

Case Note

PAST CONSIDERATION OR UNCONNECTED CONSIDERATION?

Rainforest Trading Ltd v State Bank of India Singapore
[2012] 2 SLR 713

It is trite law that a valid and enforceable contract must be supported by consideration. The recent Court of Appeal case of *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 is a further addition to the local jurisprudence on consideration, specifically the issue of past consideration. This note considers the specific issue of past consideration and argues that its label should be discarded in favour of a more realistic one that correctly emphasises its underlying concerns.

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I. Introduction

1 A valid and enforceable contract must be supported by consideration, defined as either a benefit conferred by the promisee on the promisor in return for the promisor's promise, or a detriment incurred by the promisee in return for the promisor's promise.¹ The recent Court of Appeal decision of *Rainforest Trading Ltd v State Bank of India Singapore*² ("*Rainforest Trading*") affords us an opportunity to consider the subsidiary rule that past consideration is not good consideration ("the past consideration rule").

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1 This definition has been accepted by the Court of Appeal: see *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [67]. On consideration generally, see Lee Pey Woan, "Consideration" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ch 4.

2 [2012] 2 SLR 713.

2 This note suggests that the nomenclature of the past consideration rule, premised as it is on the chronological order in which consideration is provided, may be misleading and should be discarded. Even though the supposed exception in *Pao On v Lau Yiu Long*³ (“*Pao On*”) preserves the emphasis on the chronological order by carving out an emphasis on the promisor’s request, the fact remains that the courts are often more than willing to find such “request”, such that the exception, if indeed it is one, has become the norm. The proper emphasis is really whether the consideration was *connected* to the promise sought to be enforced. The chronological order in which consideration was given is an indication of such connection but that is neither determinative nor the primary concern. This note then briefly discusses various categories in which the past consideration rule may apply and how a test based on connection will produce a clearer analysis.

II. Facts and decision in *Rainforest Trading*

3 The facts of *Rainforest Trading*⁴ concerned commonplace commercial arrangements. With the intent of investing in the second appellant, Teledata Information Limited (“Teledata”) entered into a share subscription agreement with the second appellant and its majority shareholder, Mr Goel. Pursuant to this agreement, a company (the first appellant) was incorporated in the British Virgin Islands in order for Mr Goel to transfer his majority shareholding in the second appellant to the first appellant in return for a certain shareholding in the latter. Teledata would then invest in and extend loans to the first appellant, which would in turn use such moneys to extend loans to the second appellant. The result was for Teledata to eventually hold 51% of the shares in the first appellant.

4 Subsequently, Teledata nominated its subsidiary, Baytech Inc (“Baytech”), to subscribe to shares in the first appellant. To fund the subscription, Baytech entered into a facility agreement with the respondent bank on 22 February 2007. Crucially, the first appellant “pledged” 10,200,000 shares in the second appellant (representing 51% of its share capital) as security to the respondent. On 23 February 2007, Baytech fully drew down on the facility. The first appellant then delivered share certificates representing the pledged shares and a signed bank share transfer form to the respondent on 5 April 2007. On the same day, the second appellant informed the respondent in writing that it had noted the respondent’s interest in the Register of Members.

3 [1980] AC 614.

4 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713.

Finally, on 10 December 2007, the first appellant and Baytech each registered a charge over the pledged shares in favour of the respondent.

5 As it turned out, Baytech failed to repay moneys due to the respondent on 29 February 2009. After the declaration of an event of default by the respondent, the respondent sought to enforce its security over the pledged shares. The High Court ruled that it could.⁵ The court held that an equitable mortgage carrying an implied power of sale was created over the pledged shares in favour of the respondent. This was done through the deposit of the share certificates and the signed blank share transfer form with the respondent. Since an event of default had occurred, the respondent could therefore exercise its power of sale.

6 On appeal to the Court of Appeal, the appellants argued, *inter alia*, that the equitable mortgage over the pledged shares was invalid because the consideration furnished by the respondent, namely the entrance into the facility agreement or the subsequent disbursement of funds was past consideration. It was argued that consideration was past because both said events took place *before* the creation of the equitable mortgage on 5 April 2007. Further, the exception against past consideration in *Pao On*⁶ did not apply because the first appellant, who granted the equitable mortgage, did not request the respondent to enter into the facility agreement in the first place. Also, the first appellant was never involved in any discussions regarding the loan facility and had no dealings with the respondent before 5 April 2007. There was thus no understanding between the parties that the respondent would be granted the equitable mortgage when the facility agreement was entered into and when the funds were fully disbursed.

7 The Court of Appeal rejected this argument on two bases. It first held that there was a “fundamental – and fatal – flaw”⁷ with this argument because it was inconsistent for the appellants to argue that the equitable mortgage granted over the pledged shares was unenforceable due to past consideration, while simultaneously arguing that the first appellant had no contact with the respondent. In the court’s view, any argument on past consideration is necessarily premised on a separate agreement that would otherwise have been a valid contract between, *inter alia*, the first appellant and the respondent, thus falsifying the former’s claim of no prior dealings.

8 Second, and more substantively, the Court of Appeal held that the exception in *Pao On*⁸ clearly applied: the court was prepared to find,

5 See *State Bank of India Singapore v Rainforest Trading Ltd* [2011] 4 SLR 699.

6 *Pao On v Lau Yiu Long* [1980] AC 614.

7 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [29].

8 *Pao On v Lau Yiu Long* [1980] AC 614.

in the context of the commercial dealings between the parties, that there was a request by the appellants that the respondent enter into the facility agreement with Baytech and that this would be compensated for by the grant of an equitable mortgage over the pledged shares. The court found evidentiary support for its analysis in the appellants' letters to the respondent on 5 April 2007. Those letters showed that the appellants knew that the share certificates were deposited in accordance with the facility agreement.

III. Re-examining the past consideration rule

A. *Past consideration in Rainforest Trading*

9 The past consideration rule was clearly the focus of *Rainforest Trading*.⁹ Apart from being determinative of one aspect of the parties' appeal, the court also explained that the past consideration rule is a "firmly established part of both the English and Singapore law of contract".¹⁰ Where it operates, the rule has the effect of preventing an otherwise valid contract from being formed.¹¹ However, as the court noted,¹² the potential harshness of the rule is mitigated by an apparent "exception" that has its genesis in the old English case of *Lampleigh v Braithwait*¹³ and stated in its modern form in *Pao On*.¹⁴ According to Lord Scarman in *Pao On*, three cumulative elements must be satisfied before the "exception" against the past consideration rule can operate where an act is done before the giving of the promise sought to be enforced:¹⁵

- (a) the act must have been done at the promisor's request;
- (b) the parties must have understood that the act was to be remunerated; and
- (c) such remuneration must have been legally enforceable if it had been promised in advance.

9 See Lee Pey Woan, "Consideration" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 04.016–04.017.

10 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [34].

11 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [35].

12 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [36].

13 (1615) Hob 105.

14 *Pao On v Lau Yiu Long* [1980] AC 614.

15 *Pao On v Lau Yiu Long* [1980] AC 614 at 629. See also *Re Casey's Patents* [1892] 1 Ch 104 and the Malaysian cases of *GBH Ceramics Sdn Bhd v How It @ Low Aik* [1989] 2 CLJ 427 and *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355.

The court, with respect, correctly pointed out that this is not a true exception inasmuch as it operates outside of the past consideration rule.¹⁶

10 The court in *Rainforest Trading*¹⁷ also pointed out that “while the doctrine of past consideration remains part of our law, it would generally be difficult for a party to successfully argue that a perfectly sensible and legitimate commercial transaction is unenforceable simply because the consideration provided for the promise was past”.¹⁸ The court seemed to justify this by reference to the modern approach in contract law that requires “very little” to find the existence of consideration. It also pointed out that a strictly chronological approach in determining whether consideration is past or not is “deeply unrealistic and unnecessarily restrictive” and it undermines the freedom of contracting parties and the sanctity of commercial transactions.¹⁹ These are, once again, very sensible views well supported by authority.²⁰

B. Past consideration or unconnected consideration?

11 The court’s analysis in *Rainforest Trading*²¹ follows the traditional analysis in resolving such questions: the chronological order in which the consideration is given relative to the promise sought to be enforced is first examined and a determination is made whether the consideration was factually past. If factually past, the subsequent question is whether the consideration was nonetheless given at the request of the promisor and if so, the “exception” in *Pao On*²² applies. This traditional analysis seemingly attributes too great an importance to the chronology of events,²³ an approach that is perhaps inherently mandated by the label “past consideration”. However, factual past consideration is not equivalent to *legal* past consideration; it is the latter which renders the promise unenforceable. Factual past consideration is merely an indication of the possibility of such an outcome.

16 See also Lee Pey Woan, “Consideration” in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 04.017.
17 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713.
18 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [38].
19 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 at [38].
20 See, for example, in the Singapore context, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139] and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [29]–[30].
21 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713.
22 *Pao On v Lau Yiu Long* [1980] AC 614.
23 To be fair, this approach does not regard chronology as conclusive: see Lee Pey Woan, “Consideration” in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 04.013.

12 However, legal past consideration is itself a conclusion; not a test. What is critical is to articulate the substantive test behind this conclusion. It is proposed that the true substantive test is whether the consideration is intrinsically and causally connected with the promise sought to be enforced.²⁴ The necessary connection in this regard is that the consideration is *given in exchange* for the promise. In other words, the courts are looking for a “bargained for” consideration. On this basis, and to avoid further misguidance by a misleading label, it may be preferable to re-label the doctrine of “past consideration” as “connected consideration”. It thus also follows that the apparent “exception” in *Pao On*²⁵ should instead be regarded as the general rule, that is, whether the consideration was “connected” to the promise. Indications of such connectivity, none of which are conclusive by themselves, would include whether the consideration was given at the request of the promisor or whether the consideration was given after the promise. The key question is always whether the consideration was connected, rather than whether it was factually past.

13 Such an approach finds support in *Dent v Bennett*,²⁶ an oft-cited case for the past consideration rule.²⁷ In that case, the defendant surgeon alleged that a deceased patient had agreed to pay him £25,000 for, *inter alia*, “the gratitude and respect of the [deceased] to the defendant for past services”.²⁸ Such past services included, most importantly, saving the deceased’s life on one occasion in 1827. The plaintiff, who was the executor of the deceased’s will, applied to set aside that supposed agreement. Cottenham LC granted the application. Although he had characterised the defendant’s case as being built on a “gratuitous reward for past services”,²⁹ his judgment did not focus on the chronology in which consideration was given for the promise sought to be enforced. Instead, he focused on whether the objective evidence showed the deceased ever agreed to pay the defendant £25,000 for such services. He held that the evidence did not show such an intention. On the contrary, the deceased had shown little gratitude to the defendant: in 1828, the deceased told the defendant to stop providing his medical services if the latter intended to charge for them. These facts showed “a state of the testator’s mind and feelings towards the [d]efendant wholly inconsistent

24 Although some leading texts (see, for example, *Chitty on the Law of Contract* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at p 271) say that in determining whether consideration is past, the courts are not bound to apply a strictly chronological test, such statements do not help in clarifying when and why the courts are not so bound, which is the true underlying test.

25 *Pao On v Lau Yiu Long* [1980] AC 614.

26 (1839) 41 ER 105.

27 See, for example, *Chitty on the Law of Contract* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at p 270.

28 *Dent v Bennett* (1839) 41 ER 105 at 107.

29 *Dent v Bennett* (1839) 41 ER 105 at 107.

with that exuberance of gratitude and generosity which could alone have rendered the alleged agreement intelligible”.³⁰ The learned Lord Chancellor therefore concluded that the deceased never approved of the alleged agreement.

14 The reasoning used in *Dent v Bennett*³¹ therefore does not adopt a strictly chronological approach. Instead, by examining the evidence related to the deceased’s intention after he had found that the consideration given was factually past, the Lord Chancellor recognised the possibility that factually past consideration could, in appropriate cases, be good consideration. The determinative criterion in that case was whether the deceased had intended to compensate the defendant from the very start. In other words, whether the consideration was *connected* with the promise sought to be enforced. Such a connection is probably easier to establish if the consideration was provided after the promise was made, but that is by no means wholly determinative of the matter. What truly matters is whether the promisor intended the consideration to be in exchange for the promise given.

15 *Eastwood v Kenyon*,³² another leading case on the past consideration rule, likewise supports this analysis. In that case, the plaintiff had provided for a young woman. When the young woman later got married, the husband promised the plaintiff that he would repay the money spent on her support. As it turned out, the husband failed to pay and the plaintiff sued the husband for the money promised. This claim was dismissed since it was not supported by consideration. Lord Denman CJ regarded as correct in general the principle of law stated in a note to the case of *Wennall v Adney*:³³ “an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law”.³⁴ Such a promise will be implied for, as an example, necessities given to an infant or where there was in fact an actual request by the promisor.³⁵ Once again, it is the existence of such implied promises that connects the consideration to the promise sought to be enforced. While Lord Denman CJ said that consideration given in *Eastwood v Kenyon* was factually past,³⁶ that was not determinative of his conclusion that it was not good consideration. It was rather because that consideration was not “at the request of the [husband], nor even of his wife ... the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the

30 *Dent v Bennett* (1839) 41 ER 105 at 108.

31 (1839) 41 ER 105.

32 (1840) 113 ER 482.

33 3 B & P 249.

34 *Eastwood v Kenyon* (1840) 113 ER 482 at 485.

35 *Eastwood v Kenyon* (1840) 113 ER 482 at 485.

36 *Eastwood v Kenyon* (1840) 113 ER 482 at 487.

[husband], with an express promise by the [husband] to pay money”.³⁷ The absence of any request, and therefore the lack of a necessary connection between the consideration and the promise, was the determinative reason in that case.

16 This analysis is also consistent with Professor Carter’s analysis in his joint textbook on Australian contract law.³⁸ He draws a distinction between executed and past consideration: in the case of executed consideration, “the act of forbearance supplied is part of the same transaction as the promise sought to be enforced”, whereas in the case of past consideration, “the promise is made after an *independently constituted and concluded transaction*” [emphasis added].³⁹ This likewise recognises the true reason why so-called past consideration is not good consideration: when consideration is given in the past, it is indicative that it arose in a *different* and independent transaction. Where however there is a connection between the consideration and promise, such that the promise is made in the same transaction as the consideration, the promise will be enforceable.

C. Why analysis based on “connected consideration” is preferable

(1) Analysis based on “connected consideration” better accords with rationale behind past consideration rule

17 From the perspectives of terminology and jurisprudential basis, an analysis based on “connected consideration” is preferable to one based on “past consideration”. Other than the reasons that have been highlighted above, such an analysis better reflects the rationale underpinning the past consideration rule. In *Eastwood v Kenyon*,⁴⁰ Lord Denman CJ explained why transactions affected by past consideration are not enforced by the courts:⁴¹

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors.

37 *Eastwood v Kenyon* (1840) 113 ER 482 at 487.

38 J W Carter, Elisabeth Peden & G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th Ed, 2007) at p 122. See also Lee Pey Woan, “Consideration” in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 04.012.

39 J W Carter, Elisabeth Peden & G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th Ed, 2007) at p 122.

40 (1840) 113 ER 482.

41 *Eastwood v Kenyon* (1840) 113 ER 482 at 487.

18 The passage cited above demonstrates two competing concerns at the heart of the past consideration rule.⁴² On the one hand, there is a need to restrict the types of promises enforceable by the law. On the other hand, there is a need to also recognise claims by “real” creditors, that is, claims that have been intended by both parties to be binding. Whether consideration is factually past cannot provide a normative reason why certain promises are enforced or not. It is instead a manifestation of a more primary reason: promises are not enforced if the alleged consideration is not intrinsically and causally connected to it; the consideration is simply not given *for* the promise concerned. This preserves the central idea of *reciprocity* behind the doctrine of consideration. On the contrary, to say that consideration is not good simply because it was given in the past is potentially under-inclusive for this does not account for instances where the parties had intended for consideration to be for a future promise. While this may be taken into account by the *Pao On* “exception”, it is submitted that that is nonetheless insufficient for it does not accord primary importance to the true underlying basis for enforcement (or non-enforcement) of promises affected by what is presently known as “past consideration”.

(2) *Analysis based on “connected consideration” is context sensitive and avoids artificial reasoning*

19 This analysis based on “connected consideration” also avoids the fiction that the courts may resort to when confronted with a fact situation involving past consideration. A prominent example is in the area of guarantees. A contract of guarantee will fail for being given for past consideration, like any other contract.⁴³ This presents a particular problem in guarantees because the statement of consideration may itself give the appearance of being past consideration: for example, the guarantee may be given “in consideration of an account having been opened”.⁴⁴ In such cases, older authorities have held that the consideration is past and that there is no contract.⁴⁵ Modern authorities have tried to overcome these older authorities by avoiding a “literal interpretation of the expressed statement of consideration in the guarantee where it

42 *Eastwood v Kenyon* (1840) 113 ER 482 was decided at a time when the tide was turning against the view that consideration included certain pre-existing “moral” obligations. The case is illustrative of that trend. This should be taken into account when considering the case: see *Chitty on the Law of Contract* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at pp 273–274. See also Steve Thel & Edward Yorio, “The Promissory Basis of Past Consideration” (1992) 78 Va L Rev 1045.

43 James O’Donovan & John Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, 2nd Ed, 2010) at p 72.

44 James O’Donovan & John Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, 2nd Ed, 2010) at p 82.

45 See, for example, *Oldershaw v King* (1857) 157 ER 213.

might appear on the face of it to be past consideration”.⁴⁶ Thus, in *SH Lock Discounts & Credits Pty Ltd v Miles*,⁴⁷ although the creditor’s consideration was expressed as “at my request *agreed* to make loans to C”, the past tense used was interpreted to mean the making of future loans. This therefore avoided the issue of past consideration.

20 However, this interpretative technique may be criticised for being overly imaginative, straining the ordinary understanding of English language.⁴⁸ This is no doubt the unfortunate product of the traditional analysis of past consideration that puts the chronology of events as a determinative criterion, subject to an exception. Such artificial reasoning may, however, be avoided if we focus on the singular most important question of whether the consideration given was *for* the guarantee in question. This suggested analysis is straightforward and sensitive to the commercial context, in this case, the nature of security transactions. Securities are typically furnished post the occurrence of events which amount to consideration for the provision of the relevant security.

D. Categories in which “connected consideration” can be applied and relevant factors

21 In this section, the analysis suggested will be applied to three distinct categories in which past consideration may arise. In considering these categories, ways will also be suggested in which the promisor can be made liable even outside the regime of contract law.

(1) *Services rendered in the past to the benefit of promisor*

22 Where services were rendered in the past to the benefit of the promisor, whether the promisor may remain liable will depend on whether the consideration is connected to the promise of payment in the sense that it was given in exchange for the payment. Based on this test, therefore, in a case of rescue and subsequent promise of reward, the reward is unenforceable because the consideration was given without the contemplation of the possibility of a reward and hence, ineffective. On the other hand, if the consideration is given in contemplation of the reward and hence connected with the promise, the promisor shall be liable for payment. One explanation is that the original request and response constitute an agreement to pay a reasonable amount for the service rendered, and that the actual agreeing on a specific sum is a settlement of the original right to a claim of a reasonable sum. The

46 James O’Donovan & John Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, 2nd Ed, 2010) at p 83.

47 [1963] VR 656.

48 J Phillips, “Guarantees: Protecting the Bankers” [2012] JBL 248 at 255.

consideration is found in the settlement of the earlier entitlement in favour of the specific sum.⁴⁹

23 This is well-illustrated by the High Court decision of *Foo Song Mee v Ho Kiau Seng*⁵⁰ and the subsequent Court of Appeal decision of *Foo Song Mee v Ho Kiau Seng*⁵¹ (“*Foo Song Mee (CA)*”). In *Foo Song Mee v Ho Kiau Seng*,⁵² the plaintiff, a real estate agent, claimed the balance of a sum from the defendant pursuant to an alleged contract. Under that contract, the defendant had allegedly agreed to pay the plaintiff a commission in consideration of the plaintiff procuring “a good price” in relation to the defendant’s en bloc purchase of some apartments. The High Court found that the quantum of the commission was not agreed before the options to purchase the apartments were granted. There was instead only a promise to pay an unspecified sum before the defendant secured the options. The final sum was agreed (if at all) only in a subsequent agreement *after* the options had been granted. Therefore, according to the court, the plaintiff’s effort in securing a good price was past consideration in relation to the subsequent agreement.

24 The judgment of the High Court was overturned by the Court of Appeal in *Foo Song Mee (CA)*.⁵³ The appellate court’s decision emphasised the importance of looking at the substance of the transaction; it disagreed with the High Court’s finding that consideration was past. The error, according to the Court of Appeal, was in viewing the subsequent agreement on the quantum of commission in isolation, rather than in its proper context. It is not uncommon for commercial parties to postpone the agreement of the specific sum or other details to a later date, especially if the counter-performance is considered urgent and is requested to be performed expeditiously. Moreover, even without the subsequent agreement on a specific sum to be paid, as long as there is an agreement that there shall be remuneration, it amounts to sufficient consideration to support a claim in contractual *quantum meruit*.⁵⁴ The court would in such circumstances imply a term of reasonable remuneration. It is difficult to see how the presence of a subsequent agreement on a specific sum would then turn a contractual claim into a non-contractual claim. An overly technical approach may thus defeat parties’ expectation to be bound by a contract and out of step with commercial practices. This illustrates the danger of looking at

49 J W Carter, Elisabeth Peden & G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th Ed, 2007) at p 123.

50 [2011] SGHC 4.

51 [2011] SGCA 45.

52 [2011] SGHC 4.

53 *Foo Song Mee v Ho Kiau Seng* [2011] SGCA 45.

54 *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [123]. See also Judith Prakash J’s discussion (at [122]–[124]) on the distinction between contractual *quantum meruit* and restitutionary *quantum meruit*.

chronology as a determinative criterion in ascertaining the sufficiency of consideration. This error would have been avoided if the governing criterion were regarded to be that of connection, rather than chronology.

(2) *Promise given in the past for the benefit of promisor*

25 Where the consideration consists of a promise rather than a service (that is, a past act), the principles in the previous category can also apply,⁵⁵ but in such cases, the *Pao On* “exception”, which requires an antecedent request from the promisor for the promisee’s counter-promise, is likely to be important. Unlike cases in the previous category, consideration in the present context is not as easily found in a material benefit given in exchange for the promise. Rather, it is the element of “request” (which is also relevant, but perhaps to a different extent, in the past services context) that provides the necessary connection between the consideration and the promise. The danger of adopting a purely chronological approach as the primary recourse is that it misses the true underlying premise behind the enforcement (or non-enforcement) of promises in such cases.

(3) *Services rendered in the past but not to the benefit of promisor*

26 Where services were rendered in the past but not to the benefit of the promisor, it is very likely that the promisor will not be liable. *Eastwood v Kenyon*⁵⁶ is arguably a case within this category. Although a broad argument can be made that support for the young woman was to the husband’s eventual benefit, the fact remains that when the service was rendered, the husband was never in the promisee’s (or wife’s) contemplation. Therefore, there was no benefit to the promisor at the time the promise was made. This is a strong indication of the lack of any connection between consideration and service. In all the categories discussed thus, we see that the primary criterion is that of connection, rather than chronology, even if the latter provides an indication as to the legal effectiveness of the alleged consideration.

IV. Conclusion

27 In conclusion, this note, through a discussion of *Rainforest Trading*,⁵⁷ has suggested that the past consideration rule should not be envisaged as one based primarily on chronology. That approach is liable to result in artificial reasoning used to get around a criterion that does

55 *Chitty on the Law of Contract* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at p 272.

56 (1840) 113 ER 482.

57 *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713.

not even constitute the substantive basis of the past consideration rule. It is preferable to simply ask whether the consideration is “connected” to the promise sought to be enforced, and this may be done through the various categories suggested above. More broadly, the Court of Appeal’s statement that past consideration is easily found may also indicate that the doctrine of consideration in Singapore is easily satisfied. To some extent, this may possibly herald, as some have argued,⁵⁸ the demise of consideration in Singapore.

58 See Koo Zhi Xuan, “Envisioning the Judicial Abolition of the Doctrine of Consideration in Singapore” (2011) 23 SAcLJ 463 for an extensive examination of the possible rationales of consideration. The learned author argues for the abolition of consideration after concluding that its supposed rationales are not convincing.