

## CONSIDERATION

Read chapter 3, law of Contract, Richards

An agreement cannot form a contract unless it is supported by consideration.

**"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 [1875] LR 10 Exch 153**

This is rarely a problem in the commercial world as most contracts relate to one party supplying goods and/or services and the other party paying for them.

It is important, however, that certain basic rules relating to consideration are observed.

### **1. Consideration must not be past.**

This means that a thing already done cannot form consideration for an agreement reached subsequently.

#### **Re McArdle [1951] 1 All ER 905**

In Mr McArdle's will, the children were left the house on the death of the mother. The mother carried out alterations and improvements while she lived in the property, in gratitude the children signed a document "in consideration of you carrying out certain alterations & improvements to the property, we hereby agree that the executors shall repay you from the estate the sum of £488"

Held – Alterations & improvements were completed before the signed undertaking by the children. It was past consideration. When executors refused to pay the wife was unable to sue because she had furnished no consideration for the promise to pay the money.

However, if there was always a presumption of payment, as in most commercial contracts, then fixing it subsequent to performance is permissible.

#### **Re Casey's Patents, Stewart v Casey [1892] 1 Ch 104**

Joint owners of certain patent rights, wrote to plaintiff stating "in consideration of your services as the practical manager, we hereby agree to give you 1/3 share of the patents". The defendant contended it was consideration for past services and therefore plaintiff could not enforce the promise as he supplied no consideration.

Held – There had been an Implied Promise at the start of the venture that the defendant's services would be paid for, and a promise by the plaintiffs to render future services even though those services were never requested.

## **2. Each party must supply consideration**

### **Price v Easton [1833] 4 B & Ad 433**

Defendant promised "X", that if "X" did certain work for him, he would pay a sum of money to the plaintiff. "X" did the work and defendant did not pay.

Held – Plaintiff could not sue the defendant.

Rule 1 : Plaintiff could show no consideration from the promise moving from him to the defendant

Rule 2 : No Privity is shown between the plaintiff and the defendant

But it is possible that parties may contract jointly.

### **Coulls v Bagot's Executor and Trustee Co. Ltd. [1967] ALR 385,(1967) 119 CLR 460**

Mr Coulls granted to O'Neill Construction Ltd, the right to quarry on his land in return for payment. Coulls authorised the Company to pay money to himself and his wife jointly, the agreement was signed by Mr and Mrs Coulls. Mr Coulls died and the court had to decide whether to pay his wife or the executors of his estate.

Held – Consideration moved from them both to the Company because it was given on behalf of them both, also Mrs Coulls was a party to the Contract.

**However,**

### **Contract Rights of Third Parties Act 1999**

The Act reformed the rule of "privity of contract" under which a person could only enforce the law if he was a party to it.

Formerly a person who was not a party to a contract, had no right to sue for breach of contract.

Under certain circumstances a third party can have a right to enforce a term of the contract.

There is a two-limbed test for the circumstances in which a third party may enforce a term of the contract.

1. Where the contract expressly provides for this.
2. Where the term purports to confer a benefit on the third party unless it appears from the true construction of the contract that the contracting parties did not intend him to have the right to enforce it.

The third party **MUST** be expressly identified in the contract by name, class or description. But need not be in existence when the contract is made. (e.g. for a prospective child, future spouse, or a company not yet incorporated.)

The third party's right of enforcement is subject to the terms and conditions of the contract.

It is open to the parties to limit or place conditions on the third party's right; for example, if he wishes to do so by way of arbitration not litigation.

The courts may award all of the remedies available to a third party seeking to bring a claim for breach of contract. Normal rules of law apply to those remedies, including the rules relating to causation, remoteness and the duty to mitigate one's loss.

The Act also makes it clear that a third party can take advantage of an exclusion or limitation clause in the contract as well as to enforce positive rights.

### **3. Sufficiency of consideration**

Consideration must have some value, however small, but it does not need to be adequate.

#### **Thomas v Thomas [1842] 2 QB 851**

The plaintiff's husband had expressed a wish, but not in his will, that the plaintiff, if she survived him, should have the use of his house. After his death the defendant, his executor, agreed to allow her to occupy the house (a) because of her husband's wishes. (b) on the payment of £1 a year.

Held – The plaintiff's promise to pay £1 a year was consideration for the defendant's promise.

#### **Chappell & Co. Ltd. v Nestle Co. Ltd. [1960] AC 87**

The plaintiffs owned the copyright to a dance tune "Rockin` Shoes". The Hardy Co made records of the tune which they sold to Nestle Co for 4d each, and the Nestle Co offered them to the public for 1s 6d plus 3 wrappers from their 6d chocolate bars. Nestle threw the wrappers away, the main aim was to increase sales of chocolate bars but they also made a profit on the sale of the records. The plaintiffs sued for breach of copyright. Section 8 of the Copyright Act 1956, allowed the making of records for retail sale provided a royalty of 6 ¼ % of the selling price was paid to the plaintiffs. The plaintiffs were told the records selling price was 1s 6d.

Held – The wrappers were part of the consideration, even though they had no value and were thrown away by Nestle. There was a breach of Contract

As a result it may be advantageous to one party to show that there is no contract if they would be losers on it as the court would then need to decide on payment on a **quantum meruit** basis (how much he has deserved, payment as much as the work and labour is worth) as in the British Steel case (see previous notes).

#### **4. A promise to perform an existing duty**

Old textbooks, state that a promise to perform an existing duty cannot be consideration, i.e.

If A enters into a contract with B, A cannot subsequently use that contract to support another.

##### **Stilk v Myrick (1809) 2 Camp 317, 170 ER 1168**

A seaman sued for extra pay promised by the captain after 2 members of the crew deserted, during a voyage from London to the Baltic. The captain could not find replacements and promised the remaining crew that he would divide the deserters' wages up among them. But when they returned he refused to pay more.

Held – There was no consideration. The plaintiff was already bound by an existing contractual duty to the defendant.

This is now not so clear following:

##### **Williams v Roffey Bros. and Nicholls (Contractors) Ltd. [1990] 1 All ER 512**

The defendants were a firm of building contractors; they entered into a contract to refurbish a block of 27 flats. They contracted out the carpentry work to the plaintiff for £20,000. The plaintiff had finished 9 of the flats and had done preliminary work on the rest, for which he had received £16,200 on account, when he found he was in financial difficulties, due to under-estimating the cost and because of bad supervision of his workers.

The plaintiffs & defendants had a meeting, where the defendants agreed to pay the plaintiffs further money, paid as each flat was completed. The plaintiffs completed 8 further flats but only received one payment of £1,500.

The plaintiffs stopped work and sued for damages.

The defendant claimed they were not liable as they had simply promised to pay the plaintiff extra for what in any case he was obliged to do, that was to finish the contract.

Glidewell LJ, thought that, the defendant had received a benefit, capable of being consideration for W's promise. It is clear that there are often good commercial reasons for promising more to ensure performance. If the plaintiffs

were to go out of business or become insolvent, it would almost inevitably cost a good deal more to engage somebody to complete the work.

The important point is that the extra payment must confer some benefit on the party paying it but, as *Williams v Roffey Bros.* shows, that may be the avoidance of a detriment which could be brought about by the other party's breach.

### **Can a part payment of money provide consideration for full payment?**

#### **Foakes v Beer [1884] 9 App Cas 605**

Foakes owed Beer a sum of about £2000, awarded in damages from an earlier case. The parties agreed that if Foakes paid £500 at once and the rest of the sum by instalments, then Beer would not take legal action. Foakes eventually paid the debt, but not the interest. Beer sued Foakes for the interest.

In defence, Foakes claimed that the new agreement (payment of the sum in instalments) cancelled the original obligation; Beer claimed that the agreement was void since Foakes offered no consideration.

Held - The Court sided with Beer, allowing Pinnel's case to stand.

#### **Pinnel's Case [1602] 5 Co Rep 117a**

This case is probably the earliest to establish the principle that if one person owes money to another, then an agreement to take a lesser sum to settle the debt, even if well-attested, is not a binding obligation. The reason it is not, rests on the fact that there is no new consideration to support the new agreement.

Cole owed Pinnel £8 10s, but at Pinnel's request paid £5 2s 6d one month before the full sum was due. Cole claimed that there was an agreement that the part-payment would discharge the full debt.

Held - The court found in favour of Pinnel, because part-payment of an original debt did not make for fresh consideration. Therefore the agreement was not a contract.

How far this is still so is an unanswered question.

One way out of the problem is by the principle of estoppel.

#### **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130**

Central London Property Trust (CLPT) owned a block of flats which it leased for £2250 pa to High Trees Ltd (HT), and which became known as 'High Trees House'. HT's plan was to let the flats individually to tenants. However, the war meant that demand was slack and HT negotiated a reduction in the cost of the lease to £1250 pa for the period 1940-1945.

After the war the demand increased and the flats were all let. CLPT attempted to recover the full cost of the lease, as per the original agreement, claiming that there was no Consideration from HT to support the agreement for the reduced rates. The absence of consideration was not in dispute, and under a strict interpretation of the common law on contracts CLPT would have been able to enforce their rights to full lease value. Held - Lord Justice Denning ruled that the agreement to reduce the rent was a promise, and HT had acted on that promise. If CLPT were allowed to enforce their rights then the fact that HT had acted on the promise would be to its detriment (because they would have to pay full price when most of the flats were unlet), and CLPT could be made subject to a promissory estoppel.

However, this is subject to certain rules:

1. The other party has altered position.
2. The party making the promise can end it by reasonable notice.
3. It is only a defence.

## **EQUITABLE OR PROMISSORY ESTOPPEL**

**“Where one party has, by his words or conduct, made to the other party a promise or assurance which was intended to affect the legal relations between them and to be acted upon accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word”**

**Denning: Combe v Combe [1951] 2 KB 215**

### **vitiating factors**

are elements of duress, mistake, misrepresentation, and are an essential element of a valid contract it is recognized in common law that a party might have been coerced, or pressed into a contract. the resulting contract cannot be regarded as a true agreement between the parties.