when flats became fully let.**R: A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply – only as a shield.**   |

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| **D&C Builders Ltd. v. Rees (1966)****F:** D hired P to do work on his shop. D did not pay full sum and had remaining balance, despite P reaching out several times. D finally responded but said he would only pay 300 as settlement. P offered to take it and asked for rest to be paid over a year. D refused – she knew P was desperate for money. P would go bankrupt without the money. D gave cheque to P, made P sign that debt was satisfied. P sued for remainder. **I:** Was the settlement binding? **D:** Decision in favor of P. Payment in full can be demanded. **A:** First off, there was no consideration for the settlement agreement – applied **Foakes**. Payment of lower sum to satisfy larger sum is not sufficient consideration. D also attempted PE argument – although all the factors were arguably present, PE was not made out. D procured agreement by intimidation and equity will not assist a party that abuses their rights or position. **R: Clean hands doctrine – need to be deserving of assistance to make out PE. Equity only protects when outcome would be inequitable.****Promisory estoppel as a shield:**1. Existing legal relationship
2. Promise or assurance – intended to be binding and acted upon
3. Reliance and detriment to the promisee
4. Equities in the promisee’s favour
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| **John Borrows v Subsurface Surveys (1968)****F:** D purchased business from P. Part of payment was secured with promisory note of $42,000 for payments to be made in monthly instalments + acceleration clause permitting creditor to claim entire amount due if there was 10 days delay on any payment. D consistently paid late more than 10 days over 18 months, but never went beyond 35 days. P always accepted late payment. Following disagreement, next time D’s payment was late more than 10 days, P invoked acceleration clause and sued for full amount. **I:** Can P be estopped from suing for full amount based on fact that they did not invoke acceleration cause all those other times? **D:** No. Evidence does not suggest that P had agreed to disregard the acceleration clause. **A:** PE defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which lead other party to suppose that strict rights under contract would not be enforced. There is no evidence P intended to side step his legal contract. **R: In order for a promise to be capable of being relied upon and invoking estoppel defence, it must be a promise either by words or conduct and its effect must be clear and unambiguous** **A friendly gesture is not a binding agreement and if it is relied upon estoppel will not be available as a defence + Series of waivers does not constitute estoppel**  |

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| **Saskatchewan River Bungalows v Maritime Life Assurance** **F:** ML issued insurance policy on life of MF to SRB. Ownership of policy was transferred to F, who became the beneficiary, with SRB remaining responsible for paying annual premiums. SRB mailed a cheque for 1316 to pay annual premium for July, 1984, but ML did not receive + not deducted from SRB’s bank. ML sent notice requesting payment of 1361. SRB simply sent 45 (the difference). After expiry of grace period, ML sent late payment offer to SRB, which SRB did not respond to. ML wrote letter to F in November that July 1984 premium was still unpaid and “policy was now technically out of force and will require immediate payment”. ML sent notice of policy lapse to SRB + F with an application for reinstatement. SRB did not become aware of late payment offer until April 1985 and sent late payment cheque on July 1985. MF died in August, and ML rejected SRB’s claim for benefits because it was no longer in force. **I:** Did ML, through conduct, waive its right to compel timely payment under policy? **D:** ML’s waiver no longer in effect when SRB tried to make payments – SRB not entitled to benefits.**A:** Waiver will only be found where evidence demonstrates that party waiving had (1) full knowledge of rights and (2) an unequivocal and conscious intention to abandon them. SRB argues ML waived right to compel timely payment by encouraging policyholders to pay by mail, requesting payment after grace period, delaying issuance of lapse notice, failing to return the partial payment and accepting late payments previously. November letter constituted waiver, but this waiver did not stay in effect. SRB did not rely on ML’s waiver, thus ML was not required to give any notice of its intention to lapse the policy.**R: Waivers can be retracted with sufficient notice AND if it can be done without prejudice to the other party; Waiver can be determined through examining conduct of promisor** |

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| **Combe v Combe** **F:** Husband wife married but divorced. Parties agreed husband will provide wife maintenance of 100 pounds a year free of income tax. Husband doesn’t pay. Wife brings action claiming arrears of payment. **I:** Could the agreement be enforced by estoppel despite having no consideration? **D:** No, promissory estoppel can only be used as a shield, not a sword. **A:** By allowing PE to create new rights, as opposed to simply suspending existing ones (using a sword, as opposed to just as a shield), it would undercut the doctrine of consideration. There was no consideration in this case and PE should not be able to undercut this fundamental principle of contracts.**R: Promissory estoppel can't create new rights, but can stop party from insisting on their strict legal rights; reinforces estoppel as shield** |

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| **Walton Stores v Maher (Australia)****F:** WS is a chain of stores – entered into negotiations with M with respect to leasing premises. The existing building on the site would have to be demolished and new one erected to meet WS’s needs. WS told M they would have to begin right away to meet timeline. Contracts drafted + amendments proposed and informally agreed as work was about to take place. WS said they needed specific agreement on each item amended in the lease but would let M know if there were any objections. WS then advised it would not enter lease agreement. In between communications though, M sent its signed contract over, completed demolition and begun construction. WS was aware of the steps M was taking on faith of communications. **I:** Can M claim promissory estoppel to obtain a remedy? **D:** Yes, promissory estoppel can be used as a sword. **A:** PE is arguably unavailable here because of **Combe v Combe.** Courts here say that there was no difference between altering an existing legal relationship and creating a new one + PE would not undercut contract if it were strictly limited to preventing unconscionable outcomes (not just enforcing promises for their own sake).**R: Proposed test for PE being used as a sword** 1. **Assumption or expectation of a particular legal relationship**
2. **D has induced P to adopt the assumption/expectation**
3. **P acts or abstains from acting in reliance on the expectation/assumption**
4. **D knew or intended P to do so**
5. **P’s action/inaction will occasion detriment if assumption/expectation not fulfilled**
6. **D has failed to act to avoid detriment by fulfilling the expectation or otherwise**
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