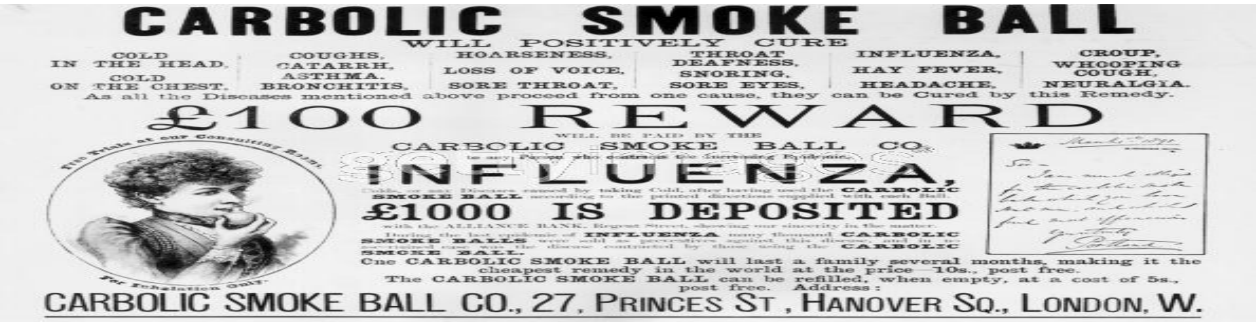
TOPIC 1: *OFFER*

Offer

Case: *Carlill v Carbolic Smoke Ball Company (1893)*



Facts:

The defendants, the *Carbolic Smoke Ball Company* ('the Company'), manufactured a device known as the Carbolic Smoke Ball, which they claimed would prevent colds and/or influenza. The Company released the following advertisement:

> *"£100 reward will be paid by the Company to any person who contracts influenza or the cold after having used the Smoke Ball three times daily for two weeks as per printed instructions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter"*

The plaintiff, *Carlill*, purchased and used a Smoke Ball in accordance with the manufacturer's directions from November 1891 – January 1892. During this period, she contracted influenza. She claimed for the reward of £100, but the defendant refused to pay. The Carbolic Smoke Ball Company argued the following:

i) Advertisement was <u>not</u> a promise, and thus, not an Offer; was a mere **puff,** which meant nothing, and they had no intention to be contractually bound (no *Intention* to be bound).
ii) No offer had been made to any particular person – argued that it is **impossible to make an offer to the world at large**.
iii) Carlill, the plaintiff, had **not notified** the Company that she had **Accepted** their Offer; thus, there was no means by which she had not communicated her *Acceptance*.
iv) There was no way of **checking/monitoring** that Carlill had in fact bought and used the Smoke Ball as per instructions.
v) The advertisement had ascribed **no time limit** on the Offer i.e. their Offer was not to say that if someone bought and used the Smoke Ball as per instructions, they would be protected from contracting influenza indefinitely from then onwards.
vi) Their Offer was **too vague**; that is to say, the terms of the Offer were too open ended (no *Certainty* that an Offer was stipulated).
vii) No *Consideration* had moved from Carlill; according to contractual law, consideration has to move from the promisee for it to be construed as Acceptance.

Issues:

- *Did the Company's advertisement constitute an Offer? That is to say, did it fulfill the requirements of an Offer?*

- *Did Carlill's actions of purchasing and using the Smoke Ball as per instruction constitute Acceptance of the Offer?*

Ruling:

(Lidley, LJ):

i) The advertisement did not construe an 'inference of fact'; it was a 'distinct promise' with language that was 'perfectly unmistakeable' – language was **not too vague** (*Certainty* of contract).

ii) Offer was **not a 'mere puff'** – inferring seriousness of offer through the £1,000 deposited at the Alliance Bank (*Offer* was made).

iii) Offer **can be made to world at large** – wording stipulated that the £100 was the Offer, and performance of conditions constituted Acceptance of Offer. This was a *wagering contract* for which the Company should bear the consequences (*Acceptance* was provided).

iv) Acceptance **did not need to be communicated to Offeror** – in contracts of this type, the Offeror construes by his language that he does not expect nor require notice of acceptance apart from notice of performance i.e. Offeror dispenses with notice of acceptance.

v) **Time Limit was placed** – there were 3 possible arguments for time limit of protection through use:
   a. During the prevalence of the epidemic.
   b. For two weeks after use.
   c. Protection for a **reasonable amount of time** after having used the Smoke Ball as per instructions (Lidley, LJ preferred this argument) – Carlill's use fell within this time period, therefore time limit did exist.

vi) **Consideration was given by Carlill** (the Offeree/Promisee) – according to the law of contract, consideration either results in a benefit to the promisor, or detriment to the promisee. Lidley argued that the sales of the Smoke Balls themselves would have been enough of a benefit to the Company to constitute Consideration. However, with the detriment suffered by Carlill through the inconvenient use of the Smoke Ball, good consideration was given for the promise.

(Bowen, LJ):

i) **Time Limit was placed** – eventhough he disagreed with Lidley about the concept of a 'reasonable' period of time, he agreed that Carlill's contraction of the disease fell within the time limit because she fell ill during the period of use of the Smoke Ball – a time period when she should have been protected from disease.

ii) **Offer was not too vague –** language was such that any reasonable person who would read the advertisement would think that if they fulfilled the conditions for reward, they would be entitled for same.

iii) **Offer can be made to the public at large (the 'world') –** as the Offer was not retracted, the Offeror (the Company) would become liable to pay the reward to anyone who performs the condition.

iv) **Notification of Acceptance was not required in this instance** – the Company implied by its Offer that performance of the condition would provide sufficient Acceptance; that is to say, the Company dispensed with the requirement to provide notification of Acceptance through their Offer.

v) **Consideration was given for the promise –** Carlill, the promisee, suffered the inconvenience of having to use the Smoke Ball three times daily for two weeks. This was a legal detriment on the promisee's part which was enough to constitute good consideration.

Carlill successful

Offer + Invitation to Treat

Case: *Gibson v Manchester City Council (1979)*

Facts: In 1970, the Manchester City Council ('the Council'), controlled by the Conservative Party, enforced a scheme whereby council housing tenants were eligible to purchase the title to their homes. As part of the scheme, the Council wrote a standard letter to all tenants who fell under this scheme, including Robert Gibson. This letter stipulated the following:

"*Council **may be prepared** to sell the house to you for £2,180. If you would like to make a formal application to buy your Council house, please complete the enclosed application form and return it*".

Gibson completed the form, leaving the purchase price blank, and returned it to the Council. But before formal contracts were prepared, elections were held and control of the Council passed to the Labour Party, which abandoned the scheme, agreeing to only complete sales for which contracts had been concluded. Unfortunately, Gibson's contract had not been completed. The Council denied that there was a binding contract with Gibson. Gibson argued that the correspondence between parties constituted a legally enforceable contract; that is to say, the application documents provided by the Council was an Offer for Gibson to purchase his house, of which Acceptance was provided by Gibson when he completed and returned the application forms to the Council.

Issues:

- *Was there an Offer from the Council for Gibson to purchase his house; i.e. did the Council indicate its willingness to enter into an agreement with Gibson on certain terms?*

Ruling:

(Geoffrey Lane, LJ):

There was no standard form of Agreement in any of the documents said to constitute a contract; that is, when measured by the conventional Offer and Acceptance approach, there never was an Offer by the Council for which Gibson's Acceptance would constitute a legally enforceable contract – the documents were but a step in the negotiations for the contract.[1]

This sentiment is expounded upon by the fact that the Council's documentation included the wording "may be prepared to sell [the house]". Thus, the Council's application form was not a formal Offer, but merely an **invitation to treat;** that is, an invitation for Gibson to make a formal Offer, to which the Council could choose to either accept or reject. Further, the application form included the term "this letter should not be regarded as a firm offer of a mortgage", lending credence to the notion that the application form did not constitute a formal Offer on the Council's part to sell the house to Gibson.

[1] Application form constituted an **Invitation to Treat,** as opposed to a formal **Offer** on the Council's part.

(Lord Diplock):

There is nothing to suggest that the application form provided to Gibson for him to purchase his house amounted to a formal Offer – it was merely an invitation for Gibson to treat the Council with an Offer of his own. However, even if the documentation amounted to an Offer, there is no evidence to suggest that it was Accepted by the Council – *Manchester City Council successful.*

Ticket Cases

Case: *MacRobertson Miller Airline Services v Commissioner of State Taxation (1975)*

Facts:

A prospective passenger of the MacRobertson Miller Airline Service ('the Airline') would be advised, on inquiry, on the flights available to his/her destination, and the fare of the flight. After selecting the flight, the passenger would be handed a ticket, on which were entered appropriate details, in return for paying the fare. When the time came for their flight, the passenger would present the ticket to secure his/her seat.

However, a condition printed on the ticket reserved the right for the Airline to abandon any flight or cancel any booking without incurring any liability to the passenger other than refunding the passenger's fare. For stamp duty purposes (a tax often required for services such as airline transportation), it was necessary to determine whether the ticket issued fell under the criteria of **Agreement,** that is, amounted to an Offer and Acceptance, and therefore would be liable for the stamp duty tax.

At the time of the case, the Airline did not claim stamp duty on their tickets.

Ruling:

(Barwick, CJ):

Airline would not incur liabilities when cancelling tickets or abandoning flights, other than refunding passengers the fare of the tickets – this sweeping exemption clause relieves the airline from any obligation to carry the passenger, leaving no room for the existence of a *contract of carriage.*

In effect, Barwick CJ reasoned that the arrangement was similar to a *unilateral contract* and an *invitation to treat;* that is, the act of the Airline selling the ticket amount to an **Invitation to Treat**, with the **Offer** arising when the passenger presented the ticket at the airport on the day of their flight, and **Acceptance** being provided only once the Airline had performed its duty of carrying the passenger.

As no liabilities other than refunding of the ticket arose out of abandonment of flights and/or cancellation of tickets other than refunding of the fare, there were no contractual obligations between the Airline and the passenger until the Airline had provided the passenger with a seat on the plane – **no contract, no incurrence of stamp duty.**

(Stephen, J):

The usual conventional analysis of the formation of a contract in a ticket case such as this is to consider the ticket as an Offer, the terms of which the passenger can choose to either accept or reject after being given a **reasonable amount of time** to accept or reject the terms. If no rejection is provided, the passenger is assumed to have provided Acceptance of the terms, and the contract is formed. The conventional approach may be applied in this case because the passenger is provided with a reasonable amount of time to ascertain the conditions of the ticket and choose to either accept or reject the terms.

Thus, the ticket records the terms of an Offer, but requires the terms of Acceptance to be construed as forming a contract. Therefore, tendering of the ticket **does not constitute an agreement** and is not dutiable for Stamp Duty purposes – *MacRobertson Miller Airlines successful; no stamp duty on tickets.*

Shop Sales – Offers vs. Invitations to Treat

Case: *Pharmaceutical Society of Great Britain v Boots Cash Chemists (1953)*

Facts:

Boots operated a self-service shop where certain drugs were displayed. This part of the store was under the control of a registered pharmacist, as was required by legislation. When a customer selected drugs and took them to the cash register, the pharmacist supervised that part of the transaction, and was authorised by Boots to prevent a customer from removing drugs if he, the pharmacist, saw fit.

Nevertheless, the Pharmaceutical Society of Great Britain ('the Society') believed that Boots contravened legislation by selling drugs in an unauthorised fashion, and filed suit. They believed they contravened legislation because when the performance of a customer in selecting drugs amounted to a complete purchase, an Offer, and an unauthorised contract thereby arose as a result. The case was dismissed in a lower court, and was subsequently appealed by the Society to the Court of Appeal.

Issues:

- *Was the sale of items Acceptance of the shop's Offer to buy, or did customer's assume Acceptance the moment the items were taken off the shelves?*

Ruling:

(Somervell, LJ):

Goods displayed in a shop are an **Invitation to Treat**; that is, they are intended to invite the customer to select their desired items. The customer then makes the **Offer** by taking the goods to the cashier. The cashier then **Accepts** the Offer from the customer to purchase those items.

The shop in question and its selling practices are no different to any other store, and no contract arose until the pharmacist chose to either accept or reject the Offer provided by the customer in purchasing the drugs.

Further, if the act of selecting an item off the shelves constitutes a purchase, and thereby, a contract, the customer itself is bound to select the item they have chosen and cannot substitute the item for another. This is clearly not the

case. But even if it were, the supervision of a registered pharmacist at the appropriate time of purchase provided for adherence to the *Pharmacy and Poisons Act 1933* ('the Act') – *Boots successful.*

(Birkett, LJ):

Agreed with Somervell, LJ; a customer selecting a drug does not amount to Acceptance of an Offer (by the shop) to sell. It is an Offer by the customer to buy the item, and no sale, and therefore, no Agreement, arises until the customer's Offer of purchase is Accepted by the shop (Boots). Further, the supervision of the registered pharmacist at the time of purchase provides for adherence to the Act – *Boots successful.*

Auctions

Case: *AGC (Advances) Ltd v McWhirter (1977)*

Facts: McWhirter was the guarantor of his company's mortgage; that is, guaranteed repayment of the mortgage on behalf of their company in the event that the company could make payment. As anticipated, the company could not make payment. AGC, the mortgage company, called upon McWhirter to make payment of the mortgage as the guarantor. McWhirter refused, and AGC proceeded to seize assets from McWhirter's company to make good on the mortgage.

Eventually, the company's property was brought to auction. The auction reached a point where there was no more reserve; that is, passed the value which AGC sought to reclaim ($70,000). McWhirter, who was present at the auction, proceeded to bid $70,500. Ordinarily, in auctions without reserve, the sale is made to the highest bidder – in this case, McWhirter, who refused to make payment of the mortgage in the first place!

AGC refused to make the sale to McWhirter, bringing an action to court.

Issue:

- *In cases of auctions without reserve, where the sale is usually made to the highest bidder, does the highest bid constitute Acceptance of the Offer to buy, or is it still merely an Offer until accepted by the auctioneer?*

Ruling:

(Holland J):

There is no reason to distinguish between sales by auction, whether it is with or without reserve. The auction in either case is considered an *Invitation to Treat*.

Even in auctions without reserve, an Offer is not binding until assented to. The highest bid **does not** amount to Acceptance of the Offer to sell; it is still an Offer until Accepted by the auctioneer by the fall of the hammer. Thus, the sale was made to the next highest bid ($70,000) – *AGC successful.*

Tenders

Case: *Harvela Investments Ltd v Royal Trust Co. of Canada (1986)*

Facts: Two parties, *Harvela* and *Outerbridge*, were invited by the Royal Trust Co. of Canada ('the Royal Trust') to submit tenders for the purchase of shares in a particular company the Royal Trust owned. The successful tenderer would obtain control of said company. The letter sent bound the Royal Trust to accept the highest offer.

Subsequently, both parties placed tenders. *Harvela* placed a fixed tender of **$2.175m**, whilst *Outerbridge* submitted a tender of **$2.1m or $101,000 more than the highest Offer** (this being known as a 'referential bid'). The Royal Trust accepted *Outerbridge*'s Offer. Subsequently, *Harvela* sued on the grounds that the conditions of the tender did not make a provision for referential bids, making that part of the tender invalid.

Issues:

- *Whose tender was the Royal Trust bound to sell shares to?*

Ruling:

The making of a **referential bid** was inconsistent with the terms of an Offer. The *Royal Trust* had created a **fixed bidding** sale, extending the same invitation to both parties and giving them an equal opportunity to purchase shares. This meant that each party had to submit a singled, fixed bid. Outerbridge was not entitled to submit a referential bid[2] - *Harvela successful.*

Case: *Hughes Aircraft Systems International v Airservices Australia (1997)*

Facts: The Civil Aviation Authority (CAA) tendered for an advanced air traffic system. On 9 March, 1993, the CAA stated that it would conduct the tender in **accordance with detailed procedures and criteria**. Prospective tenderers were asked to sign the letter signifying their acceptance of the letters terms.

In July 1993, CAA issued a formal Request for Tender, including similar procedures and criteria to the March letter.

The successful tenderer was Thomson Radar Australia. Hughes Aircraft Systems, the unsuccessful tenderer, brought an action against the CAA, claiming that Thomson's tender failed to comply with the defined procedures and criteria. Hughes sued for breach of contract.

[2] The phrase '*a single bid*' was influential in this case.

Issues:

- *Did the CAA have an obligation to evaluate the tenders in accordance with the stipulated criteria?*

Ruling:

(Finn J):

The Request was **not** a mere Invitation to Treat. On its signing, it was a *binding statement* of the procedures to be followed in the tender process. The CAA was required to evaluate the tenders in accordance with the stipulated criteria. This gave rise to contractual rights.

CAA's failure to evaluate the tender in accordance with the evaluation criteria was thus a **breach** of the Tender Process contract – *Hughes successful.*

<u>Revocation of Offer - Options</u>

Case: *Goldsbrough Mort & Co Ltd v Quinn (1910)*

Facts: Goldsbrough ('G') had an interest to purchase land from Quinn. Requesting to contemplate the Offer from Quinn to buy, G paid 5 shillings as consideration to keep the Offer open for a period of one week, vis a vis an option. Before the expiration of the week and before Acceptance of the Offer to purchase land, Quinn repudiated the Offer, claiming it had been made under a mistake. Meanwhile, G accepted the Offer within the week.

An action was subsequently brought by G against Quinn for breach of contract by repudiating the Offer before the option had expired, despite G paying consideration to keep the option open.

Issue:

- *Could the Offer be revoked before the option had expired?*

Ruling: Quinn was bound to keep the option open for the specified period of time due to the valuable consideration of 5 shillings paid by G to enact the option. As G had Accepted the Offer within the week following consideration i.e. within the time allotted by the option, Quinn was bound to Accept the Offer.

Revocation of Offers – Unilateral Contracts

Case: *Mobil Oil Australia v Wellcome International (1998)*

Facts: Mobil Oil announced that it was creating an incentive scheme to improve the performance of franchisees operating Mobil service stations. Mobil told its franchisees that it was **seeking** to implement a proposal whereby a franchise that achieved 90% or above in the *Circle of Excellence* program for 6 consecutive years would be granted a 9 year renewal of said franchise, at no extra cost to the franchise itself.

Several franchisees claimed to have spent money in improving their operations to meet the target of >90%. However, after 4 years, Mobil **revoked** on their proposal (offer?), and the franchisees brought an action against Mobil.

Issues:

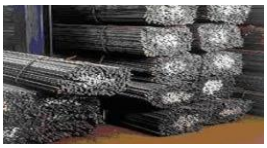
- *Was Mobil entitled to revoke its offer after the 4 years, when the franchisees had partly performed their promise?*

Ruling: Mobil **had not** made an Offer to the franchisees as evidence by Mobil's indication that the scheme was only in a developmental stage, and their commitment to "finding a way" to extend the franchisees tenure was "simply too vague" to give rise to a contractual obligation. Further;

An offer made in return for **performance of an act**, like any Offer, is **revocable at any time**. The Offeror can only be prevented from revoking where there is an implied term not to revoke or there is an estoppel.

Revocation of Offer – Rejection and Counter-Offer

Case: *Stevenson, Jacques & Co v McLean (1880)*



Facts: Stevenson & Co was an iron merchant which purchased iron to sell to third parties. McLean was a seller of iron. McLean made an Offer to sell iron to Stevenson & Co. Stevenson & Co then responded, **inquiring** as to the possibility of a staggered repayment. McLean did not respond to this inquiry, and proceeded to sell said iron to another party. McLean then notified Stevenson & Co of the sale to another party, but before they were notified, Stevenson & Co informed McLean of their Acceptance of McLean's Offer to purchase iron.

However, once Stevenson & Co were notified of the sale of iron to another party, they sued under breach of contract. McLean however, argued, that the sale to a third party was not a breach of a contract, alleging that Stevenson & Co's request for information amounted to a counter-offer, which would have revoked McLean's original Offer.

Issues:

- *Did Stevenson & Co's inquiry amount to a counter offer, thus invalidating the original offer?*

Ruling:

1. Stevenson and Co's request for information as to the staggered repayment did not amount to a counter-offer, but a mere inquiry to which McLean should have responded. Thus, the original Offer **was not revoked.**
2. McLean was entitled to revoke the Offer in the first instance as no consideration had been provided by Stevenson and Co to keep the Offer open; vis a vis an Option. However, revocation only stands **once it is communicated to the Offeree**. As such, as Stevenson and Co had provided notification of Acceptance *prior* to receiving revocation of the Offer by McLean, the original Offer stood which McLean was bound to Accept – *Stevenson & Co successful.*

Revocation of Offer – Lapse of Time and Death of Offeror

Case: *Fong v Cilli (1968)*

Facts: Fong owned a parcel of land which he offered to the Cilli brothers shortly before his death. Prior to Fong's death, one of the Cilli brothers Accepted the Offer to purchase Fong's land, whilst the other Accepted the Offer shortly after his death. Subsequently, Fong passed away, and the brothers wanted to claim the land. However, the executor of Fong's estate refused, claiming that following the death of the Offeror (Fong), the Offer was no longer valid.

Issues:

- *Would Luigi Fong accept the Offer when he knew that Cilli had died?*

Ruling:

(Blackburn J):

Since the other joint purchaser (the second Cilli brother) had not signed the agreement prior to Fong's death, Acceptance for Fong's Offer was not complete by the time he died. Thus, the Offer was no longer valid and the contract had lapsed.

Case: *Laybutt v Amoco Australia Pty Ltd (1974)*

Facts: Laybutt provided an option for Amoco to purchase a tract of land that he (Laybutt) owned, to be exercised within 3 months following the date of option. Amoco had paid the consideration for the option – a sum of $10. In

order for the option to be exercised, however, Amoco still had to pay a deposit . The option itself stated that the deposit be paid to the specified agent; however, no agent was listed.

Meanwhile, Laybutt passed away, meaning his will passed to his successor – his widow. Subsequently, Amoco sent within the 3 months following the option:

- A notice to the widow that they were exercising the option, as well as;
- The cheque for the deposit to Laybutt's solicitors, stating they act as **stakeholders** of the deposit, pending completion of the purchase – **NOT** to transfer to Laybutt's widow (as they should have done).

However, there was no clause in the agreement which authorised Laybutt's solicitors to receive payment of the deposit. The solicitors held the deposit for a further 3 months, returning the cheque with a letter that the option had been withdrawn as it had **not been properly exercised.**

Amoco then brought a declaration from the Supreme Court of NSW stating the option had been properly exercised and that there was an enforceable contract. However, this was appealed to the High Court of Australia by Laybutt's successor, his widow.

Issue:

- *Could the option be exercised after Laybutt's death?*
- *If so, was the option exercised properly?*

Ruling:

(Gibbs J):

Since no agent was named to whom the deposit should be paid, it was implied that payment should be made to the other contracting party (Laybutt), or his successors. Hence, payment of the deposit the solicitors, not to account to the widow, to keep as stakeholders until the purchase was completed, was an incorrect exercise of the option. The option was thus invalidated, and there was no binding contract between Amoco and Laybutt's widow (successor).

Revocation of Offer – Changed Circumstances

Case: *Dysart Timbers Ltd v Nielsen (2009)*

Facts: The Nielsen brothers were guarantors of a debt to Dysart. Dysart obtained a judgment against the Nielsen brothers for the debts of their (the brother's) company. The Nielsens disputed liability and applied to appeal the decision against them, thus seemingly *changing the circumstances* of their Offer to guarantee the debt.

Three days after applying for an appeal, the Nielsens Offered to pay part of the debt in full satisfaction of the debt. Upon finding out that the application for appeal had been granted, Dysart was faced with added costs and the chance of loss in court. Thus, they decided to Accept the Offer, but Nielsen retorted, claiming that the Offer was no longer open. It was appealed to the courts.

Ruling: Judges agreed that a change of circumstances had the effect of terminating an Offer, but held that the Offer was still open as they could not validate an application for appeal as causing a *change in circumstance*.

TOPIC 2: *ACCEPTANCE*

Conduct Constituting Acceptance

Case: *Smith v Hughes (1871)*

Facts: Hughes, the defendant, sought to purchase old oats to feed his cattle. After receiving what he thought was a sample of old oats from Smith, Hughes consented to purchase. However, this sample was actually new oats, as Smith was under the impression that Hughes required new oats. Subsequent to the purchase, Hughes realised that he was sold new oats, and claimed that he was provided with the wrong terms, that no contract existed, and refused to pay. Smith brought an action claiming breach of contract.

Issue:

- *'Ad idem': Had Hughes accepted Smith's offer if he had a false impression of what he was assenting to?*

Ruling:

(Blackburn J):

Usually, if there is no 'ad idem' – as in this case – there is no contract between the parties. However, in this case, the courts decided to use a ***subjective approach coupled with estoppel***, whereby Hughes was denied (under estoppel) from denying that he agreed to the wrong terms. This would have had the same result as the objective test, where a reasonable person, without knowledge of miscommunication, would have thought that Hughes was consenting to the purchase of new oats.

Thus, applying this approach, the courts ruled that one party's mistake does undermine a contract, and proceeded to rule for Smith.

Case: *Taylor v Johnson (1983)*

Facts: Johnson provided Taylor with an **Option** to purchase 2 plots of land, of 5 acres each, for $15,000 total. However, Taylor was under the impression that she was being offered land at $15,000 per acre, or $150,000 total. Taylor sued for misinformation of contract terms, and Johnson sought an order to set aside the contract of sale.

Issues:

- *Was there an agreement between Taylor and Johnson, or did Johnson's mistake vitiate acceptance?*

Ruling: Applying the *objective* approach to Acceptance, the law is not concerned with the **intentions** of the parties, but rather, with their outward manifestations; that is, what a reasonable person would have thought had they viewed the Agreement.

In accordance with law, a contract may only be voided if it was found that one of the parties operated in an 'unconscionable manner'. Objectively, in this case, it would have appeared to a **reasonable person** that Taylor acted unconscionably by being aware that Johnson had made a mistake, yet deliberately sought to ensure she would not realise she was mistaken (by terms of agreement). Thus, contract can be set aside – *Johnson successful.*

Case: *Fitness First v Chong (2008)*

Facts: Chong signed an application form to join Fitness First, a gym, on a 12-month membership. However, she failed the read the terms of the agreement beforehand – particularly, a clause which stated that if she cancelled her membership within the first 12 months of joining, she would be liable to pay a $200 fee. Unaware of this clause, she cancelled her membership within the first year, and was required to pay the cancellation fee. She sued, arguing that since she was unaware of this term, there was no valid contract.

The Tribunal ruled in her favour, stating that since the parties did not have a 'consensus *ad idem*' i.e. were not aware of the same terms when the contract was formed, there was no valid contract to start. This was appealed by Fitness First.

Issues:

- *Was Chong bound to pay the $200 penalty eventhough she was unaware of the terms of the contact?*

Decision: The courts held that the Tribunal member erred in law, and that by signing the form, Chong assented to the terms of the contract, irrelevant of whether there was a consensus *ad idem* between the two parties – *Fitness First successful.*

<u>Rule 1: Acceptance Must be in Response to an Offer</u>

Case: *The Crown v Clarke (1927)*

Facts: The Crown released a proclamation offering a £1,000 reward to anyone who provided information leading to the arrest and conviction of the murderers of two police officers. During the investigation, Clarke and Treffene were arrested and charged with the murders. Ignorant of the proclamation, Clarke provided information about the murders which led to the arrest and conviction of Treffene and Coulter, and to his own release.

Clarke subsequently heard about this proclamation of reward and claimed for it. The Crown refused to pay it, and an action was filed by Clarke. The Crown argued that they had refused to pay believing Clarke had provided information not in response to the Offer, but to free himself from conviction. The court held for the Crown, but the case was appealed by Clarke to the Supreme Court, which held **for Clarke.** However, the Crown appealed yet again to the High Court.

Issues:

- *Did a valid contract exist between the Crown and Clarke i.e. had Clarke's provision of information constituted Acceptance to the terms of the Offered reward?*

Ruling: The High Court held that for unilateral contracts to occur, Acceptance by performance can **only** be made when it is performed *on the faith of the Offer.* Eventhough by the objective ruling (what a reasonable person would have assumed by viewing Clarke's actions), it would appear Clarke was fulfilling the Offer and providing Acceptance thereof, the courts were of the opinion that Clarke's **intention** was not to provide Acceptance of the Offer, but to save himself from conviction.

Thus, the courts used the objective rule that Acceptance must be in direct response to the Offer, but at the same time, made room for the subjectivity of Clarke's actions – *Crown successful.*

Rule 2: Acceptance may not be inferred from silence

Case: *Felthouse v Bindley (1862)*

Facts: Felthouse sought to purchase a horse from his nephew. He wrote a letter to his nephew stating that "if [he] hears no more about [the horse], he shall consider the horse his at £30.15s". The nephew did not write back to the uncle Accepting the Offer stipulated in the letter, but instead informed the auctioneer, who was to subsequently sell the nephew's farming stock, **not** to sell the horse, stating it had already been sold.

By mistake, the auctioneer proceeded to sell the horse at auction. Felthouse sued the auctioneer, Bindley, for tort of conversion.

Issues:

- *Could Felthouse sue on the grounds that the auctioneer had breached the contract between Felthouse and his nephew?*

Decision: Eventhough Felthouse's nephew had intended to sell his horse to him, the nephew's failure to provide express Acceptance to his uncle by replying to his uncle's letter of Offer meant that no contract had been formed between the uncle and the nephew, and the uncle therefore did not own the horse. As a result, he did not have grounds to sue the auctioneer on – *case dismissed.*

Rule 3: Conduct may amount to Acceptance

Case: *Empirnall Holdings v Machon Paull Partners (1988)*

Facts: Empirnall, a property developer, retained architects Machon Paull to work on a property development. Following completion of a percentage of the work, Machon Paull requested a **progress payment**, as well as an execution by Empirnall of a **contract.** Empirnall made the progress payment, but informed Machon that they "do not sign contracts".

Further work was done by Machon, for which they requested a second progress payment. Along with this request, they sent a letter to Empirnall stating that they were:

> *"Proceeding on the understanding that the conditions of the contract are accepted by you (Empirnall), and work is being conducted in accordance with those terms".*

Machon Paull proceeded to work and receive further progress payments. Eventually, Empirnall went insolvent, at which time it was necessary to establish whether the silence in response to the unsigned contract, and the subsequent acceptance of the work provided by Machon Paull, nonetheless amounted to Acceptance of Machon Paull's Offer of work.

Issues:

- *Did Empirnall accept Machon Paull's offer of work, eventhough they had not signed a contract nor responded to MP's query?*

Ruling: In general, silent acceptance of a contract is insufficient to create a contract – Acceptance should be communicated to the Offeror. However, in some circumstances, communication of Acceptance is not necessary. Where an Offeree has **reasonable opportunity** to reject an Offer, and takes the benefit of the Offer under circumstances which indicate that the Offer will be paid for, it may be inferred that the Offer was Accepted – even if Acceptance is not explicitly communicated.

Further, from an *objective standpoint*, it would have appeared that Empirnall's willingness to take the benefit of Machon Paull's work on the knowledge that it would be paid for was an inference of their Acceptance. Therefore, a contract existed – *ruled in favour of Machon Paull.*

Case: *Brambles Holdings Ltd v Bathurst City Council (2001)*

Facts: Brambles managed a solid waste disposal plant owned by the Bathurst City Council ('the Council'). For some years, Brambles had been receiving liquid waste. Upon receiving such waste, Brambles would charge for receipt and retained the money for themselves. Before their contract with the Council was to expire, Brambles tendered for a new contract, which the Council accepted.

Subsequently, their contract expired, whilst the two parties were still in negotiation over the terms of the second, new contract. The Council then wrote to Brambles that it should start to increase fees for **liquid waste**, upon completion of a liquid waste area. However, a portion of the fees should be remitted to the Council. The parties then entered into the new contract.

Brambles later responded that it was unviable to continue to provide liquid waste disposal at the rates it was providing the service for, asking to increase the price charged. The parties did not reach an agreement. However, Brambles proceeded to charge the fees set out in the Council's letter (see above), retaining all income for themselves.

Some years later, the Council sought a portion of the liquid waste fees, as agreed. Brambles refused to remit the income, on the grounds that the Council failed to Accept their Offer (to increase fees further), and as such, there was no contract. The Council sued.

Issues:

- *Was there a contract covering liquid waste? On what terms?*

Ruling: Referring to the precedent laid down in *Empirnall v Machon Paull*, Brambles had knowledge of the terms of the new agreement and proceeded to accept financial benefit thereof. Thus, Brambles' conduct was enough to constitute Acceptance of the Council's Offer, and thus a contract was binding. This would have equally applied to the objective theory, as any reasonable bystander would have thought Brambles was Accepting the Offer through conduct.

Contract was binding, *Bathurst City Council successful.*

<u>Rule 4: Acceptance must be communicated to the Offeror</u>

Case: *Latec Finance v Knight (1969)*

Facts: Knight signed a *hire-purchase agreement* relating to a TV. This document was to act as an irrevocable Offer for seven days, but was not binding until the hire-purchase company, Latec, signed, and thus Accepted, the Offer. Latec proceeded to accept the Offer, but **did not communicate Acceptance to Knight**. Meanwhile, Knight had found the TV to be unsatisfactory and returned it to the dealer before any payment was made, thus revoking his Offer.

Latec sought to enforce the contract and brought an action against Knight.

Ruling:

(Jacobs JA):

Latec argued that the signing of the hire-purchase agreement amounted to effective Acceptance, and thus a binding contract. However, the language of the document did not support this interpretation, and since Acceptance had not been communicated to Knight prior to his return of the TV, there was no contract between the parties and Knight was free to return – *Knight successful.*

The Postal Acceptance Rule

Case: *Adams v Lindsell (1818)*

Facts: Lindsell sent an Offer to Adams via post for the sale of wool. Adams did not receive the letter of Offer until 3 days later, but posted their Acceptance swiftly on the same day. However, the letter of Acceptance only reached Lindsell a further 4 days later. Meanwhile, Lindsell, expecting to have an answer two days **prior** to the letter reaching them, sold the wool to another party in the interim – thus revoking their Offer. Adams subsequently brought an action against Lindsell claiming breach of contract.

Issues:

- *Had a contract been entered into between Adams and Lindsell?*

Ruling: The general rule with Offer and Acceptance is that a contract only becomes binding **when and where** Acceptance reaches the Offeror from the Offeree. However, such a rule cannot apply to post, as it would be impossible to complete a contract through such means. Therefore, it must be considered that the Offer was available the entire time it was in the post, and likewise, Acceptance had been provided the **entire time the letter of acceptance was in the post back**.

Thus, Acceptance had been provided the **moment the letter was posted** – which was before the Offeror 'revoked' the Offer – and a contract was binding. *Lindsell successful.*

Acceptance – Instantaneous vs. Non-Instantaneous Modes of Communication

Case: *Brinkibon v Stahg Stahl (1983)*

Facts: Stahg Stahl, an Austrian steel company, made an Offer to Brinkibon, an English company, for the sale of steel. Brinkibon sent their Acceptance **via telex**, akin to a fax. However, the sale did not go ahead, and Brinkibon attempted to sue for breach of contract.

Stahg argued that they had no grounds to sue as the English courts were outside Austrian jurisdiction. However, the English courts had a provision in place which allowed English parties to sue parties in external jurisdictions if it was found that a contract had been formed **within** English jurisdiction. It was up to the courts to decide this, and whether an action could proceed.

Issues:

- *When and where was the contract made?*

Ruling:

(Lord Wilberforce):

As telex was a method of communication which lay in between instantaneous (telephone, face-to-face communication) and non-instantaneous (post), it had to be decided whether the *general rule* or the *postal rule* of Acceptance would apply.

Judge ruled, based on precedent, that telex, in most cases, amounted to an *instantaneous* method of communication, and that the general rule of Acceptance – Acceptance is affected **once it is communicated** to the Offeror from the Offeree – should apply. As such, since Acceptance took place once Brinkibon communicated such to Stahg Stahl i.e. only once Acceptance reached Austrian soil, the jurisdiction for the contract was Austria. Thus, Brinkibon had **no grounds to sue** – *Stahg successful.*

Rule 4: Acceptance must correspond with the Offer

Case: *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (1979)*

Facts: Butler, machine too suppliers, quoted a price (made an Offer) to Ex-Cell-O to provide Ex-Cell-O with a machine tool, ready for delivery in 10 months. On the back of this quote were terms and conditions. One of these terms was a **price-variation clause**, which provided Butler with a means to seek an increase in price if there was an increase in costs. Ex-Cell-O, meanwhile, responded with an acknowledgement of order form, which had its own terms and conditions. They agreed to purchase the machine tool on these terms. Butler signed this acknowledgement form and sent it back to Ex-Cell-O, along with a letter, in which they agreed to sell the machine tool in accordance with their (Butler's) terms.

The machine was subsequently delivered several months later, by which time costs had increased so much that Butler attempted to claim almost £3, 000 extra on the cost of the machine tool. Ex-Cell-O claimed that they had agreed to no such price-variation clause as they did not make a provision for such in their own terms. Butler brought an action, with the trial judge holding for them, but Ex-Cell-O subsequently appealed.

Issues:

- *Was the price variation clause in Butler's quotation form a term of the* ***final contract?***

Ruling:

(Lawton J):

The original quote provided by Butler amounted to an Offer, complete with their terms and conditions. However, the order form ('acknowledgement of order' form) returned by Ex-Cell-O had its own terms and conditions which were so different to Butler's terms on their quote that they could not amount to anything other than a counter-Offer, effectively killing the original Offer by Butler.

Butler's subsequent letter of agreement to sell the machine tool provided their Acceptance of this new Offer. Eventhough they stated that they were selling on their terms, the terms that they were referring to were merely the price and date. Thus, their letter of agreement i.e. their Acceptance, did not alter the terms of agreement, and a contract was formed on Ex-Cell-O's terms. Therefore, no price variation clause was effective – *Ex-Cell-O successful.*

TOPIC 3: *CONSIDERATION*

Consideration – The Bargain Requirement

Case: *Australian Woollen Mills v Commonwealth (1954)*

Facts: Following the advent of WW2, wool was scarce in Australia. The Commonwealth government as a result introduced a scheme, whereby it would pay a subsidy on **all wool** purchased for domestic use by Australian manufacturers of wool. Australian Woollen Mills ('AWM') purchased large quantities of wool from 1946-1948, including for 3 months in 1948, in respect of which the subsidy had not been paid.

In June 1948, the Commonwealth government announced that it would be discontinuing the scheme, but would ensure that each wool manufacturer would have a **certain amount** of subsidised wool in stock on 30 June 1948. The stock AWM had on hand exceeded this 'certain amount', so the Commonwealth required AWM to repay the subsidy on the excess. AWM paid, but later sued to recover the amount, as well as the unpaid subsidies for the 3 month's worth of purchases in 1948.

AWM argued that they had a contract with the Commonwealth, and that the Commonwealth were in breach of said contract.

Issue:

- *Was the Commonwealth's promise to pay the subsidy made <u>in return</u> for AWM purchasing the wool i.e. was a **bargain** struck?*

Ruling: AWM claimed that they had purchased wool in "pursuance of an agreement (*offer & acceptance*)" to be subsidised. That is to say, that the Commonwealth had made an Offer which would be Accepted by the purchase of wool (an act), and thus a contract would be legally enforceable. Further, AWM argued that their purchasing wool 'in return' for the Offer of subsidy constituted consideration.

The courts, however, reasoned that for consideration to established, the following test has to be applied:

1) The statement made is **intended** to be an Offer of a promise (for the act executed).
2) The **promise** itself was offered as **consideration.**
3) The doing of the act is simultaneously the:
    a. *Acceptance* of the Offer.
    b. Direct *consideration* for the promise.

That is to say, a promise made for an act which is **intended** to give rise to a legal obligation is consideration.

The courts ruled that the Commonwealth had **no intention** to contract with AWM, nor with any other wool manufacturers – it was merely conducting policy. There was **no request** on the part of the Commonwealth for wool manufacturers to purchase wool – and therefore no promise to pay if adhered to - merely a statement announcing policy. As such, AWM had acted **on reliance** of a supposed promise by the Commonwealth, not **in return** for a promise. It had therefore failed to provide valid consideration to the Commonwealth to contract (via the *bargain requirement*), and no contract existed – *Commonwealth successful.*

Case: *Beaton v McDivitt (1987)*

Facts: The McDivitt family owned a large tract of land but farmed only a portion of it. At some point in time, McDivitt was of the belief that a rezoning was to occur which would substantially increase his rates payable to the local council. Unable to pay such an expected increase, the McDivitts decided to minimise payments by sub-dividing the land into four plots. The family would retain three of the plots, making the fourth available to "someone interested in the form of cultivation known as permaculture **to work the block**". Occupancy would be rent free up until the time of the expected rezoning, at which time, the McDivitts would transfer the fourth block to the inhabitant of the block.

Beaton, who was having trouble with his landlord, discussed the possibility of moving in with the McDivitts. The family accepted, and as agreed, the Beaton family moved into the fourth plot, built a house and road, and cultivated the block using permaculture methods.

No re-zoning eventuated. After a time, a dispute arose between the McDivitt and Beaton families, and the Beatons were ordered off the block. However, Beaton brought an action against McDivitt, claiming that there had been a contract between them and that the land title should be transferred to the Beatons.

Issues:

- *Did Beaton provide consideration for the promise to transfer the land?*

Ruling:

(Kirby J):

Consideration is an essential element of contracts, without which contracts cannot be enforceable. For consideration to arise, a price, or **bargain**, must be struck *in return* for the promisor's promise, and said bargain has to result in some benefit conferred to the promisor or detriment suffered by the promisee. In this case, no consideration was present because:

There was **no bargain** struck between McDivitt and Beaton. McDivitt may have benefited from having a congenial neighbour, but it does not amount to sufficient consideration in return for land title. Further, whilst the money expended on cultivation by Beaton may ordinarily amount to consideration, it wasn't so in this case, as the money expended was largely for his own benefit.

There was no detriment suffered by Beaton. Having been in the midst of troubles with his landlord, the prospect of rent free property with the possibility of land title – despite the requirement of moving in – could only have been of **benefit** to Beaton, the promisee.

Therefore, the prospect of land title was merely a *conditional gift* that would have been conferred on to Beaton <u>if</u>, but not <u>in return</u>, for working the land. No contract was formed – ***held for McDivitt.***

(Mahoney & McHugh JJ):

Where a *conditional gift* is promised, and the promisee relies on that promise **to his detriment**, the promisee gives consideration for that promise, which is contractually enforceable. The act of Beaton moving in to the property and working the land as agreed constituted valid and sufficient consideration, and a **contract existed.**

However (*Mahoney*), the contract had been on the basis of a rezoning, and since none occurred, the contract was *frustrated* and was unenforceable. McDivitt was under no obligation to transfer title to Beaton.

Case: *Atco Controls Pty Ltd v Newtronics Pty Ltd (2009)*

Facts: Atco owned Newtronics as a subsidiary firm. Atco provided a series of annual 'letters of support' to the auditors of Newtronics, confirming it would not seek to recover debts from Newtronics to the detriment of its (Newtronics) other creditors, and would provide sufficient funds to allow Newtronics to continue to trade – thus purporting Newtronics as a solvent entity.

Subsequently, when Newtronics went insolvent, its liquidator brought an action claiming that the 'letters of support' sent by Atco were evidence of a contract that Atco undertook to provide financial support to Newtronics, and thus should not have allowed it to go insolvent. The trial judge deemed there was a contract, and Newtronics continuing to trade provided consideration for such. Atco appealed this.

Issues:

- *Was the promise to continue trading by Newtronics quid pro quo for Atco's periodical payments?*

Ruling: In order to demonstrate that they were providing consideration, Newtronics would have had to show that Atco requested that Newtronics continued trading **in return** for their letters of consideration. This could not be shown nor implied because Atco ran/owned Newtronics and had no need to 'request' it of anything.

Thus, the judges held that Newtronics did not continue to trade **in return** for Atco's letters of support, but merely continued **in reliance** on Atco's letters.

Consideration must not be past

Case: *Roscorla v Thomas (1842)*

Facts: Thomas sold Roscorla a horse for £30. **Following completion** of the sale, Roscorla enquired as to the soundness of the horse. Thomas promised that the horse was sound. Later, Roscorla determined that the horse was unsound, subsequently bringing an action to seek damages for Thomas' false promise.

Issues:

- *Was the payment of the purchase price good consideration for the subsequent promise of the horse's soundness?*

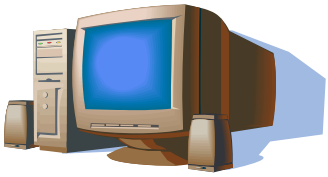
Ruling:

(Lord Denman):

For a promise to be enforceable, it has to be met with consideration prior to, and as part of, a contractual agreement. The payment of £30 was **past** consideration for the previous promise to sell the horse. Thomas made a promise that the horse was sound **after** the contract of sale was complete, which has not been met by any further consideration by Roscorla, and is therefore unenforceable.

Promises to pay for past services performed at the request of the Promisor is good consideration

Case: *Ipex Software Services Pty Ltd v Hosking (2000)*



Facts: Hosking transferred a computer software business to Ipex on the basis that he would be compensated with 5% share ownership in the restructured Ipex group. Ipex reneged on this promise. Hosking brought an action claiming that he had a contract with Ipex and had given valuable consideration in the transfer of his business.

Issues:

- *Had Hosking provided good consideration to Ipex for their promise to provide him with share ownership in the new company?*

Ruling:

(Callaway J):

The Court of Appeal ruled that Hosking had provided valuable consideration in the transfer of his business, as it was implied that he would be compensated i.e. paid for his services with 5% of the share ownership in the restructured company. Therefore, appeal was successful – *Hosking successful.*

Case: *Lampleigh v Braithwait (1616)*

Facts: Braithwait had committed a murder, and sought the assistance of Lampleigh to secure a pardon from the King. Lampleigh agreed to do so, expending considerable effort to secure the pardon, but was ultimately unsuccessful. Braithwait had promised to pay Lampleigh £100 for his services, but failed to do so. Lampleigh sought to enforce this promise and brought an action against Braithwait.

Issue:

- *Was Lampleigh's work good consideration for the later promise from Braithwait for payment?*

Ruling: Where a party ***requests*** services with a later promise to pay for such, the services will be considered consideration for the promise and the promise will be binding. This means that the services themselves 'couple' with the promise as part of the agreement, and the services thus constitute valuable consideration. Lampleigh's services constituted good consideration, and Braithwait's promise is enforceable.

The Existing Legal Duty Rule

Case: *Stilk v Myrick (1809)*

Facts: A ship was on a voyage from England to the Baltic. Once the ship arrived, two crew members deserted the ship. Unable to replace these sailors, Captain Myrick ('the captain') promised to **divide the deserter's wages amongst the remaining crew** if they were able to sail the ship back to England safely. The crew did so, but the captain refused to pay more to the crew members than their usual wages. Stilk, one of the crew members who sailed back to England, brought an action against the captain claiming breach of contract.

Issues:

- *Was the promise to split the extra money amongst the sailors supported by good consideration?*

Ruling:

(Lord Ellenborough):

The crew were originally employed to "do all that they could under all emergencies of the voyage". Sailing back to England constituted such an emergency. Thus, the remaining crew were bound by the terms of their original contract, and since they had **done no more** than they were originally bound to do, their sailing back to England under the captain's promise of extra wages provided no further consideration on their (the sailor's) part. No legally enforceable agreement – *Myrick successful.*

Part Payment of a Debt

Case: *Foakes v Beer (1884)*

Facts: Foakes owed a debt to Beer of £2,090. Unable to make full payment up front, Foakes and Beer made an agreement that were Foakes to pay £500 up front and pay £150 in half-yearly payments up until complete satisfaction of his debt, she (Beer) would not undertake proceedings against him.

Several years later, when Foakes was under the impression that he had completely satisfied his debt, he ceased making payment. However, Beer claimed that she was still owed interest on the debt. Foakes refused to pay such interest, and Beer brought an action against him.

Ruling:

(Earl of Selbourne LC):

Foakes was already under a pre-existing obligation to pay the whole debt, as well as the interest which necessarily accrues. Payment of a **lesser sum** in satisfaction of a **greater sum** cannot be satisfaction for the whole; it is not good consideration. Therefore, Foakes had not provided consideration. Beer could enforce the original debt, including interest[3] - *Beer successful*

Exception to ELD Rule 1: Fresh Consideration.

Case: *Hartley v Ponsonby (1857)*

Facts: A ship was sailing from England to Australia. Upon arrival in Australia, **nearly half** the crew deserted the ship. Unable to replace the crew, Captain Ponsonby ('the captain') promised to divide the wages of the deserting half crew amongst the remaining crew if they were to sail back to England i.e. essentially pay double wage. The crew consented, but upon arrival in England, the captain refused to pay the extra wages. Hartley, one of the crew, brought an action against the captain.

(Campbell CJ, Coleridge J):

Ruling: Although the facts are similar to *Stilk v Myrick* (and the captain may have made the promise to provide extra wages based on the ruling in this case), the remaining crew in this case were under no obligation to sail back to England, **so dangerous would it have been to do so**. As such, agreeing to sail in such dangerous conditions amounted to **fresh consideration** i.e. the crew was promising **to do more** than they were originally bound to do, and the captain is legally bound to make payment of extra wages.

[3] Lord Blackburn dissented, arguing that businesspeople often recognise that it is more beneficial to receive part-payment of a debt promptly as opposed to full-payment deferred. There should therefore be room for discussions that prompt part-payment should amount to consideration. Nonetheless, Lord Blackburn agreed with his colleagues in this case.

Exception to the ELD Rule 2: Practical Benefit

Case: *Williams v Roffey Bros & Nicholls (1991)*

Facts: Roffey Bros held a contract to refurbish a block of 27 flats. Roffey subcontracted Williams, a carpenter, to carry out carpentry on all said flats. Williams commenced work, but because the agreed price of £20,000 was too low, got into financial difficulties on the job and started making a loss. Williams subsequently slowed down his efforts. Roffey was concerned that Williams would not complete the job on time and that they (Roffey) would incur a penalty for late completion. As such, Roffey sought to offer Williams extra pay to complete the job on time.

Williams proceeded, and completed substantially all work on a further 8 flats. However, after seven weeks, and having only been paid a small portion of the promised further amount, Williams ceased work. Roffey were able to subcontract other carpenters, but finished a week late and incurred a penalty for such.

Roffey subsequently declined to make payment to Williams for the additional amount owing, as well as a portion of the amount owing on the original contract. Williams sued for these amounts, and Roffey counterclaimed for breach of contract.

Ruling:

The lawyer for Roffey argued that in pursuance of the offer of extra payment to complete on time, Williams had promised to **do no more** than they were already legally obliged to do i.e. complete carpentry on all the flats, and they had therefore provided no valid consideration for the agreement.

(Glidewell J):

The current state of the law is as follows:

A **practical benefit** is said to have been conferred if:

a) Party A has entered into a contract to do work, or supply goods and services, to Party B in return for payment by Party B; and
b) At some stage before Party A completely performs his obligations under the contract with B, B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
c) Party B then promises Party A additional payment in return for Party A's promise to perform his contractual obligations **on time**; and
d) As a result of giving his promise, B obtains a benefit, or obviates a detriment and B's promise is not given as a result of economic duress or fraud on part of A; and

The benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

In pursuance of the **5 criteria** (see above), Williams entered into a contract with Roffey, agreeing to provide the practical benefit of work, and sometime before completion, Roffey became concerned about Williams' ability to finish work on time. Roffey subsequently promised additional payment to Williams, and Williams continued working to a) save Roffey the effort of sub-contracting further carpenters, and b) avoid the penalty for late completion. This **practical benefit**, which would obviate a detriment to Roffey, and was not a result of economic duress, amounted to valid consideration. Roffey was bound to make payment of the promised extra amount, as well as the amount stipulated in the original agreement – *Williams successful.*

Case: *Musumeci v Winadell Pty Ltd (1994)*

Facts: Musumeci was the owner of a small fruit and vegetable shop in a shopping centre owned by Winadell. A larger, competing fruit and vegetable shop was introduced into the shopping centre, which subsequently threatened Musumeci's business and his ability to pay rent. Musumeci requested a rent reduction to stay operative in the shopping centre; otherwise, he would have to pursue work elsewhere.

As a concession for Musumeci to continue trading in the shopping centre, Winadell accepted a reduced rent from him. However, following disagreements, Winadell sought to claim the full rent. Musumeci brought an action against Winadell, seeking to rely on the reduced rental as consideration for the promise of continued trade.

Ruling:

(Santow J):

Santow J sought to **apply the *Practical Benefit* rule to Australia** through this case. As a result, he ruled that:

a) Musumeci's assurance of continued trade; and
b) The potential harm to Winadell's goodwill that may have resulted had Musumeci left; and
c) The prospect of having a vacant shop and certain lower rental payments

Was of **sufficient practical benefit**[4] to Winadell to amount to consideration for his (Winadell's) promise of reduced rental.

Exception to the ELD Rule 3: Promises made to a Third Party

Case: *Pao On v Lau Yiu Long (1980)*

Facts: Pao On, the owner of *Shing On*, agreed to sell the whole company to *Fu Chip* (**original contract**). Fu Chip was under the ownership of Lau Yiu Long. The sale of Shing On was to be met by an allotment of 4.2m shares, valued at $HK2.50 each, in the restructured company.

So that the market would not be depressed if Pao On was to sell the allotment of his shares, the shareholders of Fu Chip entered into a **second agreement** whereby Pao would not sell 60% of his share allotment until at least one year later. In return, Pao required protection should the price of his Fu Chip shares fall in the time he was unable to sell.

[4] ***Re Selectmove:*** Despite the concessions of *practical benefits* in many cases, the court was **unable to extend the principle to cases where part-payment of a debt** is made in discharge of the whole debt.

Accordingly, an agreement was struck between Pao On and the shareholders of Fu Chip for Pao to sell 60% of his shares back to the company a year later, at $2.50 each (**second contract**).

Whilst this second agreement protected Pao from loss, it prevented him from realising a profit if the price of the shares were to rise. Upon realising this, Pao refused to continue with the **original contract** (i.e. sale of Shing On company to Fu Chip) if this second contract was not cancelled and replaced by a guarantee – a review of the second contract.

Fu Chip shareholders considered bringing an action against Pao, but as the takeover of Shing On had already been announced, they agreed to cancel the second, *subsidiary* contract and replace with a guarantee. This new guarantee did not require Pao to sell his shares back to the shareholders after a year, but automatically ensured that a year later, the shares would be worth $HK2.50 each, irrespective of the market figure. This protected Pao from any loss should the market price fall below $HK2.50 a share. Further, if Pao so wished, he could sell shares elsewhere if their value increased above $HK2.50 each.

A year later, the value of the shares had dropped to 36c each. Pao sought to sell the shares in Fu Chip back to the shareholders at the original agreed upon price of $HK2.50 per share. However, the shareholders refused to buy back the shares at such a price. Pao sued for indemnity and was successful, but the decision was reversed on appeal. Pao then appealed to the Privy Council in England.

Issues:

- *Was valid consideration given by Pao for the shareholders' guarantee and indemnity?*

Ruling:

(Lord Scarman):

Pao On had entered into a legal obligation to hold 60% of his shares in the Fu Chip Company for at least a year post restructuring (**original contract**). To enforce this, the shareholders had entered into a second agreement to buy back the shares at $HK2.50 at the end of the year, irrespective of the market price (**second contract**).

In essence, this was Pao On's *existing legal duty.* He promised to do no more than he was already legally bound to do i.e. hold on to the shares for a year. However, through Pao's original agreement to hold on to the shares, the shareholders (a 3rd party) obtained the benefit of a **direct obligation,** which is sufficient consideration.

That is to say, the promise to hold on to the shares and sell them back to the company in a year's time – a *legal duty* – is sufficient consideration, as it was made to the shareholders, as well as the company, and as such, Pao took on a **further** legal obligation which conferred an enforceable legal obligation for Fu Chip's shareholders. Valid consideration was provided, and as such, Fu Chip's shareholders are legally obliged to buy back Pao's shares at $HK2.50 each – *Pao successful.*

Exception to ELD Rule 4: 'Bona Fide' – 'Good Faith' - Compromises

Case: *Wigan v Edwards (1973)*

Facts: Mr and Mrs Edwards had agreed to purchase a house from Wigan. The contract contained no express term that the house had been well constructed and that it was free from structural defects – in essence, had no terms relating to quality. Subsequent to the completion of the contract, the Edwards had discussions with Wigan relating to certain features of the house which they (the Edwards) said required attention before they would complete the purchase. Wigan agreed to remedy these defects and faults over a certain period of time.

However, Wigan subsequently failed to make adequate repairs as promised. The Edwards brought an action against Wigan citing breach of contract. Wigan argued that no sufficient consideration had been provided by the Edwards in return for his promise to make repairs to the house.

Issues:

- *Had the Edwards provided valid consideration for Edward's further promise to rectify defects on the house?*

Ruling:

(Mason J):

An *Existing Legal Duty* is no consideration when:

a) The promise is made by a party to a pre-existing contract; and
b) It is made to the promisee under that contract; and
c) It is a promise to **do no more** than the promisor is bound to do.

However, an exception does apply in **bona fide compromises.** A promise to perform an existing legal duty is sufficient consideration when the dispute is honestly made, and it can be shown that the claim is not 'vexatious or frivolous'. In this case, the Edwards **honestly and truly** believed that, with the house in such disrepair ('water had not been connected... fence had not been erected'), they were not bound to complete the contract. As such, eventhough Wigan had volunteered to make repairs to the house, the notion that he was selling the house in an acceptable condition was deemed to be an element of the bargain reached – *Edwards successful.*