BUTTERWORTHS HONG KONG

Contract Law HANDBOOK

Fourth Edition

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Contract Law Handbook

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(3) Subsections (1) and (2) apply notwithstanding that the place where the information system is located is different from the place where the electronic record is taken to have been sent or received under subsection (4).

(4) Unless otherwise agreed between the originator and the addressee, an electronic record is taken to have been-
   (a) sent at the place of business of the originator; and
   (b) received at the place of business of the addressee.

(5) For the purposes of subsection (4)-
   (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, or where there is no underlying transaction, the principal place of business of the originator or the addressee, as the case may be;
   (b) if the originator or the addressee does not have a place of business, the place of business is the place where the originator or the addressee ordinarily resides.

(6) Where the originator and the addressee are in different time zones, time refers to Universal Standard Time.'

[Emphasis added]

Note that parties can contract out of the provisions of the Electronic Transactions Ordinance. Note that the wording of the UNCITRAL Model Law on which the Electronic Transactions Ordinance was based, used the word 'retrieved' instead of 'comes to the knowledge of'. Therefore the addressee must be aware of the message in Hong Kong. Given it is unknown how the common law will develop, and which of the two options in the *Chwee Kin Keong v Digilandmall.com* approach will find favour, in the absence of an agreement to the contrary s 19(2) of the Electronic Transactions Ordinance will operate:

(1) If the offer refers to a designated information system, for example, a particular email address, for the acceptance of the offer, the acceptance is deemed to have been received when the offer is received by the system irrespective of whether the recipient has actual knowledge of the reception.

(2) If no designated information system is assigned, acceptance is only received when the message comes to the knowledge of the recipient (ie when they open the email).

Note also in the situation for example of an online bookstore, by submitting the order to the computer server, the computer will normally issue an acknowledgment. Under s 18(1)(c) of the Ordinance, unless otherwise agreed, an electronic record can create a legally binding offer and acceptance and legally bind the 'originator'.

6.5 *Exception – Waiver of communication*

There may be instances in which the offeror waives the need for the acceptance to be communicated to him. Afterall, the rule exists the offeror's protection and he is free to forgo it. The typical example of such waiver would be unilateral contracts, which can be accepted by performing the prescribed conduct stipulated in the offer, and the offeror is then bound to perform his side of the bargain: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

6.6 *Offeror may prescribe method of communication*

Just as the offeror may waive the need of communication, he is also at liberty to limit a specified mode of dealing as giving rise to a valid acceptance. Hence, even though the offer was made through the post, and it is reasonable in the circumstances to reply by post, the offeror can expressly exclude the postal rule by stipulating that acceptance should *only* be made by telephone, or some other method.

Where one mode of communication is specified by the offeror without limiting that mode as the *only acceptable mode*, then any other mode no less advantageous can also constitute acceptance: *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1969] 3 All ER 1593. 'Advantages' in this context usually refers to the speed of the mode in question.

If however, the mode is not specified, the mode can be implied from the circumstances. Also where there is an established course of dealing between the parties the courts will try to save bargains rather than strike them down: *Brogden v Metropolitan Railway Company* (1877) 2 App Cas 666.

6.7 *Silence as a method of acceptance*

Notwithstanding that the offeror is generally free to prescribe any mode of communication or even to waive communication, the limit of his freedom is that he cannot go so far as prescribing silence as acceptance: *Felthouse v Bindley* (1862) 142 ER 1037. Understandably, commerce would be in chaos if binding contracts could be formed by somebody distributing offers in outrageous terms putting the burden of his counterparty to reject him.

However, conduct including silence can amount to communicated acceptance in exceptional circumstances: *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334. In *Rust* the Court of Appeal held that a failure by a proposed insured to reject a proffered insurance policy for seven months justified on its own an inference of acceptance by conduct: see also Treitel, The Law of Contract, (13th Ed, 2010), pp 33-35. In *Kar Ho Development Company Ltd v Axis Investment Ltd* [2001] 1 HKC 86 Mayo VP made the following comments relating to whether non-performance of an obligation can ever as a matter of law capable of constituting an act of acceptance:

> "It all depends on the particular contractual relationship and the particular circumstances of the case … In the different field of

repudiation, a failure to perform may sometimes be given a colour by special circumstances and may only be explicable to a reasonable person in the position of the repudiating party as an election to accept the repudiation. The critical point to be noted is that while the defendant's silence may have indicated that the contract was at an end it could not in any sensible way be interpreted as being the exercise of a right to rescind."

Silence combined with conduct signifying acceptance can amount to a communicated acceptance of an offer: *Brogden v Metropolitan Railway Company* (1877) 2 App Cas 666, 672 per Lord Steyn. See the next section.

6.8 *Acceptance by conduct*

Even though no formal assent is communicated to the offeror, an offer can be accepted by conduct, ie by despatching goods in response to an offer to buy, or by rendering services in response to an offer to request to them: *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325. In the same vein, an offer to supply goods can be accepted by the offeree opening the packaging and using the goods: *Weatherby v Banham* (1832) 5 C & P 228.

Conduct would only have the effect of acceptance if the offeree had the (objectively) intention of accepting the offer: *Khatri v Cooperatieve Centrale Raiffeisen-Boer-enleenBank BA* [2010] EWCA Civ 397. Objective intention refers to whether a reasonable person, having regard to all the relevant background and circumstance of the case, would regard such conduct to evince an intention to accept the offer; the subjective intention of the parties themselves is irrelevant.

The objective test is subject to a 'subjective qualification'; it is not applicable in favour of a party who knows the truth. If the offeror knew that the offeree did not actually intend to accept the offer by his conduct, there will be no acceptance: *Shanghai Tongji Science & Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79, [2004] 2 HKLRD 548 per Ribeiro PJ.

If an offeree understood and accepted the offer according to the natural meaning of the words used, the offeror cannot later say he intended those words to have a different meaning. Likewise, the 'subjective qualification' would displace the objective test if the offeree in fact knew that the offeror did not actually intend the words of the offer to have their natural meaning.

7 Consideration

This follows the common law concept that an agreement which does not reach the requisite formality of a deed, to be legally enforceable, must involve some value given or detriment suffered by one party in return for the other party's

promise. The standard definition of consideration adopted is that in *Currie v Misa* (1875) LR 10 Ex 153, 162 per Lush J:

> 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by another.'

The Courts do not enquire into the adequacy of consideration as long as it is sufficient, ie it has some value in the eyes of the law. Gratuitous promises therefore do not constitute enforceable contracts.

Some important points to remember about consideration:

(1) Consideration moves from the promisee: *Kao Lee & Yip v Euro Treasure Ltd* [1985] 1 HKC 46.

(2) Consideration normally involves the conferring of a benefit or the suffering of a detriment: *Currie v Misa* (1875) LR 10 Ex 153, 162.

(3) The courts will not measure the adequacy of consideration. See *Thomas v Thomas* (1842) 2 QB 851, 859, *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87, [1959] 3 WLR 168, [1959] 2 All ER 701, 103 SJ 561.

(4) Consideration must be sufficient in the eyes of the law. See *Thomas v Thomas* (1842) 2 QB 851, 859, *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87, [1959] 3 WLR 168, [1959] 2 All ER 701, 103 SJ 561.

(5) Forbearance to sue can be sufficient consideration: *Cook v Wright* (1861) B & S 559.

(6) Past consideration is not usually good consideration. But note the difference between past consideration and executed and executory consideration. Note that past consideration can be good consideration if there was an understanding at the time the contract was made that the service would be paid for: *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104.

(7) Performance of an existing public duty cannot usually be good consideration: see *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270.

(8) Existing contractual obligations: payment of a lesser sum on the due day cannot be good consideration for the whole debt: *Foakes v Beer* (1884) 9 App Cas 605, *Pinnel's Case* 5 Rep 117a (important exceptions – can do something additional, can be released by deed, creditors can jointly agree to take a lesser sum in full discharge of the debt, a third party can make a part payment).

(9) Existing contractual obligations: payment of a greater sum to ensure that a service already contracted for is carried out on time can be good consideration: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA).

(10) Existing contractual obligations: in some circumstances, the Doctrine of Promissory Estoppel will prevent the promisee who suspended their legal rights from enforcing those rights retrospectively: see para 22 et seq, below.

However, as explored in Para 7.7 below, the UK Supreme Court has expressed the view, *obiter*, that in view of issues arising from *Williams v Roffey Bros* and *Re Selectmove* [1995] 1 WLR 474 (CA), the decision in *Foakes v Beer* "*is probably ripe for re-examination*": see *MWB Business Exchange Ltd v Rock Advertising Ltd. (SC(E))* [2018] 4 All ER 21; [2018] 2 WLR 1603

7.1 Consideration moves from the promisee

A promise, to be enforceable, must be supported by consideration moving from the promisee (known in Latin as quid pro quo and also as the bargain theory).

The general rule is that, while **consideration must move from the promisee,** it need not move to the promisor. Therefore, the requirement of consideration is satisfied if the promisee, that is to say the plaintiff in this case, suffers detriment, at the promisor's request, even though this confers no corresponding benefit on the promisor: *Kao Lee & Yip v Euro Treasure Ltd* [1985] 1 HKC 46 per Roberts CJ.

Extensions

The requirement that **consideration must move from the promisee** is most generally satisfied where some detriment is suffered by him, for example, where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) quoted in *City Polytechnic of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd* [1994] 3 HKC 423 per Rhind J.

A possible exception in insurance cases

In *B + B Construction Ltd v Sun Alliance and London Insurance Plc* [2000] 2 HKC 295, 300, Godfrey VP suggested an exception to the general rule:

> "Before I proceed to consider whether the judge was right to accept the construction of the policy, in particular of the words 'and his contractors', suggested by the contractor, the question suggests itself as to how the contractor, which did not effect the policy, is not named as a party to it; and gave no consideration for it, can claim any benefit under the policy at all.
>
> Even assuming, in favour of the contractor, that the policy *was* intended to [insure] for the benefit of the contractor as well as for the benefit of the sub-contractor, the contractor's claim would fall foul of the well-settled (although much criticised) rule that, on the face of it, a contract

> between two parties for the benefit of a third party is not enforceable by the third party, who is, as it is sometimes put, 'a stranger to the consideration'. I am aware, of course, that there are some statutory exceptions to the rule, but none of these would apply to the present case. I am also aware of the proposals before the legislature in England and Wales for the reform of the rule; and of the judicial abrogation of the rule effected in Australia by the decision of the High Court (split 4 to 3) in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 80 ALR 574, a case the facts of which bear many similarities to our own. In that case, Mason CJ and Wilson J held that the rules that only a party to a contract can sue on it, and that consideration must move from the promisee, do not apply to a policy of insurance; Toohey J held that:
>
> 'When an insurer issues a liability insurance policy, identifying the assured in terms that evidence an intention on the part of both insurer and assured that the policy will indemnify as well those with whom the assured contracts for the purpose of the venture covered by the policy, and it is reasonable to expect that such a contractor may order its affairs by reference to the existence of the policy, the contractor may sue the insurer on the policy, notwithstanding that the contractor is not a party to the contract between the insurer and assured; and Gaudron J held that a promisor who has accepted an agreed consideration for a promise to benefit a third party comes under an obligation to the third party to fulfil that promise and the third party acquires a right to bring an action to secure the benefit of that promise.'

But here, in Hong Kong, the law remains as magisterially stated by Viscount Haldane LC in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853:

> "My Lords, 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. Our law knows nothing of a *jus quaesitum tertio* [Latin: right acquired by a third party] arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.""

7.2 *The courts will not measure the adequacy of consideration, but consideration must be sufficient in the eyes of the law*

Consideration must mean something of value in the eye of the law: *Thomas v Thomas* (1842) 2 QB 851, 859.

- Widow of John Thomas promised to give John Thomas' cottage to his widow for her entire life or as long as she should be a widow, on the condition she paid the sum of £1 per year towards the ground rent.

When Patteson J had to consider was this a mere voluntary gift or was it a contract supported by consideration? He found as follows - although the cause for the gift may have been respect for the memory of the testator, the payment of £1 to the executors was not a payment contingent on taking the property, but was a payment in consideration of the right to stay in the cottage.

The courts seem to have been very willing to find consideration on the least possible value – for example *Bainbridge v Firmstone* (1838) 8 A & E 743. Often the benefit / detriment analysis is two sides of the same coin. In this case it is easier to find the detriment:

- Defendant asked permission to weigh two of the plaintiff's boilers and promised to return them in the same condition that they were in when he took possession of them.
- The plaintiff gave his permission.
- The defendant took the boilers apart but failed to put them back together.
- The defendant said that no consideration had been provided for his promise to restore the boilers.

Per Lord Denman CJ: (p 744) 'The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. *We need not inquire what benefit he expected to derive*. The plaintiff might have given or refused leave.'

[Emphasis added]

Per Patteson J: (p 744) 'The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; *at any rate, there is a detriment to the plaintiff from his parting with the possession* for even so short a time.'

[Emphasis added]

An interesting application of this principle in the HK context is *Andayani v Chan Oi Ling* [2001] 1 HKC 252 per Deputy Judge To:

> "Another equally compelling reason for not upholding the legality of this contract is that it is a contract of exploitation. As a general principle, men and women of full age and competent understanding have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. There is nothing to prohibit a local resident from entering into contracts of the kind entered into by the appellant, though any reasonable member of our society would consider such a wage of $ 2,000 a month outrageous. *But it is not the court's duty to enquire into the adequacy of consideration and a pepper corn does not cease to be good consideration.*"
>
> [Emphasis added]

Restricting freedom to do something you were allowed to do appears to be, at least in the US, good consideration, irrespective of whether that thing was in fact a benefit or a detriment. In *Hamer v Sidway* 124 NY 538 (1891):

- An uncle promised his nephew that if he would refrain from drinking liquor, using tobacco, swearing, and playing billiards or cards for money until he was 21 years old the uncle would pay $5,000, to which the nephew agreed.
- The nephew fully performed his part of the agreement.

Parker J stated his decision at p 538:

> "The defendant contents that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promise by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. *A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement.* Such a rule could not be tolerated, and is without foundation in law."
>
> [Emphasis added]

And at p 539:

> "The promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. The right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. *It is sufficient that he restricted his lawful freedom of action within certain prescribed*

limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense."

[Emphasis added]

This trend toward finding consideration based on parties restricting their position in reliance of a contractual promise has continued: see for example *Centrovincial Estates Plc v Merchant Investors Assurance Company Ltd* [1983] Com LR 158 (CA) per Slade LJ.

In the landmark case of *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87, [1959] 3 WLR 168, [1959] 2 All ER 701, 103 SJ 561, there is an important conflict between the slightly artificial view of consideration (which takes into account the sales and marketing benefits) held by the majority in this case, and the dissenting view, which is possibly too narrow. Given the modern proliferation of benefits, the majority view may be more suitable (which also contains the oft-quoted peppercorn example). It also shows the court's added willingness to find good consideration in commercial cases to uphold the bargain:

- Anyone sending a postal order for 1s 6d together with three Nestle chocolate bar wrappers was entitled to get a copy of the record "Rockin' Shoes".
- The copyright owners of the music could obtain a royalty based on the ordinary selling price of the record.
- The question for royalty purposes was whether the selling price included the chocolate bar wrappers, so that the actual royalty should be higher.

The court had to discover whether the 1s 6d was an ordinary retail selling price and whether the contract included the chocolate bar wrappers.

Lord Reid:

'It seems to me clear that *the main intention of the offer was to induce people interested in this kind of music to buy (or perhaps get others to buy) chocolate which otherwise would not have been bought*. It is of course, true that some wrappers might come from the chocolate which had already been bought or from chocolate that would have been bought without the offer, but that does not seem to me to alter the case. Where there is a large number of transactions – the notice mentions 30,000 records – I do not think we should simply consider an isolated case where it would be impossible to say whether there had been a direct benefit from the acquisition of the wrappers or not. The requirement

that wrappers should be sent was of great importance to the Nestle Co; there would have been no point in their simply offering records for 1s 6d each. It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (a) does something of value to the supplier and (b) pays money: the consideration is both (a) and (b). There may have been cases where the acquisition of the wrappers conferred no direct benefit on the Nestle Co, but there must have been many cases where it did. I do not see why the possibility that in some cases the acquisition of the wrappers did not directly benefit the Nestle Co should require us to exclude from consideration the cases where it did; and even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement.'

[Emphasis added]

Lord Somervell of Harrow:

"The question, then, is whether the three wrappers were part of the consideration, or, as Jenkins LJ held [in the appeal to the Court of Appeal], a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store. I think they are part of the consideration. They are so described in the offer. 'They,' the wrappers, 'will help you to get smash hit recordings.' They are so described in the record itself – 'all you have to do to get such new record is to send three wrappers from Nestle's 6d milk chocolate bars, together with postal order for 1s 6d' This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestles. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will through away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration."

Viscount Simonds (Dissenting):

"In my opinion, my Lords, the wrappers are not part of the selling price. *They are admittedly themselves valueless and are thrown away* and it was for that reason, no doubt, that Upjohn J [the trial judge in the first instance] was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than someone, by no means necessarily the purchaser of the record, has in the past bought not from Nestles but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure

speculation. *The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the manufacturers*.

I conclude, therefore, that the objection fails, whether it is contended that (in the words of Upjohn J) the sale 'bears no resemblance at all to the transaction to which the section … is pointing' or that the three wrappers for part of the selling price and are incapable of valuation. *Nor is there any need to take what, with respect, I think is a somewhat artificial view of a simple transaction*. What can be easier than for a manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that? It may be assumed that the manufacturer' motive is his own advantage."

[Emphasis added. Note: 1s 6d is one shilling six dimes].

7.3 *Difference between adequacy and sufficiency*

Provided consideration has 'some value' in the eyes of the law (sufficiency), the court is not concerned with how much value attaches to that consideration (adequacy). Consideration that is illegal, against public policy, illusory or impossible will not be sufficient in the eyes of the law. An agreement for 'plain loyalty and chastity' and 'cohabit … live happily together' was held not to constitute good consideration for being against public morals: *Chan Man Tin v Cheng Leeky* [2008] 3 HKLRD 593 (CFI).

7.4 *Forbearance to sue can be good consideration*

A request that the promisee refrain from doing something which he or she is otherwise free to do can be good consideration: *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327. In *Pitt,* the court had to consider whether there had been consideration provided to make good the agreement:

- Property was put up for sale at £205,000.
- Two parties were interested (plaintiff and Buckle), bids started at £185,000 and increased to £200,000.
- Plaintiff bid £200,000 and defendant accepted subject to contract.
- Buckle bids increased offer to £210,000. Defendant informs plaintiff acceptance is withdrawn.
- Plaintiff threatened the estate agent acting for the defendant with an injunction if sold to Buckle, and would tell Buckle had withdrawn offer.
- Plaintiff then reached agreement with the estate agent to which the defendant would sell the property to the plaintiff for £200,000 and

would not consider any further offers provided that the plaintiff exchanged contracts on the property within two weeks of receiving a draft contract.

- Defendant decided to accept Buckle offer of £210,000 but did give the plaintiff the opportunity to exchange contracts that day at £210,000.
- Plaintiff refused, defendant sold to Buckle, defendant brought action for breach of contract.

Peter Gibson LJ found:

(1) The judge accepted threat of the injunction only had a nuisance value which could not have succeeded. However, by agreeing to the lock out agreement, the defendant was freed from this nuisance.

(2) The threat of causing trouble with Buckle was also a nuisance which removed gave some consideration.

(3) The promise by the plaintiff to get on by limiting himself to just two weeks if he was to exchange contracts was also of value to the defendant.

The combination of the 3 factors constituted valuable consideration. However, the idea that the giving up of a worthless claim which would be a nuisance appears problematic. It will be seen in the next two cases discussed that it must be a balancing act between practical needs to facilitate agreements, and preventing the use of coercive tactics. Even if the promisee *bona fide* believes they have a right to sue, and in fact they do not, forebearance to sue can be good consideration, as established in *Cook v Wright* (1861) B & S 559:

- Notice was given to the defendant occupier of a house calling upon him to pay his share of the cost of works done in an adjoining street.
- Defendant objected that he was not liable as he was not the owner.
- Later promised to pay a reduced contribution in instalment by way of three promissory notes after threatened with legal action.
- Defendant paid first instalment but refused any more.
- Plaintiff brought action to recover the balance.
- It transpired at trial the defendant was not personally liable to make a contribution.

The court had to consider whether the promise to make the reduced contribution was enforceable. The court argued that, although the defendant believed he was not liable, he knew that the plaintiff believed he was. The compromise was enforceable against the defendant. The compromise had been a detriment to the plaintiff because it was not able to take proceedings against the actual owner of the house.

For practical reasons it is important to prevent threats to sue from becoming good consideration when they are baseless, for 'floodgates' purposes: *Wade v Simeon* (1846) 2 CB 548. However, the strict legal logic is not very pure in terms of consideration theory as seen from the decision:

- The plaintiff brought an action to recover sums of £1,300 and £700.
- The defendant promised to pay as long as the plaintiff did not pursue his claim.
- The defendant refused to honour the promise, so the plaintiff decided to pursue the claim and lost.

When Tindal CJ had to consider whether the promise not to sue was consideration for the promise to pay the sum claimed, he relied on an estoppel type argument:

> "The plaintiff admits that he had no cause of action against the defendant in the action ... *It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise*. It is almost *contra bonos mores* [Latin: against good morals], and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must shew a good consideration, something beneficial to the defendant, or detrimental to the plaintiff."
>
> [Emphasis added]

7.5 Past consideration is not normally good consideration

The phrase 'consideration must not be past' refers to the rule that consideration given for a promise must be given at the same time and be referrable to the promise of the other party. If X performs a gratuitous act for the benefit of Y, and Y being grateful promises a payment to X in return, there is no enforceable contract. This is because X's earlier gratuitous act was done independently of Y's later promise; ie not in exchange of the later promise.

In *Roscorla v Thomas* (1842) 3 QB 234:

- Plaintiff bought a horse from the defendant for £30.
- After the contract was concluded, the Defendant then warranted that the horse was sound and free from vice.
- Plaintiff sued alleging a breach of warranty.

When considering whether there was consideration for the subsequent oral warranty, Denman CJ remarked:

> 'It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coextensive with the consideration ... But the promise in the present case must be taken to be, as in fact it was, express and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.'

In *Eastwood v Kenyon* (1840) 11 Ad & E 438:

- Sutcliffe died and left his estate to his daughter.
- As the estate was insufficient to cover the cost of educating his daughter and maintaining the cottages, the plaintiff guardian borrowed £140 to meet these costs.
- After she came of age, she promised to repay the debt. She paid interest for a year.
- The plaintiff then gave up control and management of the estate to the daughter's agent.
- The daughter later married the defendant who promised to discharge the plaintiff's liability.
- He failed to honour the promise but this was held to be unenforceable.

The plaintiff's previous loan was given before the Defendant later promise to repay. Lord Denman CJ follows the approach that past consideration is not good consideration, especially where there is no real connection between the two events. Also, the defendant never required the plaintiff to borrow the money:

> 'Taking the promise of the defendant ... to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole ... and *the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money*.'
>
> [Emphasis added]

Reasoning from first principles, the rationale why past consideration is ineffective is because it would have been given in exchange for a past promise. If subsequently a new promise is introduced, then the promisee must also give new consideration in exchange in order to form a new (or vary the existing) contract. He cannot simply rely on past consideration given in exchange to a past promise.

Because of the occasional injustice created by this rule, there is a trend towards a pragmatic appraisal of consideration in commercial relationships by the courts. In *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd* [2011] 1 HKLRD 10 (CA), the defendant varied the terms of its employment contract with the plaintiff by providing for retirement benefits. When the plaintiff reached retirement age, the defendant declined to give the promised retirement benefits, arguing that the plaintiff provided no more than past consideration for this new promise. The Court of Appeal decided that there was new consideration given by the plaintiff, in the form of her refraining from exercising her right to leave throughout the years.

7.5.1 Exception – request of promisor

An early illustration of the exception comes from *Lampleigh v Brathwait* (1615) Hob 105.

In considering whether a past service can be good consideration for a promise, Hobart CJ put it like this:

> 'a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But *if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind*; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference.'
>
> [Emphasis added]

Assumpsit in this context means an undertaking either express or implied, to perform a parol agreement. Therefore, the concept is, when the service was performed at the request of the promisor, and payment was reasonably expected, it is the same as if it were performed later after the reward was promised.

In *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104 the court examined the issue of whether a past service serve as consideration for a promise.

- Patents were awarded to Casey in consideration of his services as the practical manager in working Stewart and Carlson's patents.

The court found that although it is usually the case that a past service cannot support a future promise, in the situation where a past service raises the implication that at the time of service it was to be paid for, the later promise could be an admission evidencing a positive bargain on the faith of which the original service was rendered. In this way it is like an acknowledgment of delayed and expected payment.

The question whether consideration was past was essentially one of fact. The act must have been done at the promisor's request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit. Payment, or the conferment of a benefit,

must have been legally enforceable had it been promised in advance. *Pau On v Lau Yiu Leong* [1980] AC 614 applied.

7.6 Pre-existing duties

In *Ward v Byham* [1956] 1 WLR 496:

- Father of illegitimate child paid the mother £1 on the basis that the child was well looked after and happy and could decide whether she wanted to live with the mother.

Denning LJ, found good consideration to support the promise of payment. Although the mother was legally bound to take care of the child, and the promise was only to perform an existing duty, the performance of that duty can be good consideration if it is of benefit to the promisor.

In the old controversial case of *Stilk v Myrick* (1809) 170 ER 1168 the defendant promised the plaintiff and other seamen extra wages if they sailed the ship back to London without two deserting crewmen. This promise was found not to be a binding contract as desertion was an emergency, and those remaining are bound by their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, the agreement was void for want of consideration. If the crew had been at liberty to depart before returning to London, or if the captain discharged the other crewmen, there may have been good consideration as the crew had done something they were not required to do.

Note that in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) the court, without overruling *Stilk v Myrick*, seek to limit the application of the principle, and will not apply the principle where there has been a practical benefit. *Stilk v Myrick* was an example of extreme circumstances:

> 'Namely the extraordinary conditions existing at the turn of the 18th century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews. Thus, the decision that the promise to pay extra wages even in the circumstances established in those cases was not supported by consideration is readily understandable. Of course, conditions today on the high seas have changed dramatically and it is at least questionable, as Mr Makey submitted, whether these cases might not well have been decided differently if they were tried today.'

Performance of a public duty

In *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270:

- Police officers supplied for the purposes of protecting safety men at a mine from strikers.