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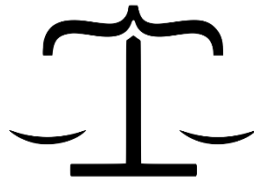
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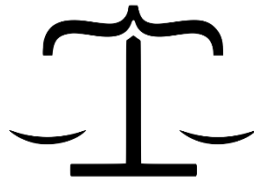
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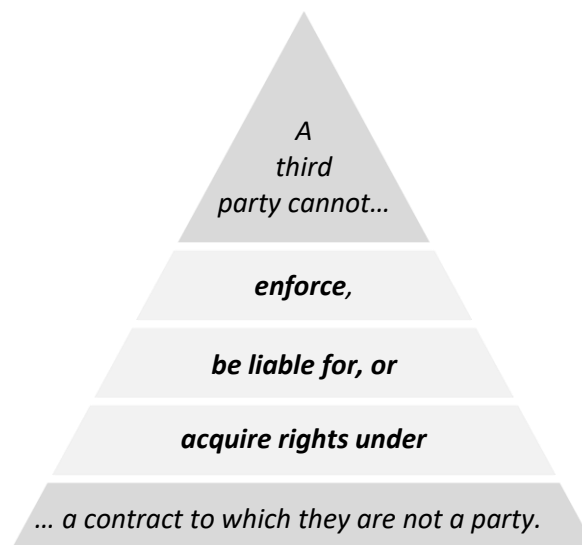
PRIVITY

KEY CONCEPTS

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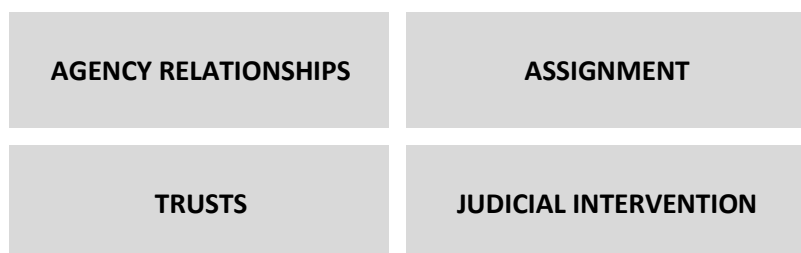
DOCTRINE OF PRIVITY

Under the common law:



AVOIDING THE DOCTRINE OF PRIVITY

The main common law exceptions are:



The main statutory exception is:

**CONTRACTS (RIGHTS OF
THIRD PARTIES) ACT 1999**

WHAT IS PRIVITY?

PRIVITY

"The doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it." Treitel, *The Law of Contract*.

Under the doctrine of privity:

A third party cannot	ACQUIRE RIGHTS UNDER	a contract to which they are not a party.
	BE LIABLE FOR	
	ENFORCE	

NOTE: the doctrine is closely connected to the principle that consideration must move from the promisee (see *Consideration chapter*). The leading cases on the classic doctrine are ***Price v Easton***, ***Tweddle v Atkinson*** and ***Dunlop Pneumatic Tyre Co Ltd v Selfridges & Co Ltd***.

WHO CAN SUE ON A CONTRACT?

Viscount Haldane LC made one of the classic statements on privity in ***Dunlop v Selfridges***:

"In the Law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

The rule can be divided into two elements:

- 1) Who are the **parties** to the agreement; **and**
- 2) Has the claimant provided **consideration**?

THE AGREEMENT COMPONENT

Establishing the parties to a contract is usually straightforward. Confusion can arise where one party is acting as agent for another. Whether the person who took part in the negotiations was acting as an agent or as principal with the **intention to be a party** to the contract is a question of fact.

In some circumstances it may be disputed whether the beneficiary entered into the contract as a **party** to the agreement or merely as someone **interested** under the agreement.

COLLATERAL CONTRACTS

A collateral contract is a subsidiary contract which relies upon another contract for its existence.

Consider the following examples:

<i>Shanklin Pier v Detel Products Ltd</i>	Shanklin Pier (SP) employed contractors to paint a pier. It instructed the contractors to buy the paint from Detel Products Ltd (DP), which they did. SP had relied on a statement from DP that the paint would last 7 years. The paint only lasted 3 months and it was held that there was a collateral contract between SP and DP that the paint would last 7 years.
<i>Charnock v Liverpool Corp</i>	A damaged car was repaired by a garage under a contract with the owner's insurers. It was held that there was a collateral contract between the garage and the owner, with an implied term that the garage would do the repairs in a reasonable time, not the eight weeks taken. The owner had provided consideration by leaving the car with the garage to be repaired.

The same principle applies where a person buys goods from a retailer and is given a manufacturer's guarantee. Here, the main contract is between the retailer and the customer, but the guarantee is a collateral contract between the customer and manufacturer.

NOTE: legislation for the protection of consumers may also apply in this situation.

Where is the consideration in collateral contracts?

- In ***Shanklin Pier*** the consideration was in the instruction given to the claimant's contractors to use the specific paint.
- In guarantee cases the consideration is the purchase of the goods from the retailer.
- In cheque guarantee or credit card cases, the consideration is the supply of goods by the retailer to the customer, and the discount allowed by the retailer to the issuer of the card.

MULTIPLE PARTY CONTRACTS

<i>Clarke v Earl of Dunraven</i>	There was a collision during a race which was organised by a yacht club, Clarke's yacht sank. Dunraven had a contract with the yacht club but not with the owners of other boats. The House of Lords held Dunraven had effectively entered into an obligation with the owners of all the yachts who were competing in the race, holding each liable to the other for any damage caused by a breach of club rules.
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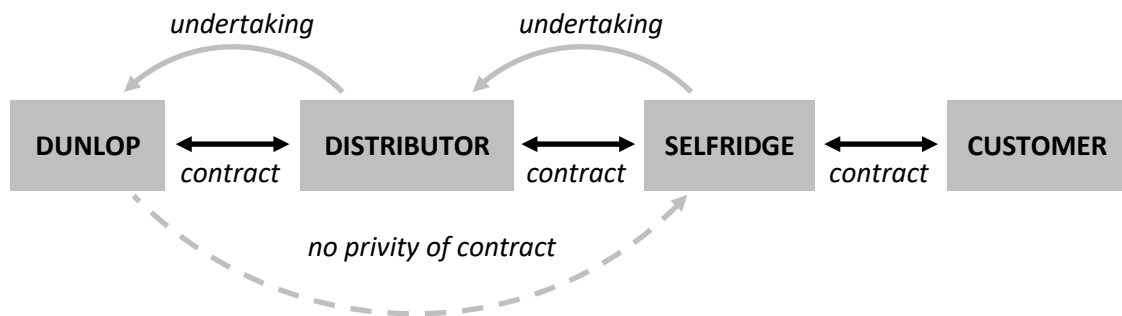
THE CONSIDERATION COMPONENT

As discussed above in the Consideration chapter, consideration must move from the promisee, i.e. a claimant can only sue on a contract if the claimant has provided consideration.

KEY CASE:***Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd***

Facts: Dunlop sold tyres to a distributor on the terms that they would not resell at a price lower than Dunlop's price list and would obtain undertakings from any trade customers not to do so. The distributor sold the tyres to Selfridge who sold them on at less than the agreed price in breach of their undertaking to the distributor. Dunlop sued Selfridge.

Held: Dunlop could not sue on the contract between Selfridge and the distributor, as Dunlop was not a party to the contract and had provided no consideration (*see diagram below*).



See also ***Tweddle v Atkinson*** in the Consideration chapter.

JUSTIFICATIONS FOR THE PRIVACY RULE

Several key arguments have historically been put forward to justify the doctrine of privity:

- The doctrine rests on the principle of **mutuality**: it would be unfair to allow a person to sue on a contract to which they are not a party. In ***Tweddle v Atkinson*** **Crompton J** argued that “*it would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued.*”
- It is undesirable for third-party rights to be created by contract, since that would restrict the freedom of the parties to amend or rescind their agreement (***Re Schebsman***).

ARGUMENTS AGAINST THE PRIVACY RULE

There are several arguments for avoiding the rule that only parties to the contract can enforce it:

- The doctrine of privity is arguably outdated given developments in other areas of law:
 - As estoppel has gained prominence, the concept of reliance can allow parties to obtain relief even if no consideration has been given; and
 - The doctrine of consideration has itself been weakened by the establishment of various judicial and statutory exceptions to the rule.
- If a person makes a contract for the benefit of a third party, not only would the doctrine of privity prevent the third party beneficiary from enforcing breaches of the contract, the party making the contract would also be unlikely to be entitled to more than nominal damages for any breach, as they would have suffered no loss.

- Many commercial contracts involve multiple interlinked contracts, each with multiple parties. Preventing third parties who are benefited by a contract from enforcing the agreement can sometimes defeat the intentions of the parties to the contract.

EXAM TIP: if you plan to answer an essay question on privity, you should familiarise yourself with the historic arguments for and against the doctrine. Justifications for reform have been considered by numerous Law Commission reports, as well as the Law Revision Committee in 1937. Try reading the Law Commission's 1996 report, "**Privity of Contract: Contracts for the benefit of Third Parties**".

Consider **Steyn LJ**'s statement in **Darlington Borough Council v Wiltshier Northern Ltd**:

*“ The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. **The law of contract should give effect to the reasonable expectations of contracting parties.** Principle certainly requires that a burden should not be imposed on a third party without his consent. But **there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit a third party where that is the expressed intention of the parties.** Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. **They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.** ”*

METHODS OF AVOIDING THE DOCTRINE OF PRIVACY

COMMON LAW AVOIDANCE OF PRIVACY RULE

AGENCY RELATIONSHIPS	In agency relationships, the agent contracts with a third party on behalf of the principal. It is the principal who can enforce the contract and be sued upon it. This is arguably not a true exception to the privity rules, as the agent is not actually a party to the contract – they merely negotiate on behalf of the principal.
ASSIGNMENT	A party may assign their contractual rights to a third party. In such a case the third party is able to sue under the contract, despite not being a party to the original agreement. This is subject to strict equitable rules. NOTE: it is not possible to assign the burden under a contract.

TRUSTS	The doctrine of privity does not apply to trusts. It is therefore possible for a party to a contract to use this principle to circumvent the privity requirement by declaring themselves trustee of the benefit of the contract, with a third party as the beneficiary. A contractual right is a “chose in action”, and thus may be subject to a trust just like any other form of property. The third-party beneficiary would gain an equitable interest in the contractual right and be able to enforce it in the courts, despite not being party to the agreement.
COLLATERAL CONTRACTS	Collateral contracts are a further common law method of avoiding the doctrine of privity (<i>see above for more detail</i>).
JUDICIAL INTERVENTION	There have been various judicial attempts to circumvent the strict requirements of privity. In Jackson v Horizon Holidays, Denning ruled that, after experiencing a bad holiday, a man was able to recover not only for his own losses, but for those of his family as well, despite the fact that the contract for the holiday was made only with the man. In Woodar v Wimpey it was suggested that such holiday contracts might make up part of a limited group of contracts exempt from the doctrine of privity (along with situations such as hiring a taxi or ordering food for a group). Further precedent is in Linden Gardens Trust v Lenesta Sludge Disposals; St. Martins Property Corp. v McAlpine; Beswick v Beswick; The Albazero, Alfred McAlpine Construction Ltd v Panatown Ltd and First Abu Dhabi Bank v BP Oil where the Court of Appeal followed the other cases with reluctance and called for the Supreme Court to reconsider this area of law.

STATUTORY AVOIDANCE OF PRIVACY RULE

There are various specific statutory exclusions to the doctrine of privity. Below are some examples:

s. 11 Married Women's Property Act 1882	Enables wives to claim under their husbands' life assurance policies.
s.136 Law of Property Act 1925	Allows contractual rights to be assigned to a third party.
s. 148(7) Road Traffic Act 1988	Requires road users to have third party insurance, which third parties can use if they suffer loss as a result of the driver's negligence.
Contracts (Rights of Third Parties) Act 1999	By far the most significant exception to the privity rule (<i>see next page for more details</i>).

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999 (“C(RTP)A”)

There was a long history of judicial dissatisfaction with the doctrine of privity in the lead up to the passing of the C(RTP)A. For example, in *Beswick v Beswick* Lord Scarman commented that:

“*If the opportunity arises, I hope the House will reconsider **Tweddle v Atkinson** and the other cases which stand guard over this unjust rule.*”

However, the courts recognised the problems with judicial reform, and the Law Commission recommended reform through legislation. Reform eventually came in the form of the C(RTP)A, but the scope of the reform is limited:

- The Act **does not allow the enforcement of burdens** imposed on third parties;
- The Act **deals only with enforcement of benefits by third parties** entered into after 11 May 2000 (the C(RTP)A came into force on 11 November 1999); and
- Even where the Act does apply, it is **not every third party who can enforce a contractual provision** – the test of enforceability in s. 1 of Act must be satisfied. However, the common law exceptions will continue to apply; the common law and statute work together.

The Law Commission recommended that the privity doctrine be reformed by legislation to “*enable contracting parties to confer a right to enforce the contract on a third party*”, i.e. the right to enforce the **remedies for breach of contract** that would have been available had the third party been a contracting party.

The basic right is contained in s. 1(1) and provides that a person who is not a party to a contract may enforce a term of the contract in their own right if the **test of enforceability is satisfied**, even when the third party beneficiary is unaware of the contract at the time it was made (*Chudley v Clydesdale Bank*).

It is not intended that strangers should be able to enforce contractual provisions. **Only third parties who were intended to benefit under the relevant term of the contract** can enforce such contracts. **NOTE:** parties are able to expressly exclude the C(RTP)A from applying to a contract.

TEST OF ENFORCEABILITY

There are **two ways** in which a third party may satisfy the test of enforceability and be able to enforce contractual terms under the C(RTP)A:

s.1(1)(a) “The contract expressly provides that [the third party] may” enforce the provision; or

s.1(1)(b) “The term purports to confer a benefit” on that third party.

NOTE: s. 1(1)(b) will not apply, if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party (s. 1(2)). Under s. 1(3): the third party “**must be expressly identified in the contract by name, as a member of a class or as answering to a particular description**,” although the third party need not be in existence at the time contract is made. (Reference to a client account amounted to an express identification of the class (*Chudley v Clydesdale Bank*)).

Examples from case law:

<i>The Swedish Club</i>	The Claimant sought to recover commission payable to them by underwriters and cargo-owners from the club. It was held that such a payment was not covered by s. 1(1)(b) , as it was merely payment of a commission to an agent.
<i>Nisshin Shipping Co Ltd v Cleaves & Co Ltd</i>	Cleaves had negotiated a number of time-charters under which commission was payable. Nisshin refused to pay on the basis that the contract had been repudiated. It was held that Cleaves could recover payment under s. 1(1)(b). The clause purported to confer a benefit on Cleaves and there was nothing to indicate that the parties did not intend Cleaves to have a right to enforce.
<i>Avraamides v Colwill</i>	Avraamides (A) employed Colwill (C) to refurbish A's bathroom. C's performance was defective, and C would have been liable for damages, but C had sold the relevant business to a third party (B). B had taken on C's liabilities under the agreement. It was held that since A was not <u>expressly identified</u> in the contract between C and B, s. 1(1) did not apply and therefore A could not recover from B.

VARYING A CONTRACT UNDER THE C(RTP)A

The parties to a contract are **not** able to remove a purported benefit granted to a third party if:

s. 2(1)(a)	the third party has communicated their assent to the term to the promisor;
s. 2(1)(b)	the promisor is aware that the third party has relied on the term; or
s. 2(1)(c)	the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

FURTHER READING

Law Commission Report No. 242, 1996. *Privity of Contracts: Contracts for the benefit of third parties*, Cm 3329.

Treitel, G., 2002. The battle over privity. In G. Treitel (ed). 2002 *Some Landmarks of Twentieth Century Contract Law*. Oxford: Clarendon Press.

ANSWERING A PROBLEM QUESTION ON PRIVITY

STEP 1:	Briefly set out the potential claim(s) in the scenario. State that the issue is with privity of contract.
STEP 2:	Define the doctrine of privity.
STEP 3:	Does privity of contract exist between C and the potential defendant? Is C a party to the agreement? Has C provided consideration?
STEP 4:	If C does not have privity, is there a relevant common law or statutory exception to the doctrine? Set out all potentially relevant exceptions and analyse whether the requirements have been met. Remember to consider whether the C(RTP)A applies.
STEP 5:	Conclude by identifying which mechanism C can use to bring a claim. If the doctrine of privity will prevent a claim, is there anything which could have been done differently which would have enabled C to make a claim, for example including an express provision in the contract allowing C to enforce the contract?

ANSWERING AN ESSAY QUESTION ON PRIVITY

EXAMPLE QUESTION:

“Despite the attempts to avoid the rule of privity, the doctrine still causes injustice.” Critically discuss.

STEP 1:	Introduction:
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Set up your argument, briefly outlining the key points of discussion. State whether you agree with the statement.

STEP 2:	Define Privity:
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Set out the law on privity, referring to the key case law (*Dunlop*; *Tweddle* etc.).

STEP 3:	Consider the criticisms of the doctrine of privity:
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Consider the criticisms that have been made of the doctrine of privity, both in case law and academic commentary. Explain how the doctrine can cause “*injustice*”, for example by preventing a party from benefiting from a contract in the way intended by the original contracting parties. Refer to relevant case law.

STEP 4:

Consider the exceptions to the doctrine. To what extent have these mitigated the negative effects of the doctrine?

Consider the different exceptions to the doctrine in both common law and statute. Do they reduce the “injustices” you have identified in STEP 3? Is there a risk that they could create their own injustices in some circumstances?

For example, some of the common law exceptions have a narrow scope and could lead to unpredictable outcomes in some cases. This arguably undermines legal certainty, preventing parties from knowing in advance what the legal consequences of their actions will be.

Consider the effect of the **C(RTP)A**. To what extent has it removed the injustices of the doctrine of privity? Consider the limits of the act – it does not apply in all situations and can be excluded by the parties.

The **C(RTP)A** subverts the general requirement that consideration is needed to enforce a contract and enables a third party to enforce an agreement even if they have offered nothing in return. Is this just? Remember that the act is designed to give effect to the intentions of the contracting parties and only applies if the test for enforceability has been satisfied.

STEP 5:

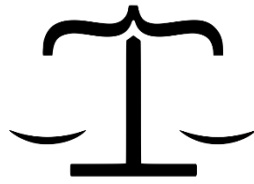
Consider the justifications for the doctrine of privity:

Do not be afraid to challenge the premise of the question. Do you in fact agree that the doctrine causes injustice? Consider the various justifications for the doctrine.

STEP 6:

Conclusion:

Summarise your argument and conclude as to how far you agree / disagree with statement.



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CASE	FACTS	PRINCIPLE
AB Corporation v CD Company <i>(The Sine Nomine)</i> [2001]	A ship owner committed an “efficient breach”, of a charter to enable itself to charter the vessel out to a third party more profitably. The charterer claimed damages for the breach of the charter and for the additional profits made by the owner as a result of the breach.	The charterers were only entitled to damages in respect of the losses they incurred and not to a share of the profits earned by the owner as result of the breach. It was not the role of the courts to make moral judgments.
Ace Paper v Fry [2015]	The interpretation of ambiguous provisions in a contract relating to debt repayment was considered in the context of “ <i>business common sense</i> ”.	Where genuinely ambiguous provisions exist, business common sense should be used as a method of interpretation. COMPARE with <i>Arnold v Britton</i>*
Adam Opel GmbH v Mitras Automotive Ltd [2007]	This case concerned the variation of a contract.	This noted that contract variations had been allowed by the courts where the benefit and burdens of the variation moved in one way only. The judge noted that consideration was no longer used to protect participants, but the law of economic duress was central, providing a more refined control mechanism and rendering contracts voidable rather than void. APPLIED <i>Williams v Roffey</i>
Adams v Lindsell* [1818]	Acceptance of an offer to buy wool was posted by the offeree (the party to whom the offer had been made) but was delayed in reaching the offeror (the party who had made the offer). In the interim, the offeror had assumed the buyer was not interested and had sold the goods to someone else.	Established the “ <i>postal rule</i> ”: acceptance by post occurs at the moment of <i>posting</i> , not at the moment of receipt. COMPARE with <i>Byrne v Van Tienhoven, Henthorn v Fraser, Holwell Securities v Hughes*</i>, <i>Household Fire v Grant</i>, <i>Getreide-Import Gesellschaft v Contimar</i> and <i>Re London and Northern Bank ex parte Jones</i>
Addax Energy v Petro Trade [2023]	The parties had been in a commercial relationship for around three years during which time the claimant provided petroleum to the defendant under a series of spot agreements. Each time price and quantities were agreed and sometimes a spot agreement was sent through with detailed terms and conditions and sometimes this was acknowledged. After 3 years the parties negotiated and produced a draft Term agreement but never finalised discussions or signed the document although they continued to trade but with no further spot agreements.	The court held that the terms and conditions on the spot agreements were incorporated into the subsequent contracts.

CASE	FACTS	PRINCIPLE
Adderley v Dixon [1824]	This was about specific performance on land sales.	Each parcel of land has unique characteristics; specific performance may be available to a disappointed purchaser. Damages will normally be an adequate remedy for a vendor.
Addis v Gramophone Company [1909]	An employee was wrongfully dismissed by his employer.	Although the employee could claim for breach of (employment) contract, he could not claim damages for the manner of his dismissal, for injured feelings or the impact that the dismissal might have on his further employment in the local business community. COMPARE with <i>Jarvis v Swan Tours</i> and <i>Hayes v Dodd</i>
Ahuja Investments Ltd v Victorygame [2021]	The claimant brought an action alleging fraudulent misrepresentation. There was a claim for contractual interest which was set at 12% in the event of default.	The Court of Appeal accepted that the representations were false but found that the claimant had not relied on them and that even had there been any reliance no loss would have been incurred. The default interest rate was held to be an unenforceable penalty.
Ailsa Craig v Malvern Shipping [1983]	Due to negligence and a breach of contract by the defendant's security company, a ship belonging to the claimant sank. The contract contained a clause limiting, but not excluding, liability.	Where liability is limited but not excluded, the clause should generally be given its ordinary meaning (i.e. it is to be construed less harshly than an exemption clause). COMPARE with <i>Arnold v Britton</i>*
Akerhielm v De Mare [1959]	The claimants alleged that they had been induced to buy shares in a company on the basis of misrepresentations.	Those making the representations had believed at the time that they were true. APPLIED <i>Derry v Peek</i>
Alan (WJ) & Co v El Nasr [1972]	A contract for the supply of coffee beans expressed payment to be due in Kenyan Shillings. A letter of credit was opened in Sterling and payments were accepted in Sterling.	The claimants were estopped from claiming that payment should be made in Kenyan shillings. Reliance for the purpose of promissory estoppel does not need to be detrimental. COMPARE with <i>The Post Chaser</i>
Alderslade v Hendon Laundry [1945]	The defendant lost linen sent to be cleaned by the plaintiff, it sought to rely on a limitation of liability clause.	The only way in which the goods could have been lost was by negligence and the clause was effective to limit liability.

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Z

AGREEMENT - OFFER

KEY CASES – AGREEMENT (OFFER)

- | | |
|--|---|
| <ul style="list-style-type: none"> • Carlill v Carbolic Smoke Ball Co [1891-4] • Gibson v Manchester City Council [1997] • Harris v Watson [1791] | <ul style="list-style-type: none"> • Hyde v Wrench [1840] • Partridge v Crittenden [1968] |
|--|---|

ADDITIONAL CASES – AGREEMENT (OFFER)

- | | |
|---|--|
| <ul style="list-style-type: none"> • Allied Marine Transport v Vale do Rio Doce Navegacao SA [1985] • Barry v Davies (t/a Heathcote Ball & Co) [2000] • Blackpool & Fylde Aero v Blackpool BC [1990] • Blue v Ashley [2017] • Bradbury v Morgan [1862] • Bridgehouse (Bradford No.2) v BAE Systems Plc [2019] • Byrne v Van Tienhoven [1880] • Burgess v Kempson [2023] • Countess of Dunmore v Alexander [1830] • Dahlia v Four Millbank Trustees [1978] • Dickinson v Dodds [1875] • Errington v Errington & Woods [1952] • Financings Ltd v Stimson [1962] • Fisher v Bell [1960] • Freeman and Lockyer v Buckhurst Park Properties [1964] • Gibbons v Proctor [1891] • Grainger v Gough [1896] • Great Northern Railway v Witham [1873] • Harris v Nickerson [1872] • Harvela Investments Ltd v Royal Trust Co of Canada [1986] | <ul style="list-style-type: none"> • Harvey v Facey [1893] • Kleinwort Benson Ltd v Malaysia Mining Corp [1989] • Lefkowitz v Great Minneapolis Surplus Les Affrêteurs Réunis SA v Leopold Walford [1919] • Store [1957] • Morrison SS Co. Ltd v The Crown [1924] • Paradine v Jane [1646] • Payne v Cave [1789] • Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] • Quenerduaine v Cole [1883] • R v Clarke [1927] • Ramsgate Victoria Hotel v Montefiore [1866] • Reynolds v Atherton [1921] • Routledge v Grant [1928] • Simpkins v Pays [1955] • Soulsbury v Soulsbury [2007] • Spencer v Harding [1870] • Stevenson, Jacques & Co v McLean [1880] • Taylor v Laird [1856] • Thornton v Shoe Lane Parking [1970] • Warlow v Harrison [1859] • Williams v Williams [1957] |
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SQE ANSWERED

SAMPLE CHAPTER FROM OUR SQE GUIDES:

- Contract Law: Consideration and Promissory Estoppel
- Property Practice: Investigating Title
- Criminal Law and Practice: Manslaughter

SQE Answered is a comprehensive, distinction-level set of exam-focused study notes for the Solicitor's Qualifying Exam. This is a sample from our *SQE1 Core Guide*. All our SQE topic guides follow the same style as the chapters shown in this sample. If you have any questions about a specific FLK1 or FLK2 topics, please contact us at help@lawanswered.com.

Please visit lawanswered.com if you wish to purchase a copy.

Notes for the PGDL, GDL, MA Law, LPC and LLB are also available via lawanswered.com.

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LAW ANSWERED SQE GUIDES AVAILABLE:

NOTE: Our SQE1 Core Guide includes all of the topics listed below.

FLK1 TOPICS *(available as individual guides or in one volume of FLK1 topics)*

- Business Law
- Dispute Resolution (Civil Litigation)
- Contract Law
- Tort
- Legal Services (including Professional Conduct)
- Legal System of England and Wales, Public (Administrative and Constitutional) Law & EU Law

FLK2 TOPICS *(available as individual guides or in one volume of FLK2 topics)*

- Property Practice
- Wills and the Administration of Estates
- Land Law
- Solicitors' Accounts
- Trusts
- Criminal Law and Practice

***NOTE:** Tax and ethics are covered throughout all guides where required by the SQE syllabus.*

CONSIDERATION

RULES OF CONSIDERATION

In order for consideration to be valid in law it must:

NOT BE PAST	MOVE FROM THE PROMISEE TO THE PROMISOR	BE SUFFICIENT, BUT NEED NOT BE ADEQUATE
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PERFORMANCE OF AN EXISTING OBLIGATION

The general rule is that performance of an existing...	OBLIGATION IMPOSED BY LAW	... is not good consideration.
	OBLIGATION OWED TO A THIRD PARTY	
	CONTRACTUAL DUTY	

PROMISSORY ESTOPPEL

In order to rely on promissory estoppel, a Defendant must establish the following four elements:

<u>A clear and unequivocal promise</u> that causes...
... a <u>change of position</u> by the promisee <u>in reliance</u> on the promise.
It must be <u>inequitable</u> for the promisor to go back on the promise.
This doctrine is a " <u>shield not a sword</u> ".

Definition of consideration:

“ An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought. ”

The simplest way to understand consideration is as the value element of the promises exchanged between the parties. There must be a **mutuality of promises**. For example, when buying goods from a supermarket, the buyer obtains the goods in the basket and the seller receives money for the sale. The law will not generally enforce a purely gratuitous promise i.e. a promise for which nothing is offered in exchange.

GENERAL RULE:

Consideration is an essential requirement for the formation of a legally binding contract. In order for a contract to be enforceable "*a consideration must be proved*".

Consideration limits the types of promises which will be enforced by the courts. Without the doctrine of consideration, any promise could be actionable.

REMEMBER: **both** parties must provide consideration.

EXCEPTION:

Contracts which are executed as **deeds** are enforceable without consideration.

RULES OF CONSIDERATION

There are various common law rules with which consideration must comply in order to be valid in law. **Consideration must:**

NOT BE PAST

MOVE FROM THE PROMISEE
TO THE PROMISOR

BE SUFFICIENT, BUT NEED
NOT BE ADEQUATE

1: **Consideration must not be past.**

Where one party has already acted, a **later** promise by another party to perform an act in return is not good consideration, as it is past consideration.

EXCEPTION:

In an important Privy Council case the claimant purchasers agreed not to sell shares for 12 months. By a later agreement the defendants agreed to indemnify the claimants against any fall in value of the shares over that period.

The consideration in relation to the indemnity was past but the Privy Council found it was good consideration, and set out the following criteria for past consideration to be good consideration:

a:

Was action taken at the request of the promisor?

Did the promise-maker (promisor) ask for the promisee to do (or not do) a specific thing?

Was payment understood to be due?

- b:** Did both parties assume that payment would be made for the variation? This is more likely in a commercial context than in a domestic one.

If the payment had been made in advance, would it have been legally enforceable?

- c:** Are there any other consideration, acceptance or ICLR problems?

2: Consideration must move from the promisee to the promisor.

In return for receiving the promisor's promise, the promisee must have given consideration. **Both parties must provide consideration**, if consideration does not pass in each direction then there is no contract.

EXCEPTION:**Contract (Rights of Third Parties) Act 1999**

3rd parties (people who are neither promisor nor promisee to the contract) **can** enforce a contract between others which benefits that 3rd party, even though the 3rd party has not provided any consideration.

3: Consideration must be sufficient but need not be adequate.

Consideration must have **some** value in the eyes of the law (i.e. be sufficient), even if it is inadequate (i.e. far less than the promise is worth).

Examples of sufficiency in case law:

- Giving up a legal right is sufficient, but promising not to enforce a right that you do not have is insufficient.
- Promising to abstain from drink and tobacco was giving up a legal right and did amount to sufficient consideration.

4: Performance of an existing obligation, as between the same parties, is not good consideration – an existing obligation already binds and cannot be good consideration.

Performance of an existing obligation is not good consideration – in order **to be good consideration** something extra must be offered above one's existing obligations.

Two contrasting cases demonstrate this point and its exception.

CASE 1: On a sea voyage some sailors deserted, the remainder were offered extra money to crew the ship home with fewer hands. When the additional, promised payment was refused they could not

enforce; they had been employed to cover “*all reasonable endeavours*”, accordingly their pay already covered the extra work they were asked to do.

CASE 2: On a different occasion so many sailors deserted a ship that those who remained were obliged to carry out tasks far more onerous than had been contemplated. These sailors were able to enforce payment of the additional monies promised.

Further examples of offering something extra:

PUBLIC DUTIES

Carrying out a pre-existing public duty will not amount to consideration. For example, a witness who had been subpoenaed could not enforce a promise to be paid to appear in court as the witness was already legally obliged to attend.

Exceptions may be made where actions or obligations go beyond ordinary duties:

- The policing bill for a football match had to be paid by the club that requested it, the policing requirements went beyond ordinary policing duties.
- A police officer had provided valid consideration for a reward when they gave information to a householder about a break in. Their duty was to prevent crime and the provision of information went beyond the duty.

Consider: have the Claimant’s actions gone above and beyond what they were contracted to do?

If so, that can be good consideration. Remember that in addition all the criteria for good consideration must also be met. If the Claimant has not gone “*over and beyond*” expectation there are other circumstances in which performance of an existing obligation can amount to good consideration. The exception is set out in ***Williams v Roffey Bros*** as follows:

a:	Where A already has a contract with B to supply goods or services; and
b:	B has reason to doubt that A will complete (A cannot approach B and say this though, as it would be duress); and
c:	B approaches A and promises to pay A extra to complete on time; and
d:	B obtains a “practical benefit” or “obviates a disbenefit”. NOTE: this was not defined in <i>Roffey Bros</i> . In this case it was avoidance of a penalty clause – is the example in your MCQ similar? What exactly is the benefit afforded/disbenefit avoided?; and
e:	B’s promise was not given as a result of duress or fraud; then
f:	The benefit to B is capable of being consideration, so B’s promise to pay more for the same will be binding.

NOTE: this case is precedent only for situations where the contract is renegotiated and applies only where there is an offer to **increase** the contract price.

When applying *Roffey Bros.*, you must be certain that the variation did not result from duress (see *Duress chapter*). The effect of duress would be to render the contract voidable.

DUTIES OWED TO THIRD PARTIES

The general rule is that promising someone new that you will perform an existing contractual duty owed to a third party **may** be valid consideration. This would apply if the person to whom you make the promise gains a direct right to sue if you fail to fulfil the promise.

5: Part payment of a debt is not good consideration

GENERAL RULE: **Part payment of a debt is not good consideration** as this is merely fulfilling an existing obligation to pay the money. Even where the other party promises to waive the remainder of the debt, they can still claim the debt back at any later point. There are three potential exceptions to the rule:

EXCEPTION 1: Payment with a **different thing**, in a **different place**, or a **different time** (i.e. earlier) can be good consideration (*Pinnel's Case*).

EXCEPTION 2: Part-payment of a debt by a **3rd party** is good consideration.

EXCEPTION 3: **Promissory Estoppel.**

PROMISSORY ESTOPPEL

Promissory estoppel was established by **Lord Denning** in ***Central London Property Trust v High Trees House***. In this case the Claimant promised to reduce the agreed rent "*for the duration of the war.*" The property became fully let in 1945, and when the Claimant sued for the full back rent, it was held that the rent could be claimed in full for the period for which it was fully let, but that the landlord could not claim for the wartime period when it was partly vacant.

ELEMENTS OF PROMISSORY ESTOPPEL

You need to remember five requirements in relation to promissory estoppel:

- | | |
|-----|--|
| i: | There must be a clear and unequivocal promise to suspend or waive existing contractual rights.
This can be by words or conduct but must be sufficiently clear. |
| ii: | There must be a change of position by the promisee in reliance on the promise. |

iii:	The reliance by the promisee need not be detrimental to them.
iv:	It must be inequitable for the promisor to go back on the promise. The party claiming the estoppel in their favour will not succeed if they have demonstrated bad faith. Promissory estoppel is an equitable remedy and there is an expectation that those seeking equitable remedies will have “<i>clean hands</i>”; this will not be the case if they have shown bad faith.
v:	Promissory estoppel is a shield, not a sword. It can only be used as a defence, not a cause of action.

EFFECT OF THE ESTOPPEL

Generally **suspends** rights, which means that rights could be resumed later.

Rights can be **resumed** later:

1:	following reasonable notice ; or
2:	when the circumstances giving rise to estoppel cease (in <i>CLP v High Trees</i> the properties were fully let before the war ended, unlike during the Blitz in 1940).

If the money is due in instalments (like rent), the Claimant cannot recover the money that was waived – they can only receive **future** payments. Any past periodic payments are extinguished. **This implies** that **if the money is due as a lump sum** (one debt payment), then the **payment is merely suspended** for the period that the estoppel lasts – afterwards the Claimant can resume their rights for the **whole sum**.

IN SUMMARY

If the Claimant has promised to accept less, the Defendant will be able to rely on this variation if payment is made with a different thing, if a third party pays, or if promissory estoppel applies.

NOTE: duress is **not** relevant to promises to accept less.

ESTOPPEL BY CONVENTION

Estoppel by convention is where the parties act on the common assumption that a set of facts or situation in law is true.

The Supreme Court approved the following five principles for an estoppel by convention to arise:

1:	The common assumption must be expressly or impliedly shared by the parties not merely understood by them;
2:	The party raising the estoppel must have <i>“assumed some element of responsibility for it... in the sense of leading the other party to understand they would rely on it”</i> ;
3:	The person raising the estoppel must have relied on the common assumption;
4:	Reliance must be apparent in some subsequent mutual dealing between the parties; and
5:	Some detriment must have been suffered by the person defending the estoppel or some benefit accrued to the other party so that it would be unconscionable to assert the true legal position.

HOW TO ANSWER AN MCQ ON CONSIDERATION

STEP 1:	Does the MCQ involve a new contract being formed or an issue with variation of an existing contract? Remember that a variation contract is itself a new contract and so any variation must also meet all of the usual requirements of a contract.
STEP 2:	Decide what is the issue with consideration. There are only a few potential issues: The consideration is <u>not good consideration</u> because it does not meet one or more of the criteria. ASK: • Is it past consideration? • Is the consideration flowing from the promisee to the promisor? If not, it is not valid. • Is the consideration sufficient? Remember that this does not mean adequate. • Is it performance of an existing obligation? • Is it in respect of a duty owed to a third party? • Is it a promise to pay more? Remember that this will only be enforceable if some extra value is given. • Is it a promise to pay less? If so, it will be invalid unless the payment is made in a different way, or there is a promissory estoppel, or a part payment is made by a third party in circumstances where a fresh contract arises between that third party and the promisor.
STEP 3:	Pick the most appropriate answer.

INVESTIGATING TITLE

SEARCHES & ENQUIRIES

Searches will be carried out by any party acquiring land, whether that is freehold or long leasehold. Certain tenants entering into new leases may also conduct searches.

IDENTIFY	the potential issues;
CONSIDER	why those issues could cause problems for your client; and
SOLVE	know what options are available to the client. In an MCQ there will always be one answer which is clearly the best.

Run through this checklist of potential issues:

1:	Description of land
-----------	----------------------------

Is it correct and in line with the client's expectations?

2:	Rights / easements
-----------	---------------------------

This will most commonly be a right of way. Consider the following:

ADEQUACY	Is the easement adequate for the client's needs? (E.g. if considering a right of way, is the roadway wide enough to allow suitable vehicles through?) If it is not adequate, a Deed of Variation can be requested from the owner of the servient land.
MAINTENANCE	Is the easement in need of maintenance? This could mean ongoing costs
ADOPTION	In the case of a right of way, does the Local Authority have any plans to adopt it? This should be revealed by the results of Local Authority Search CON29 . If so, this may mean that the client incurs costs to bring the road up to the standard required by the Authority, but that after this the client will save on ongoing maintenance costs.
REGISTRATION	Has the right been registered? For registered land, check the Charges Register of the servient land. If the servient land is unregistered, check the Land Charges Register. You should also check if there is a caution against first registration by searching the Index Map.

3: Is the Title Absolute?

Any mortgagee is likely to require a client to show that they have Title Absolute to the land as a pre-condition to any loan. Title Absolute is the best form of title that a landowner can have – it means that they have the strongest possible proof that they are the lawful owners of the land.

TITLE ABSOLUTE	Shows that LR is satisfied that the Seller is the true and proper owner.
QUALIFIED TITLE	Ownership has only been established for a short period of time, or there are reservations or missing documents – can be upgraded to absolute if the issues are rectified.
POSSESSORY TITLE	Where the Seller is in actual occupation without documentary evidence as to how the property was acquired. This can be upgraded to Title Absolute after someone has owned the land for 12 years, provided no adverse claims against it have been made during that period.
GOOD LEASEHOLD TITLE	Where the Tenant cannot provide evidence of the Landlord's title.

4: Check that the Registered Proprietor of the land is the same person as the Seller

Have the following checks been carried out - depending on who the seller/proprietor is?

JOINT TENANTS ("JTs") HOLD LEGAL ESTATE

Where more than one person is a legal owner, assume that the beneficial estate is held as a joint tenancy unless there is a **restriction on the Proprietorship Register** (which will look something like this: "*no disposition by a sole proprietor...*"). If there is, that means there has been a severance of the joint tenancy at some point, and so the beneficial estate is now held as a tenancy-in-common. Check how many of the JTs or TiCs are surviving:

- **All JTs alive** – all of them must execute the deed.
- **All Tenants-in-Common ("TiCs") alive** – all of them must execute the deed.
- **One surviving JT** – the survivor can execute as both the legal and beneficial interests are vested in them. Remember that the Land Registry ("LR") will also need to see the **death certificate(s)** (or a certified copy) for the deceased JT(s).
- **One surviving TiC** – the purchaser can overreach all beneficial interests if another trustee is appointed, and the purchase monies are paid to both the surviving TiC and that second trustee.

An exception is made if there is a Personal Representative ("PR"), in which case there is no need to appoint another trustee to overreach). **Remember** that the LR needs to see both the **death certificate(s)** of the deceased TiC(s) and also the **deed of appointment** of the second trustee, if relevant.

COMPANIES	Check name, company number and solvency at Companies House (“CH”). Is an overseas company registered? (Companies can execute deeds.)
INDIVIDUALS	Can execute deeds.
PERSONAL REPRESENTATIVES	The Buyer needs to see the PRs’ Grant of Representation – PRs must then assent to the sale in writing (use a deed), and all must execute. Remember that payment to one PR overreaches any beneficial interests, as above.
ATTORNEY	The Buyer needs to see a certified copy of the Power of Attorney, check that it was validly granted, has not been revoked and that this property sale is within the attorney’s powers. REMEMBER: the sale can still be valid if the power has been revoked provided that the buyer is unaware of this.
MORTGAGEE	Buyer must check that a power of sale exists (inspect the mortgage deed) and has arisen.

5: Are there any leases over the land?

Advise the client that they could be bound by them and so become a landlord on purchase.

6: Are there any easements burdening the land?

For example, rights of way over the land enjoyed by a neighbour. You will need to advise the client on their enforceability and potential impact on the client. Refer back to the Land Law section of the guide.

7: Check the mortgages

There must be an **undertaking from the Seller’s solicitor to discharge the Seller’s mortgage** – otherwise the Buyer could be bound by the mortgage. The Seller must discharge the mortgage using either a **DS1**, Electronic Discharge (“ED”) or an **e-DS1**.

8: Check for covenants

Are there any positive covenants (where an indemnity was given by the previous owner(s) or restrictive covenants? If so, go through the steps below:

STEP 1:

Will the covenant be enforceable against the buyer?

You may want to refer back to the Land Law section of the guide.

STEP 2:	Will the covenant be a problem for the buyer? Are there any continuing, past or future breaches of the covenants? Has the previous owner been breaching the covenant? Will the Buyer want to breach it? Consider the use they want to make of the land (e.g. a restrictive covenant preventing the Buyer from using the land for heavy industry may not be a problem if they want to open a shop). Apply the facts in the scenario – is this covenant a problem for this Buyer?
STEP 3:	Find out who has the benefit of those covenants. The Person with the Benefit, or “PWB” can be determined via a search of the Index Map.
STEP 4:	Is there an available solution? Solutions vary depending on the timing of the breach and the age of the covenant. • A past breach, where the covenant is >50 years old – take out insurance (*conduct point - remember that s. 19 FSMA limits a solicitor’s ability to advise on, or broker insurance). Do not tell the PWB of the breach. • A past breach, where the covenant is <50 years old – seek the PWB’s consent. • Intend to breach in future – seek the consent of PWB or obtain insurance. • Any, e.g. where the PWB will not give consent – go to the Lands Tribunal to have the covenant discharged. NOTE: application to the tribunal is a last resort, as it will take a long time, cost a lot, and in any event the tribunal may decide against the client. It is only for restrictive covenants. REMEMBER: the beneficiary of a covenant has the right to modify or vary restrictive covenants.

9: Are there any other charges not on the register?

The following unregistered charges could override a purchase, and so the Buyer must be aware that they could be bound by them:

- **Interests of persons in actual occupation.**
- **Leases** – but only if ≤ seven years in length, or ≤ 21 years if granted before 13 October 2003.
- **Easements** – only legal easements created under the rule in *Wheeldon v Burrows* and equitable easements created before 13 October 2003 override.

The Buyer’s solicitor must **raise requisitions** (i.e. make enquiries) with the Seller’s solicitor and **inspect the property** in order to check for such interests.

10: Any issues on the enquiries before contract?

The **CPSE.1** is the questionnaire on which the Seller answers the Buyer's questions in commercial transactions. Forms **TA 6-10** are used for most residential questions. The Seller could be liable for **misrepresentation** if they have lied on either questionnaire. The Seller must also provide an Energy Performance Certificate.

11: Any issues visible on inspection?

Advise that a structural survey should be carried out by a professional surveyor or structural engineer.

12: Possibles environmental issues – contaminated land?

Where there is "*significant harm*" or the possibility of harm or water pollution.

Check:

- Is there any hint of contamination on the facts (e.g. there was previously a warehouse on the land which could have stored industrial chemicals)? If so, it is advisable that a Phase I inspection / survey is carried out. If anything is found, the Buyer may need to commission an expensive Phase II inspection.
- Where there is pollution on the land, it is the original polluter who is responsible, but beware that the current owner will be liable if the polluter is untraceable and the local authority serves a Remediation Notice. To prevent the Buyer becoming liable, ensure that the Seller cleans up – and check on the **CON29** whether the Local Authority has served, or will serve, a Remediation Notice.
- The Buyer may need to do more detailed searches, e.g. for flood risk or coal mining. Consider the answers in the **CON29M** as to whether this could be needed.

13: Drainage and water

Is the property connected to the mains water and a public sewer? Lateral drains should now all have been adopted by the local utility company. Check this – ask the utility supplier if it is commercial property, or commission a **CON29DW** if residential.

14: Chancel repair liability?

NOTE: there was a requirement that all such liabilities should be registered as of **13 October 2013** and so this should be visible on the **Official Copies** – but the position is not entirely clear. The LR has guidance indicating that it will still accept registrations for notices that lost their automatic protection after 13 October 2013. Currently there is no case law which demonstrates how this works in practice. It is common to search and to take out insurance.

15: Roads

The **CON29** will provide answers as to whether the Local Authority has any plans to adopt any private roads. Where the boundary of a road is unclear the Highways Authority will clarify.

16: Tree Preservation Orders ("TPO") / smoke control orders?

The Buyer will be bound by such orders, so check the **LLC1** to see whether there are any orders over the property.

17: Planning

Check the answers provided by the "*Local Search*" (which is just a term for the **LLC1** & **CON29**) in respect of the following potential issues.

(The points below are a summary – more details on planning issues are explained in the next section.)

IS THE LAND IN A CONSERVATION AREA?

If so, the Buyer will need consent for tree felling / demolition – and planning permissions will generally be harder to obtain. Check that planning permissions for any works carried out from 2013 had been obtained (if required) and that anything before 2013 had Conservation Area Consent.

IS THERE A LISTED BUILDING ON THE LAND?

If so, Listed Building Consent will be needed for any changes – and planning permissions will generally be harder to obtain.

CHANGE OF USE?

Planning permission is needed to change between the classes of use of land that are set out in the **Use Classes Order ("UCO")** unless there is a **General Permitted Development Order ("GPDO")** exception. Check all planning permissions – if there was a change of use recently where no planning permission was granted, then the council **has ten years to enforce**. The Buyer would be bound to use the land in accordance with the use class(es) to which it was restricted previously.

BUILDING WORKS?

Planning permission is needed, unless it is a minor permitted development – the council has ten years to enforce in respect of a breach of the planning regulations. If the Seller has carried out recent works without planning permission, the Buyer must insist that the necessary permissions are obtained prior to exchange. Be aware that permitted development rights can be withdrawn by a Local Authority when planning permission is granted, so that all subsequent developments, no matter how minor, will require planning permission.

**BUILDING
REGULATIONS**

These must be complied with for any building works, and there is no time limit on enforcement. Has the seller complied? If not, the Local Authority can inspect and issue a **Regularisation Certificate** – otherwise the Buyer could be bound to carry out expensive remediation works to ensure compliance.

18: Are there any public rights of access over the land?

Answers will be revealed on the **CON29**.

Always search by the following means and **always advise carrying out a physical inspection/survey** of the land.

We have given you search numbers although you will not need to know them for the MCQs – they will be useful to you when you enter practice:

- Official copies (*see below for more details*);
- Pre-contract enquiries form;
- Register of Local Land Charges – Requisition for Search and Official Certificate of Search **LLC1**; (this information is being migrated to HM Land Registry, once the information has migrated the search will be conducted there)
- Chancel repair search (*see above*);
- Enquiries of Local Authorities - **CON29**;
- **CON290** (a series of optional supplementary questions to **CON29** on a range of topics, such as pollution, noise abatement, urban development areas and pipelines);
- **CON29DW** (drainage and water);
- Environmental searches (*see above*); and
- Highways search.

If **unregistered**, always also search:

- the Index Map; and
- the Land Charges registry using form **K15**.

Other searches to perform **if the facts suggest** there might be an issue:

- **CON29M** (mining);
- Companies House search;
- **K16** search for bankruptcy (where acting for a lender against an individual borrower);
- Commons registration search;
- Canals / rivers search; and
- Railways.

NOTE: when a solicitor is acting for a vendor and has replied to pre-contract enquiries and something occurs to make an answer inaccurate, there is a duty to advise the purchaser's solicitors of the change.

ANALYSING OFFICIAL COPIES

EXAMPLE OFFICIAL COPY

- TITLE NUMBER : RE32510

A: PROPERTY REGISTER

OXFORDSHIRE: OXFORD

1. (3 July 1986) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 14 Rayleigh Road, Oxford, OX1 3NP.
2. (3 July 1986) The land tinted yellow on the title plan has the benefit of the following rights granted by the Conveyance dated 27 July 1968 referred to in the Charges Register: "TOGETHER WITH the benefit of a right of way on foot only over that part of the shared accessway belonging to 14 Rayleigh Road."
3. (3 July 1986) The land has the benefit of the rights granted by the Transfer dated 21 August 1974 referred to in the Charges Register.

NOTE: the Property Register describes the land and estate comprised in the title. It details the location and gives a brief description of the property. This is usually the address. It may include reference to rights that benefit the land, such as legal easements.

B: PROPRIETORSHIP REGISTER

TITLE ABSOLUTE

1. (28 September 2001): PROPRIETOR: PETER SMITH and ANNE SMITH of 14 Rayleigh Road, Oxford, OX1 3NP.
2. (28 September 2001) The price stated to have been paid on 2 September 2001 was £500,000.
3. (28 September 2001) Except under an order of the registrar no disposition by the proprietor of the land is to be registered without the consent of the proprietor of the charge dated 2 September 2001 in favour of the Goldfarm Building Society referred to in the Charges Register.
4. (28 September 2001) RESTRICTION: No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.

NOTE: the Proprietorship Register records the quality of the title, for example absolute or limited title. It identifies the owner of the property, giving details such as their name and address. It shows whether there are restrictions on the power to sell the property or otherwise deal with the land. It may give a price paid for the land on a specified date.

 C: CHARGES REGISTER - ABSOLUTE FREEHOLD

1. (3 July 1986) A Conveyance of the land tinted pink on the title plan dated 18 December 1960 made between (1) Gary Phillips (Vendor) and (2) George Roney (Purchaser) contains the following covenants: -

“THE Purchaser hereby covenants with the Vendor so as to bind the land hereby conveyed into whosoever hands the same may come that the Purchaser and his* successors in title will not use the premises hereby conveyed for any purpose other than as a flower shop.” (*NOTE: in 1960 the pronoun “his” would have been used).

2. REGISTERED CHARGE dated 2 September 2001 to secure the moneys including the further advances therein mentioned.

PROPRIETOR Goldfarm Building Society of Manor House, High Road, Oxford, OX4 4NP.

NOTE: the Charges Register identifies charges and other matters that affect the land.

HOW TO ANSWER AN MCQ ON THE ANALYSIS OF OFFICIAL COPIES

1:	Identify the issue. a) In which register does the issue appear? Property, Proprietorship or Charges? b) What is the number of the entry?
2:	What does the entry say and why is this a potential problem? a) Does it relate to a particular sensitivity on the part of the client or to a particular way in which they wanted to use the land? b) Is it a more general problem relating to the land itself (e.g. environmental issues or lack of planning permission)?
4:	What is the appropriate action in the circumstances? a) Initially: i) Make enquiries of the seller; ii) Make enquires at the Land Registry; and/or iii) Inform the client. b) Does further action need to be undertaken? i) Surveys ii) Expert advice c) How can the issue be solved. Possible solutions are: i) Defective title indemnity insurance ii) Putting a special condition into the contract iii) Appointing a second trustee

PROFESSIONAL CONDUCT POINT

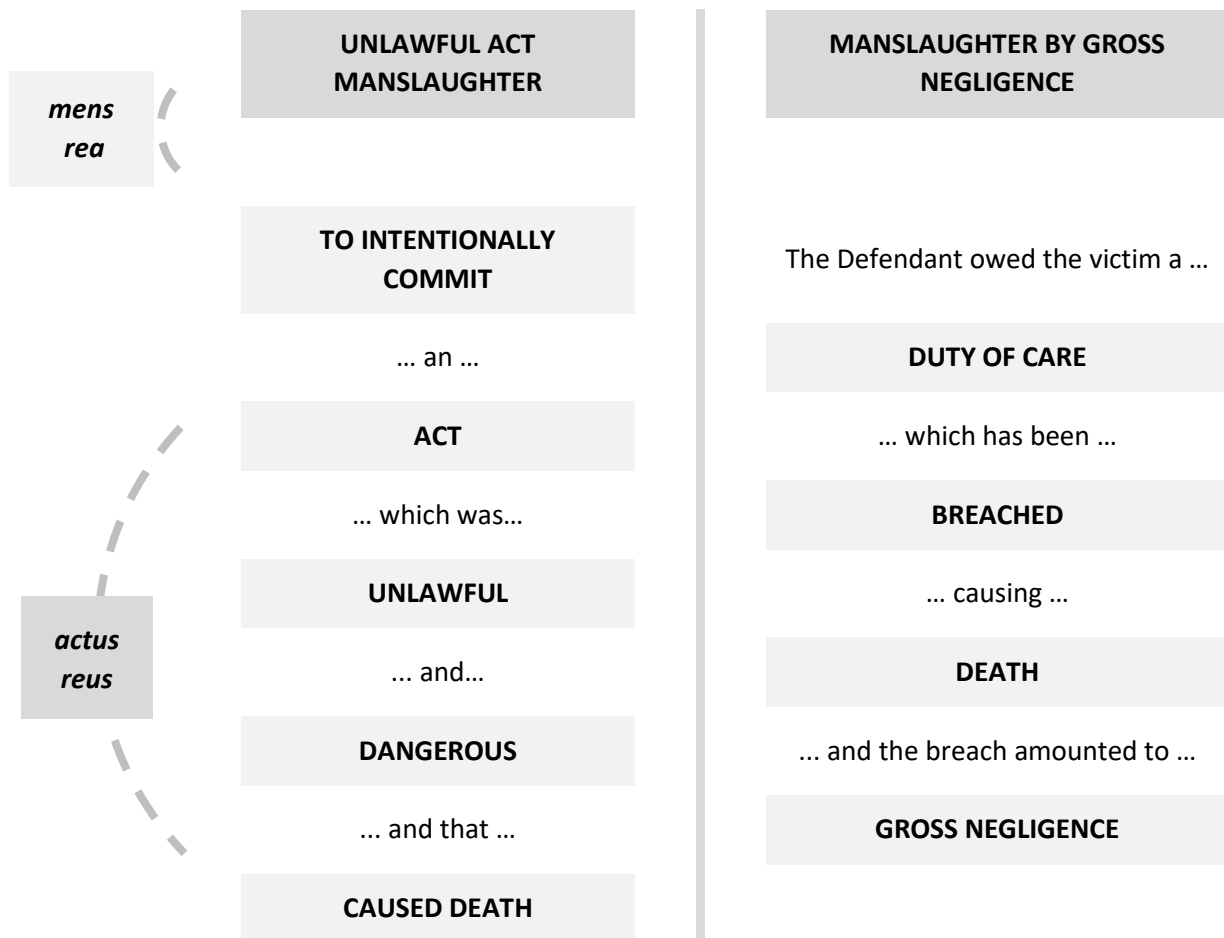
Remember the general prohibition in **s.19 Financial Services and Markets Act 2000**. Providing advice on insurance is a regulated activity, which may not be carried out unless the advisor is authorised or exempt. You should remember this in relation to the suggestion regarding insurance. (*You will find more detail on this in the Legal Services section of this guide.*)

EXAMPLE OF OFFICE COPIES ANALYSIS

1:	There is a potential issue in the Proprietorship Register at entry 3 : no disposition without the consent of the proprietor of Goldfarm Building Society.
2:	The entry states: " <i>RESTRICTION: No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.</i> " This means that a single owner cannot sell the property on their own as the property is owned beneficially as tenants in common .
3:	This may be an issue for the client if one of the owners does not want to sell the property or if one owner is deceased; in that case a second trustee will need to be appointed . If a second trustee is appointed, the purchase price should be paid to both trustees to overreach any beneficial interest which may remain under the trust. This is a safe method to ensure that the buyer is free from liability in relation to the second trustee.
4:	The client will have to ensure that a new trustee has been appointed and will require evidence of the appointment. If the second owner is deceased, it may be possible for the seller to prove that the deceased's share in the property passed to the seller.

MANSLAUGHTER

INVOLUNTARY MANSLAUGHTER		RELATED OFFENCES	
1:	Unlawful Act Manslaughter	3:	Killing a Child or Vulnerable Adult
2:	Manslaughter by Gross Negligence	4:	Corporate Manslaughter



There are two forms of **involuntary** manslaughter:

1:	Unlawful Act Manslaughter
2:	Manslaughter by Gross Negligence

NOTE: that involuntary manslaughter is distinct from **voluntary** manslaughter, which results from a successfully raised partial defence to murder (*see the Murder chapter*).

UNLAWFUL ACT MANSLAUGHTER

Also known as “*constructive*” manslaughter, the definition of unlawful act manslaughter derives from **LJ Salmon’s** judgment in **DPP v Newbury and Jones**:

UNLAWFUL ACT MANSLAUGHTER

*“[the Defendant] **intentionally** did an act which was **unlawful** and **dangerous** and that act inadvertently **caused death**.”*

For example, D intentionally injecting V with heroin, which leads to V’s fatal overdose.

There are **four requirements** for unlawful act manslaughter:

1: D must intentionally commit an act

This is the *mens rea* requirement. All that is required is intention to do the act itself, not cause the deadly outcome.

It must be a positive act – the offence **cannot be based on an omission or on negligence**.

2: The deliberate act must be unlawful

This means that the act itself must be a crime capable of prosecution, for example an offence against the person.

Only a criminal act will count as **unlawful**. This does not include a mere civil wrong such as a tort. (In a situation involving a tort, consider gross negligence manslaughter instead).

It is necessary to **prove that D had both the AR and MR of the underlying offence**, e.g. the AR and MR for intention to cause GBH.

The act need not be aimed at the ultimate victim (*see transferred malice in the General Principles chapter*).

A Defendant can apply any of the usual defences to the unlawful act.

3: The act must be dangerous

The act will be “*dangerous*” if the reasonable person **foresees the risk of some harm**, not necessarily the serious harm that actually occurred. This is an **objective** standard. There is also a subjective *mens rea* element requiring some foresight: **D must have foreseen that physical harm** might occur.

The objective part of the test is very important: the jury will take into account facts that make the act dangerous that are **known to the Defendant; or would be obvious to the reasonable person**.

In a caselaw example a post office robbery led to the death of a bystander due to a heart attack. This heart vulnerability was not something that was either known to the Defendants, or obvious to a reasonable person. By contrast, in a different case, where a violent attack was perpetrated against an elderly and frail person and they died, the risk of that should have been obvious to a reasonable person.

4: The act must cause the death

The usual causation rules apply (*see the General Principles chapter*).

MANSLAUGHTER BY GROSS NEGLIGENCE

Manslaughter by gross negligence occurs when D, by grossly negligent acts or omissions, breaches a duty of care which D owes V, thereby causing V's death. The concept of negligence is not simply broken down into AR and MR requirements, so consider the following four requirements:

1: D must owe a duty of care

The normal rules of negligence apply. This means that there can be criminal liability for **omissions** as well as commissions.

The prosecution must establish that D owed V a duty of care. Ultimately, the judge (not jury) shall determine whether a duty has arisen. Situations in which duties have been found for the purposes of gross negligence manslaughter include:

Medical professional and patient	Ship owner and crew
Landlord and tenant	Electrician and homeowner

NOTE: a key difference from tort law: the defence of illegality (*ex turpi*) does not apply to manslaughter. For example, when a lorry driver failed to open an air vent when smuggling illegal immigrants, thereby causing their fatal asphyxiation, they were convicted despite their victims having been committing an illegal act.

2: D must have breached that duty

The normal rules of negligence apply.

3: The breach must cause V's death

The normal rules of causation apply (*see the General Principles chapter*).

This can be complex. In caselaw a man gave drugs to his girlfriend and then watched her become progressively more ill without getting medical attention for her. She died and the evidence was that she would have had "*a significant or substantial*" chance of survival had she been treated. The man was not guilty of manslaughter because the court held that the prosecution had to prove that the possible medical intervention **would** have saved her life.

4: It must have been reasonably foreseeable that the breach could cause death

The test here is what was foreseeable to D **at the time of the breach** - not what would have been foreseeable had the breach not occurred.

5: That breach must amount to gross negligence

“Gross” negligence is negligence to such a degree that it **amounts to a crime against the state and is deserving of punishment**. *“Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear and unambiguous. It is immediately apparent, striking and glaring, rather than something that might become apparent on further investigation.”*

Remember that there must be a **foreseeable** risk of death. Caselaw examples:

- a landlord failed to fix a carbon monoxide leak of which he was aware; the escaping gas caused the foreseeable death of a tenant; and
- a ship’s captain sailed his boat close to rocks without ensuring that he had sufficient fuel on board to navigate away safely.

ELEMENTS OF GROSS NEGLIGENCE

The same standards apply to gross negligence in a medical context; the risk of death must be **serious and obvious**, not merely a remote possibility or one that would only become apparent on further investigation.

For example, where an incompetent anaesthetist killed a patient accidentally, or where the patient died from atrocious post-operative care.

NOTE: several separate acts can **cumulatively** constitute one act of gross negligence.

Expert evidence can assist the jury in reaching a decision, but whether the negligence amounts to gross negligence **must be** a question for the jury.

D will be liable where D has **personal responsibility** even if others are partly responsible, although if others are wholly responsible then D will not be.

There must be a clear connection at a point of time as to what the Defendant should have done when the threshold of *“serious and obvious risk of death”* was reached and on the prospects of survival at that point.

There is no requirement for a specific MR, although D’s state of mind and what D knew will be taken into account when considering the above points, particularly in the alleged breach of duty.

DEFENCES

The SQA syllabus only requires you to know about intoxication and defence (*see the Defences chapter*).

REMEMBER: the special defences to murder (**loss of control** and **diminished responsibility**) do not apply to manslaughter, only to murder. If successfully raised in a murder case, these special partial defences will instead lead to a conviction of **voluntary manslaughter**.

HOMICIDE OFFENCE FLOWCHART

(where D is an individual)

