

Chapter 6: Consideration.

Meaning of consideration

- Exchange of something of value; price paid for a promise; must be present in every simple contract
- In order to be binding/enforceable as contract, agreements require the exchange of something of value.
- A promise must be supported by consideration

Gratuitous promises and Deeds

Gratuitous promise – not supported by consideration (nothing promised in return of value).

- Someone promises to do something without requiring consideration in exchange.

Deed – formal contract (form takes place of consideration). ONLY way a gratuitous promise may be enforced.

- Deeds may enforce gratuitous promises. They indicate solemn and binding promises
- Consideration is not necessary
- Must comply with formal writing requirements
- Only damages are available for breach of deed
- Deeds have strategic and evidentiary advantages, contain recitals and these are words in the deeds that set out facts and backgrounds to the deed. Factual background is evidence that may be tendered in court. May give rise to an estoppel.
- The form must say it is a “deed”, must be executed (signed, sealed and delivered) in front of authorised witness.
- Represents a serious promise that the law will enforce.
- Failure to comply with deed allows other party to seek damages.
- In equity a deed is not enforceable (specific performance is not available) equity will not support a volunteer ie. Someone who has not given consideration.
- Advantage is that there is 12 years to sue (use as evidence) for formal contract and 6 years to sue for simple contract.

RULES OF CONSIDERATION

Consideration must be bargained for – before the promisee’s promise or act can be regarded as consideration, it must be established that the promise or act is given at the request of the promisor and in reliance upon the promisor’s promise. For the promisee’s act to constitute consideration, it must be performed at the request (express or implied) of the promisor.

1. **Consideration must move from the promisee:** IN any transaction, for the purposes of consideration, it is the promisor that is making promise and the promisee is the party to whom the promise is made, typically also the offeror and offeree. Only the party giving consideration can enforce a promise by the other party. In typical bilateral contract (promise for a promise), both parties can sue for breach. Both are promisors and promisee.

- **Dunlop Pneumatic Tyre Co v Selfridge & Co [1915] AC 847**

Top – Manufacturer (Dunlop), Middle- Wholesaler, Bottom – Retailer. Dunlop entered into a contract with the wholesaler (we will supply tires to you & you will promise not to sell them under a certain price). Wholesaler enters into a separate contract with retailer on similar terms. The retailer in order to sell more tires dropped the price below what was promised (breached contract with wholesaler). Dunlop sued the retailer and lost the case as no consideration was given by Dunlop to the retailer in exchange for the retailer's promise. There was no contract between Dunlop and the retailer. -> Consideration did not move from the promisee (wholesaler not the manufacturer).

EXCEPTION

Joint promisee rule exception: States that if a promisor makes a promise to two or more promisee's and only one promisee provides consideration for that promise either promisee may enforce that promise

- **Coulls v Bagot's Executor & Trustee Co (1967) 119 CLR 460**

(Joint promisees) Coulls owned land and entered into agreement with O'Neil Construction where they could quarry stone from his land. Royalties would be paid to Mr & Mrs Coulls as joint tenants. After Mr Coulls died, the issue was whether the royalties were to be paid to Mrs Coulls or the executor of Mr Coulls' estate. Majority of High Court denied Mrs Coull's claim and held that the promise by O'Neil Construction was not made to Mr & Mrs Coulls jointly. The Minority held that the promise was to Mr & Mrs Coulls jointly and as long as one provided consideration that was enough for the other to be able to enforce the promise.

- **Australian Woollen Mills v The Commonwealth (1954)**

Commonwealth Government implemented a scheme to facilitate the payment of subsidies for those who bought wool. The government did not pay subsidies. AWM sued the Commonwealth government for the unpaid subsidies claiming the purchase of wool was consideration for the promise by the government. Court rejected this claim and considered the government's subsidy scheme as a conditional promise of a gift, which cannot be legally enforced.

- **Carlill v Carbolic Smoke Ball Co [1893]** (By way of contrast) Inconvenience sustained by one party at the request of another is enough to create a consideration.

2. **Past consideration is not good consideration:** Future and present consideration is good. Consideration given before the promise. A situation where something is done before any promise to pay for it is made. Arises where a contract is entered into and completed and subsequently one party makes a further promise to the other. The earlier contract does not amount to consideration for the subsequent promise (the earlier contract is past consideration).

- **Roscorla v Thomas (1842) 114 ER 496**

Roscorla purchased horse from Thomas. After the sale was completed, Thomas promised Roscorla that the horse was 'sound and free from vice'. This was not true. Roscorla sued Thomas for breach of contract on the basis of that promise. He failed because there was no consideration given for that promise. The earlier purchase of the horse was past consideration. Court held that this was an additional promise after the contract for which the buyer had not given additional consideration.

Seller's promise came after the promise for which the promisee gave no consideration.

EXCEPTIONS

1. Where giving of consideration and making the promise are part of the same transaction (eg. In negotiations).
2. Where there is an implied promise to pay for a service (eg. Pain kitchen and both parties reasonably assume payment would follow but never agreed on amount).

3. **Consideration must be sufficient (legally):** Law does not require that the consideration that is given for promise does not have to be equal to promise. Not concerned by actual commercial value, as long as it does have some value. Must have a value that the law will recognize. Regardless of adequacy.
 - 6.38: For the promisee's promise or act to be consideration, it must be of value in the eyes of the law. It does not have to be commercially adequate to be sufficient in law.
 - 6.39: Nominal consideration: cases where consideration is only of token value. Natural love and affection of a promisee is not sufficient consideration.
 - 6.41: Equitable remedies not available to a person who has given nominal consideration. Equity will not assist a volunteer (person who has not provided valuable consideration).

- **Woolworths v Kelly (1991) 22 NSWLR 189**

(Sufficiency of consideration principle) 1. Different people put different values on the contracts they make. 2. Judges are not trained in the economic and other factors that need to be considered when evaluating contracting decisions. 3. Would lead to a flood of cases before the courts and different judges would reach different decisions. 4. Disputes would lead to uncertainty in an area of law where certainty is of economic importance to society. 5. There are other avenues to challenge the adequacy of bargain such as Australian Consumer Law and Contracts Review Act 1980 (NSW). 6. Contract law is a reflection of the doctrine of freedom of contract; parties are at liberty to negotiate contracts on whatever terms they wish free from the paternalistic superintendence of the courts.

Promise to perform a public duty: A promise to perform an obligation imposed upon a person by the State is not good consideration. Eg. Provision of police, public health and firefighting services. 6.48: Promise to perform existing contractual duty

- **Collins v Godefroy (1831) 109 ER 1040**

Person subpoenaed to give evidence in court. He had been promised payment for his attendance. The question was whether or not payment was supported by consideration from the person. The court held that a person who receives a subpoena is under a legal duty to give evidence and that a promise to pay that person for loss of time is a promise for which no valid consideration is given.

- **Glasbrook Bros v Glamorgan County Council [1925] AC 270**

A promise to do more than what is required of the promisee in carrying out his/her public law duty is good consideration. Police agree to be paid extra money to protect colliery premises. Court ruled that they had done more than they considered necessary for the adequate protection of the colliery. Therefore promise to pay that extra money was acceptable.

4. **Promise to perform a public duty:** A promise to perform an obligation imposed upon a person by the State is not good consideration. Eg. Provision of police, public health and firefighting services.
- Promise to perform existing contractual duty General rule was that performing an existing contractual duty already owed to the promisor is not good consideration for some additional benefit promised by the promisor. Such a variation has to be by means of another contract.
 - Variation of additional payment may be enforceable even though the promisee gave no new consideration and only does what he/she is originally contracted to do – if the promisor received a practical benefit or avoids a dis-benefit. In NSW we require evidence of a practical benefit or avoidance of a dis-benefit for an existing contractual duty to be recognised as valid and sufficient consideration.
 - A promise to perform an existing contractual duty already owed to a third person is valid consideration

- **Stilk v Myrick (1809) 170 ER 1168**

Stilk agreed to become a crewmember of a ship. One of the terms of the written contract was that they would do all they could under all emergencies of the voyage to get the ship back to England safely. Some crewmembers deserted the ship. The captain promised to pay remaining crewmembers extra money to get the ship back safely. The extra money was not paid. Stilk sued the captain. Court held that there was no consideration for the promise to pay the increased wages.

- **Hartley v Ponsonby (1857) 119 ER 1471**

Court found that what was promised was in excess of the existing contractual duty already owed to the promisor. The court held that Hartley had performed above and beyond his existing contractual duty, which was to work on a seaworthy ship (the extra effort was measurable as sufficient consideration for the promise). The ship had become unseaworthy because of the shortage of skilled crew.

- **Williams v Roffey Bros & Nicholls [1991] 1QB1**

Roffey Bros entered into an agreement to renovate a block of flats with the owner. One of the terms of that agreement was the job had to be finished by a certain date. If the job wasn't finished then the parties agreed that certain damages would be payable to the owner (Roffey Bros were under contractual pressure to finish the job in time). Roffey Bros has a subcontractor Williams (carpenter) who had a contract with Roffey Bros. Williams threatened to leave the job. Roffey Bros were left with a breach of contract by Williams. Roffey Bros promised to pay Williams an extra \$10000 if he stayed to finish the job. Williams accepted that promise and finished the job. Roffey Bros only paid the original contract amount and not the extra amount arguing that Williams only did what he was contractually bound to do and he gave no extra consideration for the promise of the extra money. The court ruled that by staying to finish the job (and performing his existing contractual duty) Williams was actually giving Roffey Bros a practical benefit. This practical benefit amounted to good consideration. It can be argued that consideration will always be present on the basis that the promisor, acting rationally, would not have made the promise in the first place unless it was in his/her interest to do so.

- **Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723**

Small business in a shopping centre, promises made, no consideration given but was practical benefit to the landlord. Practical benefit test has been confirmed and is now authority and has been expanded by this judgment

- **Antons Trawling Co v Smith [2003] 2 NZLR 23**

(NZ decision – we are not bound by it) In NZ you don't even need to prove practical benefit. Any additional promise of extra money or some benefit is always enforceable. The consideration is the underlying consideration in the contract in the first place. The underlying consideration for the original agreement will be enough to support the extra promise. You don't need to show a practical benefit if an additional promise has been given and you have given no consideration for it. You can point to your existing contractual duty as sufficient consideration.

5. Forbearance to sue

- Whether a promisee who gives up a right to sue has given sufficient consideration. Courts would recognise this because you are giving up something of value (legal value) -Can give up right to damages if:

1. There is a reasonable claim (not frivolous or vexatious).
2. Need to have a reasonably held belief that claim would be successful if litigated (no need to prove).

- **Hercules Motors v Schubert (1953) 53 SR(NSW) 301**

Schubert purchased a car from Hercules Motors. He later found out the car had faulty paintwork. Schubert eventually agreed to accept the car company's promise to repaint the car and put it in "as new condition". The report was unsatisfactory. Schubert took the car and sued on the promise to put the car in an 'as new' condition. Hercules Motors argued that there was no consideration for its promise. The court held that there was a genuine dispute between the parties. The agreement to repaint was a compromise of that dispute. Schubert's compromise was sufficient consideration for the company's promise.

- **Wigan v Edwards (1973) 1 ALR 497**

Mr & Mrs Edwards agreed to purchase a house from Wigan (the builder). The contract contained no express term that the house had to be completed in a good and workman like manner. Before completion Mr & Mrs Edwards gave Wigan a list of defects so Mr & Mrs Edwards paid the money and moved in. Wigan promised to fix it. Wigan did not do the work. Mr & Mrs Edwards sued in Wigans promise. The High Court held that the purchaser's genuinely believed that they did not have to complete the purchase because of the defects to the house. The compromise of that belief was sufficient consideration for the promise to remedy the defects.

Part payment of a debt

EXCEPTIONS

1. Where agreement to accept part payment is set out in a deed.
2. Where debtor promises something other than part payment provided it amounts to nominal consideration at least (as this could be more beneficial to the creditor than the money).
3. Where the debtor promises to pay the lesser sum at an earlier time than originally promised. Because the creditor is accepting the sum before it is due, earlier benefit, smaller sum but willing to accept for earlier

4. Statute for sale of goods or Bankruptcy Act 1966 (Cth).
5. Where debtor can satisfy requirements of the principle of equitable estoppel creditor will be precluded from taking action to recover the balance.
6. Where part payment is paid by someone else to discharge the full amount – the creditor cannot claim the balance from the debtor.

- **Pinnel's Case (1602) 77 ER 237**

Part payment of debt is not sufficient consideration for a promise to discharge the whole debt. The court held that payment of a lesser sum in satisfaction of a greater sum cannot be any satisfaction for the whole. In other words, if a debtor owes a creditor \$100, and the creditor promises to accept \$70 in full satisfaction of the debt, the creditor's promise is not enforceable because the debtor has not provided any consideration for the creditor's promise to forgo the balance of \$30. The consequence is that the creditor can sue the debtor to recover the balance.

- **Foakes v Beer (1884) 9 AC 605**

Foakes owed Beer money. Foakes asked if he could pay the debt in instalments. Beer agreed not to take any further action if Foakes paid a lump sum and the balance in instalments. Foakes complied. Beer then claimed the interest that had accrued on the debt. House of Lords held that interest was payable. Foakes did not provide consideration in return for the promise not to take any further action by Beer. Foakes has a pre-existing obligation to pay the whole judgment debt, which included any accrued interest. The mere payment by instalments of the debt, less the accrued interest was not sufficient consideration.