

TOPIC 5: CONSIDERATION

Consideration

The mere fact that a promise is made and enshrined in an “agreement” is **insufficient** to found contractual obligation/liability: that promise must **additionally** be supported by **valid consideration**.

The General Principle

A person is **contractually bound** to perform a promise **only** if consideration was given for it, i.e. consideration must move from the promisee. Accordingly, gratuitous promises are not enforced at law.

What Consideration Is

A variety of definitions of consideration have been proffered in the case law over time, not all of which are entirely consistent with one another.

Consider the following judicial encapsulations of the concept:

- “Consideration means something which is of some value in the eye of the law, moving from the promisee; it may be of some benefit to the promisor or some detriment to the promisee; but at all events it must be moving from the promisee.” *Thomas v Thomas*
- “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.” *Currie v Misa*
- “An act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.” *Dunlop Pneumatic Tyre Co Ltd v Selfridge*

Hamer v Sidway (1891) US

Facts: Uncle offered nephew \$5,000 to abstain from drinking/smoking/swearing/gambling until he turned 21. The uncle died and the nephew sued his estate.

Held: Consensual abstinence from drinking/smoking/etc constituted consideration. Forbearance is valid consideration.

Definition

Consideration = the agreed price of a promise, constituting ‘**legal detriment**’, moving from the promisee, at the request of the promisor, in return for the promisor’s promise, action or forbearance. Consideration must **flow both ways**. It is the thing requested and given in return for the other party’s act/promise.

There are a number of **key aspects** of consideration:

- That what is furnished as consideration must have been **agreed upon as the price of the promise**—‘accidental’, ‘coincidental’ or ‘collateral’ detriments (or benefits) do not qualify;
- In other words, whatever moves from the promisee as consideration must be “**at the request of**” the promisor, and **in return for** whatever she or he is bringing to the exchange—bargain as the basis of consideration;

- The law distinguishes between detriment (or reliance) that is a mere consequence of a promise having been made, and detriment (or reliance) that is the inducement for a promise
- What moves from the promise must constitute legal detriment, meaning that some prices that are agreed upon will not serve as valid consideration.

The Bargain Concept of Consideration

A contract is a bargain struck between the parties by an exchange; contractual promises are said to be 'purchased' or 'bargained for' rather than gratuitous. Between promise and counter-promise there must exist the relation of a 'quid pro quo' (this for that/something for something). The 'quid pro quo' idea can be illustrated through the problem of past consideration, where a promise is made after an independently constituted concluded transaction. Consideration must be **the thing that induces the promisee to incur a legal detriment**. It must be **asked for by the promisor** in order for them to make that promise.

The **rule of past consideration** simply states that a **past service** (action) **cannot** support a promise in the present (the promise being deemed to be a gift of gratitude for the past service) –past consideration is **no consideration**. Cause and effect is what the courts are looking for.

Roscorla v Thomas

Facts: After P had already purchased D's horse for £30, D promised that the horse was "sound and free from vice". The horse turned out not to be free from vice: it was "very vicious, resistive, ungovernable and ferocious". P thus sued D for breach of express warranty, but P's action would founder if P was unable to show that consideration had been given for D's warranty.

Held: P's claim must fail; P has not furnished consideration for D's warranty; buying the horse could not be consideration, as that transaction preceded the giving of the warranty; "a consideration past and executed will support no other promise than such as would be implied by law."

At common law it is possible to avoid the past consideration rule by showing that the 'request', 'response', and 'promise' are really party of a single, connected, transaction, not a prior closed transaction followed by a promise of payment. In order for a past act to be good consideration it must be shown:

1. The past action was done at the promisor's request;
2. Both parties understood that the act was ultimately to be paid for; and
3. Payment would have been legally enforceable had I been promised in advance.

Re Casey's Patents

Facts: The owners of certain patent rights employed C to market their invention. Later, in a letter, they agreed to give C a one-third interest in the patents "in consideration of his services as manager in working the patents." Subsequently, the other patent holder sought to have C's name removed from the Register of Patents, arguing that, on its true construction, the agreement was one to reward for past services only.

Held: The past services were good consideration for the one-third share; **the fact of the past service raised an implication that at the time it was rendered it was to be paid for**; the subsequent promise to pay operated as either an admission that evidenced or a positive bargain that fixed the amount of reasonable remuneration for which the service was originally rendered; the consideration

for the promise, impliedly made earlier and 'refined' later, was the actual supply of the service requested.

Australian Woollen Mills v Cth

Facts: The Commonwealth Government announced that it would pay a subsidy to manufacturers of wool who purchased and used it for local manufacture after 30 June 1946. P purchased and used wool for local manufacture and received some payments. The Government subsequently stopped its scheme and P sued for subsidies it claimed it was due.

Held: No contract. **The statement made by the Cth was not offered as consideration for P buying the wool. Buying the wool was merely a condition precedent to entitlement to the subsidy.** It was not intended as the consideration for a promise to pay the subsidy. In this respect the Court also noted that there was no offer or request or invitation to purchase wool or anything else suggesting that 'payment of subsidy and the purchase of wool were regarded as related in such a way that the one was a consideration for the other.'

The Court also concluded that there was no intention on the part of the government to create legal relations; it was a government scheme to promote industry.

Important Quote: *"...it is necessary, that it should be made to appear that the statement or announcement which is relied on as a promise [hereby the subsidy statement] was really offered as consideration for the doing of the act, and that the act [buying and using the wool as directed] was really done in consideration of a potential promise inherent in the statement or announcement."*

Pre-Existing Duty

If A has entered a contract with B to do something, A cannot turn around and ask for more money for the thing they were already contractually obliged to do (*Stilk v Myrick*). However, if there is **new detriment** that changes the condition of the contract a sort of ~new~ contract arises (*Hartley v Ponsonby*).

Glasbrook Bors v Glamorgan

Facts: Glasbrook promised to pay Council for special police protection during a strike (after requesting police protection and being refused). Glasbrook refused to pay and the Council sued.

Held: 1) The public cannot be called upon to pay the police for performing their obligations and any promise to do so will be unenforceable. 2) But if individuals require services of a special kind, then a promise to pay for these will be enforced.

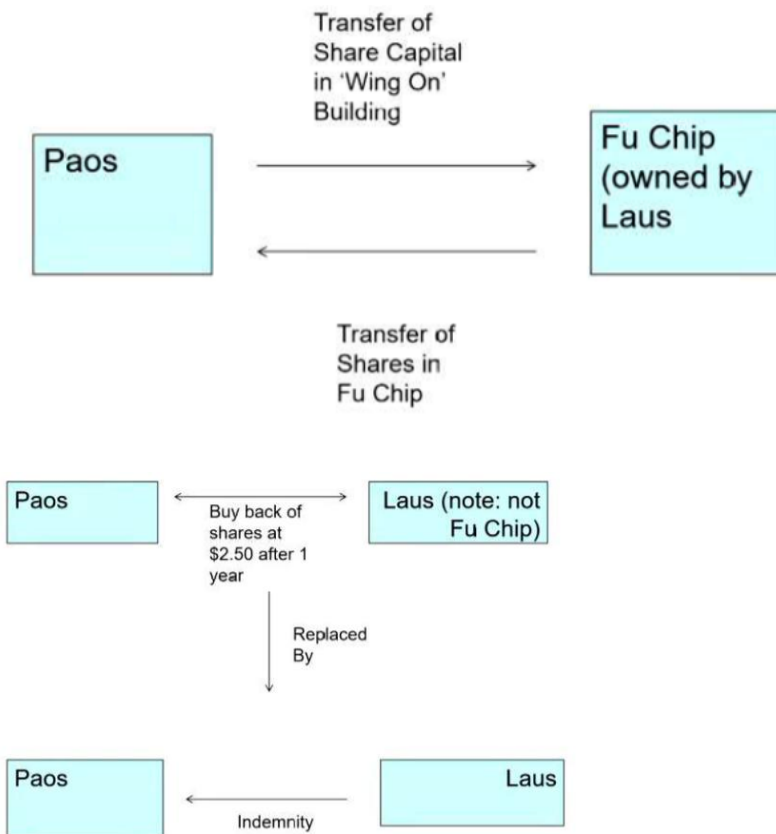
Hartley v Ponsonby

Facts: Hartley was contracted to crew a ship owned by Ponsonby. After docking, seventeen of the thirty-six crew deserted. Hartley agreed to continue after being promised to be paid extra once the ship docked.

Held: The desertion of so many crewmen (compared to the desertion of only two crewman in *Stilk v Myrick*) changed the nature of the remaining sailors' duties to the point where the contract could be considered discharged. As such the offer by Ponsonby to pay the crew to sail back and the acceptance by the crew could be considered an entirely new contract, providing valid consideration.

Pao On v Lau (1979) UK

Facts: Pao On agreed to sell shares to Fu Chip (controlled by Long) in consideration for certain shares. This is done on the basis that Pao On would retain 60% of the shares for 6 months.



Conditional Gift (not consideration)

Beaton v McDivitt

Facts: McDivitt owned land, which he expected to be rezoned. He gave some of that land to Beaton where he could work and live (rent free), and promised to transfer it once rezoning took place. Beaton occupied the land (built a house and a road) for several years. The rezoning never took place and McDivitt ordered Beaton off the land.

Issue: Is an act performed in reliance of a promise the same as an act performed as the agreed price for a promise?

Held: Acts performed in reliance on a promise will not constitute good consideration for that purpose. Beaton did not make a promise or perform any action which could be considered as his consideration in exchange for McDivitt's promise.

The building of the house and road was done *before* the promise to give him the land –past consideration.

Illusory Consideration

MacRobertson Miller Airline Services v Commissioner of State Taxation

Issue: Whether a ticket issued by an airline to a passenger was chargeable with a duty under the *Stamp Act* as an "agreement or memorandum of agreement".

Facts: A condition printed on the ticket read as:

"The [Airline] reserve the right at any time to abandon any flight or to cancel any ticket or booking of any passenger or to carry the passenger for a portion only of any booked flight."

Held:

Barwick CJ and Jacobs J:

As a result of the above clause, there was in effect **no promise** by the airline to carry passengers: "The exemption of the ticket in this case fully occupies the whole area of possible obligation, leaving no room for the existence of a contract of carriage." (Barwick CJ at 133)

Duress

Universe Tankships v ITWF

Scarman J outlines two elements of duress:

1. Illegitimate pressure (the pressure applied means one party's options are so limited as to have no choice but to comply)
2. Compulsion of the will

North Ocean Shipping v Hyundai

Facts: Tanker being made, instalment payments over a period of time.

US dollar depreciated so the defendants insisted on further instalments being increased by 10 per cent. P refused and suggested arbitration, but it became apparent the defendants would not continue their work without this agreement. P paid the increased amount "without prejudice" to their rights.

Held:

Mocatta J:

Certain actions by the defendants in relation to the arrangements for increased payments were sufficient to constitute consideration for the increased contract price. Merely to agree to a change to "*maintain amicable relations*" would not be enough to amount to consideration. But in this case the parties had agreed to cancel the old deal and replace it with a new one.

In the circumstances of this case there was economic duress.

Current Australian Law:

Williams v Roffey Bros

Musumeci v Winadell

Accord and Satisfaction

In order to relinquish promises (i.e. the extinguishment or consensual discharge of contractual obligations). 'Accord and satisfaction' involves one party **purchasing a release** from an obligation owed to the other party by means of valuable consideration, not being actual performance of the obligation itself.

- In other words, accord and satisfaction is the acceptance by the plaintiff of something in place of the contractual obligation of the defendant, and that 'something' must constitute a legal detriment to the defendant.
- An example: A owes B \$10,000. A cannot afford to pay and so B agrees to accept A's promise to mow B's lawns for one year instead.

The Lesser Sum Rule = the payment of a lesser sum and nothing else is not good satisfaction (Pinnel's Case)

The accord = the **agreement** (offer and acceptance) by which the obligation is discharged.

The satisfaction = the **consideration** that makes the accord/agreement/release operative.

McDermott v Black

Facts: P wished to buy shares from D. P had difficulty paying the purchase price and obtained a three week extension. Toward the end of this period P claimed he had been misled about the shares by D's misrepresentations. P offered to withdraw the allegations of fraudulent misrepresentation if D granted a further extension. D agreed. P was still unable to pay and commenced an action alleging fraud. D claimed that P was contractually bound not to bring such an action.

Held:

Dixon J:

The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. The plaintiff may take a promise or it may be an action. If the plaintiff agrees to accept the promise of something, the discharge of liability is immediate.

In the present case, an extension of time is the thing promised. In return the P agreed to withdraw and, it is implied, not to revive the allegations.

D&C Builders v Rees

Facts: D&C Builders Ltd was a two man building firm. They had done work for Rees. Rees had only paid \$250, \$482 was owing. D&C were facing bankruptcy if they were not paid. Rees phoned up to complain the work was bad and refused to pay more than \$300. D&C reluctantly accepted and took a receipt marked 'in completion of account'.

Held:

Lord Denning:

Believed that part payment could satisfy a whole debt (not ratio though). However Rees had effectively held the builders to ransom. Therefore, any variation of the original agreement was voidable at the instance of the debtors for duress.

"In point of law payment of a lesser sum is no discharge of a greater sum.

When a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. In applying this principle we must note the qualification: The creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. He is not bound unless there has been truly an accord between them."