

3 – Consideration

Intro: Consideration is something the law recognises as valuable given in return for a promise and can be seen as the agreed price of the promise (**Beaton v McDivitt**).

In a 2-party contract (bilateral), consideration must move from each side.

Definition

- Price paid by the promisee for the promisor's promise (**Beaton v McDivitt**)
- Something of value moving from the promisee
- First element that makes a contract legally binding → no consideration given, no legally enforceable contract
- Bilateral contracts = needs to **flow** from both parties
- Doesn't have to be written deed

Elements

1. Benefit/detriment
 - Valuable consideration must consist of benefit to promisor and/or detriment to promisee (usually both) (**Australian Woollen Mills**)
 - Must be of something of appreciable value/significance (**Ballantyne/Beaton**)
2. Bargain
 - Consideration is given by promisee in return for the promise (**Atco Controls v Newtronics**)
 - Referred to as “**quid pro quo**” requirement (**AMW; Beaton**)
 - **Request** from the promisor is relevant in establishing the bargain (**AMW**)
 - **Distinction** between promise made in return for an act and a conditional gift (**AWM/Beaton**)

Distinction between **performance in exchange** for promise (good consideration) and **performance in reliance** on a promise (**Beaton**)

Note that it is possible that parties may strike a bargain but the court does not recognise one of the parties' acts/promises as satisfying the benefit detriment requirement (**Ballantyne**).

Sufficiency and Adequacy of Consideration

Law requires that consideration be **sufficient** but need not be **adequate** (**Woolworths**).

Kirby P in Woolworths: Impossible for courts to indulge in an evaluation; judges not qualified to give opinions about wisdom of certain bargains; economic freedom; other areas of law provide challenge to unjust bargains.

Bad Consideration

Past consideration

- Generally, if something of value is given **before** the promisor makes the promise = not good consideration (**Roscorla v Thomas**)
 - Promisor's promise must be “coextensive” (**Roscorla**)
- Exception:** when promise to pay for past services, which at the time was understood to be compensated for (**Lampleigh**)

Must demonstrate:

1. **Request** for services
2. **Circumstances** support **understanding** that services **would** be paid for (**Ipex**)
3. Promisee **performs** service
4. Promisor **subsequently** makes promise to pay

Existing Legal Duty

- Consideration will be insufficient if it is merely to promise to perform an existing legal duty. (**Stilk v Myric – sailors obliged to do work anyway after seamen departed, not entitled to extra money**)
- Payment of debt in instalments when already legally required to pay full amount = not good consideration (**Foakes v**

Beer)

- Exception 1: 'Fresh Consideration' (Hartley v Ponsonby)
 - Beneficiary undertakes to do something more than previously required - new consideration that is 'fresh' and over and above existing legal duty.
 - Modifying pre-existing contractual agreement e.g. *sailors promising to do something more than originally agreed*
- Exception 2: Practical Benefit
 - Party promising to perform existing legal duty can show other party receives practical benefit from it.
 - 6 stage test, from developed in **Williams** and modified in **Musumeci**:
 1. A entered into contract with B to do work, supply goods or services in return for payment. (*Leasing the shop to sell fruit*)
 2. Before A has completely performed obligations, B has reason to doubt whether A will, or will be able to, complete bargain. (*W unsure M can still pay rent*)
 3. B therein promises additional payment (or concession, i.e. reducing obligation) in return for A's promise to perform contractual obligations on time. (*W lowers rent*)
 4. As a result, B obtains benefit or obviates a disbenefit, (*W still has tenant*)
 - 4.A - Provided that A's performance is worth more to B than any likely remedy, including cost to obtain extra promise.; OR (*W doesn't have to bother with finding new tenant*)
 - 4.B - As a result A suffers detriment/obviates benefit in circumstances where non-performance of original is worth more than performance. (*Would have been better for M to just not pay rent*)
 5. B's promise is not given as result of fraud or economic duress or undue influence or unconscionable conduct on part of A, (*M did not lie to W*)
 6. Then Benefit to B is capable of being consideration for B's promise i.e. a practical benefit given to B means consideration is given = sustains benefit/detriment requirement (*W gets benefit of tenants staying*)
 - *Above test/cases don't apply to obligation to make payment as in **Foakes** = Foakes precedent remains (Selectmove)
- Exception 3: Third Party
 - A promise to perform an ELD owed to **B** but made to **C** is good consideration. Promise to perform existing legal duty to a 3rd party becomes enforceable, and 3rd party is now liable to sue A for breach of contract if not completed (**Pao On**).
- Exception 4: Bone Fide Compromise of Legal Duty
 - If one party has bona fide belief (which is not frivolous) that they are **legally excused** from performing a pre-existing legal obligation, then **performing** that obligation will be **sufficient** consideration for a **new promise** by the other party (**Wigan**). I.e. if parties come to a compromise of legal dispute, counts as consideration.
 - Giving of acknowledgment by a person that they have no claim against another is not sufficient consideration (Split decision, **Ballantyne**).
- Exception 5: Termination and replacement
 - Existing legal duty rules does not apply where parties terminate contract and enter a new one. This is so even if new terms are onerous or identical.
 - If contract is new, determine if sufficient consideration is present.