

Chapter 2: Consideration

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 4 Understand the doctrine of consideration

2.1 Introduction

Consideration means something which is of some value in the eyes of the law – it is the price for which the promise of the other is bought. In ***Currie v Misa [1875]*** consideration was defined as:

“some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”.

The idea of defining consideration in terms of detriment and benefit is very much a 19th-century concept and one which is not popular today. It is arguably preferable to think in terms of a claimant buying a defendant’s promise by performing some act in return for it or by the claimant making a counter promise. Thus, Sir Frederick Pollock defined consideration as:

“An act or 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.”

Consideration is required to be present in all contracts except those made by deed.

This chapter is concerned with explaining what promises or actions will be considered by the courts as capable of constituting consideration. It also looks at a situation where the courts have found that a promise can, to a certain extent, be enforceable even if the other party has provided no consideration. This involves the doctrine of “promissory estoppel”.

2.2 Types of consideration

There are two valid types of consideration: executed and executory. This reflects the two different ways in which a claimant may purchase the defendant’s promise. Executory consideration consists of a promise made in return for a promise, such as a contract between a buyer and seller for the future delivery of a car on credit. Executed consideration occurs when one of the two parties has done all that he is required to do, thus leaving any outstanding liability on the other party, for example, where there is a promise of a reward if lost property is returned. If the property is returned by B to A then B has fulfilled his part of the contract. He is said to have executed his consideration, whilst A’s consideration, payment of the reward, is still outstanding.

What happens if the promise (the alleged consideration) is given **after** the act has been completed? In English law this is treated as “past consideration” and the general rule is that past consideration is no consideration at all. In cases involving executed and executory consideration the claimant, in order to succeed in any claim, must prove that his act or promise was given in exchange for the defendant’s promise. If the defendant made the promise afterwards it can be regarded only as an expression of gratitude (i.e. a gift) and thus not a binding contract. It is important to understand that the term “past” here means past in relation to the **making of the promise** that the claimant is seeking to enforce, not past in relation to the time at which the claimant is seeking to enforce the promise. For example, X offers Y £25 for giving him a lift to an airport. Here, Y can claim the £25 only if he does, in fact, take X to the airport – Y’s consideration is then executed (i.e. given in return for the promise, since it is carried out after the promise). On the other hand, if Y, knowing that X is in need of a lift to the airport, volunteers his services and, having been transported to the airport, X promises to give Y £25 for his trouble and effort, Y’s consideration here is past in relation to the making of the promise by X. Y would not be able to enforce X’s promise since his act of taking X to the airport was done before X’s promise was made.

Two classic cases illustrate the principle. In *Roscorla v Thomas [1842]* there was a declaration that “*in consideration that the claimant at the request of the defendant had bought of the defendant a certain horse . . . for a certain price, the defendant promised the claimant that the said horse was sound and free from vice*”. It transpired that the horse was extremely vicious and the claimant sued for breach of the promise. It was held that his claim must fail since the express promise was made after the sale and was therefore unsupported by consideration.

In the second case, *Re McArdle [1951]*, a number of children were entitled by virtue of their father’s will to a house once their mother had died. During the mother’s lifetime one of the children and his wife lived with her in the house. During this period the wife made various improvements and alterations to the house. On the mother’s death the other children signed a document stating that the executors should pay her £488, the cost of the improvements. The executors, in fact, failed to pay and the wife sued. It was held that the carrying out of the improvements was past in relation to the promise to pay her the £488, so her action failed.

2.2.1 The principle in *Lampleigh v Brathwait*

The rule that past consideration is no consideration has an exception to it in that if a claimant performed certain services for the defendant **at the defendant’s request** without any promise of reward and the defendant subsequently promised to pay for those services (i.e. the classic past consideration scenario), the claimant **would** be able to enforce the defendant’s promise in some circumstances. This principle first became settled in *Lampleigh v Brathwait [1615]* where Brathwait asked Lampleigh to get him a pardon from the King after he had committed a murder. Lampleigh succeeded in obtaining the pardon and Brathwait in gratitude promised to pay him £100, which he then failed to pay. Lampleigh sued but was met with the defence that his consideration was in the past when the promise to pay the £100 was made. The court nevertheless gave judgment to Lampleigh on the basis that the previous request, in fact, implied that there would be some reward for Lampleigh should he obtain the King’s pardon and that the request and the subsequent promise should be treated as part of the same transaction.

The principle in *Lampleigh v Brathwait* was restated in *Pao On v Lau Yiu Long [1980]* in which Lord Scarman stated: “*The [past] act must have been done at the promisor’s request; the parties must have understood that the [past] act was to be remunerated either by a payment or the conferment of some other benefit; and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.*”

Lord Scarman’s reference to an understanding that the past act “*was to be remunerated*” is drawn from *Re Casey’s Patents [1892]*. The claimant had managed the royalties for some patents owned by the defendants. They then promised him a one-third share in return for the work he had done. It was held that there must have always been an expectation that the claimant would be recompensed for the work he was doing. The promise of the one-third share simply gave specific form to that implied promise.

Other exceptions to the rule of past consideration being no consideration exist in statute (**s29(5) Limitation Act 1980** and **s27 Bills of Exchange Act 1882**).

2.3 Consideration must move from the promisee

English contract law has traditionally required that consideration moves from the promisee, though this rule has now been affected by the **Contracts (Rights of Third Parties) Act 1999 (C(RTP)A 1999)**, discussed in **Chapter 9**.

Where the traditional rule applies, a person to whom a promise has been made can enforce it only if he himself has provided consideration for it. For example, if A promises to wash B’s car if B promises to pay C £10, then if A does, in fact, wash the car and B subsequently fails to pay the £10 to C, C cannot enforce the contract against B since he (C) has not furnished any consideration. It may, of course, be possible for A to enforce the promise against B. The rule is really a corollary of the rule that only the parties to a contract can sue on the contract (the rule of privity of contract), since, if a person furnishes no consideration, he takes no part in the bargain and if he takes no part in the bargain he takes no part in the contract.

An illustration of the rule may be seen in *Tweddle v Atkinson [1861]*, where the partners’ fathers each agreed to pay a sum of money to the new husband after a marriage and agreed between themselves that the husband would have a right of action to sue should either parent fail to pay. The wife’s father died before he could make the payment and his executors refused to pay. The husband sued the executors. It was held that his action must fail, because he had furnished no consideration under the agreement.

It should be noted that whilst the consideration must move from the promisee, it need not move to the promisor.

As noted above, **C(RTP)A 1999** now provides that where A and B make a contract with the intention that C shall have an enforceable right under it, C may be able to enforce this right. This is discussed in more detail in **Chapter 9**.

2.4 Consideration must be of some value

This rule is often expressed as “consideration **must be sufficient but need not be adequate**”. To the layman the terms would appear to be synonymous, but in the law of contract the term “sufficient” consideration means that what

is being supplied must be something of a type which is regarded by the law as capable of supporting a contract. On the other hand “adequate” consideration relates to the **value** of what is being provided.

2.4.1 Adequacy of consideration

It is well settled that the courts will not enquire into the adequacy of consideration (i.e. they will not seek to measure the respective economic value of the parties' considerations, though it seems each must possess some economic value). Natural love and affection cannot of itself be adequate or sufficient consideration since it has no economic value. Thus, in *Thomas v Thomas [1842]*, the claimant's husband expressed the wish that the claimant, if she survived him, should have the use of the house. After his death the executor, the defendant, agreed to allow her to occupy the house, first because of her husband's wishes and, second, on payment by her of £1 per annum. The court held that the desire of the deceased husband for his wife to live in the house was not part of the consideration but that the paying of £1 per annum was. Similarly, in *White v Bluett [1853]*, a son's promise not to bore his father could not amount to consideration in return for the father's promise not to sue him on a promissory note.

It seems from the above cases that the consideration offered does have to have some form of economic value, but what if this is present, albeit disproportional to the consideration offered in return? The question to be dealt with by the courts here is whether acts or omissions having little economic value can support the promise of the other party. The principle may be seen in *Chappell & Co Ltd v Nestlé [1959]*, where chocolate manufacturers sold records for one shilling and sixpence plus three wrappers from their sixpenny chocolate bars. It was held that the wrappers formed part of the consideration, even though they were of little value. The wrappers would, in fact, have amounted to sufficient consideration even if they were the sole payment for a record.

The question of consideration arose in *Edmonds v Lawson [2000]* where the Court of Appeal considered the position of a pupil, over 26 years of age, and her entitlement to be paid the national minimum wage during her pupillage. It was held that pupillage did not come within **reg 12 National Minimum Wage Regulations 1999**. One of the questions was whether there was a contract between the pupil and her chambers and, if so, what was the consideration provided by the pupil. The court held that a broad view had to be taken of the relationship between a pupil and chambers. It was in chambers' long-term interests to attract talented pupils and, regardless of whether the claimant was a prospective candidate for tenancy, her agreement to that potentially productive relationship amounted to consideration.

2.4.2 Insufficiency of consideration

The key question is whether the consideration is of some value in the eyes of the law. It may be that a bargain has been struck between the parties and that the consideration that is offered by each party has an economic value, but the courts do not recognise the existence of the contract since the consideration cannot amount to such in law. Particular problems with sufficiency arise when the alleged consideration involves a party doing something which he is already under a legal obligation to do. In particular, there may be problems in relation to the part-payment of debts. These two issues, performance of existing duties and part-payment of debts, will now be looked at in turn.

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