

## Consideration

Consideration is required to make a contract enforceable. For a promise to become legally binding, the promisee must give consideration to the promisor in exchange for the promise. When contract made by an exchange of promises, each party's promise is consideration in support of the other's promise. An agreement not supported by consideration is called nudum pactum (naked agreement) and is generally unenforceable.

### Definitions of Consideration

Consideration is generally defined in law as something of value given in exchange for a promise. **It is regarded as the agreed price for the promise.**

- Price, detriment or forbearance given as a value for the promise. In exchange for a promise that you wish to have made binding, an offeree must pay a price, suffer a detriment or give something up as value for that promise.

Two aspects to the definition:

- **The benefit/detriment requirement:** either a benefit flowing to one party or detriment suffered by the other
- **The bargain requirement:** the benefit or detriment is given in return for the promise

### Benefit/Detriment requirement

#### Case: *Currie v Misa (1875)*

- 'A valuable consideration in the sense of the law, may consist of some right, interest, profit or benefit accruing to one party or some forbearance detriment loss or responsibility, given, suffered, or undertaken by the other...'

Promises must either

- Confer a benefit (usually on the promisor)
- Give rise to a legal detriment (giving something or undertaking an obligation)

### Bargain requirement

The act relied on as consideration must be performed as the agreed price of the promise.

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

**In *Australian Woollen Mills Pty Ltd v Commonwealth (1954)*, it was held that there was no quid pro quo. There was nothing said by the Commonwealth which suggested that payment of the subsidy was promised in return for AWM purchasing wool (act). The Commonwealth's announcement was simply policy. Part of its policy to induce and support the wool industry.**

**Held:**

- Between the Cth's announcement (offer/promise), and the act of AWM purchasing wool which is put forward as the executed consideration for that promise, there must subsist the relation of a *quid pro quo* ("this for that")
- There was no consideration- There must be "*quid pro quo*" – an exchange of one thing (act) for another (promise)

- **Quid pro quo** – If I'm going to hold you on you promise to give me this it needs to be clear that I've agreed to give you that in exchange for this.

### Rules of Consideration

#### **Consideration must move from promisee**

Promisor's promise can only be enforced by promisee if he or she has provided consideration for the promise

Two aspects

- Consideration must move from promisee
  - o E.g. I will mow your mother's lawn for \$10. Do you agree? Promisee to mow your mother's lawn in consideration of the \$10 price that you will be obliged to pay on acceptance of that offer. My promise to mow your lawn can only be enforced by you if you provide consideration for the lawn. The act of accepting the offer and promising to pay \$10 is consideration.
- It need not move to promisor

### Sufficiency of consideration

**Case: *Thomas v Thomas (1842)*** – one pound rent was good consideration for life occupancy of the house

**Case: *Chappell & Co Ltd v Nestle Co Ltd [1960]*** – throw-away chocolate wrappers were sufficient consideration

### Past consideration rule

Past consideration is defined as an act done before a contract is made. It is consideration that is already given or some act that is already performed and therefore cannot be induced by the other party's thing, act, or promise in exchange.

#### **Case: *Roscorla v Thomas (1842)***

**In *Roscorla v Thomas (1842)*, the defendant made a promise after the purchase contract was signed that the horse was sound. This promise was not held to be consideration. It preceded the defendant's promise and not part of the bargain. It was not given in exchange for the promise for payment of the horse.**

#### **Facts**

- P purchased a horse from the D. D then made a promise after the purchase contract was signed that the horse was sound.
- Horse wasn't sound, P sued for breach of contract

#### **Held**

- It wasn't consideration. This preceded D's promise and not part of the bargain. Wasn't given in exchange for the promise for payment of the horse.

### *Exceptions to Past consideration*

#### ***Lampleigh v Braithwait (1616)***

It was found that in *Lampleigh v Braithwaite (1616)*, that an act or forbearance pre-dating a promise can be good consideration when done at promisor's request and at time of request, circumstances implied payment to the promisee.

#### **Case: *Pao On v Lau Yiu Long [1980]***

In *Pao On v Lau Yiu Long [1980]*, past consideration can be good consideration if (a) provided at the request of the promisor (b) the parties understood that the act would be remunerated and (c) had the promise occurred in advance of the act it would have been enforceable

#### **Existing Legal Duty Rule**

A promise to perform, or the performance of, an existing legal duty is not sufficient consideration. It is merely illusory as promise neither gives nor gives up anything which s/he was not already obliged to give or give up

#### Performance of a Public Duty

Parties may not bargain for a personal benefit in exchange for the performance of a public duty.

#### Existing contract with Promisor

#### **Case: *Wigan v Edwards (1973)*:**

"The general rule is that a promise to perform an existing duty is no consideration, at least when the promise is made by a party to a pre-existing contract, when it is made to the promisee under that contract, and it is to do no more than the promisor is bound to do under that contract".

#### **Case: *Stilk v Myrick (1809)***

In *Stilk v Myrick (1809)*, it was found that the agreement was not enforceable because there was no consideration given by plaintiff for the payment. Performing a duty you are already bound to perform is not good consideration for any made to you

#### **Facts**

- Before start of voyage the P contracted to work as a seamen (11).
- During the voyage two seamen deserted ship. Captain made an agreement that the crew receive wage of the deserters if they can continue to work ship on the way back to London.
- Captain didn't honour payment and P's sued

#### **Case: *Hartley v Ponsonby (1857)***

However, in *Hartley v Ponsonby (1857)*, Desertion of so many crewmen changed the nature of the voyage to the point where contract could be considered discharged. Fundamentally new contract created as there were so many deserters.

## Facts

- Same as Stilk but 17 of 36 remaining, 6 competent seamen
- Unsafe to continue voyage, agreed to do it for extra pay
- D refused to pay when docked

## Held

### Part Payment of a Debt

**Pinnel's Case (1602):** Provides that payment of part of debt on the due date is not sufficient consideration for promise to discharge the whole debt.

### *Exceptions*

- Earlier payment is made
- Payment is made with something else
- Where it arises from a composition agreements (e.g.. Arrangement with all creditors)
- Where payment is made by a third party
- Where the claim is unqualified (rule does not apply to unliquidated or disputed claims)

## Exceptions to Existing Legal Duty Rule

### Practical Benefit

#### **Case: *Williams v Roffey Bros (1990)***

**In *Williams v Roffey Bros (1990)*, Williams was subcontracted to Roffey for carpentry work. William fell into financial difficulties, Roffey promised Williams extra 575 pounds per flat to complete work on time. It was held that Williams performance conferred a 'practical benefit' to Roffey amounting to sufficient consideration.**

## Held

If A enters into a contract with B for the supply of goods or services in return payment by B, and prior to completion B has reason to doubt whether A will complete, B then promises A an additional payment in return for B promising to perform on time. As a result of the promise B obtains a benefit and this is capable of being good consideration for B's promise.

### Promises to Third Parties

#### **Case: *Hirachand Punamchand v Temple [1911]***

**In *Hirachand Punamchand v Temple [1911]* it was found If a debtor issues a cheque for part of the debt offering in full payment then the creditor can keep the cheque or cash, but by doing either, he's not accepting or extinguishing the entire debt. However, if the 3rd party offers a cheque of part payment as full payment, the creditor needs to either promptly return it, or cash it and accept the compromise. If the creditor keeps it he cannot keep it and sue debtor for balance, to do so would be a fraud upon the stranger.**