

Consideration

The doctrine of consideration requires that something must be given in return for a promise in order to make it binding.

Exchange element:

There must be a quid pro quo relationship between the consideration and the offer; that is, there must be a reciprocal exchange as authorised by *Australian Woollen Mills v Cth*.

Beaton v McDivitt held that Substantial consideration is needed from both parties in the spirit of quid pro quo.

The consideration must move from the promisee. Consideration need not flow to the promisor but may be authorized to flow to a third party. In *Collus v Bagot* it was held that it is possible to be a party to a contract in which a promise is made, but still be a stranger to the consideration given in return for that promise

Sufficiency element:

Benefit/detriment requirement- An act of the promisee must either be an act to benefit the promisor, or is done to the detriment of the promisee at the request of the promisor. (*Carlil v Carbolic*)

It was held in *Beaton v McDivitt* that acts performed in reliance on a promise will not constitute good consideration for that promise but instead is considered merely a conditional gift – where one party is the sole benefiter

Consideration must be sufficient, but it need not be adequate. The court is NOT concerned with the adequacy of the consideration. (*Woolworths v Kelly*) Consideration can be anything stipulated by the promisor (*Chappell v Nestle*). The case of *Dunton v Dunton*; concluded that the surrendering of one's liberty can amount to good consideration.

A promise **will not constitute good consideration** if the promisor retains an unfettered discretion as to performance.

It was held in *Placer Development v Cth* that a promise will not amount to sufficient consideration if it is too vague or uncertain to be enforced. Consideration must not be illusory – where the option to pay/act rests solely in the discretion of the promisor and is not remedied by a further clause in the contract.

Past consideration is not considered sufficient consideration. The promise must be coextensive with the consideration, something given before a promise is made cannot constitute good consideration (*Roscorla v Thomas*).

It is important to distinguish between past consideration and executed consideration. Executed consideration is something given as part of the same transaction as the promise

An exception to the past consideration rule is made in the case of a promise to pay for past services. The case of *Lampleigh v Braithwait* held that, where services are provided at the request of a party, a later promise to pay for those services will be binding because the promise “couples itself” with the earlier request.

Criteria to a subsequent promise being binding in *Pao On*:

- 1) Act must have been done at the promisor's request

- 2) Parties must have understood that the act was to be remunerated either by a payment or the conferment of another benefit
- 3) Payment or the conferment of the benefit must have been legally enforceable had it been promised in advance

Existing duty rule: Neither a promise to perform an existing legal duty, nor the performance of an existing legal duty, is regarded as sufficient consideration to support a contract.

Public duties: public officials and those involved in the administration of justice (eg. police) cannot gain extra rewards for discharging their responsibilities

Private duties: consideration will not be considered sufficient if the party already owes the act under existing terms to a contract (*Stilk v Myrick*).

A result of the existing legal duty rule is the principle that **part-payment** of a debt **does not constitute good consideration** for an agreement to discharge the debt. (The rule in *Pinnel's case*)

Foakes v Beer applied Pinnel's rule, concluding that part payment of a debt on the day or days after, cannot satisfy the full debt even at the promisor's request, where no additional consideration is provided.

The existing duty rule will NOT apply

1) Where **fresh consideration** has been provided by the beneficiary. This was explored in the case of *Hartley v Ponsoby* where crew were able to enforce extra wages as they provided fresh consideration by agreeing to continue the voyage in *dangerous* conditions they were not obliged to sail in.

2) Where the beneficiary's promise to perform confers a **practical benefit** on the modifying party. It was accepted in the case of *Williams v Roffey* that the existing duty rule was inapplicable where the modifying party obtains a practical benefit from the beneficiary's promise to perform an existing obligation. (plaintiff's promise to perform on time was of benefit to defendant – defendant retained services of plaintiff and wouldn't have needed to employ someone else)

Musumeci v Windael refined *Williams v Roffey*

Williams precedent extended to cover situations where the modifying party makes a concession (i.e. accepting reduction in obligations). Practical benefit doesn't apply where there has been the application of unfair pressure. Practical benefit should only constitute good consideration if the beneficiary's performance is capable of being regarded by the modifying party as worth more than any remedy against the beneficiary

- i) If A enters into a contract with B to do work or to supply goods/services to B in return for payment; and
- ii) Before A completes obligations, B has reason to doubt whether A will or will be able to complete his side of the bargain; and
- iii) B promises A extra payment in return for A's promise to perform contractual obligations on time; and
- iv) As a result of his promise, B obtains a benefit or obviates a disbenefit; and
- v) B's promise isn't given as a result of economic duress/fraud on the part of A; then
- vi) Benefit to B is capable of being consideration for B's subsequent promise – and the promise be legally binding

3) Where the promise to perform an existing contractual duty is made by the beneficiary to a **third party**. A promise to perform an existing contractual obligation does amount to a good consideration if it is made to a person who was not a party to the original contract. This exception to the existing legal duty rule was accepted in **Pao On** as the promisor incurred an additional legal obligation and conferred an additional legal right on the new promisee.

4) Where a promise is made by way of **bona fide** (genuine/honest) compromise of a legal claim. The High Court accepted this exception in the case of **Wigan v Edwards** as the promise was made as part of a bona-fide compromise to a disputed contractual claim.

5) Where the parties have terminated their original contract and entered into a new contract. Parties must have intended to terminate and replace the original contract and not merely modify it. **Hartley v Ponsonby**

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Alternative sources of rights/remedies

If you failed to establish a contract, or found a problem with enforcing the contract, what else might be available to your client?

If in doubt that a contract exists or is enforceable against another party – are there any alternative sources of relief available?

Promissory (equitable) Estoppel – Can the elements be established?

Principle: Estoppel is an alternative form of relief, outside of the law of contract, which may be available to a party (relying party) of an unenforceable contract who has been induced by another party (representor) to adopt and act upon an assumption of fact (common law) or an assumption as to the future conduct of the representor (equitable) and will incur detriment if the representor fails to pursue his word.

“A **common thread**... equity will come to the relief of a plaintiff who has **acted to his detriment** on the **basis of a basic assumption** in relation to which the other party... has ‘**played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it**’... Equity comes to the relief... on the footing that it would **unconscionable conduct** on the part of the other to ignore the assumption” *Waltons v Maher*

Equitable estoppel will be available where the following 6 elements, as established in, **Walton v Maher**, are present

1. Assumption

The plaintiff assumed or expected that a particular legal relationship exists between the plaintiff and the defendant or that a particular legal relationship will exist between them and that in the latter case that the defendant is not free to withdraw from the expected legal relationship.

Mobil Oil Australia - It is a necessary element of the principle that the defendant has created or encouraged an assumption that a particular legal relationship...would arise or be granted.

2. Inducement

The defendant has induced the plaintiff to adopt that assumption or expectation.

Note: Brennan has expressly included the defendant consciously refraining from telling the plaintiff that the assumption was wrong, as being able to constitute inducement.

3. Detrimental Reliance

The plaintiff acts or abstains from acting in reliance on the assumption or expectation so that the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.

Je Mainteindrai – Promissory estoppel could arise if the promisee had altered his or her position on the faith of the promise and would thereby suffer detriment if the promisor was subsequently allowed to assert his or her strict legal rights; whether an action is detrimental in expectation or reliance loss is assessed at the time and circumstances that the defendant seeks to resile from the relevant assumption.

4. Reasonableness:

There are two standards that must be met:

- The **assumption must be reasonable** - This is particularly the case if the representation was by conduct. If the assumption made was unreasonable, there can be no Unconscionability in enforcement.
- The **detriment** sustained must **be reasonable**.

5. Unconscionable Conduct – ‘Unconscionability’

Unconscionable conduct is not a requirement, but rather the underlying principle of estoppel. “The underlying principle informing the elements of estoppel, rather than a discrete ingredient which is additional to those elements” (Anaconda Nickel Ltd v Edensor Nominees Pty Ltd [2004] VSCA 167)

6. Departure or threatened departure

it is the representor's departure or threatened departure from the assumption which is said to constitute unconscionable conduct

“An equitable estoppel cannot arise until there has been an unjust or unconscionable departure or threat to depart from the assumption adopted and acted upon by the party seeking to assert the estoppel.” (Anaconda Nickel Ltd v Edensor Nominees Pty Ltd [2004] VSCA 167)

What is the measure of remedy?

The case of **Giumelli** considered the measure of remedy.

- Prima facie – court seeks to **preclude departure** from assumed states of affairs (specific performance) (court will first try to stop the representor from departing from the relied-upon assumption)
- However, there are two reasons why that prima facie entitlement might give way to some other form of relief

1. It may be impossible, impractical or inappropriate in the circumstances to fulfil the relying party's expectations
2. Second consideration is one of principle or justice between the parties – this is the minimum equity principle or proportionality requirement

This was the case in *Giumelli* where the relying party received *a money sum rather than the conveyance to him of the "promised lot"*

Can Common Law estoppel be established? What is the effect of Common Law estoppel?

In establishing a Common Law estoppel the representor is estopped from departing from his assumption. The rights of the parties are then determined by reference to the represented or assumed state of affairs.

In comparison, an equitable estoppel, raises "equity" (some form of relief to the courts discretion) in favour of the relying party