

## Consideration under Common Law

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Pursuant to the Common Law, in order for a contract to be valid and legally binding, certain elements should be found, which are:

- a. Offer and acceptance<sup>1</sup>;
- b. Consideration;
- c. Intention to be legally bound.

A "consideration" is defined as "something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something"<sup>2</sup>. Under the Common Law, a contract without a consideration is not enforceable<sup>3</sup>.

A limitation that can be found in a consideration is the pre-existing contractual obligation under a contract. This can be seen in *Stilk v Myrick* [1809]<sup>4</sup>, where a set of ship crew, including Stilk, were promised by Myrick, the ship owner, to be paid more if they continue to sail the ship to its destination when 2 crews had deserted. Stilk was already under a contract with Myrick stipulating that he will get paid £5 a month for the voyage. When Myrick does not pay the additional amount after the ship reached its destination, the high court renders a favorable decision for Myrick by rejecting the claim. The basis of the rejection was that pursuant to the initial contract, it has been the duty of Stilk to navigate the ship until destination and therefore the obligation is part of the initial agreement and not valid for a new contract.

The above high court decision referred to *Harris v Watson* [1791] King's Bench. Similarly in this case, Watson, the Captain of the ship promises to give additional payment to Harris, one of the crew to manage an emergency situation which occurred in sea during the voyage. The King's Bench ruled in favor of Watson, but the basis of such ruling was for public policy reasons in order to discourage sailors from acting opportunistically in sea. However, in my opinion, in *Harris v Watson* the element of duress can also be identified. Harris demanded an increase of payment during an emergency situation at sea, and Watson had no option to refuse. Therefore duress should also be the basis of rejection<sup>5</sup>.

In addition to the foregoing, a pre-existing contractual obligation also exists in *Harris v Watson*. Similar with *Stilk v Myrick*, both the plaintiffs had agreed to perform its obligation under the initial contract, and therefore they are bound by the same. The performance of their obligation is a mandatory and such cannot entitle them for another benefit in a new contract since it will lack the element of consideration to be delivered by the plaintiffs. This is the similarity between those two cases, which I believe builds the court decision in ruling *Stilk v Myrick*.

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<sup>1</sup> Lord Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men* (1997) 113 LQR 433; c.f. § 133 BGB in Germany, where "the actual will of the contracting party, not the literal sense of words, is to be determined"

<sup>2</sup> Black's Law Dictionary, 9<sup>th</sup> ed. 2010

<sup>3</sup> Restatement (Second) of Contracts § 81 (1979)

<sup>4</sup> EWHC KB J58

<sup>5</sup> *Redgrave v Hurd* (1881) 20 Ch D 1 and *Allcard v Skinner* (1887) 36 Ch D 145

Based upon the above, the Contract Law had further developed. If a new circumstance had arisen during the contract, which entitled a party to refuse performing its obligation pursuant to the said contract, then only it is possible for the consideration to be varied as reflected in *Hartley v Ponsonby* [1857]<sup>6</sup>. In the latter, Hartley had been promised additional payment to sail in the ship when a significant number of crew had deserted, thus leading the voyage to be dangerous. Due to the changes of the condition, Hartley is entitled to refuse the continuation of his obligation since the current situation was not similar with the one during the contract was being made. Therefore, the offer by Ponsonby, the captain of the ship, and acceptance by Hartley, was deemed as a new contract, and thus enforceable.

Another case that further adds a mechanism to alter a consideration is *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, [1989]<sup>7</sup>, which indicates that a new arrangement can be made if it confers benefit to the other party, where the bargaining powers are equal, and such arrangement reflects the true intention of both parties.

## Summary

The cases of *Harris v Watson* and *Stilk v Myrick*, had laid some of the basic foundations of contract law. The basic foundation was later developed by subsequent cases, by introducing variations due to different circumstances and the dynamism of the commercial aspects. Without those foundations at place, it will be difficult to define how an arrangement in a contract should be formed and therefore the development itself is impracticable.

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<sup>6</sup> 119 ER 1471

<sup>7</sup> EWCA Civ 5