

## Chapter 4 – Consideration

### Introduction

- **Common law definition:** consideration is simply the price that's being paid or the promise of the price that will be paid – *what the offeror asks for in exchange for the offer or the promise being made* (there has to be something for something; there can't be something for nothing)
- Forms of consideration:
  - Money (most common)
  - Performance of an act or forbearance (promising not to do a certain act)
  - If the promisor receives some kind of benefit and the person who is the promisee receives some kind of detriment
- Two exceptions to the common law doctrine of consideration:
  1. If an offer or promise is written down in a formal deed, then it will be enforceable even if there is no consideration received and returned
  2. Estoppel (prevention)

### Principles of Consideration

#### 1. Consideration must be distinguished from conditional gifts

- a. Consideration is when that something for something is bargained for
  - i. If the words 'in exchange for' or 'bargained for' then it clearly a case of consideration
- b. A conditional gift is merely a gift with a condition attached
  - i. The word 'if'

#### Beaton v McDivitt (pp.121-122)

- Rule: Consideration distinguished from performing a condition
- McDivitt promised to transfer part of his land to Beaton if he would move onto the land and cultivate it in a certain way. Beaton did so, built a house on the land and cultivated it as McDivitt had prescribed. 7 years later a dispute arose and McDivitt ordered Beaton off the land.
- **The court held after appeal by Beaton that a contract had been formed between the two parties as Beaton working on the land and entering the Lot was looked upon as sufficient consideration. However in this case, the contract had been frustrated and dismissed the appeal.**

#### Australian Woollen Mills Pty Ltd v The Commonwealth (pp.120-121)

- Rule: Consideration distinguished from performing a condition
- *In June 1946 the Commonwealth Government had a scheme in which a subsidy would be paid to manufacturers for wool purchased and used for local manufacture. Australian Woollen Mills received large subsidies for wool purchases up until the Govt. ended the scheme in June 1948. Australian Woollen Mills then took the Commonwealth to court, arguing that the scheme had given rise to a contract between the two parties.*
- **The court held that it was impossible to deem if there was any binding contract for the Commonwealth to pay a subsidy to the Australian Woollen Mills. It cannot be inferred from the information given that there was any intention for the announcement of the subsidy to increase the purchase of wool, or it is impossible to judge if there was an implied invitation to purchase wool.**

## 2. Consideration can be anything stipulated by the offeror

- a. Free to stipulate whatever he or she wants in exchange for the promise

### Carlill v Carbolic Smoke Ball Company (pp.123-124)

- Rule: consideration can be anything stipulated by the offeror
- *Carbolic Smoke Ball Company developed a smoke ball which was designed to prevent users from contracting a cold or influenza. To promote this, they published an advertisement in which they offered 100 pounds to anyone who used the product and still contracted colds, influenza etc. Mrs Carlill then used the smoke ball and contracted influenza, then she claimed the reward. She succeeded but then the company appealed.*
- **The court held that there was consideration; the inconvenience suffered by Mrs Carlill in using the smokeball as directed was sufficient consideration. In addition, the Carbolic Smoke Ball received a benefit in having people use the smoke ball.**

### Chappell & Co Ltd v Nestle Co Ltd (pp.124)

- Rule: The nature of consideration and value of the consideration
- *Nestle had a promotion that if a person sent three wrappers from Nestle's 6d milk chocolate bars, together with postal order for 1s 6d, they would send that person a smash hit gramophone record. A question arose in a copyright matter as to whether the wrappers were sufficient consideration.*
- **The court held that the wrappers were a part of the consideration due to the fact that they represented positive sales which was the intention of the promotion. Even if a peppercorn was given to someone who does not like pepper and would throw away the corn, it is good consideration as the contracting party can stipulate for what consideration they choose.**

### Dunton v Dunton (pp.125)

- Rule: Consideration
- *Mr Dunton agreed to pay maintenance to his former wife (Mrs Dunton), so long as 'conduct herself with sobriety, and in respectable, orderly, and virtuous manner'. When Mr Dunton did not pay the maintenance, Mrs Dunton sought to enforce the agreement*
- **The court held that the agreement was binding and that it was not *nudum pactum* (or void for want of consideration). Despite the written agreement disclosing no consideration for the defendant to pay the plaintiff, the court found it implies a promise to do so. They ruled that the plaintiff was legally at liberty to conduct herself in respects as she might think fit and her promise to surrender her liberty and behave in the desired manner of the defendant constituted good consideration for his promise to pay her.**
- **In a separate judgement, the court dissented on the ground that there was no implied promise by Mrs Dunton and if there was, it was too uncertain.**

### 3. Consideration must be real (not illusory)

- a. However, it does not have to be as valuable or equal in value to the promise

#### Biotechnology Australia Pty Ltd v Pace (pp.126-127)

- Rule: consideration does not have to be equal in value to the promise
- *Pace entered into an employment contract with Biotechnology which provided that he would have 'the option to participate in the company's senior staff equity sharing scheme.'* There was no such scheme in existence at the time of contract or at any time during Pace's employment. Pace sued for breach of contract.
- **In this case consideration was illusory, as it was solely within Biotech's discretion and there were no objective standards.**

### 4. Consideration must be contemporaneous with the promise

- a. Timing
- b. Contemporaneous meanings existing at or occurring in the same period of time
- c. Past consideration is not good consideration
  - i. There are a number of exceptions to the general rule that past consideration cannot be good consideration:
    1. A service performed in the past may be good consideration for a subsequent promise to pay for that service if it was performed at the promisor's request and it was understood that it would be paid for.

#### Pao On v Lau Yiu Long (pp.128-129)

- Rule: exception 1 to the general rule that past consideration is not good consideration
  - *In Feb 73 Pao On agreed to sell shares to Fu Chip (owned by Long) in exchange for shares issued by Fu Chip. Fu Chip agreed to retain 60 per cent acquired until Apr 74. In Apr 73, Pao On refused to proceed unless Long agreed to indemnify the shares he retained falling below a certain sum. Long agreed to this under pressure to retain public confidence. The sale proceeded and some time later Pao On sought to enforce the indemnity.*
  - **The court held after appeal that the consideration stated in the written guarantee is sufficient to support the promise of indemnity. Because the act was done at the promisor's request the parties understood that the act was to be remunerated either by a payment or the conferment of some other benefit. All three features were present in the case. The restriction of selling was compensated for by the benefit of a guarantee against a drop in price: and such a guarantee was enforced legally.**
2. A debt incurred by an infant may be good consideration for a promise to pay made after the person has become an adult.
  3. A statute-barred debt may be good consideration for a subsequent promise to pay the amount owed. The revival of liability for such debts more generally is governed by the Limitations Acts in each state and territory.
  4. A technical exception is created by s 32 of the *Bills of Exchange Act 1909* (Cth), which provides that an antecedent debt or liability can be good consideration for a bill of exchange.

Roscorla v Thomas (pp.127)

- Rule: past consideration is not good consideration
- *P purchased a horse from D. D then promised the horse was sound. The horse was in fact not sound and P sued for breach of contract.*
- **There was no consideration for the promise that the horse was sound. The only consideration that had been alleged was the contract for the sale of the horse – this, however, had preceded the defendant’s promise – it was not part of the bargain – not given in exchange for the promise. Consequently it was not good consideration.**

**5. Consideration must proceed from the promisee but it need not pass to (or be of benefit to) the promisor)**

- a. The person making the offer does not need to receive the benefits of the consideration

Coulls v Bagot’s Executor & Trustee Co Ltd

- Rule: consideration must move from the promisee but it need not pass to the promisor
- Mr Coulls entered into an agreement with O’Neil Construction to give him the right to quarry part of his land. O’Neil and Mr and Mrs Coulls signed the document. After Mr Coulls died, his executor sought a determination of whether O’Neil was bound to pay royalties under the agreement to his estate or Mrs Coulls.
- **The court held that the agreement constituted a contract between O’Neil and Mr Coulls alone, so that the royalties were payable to his estate and not Mrs Coulls: However, two judges were of different opinion and believed that Mrs Coulls was a party to the contract.**

**6. A promise can be made to joint promisees’**

- a. Person B can also sue you for a breach of contract because the consideration paid by person A is also covered
- b. Example: promise from A to B in exchange for \$1,000 to paint house, they say yes. Person A pays \$1,000 and you don’t paint house. However, both A and B can sue you.

**7. Performing an already existing duty might count as good consideration**

- a. Sometimes the court may enforce it, sometimes they may not

- b. Three different scenarios:

- i. When there is a contractual duty that the promisee already owes to the promisor;

Musumeci v Winadell Pty Ltd

- Rule: when there is a contractual duty that the promisee already owes to the promisor
- *The Musumeci’s leased a shop in a shopping centre run by Winadell. Winadell subsequently leased another shop in the centre to a competing business. Musumeci’s asked for a rent reduction to compensate for this and Winadell agreed. When a dispute later arose Winadell sought to terminate the lease and Musumeci sought damages for breach, relying in part on Winadell’s promise to charge a reduced rent.*
- **The court concluded that there was a practical benefit; there was valid consideration for varying the lease.**

ii. When it's a contractual duty that the promisee owes to a third party; or

Pao On v Lau Yiu Long (pp.136-137)

- Rule: contractual duty that the promisee owes to a third party
- *Pao On agreed to sell shares to Fu Chip (controlled by Long) in consideration for certain shares. To protect the share value, Pao On and Fu Chip agreed that Pao On would retain 60% of the acquired shares until April 1974. However, in April 1973, Pao On refused to proceed with the contract unless Long agreed to indemnify him against the value of the retained shares falling below a set level. Long agreed, but only to ensure public confidence in the company. The sale proceeded and Pao On sought to enforce the indemnity.*
- **There was consideration here – an act done prior to a promise can be good consideration in some cases; in particular, it will be good consideration if the act done was done at the promisor's request, the parties understood that the act would be remunerated in some way and, if the promise had been given in advance of the act it would be legally enforceable. In this case all three elements were present.**

iii. When there is a public duty that the promisee already owes to the public.

1. Usually due to holding some kind of public office
2. Usually this is not considered good consideration, unless the actions are going above and beyond the call of duty to the public

Glasbrook Bros Ltd v Glamorgan County Council (pp.137-138)

1. Rule: performance of more than public duty is good consideration
2. *Glasbrook promised to pay Council for special police protection during a strike (after requesting police protection and being refused). The protection Glasbrook received was more than the police thought necessary. Glasbrook refused to pay and Council sued.*
3. **The court held that performance of public duty is not good consideration but performance of more than required public duty is good consideration**

Popiw v Popiw (pp. 138-139)

- Rule: performing an existing duty may be consideration in the form of a public duty
- Mr and Mrs Popiw separated and Mr Popiw promised Mrs Popiw to put the title of the matrimonial home in their joint names if she returned to live with him. She did this until they separated 3 weeks later. Mrs Popiw commenced proceedings seeking a determination of her interest in the home and an order for its sale and a division of the proceeds, claiming that there was a contract between the parties relating to their home. Mr Popiw argued that there was no enforceable contract because; (i) there was no intention to create legal relations; (ii) there was no consideration for his promise; and (iii) the agreement was not recorded in writing. (note: Mrs Popiw's claim failed on other grounds, however the case also deals with consideration)
- **The court held that:**
  1. **Even if it could be said that Mrs Popiw was under a duty to cohabit with the respondent there was no remedy in law which would compel her to do so**
  2. **Thus, in exchange for his promise, the husband, from a practical viewpoint, obtained something more advantageous than the 'right of cohabiting with his wife' which he could not enforce; Mrs Popiw suffered a detriment by 'placing herself in a position which she could not have been compelled to occupy' - there was good consideration**