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***1** Williams v. Roffey Bros. & Nicholls (Contractors) Ltd. [1990] 2 W.L.R. 1153

Court of Appeal
CA
Purchas, Glidewell and Russell L.JJ.
1989 Nov. 2, 3; 23

Contract--Consideration--Performance of existing duty--Subcontract for carpentry work--Agreed price too low for subcontractor to operate satisfactorily and at profit--Oral agreement by main contractors to pay subcontractor additional sum for performance of existing contractual obligations on time--Whether agreement enforceable--Whether sufficient consideration

The plaintiff entered into a subcontract with the defendants, who held the main building contract, to carry out carpentry work in a block of 27 flats for an agreed price of £20,000. The plaintiff got into financial difficulty because the agreed price was too low for him to operate satisfactorily and at a profit. The main contract contained a time penalty clause and the defendants, worried lest the plaintiff did not complete the carpentry work on time, made an oral agreement to pay the plaintiff an additional sum of £10,300 at the rate of £575 for each flat on which the carpentry work had been completed. Approximately seven weeks later, when the plaintiff had substantially completed eight more flats, the defendants had made only one further payment of £1,500 whereupon the plaintiff ceased work on the flats. The plaintiff then sued the defendants for the additional sum promised. The judge held that the agreement for payment of the additional sum was enforceable and did not fail for lack of consideration, and gave judgment for the plaintiff.

On appeal by the defendants: -

Held, dismissing the appeal, (1) that where a party to a contract promised to make an additional payment in return for the other party's promise to perform his existing contractual obligations and as a result secured a benefit or avoided a detriment, the advantage secured by the promise to make the additional payment was capable of constituting consideration therefor, provided that it was not secured by economic duress or fraud; that the defendants' promise to pay the plaintiff the additional sum of £10,300, in return for the plaintiff's promise to perform his existing contractual obligations on time, resulted in a commercial advantage to the defendants; that the benefit accruing to the defendants provided sufficient consideration to support the defendants' promise to pay the additional sum; and that, accordingly, the agreement for payment of the additional sum was enforceable (post, pp. 15G-16B, C, G, 19B-E, 23A-D).

Stilk v. Myrick (1809) 2 Camp. 317 distinguished.
(2) That substantial completion on the eight flats entitled the plaintiff to be paid part of the £10,300 promised; and that, in the absence of payment, he had properly ceased further work on the remaining flats (post, pp. 10D, 16H-17B, 23E).

Hoenig v. Isaacs [1952] 2 All E.R. 176, C.A. applied.

***2** The following cases are referred to in the judgments:

Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84; [1981] 2 W.L.R. 554; [1981] 1 All E.R. 923; [1981] 3 W.L.R. 565; [1981] 3 All E.R. 577, Robert Goff J. and C.A..

De la Bere v. Pearson Ltd. [1908] 1 K.B. 280, C.A..

Harris v. Watson (1791) 5 Peake 102

Hoenig v. Isaacs [1952] 2 All E.R. 176, C.A..

North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1979] Q.B. 705; [1979] 3 W.L.R. 419; [1978] 3 All E.R. 1170

Pao On v. Lau Yiu Long [1980] A.C. 614; [1979] 3 W.L.R. 435; [1979] 3 All E.R. 65, P.C..

Stilk v. Myrick (1809) 2 Camp. 317

Syros Shipping Co. S.A. v. Elaghill Trading Co. [1980] 2 Lloyd's Rep. 390

Tweddle v. Atkinson (1861) 1 B. & S. 393

Ward v. Byham [1956] 1 W.L.R. 496; [1956] 2 All E.R. 318, C.A..

Watkins & Sons Inc. v. Carrig (1941) 21 A. 2d 591

Williams v. Williams [1957] 1 W.L.R. 148; [1957] 1 All

E.R. 305, C.A..

Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd. [1972] A.C. 741; [1972] 2 W.L.R. 1090; [1972] 2 All E.R. 271, H.L.(E.).

The following additional cases were cited in argument:

Atlas Express Ltd. v. Kafco (Importers and Distributors) Ltd. [1989] Q.B. 833; [1989] 3 W.L.R. 389; [1989] 1 All E.R. 641

Bush v. Whitehaven Port & Town Trustees (1888) 2 Hudson's B.C., 4th ed. 122, C.A..

Davis Contractors Ltd. v. Fareham Urban District Council [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.(E.).

Finland Steamship Co. Ltd. v. Felixstowe Dock and Railway Co. [1980] 2 Lloyd's Rep. 287

APPEAL from the assistant recorder, Mr. R. Jackson Q.C., sitting at Kingston-upon-Thames County Court.

By specially indorsed writ dated 10 March 1987 the plaintiff, Lester Williams, claimed against the defendants, Roffey Bros. & Nicholls (Contractors) Ltd., the sum of £32,708.70. By re-amended statement of claim dated 3 March 1988 the sum claimed was reduced to £10,847.07. Subsequently, the action was transferred for trial to the county court. The assistant recorder gave judgment for the plaintiff.

By notice of appeal dated 22 February 1989 and amended on 3 November 1989 the defendants appealed on the grounds that (1) the assistant recorder erred in law in holding (i) that an agreement between the parties reached on 9 April 1986 whereby the defendants agreed to pay to the plaintiff a sum of £10,300 over and above the contract price originally agreed of £20,000 was enforceable by the plaintiff and did not fail for lack of consideration; (ii) the plaintiff's pre-existing contractual obligation to the defendants to carry out works was capable in law of constituting good consideration for an additional sum of £ 10,300 in respect of identical works; (iii) notwithstanding the lack of consideration moving from the plaintiff promisee, the benefit to the defendant promisors which might result from payment of an increased contract ***3** price was itself capable of constituting good consideration for the increase; and (iv) a main contractor who agreed too low a price with a subcontractor was acting contrary to his own interests, and that if the parties subsequently agreed that additional moneys should be paid, such agreement was in the interests of both parties and for that reason did not fail for lack of consideration; (2) alternatively, in the event that the plaintiff was contractually entitled to the sum of £10,300 the assistant recorder erred in not holding that such entitlement was limited to the sum of £575 per flat as and when the plaintiff's work in each flat had been completed in its entirety, and that since no flats had been so completed no money was owing by the defendants to the plaintiff; and (3) the assistant recorder was wrong in holding that (i) the defendants repudiated the contract between the parties by their failure to pay the plaintiff interim payments after 17 April 1986; and (ii) the plaintiff was entitled to leave the site.

By a respondent's notice the plaintiff contended that the judgment of the assistant recorder should be affirmed on the additional grounds that (i) when a new price was agreed between the parties, in the absence of duress and in the case of a commercially reasonable renegotiation, the promise to pay that new price was enforceable and Stilk v. Myrick (1809) 2 Camp. 317 did not correctly state the position in English law; (2) on the facts as found, the assistant recorder should have held that there was a termination of the earlier agreement by mutual consent and that the parties entered into a new agreement on 9 April 1986; and (3) alternatively, the assistant recorder should have held that there was an implied term in the first agreement to the effect that in the event of both parties agreeing that the price was too low, a higher price would be agreed and substituted for it.

The facts are stated in the judgment of Glidewell L.J.

Franklin Evans for the defendants. The defendants' promise to pay the plaintiff an additional sum of £10,300, at the rate of £575 for each completed flat, is unenforceable since there was no consideration for it. The trial judge held that it was in the interests of the defendants on the facts to promise the extra payment. The benefits to the defendants which arose from their agreement to pay the additional sum were (i) to ensure that the plaintiff continued work and did not stop in breach of the subcontract; (ii) to avoid the penalty for

delay; and (iii) to avoid the trouble and expense of engaging other people to complete the carpentry work. However, those benefits are of a practical nature; the defendants derived no benefit in law since the plaintiff was promising to do no more than he was already bound to do by his subcontract, i.e., continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement: see Davis Contractors Ltd. v. Fareham Urban District Council [1956] A.C. 696, 716, *per* Viscount Simmonds. There was no finding of a mutual discharge from the existing obligations and no new contract. None should be implied. The defendants rely on the principle of law which, traditionally, is based on Stilk v. Myrick (1809) 2 Camp. 317. In North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1979] Q.B. 705, 712G-713E, Mocatta J. regarded ***4** the general principle in Stilk v. Myrick, 2 Camp. 317, as still being good law and referred to two earlier decisions of this court, dealing with wholly different subjects, in which Denning L.J. sought to escape from the confines of the rule, but was not accompanied in his attempt by the other members of the court: see Ward v. Byham [1956] 1 W.L.R. 496, 498 and Williams v. Williams [1957] 1 W.L.R. 148, 151. [Reference was made to Syros Shipping Co. S.A. v. Elaghill Trading Co. [1980] 2 Lloyd's Rep. 390; Atlas Express Ltd. v. Kafco (Importers and Distributors) Ltd. [1989] 3 W.L.R. 389 and Bush v. Whitehaven Port & Town Trustees (1888) 2 Hudson's B.C., 4th ed., 122]. On the facts of the present case the consideration, even if otherwise good, did not move from the promisee: see Tweddle v. Atkinson (1861) 1 B. & S. 393.

Even if there had been a contractual entitlement by the plaintiff to the additional sum promised, such entitlement would only have been to payment thereof in accordance with the express terms of the promise. Those terms were that the additional payment should be released to the plaintiff at the rate of £575 per flat as and when the carpentry work on each flat had been completed in its entirety. The trial judge found as a fact that no single flat had been completed as at the date when the plaintiff left the site. Therefore even if the plaintiff had a contractual entitlement he had not acquired the right to claim any part of it. There is a distinction between Hoenig v. Isaacs [1952] 2 All E.R. 176 and the present case.

Christopher Makey for the plaintiff. It is in the interest of commercial reality that the parties should be allowed to agree that if the contract price for a subcontracted job is too low it should be increased. It is quite common practice in the building industry for main contractors to increase subcontractor's payments. The proposition established in Finland Steamship Co. Ltd. v. Felixstowe Dock and Railway Co. [1980] 2 Lloyd's Rep. 287 is that where there is an agreement between the parties for a variation in the contract then there should be such a variation but not if there is a unilateral variation which the other party objected to. It would be unfortunate if English law deprived an acceptable commercial practice, which both parties to the agreement regard as beneficial, of legal effect. Such an agreement has legal effect because either (i) there is consideration in the sense of benefits and detriments to both parties; the subcontractor may be better off by breaking the contract, getting higher paid work elsewhere and paying such damages as the contractor can recover against him; the contractor may avoid penalties or incur lesser penalties for late completion if the subcontractor stays on the job and finishes it; in that sense Stilk v. Myrick, 2 Camp. 317, is distinguishable; or (ii) Stilk v. Myrick, although of general application, does not apply to this specific situation in the building industry, where performance of existing obligations can constitute sufficient consideration; or (iii) now that the concept of duress has been developed, the principle in Stilk v. Myrick is neither necessary nor desirable and should no longer be regarded as good law. Where a new promise is made in the course of a commercially reasonable renegotiation, it should be enforceable. The judgment of Mocatta J. in North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1979] Q.B. 705 that such a ***5** principle forms no part of English law should be overruled and the American approach in Watkins & Sons Inc. v. Carrig (1941) 21 A. 2d. 591 should be accepted as being part of English law.

The two cases, Harris v. Watson (1791) 5 Peake 102 and Stilk v. Myrick, 2 Camp. 317, involved circumstances of a very special nature, namely the extraordinary conditions existing at the turn of the 18th century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews. Thus, the decision that the promise to pay extra wages even in the circumstances established in those cases, was not

supported by consideration is understandable. Conditions today on the high seas have changed dramatically and it is at least questionable whether those cases might not well have been decided differently if they were tried today. The modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement. For the possible application of the concept of economic duress, see Pao On v. Lau Yiu Long [1980] A.C. 614.

Davis Contractors Ltd. v. Fareham Urban District Council [1956] A.C. 696 is a completely different type of case - the contractor there carried out all the work and then asked for more money. The case does not really assist the court. The judgment of the assistant recorder should be upheld.

Evans in reply. Pao On v. Lau Yiu Long [1980] A.C. 614 concerned a tripartite relationship and is distinguishable on that basis. The new promise came from a stranger to the original contract.

Cur. adv. vult.

23 November. The following judgments were handed down

GLIDEWELL L.J.

This is an appeal against the decision of Mr. Rupert Jackson Q.C., an assistant recorder, given on 31 January 1989 at Kingson-upon-Thames County Court, entering judgment for the plaintiff for £3,500 damages with £1,400 interest and costs and dismissing the defendants' counterclaim.

The facts

The plaintiff is a carpenter. The defendants are building contractors who in September 1985 had entered into a contract with Shepherds Bush Housing Association Ltd. to refurbish a block of flats called Twynholm Mansions, Lillie Road, London S.W. 6. The defendants were the main contractors for the works. There are 28 flats in Twynholm Mansions, but the work of refurbishment was to be carried out in 27 of the flats.

The defendants engaged the plaintiff to carry out the carpentry work in the refurbishment of the 27 flats, including work to the structure of the roof. Originally the plaintiff was engaged on three separate sub-contracts, but these were all superseded by a subcontract in writing ***6** made on 21 January 1986 by which the plaintiff undertook to provide the labour for the carpentry work to the roof of the block and for the first and second fix carpentry work required in each of the 27 flats for a total price of £20,000.

The judge found that, though there was no express term providing for payment to be made in stages, the contract of 21 January 1986 was subject to an implied term that the defendants would make interim payments to the plaintiff, related to the amount of work done, at reasonable intervals.

The plaintiff and his men began work on 10 October 1985. The judge found that by 9 April 1986 the plaintiff had completed the work to the roof, had carried out the first fix to all 27 flats, and had substantially completed the second fix to nine flats. By this date the defendants had made interim payments totalling £16,200.

It is common ground that by the end of March 1986 the plaintiff was in financial difficulty. The judge found that there were two reasons for this, namely: (i) that the agreed price of £20,000 was too low to enable the plaintiff to operate satisfactorily and at a profit; Mr. Cotterell, a surveyor employed by the defendants said in evidence that a reasonable price for the works would have been £23,783; and (ii) that the plaintiff failed to supervise his workmen adequately.

The defendants, as they made clear, were concerned lest the plaintiff did not complete the carpentry work on time. The main contract contained a penalty clause. The judge found that on 9 April 1986 the defendants promised to pay the plaintiff the further sum of £10,300, in addition to the £20,000, to be paid at the rate of £575 for each flat in which the carpentry work was completed. The plaintiff and his men continued work on the flats until the end of May 1986. By that date the defendants, after their promise on 9 April 1986, had made only one further payment of £1,500. At the end of May the plaintiff ceased work on the flats. I will describe later the work which, according to the judge's findings, then remained to be done. Suffice it to say that the defendants engaged other carpenters to complete the work, but in the result incurred one week's time penalty in their contract with the building owners.

The action

The plaintiff commenced this action by specially indorsed writ on 10 March 1987. He originally claimed the sum of £32,708.70. In a re-amended statement of claim served on 3 March 1988 his claim was reduced to £10,847.07. It was, I think, at about this time that the matter was transferred to the county court.

It is not necessary to refer to the statement of claim. On every important issue on which the plaintiff's case differed from that of the defendants, the judge found that the plaintiff was mistaken, and preferred the evidence of the defendants. In particular, the plaintiff denied the defendants' promise of 9 April 1986 to pay him an additional £10,300, instead alleging an earlier and different agreement which the judge found had not been made.

***7** In the amended defence the defendants' promise to pay an additional £ 10,300 was pleaded as part of paragraph 5 in the following terms:
"In or about the month of May 1986 at a meeting at the offices of the defendants between Mr. Hooper and the plaintiff on the one hand and Mr. Cottrell and Mr. Roffey on the other hand it was agreed that the defendants would pay the plaintiff an extra £10,300 over and above the contract sum of £20,000. Nine flats had been first and second fixed completely at the date of this meeting and there were 18 flats left that had been first fixed but on which the second fixing had not been completed. The sum of £10,300 was to be paid at a rate of £575 per flat to be paid on the completion of each flat."

The defence then alleged that neither the balance of the original contract sum nor the £10,300 addition was payable until the work was completed, that the plaintiff did not complete the work before he left the site, and thus that no further sum was due to him. By their amended counterclaim the defendants claimed that the plaintiff was in breach of contract in ceasing work at the end of May 1986, as a result of which they had suffered damage to the extent of £ 18,121.46.

The judge's conclusions

The judge found that the defendants' promise to pay an additional £10,300, at the rate of £575 per completed flat, was part of an oral agreement made between the plaintiff and the defendants on 9 April 1986, by way of variation to the original contract.

The judge also found that before the plaintiff ceased work at the end of May 1986 the carpentry in 17 flats had been substantially (but not totally) completed. This means that between the making of the agreement on 9 April 1986 and the date when the plaintiff ceased work, eight further flats were substantially completed.

The judge calculated that this entitled the plaintiff to receive £4,600 (8 X £575) "less some small deduction for defective and incomplete items." He held that the plaintiff was also entitled to a reasonable proportion of the £2,200 which was outstanding from the original contract sum. I believe this figure should be £2,300, but this makes no practical difference. Adding these two amounts, he decided that the plaintiff was entitled to further payments totalling £5,000 against which he had only received £1,500, and that the defendants were therefore in breach of contract, entitling the plaintiff to cease work.

The issues

Before us Mr. Evans for the defendants advances two arguments. His principal submission is that the defendants' admitted promise to pay an additional £ 10,300, at the rate of £575 per completed flat, is unenforceable since there was no consideration for it. This issue was not raised in the defence, but we are told that the argument was advanced at the trial without objection, and that there was equally no objection to it being argued before us.

***8** Mr. Evans' secondary argument is that the additional payment was only payable as each flat was completed. On the judge's findings, eight further flats had been "substantially" completed. Substantial completion was something less than completion. Thus none of the eight flats had been completed, and no further payment was yet due from the defendants. I will deal with this subsidiary argument first.

Does substantial completion entitle the plaintiff to payment?

The agreement which the judge found was made between the parties on 9 April 1986 provided for payment as follows: "The sum of £10,300 was to be paid at the rate of £575 per flat to be paid on the completion of each flat." Mr. Evans argues that the agreement provided for payment on completion, not on substantial completion, of

each flat. Since the judge did not find that the work in any additional flat was completed after 9 April 1986, the defendants were under no obligation to pay any part of the £10,300 before the plaintiff ceased work at the end of May.

In his judgment the judge does not explain why in his view substantial completion entitled the plaintiff to payment. In support of the judgment on this issue, however, Mr. Makey for the plaintiff, refers us to the decision of this court in Hoenig v. Isaacs [1952] 2 All E.R. 176. In that case the plaintiff was engaged to decorate and furnish the defendant's flat for £750, to be paid "net cash, as the work proceeds, and balance on completion." The defendant paid £400, moved into the flat and used the new furniture, but refused to pay the balance on the ground that some of the work was defective. The official referee found that there were some defects, but that the contract had been substantially performed. The Court of Appeal held that accordingly the plaintiff was entitled to be paid the balance due, less only a deduction for the cost of making good the defects or omissions. Somervell L.J. said, at p. 179:

"The learned official referee regarded H. Dakin & Co. Ltd. v. Lee [1916] 1 K.B. 566 as laying down that the price must be paid subject to set-off or counterclaim if there was a substantial compliance with the contract. I think on the facts of this case where the work was finished in the ordinary sense, though in part defective, this is right. It expresses in a convenient epithet what is put from another angle in the Sale of Goods Act 1893. The buyer cannot reject if he proves only the breach of a term collateral to the main purpose. I have, therefore, come to the conclusion that the first point of counsel for the defendant fails."

Denning L.J. said, at pp. 180-181:

"In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of ***9** the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good: see Mondel v. Steel (1841) 8 M. & W. 858; H. Dakin & Co. Ltd. v. Lee [1916] 1 K.B. 566; and the notes to Cutter v. Powell (1795) 6 Term Rep. 320 in *Smith's Leading Cases*, 13th ed. (1929), vol. 2, pp. 19-21. It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions. In the present case the contract provided for 'net cash, as the work proceeds; the balance on completion.' If the balance could be regarded as retention money, then it might well be that the contractor ought to have done all the work correctly, without defects or omissions, in order to be entitled to the balance. But I do not think the balance should be regarded as retention money. Retention money is usually only 10 per cent., or 15 per cent., whereas this balance was more than 50 per cent. I think this contract should be regarded as an ordinary lump sum contract. It was substantially performed. The contractor is entitled, therefore, to the contract price, less a deduction for the defects."

Romer L.J. said, at pp. 182-183:

"The defendant's only attack on the plaintiff's performance of his obligations was in relation to certain articles of furniture which the plaintiff supplied and which the defendant says were faulty and defective in various important respects. The finding of the learned official referee on this was 'that the furniture supplied constituted a substantial compliance with the contract so far as the supply of furniture was concerned.' That is a finding of fact, and whether or not another mind might have taken a

different view it appears to me impossible to say that there was no sufficient evidence on which the finding could be based. This, then, being a lump sum contract for the supply of furniture (and the carrying out of certain minor work) which was substantially complied with by the plaintiff, the question is whether the official referee was wrong in law in applying the principle of H. Dakin & Co. Ltd. v. Lee [1916] 1 K.B. 566 and rejecting the defendant's submissions that the plaintiff had failed to ***10** perform a condition on the fulfilment of which his right to sue depended. In my judgment, he was quite right in applying the H. Dakin & Co. Ltd. v. Lee principle to the facts of the present case. I can see no reason why that principle should be approached with wariness and applied with caution. In certain cases it is right that the rigid rule for which the defendant contends should be applied, for example, if a man tells a contractor to build a ten foot wall for him in his garden and agrees to pay £x for it, it would not be right that he should be held liable for any part of the contract price if the contractor builds the wall to two feet and then renounces further performance of the contract, or builds the wall of a totally different material from that which was ordered, or builds it at the wrong end of the garden. The work contracted for has not been done and the corresponding obligation to pay consequently never arises. But when a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor a character that he can be said to have substantially performed his promise, it is, in my judgment, far more equitable to apply the H. Dakin & Co. Ltd. v. Lee principle than to deprive him wholly of his contractual rights and relegate him to such remedy (if any) as he may have on a quantum meruit, nor, in my judgment, are we compelled to a contrary view (having regard to the nature and terms of the agreement and the official referee's finding) by any of the cases in the books."

In my view this authority entirely supports the judge's decision on this issue.

Was there consideration for the defendants' promise made on 9 April 1986 to pay an additional price at the rate of £575 per completed flat?

The judge made the following findings of fact which are relevant on this issue. (i) The subcontract price agreed was too low to enable the plaintiff to operate satisfactorily and at a profit. Mr. Cottrell, the defendants' surveyor, agreed that this was so. (ii) Mr. Roffey (managing director of the defendants) was persuaded by Mr. Cottrell that the defendants should pay a bonus to the plaintiff. The figure agreed at the meeting on 9 April 1986 was £10,300.

The judge quoted and accepted the evidence of Mr. Cottrell to the effect that a main contractor who agrees too low a price with a subcontractor is acting contrary to his own interests. He will never get the job finished without paying more money. The judge therefore concluded:
"In my view where the original subcontract price is too low, and the parties subsequently agree that additional moneys shall be paid to the subcontractor, this agreement is in the interests of both parties. This is what happened in the present case, and in my opinion the agreement of 9 April 1986 does not fail for lack of consideration."
In his address to us, Mr. Evans outlined the benefits to his clients, the defendants, which arose from their agreement to pay the additional ***11** £ 10,300 as: (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the subcontract; (ii) avoiding the penalty for delay; and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work.

However, Mr. Evans submits that, though his clients may have derived, or hoped to derive, practical benefits from their agreement to pay the "bonus, " they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his subcontract, i.e., continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement. Mr. Evans relies on the principle of law which, traditionally, is based on the decision in Stilk v. Myrick (1809) 2 Camp. 317. That was a decision at first instance of Lord Ellenborough C.J. On a voyage to the Baltic, two seamen deserted. The captain agreed with the rest of the crew that if they worked the ship back to London without the two seamen being replaced, he would divide between them the pay which would have been due to the two deserters. On arrival at London this extra pay was refused, and the plaintiff's action to recover his extra pay was dismissed. Counsel for the defendant argued that such an agreement was contrary to public policy, but Lord Ellenborough C.J.'s judgment was based on lack of consideration. It reads, at pp. 318-319:
"I think Harris v. Watson (1791) Peake 102 was rightly decided; but I doubt whether the ground of public policy,

upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month."

In North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1979] Q.B. 705, Mocatta J. regarded the general principle of the decision in Stilk v. Myrick, 2 Camp. 317 as still being good law. He referred to two earlier decisions of this court, dealing with wholly different subjects, in which Denning L.J. sought to escape from the confines of the rule, but was not accompanied in his attempt by the other members of the court. In Ward v. Byham [1956] 1 W.L.R.496 ***12** the plaintiff and the defendant lived together unmarried for five years, during which time the plaintiff bore their child. After the parties ended their relationship, the defendant promised to pay the plaintiff £1 per week to maintain the child, provided that she was well looked after and happy. The defendant paid this sum for some months, but ceased to pay when the plaintiff married another man. On her suing for the amount due at £1 per week, he pleaded that there was no consideration for his agreement to pay for the plaintiff to maintain her child, since she was obliged by law to do so: see section 42 of the National Assistance Act 1948. The county court judge upheld the plaintiff mother's claim, and this court dismissed the defendant's appeal. Denning L.J. said, at p. 498:

"I approach the case, therefore, on the footing that the mother, in looking after the child, is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise; and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child. I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week. The case seems to me to be within the decision of Hicks v. Gregory (1849) 8 C.B. 378 on which the judge relied. I would dismiss the appeal."

However, Morris L.J. put it rather differently. He said, at pp. 498-499:

"Mr. Lane submits that there was a duty on the mother to support the child; that no affiliation proceedings were in prospect or were contemplated; and that the effect of the arrangement that followed the letter was that the father was merely agreeing to pay a bounty to the mother. It seems to me that the terms of the letter negative those submissions, for the husband says 'providing you can prove that she' - that is Carol - 'will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you.' The father goes on to say that Carol is then well and happy and looking much stronger than ever before. 'If you decide what to do let me know as soon as possible.' It seems to me, therefore, that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that Carol will be well looked after and happy, and also that you must agree that Carol is to be allowed to decide for herself whether or not she wishes to come and live ***13** with you. If those conditions were fulfilled the father was agreeable to pay. Upon those terms, which in fact became operative, the father agreed to pay £1 a week. In my judgment, there was ample consideration there to be found

for his promise, which I think was binding."
Parker L.J. agreed. As I read the judgment of Morris L.J., he and Parker L.J. held that, though in maintaining the child the plaintiff was doing no more than she was obliged to do by law, nevertheless her promise that the child would be well looked after and happy was a practical benefit to the father which amounted to consideration for his promise.

In Williams v. Williams [1957] 1 W.L.R. 148, a wife left her husband, and he promised to make her a weekly payment for her maintenance. On his failing to honour his promise, the wife claimed the arrears of payment, but her husband pleaded that, since the wife was guilty of desertion she was bound to maintain herself, and thus there was no consideration for his promise. Denning L.J., at p. 151, reiterated his view that:
"a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest."
However, the other members of the court (Hodson and Morris L.JJ.) declined to agree with this expression of view, though agreeing with Denning L.J. in finding that there was consideration because the wife's desertion might not have been permanent, and thus there was a benefit to the husband.

It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under an existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise. However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed: see e.g. the judgment of Lloyd J. in Syros Shipping Co. S.A v. Elaghill Trading Co. [1980] 2 Lloyd's Rep. 390, 392. Moreover, this point was not argued in the court below, nor was it more than adumbrated before us. Interesting though it is, no reliance can in my view be placed on this concept in the present case.

There is, however, another legal concept of relatively recent development which is relevant, namely, that of economic duress. Clearly if a subcontractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the subcontractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has ***14** troubled the courts since before Stilk v. Myrick, 2 Camp. 317, and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration.

This possible application of the concept of economic duress was referred to by Lord Scarman, delivering the judgment of the Judicial Committee of the Privy Council in Pao On v. Lau Yiu Long [1980] A.C. 614. He said, at p. 632:
"Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. In New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon) [1975] A.C. 154, 168 the rule and the reason for the rule were stated: 'An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration . . . the promisee obtains the benefit of a direct obligation. . . . This proposition is illustrated and supported by Scotson v. Pegg (1861) 6 H. & N. 295 which their Lordships consider to be good law.' Unless, therefore, the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress, the extrinsic evidence establishes that it was supported by valid consideration. Mr. Leggatt for the defendants submits that the consideration is illegal as being against public policy. He submits that to secure a party's promise by a threat of repudiation of a pre-existing contractual obligation owed to another can be, and in the circumstances of this case was, an abuse of a dominant bargaining position and so contrary to public policy. . . . This submission found favour with the majority in the Court of Appeal. Their Lordships, however, considered it misconceived."

Lord Scarman then referred to Stilk v. Myrick, 2 Camp. 317, and its predecessor Harris v. Watson (1791) Peake 102, and to Williams v. Williams [1957] 1 W.L.R. 148,

before turning to the development of this branch of the law in the United States of America. He then said, at pp. 634-635:

"Their Lordships' knowledge of this developing branch of American law is necessarily limited. In their judgment it would be carrying audacity to the point of foolhardiness for them to attempt to extract from the American case law a principle to provide an answer to the question now under consideration. That question, their Lordships repeat, is whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position. Their Lordships' conclusion is that where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by ***15** coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal. Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position. It would create anomally because, if public policy invalidates the consideration, the effect is to make the contract void. But unless the facts are such as to support a plea of 'non est factum,' which is not suggested in this case, duress does no more than confer upon the victim the opportunity, if taken in time, to avoid the contract. It would be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable. Indeed, it is the defendants' case in this appeal that such an anomaly is the correct result. Their case is that the plaintiffs, having lost by cancellation the safeguard of the subsidiary agreement, are without the safeguard of the guarantee because its consideration is contrary to public policy, and that they are debarred from restoration to their position under the subsidiary agreement because the guarantee is void, not voidable. The logical consequence of Mr. Leggatt's submission is that the safeguard which all were at all times agreed the plaintiffs should have - the safeguard against fall in value of the shares - has been lost by the application of a rule of public policy. The law is not, in their Lordships' judgment, reduced to countenancing such stark injustice: nor is it necessary, when one bears in mind the protection offered otherwise by the law to one who contracts in ignorance of what he is doing or under duress. Accordingly, the submission that the additional consideration established by the extrinsic evidence is invalid on the ground of public policy is rejected."

It is true that Pao On is a case of a tripartite relationship that is, a promise by A to perform a pre-existing contractual obligation owed to B, in return for a promise of payment by C. But Lord Scarman's words, at pp. 634-635, seem to me to be of general application, equally applicable to a promise made by one of the original two parties to a contract.

Accordingly, following the view of the majority in Ward v. Byham [1956] 1 W.L.R. 496 and of the whole court in Williams v. Williams [1957] 1 W.L.R. 148 and that of the Privy Council in Pao On [1980] A.C. 614 the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform ***16** his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

As I have said, Mr. Evans accepts that in the present case by promising to pay the extra £10,300 his client secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress. If it be objected that the propositions above contravene the principle in Stilk v. Myrick, 2 Camp. 317,

I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed e.g. where B secures no benefit by his promise. It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day. It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants' promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement.

As a subsidiary argument, Mr. Evans submits that on the facts of the present case the consideration, even if otherwise good, did not "move from the promisee." This submission is based on the principle illustrated in the decision in Tweddle v. Atkinson (1861) 1 B. & S. 393. My understanding of the meaning of the requirement that "consideration must move from the promisee " is that such consideration must be provided by the promisee, or arise out of his contractual relationship with the promisor. It is consideration provided by somebody else, not a party to the contract, which does not "move from the promisee." This was the situation in Tweddle v. Atkinson, but it is, of course, not the situation in the present case. Here the benefits to the defendants arose out of their agreement of 9 April 1986 with the plaintiff, the promisee. In this respect I would adopt the following passage from *Chitty on Contracts*, 26th ed. (1989), p. 126, para. 183, and refer to the authorities there cited:
"The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment."
That is the situation in this case. I repeat, therefore, my opinion that the judge was, as a matter of law, entitled to hold that there was valid consideration to support the agreement under which the defendants promised to pay an additional £10,300 at the rate of £575 per flat. For these reasons I would dismiss this appeal.

RUSSELL L.J.

I agree with and have nothing to add to the judgment of Glidewell L.J. in so far as it relates to the defendants' submission that ***17** the plaintiff was not entitled to any part of the £10,300 because none of the eight flats had been completed. The judge found that there had been substantial completion and made a small deduction for defective and incomplete items. He did not identify those items nor define the extent of his deductions but no complaint is made about that. For the reasons appearing in the judgment of Glidewell L.J., supported as they are by Hoenig v. Isaacs [1952] 2 All E.R. 176, I have no doubt that the judge was right upon what Mr. Evans, on behalf of the defendants, referred to as his secondary point.

I find his primary argument relating to consideration much more difficult. It is worth rehearsing some of the facts. The judge found that the parties made an agreement on 9 April 1986. Subject to the date, which was inaccurately pleaded, it was the defendants who pleaded the agreement in paragraph 5 of their amended defence. The relevant passage reads:
"In or about the month of May 1986 at a meeting at the offices of the defendants between Mr. Hooper and the plaintiff on the one hand and Mr. Cottrell and Mr. Roffey on the other hand it was agreed that the defendants would pay the plaintiff an extra £10,300 over and above the contract sum of £ 20,000. Nine flats had been first and second fixed completely at the date of this meeting and there were 18 flats left that had been first fixed but on which the second fixing had not been completed. The sum of £10,300 was to be paid at a rate of £575 per flat to be paid on the completion of each flat."

There is no hint in that pleading that the defendants were subjected to any duress to make the agreement or that their promise to pay the extra £10,300 lacked consideration. As the judge found, the plaintiff must have continued work in the belief that he would be paid £575 as he finished each of the 18 uncompleted flats (although the arithmetic is not precisely accurate). For their part the defendants recorded the new terms in their ledger. Can the defendants now escape liability on the ground that the plaintiff undertook to do no more than he had originally contracted to do although, quite clearly, the defendants, on 9 April 1986, were prepared to make the payment and only declined to do so at a later stage. It would certainly be unconscionable if this were to be their legal entitlement.

The submissions advanced on both sides before this court ranged over a wide field. They went far beyond the pleadings, and indeed it is worth noticing that the absence of consideration was never pleaded, although argued before the assistant recorder, Mr. Rupert Jackson Q.C. Speaking for myself - and I notice it is touched upon in the judgment of Glidewell L.J. - I would have welcomed the development of argument, if it could have been properly raised in this court, on the basis that there was here an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding. For example, in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84 Robert Goff J. said, at p. 105: ***18**
"it is in my judgment not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist. It is sometimes said that an estoppel cannot create a cause of action, or that an estoppel can only act as a shield, not as a sword. In a sense this is true - in the sense that estoppel is not, as a contract is, a source of legal obligation. But as Lord Denning M.R. pointed out in Crabb v. Arun District Council [1976] Ch. 179, 187, an estoppel may have the effect that a party can enforce a cause of action which, without the estoppel, he would not be able to do."

When the case came to the Court of Appeal Lord Denning M.R. said, at p. 122:
"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."
Brandon L.J. said, at pp. 131-132:
"while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed."

These citations demonstrate that whilst consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early 19th century when Stilk v. Myrick, 2 Camp. 317 was decided by Lord Ellenborough C.J. In the late 20th century I do not believe that the rigid approach to the concept of consideration to be found in Stilk v. Myrick is either necessary or desirable. Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.

***19** What was the true intention of the parties when they arrived at the agreement pleaded by the defendants in paragraph 5 of the amended defence? The plaintiff had got into financial difficulties. The defendants, through their employee Mr. Cottrell, recognised the price that had been agreed originally with the plaintiff was less than what Mr. Cottrell himself regarded as a reasonable price. There was a desire on Mr. Cottrell's part to retain the services of the plaintiff so that the work could be completed without the need to employ another subcontractor. There was further a need to replace what had hitherto been a haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat. These were all advantages accruing to the defendants which can fairly be said to have been in consideration of their undertaking to pay the additional £10,300. True it was that the plaintiff did not undertake to do any work additional to that which he had originally undertaken to do but the terms upon which he was to carry out the work were varied and, in my judgment, that variation was supported by consideration which a pragmatic approach to the true relationship

between the parties readily demonstrates.

For my part I wish to make it plain that I do not base my judgment upon any reservation as to the correctness of the law long ago enunciated in Stilk v. Myrick. A gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration. As I read the judgment of the assistant recorder this was his true ratio upon that part of the case wherein the absence of consideration was raised in argument. For the reasons that I have endeavoured to outline, I think that the assistant recorder came to a correct conclusion and I too would dismiss this appeal.

PURCHAS L.J.

The history and circumstances under which this appeal comes before the court have been set out in the judgment of Glidewell L.J. whose exposition I gratefully adopt. I repeat here only for ease of reference the significant features of the factual matrix against which the parties came together on 9 April 1986.

Evidence given by Mr. Cottrell, the defendants' surveyor, established that, to their knowledge, the original contract price was too low to enable the plaintiff to operate satisfactorily and at a profit by something a little over £3,780. It was also known that the plantiff was falling short in the supervision of his own labour force with the result that productivity fell and his financial difficulties had been aggravated. A further difficulty, which the judge found had arisen by the time of the meeting in April, was that the plaintiff had been paid for more than 80 per cent. of the work but had not completed anything like this percentage. These facts were all obviously known to the plaintiff as well as the defendants. Also known to the defendants through Mr. Cottrell, and probably also appreciated by the plaintiff, was that the carpentry work to be executed by the plaintiff was on what was known as "the critical path of the ***20** defendants' global operations." Failure to complete this work by the plaintiff, in accordance with the contract, would seriously prejudice the defendants as main contractors vis-à-vis the owners for whom they were working.

In these circumstances there were clearly incentives to both parties to make a further arrangement in order to relieve the plaintiff of his financial difficulties and also to ensure that the plaintiff was in a position, or alternatively was willing, to continue with the subcontract works to a reasonable and timely completion. Against this context the judge found that on 9 April 1986 a meeting took place between the plaintiff and a man called Hooper, on the one hand, and Mr. Cottrell and Mr. Roffey on the other hand. The arrangement was that the defendants would pay the plaintiff an extra £10,300 by way of increasing the lump sum for the total work. It was further agreed that the sum of £10,300 was to be paid at the rate of £575 per flat on the completion of each flat. This arrangement was beneficial to both sides. By completing one flat at a time rather than half completing all the flats the plaintiff was able to receive moneys on account and the defendants were able to direct their other trades to do work in the completed flats which otherwise would have been held up until the plaintiff had completed his work.

The point of some difficulty which arises on this appeal is whether the judge was correct in his conclusion that the agreement reached on 9 April did not fail for lack of consideration because the principle established by the old cases of Stilk v. Myrick, 2 Camp. 317 approving Harris v. Watson, Peake 102 did not apply. Mr. Makey, who appeared for the plaintiff, was bold enough to submit that Harris v. Watson, albeit a decision of Lord Kenyon, was a case tried at the Guildhall at nisi prius in the Court of King's Bench and that Stilk v. Myrick was a decision also at nisi prius albeit a judgment of no less a judge than Lord Ellenborough C.J. and that, therefore, this court was bound by neither authority. I feel I must say at once that, for my part, I would not be prepared to overrule two cases of such veneration involving judgments of judges of such distinction except on the strongest possible grounds since they form a pillar stone of the law of contract which has been observed over the years and is still recognised in principle in recent authority: see the decision of Stilk v. Myrick to be found in North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1979] Q.B. 705, 712 *per* Mocatta J. With respect, I agree with his view of the two judgments by Denning L.J. in Ward v. Byham [1956] 1 W.L.R. 496 and Williams v. Williams [1957] 1 W.L.R. 148 in concluding that these judgments do not provide a sound basis for avoiding the rule in Stilk v. Myrick, 2 Camp. 317. Although this rule has been the subject of

some criticism it is still clearly recognised in current textbooks of authority: see *Chitty on Contracts*, 28th ed. (1989) and Cheshire, Fifoot and Furmston's Law of Contract, 11th ed. (1986). By the same token I find myself unable to accept the attractive invitation offered by Mr. Makey to follow the decision of the Supreme Court of New Hampshire in Watkins and Sons Inc. v. Carrig (1941) 21 A. 2d 591.

***21** In my judgment, therefore, the rule in Stilk v. Myrick, 2 Camp. 317 remains valid as a matter of principle, namely that a contract not under seal must be supported by consideration. Thus, where the agreement upon which reliance is placed provides that an extra payment is to be made for work to be done by the payee which he is already obliged to perform then unless some other consideration is detected to support the agreement to pay the extra sum that agreement will not be enforceable. The two cases, Harris v. Watson, Peake 102 and Stilk v. Myrick, 2 Camp. 317 involved circumstances of a very special nature, namely the extraordinary conditions existing at the turn of the 18th century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews. Thus, the decision that the promise to pay extra wages even in the circumstances established in those cases, was not supported by consideration is readily understandable. Of course, conditions today on the high seas have changed dramatically and it is at least questionable, as Mr. Makey submitted, whether these cases might not well have been decided differently if they were tried today. The modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement. In the present case the question of duress does not arise. The initiative in coming to the agreement of 9 April came from Mr. Cottrell and not from the plaintiff. It would not, therefore, lie in the defendants' mouth to assert a defence of duress. Nevertheless, the court is more ready in the presence of this defence being available in the commercial context to look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid. Although the passage cited below from the speech of Lord Hailsham of St. Marylebone L.C. in Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd. [1972] A.C. 741 was strictly obiter dicta I respectfully adopt it as an indication of the approach to be made in modern times. The case involved an agreement to vary the currency in which the buyer's obligation should be met which was subsequently affected by a depreciation in the currency involved. The case was decided on an issue of estoppel but Lord Hailsham of St. Marylebone L.C. commented on the other issue, namely the variation of the original contract in the following terms, at pp. 757-758:

"If the exchange of letters was not variation, I believe it was nothing. The buyers asked for a variation in the mode of discharge of a contract of sale. If the proposal meant what they claimed, and was accepted and acted upon, I venture to think that the vendors would have been bound by their acceptance at least until they gave reasonable notice to terminate, and I imagine that a modern court would have found no difficulty in discovering consideration for such a promise. Business men know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration from the earlier correspondence."

***22** In the light of those authorities the question now must be addressed: Was there evidence upon which the judge was entitled to find that there was sufficient consideration to support the agreement of 9 April, as set out in the passage from his judgment already set out in the judgment of Glidewell L.J.? The references to this problem in *Chitty on Contracts* 26th ed. (1989), are not wholly without some conflict amongst themselves. In paragraph 1601 the editors turn to the question of consideration to support an agreement to vary an existing contract:

"In many cases, consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other."

Reference is made to the Woodhouse case to which I have already referred:

"For example, an alteration of the money of account in a contract proposed or made by one party and accepted by the other is binding on both parties, since either may benefit from the variation. . . . However, an agreement whereby one party undertakes an additional obligation, but the other party is merely bound to perform his existing obligations, or an agreement whereby one party undertakes an additional obligation, but for the benefit of that party alone, will not be effective to vary the contract as no consideration is present."

These statements are based upon Stilk v. Myrick, 2 Camp. 317 and Syros Shipping Co. S.A. v. Elaghill Trading Co. [1980] Lloyd's Rep. 390. Reference is also made to paragraph 197 earlier in the textbook where Stilk v. Myrick is considered at some length. On the other hand, at paragraph 183 the editors make this proposition:
"The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him: e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in *fact* suffering any detriment. For example, in De la Bere v. Pearson Ltd. [1908] 1 K.B. 280 the defendants owned a newspaper and invited readers to apply for financial advice on the terms that the defendants should be entitled to publish the readers' letters and their own replies."
This is an accurate recital of the facts in De la Bere v. Pearson Ltd. [1908] 1 K.B. 280 but when the argument and judgments are read the case turned on issues other than consideration, namely remoteness of damage, etc. So the case is doubtful support for the proposition made in this paragraph.

The question must be posed: what consideration has moved from the plaintiff to support the promise to pay the extra £10,300 added to the lump sum provision? In the particular circumstances which I have outlined above, there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April. ***23** The defendants were on risk that as a result of the bargain they had struck the plaintiff would not or indeed possibly could not comply with his existing obligations without further finance. As a result of the agreement the defendants secured their position commercially. There was, however, no obligation added to the contractual duties imposed upon the plaintiff under the original contract. Prima facie this would appear to be a classic Stilk v. Myrick case. It was, however, open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation and comforted by the passage from the speech of Lord Hailsham of St. Marylebone L.C. in Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd. [1972] A.C. 741, 757-758, to which I have referred, I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment. In my judgment, on the facts as found by the judge, he was entitled to reach the conclusion that consideration existed and in those circumstances I would not disturb that finding. This is sufficient to determine the appeal. The judge found as a fact that the flats were ' substantially completed' and that payment was due to the plaintiff in respect of the number of flats substantially completed which left an outstanding amount due from the defendants to the plaintiff in the absence of the payment of which the plaintiff was entitled to remove from the site. For these reasons and for the reasons which have already been given by Glidewell L.J. I would dismiss this appeal.

Representation

Solicitors: John Pearson, New Malden; Terence W. Lynch & Co.

Appeal dismissed with costs. Leave to appeal. (M. F.)

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