

THE LAW OF CONTRACT



HKU | LAW

Lecture 5: Consideration, Promissory Estoppel

Benjamin M. Chen

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Plan for Today

- Consideration
- Promissory Estoppel





CONSIDERATION

Reprising Traditional Doctrine

“According to English common law, a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, a canary, or a tomtit if he chose and that was accord and satisfaction, but by a most extraordinary peculiarity of the English common law, he could not take 19s 6d in the £—that was nudum pactum”.



Couldery v. Bartrum (1881) 19 Ch D 394 (Jessel M.R.)

Pace Jessel M.R., this is not a mystery. It follows from:

- the idea of consideration as mutual inducement
- the proposition that consideration must be sufficient but need not be adequate
- and the notion of a legal benefit or legal detriment



Modern Developments

Williams v. Roffey Bros & Nicholls (Contractors) Ltd

[1991] 1 QB 1, Court of Appeal

Facts

- Plaintiff carpenter had entered into an agreement with defendant building contractors to refurbish the carpentry of 27 flats at a price of £20,000.
- After being paid £16,200 for performing some of the work, plaintiff ran into financial difficulties. The contract price was too low to be profitable for the plaintiff who had also failed to supervise his workmen adequately.
- Defendants were concerned because they would owe their employer liquidated damages if the project were not completed timely. To encourage plaintiff to press on, defendants promised him an additional payment of £10,300, £575 for each flat he completed.



Modern Developments

Williams v. Roffey Bros & Nicholls (Contractors) Ltd

[1991] 1 QB 1, Court of Appeal

Facts

- Plaintiff substantially completed 8 flats after defendants had made their promise of additional payment and was paid another £1,500. Plaintiff then walked off the site and other contractors were brought in to finish the project which was handed over one week late.
- When plaintiff brought a claim against defendants for damages, defendants argued *inter alia* that no consideration had been given for the promise of additional payment.



Modern Developments

Williams v. Roffey Bros & Nicholls (Contractors) Ltd
[1991] 1 QB 1, Court of Appeal

Held

- Purchas L.J.: “It was...open to the plaintiff to be in deliberate breach of the contract in order to ‘cut his losses’ commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation...I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement”.



Modern Developments

Williams v. Roffey Bros & Nicholls (Contractors) Ltd
[1991] 1 QB 1, Court of Appeal

Held

- Russell L.J.: “The plaintiff had got into financial difficulties. The defendants...recognised the price that had been agreed originally with the plaintiff was less than...a reasonable price. There was a desire...to retain the services of the plaintiff so that the work could be completed without the need to employ another subcontractor. There was a further 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”.



Modern Developments

Williams v. Roffey Bros & Nicholls (Contractors) Ltd
[1991] 1 QB 1, Court of Appeal

Held

- Glidewell L.J.: Reviewing *Ward v. Byham* [1956] 1 WLR 496, *Williams v. Williams* [1957] 1 WLR 148 and *Pao On v. Lau Yiu Long* [1980] AC 614, “the 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”.



Modern Developments

Williams v. Roffey Bros & Nicholls (Contractors) Ltd
[1991] 1 QB 1, Court of Appeal

Held

- Glidewell L.J.:
 - Here, defendant sought to
 - “ensure that the plaintiff continued work and did not stop in breach of the subcontract”
 - “avoid[] the penalty for delay”
 - “avoid[] the trouble and expense of engaging other people to complete the carpentry work”
 - “There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress”.

Making Sense of *Roffey*

Past Consideration

- All three judges in *Roffey* insisted that *Stilk v. Myrick*—“a pillar stone of the law of contract”—remained good law.
- Recall that according to Campbell, *Stilk* held that a master’s promise to divide the wages of two deserters among the remaining members of the crew for bringing the ship home was unenforceable for want of consideration.
- But did the sailors provide no practical benefit to the captain when they could, perhaps, have deserted as well? Or is the case now better interpreted as one of economic duress, per the report of Espinasse, and as the judges seemed to suggest?
- As we will see later in this course, duress involves an “illegitimate threat” by one party that leaves the other party with “no practicable alternative” but to submit. This may not exclude all one-sided variations thought to be undesirable.

Making Sense of *Roffey*



Richard Posner's Three Situations:

1. *Nothing has changed since the contract was made, but the promisor, realizing that the remedies for breach of contract would not fully compensate the promisee, gives the promisee the unhappy choice of either paying the promisor more to complete the contract or pursuing his legal remedies”.*
2. *Something has changed since the contract signing: the promisee has given up alternative sources of supply or otherwise increased his dependence on the promisor. If modification is permitted the promisor can extract a monopoly rent from the promisee.*
3. *Something has changed since the contract signing: an unexpected event which...prevents the (willing) promisor from completing the promised performance without a modification of the contract.*

The third case is the clearest for allowing modification. The inability of a willing promisor to complete performance removes the factor of strategic behavior that is present in cases one and two.

‘Gratuitous Promises in Economics and Law’ (1977) 6 *JLS* 411, 422

Making Sense of *Roffey*

Part Payment

- *Foakes v. Beer* is a decision of the House of Lords binding on the Court of Appeal at the time it decided *Roffey*. *Roffey* did not address *Foakes*.
- Is there no practical benefit to a creditor of receiving part payment on a debt?
 - There is no need to incur the time and expense of pursuing collection.
 - The debtor may become insolvent later on—“a bird in hand is worth two in the bush”.
 - Note in this regard Blackburn L.J.’s observation in *Foakes*: “all men of business...do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this is often so. Where the credit of the debtor is doubtful, it must be more so”.

Making Sense of *Roffey*

In Re Selectmove

[1995] 1 WLR 474, Court of Appeal



Facts

- Company facing financial difficulties alleged an agreement with the taxman to pay future tax and national insurance liabilities as they fell due and to pay off arrears at a rate of £1,000 per month.
- The company did in fact pay these liabilities as they occurred and also paid £7,000 in arrears.
- The government later demanded payment of arrears of £24,650 and sought to wind up the company. It argued that the agreement, even if made, was not enforceable for want of consideration.

Making Sense of *Roffey*

In Re Selectmove

[1995] 1 WLR 474, Court of Appeal



Held

- The court held that no consideration had been given to support the alleged agreement to defer payment of the arrears.
- Gibson L.J.: It was “submitted that an additional benefit to the Crown was conferred by the agreement in that the Crown stood to derive practical benefits therefrom: it was likely to recover more from not enforcing its debt against the company, which was known to be in financial difficulties, than from putting the company into liquidation...I see the force of the argument but the difficulty that I feel with that is that, if the principle of [*Roffey*] is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v. Beer* without any application”.
- Note also that in *In Re Selectmove*, the company argued that it had implicitly promised to continue trading but the court rejected this contention as unsupported by the evidence.

Making Sense of *Roffey*

MWB Business Exchange Centres Ltd v. Rock Advertising Ltd

[2016] EWCA Civ 553, [2017] QB 604, Court of Appeal



Facts

- Defendant occupied premises managed by the claimant under a license agreement. Defendant's business struggled and by February 2012, it had accumulated £12,000 in license fee arrears, owed to the claimant.
- Defendant alleged it reached a compromise with the claimant to backload the payments due over the period from February to October 2012, such that the arrears would be paid off by the end of the calendar year.
- Claimant later exercised its right to lock defendant out of the premises and purported to terminate the license agreement between the parties. It argued that the compromise, even if made, was not enforceable for want of consideration.

Making Sense of *Roffey*

MWB Business Exchange Centres Ltd v. Rock Advertising Ltd

[2016] EWCA Civ 553, [2017] QB 604, Court of Appeal



Held

- The compromise was enforceable because claimant derived a practical benefit from it.
- Kitchen L.J.: “First MWB would recover some of the arrears immediately and would have some hope of recovering them all in due course. But second and more importantly, Rock would remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB”.

Modern Developments

So doctrinally, there is a distinction between

- Promises to pay more for the same
 - A “practical benefit” may qualify as sufficient consideration.
 - But precise definition of “practical benefit” remains elusive and not every threat to breach counts as duress.
 - *UBC (Construction) Ltd v. Sung Foo Kee Ltd* [1993] 2 HKLR 207, [1993] 2 HKC 458
- Promises to accept less for the same
 - A “practical benefit” may qualify as sufficient consideration
 - But “practical benefit” here cannot be part payment or a promise of future payment.
 - *Vinson Engineering Ltd v. Kin Shing Engineering (HK) Co Ltd* [2007] 5 HKC 268



ESTOPPEL

Qu'est que c'est un "estoppel"?

“The word ‘estoppel’ only means stopped...It was brought over by the Normans. They used the old French ‘estoupail.’ That meant a bung or cork by which you stopped something from coming out. It was in common use in our courts when they carried on all their proceedings in Norman-French. Littleton writes in the law-French of his day (15th century) using the words ‘pur ceo que le baron est estoppe a dire,’ meaning simply that the husband is stopped from saying something”.

McIlkenny v. Chief Constable of the West Midlands [1980] QB 283
(Denning M.R.)

Qu'est que c'est un "estoppel"?

“From that simple origin there has been built up over the centuries in our law a big house with many rooms. It is the house called Estoppel. In Coke’s time it was a small house with only three rooms, namely, estoppel by matter of record, by matter in writing, and by matter in pais. But by our time we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatam, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: They are all under one roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others”.

McIlkenny v. Chief Constable of the West Midlands [1980] QB 283
(Denning M.R.)

Qu'est que c'est un "estoppel"?

“Indeed they are but variations of one and the same broad principle, that a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel,’ or by any other name, it is one which Courts of law have in modern times most usefully adopted”.

Cave v. Mills (1862) 7 H. & N. 913, 158 ER 740 (Wilde, B.)

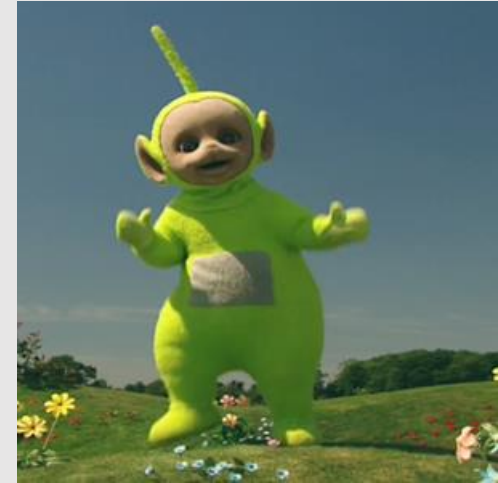
Species of Estoppel

Estoppel by Representation

- ❑ McKendrick: “[A] party who makes a representation of existing fact which induces the other party to act to his detriment in reliance upon the representation may not be permitted subsequently to act inconsistently with that representation”.
- ❑ It is a “rule of evidence that has the effect of permanently preventing a representor from asserting or proving facts that are contrary to his own representation”.



Species of Estoppel



Estoppel by Convention

- ❑ *Anson on Contracts*: “When the parties have acted in relation to a transaction upon a shared mistaken assumption (either of fact or law) then, as regards that transaction, each will be estopped against the other from questioning the truth of the facts or of law so assumed where it would be unjust and unconscionable to resile from the shared assumption”.
- ❑ *Amalgated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] QB 84 (company estopped by convention where guarantee executed by the company for loans made by a bank’s subsidiary to its own subsidiary turned out to only cover loans made by the bank itself)

Species of Estoppel

Proprietary Estoppel



- ❑ *Anson on Contracts*: “[A] person acts in reasonable reliance and to his or her detriment in the belief that he or she has or will acquire rights in or over the property of another in circumstances in which it is unconscionable for the property owner to deny the rights”.
- ❑ *Crabb v. Arun DC* [1976] Ch 179 (council estopped from denying right of access to road after owner who was assured of such access failed to reserve any right of way from the back plot of divided property when selling the front plot)

Species of Estoppel



Promissory Estoppel

- ❑ *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130 (Denning J): “[A] promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured”.
- ❑ Promissory estoppel could operate to make discharges or variations enforceable even in the absence of consideration.

Promissory Estoppel: Origin Story



Central London Property Trust Ltd v. High Trees House Ltd
[1947] 1 KB 130, King's Bench Division

Facts

- In 1937, plaintiff granted defendant a 99-year lease in a block of flats at an annual rent of £2,500.
- Because of the Second World War, defendant was unable to let all the flats and the parties agreed in January 1940 to reduce the rent “as from the commencement of the lease to £1,250 per annum”.

Promissory Estoppel: Origin Story



Central London Property Trust Ltd v. High Trees House Ltd
[1947] 1 KB 130, King's Bench Division

Facts

- Defendant paid the reduced rent from 1941 until the beginning of 1945 by which time the flats were fully occupied.
- In September 1945, plaintiff informed defendant that £2,500 was the contractually agreed upon annual rent and claimed arrears of £7,916.
- “Friendly proceedings” were instituted to test the legal position as between the two companies. Plaintiff claimed £625, being the difference between £2,500 and £1,250 for the last two quarters of 1945.

Promissory Estoppel: Origin Story



Central London Property Trust Ltd v. High Trees House Ltd
[1947] 1 KB 130, King's Bench Division

Held (Denning J.)

- Plaintiff was entitled to the amount claimed.
- “The courts have not gone so far as to give a cause of action in damages for the breach of [a bare promise made with the intent of creating legal relations, with the intent that it should be relied upon and which was in fact acted on], but they have refused to allow the party making it to act inconsistently with it”.
- As to the scope of the promise, it was “understood by all parties only to apply...when the flats were only partially let, and that it did not extend any further than that”.

Promissory Estoppel: Elements

To invoke promissory estoppel, there has to be a

- ❖ clear promise
- ❖ and reliance on the promise

such that it would be

- ❖ inequitable for the promisor to go back on the promise.

Furthermore, under English law, promissory estoppel cannot serve as an independent cause of action.

Clear Promise

The promise

- must be clear and unequivocal
 - *Woodhouse A.C. Israel Cocoa Ltd v. Nigerian Product Marketing Co Ltd* [1972] AC 741 (no promissory estoppel because seller's agreement to accept sterling rather than Nigerian pounds as originally stipulated in the contract was ambiguous as to the rate of exchange between the two currencies)
- but does not need not be express and may be implied
 - *Hughes v. Metropolitan Highway* (1877) 2 App Cas 439 (promissory estoppel where landlord asserted right to compel repairs within six month of notice which period expired shortly after his negotiations to purchase tenant's leasehold interest broke down)

Reliance on the Promise

The promisee

- must have altered his or her position based on the promise
 - *Alan & Co Ltd v. El Nasr Export & Import Co* [1972] 2 WLR 800 (Denning M.R.) (explaining that for promissory estoppel the promisee must have “acted on the belief induced by the other party”)
- but detriment, though helpful, is not necessary
 - Compare *Hughes* (detrimental reliance since promisee lost time to repair) with *High Trees* (no detrimental reliance since promisee paid less rent than before)

The promisee’s reliance on the promise and the inequity in allowing the promisor to go back on the promise are intimately related.

Inequitable to Go Back on Promise

It must be inequitable for the promisor to go back on the promise and insist on his or her legal rights under the contract.

- *D&C Builders Ltd v. Rees* [1966] 2 QB 617 (not inequitable for promisor, a small building company, to resile from agreement to accept part payment in full satisfaction of debt as promisees had exploited its precarious financial situation)
- *The Post Chaser* [1982] 1 All ER 19 (not inequitable for buyer to reject documents of ship after requesting the seller to forward them to the sub-buyer given the short amount of time that had elapsed and the absence of any prejudice to the seller)
- *MWB* (not inequitable for promisor to go back on revised payment schedule for license fee arrears where amount paid by the promisee in accordance with revised schedule was due in any case, legal rights under the contract were re-asserted by the promisor after two days and no prejudice was suffered by the promisee)

Not a Sword

Combe v. Combe

[1951] 2 KB 215

Facts

- A husband promised his wife an allowance of £100 a year, free of tax, after a decree nisi of divorce was pronounced but before it was made absolute. Although the husband never made any payments, the wife, in reliance upon this promise, did not apply to the Divorce Court for maintenance.

Held

- As promissory estoppel does not give rise to an independent cause of action, the wife could only enforce the promise if she gave good consideration for it.
- There was no consideration for the promise because the husband did not request the wife to forebear and the wife could not have, in any case, given up her right to apply to the Divorce Court for maintenance.

Not a Sword

In the United States, it has been long the case that promissory estoppel may be used to enforce a promise in the absence of consideration.

- *Porter v. Comm’r of Internal Revenue*, 60 F.2d 673 (2d Cir. 1932) (Learned Hand J.) (“Promissory estoppel’ is now a recognized species of consideration”.)
- *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (lifelong stipend awarded unconditionally in gratitude for “many years of long and faithful service” enforceable under promissory estoppel because employee had relied on the promise in deciding to retire)

In Australia, promissory estoppel may now be used offensively.

- *Walton Stores v. Maher* (1988) 164 CLR 387 (agreement on terms and rent for a lease enforceable despite the lack of an executed contract because prospective lessee allowed property owner to demolish an existing building and erect a new one under the belief that completion was a mere formality)

Not a Sword

Some arguments for permitting promissory estoppel to be used as a sword

- ❑ no principled reason for distinguishing between bare promises made in the context of an existing legal relationship and those made outside one
- ❑ also, no principled reason why proprietary estoppel should give rise to a cause of action but not promissory estoppel
- ❑ does not undermine doctrine of consideration because it protects detrimental reliance

The English courts have resisted this expansion of promissory estoppel. Where does Hong Kong law stand?



Not a Sword

Luo Xing Juan v. Estate of Hui Shui See

[2009]12 HKCFAR 1

Facts (Simplified)

- Luo cohabited with the deceased in a property which she believed he owned. The two were engaged to be married. When the deceased proposed to Luo, he promised her a 35% interest in the property “to provide her with financial security”.
- She relied on this promise by continuing to reside with the deceased *de facto* as man and wife, foregoing employment opportunities and paying a HK\$40,000 mortgage instalment on the flat.



Not a Sword

Luo Xing Juan v. Estate of Hui Shui See

[2009]12 HKCFAR 1

Facts (Simplified)

- Luo was unaware that the property was owned by a company named Glory Rise. The deceased was the controlling shareholder of Glory Rise. When the deceased passed away, the deceased's sister acting on behalf of the estate and as a director of Glory Rise caused the company to institute proceedings against Luo for possession of the property and mesne profits.
- Luo resisted the claims on the basis of rights allegedly acquired during her relationship with the deceased.



Not a Sword

Luo Xing Juan v. Estate of Hui Shui See

[2009]12 HKCFAR 1

Held (Ribeiro PJ)

- “While it is necessary for the purposes of exposition to identify the separate elements of the doctrine, it should be borne in mind that when applying them to the facts, each element does not exist in its own watertight compartment to be kept separate from the others. Each element acquires its meaning and content in the context of other elements”.
- “In my view, understood in the abovementioned context, there was a clear and unequivocal promise made by the deceased to Miss Luo sufficient to found a promissory estoppel”.



Not a Sword

Luo Xing Juan v. Estate of Hui Shui See

[2009]12 HKCFAR 1

Held (Ribeiro PJ)

- “The substance of the promise...was that the deceased would, as controlling shareholder of Glory Rise, secure for [Luo] a 35% interest in the value of the Property...and that, unless and until the Property was disposed of and her 35% entitlement duly provided for, [Luo] would have the security of being allowed to occupy it as her home without interference by the company. Put negatively, the deceased was promising to forgo exercising his legal powers (as controlling shareholder of Glory Rise) to cause the Property to be disposed of without [Luo] receiving a 35% share of the proceeds or to cause her to be evicted pending disposal”.

Suspensive or Extinctive?

Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd

[1955] 1 WLR 761, House of Lords



Facts

- Plaintiff licensed its patent to defendant for the manufacture of hard metal alloys. The contract provided for compensation to the licensor if the licensee sold more than a stipulated quantity of the licensed material.
- In 1942, the parties agreed to suspend enforcement of the compensation clause and contemplated making a new agreement post-war.
- In litigation spanning 1945 and 1946, plaintiff claimed to have revoked its suspension and to be entitled to compensation beginning 1 June 1945. Plaintiff's claim failed because adequate notice had not been given. In 1950, plaintiff again claimed to be entitled to compensation, this time, beginning 1 January 1947.

Suspensive or Extinctive?

Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd

[1955] 1 WLR 761, House of Lords



Held

- Plaintiff had effectively revoked its promise to suspend its legal right and was entitled to the compensation claimed. The prior litigation gave the defendant notice that the temporary concession made by the plaintiff would not be extended, “that the suspensory period was at an end and were bound to put their house in order”.
- Tucker L.J.: “It is, of course, clear...that there are some cases where the period of suspension clearly terminates on the happening of a certain event or the cessation of a previously existing state of affairs or on the lapse of a reasonable period thereafter. In such cases no intimation or notice of any kind may be necessary. But in other cases where there is nothing to fix the end of the period which may be dependent upon the will of the person who has given or made the concession, equity will no doubt require some notice or intimation together with a reasonable period for readjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold that in all such cases the notice must take any particular form or specify a date for the termination of the suspensory period”.

Suspensive or Extinctive?

In *MWB*, Kitchin L.J. reviewed the case law and concluded that “the effect of a promissory estoppel may only be suspensive”.

- Claimant in *Tool Metal Manufacturing* did not—or perhaps could not—ask for compensation for the period between 1942 and 1946. In *High Trees*, while the claimant did not ask for arrears accrued during the pendency of the war, Lord Denning suggested it would not have succeeded had it tried.
- Note that in both cases, the promise was intended to be time-limited.

McKendrick suggests that

- “estoppel is generally suspensory in relation to obligations to be performed in the future”
- “but it may be extinctive in relation to events that have occurred in the past”