OCR

OXFORD CAMBRIDGE AND RSA EXAMINATIONS

General Certificate of Education Advanced Level

LAW

PRE-RELEASED SPECIAL STUDY MATERIAL

2576/RM

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INSTRUCTIONS TO CANDIDATES

This copy may **not** be taken into the examination room.

2576 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIALS

SOURCE 9

Extract from *Law reform and the Law Commission* by J H Farrar (1974) Sweet & Maxwell pp 28-9

Section 3 of the Law Commissions Act 1965 defined the duties and powers of the Law Commissions. First it was their basic duty to take and keep the law under review with a view to its systematic development and reform, including in particular codification, the elimination of anomalies, the repeal of obsolete enactments, consolidation and generally the simplification and modernisation of the law. It is to be noted that although the act contemplated codification it did not in fact require it. To execute their basic duty they were authorised to consider proposals for reform, to submit to the appropriate Minister (i.e. for England and Wales, the Lord Chancellor) programmes of law reform, and then, when approval had been given, to undertake the examination of particular items in the programme and to formulate proposals for reform by means of draft Bills or otherwise.

Where the programme covered a branch of law which seemed likely to be controversial in a political sense or to have a broad social trend it was unlikely that the detailed review would be entrusted to the Commissioners themselves. In cases like that it was thought by the Government that it would be more appropriate that the matter should be referred in accordance with the usual practice to a Royal Commission or a Departmental Committee.

The Commissioners were further authorised to prepare (at the request of the Minister), comprehensive programmes of consolidation and statute law revision and to undertake the preparation of draft Bills, to give advice and information to government departments and other bodies at the instance of the government, together with proposals for reform of any branch of law and lastly, the Commissioners were authorised and instructed to obtain such information on other legal systems as appeared to them likely to facilitate the performance of any of their functions.

The Act set out certain procedures with regard to Law Commission business. Section 3(2) provided that the Minister should lay before Parliament any programmes prepared by the Law Commission and approved by him and any proposals for reform formulated by the Commission pursuant to the programmes. Each Commission should make an annual report to the Minister of their proceedings and the Minister should lay the report before Parliament with such comments (if any) as he/she thought fit (Section 3(3)).

The general effect of these provisions was described by Sir Leslie Scarman in his Manitoba Law School Foundation Annual Lecture in 1967, by the Act, he said, the law of England and Scotland shifted its emphasis from reliance on judicial lawmaking to reliance on legislation to reform the law. It meant that Parliament has accepted “a greater, continuing responsibility for the reform of the law than in our history it has ever accepted before.” However, “Parliament in matters of law reform, is an extremely amateur and indolent body. It requires advice, it requires spurring on and to be stimulated into action.’’ The Act was, therefore, an attempt to provide Parliament with the advice which it needs in order to reach a skilled decision and to provoke it to action.

SOURCE 10

Extract from Atiyah, 'Consideration: A Restatement' in Atiyah, *Essays on Contract*, OUP, 1986

"… the truth is that the courts have never set out to create a doctrine of consideration, they have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced … When the courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it. It seems highly probable that when the courts first used the word 'consideration' they meant no more than there was a 'reason' for the enforcement of a promise. If the consideration was 'good', this meant that the court found sufficient reason for enforcing the promise."

SOURCE 11

Extract from the judgment in *Stilk* v *Myrick* (1809) 2 Camp 317; 170 ER 1168

During a voyage to the Baltic, two sailors deserted ship. The captain agreed to share the wages of the deserters between the remaining sailors if they sailed the ship home short handed. On their return to the UK the extra money was not paid, and when sued the captain argued, successfully, that the remaining sailors were only carrying out their existing duty.

LORD ELLENBOROUGH:

… There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration …

SOURCE 12

Extract from the judgment in *Ward* v *Byham* [1956] 2 All ER 318

A single mother was promised £1 a week allowance for the child providing she could prove that she was "well looked after and happy". The father later stopped making these payments and the mother sought to enforce the promise. It was held that although the mother was required by statute to maintain her child, she had gone beyond that statutory duty by complying with the father's request, and this was a sufficient consideration for the father's promise to pay.

DENNING LJ: I approach the case, … on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for

the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise, and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week.

SOURCE 13

Extracts from the judgment in *Williams* v *Roffey and Nichols (Contractors) Ltd* [1991] 1QB 1 (CA)

GLIDEWELL LJ: In his address to us, counsel for the defendants outlined the benefits to the defendants which arose from their agreement to pay the additional £10,300 as (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the sub-contract, (ii) avoiding the penalty for delay and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work. However, counsel submits that, though the defendants may have derived, or hoped to derive, practical benefits from their agreement to pay the 'bonus', they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his sub-contract, i.e. continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement.

Counsel for the defendants relies on the principle of law which, traditionally, is based on the decision in *Stilk* v *Myrick* …

… [T]he present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

As I have said, counsel for the defendants accepts that in the present case by promising to pay the extra £10,300 the defendants secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress.

If it be objected that the propositions above contravene the principle in *Stilk* v *Myrick* I answer that in my view they do not: they refine and limit the application of that principle, but they leave the principle unscathed, e.g. where B secures no benefit by his promise. It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day.

It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants' promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement.

BRANDON LJ While consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early nineteenth century when *Stilk* v *Myrick* (1809) 2 Camp 317, 170 ER 1168 was decided by Lord Ellenborough CJ. In the late twentieth century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk* v *Myrick* is either necessary or desirable. Consideration there must still be but in my judgment the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.

The plaintiff has got into financial difficulties. The defendants, through their employee Mr Cottrell, recognised that the price that had been agreed originally with the plaintiff was less than what Mr Cottrell himself regarded as a reasonable price. There was a desire on Mr Cottrell's part to retain the services of the plaintiff so that the work could be completed without the need to employ another sub-contractor. There was further a need to replace what had hitherto been a haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat. These were all advantages accruing to the defendants which can fairly be said to have been in consideration of their undertaking to pay the additional £10,300. True it was that the plaintiff did not undertake to do any work additional to that which he had originally undertaken to do but the terms on which he was to carry out the work were varied and, in my judgment, that variation was supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates.

SOURCE 14

Extract from the judgment in *Jackson* v *Horizon Holidays Ltd* [1975] 1WLR 1468 (CA)

The plaintiff booked a family holiday with the defendants, the holiday being of a high standard, with excellent facilities and meals. Various breaches of these terms occurred and the plaintiff sued for damages for the loss of facilities and disappointment on behalf of himself, his wife and two small children. The claim raised the issue of whether those who were not parties to the original contract should receive the benefit of the claim.

LORD DENNING MR: We have had an interesting discussion as to the legal position when one person makes a contract for the benefit of a party. In this case it was a husband making a contract for the benefit of himself, his wife and children. Other cases readily come to mind. A host makes a contract with a restaurant for a dinner for himself and his friends. The vicar makes a contract for a coach trip for the choir. In all these cases there is only one person who makes the contract. It is the husband, the host or the vicar, as the case may be. Sometimes he pays the whole price himself. Occasionally he may get a contribution from the others. But in any case it is he who makes the contract. It would be a fiction to say that the contract was made by all the family, or all the guests, or all the choir, and that he was only an agent for them. Take this very case. It would be absurd to say that the twins of three years old were parties to the contract or that the father was making the contract on their behalf as if they were principals. It would equally be a mistake to say that in any of these instances there was a trust. The transaction bears no resemblance to a trust. There was no best fund and no best property. No, the real truth is that in each instance, the father, the host or the vicar, was making a contract himself for the benefit of the whole party. In short, a contract by one for the benefit of third persons. What is the position when such a contract is broken? At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit. But when that one does sue, what damages can he recover? Is he limited to his own loss? Or can he recover for the others? Suppose the holiday firm puts the family into a hotel which is only half built and the visitors have to sleep on the floor? Or suppose the restaurant is fully booked and the

guests have to go away, hungry and angry, having spent so much on fares to get there? Or suppose the coach leaves the choir stranded half-way and they have to hire cars to get home? None of them individually can sue. Only the father, the host or the vicar can sue. He can, of course, recover his own damages. But can he not recover for the others? I think he can.

I consider it to be an established rule of law that where a contract is made with A for the benefit of B. A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.

Take the instance I have put. The guests ought to recover from the restaurant their wasted fares. The choir ought to recover the cost of hiring the taxis home. There is no one to recover for them except the one who made the contract for their benefit. He should be able to recover the expense to which they have been put, and pay it over to them. Once recovered, it will be money had and received to their use. (They might even, if desired, be joined as plaintiffs.) If he can recover for the expense, he should also be able to recover for the discomfort, vexation and upset which the whole party have suffered by reason of the breach of contract, recompensing them accordingly out of what he recovers.

Applying the principles to this case, I think that the figure of £1,100 was about right. It would, I think, have been excessive if it had been awarded only for the damage suffered by Mr Jackson himself. But when extended to his wife and children, I do not think it is excessive. People look forward to a holiday. They expect the promises to be fulfilled. When it fails, they are greatly disappointed and upset. It is difficult to assess in terms of money; but it is the task of the judges to do the best they can. I see no reason to interfere with the total award of £1,100.

SOURCE 15

Law Revision Committee (6th Interim Report, Cmnd 5449, 1937)

Where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name subject to any defence that would have been valid between the contracting parties.

SOURCE 16

Extract from the judgment in *Darlington BC* v *Wiltshier Northern Ltd* [1995] 1WLR 68

STEYN LJ: The principal value of the consultation paper lies in its clear analysis of the practical need for the recognition of a contract for the benefit of third parties, and the explanation of the unedifying spectacle of judges trying to invent exceptions to the rule to prevent demonstrable unfairness. No doubt there will be a report by the Law Commission in the not too distant future recommending the abolition of the privity of contract rule by statute. What will then happen in regard to the proposal for legislation: The answer is really quite simple: probably nothing will happen. But on this occasion I can understand the inaction of Parliament. There is a respectable argument that it is the type of reform which is best achieved by the courts working out sensible solutions on a case by case basis, e.g. in regard to the exact point of time when the third party is vested with enforceable contractual rights.

SOURCE 17

Extracts from *Privity of Contract: Contracts for the Benefit of Third Parties, 1996* Law Commission Report 242 (Cm 3329)

3.1 A first argument in favour of reform, as stated in the Consultation Paper, is that the third party rule prevents effect being given to the intentions of the contracting parties. If the theoretical justification for the enforcement of contracts is seen as the realisation of the promises or the will or the bargain of the contracting parties, the failure of the law to afford a remedy to the third party where the contracting parties intended that it should have one frustrates their intentions and undermines the general justifying theory of contract.

3.2 A second argument focuses on the injustice to the third party where a valid contract, albeit between two other parties, has engendered in the third party reasonable expectations of having the legal right to enforce the contract particularly where the third party has relied on that contract to regulate his or her affairs.

3.3 In a standard situation, the third party rule produces the perverse, and unjust, result that the person who has suffered the loss (of intended benefit) cannot sue, while the person who has suffered no loss can sue. This can be illustrated by reference to *Beswick* v *Beswick*. In that case, as we have seen, the House of Lords held that the widow could not enforce the promise in her personal capacity, since the contract was one to which she was not privy. However, as administratrix of her husband's estate, she was able to sue as promisee, albeit that she could only recover nominal damages because the uncle, and hence his estate, had suffered no loss from the nephew's breach. Hence we see that the widow in her personal capacity, who had suffered the loss of the intended benefit, had no right to sue, while the estate, represented by the widow in her capacity as administratrix, who had suffered no loss, had that right.

(a) A third party shall have the right to enforce a contractual provision where that right is given to him – and he may be identified by name, class or description – by an express term of the contract:
(b) A third party shall also have the right to enforce a contractual provision where that provision purports to confer a benefit on the third party, who is expressly identified as a beneficiary of that provision, by name, class or description.

SOURCE 18

Extract from Stone R, *Contract Law*, 2nd edition, Cavendish, 1994

Because of the need for fairly fundamental reform, the Commission is of the view that this will have to be achieved by legislation. It then has to consider exactly what the scope of the reform should be. Should further specific exceptions to the third party rule be enacted to deal with what are seen as the most pressing areas? Or should there simply be a general legislative provision allowing a third party to sue on a contract made for his or her benefit, which would then be interpreted by the courts? The Commission's view is that tinkering with exceptions, or setting out a general principle to be fleshed out by the courts, would not lead to satisfactory reform. Rather the Commission proposes that reform should take the form of the enactment of a detailed legislative scheme granting third parties the right to enforce contracts made for their benefit. What form should this scheme take?

The simplest form would be to say that third parties should be able to sue whenever a contract happens to benefit them. The Commission rejects this as being unacceptably wide, and opening the floodgates to litigation. It should only be where the contracting parties intend to confer a benefit on the third party that a right of action should arise. Even this goes too far,

however. The Commission gives the example of a contract between a building company and a highway authority for the construction of a new road. The road may be intended for the benefit of all roadusers but it would surely not be acceptable for all of them to have a right of action, for example, in the event of delay in completion of the project. The Commission, therefore, recommends that the range of potential third party plaintiffs should be narrowed to those on whom the parties to the contract intend to confer an enforceable legal obligation. This intention need not be expressly stated, but may be inferred from all the circumstances … The finding of an intention will presumably have to be decided on an objective basis, since the defendants in situations such as those in *Beswick* v *Beswick* or *Dunlop* v *Selfridge* would be unlikely to accept that they intended to create an enforceable benefit. The court would have to ask what the reasonable person, looking at the agreement, would have taken the parties to have intended.

SOURCE 19

Extract adapted from *Recovering Losses under Someone Else's Contract* by Paul Newman
(February 2000) The Legal Executive Journal.

The Contracts (Rights of Third Parties) Act 1999 came into force on 11 November 1999. It is very short.

At its heart, the Act provides, which was vigorously opposed in particular sectors of the construction industry, a partial statutory abolition of the common law doctrine of privity of contract. Under Section 1, parties will be able to enforce contractual terms, if either a party to them, or those terms purport to confer a benefit on them. Under Section 1(3), the third parties must be expressly identified in the contract by name or as member of a class or by description even if not in existence at the date of the contract.

Under Section 2, where a third party has rights under a contract, the others may not ordinarily "cancel the contract, or vary it in such a way as to extinguish, or alter his entitlement under that right".

There are complex provisions to make this work, including appeals to the High Court to dispense with third party consent. However, parties will be able to exclude operation of the Act and thereby remove the clear cut simplicity some commentators advocated.

This right of exclusion is to be inferred from Section 1 and certain contracts, those for the carriage of goods, are excluded. How the new Act sits with the existing case law may call for judicial intervention. The common law exceptions are not expressly overturned.

The promisor has defences, including set-off, against the third party, although counterclaims are not referred to.

Section 3 provides that a third party is not to be placed in a better position than the promisee. As an action by both the third party and the promisee could put the promisor at double risk, the courts are allowed to reduce an award to a third party if the promisee has already recovered a sum equivalent to the third party's loss or the amount incurred by the promisee in putting right the loss to the third party.

OCR

Oxford Cambridge and RSA Examinations

Advanced GCE

LAW
LAW OF CONTRACT SPECIAL STUDY

2576

Specimen Paper

Additional materials:
Answer paper

TIME 1 hour 30 minutes

INSTRUCTIONS TO CANDIDATES

Write your name, Centre number and candidate number in the spaces provided on the answer booklet.

Write all your answers on the separate answer paper provided.

If you use more than one sheet of paper, fasten the sheets together.

Answer **all** questions.

INFORMATION FOR CANDIDATES

The number of marks is given in brackets [ ] at the end of each question or part question.

You will be awarded marks for the quality of written communication where an answer requires a piece of extended writing.

In this paper you are expected to show your knowledge and understanding of different aspects of the English legal system and specific areas of Law.

You are reminded of the importance of including relevant knowledge from all areas of your course, where appropriate, including the English Legal System.

*Answer **ALL** questions.*

1. The Law Commission recommends changes to the law on privity in its 1996 report - 'Privity of Contract: Contracts for the Benefit of Third Parties'.

   Critically consider the role of the Law Commission in assisting Parliament to change the law.

   [20 marks]

2. To what extent does the case of *Williams* v *Roffey* (1990) overrule the case of *Stilk* v *Myrick*?

   [20 marks]

3. Discuss why the law on privity is in need of reform.

   [30 marks]

4. Delia reserves places at a millennium party weekend celebration for herself, her husband and two children. The party organisers, Blue Moon, agree to provide accommodation, food and entertainment to make the occasion unforgettable. Unfortunately Blue Moon overbook the accommodation, and at the last minute transfer Delia and her family to a guest house with limited facilities. She wishes to sue for damages, but is told by her solicitor that the law of privity will prevent her from obtaining any compensation for her husband and children.

   Advise Delia on her rights:

   (a) under the existing law; and

   (b) under the Law Commission' proposals for the reform of the law on privity.

   [30 marks]

N.B ***Please note that the exemplar questions on this paper were submitted to QCA before the Contract (Rights of Third Parties) Act 1999 was passed. They should be taken as examples of the type of question that may be set, though future questions would be based on the existence of the relevant statutory changes.***