CHAPTER TWO

THE LAW OF CONTRACT AND CONTRACTS FOR THE SALE OF GOODS

Introduction :
This Chapter is concerned with the fundamental legal relationships between the parties to international commercial contracts, be they sellers and buyers of goods or the suppliers and receivers of services. Whilst this Chapter concerns itself primarily with the law of contract, since it is important to understand the core elements of the Law of Contract and Agency as practised in England and Wales the reader should be aware that many relationships lack the necessary nexus to establish a contract. These relationships may be governed by either the Law of Bailment or the Law of Tort and therefore is it useful also to consider the core elements of these legal rules.

THE LEGAL ELEMENTS OF A BINDING AGREEMENT

A legally enforceable contract, whether for the purchase of goods and or services, domestic or international, is an agreement, which enables the innocent party to that agreement to go to a court of law and seek a legal remedy against the other party who wrongfully failed to perform the obligations undertaken in the agreement. Provided the subject matter of the agreement is not illegal itself, then almost anything from the sale of goods to the provision of services, including the hire or chartering of ships, can be bargained for by way of contract. Contracts may be under seal or simple contracts.

A contract under seal is a very special type of contract. Such contracts have to be signed, sealed and delivered for property sales but a seal is no longer necessary if it is described as a deed on its face under s1 Law of Property Act 1989 and signed in the presence of a witness. These are not necessarily contracts at all (though they may be), since none of the special rules that apply to 'simple' contracts apply to contracts under seal, and there is no requirement for a bargain at all. Provided the deed is executed in the required manner it will be enforced by the courts. Charterparties and international sales contracts for the sale of goods are rarely made under seal. There is NO requirement for a simple contract to be made in writing, or by deed or witnessed or sealed and delivered. Every day each of us is likely to be party to a large number of simple purchase contracts. Nonetheless, most international trade contracts are in written form and mainly in standard form such as the Inco Terms 2000 supplied by the International Chamber of Commerce. Contracts for the sale of land and contracts of guarantee must be evidenced in writing.

In order to create a legally binding contract which will be enforced by a court of law in England and Wales the following must be present

1) A comprehensive agreement between the parties in respect of respective obligations, time of performance and price, achieved by an offer by one party and acceptance of those terms by the other. The courts and statute can imply certain terms into contracts but in the absence of the basic ingredients of an agreement the courts will refuse to create them in respect of executory arrangements.
2) Privity of contract must be established between the two parties to the agreement. Unless otherwise provided by the common law or statute, an agreement is only enforceable as between the parties to the agreement. Third parties to an agreement cannot legally enforce benefits accruing to them from the agreement, nor can they have burdens thrust upon them by others.

3) An agreement must be supported by consideration, so that both parties provide or promise to provide something valuable in money or services, benefit or detriment in exchange for the like consideration of the other party.

4) There are a number of other ingredients such as legality and the intention to create legal relations but these whilst important seldom feature in Trade and Carriage disputes.

If any of the points above are missing then the contract will not be legally enforceable. It does not matter that the parties mistakenly thought that they had a legally binding contract or conversely that they did not in fact realise that they had created a legally binding contract. The test for a legally binding contract is objective. Would a reasonable man, looking at the external evidence, have considered that the parties were in agreement ? The courts will not enforce a bare or gratuitous promise not supported by consideration.

The Agreement. The basic ingredients of a contractual agreement are the phenomena of offer and acceptance. Unless a valid offer and acceptance are established, there is no agreement, and thus a contract will not come into being, as demonstrated by **Baird Textile Holdings v Marks and Spencer.**[1] In long protracted negotiations it may be difficult to establish exactly when the agreement is concluded. There is no legal requirement that a contract must be in writing, but the parties are able to state during negotiations that no contract will arise until the agreed terms are reduced to writing and approved by the parties, though it is possible for one party to put the terms in writing and for the other to commence performance without formally acknowledging that the written terms are correct. The court would imply acceptance by conduct. In the absence of a requirement to commit the contract to writing before it becomes enforceable, as soon as the parties reach agreement on all elements of the agreement a contract comes into being, as in **DMA Financial Solutions Ltd. v Baan UK Ltd**.[2]

An agreement to agree is not a binding contract according to **Courtney v Tolaini**.[3] This is of particular importance to long term business relationships where the parties have an expectation that they will continue to trade together. Loyalty agreements where a party is granted preferential treatment or receives a loyalty refund, air miles or other benefit, place no requirement on a party to place an order but can, if appropriately worded, make acceptance of the order automatic and binding on the other party.

An agreement to use one's best endeavours to reach an agreement as in **Little v Courage**,[4] or an agreement to negotiate in good faith to reach an agreement is not binding or enforceable in English Law, according to **Walford v Miles.**[5] Thus it was stated in **White Point v Herrington**,[6] that "The rule is that when something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party, by the very the terms of the promise, may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." However, an agreement to enter into a third party dispute settlement process can be binding. An agreement to mediate a settlement cannot make the parties settle a dispute since this would amount to the equivalent of enforcing an agreement to agree, but engagement in the mediation process may be a pre-condition of any arbitral or judicial process.

The current practice of according a party preferred bidder status seems to fall within the apparently discredited contractual duty to negotiate recognised by Lord Wright in **Hillas v Arcos,**[7] and the decision in **Channel Home Centres v Grossman**.[8] Whilst Lord Ackner in **Walford v Miles** is clearly correct in stating that there can be no binding agreement to broker an agreement and that either party should be free to pull out if they consider that continuing to negotiate is pointless, there is no reason why a promise to suspend

1 **Baird Textile Holdings v Marks and Spencer** [2001] Court of Appeal 28 February.
2 **DMA Financial Solutions Ltd v Baan UK Ltd.** [2000] Ch.D. 28 March
3 **Courtney & Fairabirn Ltd v Tolaini Bros. Hotels Ltd** [1975] 1 All.E.R. 716.
4 **Little v Courage** [1994] 70 P & C.R. 469
5 **Walford & Others v Miles and Another** [1992] 2 A.C. 128
6 **White Point Co v Paul B.Herrington** 268, Cal App. 2d. 458 at 468. See also **Lahaina-Maui Corp v Tau Tet Hew**, 362 F 2d 419; **Transamericana Equipment Leasing Corp v Union Bank**, 426 F 2d 273; **Joseph Martin Jr. Delicatessen v Schumacher**, 52 NY 2d 105 and **Magna Dev Co v Reed**, 228 Call. App. 230.
7 **Hillas v Arcos** [1932] All E.R. 494
8 **Channel Home Centres Division of Grace Retail Corp v Grossman (1986) 795 F 2d 291.**

negotiations with other parties whilst negotiations continue could not be an enforceable promise, particularly if the preparation or tendering process involves a considerable amount of preparation and research. Despite the fact that both sets of negotiations ultimately failed, the government suspended competitive negotiations on two occasions having declared preferred status on potential buyers of the Millenium Dome.

WHAT IS AN OFFER ?

Definition : An offer represents the presentation of contract terms, by one party, the offeror, for acceptance, to the other party, the offeree. An offer is a promise by the offeror that if the offeree accepts the offer, the offeror will be bound by the terms specified in the offer. As soon as the offer is accepted a binding contract comes into existence.

In order to constitute an offer, capable of acceptance, the offer must be sufficiently complete. The courts are not in the business of completing the terms contracts for the parties, as demonstrated by **May & Butcher v R**[9] where quantity, time and price of goods, if any at all, that might become available had not been settled. An option to purchase or right of first approval can however be a binding contract, as in **Sudbrook Trading Estate Ltd v Eggleton**.[10] The parties agreed an option at a price to be determined by valuers nominated by the parties or an umpire in default. When on party refused to appoint a valuer the court stepped in an performed the task of an umpire, setting the price and ordering specific performance. Exactly what amounts to a minimum content is likely to vary with the circumstances of the case, but at the least a designation of the subject matter to be traded is needed. The price is normally also required, particularly for executory contracts, though where a contract has been performed by one party, there is scope for the courts to imply that either a reasonable market price[11] or "quantum meruit" should be paid[12] or alternatively, where there has been a pattern of pre-existing trading, to continue to apply the terms of the previous agreement. A formula for establishing a price, or an agreement to accept the price established by an independent third party assessor (but possibly not the court in a purely executory contract) is sufficient to make the agreement complete and binding. Thus in **Foley v Classique Coaches**[13] there was a sole supplier agreement for petrol for a garage at a price to be agreed from time to time, subject to the power of an arbitrator to settle the price if no agreement could be reached. The courts are able to imply some ingredients on the basis of reasonableness and standard trade practice. As will be demonstrated later, there are a number of statutory and common law implied terms that the law will treat as an integral part of a contract, even in the absence of express inclusion into the contract.

Invitations to Treat. An offer must be distinguished from an invitation by one party, to another party to make him an offer. It is an invitation to come and negotiate a contract and without more does not result in a binding contract. If the invitation is responded to, the person responding to the invitation does so by making an offer and is known as the offeror. The person making the invitation to treat becomes the offeree **ONLY IF** he accepts the offer, which is then made to him by the offeror, thereby creating a binding contract. Invitations to treat must be considered in relation to advertisements such as published shipping rates. The general rule is that an advertisement is an invitation to treat. An advertisement is not normally an offer. The person who replies to an advert in a newspaper is the offeror.[14] It is possible to make a 'Unilateral Offer' in a newspaper which can be accepted, as discussed in **Carlill v Carbolic Smoke Ball Co.,**[15] since the offeree is able to accept through conduct. These types of offer constitute an exception to the rule that an advert is not an offer These special rules may apply to a common carrier who has a duty to accept all comers' business.

9 **May & Butcher v R** (1929) 151 L.T. 246 and noted at [1934] 2 K.B. 17

10 **Sudbrook Trading Estate Ltd v Eggleton** [1983] 1 A.C. 444

11 s8 Sale of Goods Act 1979, if the price of goods is not established in advance and there is no formula for so doing after the event, then a reasonable price should be paid for any goods supplied. This does not mean that there is a duty to supply, and merely provides a mechanism for determining the price of supplied goods.

12 **British Bank for Foreign Trade v Novinex Ltd** [1949] 1 K.B. 623.

13 **Foley v Classique Coaches** [1934] 2 K.B. 1

14 **Fisher v Bell** [1961] 1 Q.B. 394 : **Partridge v Crittenden** [1968] 1 W.L.R. 1204

15 **Carlill v Carbolic Smoke Ball Co.** (1893) 1 Q.B. 256

Tenders. Often a firm will 'put a job out to tender.' What this means is that they place an advert in a newspaper inviting firms to make an offer to carry out the work or to supply goods or materials. This is quite common with central and local government contracts. The tender type advert is normally the same as any other advertisement and is simply an invitation to treat. The person who makes a 'Tender' in fact tenders an offer, ie. makes an offer. This offer may then be accepted or rejected. Once accepted, a contract comes into being.[16] By contrast, a tender which states that the highest or lowest offer will be accepted creates a binding contract with the person who makes the highest or lowest tender.[17] It must be a genuine tender. A specific sum of money must be mentioned. This type of transaction is more likely regarding the commissioning of new vessels than as a method of procuring a charterparty.

Mere Negotiations. An inquiry as to whether someone is prepared to sell something or as to what sort of figure someone might be looking for or the type of specifications that might interest someone are mere tentative opening gambits where one party is sounding out the market. They do not constitute offers that can be accepted and so amount to invitations to treat, as demonstrated by **Harvey v Facey**.[18] Similarly an application to be put on a list, as in **Gibson v Manchester City Council**[19] is an invitation to treat. The terms of any acceptance can and indeed should in certain circumstances be set out in advance, so that whilst there is no requirement to accept an application, if accepted then the terms of the contract that arises on acceptance are put in place.[20] During negotiations a party may induce the other to conclude the contract by making representations. Whilst not necessarily part of the contract such representations have legal significance and are considered below in relations to the contents of a contract.

Bilateral Contracts. A bilateral contract is a contract made between two specific persons. If a bilateral offer is made, only the person to whom the offer is made may accept the offer.[21] Most carriage contracts will be bilateral, even where the benefit of the contract is ultimately transferable to a third party purchaser of the goods. The bilateral contract consists of a promise in exchange for a promise. What is promised may be money, goods, services or some other form of disadvantage to the one party or benefit to the other. Both parties promise to do something as soon as the contract is made. If either party reneges on his promise the other party may seek legal redress. This is the most usual form of contract.

Unilateral Contracts. A unilateral contract differs from a bilateral contract in that one party (the offeror) promises to do something "Only IF" the other party (the offeree) does something. That other party is not obliged to do anything and cannot be sued for failing to perform the act contracted for. If however he does perform the act in question then he can hold the offeror to his promise. The classic example of a unilateral offer is the illustration used by Brett J **G.N.R. v Witham.**[22] If a person offers to pay another £100 if you walk to York, then that other person does not have to walk to York, but should they do so then they are entitled to claim the £100 so offered. The “no cure no pay” salvage contract fits neatly into this category of contract. Promotion offers on merchandise or in adverts are Unilateral Offers and form an exception to the general rule that an advertisement is an invitation to treat and not an offer.[23]

Communication of an offer. An offer to be effective must, before it can be accepted, have been communicated by the offeror to the offeree, at or before the time that the offeree performs the act which he claims represents his part of the bargain. Thus if a person does an act which he latter discovers someone would have been prepared to pay for, he cannot then claim that money as remuneration. His consideration is past and therefore not valid.[24]

16 See **Spencer v Harding** [1870] L.R. 5 CP 561.
17 See **Harvela Investments Ltd v Royal Trust Co of Canada Ltd.** (1986) l A.C. 207.
18 **Harvey v Facey** [1893] A.C. 552.
19 **Gibson v Manchester City Council** (1979) 1 All E.R. 972.
20 A.G. of Hong Kong v Humphreys Estate [1987] 2 All.E.R. 387. though in the event no contract was concluded.
21 **Boulton v Jones** [1857] 2 H & N 564.
22 **G.N.R. v Witham** [1873] L.R. 9 C.P. 16.
23 **Carlill v Carbolic Smoke Ball Co** [1893] 1 Q.B. 256. C.S.B.
24 **Bloom v American Swiss Watch Co** [1915] Appeal Division 100.

Termination of an offer. Three things can happen to an offer. It may be accepted. It may be rejected, directly or impliedly by the other party making a new offer, or counter offer. It may be terminated. An offer can be terminated in a variety of ways. The offeror may revoke the offer. An offer will die if it is not accepted within a specified time or within a reasonable time. The offer may cease to be enforceable if the offeror dies. This is rarely a problem in international sales where companies rather than individuals are usually involved. Termination of an offer must be distinguished from termination of a contract, which can arise from completion of the contract or by some form of breach. Breach of contract is unlawful and gives rise to a claim for damages. The lawful termination of an offer does not give rise to a claim for damages.

ACCEPTANCE

Introduction : An offer must be accepted out right as it stands without any qualifications. If the acceptance is qualified then the acceptance constitutes a counter offer according to **Hyde v Wrench**.[25] A counter offer destroys the original offer. Once a counter offer is made the person cannot later change his mind and accept the original offer. It is too late. The person making the counter offer becomes the offeror. To become a contract it is the counter offer that must then be accepted.

Post offer inquiries. A mere inquiry as to whether or not the offeror would be prepared to consider varying the terms of the offer will not destroy that offer. In **Stevenson v McLean,**[26] the defendant offered to sell the plaintiff some iron at 40/-net cash per ton. The plaintiff then sent a telegram inquiring as to whether or not the defendant would accept to deliver over a two month period and accept settlement after delivery. Alternatively, he inquired as to the longest limit of time the defendant would be prepared to accept for payment. The defendant sold the iron to someone else and sent the plaintiff a telegram informing him of the withdrawal of his offer. Before the revocation arrived the plaintiff telegraphed the defendant accepting the defendant's offer. The court held that the plaintiff had made a mere inquiry not a counter offer. The original offer was open to acceptance. As soon as the plaintiff accepted a valid contract came into being. The defendant was liable for damages for breach of contract. The only significant difference between a counter offer and an inquiry is the manner in which the proposition is put forward.

Revocation of bilateral offers. The general rule is that an offer can be withdrawn at any time before it is accepted. In **Offord v Davies,**[27] the defendant guaranteed to secure moneys advanced to a third party on discount 'for the space of 12 calendar months.' The court held that the offer could be withdrawn within the specified period unless it had been acted upon. The revocation of an offer must generally be communicated to the other party otherwise it will not be a valid withdrawal and the other party will still be able to accept.

In **Byrne v Van Tienhoven**[28] [1880] the defendant, a Cardiff businessman offered goods to the plaintiff, a New York Trader, at a fixed price. The plaintiff accepted as soon as he received the offer. However, three days before the plaintiff made his acceptance the defendant had sent a letter revoking the offer. The court held that a binding contract came into being as soon as the acceptance was posted. A revocation is not effective on posting. The postal rules do not apply to the revocation of an offer. To be effective the revocation must be received.

In **Henthorne v Fraser** [29] a plaintiff posted a letter accepting a defendant's offer to sell the plaintiff a house for £750, two hours after the defendant had posted a letter revoking the offer. The court held that the defendant had to sell the plaintiff the house. The essential factor is that the other party knows that the offeror no longer wishes to contract with him. Thus, if the offeree heard from any reliable source that the offeror had sold the subject matter of the offer to someone else he would become aware of the fact that the offer was no longer open for acceptance. It is not necessary for the offeree to be told directly by the offeror of the withdrawal and a withdrawal will still be valid if the offeree learns about it through a third party or even reads about it in the papers.[30]

25 **Hyde v Wrench** [1840] 3 Beav 334.
26 **Stevenson v McLean** [1880] 5 Q.B.D. 346.
27 **Offord v Davies** [1862] 12 C.B.(N.S.) 748.
28 **Byrne & Co v Van Tienhoven** & Co [1880] 5 C.P.D. 344.
29 **Henthorne v Fraser** [1870] L.R. 6 Ex 7.
30 **Dickenson v Dodds** [1876] 2 Ch. D 463.

Even if the offeror says that he will keep an offer open for a certain period of time he can still revoke that offer. In **Routledge v Grant**[31] the defendant offered to purchase the plaintiff's house and gave the plaintiff six weeks to make up his mind. Before the six weeks were over the defendant withdrew his offer. The plaintiff tried to accept the offer. The court held that the defendant was entitled to revoke his offer. There was no contract. If there is a collateral contract to keep an offer open, supported by consideration then withdrawal of the offer before time would amount to a breach of the collateral contract and the plaintiff would be entitled to damages for breach of the collateral contract.

Revocation of Unilateral Offers and communication. Some unilateral offers are open to acceptance by the whole world. Since the offeror does not know, in this situation, who the offeree will be, it would be very difficult for him to communicate directly with such a person to revoke the offer. He is therefore able to revoke the offer by communicating his revocation to the whole world in the same manner as that which he used to make the offer in the first place.[32]

Lapse of Time. If a time limit is prescribed by the offeror for the acceptance of an offer then once the time limit has been reached the offer ceases to be open for acceptance.[33] This reflects the notion that in the law of contract 'Time is of the Essence'. If no time limit is placed on an offer then the Courts will infer a reasonable time within which the offer may be accepted.[34]

Death of the Offeree. If the contract was for personal services then the offer dies with the offeror. If on the other hand the offer was for something that the offeror's personal representative can carry out then the offer can still be accepted.[35] Since most international trade contracts involve companies, death is not often likely to be an issue. Even large companies can go into liquidation. In such circumstances the trustees in bankruptcy will have to distribute any remaining assets of the company to the companies creditors. If company receivers continue to operate the business as a going concern then outstanding construction projects negotiated before the company goes into receivership would be performed by the receiver. This will often occur where a receiver wishes to sell the business rather than wind it up.

Acceptance of Bilateral Contracts. The acceptance, to be valid, must be unconditional[36] and must be communicated. If the acceptance is conditional in that it introduces a new term then it is not an acceptance at all. It is in fact a counter offer, which requires acceptance by the other party before an agreement or contract comes into being. What has to established is what amounts to communication. If the parties are in a face to face situation then it is unlikely that there will be a problem. Difficulties only arise if they contract from a distance. Silence cannot be acceptance. An offeror cannot make an offer and state that if he hears no more he will presume that the other party has accepted. Some form of positive act is required to amount to acceptance.[37] However, an act can amount to implied acceptance. Acceptance can be implied from conduct if the only explanation for the acts of a party to a contract is that they have accepted an offer, and the other party is aware of the acts then the contract will come into being. In **Brogden v Metropolitan Railway Co**[38] after several years of trading without a formal contract of any sort the Company sent a draft contract to Brogden for his agreement. Brogden inserted a new clause stating that if there should be any disagreement between the parties at any time then the dispute should be referred to an arbiter. Brogden then marked the draft contract with the word "Approved" and returned it to the Company. The Company did no more about the contract and business continued as usual. Some time latter Brogden tried to say that there was no contract. The court held that the introduction of a new term was a counter offer. This counter offer had been impliedly accepted by the Company since both parties had then proceeded to contract under the terms of the new contract.

31 **Routledge v Grant** [1828] 4 Bing 653.
32 **Shuey v US**. (1875) 92 U.S. 73
33 **Hare v Nicholl** (1966) 1 All E.R. 285.
34 **Ramsgate Victoria Hotel Co Ltd. v Montefiore** (1866) L.R. 1 Ex 109.
35 **Bradbury v Morgan** (1862) 158 E.R. 877.
36 **Hyde v Wrench** (1840) 3 Beav. 334.
37 **Felthouse v Bindley** [1862] 11 C.B. N.S. 869.
38 **Brogden v Metropolitan Railway Co** [1877] App Cas 686.

Acceptance subject to contract requirements.

Specific modes of communication of acceptance. If the offeror states that a specific mode of communicating acceptance must be complied with, or sets a time limit within which acceptance must be communicated then the condition must be complied with if the acceptance is to be effective. If acceptance is attempted after the expiry date of the offer it will be invalid. However an equally advantageous or more advantageous method of communication may be sufficient to satisfy the condition unless the offeror states that that is the sole and exclusive method by which acceptance may be communicated. Thus in **Manchester Diocesan Council v Commercial & General Ltd**.[39] the offeror stated that the acceptance was to be by post to the offeror's address. Instead the acceptance was sent to the offeror's solicitor and was not forwarded to the offeror's address by the solicitor for 5 months. However, since there was contact between the offeror's and the offeree's solicitors during that 5 months and the offeror was aware of this the court held that the acceptance was communicated and the contract concluded when the acceptance was sent to the offeror's solicitor.

Acceptance by post. Special rules apply to acceptance by post. Provided the proper method of acceptance is by post then the special rules will apply. If the offer is made by post and the offer does not state anything to the contrary then acceptance by post will be deemed to be the proper method of acceptance. An offer may also stipulate acceptance by post. The special rule is that provided the acceptance is properly stamped and addressed then the acceptance is deemed to be complete as soon as the letter of acceptance is posted. There is no requirement that the acceptance be actually delivered. The same rule applies to telegrams as well. Once the acceptance is posted, there is a contract, so it would not be possible to revoke an acceptance even by using a faster form of communication. Thus a telephone call asking the offeror to 'kindly ignore my letter' would not allow the offeree to escape from his contractual obligations one he had posted an acceptance. In **Adams v Lindsell** [40] the defendant offered wool to the plaintiff and required an answer in the course of the post. The defendant's offer took a long time to get to the plaintiff because the defendant got the address wrong, but as soon as the plaintiff got it he posted his acceptance. By that time however the defendant had already sold the wool to someone else. The court held that the contract was concluded as soon as the plaintiff posted the acceptance and the defendant was therefore liable in damages for breach of contract. Similarly, in **Household Fire Insurance Co. Ltd v Grant** [41] the defendant applied for shares in a company and tendered 5% immediately with the remaining 95% to be paid within a year of the allotment of the shares. The company accepted the offer and posted the allotment of the shares but the allotment was never delivered by the post office. The company became bankrupt and the official receiver sued the defendant for the remaining 95%. The defendant claimed their company had not accepted his offer. The court held that the offer was accepted on posting of the acceptance and the contract was complete. The defendant had to pay the outstanding money.

Requirement of 'actual' communication of acceptance. If the offeror specifies actual communication of an offer then the postal rules will not apply. Unless the acceptance is actually delivered the acceptance will not be complete. In **Holwell Securities Ltd v Hughes** [42] the defendant stated that acceptance was to be 'by notice in writing to the defendant at any time within 6 months of the. offer.' The plaintiff's solicitor sent an acceptance by post which was never delivered. The court held that there was no contract.

Electronic communications. It would appear that modern electronic communications such as email, telex, telephone and fax are not subject to the postal rules. In such situations acceptance is complete when the communication is received at the other end. In **Entores Ltd v Miles Far East** [43] Denning J stated that the normal rule of acceptance is that it must actually be communicated. If A shouts an offer to B across a river and B's reply is drowned out by noise, the acceptance is not effective. So a bad telephone line could prevent acceptance. Entores held that acceptance of a telex sent from Amsterdam to London was complete when it was received in London. The result of this was that English and not Dutch Law applied. What happens if no one actually reads the message ? If communication is complete as soon as it arrives this could cause

39 **Manchester Diocesan Council v Commercial & General Ltd** [1970] 1 W.L.R. 241.

40 **Adams v Lindsell** (1818) 1 B & Ald 681.

41 **Household Fire Insurance Co. Ltd v Grant** (1819) 4 Ex Div 216.

42 **Holwell Securities Ltd v Hughes** (1974) 1 All.E.R. 161.

43 **Entores Ltd v Miles Far East** (1955) 2 Q.B. 327.

problems. It would appear that communication then depends on whether the message is received within a normal working hours as stated in **Brinkibon v Stahag Stahl.**[44] Thus messages on a fax received during the night or over weekends and holidays when the offeror does not usually work would not result in a contract until the offeror read the acceptance. However, simply because the appropriate person is not informed of the message within normal working hours would not prevent a contract from being concluded.

Acceptance of Unilateral Offers. It is possible for the offeror to waive the need for communication of acceptance. The waiver may be express or implied. This is common where there is a unilateral offer. Acceptance of unilateral offers is normally by conduct. In **Carlill v Carbolic Smoke Ball Co**. a company stated that it would pay £100 to anyone who used its product in the specified manner and contracted the flu. Mrs Carlill caught the flu despite using a smoke ball according to the instructions. She applied for the £100. The company claimed that she had not communicated her acceptance. The court held, that communication of acceptance had been impliedly waived, by the company. Mrs Carlill accepted the contract by buying and using the smoke ball. The contract was complete. The company had to pay.

Once an offer has been accepted the contract is complete. It should be remembered that acceptance of unilateral contracts is by conduct, i.e. doing the act requested by the offeror. If the usual rule that revocation is permitted at any time before acceptance is complete were to prevail once performance has commenced but before completion this could result in unfairness and some cases indicate that revocation will not always be allowed in such situations. In **Errington v Errington** [45] a son and daughter in law lived in a house bought for them by the son's father. He paid the initial down payment on the mortgage and then told them that if they paid off the mortgage the house would be theirs. The children continued to pay off the mortgage. The father died and his personal representative purported to revoke the offer. The court held that one they started to pay off the mortgage it was too late to revoke the offer. The house however would only be transferred to the children once the whole of the mortgage had been paid off. In **Daulia Ltd v Four Millbank Nominees**[46] the defendant told the plaintiff that if he could secure finance from a bank and appeared by 10:00 a.m. with a draft contract prepared by the defendant then he would convey property to the plaintiff. The plaintiff did as he was told. The defendant refused to convey the property. The court held that there was a contract, and that the plaintiff had fulfilled his part of the bargain. The court ordered the defendant to convey the property to the plaintiff. However, the court remarked obiter dicta that even if the plaintiff had not completed his part of the bargain the defendant would not have been allowed to withdraw his offer even after the plaintiff had started to perform the act which would mature into acceptance. This will not however apply to all unilateral contracts. The nature of some unilateral commission contracts is such that only a completed act will amount to acceptance.[47]

European and International Law

UN Convention on Contracts for the International Sales of Goods, Vienna, 1980 provides a universal regime for international sales and is discussed in full in the next chapter.

The European Union has now developed rules that govern the conduct of e-commerce within the Union.

44 **Brinkibon v Stahag Stahl** (1983) A.C. 34.
45 **Errington v Errington** [1952] 1 K.B. 290.
46 **Daulia Ltd v Four Millbank Nominees (1978) 2** Ch 231.
47 **Luxor (Eastbourne) Ltd v Cooper** [1941] A.C. 108

Self Assessment Questions : Agreement.

1) What is an invitation to treat? Why is it important to distinguish between an offer and an invitation to treat? Give examples of invitations to treat.

3) What is a counter offer? How does it differ from a request for further information? Give case examples to illustrate.

4) John advertised his car. a distinctive Pink Chevrolet for sale for £750 in the Rhondda Special. On Thursday Matthew phoned up about it and offered John £500. John replied make that £600 and its a deal. Matthew asked if he could have time to think about it and John said 'alright I'll give you till Monday evening'. On Friday John accepted a cash offer from Peter who regularly drinks in the same pub as Matthew. That evening in the pub Matthew overheard Blodwen the local gossip relate how Peter had just bought himself this super Pink Chevrolet from this bloke John up in the Rhondda. Matthew rushed to the phone and telephoned John to say that he accepted the offer for £600 but John said 'I'm sorry mate but I've already sold it your too late.' Discuss

5) Fred asks Mike how much he would want for his car. Mike says 'At least £750'. Fred says 'It's a deal' and proffers the money. Mike refuses the money. Discuss.

6) Acceptance must be communicated to the offeror before an agreement can exist. Are there any exceptions to this rule.

7) Distinguish a bilateral and a unilateral contract. Explain the different principles that apply to the unilateral contract.

8) John advertised his car for sale for £750 in the Rhondda Special. On Thursday Matthew phoned up about it and offered John *£500.* John asked if he could think about it till next Monday saying that if he decided to sell he would write to him and Matthew agreed. On Friday Matthew changed his mind and telephoned John to say he had changed his mind and didn't want the car. John wasn't in so he left a message on John's answering machine. John had gone to Cardiff. While he was there he wrote a letter accepting Matthew's offer. He posted it before going home. When he got home John discovered the message. Matthew refuses to buy the car. Discuss

9) "Acceptance of an offer must be unqualified and must correspond exactly with the terms of the offer." Discuss this statement and explain the significance of counter offers. Distinguish a counter offer from a request for further information.

10) Explain the postal rule of acceptance and distinguish it from the rules relating to revocation.

11) Discuss the judicial precedents regarding electronic communications and whether or not they are adaptable enough to deal with the recent technological innovations such as the fax and the telephone answering machine.

12) Daniel wrote to Elizabeth offering to sell her his very fast motorbike. In his letter which arrived on Thursday Daniel asked Elizabeth 'to let me know by next Monday'; On Friday at 2pm Daniel changed his mind and telephoned Elizabeth to withdraw the offer. Elizabeth was out shopping but her telephone answering machine recorded Daniel's message withdrawing the offer. Elizabeth posted her letter of acceptance at 4pm on the Friday whilst she was out shopping. On her return she listened to her telephone messages. Discuss the legal position.

CHAPTER TWO

PRIVITY OF CONTRACT

Introduction : The common law Doctrine of Privity of Contract states that 'A contract creates rights and obligations only between the parties to it. A contract does not confer rights on a stranger nor does it impose obligations on a stranger. No person can sue or be sued on a contract unless he is party to it'. This is very closely linked to the idea that 'Consideration must move from the promisee' **Tweedle v Atkinson** but is not quite the same. It is possible to link the two concepts together in a single statement, thus per Lord Haldane in **Dunlop v Selfridge** [48] "Only a person who is party to a contract can sue on it - a stranger to a contract cannot sue on it and a stranger to the consideration cannot sue."

The Doctrine of Privity prevents the intended recipient of benefits conferred on him by an agreement made between two other persons, from taking legal action to enforce the agreement. In **Tweedle v Atkinson** [49] the plaintiff's father and father in law agreed with each other to pay the plaintiff £100 and £200 respectively in consideration of his then intended marriage. After the marriage they confirmed their agreement in writing. The £200 was not paid and the plaintiff sued his father in law's executor to recover the sum. The court held that his action must fail as no stranger to the consideration can take advantage of a contract, although made for his benefit. A promisee cannot bring a successful action unless the consideration for the promise moved from him. The plaintiff was not privy to the contract and so could not sue.

The Doctrine of Privity prevents contracting parties from imposing obligations on third parties. In **Dunlop Pneumatic v Selfridge t**he defendant storekeepers retailed tyres made by the plaintiff. The tyres were supplied to the store by Drew & Co., motor accessory factors. Dunlop made a contract with Drew that in consideration of discounts given to Drew by Dunlop, Drew would insert a clause into any contract that he made with a retailer that that retailer (in this instance the defendant) would not sell tyres at less than list price. Dunlop wished to make Selfridge keep to the retail price agreement. The court held that Selfridge was not privy to the original agreement to which Dunlop had furnished consideration and so Dunlop could not impose the obligation on Selfridge.

The Doctrines of Consideration and of Privity of Contract are unique to English Law, and legal systems based on the Common Law of England. The Continental Systems have managed to work perfectly well without the Doctrines. Strict adherence to the Doctrines can cause injustice. There have been several attempts to avoid the Doctrines and Common Law and Statutory exceptions to the Doctrines have been developed. The Law Commission Report No l2l 1992 resulted in changes to the privity rule in The Contracts Third Parties Act 1999.

Problems caused by the Doctrine of Privity of Contract.

Third Parties. Where two parties make a contract for the benefit of a third party the third party is unable to enforce the contract. Since the parties to the contract suffer no loss if the contract is not performed an action for damages for breach of contract would result only in nominal damages being awarded by the court. The contract becomes unenforceable. **Tweedle v Atkinson**. If one person makes a contract for a service to be provided to a third person, the recipient of the service is not privy to the contract of service. Even though the recipient is the intended beneficiary he cannot enforce the contract. [50] Contracts for the benefit of third parties are common in International Trade and the shipping industry in general.

Exemption Clauses. Frequently a contract will contain exemption clauses. The contract may seek to confer the benefit of the immunities on persons who are not privy to the contract and have not provided consideration, such as employees. Thus an employer may attempt to protect his employees in this way. The shipping industry has provided the most common examples of this in practice.[51]

Price Maintenance. A person who is selling goods may wish to control the manner in which the goods are used or traded after they leave the possession of the person he has sold them to as in **Dunlop v Selfridge**.where there was an unsuccessful attempt to enforce a retail price maintenance agreement. Restrictions on the use of copyrighted material and patents can however be enforced against third parties.

48 **Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd** [1915]

49 **Tweedle v Atkinson** [1895]

50 **Jackson v Horizon Holidays** [1975] 3 All.E.R. 92. and **Spencer v Cosmos Air Holidays Ltd**.

51 **Scruttons v Midland Silicones Ltd** [1962] : **Adler v Dixon** [1954]

Exceptions to the Doctrine of Privity of Contract.

The Collateral contract. It is possible to have two separate contracts which are closely related where one party is common to both contract. **Shanklin Pier v Dettol Products.**[52] The plaintiff employed contractors to repaint their pier and specified that the defendant's paint was to be used. Previously the plaintiff had told the defendant that he wished to have his pier repainted and asked which paint would be most suitable to withstand the rigours of salt water. The defendant sold the paint to the contractors who used it - but it only lasted three months! The plaintiff could not sue on the contract for the sale of paint as they were not a party to it. The court held that although not a party to the sale of paint they could sue the defendant on a collateral contract arising from their promise as to the longevity of the paint. The plaintiff's consideration to enforce this promise consisted of their causing the contractor to enter into a contract to buy paint from the defendant.

Agency. An agent is effectively the 'Alter Ego' of his principal. In some respects the agency relationship is not an exception to the Doctrine of Privity since the agent stands in the place of the principal. Thus there are really only two parties to the contract, the principal and the other contracting party. The Agent merely conducts the negotiations, but takes no further benefit from the contract and incurs no liabilities under the contract. Once the contract is concluded the agent steps aside and takes no further interest in the contract. A contract of agency arises where one person (the principal) appoints an agent to enter into contracts on his behalf with third parties. The principal - even if his identity is undisclosed at the time of contracting - may sue the third party. If an agent contracts without the authority of the principal, the person named as principal may be able to ratify the contract so that it becomes binding between himself and the third party. Agency is common in International Trade and in contracts of carriage, though the type of agency involved in **The Eurymedon** [53] was exceptional.

Proprietary rights in land. If one party to a contract subjects his land to restrictions as to user (Restrictive Covenants) or grants another rights of user over the land (Easements) then the subject matter of the contract attaches to and becomes a right over land. Even though a latter owner of the land will not have been privy to the original contract he will still be subject to the benefits or burdens of the contract by virtue of s56 Law of Property Act 1925. A person may take an interest in land or other property although he may not be named as a party to the conveyance. [54]

The right of an action in tort. Tort is not based on the existence of contractual rights and relationships. It is based on the existence of a duty owed by one party to another. Thus in **Donoghue v Stevenson** [55] the court was prepared to allow a consumer to sue directly a manufacturer of ginger beer, even though there was no contractual relationship between the parties. A tort action may result in persons being held liable for acts concerning a contract they were not a party to. In **Lumley v Gye** [56] Johanna Wagner contracted to sing for a fixed period at the Queen's Theatre, of which the claimant was the lessee and manager. The defendant was alleged to have maliciously 'enticed and procured' her to refuse to perform at the theatre and thereby break her contract of employment with the plaintiff. It was held that the plaintiff was entitled to damages for the tort of unlawfully inducing a person to breach their contract.

Assignment. Providing the correct procedures are adopted it is possible to assign a debt to a third party. The third party can avail himself of legal machinery to enforce the debt. as in **Pattison v Patsburg**.[57]

Trusts. A trust creates equitable rights, which are vested in the beneficiary of the trust. The beneficiary does not necessarily participate in the setting up of the trust, and so cannot be said to have been privy to the arrangement. Nonetheless he can enforce the provisions of the trust.[58]

52 **Shanklin Pier v Dettol Products** [1957]

53 **New Zealand Shipping Co v Satterthwaite** [1975] Privy Council. Contrast **Scruttons v Midland Silicones**

54 **Beswick v Beswick** [1967]

55 **Donoghue v Stevenson** [1932]

56 **Lumley v Gye** [1853].

57 **Pattison v Patsburg**.

58 **Jackson v Horizon Holidays Ltd** [1975 : **Woodar v Wimpey** [1980

Statutory exceptions to the privity rule. There are many situations where statute allows a person who is not privy to a contract to recover on the contract [59] and bypasses both the Doctrine of Privy and the Doctrine of Consideration considered below.

Self Assessment Questions : Privity of Contract

1) What is meant by the 'Doctrine of Privity of Contract'? Is the Doctrine of Privity of Contract important today?

2) Longsuffering. who is worried that his 35 year old daughter Reluctant may never get married and leave home tells her that he will give £5000 to anyone who will marry her. Ditherer, Reluctant's fiance, eventually makes up his mind and marries her since the £5000 that he hopes to receive is sufficient as a down payment on a mortgage. Longsuffering now refuses to give Reluctant the money. Discuss

3) How effective are the following exceptions to the Doctrine of Privity of Contract in ousting the rule? a) Common Law b) Statutory c) Equitable

4) Is **Dunlop Pneumatic Tyre Co v Selfridge** good law today?

5) Dodger. the secretary of the I.C.E. Students Society at the University of Glamorgan, arranged the Society's annual dinner at the Motley Hotel. All the diners suffered food poisoning but there was no negligence on the part of the Hotel. All the members of the Society paid for their meals via Dodger, but their guest Wheel, the Chairman of the Rotary Society, and Pompous the Mayor did not. Advise the proprietors of the Motley Hotel as to their liability. if any.

6) Mr Vain. an artist. will only sell his paintings to customers who promise to display his paintings in prominent positions. He extracts a promise from his customers that if they resell the paintings at any time they will only do so on the same terms as those imposed by Vain in the original contract of sale. Impecunious bought a painting from Vain but due to cash flow problems was later forced to sell it. Gutless who bought the painting promised to display it in a prominent place but when Agatha his wife declared that she couldn't stand the sight of it he hung it in his private study. Vain discovers that the painting is not prominently displayed and seeks your advice.

7) In February Mozart sold his CD player to Beethoven on condition that Beethoven would let Mozart use the CD during the Easter holiday. Beethoven being stretched for cash sold the CD to Vivaldi. mentioning that he had only bought it in the first place on condition that Mozart could use it for the Easter holidays. Vivaldi assured Beethoven that would present no problem at all. Vivaldi quarrels with Mozart because Mozart has been over friendly with Vivaldi's girlfriend Brossette, and so Vivaldi refuses to let Mozart use the CD in the Easter holiday. Advise Mozart.

8) We are entitled to contract work wholly or in part and these conditions shall also apply to goods entrusted to sub-contractors.' To what extent at all could such a term serve to extend the benefit of exclusion clauses to sub-contractors?

9) Jack, a retired employee of Hill & Co Ltd has recently died. His contract of employment provided for the payment of a pension of £75 a week by the Company on his retirement and of £40 per week to the widow of any retired employee. The company now refuses to pay the widow's pension to Jill. Jack's widow. Advise her.

[59] s1 Married Woman's Property Act 1882 s29 Bills of Exchange Act 1882. The Privity of Contract Act 1999

THE DOCTRINE OF CONSIDERATION

Introduction : The law will not enforce a purely gratuitous promise unless it is in a deed. A promise is only legally binding if it is made in return for another promise or an act. It must be part of a bargain. This requirement of 'something for something' is called consideration.

Definitions. Consideration has been defined as 'some *benefit accruing to one party, or* some *detriment suffered by the other.'* [60] In **Dunlop v Se1fridge** the House of Lords defined consideration as 'an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable.' As discussed already above, Dunlop sold tyres to Daw & Co, subject to an agreement that the tyres would not be retailed below list price. Daw received a discount in exchange for the agreement, so between Daw and Dunlop the agreement was enforceable since it was supported by valid consideration. Daw then sold the tyres to Selfridge who retailed the tyres below list price. Dunlop attempted to enforce the agreement. The court held that Dunlop had given no consideration to Selfridge to support the agreement so it was unenforceable.

Forms of Consideration. Consideration may be executory or executed. It must not be past. Executory consideration consists of mutual promises. The consideration in support of each promise is the promise of the other. Once a promise is fulfilled the consideration becomes executed. If an act put forward as consideration was performed before any promise of reward was made it is deemed to be past consideration, which is not a valid form of consideration.[61]. Thus, in **Roscorla v Thomas,**[62] after the claimant had bought a horse from the defendant, the defendant gave an undertaking that the horse was not vicious. The horse was in fact vicious. The court held that the plaintiff failed in his attempt to sue the defendant since his consideration (i.e. his payment for the horse in consideration of the defendant's delivery of the horse) was in the past. Fresh consideration was needed for the fresh promise.[63]

Past Consideration and Price Fixing Mechanisms. The subsequent fixing of a price for goods or services, after the event, will not amount to past consideration, if both parties anticipated that the service or goods would be paid for, but for some reason there had been a failure to fix the price in advance. The price, once agreed becomes an enforceable promise to pay. If the parties cannot agree a price the court can impose standard market rates. [64] Provisions to vary prices or apply a formula to establish the price are common in the shipping industry, particularly regarding freight rates and hire charges under charterparties. The cost of materials under design and build shipping contracts which are not fixed price contracts are often set, after the event by a chartered surveyor.

Statutory Exceptions to the Doctrine of Consideration. There are a vast range of statutory exception including s27(1) Bills of Exchange Act 1882. The holder of a Bill of Exchange may sue on the promise although the consideration is in the past. The most significant exceptions in International Trade are provided by s2 and s3 Carriage of Goods by Sea Act 1992, which creates a statutory implied contract between the lawful holder of a bill of lading and the carrier even though the seller / shipper and not the lawful holder of the bill of lading brokered the original contract of carriage.

Problematic forms of consideration.

Public Duty. If the promisor owes a public duty to the promisee, then the promisor gets nothing in consideration, if all the promisee does is to carry out that duty. In **Collins V Godefroy,**[65] Godefroy subpoenaed Collins as a witness and promised to pay him for attending. The court held that there was no consideration. Collins had to appear in any case and so was not entitled to payment. Compare this with a situation where a party provides more than he is bound to provide under the public duty discussed in **Glasbrook Bros V G1amorgan C.C**.[66] During industrial unrest a colliery owner feared for the safety of the

60 **Currie v Misa** (1875) L.R. 10 Ex 6.
61 **Eastwood v Kenyon**
62 **Roscorla v Thomas** (1842) 3 Q.B. 234,
63 See also **Re McArdle** (1951) 1 Ch. 669.
64 **Lampleigh v Brathwait** [1616] 80 E.R. 255. **Kennedy v Brown** [1863] 7 Law Times 626. **Pao On v Lau Yiu Long** (1980) A.C. 614
65 **Collins v Godefroy** [1831] 1 B & A.D. 950.
66 **Glasbrook Bros v G1amorgan C.C**. (1925) A.C. 270

mine. The local Police Superintendent felt a mobile guard was sufficient but supplied a permanent guard on request and charged the colliery owner. The court held that there was consideration. The Police had done more than their statutory duty.

Pre-existing contractual duties. If a party discharges a pre-existing obligation under the contract, there is no new consideration. If a party does more than he was already bound to do there may be fresh consideration for a new promise. The test until recently was :- 'did the party claiming to have given this further consideration really do any more than he was bound to under the initial contract with the other party ? In **Stilk v Myrick** [67] two of a ship's crew had deserted. The captain promised the remaining crew that if they undertook the work of the deserters the wages that the deserters would have earned if they had completed the voyage would be shared out amongst the crew. The court held that the captain's promise was not binding: There was no consideration for the agreement as by their original contract the crew were bound to do all they could to complete the voyage.

Compare **Hartley v Ponsonby** [68] where the ship's crew had been seriously depleted by a number of desertions. The captain promised the remaining crew members £40 extra pay if they could complete the voyage. The court held that the promise was binding. It was dangerous to go to sea with such a small crew so those who did remain were able to enter into a new contract for the rest of the voyage. Also compare **Stilk v Myrick** with **North Ocean SS v Hayundai Construction** [69] where a ship builder agreed to build a ship for a client and provided a letter of credit to the client which would reimburse him for any part payments already made, if the ship was not completed. The cost of material rose and the client agreed to pay 10% more for the ship. The builder had to write out a new, higher valued letter of credit to cover the increase. The court held that the new letter amounted to consideration for the promise to pay 10% more.

The scope of **Stilk v Myrick** appears to have been restricted by **Williams v Roffey & Nicholls**.[70] The court stated that 'Where a party to a contract promises to make a payment to the other party in addition to the contract price in order to ensure that the other party completes his existing contractual obligations on time, the paying party's benefit in obtaining thereby a practical advantage, such as avoiding a penalty, can amount to consideration for the additional payment, provided that the additional payment was not given under economic duress or fraud." leading to the conclusion that "where there were benefits derived by each party to a contract variation, even though one party did not suffer a detriment, that would not be fatal to establishing sufficient consideration to support the agreement."

In **Williams v Roffey** the defendant, a building contractor engaged the plaintiff, a carpenter, to carry out work on 27 flats for £20,000. It became clear that the contract price was too low and that the plaintiff could not complete the work without extra finance. The defendant promised to pay the plaintiff and additional £10,000. The plaintiff completed the work but the defendant refused to pay the extra money claiming under **Stilk v Myrick** principles that there was no consideration for the extra payment. The court held that the defendant had to pay the extra and stated the following propositions.

a). If A had entered into a contract with B to do work for, or supply goods or services to, B in return for payment by B, and
b) At some stage before A had completely performed his obligations under the contract B had reason to doubt whether A would or would be able to, complete his side of the bargain, and
c) B thereupon promised A an additional payment in return for A's promise to perform his contractual obligations on time, and
d) As a result of giving his promise, B obtained in practice a benefit or obviated a dis-benefit, and
e) B's promise was not given as the result of economic duress or fraud on the part of A, then
f) the benefit to B was capable of being consideration for B's promise, so that the promise would be legally binding.

67 **Stilk v Myrick** [1809] 2 Camp. 317.
68 **Hartley v Ponsonby** [1857] 7 E & B 872
69 **North Ocean S.S. Co v Hayundai Construction** (1979) 1 Q.B. 705.
70 **Williams v Roffey & Nicholls** [1990] 1 All.E.R. 512

Contractual duty owed to a 3rd party. If A contracts with B must C accept performance of that contract as consideration for a separate contract ? This was the question considered in **Shadwell v Shadwell**,[71] where A promised to marry B. C, his uncle wrote to say he was pleased to hear he was to be married and promised to give him £150 a year till his earning rose to 600 guineas a year. A started a career at the bar and needed financial assistance but the uncle failed to keep up the payment. The court held that there was consideration. Similarly, in **Scotson v Pegg** [72] A agreed with B to deliver coal to C. A then agreed with C that if A delivered the coal C would discharge at a certain tonnage per day so guaranteeing that the vessel would not be tied up in harbour too long. However C failed to discharge quick enough. The court held that C was in breach of the agreement. A was entitled to damages. Performance of the contract between A and B was consideration. Likewise in **The Eurymedon,**[73] A, stevedores, were contracted to B to unload a ship. C the owner of cargo agreed not to sue A for damage to their goods in B's ship provided A carried out their contractual duty to unload the ship. The court held that there was valid consideration. C could not sue A for damage to the goods.

Consideration need not be adequate. As long as an agreement was freely reached without undue pressure, then however inadequate the price paid, there is no remedy for someone who makes a bad bargain. The law doesn't make or remake bargains. Thus in **Bainbridge v Firmstone,**[74] Firmstone wanted to weigh Bainbridge's boilers. Firmstone promised to return them in good condition. He returned them in pieces. Firmstone claimed there was no consideration for the promise. The court held that Bainbridge had lost something, since there was no obligation to let anyone touch the boilers. There was a detriment suffered which amounted to consideration.[75]

Consideration must move from the Promisee. Only a person who has provided consideration in return for a promise may enforce that promise as a contract. Thus in the leading case of **Tweedle v Atkinson** ,[76] G and T agreed that they would each pay T's son a sum of money on his marriage to G's daughter. T paid his share but G died before making his payment. N (T's son) sued G's executors for the money. The court held that he did not succeed as no consideration had moved from him (i.e. he had not promised anything nor had he done anything which would provide consideration). This was confirmed in **Re Hudson**,[77] where trustees needed money to build a chapel. Hudson promised £20,000 in five instalments. After the first instalment he died. Meanwhile the trustees had committed the trust to heavy commitments. The court held that whilst they had incurred a detriment, it was not a detriment requested by Hudson and so was not valid consideration. The executors did not have to pay the rest.

Part Payment of Debts. The common law rule in **Pinnel's Case** [78] is, that part-payment of a debt is not good consideration for a promise to forego payment of the balance. If A owes B £50 and B accepts £25 in full satisfaction on the due date, there is nothing to prevent B from claiming the balance at a later date, since there is no consideration moving from A to enforce the promise of B to accept part payment.[79] An agreement to accept part-payment would be binding if A provided some fresh consideration, such as :-

a). B agreeing to accept part-payment on an earlier date than the due date; or

b). B accepting something other than money (or a cheque[80]) e.g. 'a horse, hawk or robe etc' (**Pinnel's Case**). This would still discharge the debt in full even if worth less than the balance of the debt (consideration need not be adequate).

In **Pinnel's Case,** Pinnel sued Cole in debt for £8.50 due on a bond dated 11th November. C's defence was that at P's request he had paid £5.12d on the 1st of October and P had agreed that this would be in full

71 **Shadwell v Shadwell** [1860] 9 C.B.N.S. 159,
72 **Scotson v Pegg** [1861] 2 H & N 295.
73 **The Eurymedon** : **New-Zealand S.S.Co. v Satterwaite** (1975) A.C. 154,
74 **Bainbridge v Firmstone** (1838) 3 A.N.D. 743.
75 See also **De La Bere v Pearson** (1908) 3 K.B. 280 and **Chapple v Nestle** [1960].2 All.E.R. 701.
76 **Tweedle v Atkinson** (1861).1 B & S 383,
77 **Re Hudson** (1885) L.J. Ch. 811
78 **Pinnel's Case** [1602] 5 Coke Rep 117
79 **Foakes v Beer** (1884) 9 A.C. 605
80 **D & C. Builders v Rees** [1966] 2 Q.B. 671

satisfaction of the debt. Unfortunately due to a technical fault in pleading Pinnel won. The court held that the technicality apart, the early payment of a lessor sum would have amounted to consideration, as would the payment of something different such as a horse, hawk or robe etc.

Payment in a different place may be consideration for a lessor sum if the change of venue is for the benefit of the creditor**.** Thus in **Vanbergen v St.Edmunds Properties Ltd.**[81] A owed B money in London. B proposed to make A bankrupt, but was eventually prevailed upon not to do so provided A paid money into a bank in Eastbourne. A paid the lessor sum into the bank at the last minute, but B being unaware of the fact, in London, made A bankrupt. The court held that there was no consideration for the agreement to take less, since the payment in Eastbourne was for the debtor's benefit not the creditors.

The Doctrine of Promissory Estoppel. The doctrine provides a means of making a promise binding, in certain circumstances, ***in the absence of consideration,*** especially where a party has waived his contractual rights against another and that other party has changed his position in reliance on the waiver and it would be unjust to allow an action against him on the original action to succeed. It was developed from obiter dicta by Denning J in **Central London Property Trust v High Trees House Co.**[82] with origins in **Hughes v Metropolitan Railway Co Ltd.**[83] Hughes**,** a landlord, gave his tenant 6 months to carry out some repairs or, in the failure of repair, forfeit the lease. However, within this period the landlord started to negotiate with the tenant for the sale of the lease. During the course of negotiations the tenant didn't effect any repairs. Shortly afterwards, negotiations broke down and at the end of the 6 month period the landlords claimed to forfeit the lease. The court held that he could not do so. The landlord, by his conduct, led the tenant to suppose that he would not enforce forfeiture at the end of the period of notice and the tenant had relied on this by not carrying out the repairs. The House of Lords did say, though, that the 6 month period would begin to run again from the date of breakdown of negotiations.

In **High Trees House** a landlord leased a block of flats to a property managing tenant in 1937 for £2,500 p.a. Because of a shortage of sub-tenants during the war the tenant manager found it difficult to pay the £2,500 ground rent. The landlord agreed to reduce the rent to £1,250. *There was no consideration given for this reduction.* After the war the block of flats became fully occupied again and so the landlord brought an action to recover the balance of rent for the last two quarters of 1945 at the original contract rate. The court held that as from the end of the war the landlord was entitled to the full rent as the circumstances which gave rise to the rent reductions were no longer in existence. Denning in a minority obiter judgement stated that if the landlord had sought to recover the balance during the war years when only half rent had been paid, they would have been estopped in equity, i.e. they would have been prevented from acting in a manner inconsistent with their promise. The significance of Denning's judgement was that it extended The Hughes doctrine, envisaging the extinguishment of the right to receive sums contractually due (i.e. the ground rent). The exact scope of the doctrine of promissory estoppel is debatable though it is clear that certain requirements must be satisfied before it can come into play:

a) There must be a clear and unambiguous statement by the promisor that his strict legal rights will not be enforced;
b) The promisee must have acted in reliance on the promise i.e.: " …. he must have been led to act differently from what he otherwise would have done" per Denning in **Alan v El Nasr**.[84]
c) It must be inequitable for the promisor to go back on his word and revert to his strict legal rights[85]**.**
d) The doctrine may only be raised as a defence; "as a shield and not a sword." [86]

In **D & C Builders v** (Mrs) **Rees** [87] a customer refused to pay the whole price for a completed home extension, saying "take this cheque as full payment or you'll get nothing." The builder took the cheque and sued for the balance. The court held that her conduct amounted to blackmail. Those that wish to rely on

81 **Vanbergen v St.Edmunds Properties Ltd** [1933] 2 K.B. 223
82 **Central London Property Trust v High Trees House Co** [1947] K.B. 130
83 **Hughes v Metropolitan Railway Co Ltd.** [1877] 2 App.Cas. 439.
84 **Alan v El Nasr** (C.A.,1972)
85 **D&C Builders v Rees** (C.A. 1966)
86 **Combe v Combe** [1951] 2 K.B. 215.
87 **D & C Builders v Rees** [1966] 2 Q.B. 617

equitable principles must come to court with clean hands. She had to pay the balance.
In **Combe v Combe,**[88] a husband promised during divorce proceedings to pay his wife £100 / annum. She didn't ask for maintenance. The husband's promise was merely gratuitous. He didn't pay so she sued. The court held that she could not use the High Trees Principles since equitable estoppel is a defence not a cause of action.

To what extent does High Trees affect Foulkes v Beer ?

1) Foakes v Beer is a House of Lords case and is, therefore, binding.
2) The Doctrine is suspensory only.
3) The Doctrine relates to a continuing agreement.
4) High Trees has never been held to apply for a 'once and for all' debt
5) High Trees prevents creditors reneiging on their prior obligations but preserves their future rights.

Self Assessment Questions : Considerations

1) David spent a weekend at an hotel. When he received his bill. it contained an item of £2 described in the bill as "10% service charge in lieu of gratuities. This sum will be distributed among the staff." David refused to pay the £2 and ask your advice whether he could be successfu[4]ly sued by either the hotel or the staff for this sum. Advise him.
2) 'Consideration must be sufficient but need not be adequate.' Discuss.
3) Mike owes £l.000 to Nick, £50 to Squeers & £20 to Dickens, all of which debts he's unable to repay. He writes to each of them separately offering 25p in the £1 in full & final settlement. They all agree to the settlements offered them. Nick later changes his mind and sues Mike for £750. Discuss.
4) Jim owes Ned £500. Jim finds that he is unable to repay this sum. What would the legal effect be if Ned agreed to accept either: a) £250 in bank notes or b) Jim's cheque for £300. or c) A cheque from Jim's father for £100?
5) Which, if any, of the following promises are binding on Paul?
   a) In response to an appeal for funds. Paul writes to Father Duncan, the priest of his local church, promising him £2 a month for 5 years.
   b) On hearing of his nephew Spendthrift's engagement. Paul writes promising not to require repayment of £500 which Paul had lent him.
   c) On his gardener Rustic's retirement Paul promises to pay him a pension of £1 per week.
   d) Paul promises his National Health Doctor £5 a month in return for the doctor's promise to see that he gets all the medical attention he needs.
6) Ace owed George £200 payable in Birmingham on July 1st. At Ace's suggestion, George agrees to accept £150 in London on June 30th in full satisfaction. George asks you if he can repudiate the agreement. Advise him. Would your answer differ i) If George had suggested the new arrangement? or ii) the new date was July 2nd?
7) Sam's landlord says that as Sam is in financial difficulties he will accept half-rent for the next 6 months. He does this because it is hard to find tenants in the area. Sam uses the money saved on rent to put a deposit on a new car. The landlord wants full rent for the 6 months penod and Sam has to return the car since he can't afford to continue the payments.

[88] **Combe v Combe** [1951] 2 K.B. 215