

CONSIDERATION

DOCTRINE OF CONSIDERATION

- The doctrine of consideration requires that something must be given in return for a promise in order to make it binding and is a requirement of the enforceability of promises.
- It is where an agreement is entirely one sided and a promise remains unperformed that the issue of consideration assume central importance.
- Consideration must be identified when A has made a promise to B, which B wishes to enforce and there is some doubt as to whether B has given anything in return.
- When a contract is made by an exchange of promises each party's promise provides consideration to support the promise made by the other.
- An agreement that is not supported by consideration on both sides is sometimes said to be a nudum pactum (a naked agreement) and this label carries with it the idea that the agreement is unenforceable

CRITICISM OF THE DOCTRINE OF CONSIDERATION

- Major failing of the bargain theory of consideration is that it excludes detrimental reliance on a promise as a basis for enforcement.
 - A promise which is relied upon in such a way that the promisee would suffer harm in the event of breach would seem to have a better case for enforcement than one given in return for an unperformed or executory promise.
 - Yet an executory promise will constitute consideration while detrimental reliance will not.
 - This deficiency has largely been rectified in Australia through the development of the doctrine of estoppel, which provides protection to a party who acts to his or her detriment on the faith of a non-contractual promise.

FUNCTION OF CONSIDERATION

- Means of distinguishing between fair and unfair transactions. It does not function well as a means of ensuring fairness though, since grossly inadequate consideration will suffice.
- The presence of consideration provides evidence that a promise has in fact been made and that it was intended to be legally binding. Promises for valuable consideration are less likely to have been made without proper deliberation than gratuitous promises.

DEFINITION OF CONSIDERATION

- **Consideration** is something the law regards as valuable, which is given in return for a promise and can be seen as the agreed price of the promise.
- A consideration is a detriment or liability voluntarily incurred by the promisee or a benefit conferred on the promisor at the instance of the promisee in exchange for the promise.

TWO ELEMENTS OF CONSIDERATION

- **Benefit/detriment requirement** - The promisee must incur a detriment or confer a benefit on the promisor
- **Bargain requirement** – that benefit or detriment must be given in return for the promise

BENEFIT/DETRIMENT REQUIREMENT.

- It must consist of a detriment to the promisee (in the sense of giving something up or undertaking an obligation) or a benefit to the promisor.
- For example, B makes a promise to A to transfer property or perform services or a promise not to sue A in respect of a breach of contract committed by A or a promise not to trade in competition with A. The consideration given by B constitutes both a detriment to B and a benefit A.
- Mutual promises will provide good consideration for each other - if B makes a promise in return for A's promise, this will confer a benefit on A (because A will have an enforceable legal right to have the promise performed) and will also be a detriment to B (because B will come under an obligation to perform the promise).

BARGAIN REQUIREMENT

- The benefit conferred on the promisor or the detriment suffered by the promisee must be given in return for the promise.
- The act relied on as consideration must be performed as the agreed price of the promise.
- The bargain aspect will be satisfied if the acts which are said to amount to consideration have been performed at the request or implied request of the person making the promise.

BARGAINS AND CONDITIONAL GIFTS.

- A promise to pay someone \$100 **IF** they perform a certain act is a conditional gift, whereas a promise to pay \$100 **IN RETURN FOR** performance of the act is capable of giving rise to a contract.

BARGAINS AND RELIANCE

- An act performed in reliance on a promise will not constitute good consideration, unless those acts can be regarded as having been performed in return for the promise/as the agreed price of a promise.
- A person who relies on a promise which has not been bargained must seek a remedy in estoppel rather than contract.

CONSIDERATION MUST MOVE FROM THE PROMISEE

- Consideration given in return for a promise need not move to the promisor. A may undertake a contractual obligation to B in return for a benefit conferred by B on C. For example, A might agree to pay a reward to any person who finds and returns C's dog. If B finds and returns the dog in reliance on A's promise, B's acts will not confer a benefit on A, but will constitute a legal detriment to B and will have been given in return for A's promise.
- Consideration must move from the promisee.

- NOTE: Where two or more parties to a contract are regarded as joint promisees, consideration may be provided by one of them on behalf of both or all of them. It is possible to be a party to a contract in which a promise is made but still be a stranger to the consideration given in return for that promise.

SUFFICIENCY OF CONSIDERATION

- Consideration must be sufficient, but does not have to be adequate.
- Requirement of sufficiency means that consideration must be something the law regards as valuable.
- Courts do not generally enquire into the adequacy of consideration because there is no way of assessing the value a particular person places on the consideration he or she has contracted to receive.
- This means that a promise to give a dollar for a house is good consideration.

DISCRETION AS TO PERFORMANCE

- A promise will not constitute good consideration if the promisor retains a free choice as to performance.
- If the promisor is not bound to perform and has an option as to whether he will carry out that which claims to be a promise, there is no contract and the promise will constitute an illusory consideration.

PAST CONSIDERATION

- GENERAL RULE: Past consideration is not considered sufficient consideration.
- Something given before a promise is made cannot constitute good consideration for the promise.
- The consideration must come into existence either with or after the promise.
- It may have been given gratuitously, such as where A gives B a dog and B subsequently promises to pay A \$50 for it. A cannot rely on the giving of the dog as consideration for B's promise because it is past consideration.

PAST CONSIDERATION AND EXECUTED CONSIDERATION

- Executed consideration is something given as part of the same transaction as the promise.
- In the case of a unilateral contract, the consideration given by the offeree has been executed by the time the contract is made, yet the offeror's promise remains executory.

PROMISE TO PAY PAST SERVICES

- Exception to the past consideration rule
- Where services are performed at the request of the promisor, and the parties understand the acts performed are to be remunerated, then performance of the services by the promisee will constitute good consideration for a subsequent promise to pay for them.

EXISTING LEGAL DUTY RULE

- GENERAL RULE: neither a promise to perform an existing legal duty, nor the performance of an existing legal duty, is regarded as sufficient consideration to support a contract.

- This rule covers promises to perform existing public duties, such as a promise to give evidence in court when the promisee is obliged by a subpoena to do so.
- A promise to perform an existing contractual duty is an illusory consideration. The promisor incurs no new burden and the promisee receives no benefit he or she did not already enjoy.
- Important that the law of contract does not encourage public officials and those involved in the administration of justice to be influenced by promises of extra rewards for discharging their responsibilities.
- For example:
 - The beneficiary has agreed to build a garage and fence for the modifying party for \$30 000, and, after the contract has been made the beneficiary realises that she has agreed to perform the work at a loss.
 - She expresses reluctance to perform, so the beneficiary and the modifying party reach an agreement that is the beneficiary builds the garage, the modifying party will pay the beneficiary an extra \$5000 and will not require the beneficiary to build the fence.
 - In return for the modifying party's promises, the beneficiary has simply promised to perform her contractual obligations. She has agreed to do nothing she was not already obliged to do.

PART-PAYMENT DEBT

- Part-payment of a debt does not constitute good consideration for an agreement to discharge the debt - known as the rule on Pinnel's case.
- If a debtor owes a creditor \$100 and the creditor agrees to accept \$50 in satisfaction of the debt, this agreement will not be binding and the creditor will be entitled to recover the remaining \$50. In paying part of the debt, the debtor is simply performing (part of) his or her obligation.
- Rule in Pinnel's case has no application where the debtor pays before the due date or in a different form, where several creditors jointly agree to forgo part of each of their debts (composition), where the payment is made to the creditor by a third party or whether the debtor gives something other than money.
- In practice, where a creditor is prepared to accept a lesser sum in full satisfaction of a debt, the rule is commonly avoided through the use of a more conventional form, a deed - if the agreement is made in the form of a deed, it will be binding in the absence of consideration.

EXCEPTIONS TO THE EXISTING LEGAL DUTY RULE

- Where the beneficiary is providing fresh consideration, such as where the beneficiary undertakes to do something more than he or she was obliged to do under the original contract
- Where the beneficiary's promise to perform confers a practical benefit on the modifying party
- Where the promise to perform an existing contractual duty is made by the beneficiary to a third party
- Where a promise is made by the way of a bona fide compromise of a legal claim
- Where an original contract is terminated by agreement and replaced with a new contract

FRESH CONSIDERATION

PRACTICAL BENEFIT

- The modifying party obtains a practical benefit from the beneficiary's promise to perform an existing obligation.
- A practical benefit should only constitute a good consideration if the beneficiary's performance is capable of being regarded by the modifying party as worth more than any remedy against the beneficiary.

PROMISES MADE TO THIRD PARTIES

- A promise to perform an existing contractual obligation does amount to a good consideration if it is made to a person who was not a party to the original contract.
- Existing legal rule does not apply because the promisor incurs an additional legal obligation and confers an additional legal right on the new promisee.
- For example consideration may be found in A's promise to B to perform a duty which A is already contractually obliged to perform for C.

COMPROMISE AND FORBEARANCE TO SUE

- A promise to perform an existing legal obligation will also constitute good consideration where it is made by the beneficiary as part of a bona fide compromise of a disputed claim.
- Existing legal duty is in dispute

TERMINATION AND REPLACEMENT

- Exception were the parties agree to terminate their original contract and enter into a new contract, rather than modify their original contract
- This is so even if the obligation of one party are more onerous than those in the original contract and the obligations of the other are identical to those in the original contract.
- The promise made by the beneficiary is seen as a "new" promise which provides consideration for the promises undertaken by the modifying party.

PROMISES UNDER SEAL

- A promise which is not supported by consideration will nevertheless be enforceable at common law if it is made under seal.
- A contract under seal as commonly known as **deed**.