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## Consideration

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Consideration is something given in exchange for a promise.

**Test:** must prove sufficient consideration was given in exchange for the other party's promise to perform.

- Exception: no consideration is required if parties use a deed.

### Structure

#### 1. Intro

- To enforce A's promise of ..., B must prove on the balance of probabilities that he gave valid and sufficient consideration in exchange for A's promise to perform.

#### 2. What will each party argue?

- E.g. A will argue that the promise is enforceable because consideration was given; B will argue no contract for want of consideration

#### 3. Identify consideration paid

- E.g. A paid B \$500

#### 4. Benefit- detriment requirement

- Consideration must flow from A, not necessarily to B

#### 5. Bargain requirement

- e.g. A paid B \$500 in exchange for performance.

#### 6. Is consideration sufficient?

- Consider: past consideration; existing legal duty

#### 7. Conclude

### Examples of consideration

- In **bilateral contracts** consideration is a promise, for example: (***executory consideration***)
  - a promise to pay a sum of money
  - a promise to sell land
  - a promise to do a certain number of hours of work
  - a promise to buy a car
  - a promise not to do something
- In **unilateral contracts** consideration is the **performance** of the act in accordance with the terms of the offer. – ***executing consideration***
  - Eg Mrs Carlill provided consideration by buying and using the smokeball

The person seeking to enforce a promise made by the other party is the promisee in respect of that promise and must provide consideration.

### Step 1: benefit and detriment requirement

In most cases each party will suffer a detriment and receive a benefit, however all that must be proven is that the promisee suffers a detriment.

- Detriment = paying money, providing a service, giving up legal rights, etc.
  - A promise to do something in the future is called executory consideration.
- Consideration must flow from the promisee, not necessarily to the promisor.
- If there are joint parties, one can provide consideration on behalf of all of them

(**Coulls**).

## Step 2: bargain requirement

Consideration must be given in exchange for the promise (quid pro quo). Distinguish from:

- A **request** from the promisor is relevant but not **conclusive** in establishing quid pro quo (**AWM**; **Beaton**).
  - ⇒ Has to be an express or implied request and the request indicates that the promise to ... is given **in exchange for** the act of .....
- **Conditional gifts** (**AWM**; **Beaton**).
- **Reliance** on the promise by the promisee (**Beaton**).

*As per bargain requirement, the promise which is relied by the promisee must be in return for the acts to be performed, and that the act performed must be done in consideration of that promise inherent in the statement (AWM). As such, between the \_\_\_\_'s statement/announcement, which is put forward as an offer capable of acceptance by doing of an act, and the act which is put forward as the executed consideration for the alleged promise [\_\_\_\_], they must be established in relation of a quid pro quo.*

*In the **absence of an express or implied request** from the promisor, the promise is likely to be a **conditional gift** (AWM). \_\_\_\_ would argue that similar to the policy announcement made by Commonwealth, there is no request to do the act could be implied from his statement ... and nothing would suggest that the payment of... was promised **in return** for the other party to do the act.*

*As per **Beaton**, detriment **suffered in reliance** would **not amount to good consideration**. Similar to Beaton, A's act of doing smth is merely a reliance on the promise but no promise is made that could be regarded as quid pro quo for the \_\_\_\_\_ (Kirby J in Beaton).*

- [A counter argument]: A's act of doing something at B's request was sufficient consideration, giving rise to a unilateral contract (McHugh and Mahoney JJ)

[if not made out]

*To conclude, it is unlikely to establish an enforceable promise to ... because of lack of quid pro quo.*

## Step 3: is consideration sufficient?

Courts will not consider the adequacy of consideration (**Woolworths v Kelly**), but consideration must be sufficient.

- ⇒ Nominal consideration (peppercorn) will be sufficient consideration
- ⇒ Parties can effectively avoid the requirement of consideration through the use of nominal consideration, as frequently occurs.

Types of insufficient consideration:

- **Past consideration**: if the promisee gives consideration in respect of one promise, the same consideration cannot be used in respect of a future promise (**Roscorla**).
  - Exception: past services are good consideration for a future promise to pay

for those services if they were performed at the promisee's request (*Lampleigh*) and there was an ongoing understanding that the services would be paid for (*Ipex*).

*As a general rule, a promisor's promise must be coextensive with the promisee's consideration (Roscorla). A may argue that similar to Roscorla relying on his past consideration for purchasing the horse, there was no consideration provided by B for A's subsequent promise – thus lack of consideration here.*

*Similar to Ipex, the services of \_\_\_\_\_ was not intended to be gratuitous, instead, it was a service performed on the basis that it would be paid for, followed by a promise which fixed the amount of a reasonable remuneration.*

- **Existing legal duty:** a promise to perform an **existing contractual obligation** is not good consideration (*Stilk v Myrick*).
  - E.g. paying part of a debt is insufficient to discharge the remaining debt (*Foakes*).
  - *Stilk v Myrick* – sailors had agreed to take responsibilities under all the emergencies of the voyage until the voyage was completed

*Similar to Stilk v Myrick, A's responsibilities of doing ... was part of their original agreement and thus A performing an existing contractual obligation would not amount to good consideration.*

### Exceptions:

1. Promisee provides **fresh consideration** in respect of the promise (*Hartley*).

*(Unlike Stilk) Similar to Hartley, A could not have been required to perform the act under the terms of the existing contract, especially considering the changes in situation (situation of danger) was something more than A had agreed to under the original contract. Hence, agreeing to continuously perform under (new conditions) was a fresh consideration given by A for the additional payment.*

2. If the promise **secures a practical benefit** to the promisor, no fresh consideration is required of the promise (*Williams, Glidewell J; Musumeci*):
  - A enters a contract with B where A provides goods/services in exchange for payment.
  - Before A completes their obligations, their ability to perform comes into question.
  - B promises A extra payment to ensure A can complete performance.
  - In doing so, B gets a benefit or avoids a detriment.
  - A did not unduly influence B into making the new arrangement. (B's promise is not given as a result of **economic duress or fraud** on part of A)
3. The promise to perform **a contractual obligation is made to a third party** who is not privy to the original contract (*Pao On*).
  - *a promise to perform a pre-existing contractual obligation to a third party*

*can be valid consideration because the promisee obtains the benefit of a direct obligation (Lord Scarman in Pao On)*

4. Parties make a **genuine, bona fide promise** to resolve a dispute (*Wigan*).
  - In the case of a contract of sale has been signed (for property), the belief that the purchaser does not have to complete the transactions due to unfixed defects of the house, will be a sufficient consideration for the promise to remedy the defects.
5. Parties **terminate the original contract** and **form a new** one which may **recycle** previous obligations (*Hartley*).

For existing legal duty rule – in the circumstances of commercial reality

How to make “one-sided” variations enforceable?

- Including some nominal considerations in the arrangements
- Documenting the arrangements through a deed and having the promisor make the promise through a deed

### International transactions

No requirement for consideration (CISG art 29(1)).

- Similar provision in *Article 3.1.2* UPICC.

### Consideration -red flags

- **Unilateral** contract – good **consideration** or a **conditional** gift?
- **Contract variations** – existing legal duty? Practical benefit exception?
- Promise to pay for services already performed- ***past consideration issue***

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## ESTOPPEL

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An estoppel bars a party from reneging on a non-contractual promise if that they induced the other party to rely upon.

**Test:** must prove the plaintiff detrimentally relied on an assumption induced in them by the defendant that the defendant subsequently departed from.

### STRUCTURE

#### 1. Introduction

- In the absence of a contract, X will argue Y is estopped from departing from their promise to [...]
- *Who is the relying party who is the representing party?*

#### 2. Common law or equitable estoppel?

#### 3. Apply **AIDRUD** test

#### 4. Remedies/conclusion

### Step 1: identify the relevant type of estoppel

- **Equitable estoppel:** representor induces in the relying party an assumption that they will do something in the future (e.g. 'I will sign the contract'); or in matters concerning an interest in land (*Waltons Stores*).
  - Proprietary estoppel – assumptions of a grant of an interest in land
  - Promissory estoppel – representations that lead to an assumption about future conduct
- **Common law estoppel:** representor induces in the relying party an assumption of fact or past conduct (e.g. 'I have already signed the contract').

### Step 2: apply the elements of estoppel (AIDKDRU)

The elements are derived from Brennan J's judgment in *Waltons Stores*, however there is no single authoritative formulation.

1. **Assumption:** relying party adopts an assumption of fact or future conduct.
  - Relying party must assume that they are entering a legal relationship with the representor (*Waltons Stores*; *Mobil Oil*; c.f. *W v G*).
  - ⇒ *The relying party assumed representor was bound by the agreement or, at very least, expected the representor would execute and .... as a matter of obligation (Brennan J in Waltons)*
  - ⇒ *For Mobil Oil, there is no expectation of a particular legal relationship due to lack of detail and certainty of the proposal*
  - ⇒ *W v G* – no existing or expected legal relationship between lesbian couple
2. **Inducement:** the representation is clear and unambiguous; the assumption must have been induced by the implied/expressed conduct of the representor

(*Legione; Crown*).

- ⇒ *Similar to Waltons, the representor induced representing party to adopt that assumption by its silence.*
- ⇒ *Despite it was unreasonable to rely on any promise made by A (the agent/solicitor) regarding to his/her authority, B acted on the faith of the inducement and believed that matter was left in abeyance until further communication is made (since they did not hear anything from A afterwards, it is reasonable for them to operate on the basis of their assumption) (Legione)*
- ⇒ In the decision of **Legione v Hateley**, the High Court held that no estoppel had been established because 1. The secretary did not make a clear and unequivocal representation about time of settlement; 2. The secretary had no authority to act
- ⇒ In the decision of **Crown v Cosmopolitan**, Cosmopolitan claimed that Crown was estopped from refusing to offer a new lease in light of Crown's statement that Cosmopolitan "would be looked after a renewal time". The main reason the HC found that the estoppel claim failed was because the statement was not sufficiently **clear precise and unambiguous to give rise** to an estoppel claim.

3. **Detrimental reliance**: relying party must have acted on the assumption in such a way that they will suffer detriment if the representor does not adhere to the assumption.
- Detriment is to be assessed at the time of the representor's departure (*Quaglia*).
  - Person seeking estoppel bears the onus of proof (*Sidhu*).
  - *The relying party doesn't need to show the promise was the sole reason for their actions, merely they had played a part of the actions (Sidhu)*
  - Detriment must be significant/substantial (*Verwayen; Quaglia*).
- ⇒ [to argue there is no detrimental reliance]
- Similar to Mobil Oil, A was contractually obliged to perform accordingly anyways thus there will be lack of reliance. (also consider whether the performance could potentially confer benefit on the relying party? – increased profitability and efficiency)*
- ⇒ **Eg Legione v Hateley**: the Hateleys had the funds to make the payment on time; they changed their position to their detriment in reliance on their assumption
- ⇒ *As per Quaglia, detriment is assessed at the time the representor seeks to depart from the induced assumption. Similar to the payment of rent in Quaglia, the representor was estopped from claiming the extra rent because the relying party would suffer detriment from making a lump sum payment of ... months – would have been easier for them to pay progressively.*
- ⇒ *The detriment that the relying party has suffered can be assessed from the opportunity costs – had B did not make promise, A (relying party) would*

have ..... (i.e. assign the lease). As such, the detriments A suffered would be quite **substantial** (*Verwayen*; *Quaglia*)

⇒ *Similar to Sidhu, A has made life changing decisions with irreversible consequences, including (did not pursue full-time employment; did not pursue a property settlement from divorce; improved the property), which is a sufficient indication that the promises were objectively likely to impose a significant detriment upon the decision making in A's shoes.*

4. **Knowledge:** representing party must know or intend that the relying party will rely on assumption.
  - Likely that constructive knowledge (ought to have known) will usually be sufficient, except in the case of inducement by silence, where actual knowledge or intent may be required to establish unconscionability.
5. **Departure:** representor has departed or threatened to depart from the assumption adopted and acted upon by the relying party.
6. **Reasonableness:** relying party has acted reasonably in adopting the assumption and in the detrimental action they took in reliance on the assumption (*Waltons Stores*; *Legione*).
  - ⇒ *It was reasonable in the circumstances for the relying party to make the assumption and to take the action they took in reliance on them.*
7. **Unconscionability:** it would be unconscionable in the circumstances for the representor to depart from the assumption.
  - The mere exercise of a legal right is not unconscionable.
  - Consider representor's knowledge of the assumption and their role in inducement (*Verwayen*).

⇒ *A may argue that the mere exercise of his/her legal right not to exchange contract is not unconscionable (Mason J in Waltons). However, there are a few factors pointing towards a conduct being unconscionable: 1. The urgency that pervaded the negotiations of the terms; 2. The representor was aware relying party was acting in reliance on ..... but still ended up departing from his promise. Hence, it was unconscionable for [A] to subsequently seek to withdraw and not fulfil the expectation.*

### Step 3: consequences of successful estoppel claim

- **Expectation loss** = loss as if the assumption is made good
  - **Reliance loss** = loss from relying on the assumption
  - **Equitable estoppel:** court seeks to give effect to relying party's **expectation interest** (i.e. the benefit they expected to receive per the assumption) unless doing so would impose a **disproportionate burden** on the representor – **reliance loss** is likely to be awarded instead (*Giumelli*; *Verwayen*, *Deane J*).
    - Proportionality: relief should be the 'minimum equity' required to do justice (*Giumelli*).
    - Be pragmatic – e.g. consider intervening third party rights (*Giumelli*; *Sidhu*).
- ⇒ *Since a third party is now in possession of the property and has made*