



Engineering Management & Society

Contract Law (RevN)

In C. S. 70



What is a Contract?

- Sir **William Anson**:
 - A contract is a **legally binding agreement** made between **two or more parties**, by which rights are acquired by one or more to acts to **forebearances** on the part of the other or others.
- **Law Made Simple**:
 - An **agreement** between **two or more parties** which is **intended** to have **legal consequences**.
- **Davies on Contract**:
 - A contract is an **agreement** which **binds** the parties to it.
- Longman **Business** English Dictionary:
 - A ***formal written* agreement** between two or more people or groups which says what each **must do** for the other, or **must not do**.

Classification/Forms of Contracts

- **Simple contracts**

- **Oral**
- Written
- **Implied** by **Conduct**

- Contracts by **Deed**

- i.e. Specialty Contract

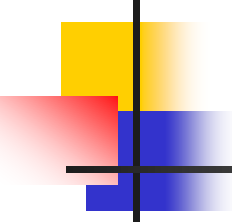
- **Contracts of Record**

- A judgment or recognizance enrolled in the record of the proceedings of a court of record, implying a debt that arises from the entry on the record and not from any agreement between the parties. [Taken from Oxford Dictionary]



Common issues in dispute on contract:

- Is there a contract, or was the contract validly formed?
 - Missing of one or more essential elements
 - The contract, though formed, is
 - **Void**
 - **Voidable**
 - **Unenforceable (Frustration)**
- ~~BREACH~~ **Breach** of Contract by a party to the contract
- **Repudiation** by a party to the contract
- **Termination** of the contract



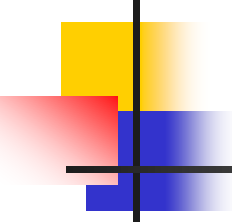
How to decide whether there is a contract or not? (...cont..)

- This is a question of **law** (mostly common law, case laws)
- **Decided** by the **court**
 - In consideration of *facts*
 - *Questions: How to establish facts?*
 - Is any of the **essentials** of a contract missing?



Law of Contract in HK

- **No consolidated ordinance** on contract laws **specifically**
- Mostly **Common Law** established through **cases laws**
 - **locally,**
 - **of UK;** and
 - other **common law jurisdiction**, such as **Australia, Canada,** etc.
- Some **statutes**, e.g.
 - ***SALE OF GOODS ORDINANCE*** (**SOGO**) **Cap 26**
 - **S.3 Formation** of Contract



How to decide whether there is a contract or not?

■ **S.3 SOGO:**

■ **Contract of sale**

- (1) A *contract of sale of goods* is a contract whereby the *seller transfers* or *agrees* to transfer the *property in goods* to the *buyer* for a *money consideration*, called the *price*. There *may* be a contract of sale between one part owner and another.



Provisions in SOGO for Consumer Protection

Section 15 of SOGO provides that goods for sale must be:

- **As described on the package or a display sign, or by the seller**
 - For example, if you are told that a shirt is 100% cotton, then it should not turn out to be cotton and polyester.



Provisions in SOGO for Consumer Protection

- **Section 16** of SOGO provides that goods for sale must be:
 - **Of merchantable (satisfactory) quality**
 - Goods must meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price and all other relevant circumstances. The quality of goods includes their appearance and finish, their safety and their durability. Goods must be free from defects, even minor ones, except where these defects have been brought to your attention by the seller.
 - **Fit for their purposes, including any particular purpose(s) mentioned by you to the seller**
 - For example, if you are buying a washing machine with program for washing silk dress and you have told the seller your requirements, the seller must not give you a washing machine incapable of washing silk material.

Formation of contracts

Essentials of a Valid Contract

- The essential elements of a binding contractual agreement are:
 - A = **Offer**;
 - B = **Acceptance**;
 - C = **Consideration**; [Note: Deed does not require "consideration" to make it valid.]
 - D = **Capacity**;
 - E = **Intention** to create legal relations;
 - F = **No vitiating factors**
- **Valid: If $A \times B \times C \times D \times E = 1$ and $F = 0$**



Common **Vitiating Factors**

■ **Duress:**

- “*coercion of will such that there was no true consent*”:
Pao On v Lau Yiu Long (1979)
- *Barton v Armstrong* (1976) AC 104

■ **Illegality** of the Object of the contract

- *Anderson Ltd v Daniel* [1924] 1 KB 138
- *Couturier v Hastie* (1856) 5 HL 672

■ **Impossibility** of **Enforcement** of the **Terms** of the Contract:

- *Hartog v Colin & Shields* [1939] 3 All ER 566



7 Essentials of a Valid Contract

- **Offer and Acceptance:**

- Offer by one party
- Acceptance by the other

- **Intention:**

- Intention to create a legal agreement rather than a casual promise with no intention of legal enforcement, or simply a negotiation for making a contract/agreement

- **Consideration:**

- Something of value to “buy” the promise of other party



Seven Essentials of a Valid Contract (...cont...)

- **Capacity** of the parties:
 - **Each** party must have the legal capacity to make the contract
- **Consent:** [Vitiating Factor]
 - Must be **genuine**
 - Willingness of parties without **fraud** or **duress**
- **Legality** of **object(s)**: [Vitiating Factor]
 - Must not be something disapproved by law
- **Possibility** of **performance:** [Vitiating Factor]
 - **Frustration – Force Majeure**
 - Performance become impossible during the course of the contract



Seven Essentials of a Valid Contract (...cont...)

- When any one or more of the seven elements is missing, the agreement will be
 - **Void:**
 - Void contracts are destitute of legal effect, i.e. do not confer legal rights to the claimant
 - **Voidable:**
 - Voidable contracts may be made void at the instance of one of the parties (*Nash v Inman* [1908] 2 KB 1)
- A valid contract could become **unenforceable**:
 - For examples due to:
 - Frustration
 - Failure in **form**: i.e. Contract on land not evidenced in **deed**
 - Time Bar: as provided in the **Limitation Ordinance**

Voidable Contract:

Nash v Inman [1908] 2 KB 1

- Facts:

- Nash was a tailor working in Saville Row. Inman was a minor studying at Cambridge University. Nash sold some cloth on credit to Inman for what was approximately £145. Nash sued to recover the money, and Inman pleaded infancy.



Nash v Inman [1908] 2 KB 1

■ **Held:**

- Inman was actually a minor (this means he lacked the **CAPACITY** to contract like an adult) and that he already had enough clothing at the time of sale.
- There was no evidence that the clothing could possibly be considered to be in the class of **necessaries**
- Jury was directed to enter judgment in favour of Nash



Nash v Inman [1908] 2 KB 1

- Held:

- Any contract with a minor is void because of the minor being held to be lacking of **capacity**.
- **Exception:**
 - A minor may contract for **necessaries** at a **reasonable price**, but it will not be enforceable unless they are necessary to his station in life and he does not already have enough.



Nash v Inman [1908] 2 KB 1

■ Legal Principle from this Case:

- With some exceptions (e.g. if the subject matters of the contract is “necessities” for the minor), a contract made by a minor is voidable
- The minor may avoid the contract, but he can also hold it as valid
- **Upon reaching the age of majority, a minor may affirm** or ratify the contract, and he will then be bound contractually
- Any expression of the minor’s intention to avoid the contract will accomplish **avoidance**.

Essentials of a Valid Contract

Definition of OFFER

- A **proposition** put by the **offeror** (one or more persons) to the **offeree** (one of more persons) coupled with an indication that he is **willing** to be held to that proposition.
- A **definite promise** to be bound provided that certain **specified terms** (with **certainty**) are accepted

OFFER –

How the offer is made

- **Orally**
- In **writing**
- By **conduct**



OFFER vs ITT

- **Differentiate** between:
 - **Offer** vs **Invitation to Treat** (i.e. “ITT”)
 - **Invitation to Treat** (i.e. “ITT”)
 - An indication that the invitor is **willing to enter into negotiation** but is **not prepared** to be **bound immediately**.
 - **ITT is not an offer**
 - ITT is an **invitation** of **offer**
 - ITT is **part** of a **negotiation** process



Offer vs. Invitation to Treat

- An ITT means an invitation to make offers.
 - e.g. auctioneer requests bids
 - Priced catalogues
 - Goods displayed in a shop window
 - *Fisher v. Bell* (1960)
 - Goods on the shelves of a supermarket
 - *Pharmaceutical Society of Gt. Britain v. Boots Cash Chemists (Southern) Ltd.*, (1953)
- Question: **What** about a **tender**?



OFFER vs ITT

General Principle

- **Advertisement**, **Tender** and **Auction** are normally taken as an invitation to treat, rather than as an offer.
- A **circular** inviting the submission of **tenders** is normally an invitation to treat and the submission of the tender is the offer.
 - **Exception:** *Carlill v Carbolic Smoke Ball*
- Example:
 - **Advertisement:** *Partridge v Crittenden* (1968)
 - **Tender and Auction:** *Spencer v Harding* (1870)



Carlill v. Carbolic Smoke Ball Co. (1893)

- A patent-medicine company advertised that:
 - it would give SP100 to anyone
 - who contracted influenza
 - after using their smoke ball for a certain period.
- The Plaintiff (i.e. Claimant), Mrs. Carliff,
 - bought the article,
 - used it as directed
 - but contracted influenza
- Held:
 - The plaintiff accepted by complying with the conditions of the offer.
 - There was an offer capable of acceptance
 - By all who used the smoke ball, which is an acceptance by conduct.
 - It mattered not that the plaintiff did not communicate her acceptance to the offer.



Carlill v Carbolic Smoke Ball

- **Key Principle**

- *An offer can be made to the world at large and it can be accepted by anybody who performs the necessary actions.*



Chapelton v Barry Urban District Council

- David Chapelton went to a beach with his friend, Miss Andrews, at Cold Knap. There was a pile of deckchairs. A notice next to them said,
 - "Barry Urban District Council. Cold Knap. Hire of chairs 2d. per session of 3 hours."
 - It also said tickets should be obtained from attendants.
- Mr Chapelton got two chairs from an attendant, paid the money and got two tickets. He put them in his pocket. On the ticket was written,
 - "Available for three hours. Time expires where indicated by cut-off and should be retained and shown on request. The council will not be liable for any accident or damage arising from the hire of the chair."



Chapelton v Barry Urban District Council

- When Mr Chapelton sat on the chair it gave way, the canvas tearing from the top of the chair. He was injured. The County Court judge held the council was negligent but that liability was exempted by the ticket. Mr Chapelton appealed.
- The Court of Appeal upheld Mr Chapelton's claim, holding that:
 - *there was a valid offer when the chairs were on display, accepted when picked up the chairs from the defendant. Therefore, the ticket was merely a receipt of the contract, and the exclusion clause could not be incorporated as a term, because it was too late.*



Certainties of Offer

- Unless the offer included the key terms of the contract, it cannot be the basis of a binding contract. For example, as a minimum requirement for sale of goods contracts, a valid offer must include at least the following 4 terms:
 - Delivery date,
 - price,
 - terms of payment that includes the date of payment and
 - detail description of the item on offer
 - including a fair description of the condition or type of service.
- Unless the minimum requirements are met, an offer of sale is not classified by the courts as a legal offer



An **OFFER** must contain **Terms** which are **Certain**

- Offer must set out **terms** on the basis of which the offeror is willing to contract:
 - **Terms** of the **offer** must be sufficiently **certain** to form the basis of an enforceable contract:
Scammell v. Ouston 1941;
 - Offer indicates that the **offeror intends** to be bound **if his offer is accepted** by the offeree



Terms could be

- **Express** Terms
- **Implied** Terms are:
 - Provisions/terms in a contract that are not expressly stated in a contract but are assumed to be included.
 - Provisions/terms in a contract that a court will assume such being intended to be included in the contract, even though they are not expressly stated.



Why we need Implied Terms

- Implied terms occur and are needed because a contract cannot be **100% complete** in practical sense in our world where **uncertainty** always **exists**.
- If **no** terms could be implied, the drafting of contract becomes practically impossible, or the cost will be very high.



Example of Implied Terms

- **Section 5 of SOGO: Mode of making contract of sale**
 - *Subject to the provisions of this Ordinance and of any enactment in that behalf, a contract of sale may be made in **writing** (either with or without **seal**), or by **word of mouth**, or **partly** in writing and partly by word of mouth, or may be **implied** from the **conduct** of the parties*
 - [**Note: Implied from conduct** is different from **Implied Terms** of contract]
 - *Provided that nothing in this section shall affect the law relating to **corporations**.*



Contract Terms – Section 15 SOGO

15. Sale by description

15 (1)

- *Where there is a contract for the sale of goods by description, there is an **implied condition** that the goods shall correspond with the description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.*



Contract Terms – Section 15 SOGO

15. Sale by description

15 (2)

- A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are **selected by the buyer**.

How Terms are Implied into a Contract



Terms may be implied by:

- **Usage** or **custom** relating to a particular **place** or **trade**, provided that there is nothing contrary in the contract.
- **Previous course of dealings:**
 - court may imply certain terms which have been **regularly** and **consistently used before between** the **parties**, provided there was a **reasonable expectation** that the term would apply again and there is no contrary term in the contract.



How Terms are Implied into a Contract

Terms may be implied by:

- **Intention** of the parties where, for example, there is a gap in the contract and it is apparent that the parties must have intended that term to form part of the contract.
- **Law**, for example, those implied by the Sale of Goods Ordinance.



Type of Contract Terms

- **Conditions**
- **Warranties**
- **Innominate Terms**



Conditions vs. Warranties

- **Condition** is:
 - a fundamental term:
 - That goes to the heart of a contract
 - a term that, if **breached**, gives the **aggrieved** party the **right** either to:
 - **terminate** the contract or
 - **affirm** it.
 - In addition, the aggrieved party can also claim **damages**.



Conditions vs. Warranties

- Warranty is:
 - a term that, if **breached**, does **not** give the **aggrieved party** the **right to terminate** the contract;
 - it gives rise only to a right to claim **damages**.
 - A **statement or assurance** about a factual matter would usually be a warranty.



Conditions vs. Warranties

Authorities:

- The 'opera singer' cases where the singer did not turn up as scheduled.
- *Poussard v Spiers* (1875) L.R. 1 QBD 410:
 - Absence on the 1st Night of a 3-month series of concerts was held to be a condition
- *Bettini v Gye* (1875) L.R. 1 QBD 183:
 - The singer's obligation to attend rehearsals was a warranty



Innominate Terms

- In **between Condition** and **Warranty**
- The remedy for breach of **Innominate** Terms:
 - depend on the effect of that breach at the time it happens:
 - If there is a **substantial effect** on the aggrieved party, it will be likely a **fundamental** term and give the right to that party to terminate the contract (and claim damages).
 - If there is **no substantial effect**, then the aggrieved party may only claim damages.
- **Authority:**
 - *Hong Kong Fir Shipping Ltd v Kisen Kaisha Ltd* (1962) EWCA Civ 7



Objective Test on Offer

- Whether the two parties have reached agreement on the terms or whether a valid offer has been made is an issue which is determined by the courts using criteria known as 'the **objective test**' which was explained in the leading English case of *Smith v. Hughes* (1870) LR 6 QB 597
- In *Smith v. Hughes*, the court emphasised that the important thing in determining whether there has been a valid offer is not the party's own (**subjective**) intentions, but how a reasonable person would view the situation.



How to make OFFER

- **Offer** must be **communicated** to the **offeree**.
 - *Taylor v. Laird (1856)*
- An offer take effect only when it is **received** by the offeree:
 - *Adams v. Lindsell (1818)*
 - Offer of wool at a price by post sent on 2 Sept. but misdirected
 - Reached offeree on 7 Sept and accepted immediately
 - But wool was sold on 8 Sept
 - Held: Valid contract and offeror was obliged to supply the wool at the quoted prices.



OFFER

- Offer made to **whom?**
 - a particular person
 - *Boulton v. Jones (1857)*
 - a group of persons or
 - people generally (as in a reward case)
 - *Carlill v. Carbolic Smoke Ball Co. (1893)*



Boulton v. Jones (1857)

- Boulton (B), the **claimant**, bought a hose-pipe business from Brocklehurst (BT).
- Jones (J), the **defendant**, placed an order with BT for some pipes, given that BT owed J a debt.
- B supplied the pipes even though the order was addressed BT, not to him.
- J refused to pay B for the pipes because he had a set-off (contra) account against BT – i.e. set-off by the debt without paying money to BT.
- Held:
 - J was not liable as there is NO contract, given that the order was made to BT, not to B.



Boulton v. Jones (1857)

(...cont...)

- Held by *Pollock*:
 - *‘Now the rule of law is clear, that if you propose to make a contract with A, then B cannot substitute himself for A without your consent and to your disadvantage, securing to himself all the beneits of the contract’*



OFFER (...cont...)

- An offer can be **terminated**:
 - On death of parties before acceptance
 - By non-acceptance within time stipulate or reasonable time
 - When **revoked** before acceptance
 - When rejected by the offeree
- **Revocation of offer**:
 - Must be **communicated** to (which means received by) the offeree
 - *Byrne v. Van Tien Hoven (1880)*
 - Before acceptance
 - Directly by the offeror himself or
 - Indirectly through a third party.

Essentials of a Valid Contract

ACCEPTANCE

- Oxford Dictionary of Law:
 - *Agreement to the terms of an offer that, provided certain other requirements are fulfilled, converts the offer into a legally binding contract.*
- **Manifestation** by an offeree of his **willingness** to be bound by the contract in the terms of the offer.



ACCEPTANCE must

- Must Mirror the terms of the offer
 - **Mirror Image Rule**
- Must be **unconditional**
- Must be **communicated** to the offeror



Unconditional ACCEPTANCE

- Must accept **unconditionally**:
 - **Qualification** of terms of the offer =
 - **Destroy** the original offer
 - **Counter-offer** =
 - **Rejection** of the original offer
- Contract formed once acceptance is received.



Battle of the Forms

- This arises when:
 - Parties to a contract negotiate the terms of a contract on the basis of its own terms
 - For example, A offers to buy goods from B on its (A's) standard terms and B purports to accept the offer on the basis of its own standard terms
 - the battle is often won by the party who fired the "last shot", that is, the last party to put forward terms and conditions that were not explicitly rejected by the recipient.



Battle of the Forms

- The battle is often won by the party who fired the "**last shot**", that is, the last party to put forward terms and conditions that were not explicitly rejected by the recipient
- A contract formed after a 'battle of the forms' is usually **deemed to have been accepted** by **performance**
 - **Authority:**
 - *Percy Trentham Ltd. v Archital Luxfer Ltd.* 1993
 - *Brogden v Metropolitan Railway Co* HL 1877



ACCEPTANCE vs Question

- Differentiate between:
 - **Offer vs Questions and/or Answers to Questions**

Harvey v Facey

[1893] AC 552 Privy Council

- The Harvey sent a telegram to the Facey asking "*Will you sell us Bumper Hall Pen? Telegraph lowest cash price.*"
- Facey replied, "*Lowest cash price for Bumper Hall Pen £900.*"
- "*We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession.*"
- Question to Students: Was there an offer and acceptance?

Harvey v Facey

[1893] AC 552 Privy Council

- Question to Students:
 - Was there offer and acceptance?
- Answer:
 - Held: The Privy Council held that there was no contract concluded between the parties. Facey had not directly answered the first question as to whether they would sell and the lowest price stated was merely responding to a request for information not an offer. There was thus no evidence of an **intention** that the telegram sent by Facey was to be an offer.



Communication of ACCEPTANCE

- **If not specified (authorized) by the offeror,**
 - may be made:
 - in writing,
 - Orally, or
 - By conduct. (Question: Which authority?)
 - Through various **means:**
 - Telephone (Question: What about voice mail?)
 - Telex, telegram
 - *Susanto-Wing Sun v. Yung Chi Hardware, 1988 No. A8177*
 - Question: What about email?
 - Directly or indirectly through a third party



Communication of ACCEPTANCE

- **Acceptance** must be **communicated** to (i.e. received by) the **offeror** or his agent.
 - **Exception: The Postal Rule**
 - *Household Fire Insurance Co. v. Grant (1879)*
- **Silence** cannot be construed as acceptance
 - *Felhouse v. Bindley (1862)*
 - *'If I hear no more about him, I shall consider the house is mine at SP30.'*
 - Question: Can acceptance be made without oral or written communication?

Offer & Acceptance

2

1

Offer and Acceptance

a

Identify the Offer

Offer=

1. manifestation of willingness to enter bargain
2. so made as to justify another person in understanding that his or her assent to the bargain *is invited*, and *will conclude it*.

i

What type of assent is required?

A

Bilateral Contract:
assent= return promise

B

Unilateral Contract:
assent= complete performance only

ii

Is this not an offer, but a solicitation for an offer?

b

Was the offer accepted?

Acceptance=

1. manifestation of assent to terms of offer
2. in the manner invited or required by the offeror

c

Termination before acceptance?

Has the offer been terminated before the offeree accepted it?

The four terminators:

i

Lapse of Time

Mailbox Rule

ii

Death of the Offeror

iii

Rejection by the Offeree

Is this a counter-offer?

iv

Valid Revocation

Is the offer irrevocable?



Essentials of a Valid Contract

INTENTION

- Intended to be legally enforceable
- *Consensus ad idem*
 - Meeting of minds
- Commercial agreements:
 - Presumed (but rebuttable) to be intended as contracts with legal consequences
 - Question: Binding on whom?
 - Bilateral contracts
 - Unilateral contracts
- Family or Social agreements:
 - Presumed to be not intended to be contracts with legal consequences: White v Bluett (1853) 23 LJ Ex 36
 - Exception: Simpkins v. Pays (1955)



INTENTION (..cont...)

- Intention or not as decided by courts:
 - A matter of facts
 - Depending on evidence
 - A matter of law
 - Depending on construction (i.e. how the court construe the facts (actually evidence))
 - i.e. interpretation of the meaning of the facts
 - i.e. how the court construe the meaning of the facts
 - A commercial **bluff?** [This is why advertisement is normally not taken as an offer.]
 - **The Test is: Is there a meeting of minds?**

Essentials of a Valid Contract

CONSIDERATION

- As defined in *Currie v. Misa (1875)*:
 - *“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 the other.”*
 - Consideration is some benefit accruing to one party or some detriment suffered by the other.
- Benefit to the promisor = Detriment to the promisee
- **Consideration** is “**price**” paid to buy a promise



CONSIDERATION (...cont...)

- *Maxim: Courts will not give help to volunteer.*
- **Volunteer** is one who give no consideration – i.e pay no price for a promise of benefits.
- **Contract** without **consideration** is **not binding**.



Stilk v. Myrick (1809)

- Return Voyage from Baltics to London
- In peril due to two of the crew abandoned the ship
- The seamen original wages = £5 per month
- The captain offered the remaining crew an equally divided share of the deserted seamen's salary if they could return sail the ship to London with reduced crew.
- The ship was returned to London by the remaining seamen
- However, the additional payment was not made



Stilk v. Myrick (1809)

- Held:
 - Agreements cannot be altered without the provision of fresh consideration to underpin the promise and contractually bind the parties
 - Each contracting party must give something in return for the consideration received from other under the contract and without which the contract will not be valid
- Contrast: *Hartley v Ponsonby* [1857] 26 LJ QB 322



Williams v. Roffey Bros & Nicholls (Contractors) Ltd. (1990)

- Roffey Bros was contracted by Shepherds Bush Housing Association Ltd to refurbish 27 flats
- They subcontracted carpentry to Mr. Lester Williams for £20,000 payable in instalments. Some work was done and £16,200 was paid. Then Williams ran into financial difficulty because the **price was too low**.



Williams v. Roffey Bros & Nicholls (Contractors) Ltd. (1990)

- Roffey Bros would be subject to a **penalty clause** for late completion
- So they had a meeting and Roffey promised an extra £575 per flat for on time completion
- Williams did eight flats and stopped because he had only got £1,500. New carpenters were brought in
- Williams claimed against Roffey Bros



Williams v. Roffey Bros & Nicholls (Contractors) Ltd. (1990)

- **Judgment by Glidewell LJ** who held that:
 - Williams had provided good consideration even though he was merely performing a pre-existing duty
 - Williams got £3,500 (not full **expectation damages**)
 - The idea of **promissory estoppel** was not properly argued and 'not yet been fully developed'



Williams v. Roffey Bros & Nicholls (Contractors) Ltd. (1990)

- Distinguish from **Stilk's** case (*see slides below for Stilk's case*) where agreement to perform an existing legal duty cannot constitute good consideration for a new contract. (Due to for reason of **economic duress**)



Williams v. Roffey Bros & Nicholls (Contractors) Ltd. (1990)

- Whether a contract could legitimately be varied is answered by the Test as set out as follows.
 - if A has a contract to employ B for work
 - Before it is done, A has reason to doubt whether B will, or be able to complete his side of the bargain
 - A promises B to pay more
 - A '*obtains in practice a benefit, or obviates a disbenefit*' from giving the promise
 - There is no economic duress or fraud



CONSIDERATION (...cont...)

- It must be **sufficient**, but not necessarily **adequate**.
- **Adequate:**
 - Means something equal in value to that for which it is given in exchange.
- **Sufficient:**
 - Means such consideration as the **law will recognize**.
 - As long as something of **value** is given, the courts will not ask whether it is of adequate value for the exchange.
 - *Thomas v. Thomas* (1842)
 - Widow's SP1 rent is sufficient, while
 - Executors' desire to satisfy the wish of a dead man was not sufficient.
 - *Chappell & Co v Nestle* [1960] AC 87

Chappell & Co v Nestle [1960]

AC 87

- Nestle ran a sales promotion
- 3 chocolate bar wrappers + 1 shilling 6d to get a music record which normally retailed at 6 shillings 8d
- Chappel owned the copyright in one of the records offered and could get a 6.25% of the retail price
- Chappel sought injunction
- Held: Chocolate bar wrappers is sufficient



CONSIDERATION- Executed vs. Executory vs. Past

- **Executory** vs. **Executed** Consideration
- **Executory** consideration:
 - Is a promise to confer a benefit or to suffer some detriment at some future time.
 - An exchange of promises for **Acts in future**.
- **Executed** consideration:
 - Means that consideration which is wholly performed on one side immediately the contract is entered into.
 - An exchange of a promise for an **act done**.



CONSIDERATION- Past Consideration = No Consideration

- **Past consideration** is not consideration
 - *Roscorla v. Thomas (1842)*
 - *T sold horse to R for SP30*
 - *After the actual sale, T stated that the horse was free from vice, which later proved to be vicious*
 - *R sued T*
 - *Held: No consideration to buy the warranty of soundness*
 - **Exception:** Past consideration good consideration, if:
 - The act was done at the **request** of the **promisor**.
 - That the parties **all along contemplated** that payment would be made.
 - *Lampleih v. Brathwait (1615)*



Roscorla v. Thomas (1842)

- Lord Denman CJ:
 - *"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... a consideration past and executed will support no other promise than such as would be implied by law."*



Roscorla v. Thomas (1842)

- The Court found for the defendant because:
 - The promise (i.e. was *the horse was free from vice*) was unsupported by consideration as this warranty was given after the contract was formed before such promise was made.
 - The original contract of sale was formed with consideration from both side which, however had no warranty offered.
 - No new consideration was provided to “buy” the warranty to have legal effect.



Roscorla v. Thomas (1842)

- This decision demonstrates the rule in English Contract Law:
 - Consideration contracted for in the past does not amount to good consideration for a present agreement.
 - "*Past consideration is no consideration*": consideration must be "**executory**" or "**executed**", but not "**past**"; that is:
 - consideration must be supplied in the present (i.e. at time of contracting) or in the future; and
 - Things done beforehand cannot be good consideration.



CONSIDERATION (...cont...)

- *Lampleih v. Brathwait (1615)*
 - B unlawfully killed a man.
 - B request L to seek the King's pardon for him.
 - L succeeded after considerable trouble.
 - B then promised L SP100 for his service, but later broke his promise.
 - L sue B
 - Held: that as L's services were rendered a the defendant's (i.e. B's) request, there was consideration for defendant's promise.



CONSIDERATION- Genuity of Consideration (...cont...)

- Consideration must be real or genuine:
 - *White v Bluett* (1853) 23 LJ Ex 36
 - *Held:*
 - An undertaking by a son ‘*to cease complaining that he was not as well treated as his brother*’ was insufficient and was nothing more than a promise ‘*not to bore*’ his father.
 - In “reality”, not a benefit nor detriment, or a vague or sham promise.



CONSIDERATION – Legality of Consideration (...cont...)

- Consideration must be **legal**:
 - Pearce v. Brooks (1866)
 - Foster v. Driscoll (1929)
 - UNCONSCIONABLE CONTRACTS ORDINANCE-CHAPTER 458 s.5
- Consideration must be **possible**:
 - **Doctrine of Frustration**
- Consideration must move from the **promisee to the Promisor**:
 - **Privity** of Contract
 - Tweddle v. Atkinson (1861)



CONSIDERATION (...cont...)

- Consideration must be real or **genuine**:
 - *White v. Bluett (1853)*
 - *Held*: An undertaking by a son ‘*to cease complaining that he was not as well treated as his brother*’ was insufficient and was nothing more than a promise ‘*not to bore*’ his father.
 - In “reality”, not a benefit nor detriment, or a vague or sham promise.



Summing up: Consideration must be

- **Genuine** and **Real**
- Of **Sufficient** value, though need not be of adequate value
- Must **not** be Consideration in the **Past**, i.e. moved before the formation of the contract (cf: **Executed** Consideration)
- Must move from **promisee** to **promisor** (Doctrine of the **Privity** of Contract)
- Must be **legal**

Essentials of a Valid Contract

CONSIDERATION (...cont...)

- Question:

- Is duty imposed by the general law a consideration?
- *Collins v. Godefroy (1831)*

- Question:

- Is the performance of an existing duty a consideration?
- *Stilk v. Myrick (1809)*
- *Hartley v. Ponsonby (1857)*
- *UBC (Construction) Ltd. V. Sung Foo Kee Ltd, [1993] 2 HKC 458*



Collins v. Godefroy (1831)

- Godefroy was a defendant of a case.
- Godefroy, however, sued an attorney for negligence
- Godefroy caused Collins the plaintiff to be subpoenaed to attend and give evidence
- Godefroy wanted to make sure that Collins attended to help his case, so he promised to pay Collins one guinea per day as compensation for the loss of his time.
- Collins attended court for six days but was not called to give evidence. Collins was not paid. So he sue Godefroy



Collins v. Godefrey (1831)

- Held:
 - The agreement was not supported by consideration
 - Because the plaintiff was under a public duty to attend court anyway having been subpoenaed
 - The law would not allow someone to recover expenses incurred in the performance of a duty that they were merely obliged to do anyway by law