

Elements of the law of contract

Zone A examination paper

Question 1

"The requirement of consideration is an unnecessary complication in the formation of contracts."

Consideration is probably regarded as one of the most controversial issues in the law of contract. The traditional and/or orthodox doctrine is based on the principle of "reciprocity", which seems to suggest that a promise given should be exchanged for something in return.

The requirement of Consideration was established since the sixteenth century in Common Law. The first mention of which had been in the form of *quid pro quo*, *inter alia*, a promise for a promise, and later, it was acceptable that even a detriment or forbearance like fulfilling the promise to marry such as in the case of *Stadwell v Stadwell*[1860] would be sufficient consideration. Consideration was first associated with debt such as in the *Pinnel's case* and had subsequently spread to other simple contracts.

This has been criticized by Lord Mansfield in 1756, and was in view that it could only be treated as evidence of the parties' intention and held that a moral obligation should be sufficient consideration. It was only in the case of *Eastwood v Kenyon*[1840] that Lord Denman confirmed that the law required some factor additional to a defendant's promise, which is, consideration, whereby the promise becomes legally binding.

So, if a party makes a promise and the other party offers nothing in return, such a promise will be *nudum pactum* or gratuitous and unenforceable for lack of consideration. It should be noted that consideration is a necessary element in all simple contracts. Formal deeds, on the other hand, which are formal contracts under seal, do not require consideration in order for the contract to be binding. The statute of Frauds 1677, the Law of Property (miscellaneous Provisions) Act 1989, etc required some classes of contracts to be evidenced in writing.

As contracts are promises which have legal sanctity, they are binding on the parties that have entered into the contract and compel them to act or not to act in a particular way and consideration is said to be a price agreed upon to be paid for the promisor's promise. A valuable consideration is defined in the case of *Currie v Misa*[1875] as some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss of responsibility, give, suffered or undertaken by the other party. Sir Frederick Pollock defines it in a similar way as well, in the case of *Dunlop v Selfridge*[1915] as being an act or forbearance of one part, or the promise thereof, is the price for which the price of the other is bought and the promise thus given in value is enforceable. Thus basically, consideration will either be a benefit to the person making the promise or a detriment suffered by the promisee, or both.

There are generally two types of enforceable consideration, which are executory and executed consideration. Executory consideration is a consideration provided in the future, whilst executed consideration is that of the present. This is to show that consideration should be prospective, *inter alia*, of the present or future and not of the past as a promise given for a deed already done in the past will not be regarded as good consideration as it lacks the element of trade and/or reciprocity. The act of forbearance, especially when giving up the right to pursuing a *bona fide* cause of action given in

exchange for the promise provided by the promisor is good consideration. Often the consideration is provided by the promisee should be at the request of promisor. Thus, in this sense, a party who receives unrequested benefits is not legally compelled to return the favor as evidently, the other party has acted voluntarily.

Therefore, promises made for something in the past is no consideration. Such a contract is not enforceable such as in the cases of *Eastwood v Kenyon* and *Roscorla v Thomas*, where promises were made after the initial contract had been formed and performed similarly, a promise to increase wages retrospectively was held to be supported by a consideration in the past and again, this lacks reciprocity and so, such a contract will be unenforceable such as in the case of *Anderson v Glass* as the consideration is not provided in response to and in support of the promisor's promise. In the case of *Roscorla v Thomas*, it was held that the fact of the sale did not imply that there was a warranty and the expressed promise was made after the sale, and so, was not supported by fresh consideration. Similarly, in the case of *Re: McArdle*, past consideration could not be sufficient enable a party to enforce a promise given after the initial consideration in the past.

At times, the application of the doctrine of consideration is neither precise nor consistent. So, the requirement of consideration often confuses such as the case of *Lampleigh v Brathwait*. Strictly speaking, this would be a prima facie case where the consideration was in the past and that the promisor's promise which came in later was not supported by a fresh consideration and yet it was argued that the previous request and the subsequent promise was deemed to be one transaction, and thus being a valid consideration after all.

Another similar case which follows this line of thought would be *Re: Casey Patents: Stewart v Casey* where the court had tried to argue that there was an implied promise. Being so, there would be sufficient consideration and the relevant contract would be regarded as binding.

The case of *Pao On v Lau Yiu Long* had subsequently provided some certainty by Lord Scarman in laying down the three conditions which are, the act constituting consideration must be done at the promisor's request, the parties must have understood that the work was to be paid at a later date and lastly, the promise would be legally enforceable should it has been made prior to the consideration to defeat the principle that past consideration is no consideration.

A problematic area regarding the requirement of consideration would be where third parties are involved in a contract. The doctrine of privity of contract was established in the case of *Tweedle v Atkinson* [1861] where the Wightman J stated that no stranger to the consideration can take advantage of the contract although made for his benefit. Obviously, the underlying principle would be that only a party who has given consideration may enforce a contract not under seal. That should be why the requirement for consideration must move from the promisee though, there is no requirement that it should move to the promisor. Thus, a promisee can provide consideration by conferring a benefit on a third party at the request of the promisor as in the case of *Bolton v Madden* [1873].

However, the promisee himself must provide the consideration either by incurring some detriment or by conferring a practical benefit on the promisor or a third party at the promisor's request as in the case of *Williams v Roffrey Bros*. But, as a result of the enactment of the Contracts(Rights of Third Parties) Act 1999, English law now confers on third parties a much wider right to enforce a term of a contract which has been concluded between two other parties. In this sense, the rule that consideration must move from the promisee has not been reformed, but the substance of the matter is

that the rule has been revised in that a third party can exercise his right to sue under the Act although he has not provided any consideration as of such.

A question might arise in regards to whether any act or promise would efficiently constitute consideration, regardless of the value of the act or promise. The general rule in regards to consideration would be that the consideration provided must be "sufficient" but need not be "adequate". This principle is established in the case of *Thomas v Thomas* [1842] where it was held that regardless of the actual economic value. As long as the consideration has some economic value to it, it can be regarded as good consideration. This principle is further illustrated in the case of *Chappell v Nestle* [1960] where Lord Somervell stated that the courts are unwilling to challenge the adequacy of consideration due to the fact that contracting parties should have the freedom to trade. The courts would be reluctant to interfere should both parties have readily agreed to what the subsequent consideration should be, regardless of how trifling its economic value may be.

In the past, as shown in the case of *White v Bluett* [1853], the consideration provided by the claimant should be of some economic value. Even if the consideration does actually constitute a practical benefit, the courts were not willing to accept this line of argument. However, in later cases it is decided otherwise, such as the case of *Ward v Byham* [1956]. The claimant was legally compelled by s 42 of the National Assistance Act 1948 to look after her child, and so, it is quite difficult to see how the claimant's performance had exceeded what was statutorily required of her to do or that the so called consideration that she had alleged to have provided was of any economic value at all. At this point, the requirement of consideration becomes vague. Clearly, doing what one is already obliged to do does not constitute good consideration. Despite this, Lord Denning and the majority of the Court of Appeal claimed that she did provide good consideration in the sense that she done more than she was obliged to do by keeping her child happy.

It could further mean that consideration no longer requires being of some economic value and this point is further supported by the more recent case of *Edmonds v Lawson* [2000].

Strictly speaking, this area in regards to whether there is a valid consideration and the distinction between an acceptable and unacceptable consideration is becoming more and more vague and may well seem to be ultimately dependent upon the discretion of the judges.

It is a general rule that performing an act which one is already legally obliged to do is not good consideration as in the cases of *Collins v Godefroy* [1831] and *Wade v Simeon* [1846] where it was held that such consideration is not good consideration. And yet in the case of *Cook v Wright* [1861] the court held that there was consideration and it was even argued that the claimant had provided consideration by honestly believing that they were entitled to their claim, regardless of the fact that generally consideration has to consist of at least a little economic value. Thus, this shows, at times, it is very difficult to understand how the requirement of consideration is provided.

Another case to illustrate this point would be *Williams v Roffey Bros* [1991], where the defendants promised a bonus to the claimants for doing what they were already under a contractual duty to do. There was no fresh consideration to support the additional promise and according to the general rule, as established in the case of *Stilk v Myrick* [1809], the promisor would not be under a legal duty to enforce his promise. And yet, it was held that the claimants had provided consideration in the sense that they provided a practical benefit to the defendants and so were entitled to the promise. Apparently, this situation differs from the cases of *Hartley v Posonby* [1857] and *Glasbrook*

Bros Ltd v Glamorgan CC [1925] where it was held that the respective promisee had actually done more than they were actually legally compelled to do and so were entitled to more than was previously stipulated. It could be said that there had been a variation in the original contract and fresh promises were being supported by fresh consideration.

One school of thought could probably argue that the requirement of consideration merely differs from case to case since the material facts and circumstances of each case can be distinctive and complex. Though, it is possible that another school of thought would suggest that the courts, at times, merely do away with the requirement of consideration, and if that is so, why bother with the requirement of consideration at all?

The traditional view when dealing with debts would be that part payment was not full payment. This principle was established in the *Pinnels' case* [1602] on the view that the debt owed cannot be discharged by merely a partial performance of the original obligation, but through some new element as requested by the promisor such as part payment on an earlier date or payment by chattels. The underlying principle would be that the debtor had given no consideration for the promise to release the balance of the debt.

Later in the case of *Foakes v Beer* [1884], the House of Lords held that the principle in the *Pinnel's case* remained good law. It has been criticized by Lord Blackburn that in reality, prompt payment of a part of another claim might be more beneficial to creditors than enforcing payment of the whole and the subsequent case of *Re: Selectmore* had also suggested as much.

An exception to the doctrine of consideration comes in the form of estoppels such as estoppels by representation or known as common law estoppels, promissory estoppels and proprietary estoppels. Estoppel by representation is when a person makes an representation of existing fact which induces another party to act in reliance to that and to his detriment, will not be permitted to act inconsistently with that representation. Proprietary estoppel has less limitation in the sense that it could be a cause of action as well as in the case of *Pascoe v Turner* [1987]. It should be noted that the case of *Jordan v Money* [1854] established that the representation must be of a fact. The common law estoppels operate upon representation or promises of existing fact while equitable estoppels operate upon representation or promises as to future conduct, including promises as to legal relations.

Estoppels are relevant to the issue at hand due to the fact that estoppels, especially promissory estoppels had watered down much of the strict requirements of consideration in simple contracts. In the past, when it had seemed inequitable for the courts to strictly demand consideration in some cases, the judges will go to much lengths to search and sometimes even create consideration, they exercise some degree of discreet and have not gone as far as to outrightly claim that even without the existence of consideration, a promise shall be deemed to be enforceable.

An estoppel prevents the promisor/representor from acting inconsistently with an assumption that the promiser had represented without taking steps to ensure that the departure does not cause harm to the representee. Generally, it only acts as a temporary waiver as in the cases of *Hickman v Haynes* [1975], *Hughes v Metropolitan Railway* [1877] and *Rickards v Oppenheim* [1950] but it remains uncertain whether the waiver is permanent or not.

The case of *Central London Property Trust Ltd v High Trees House Ltd* (1947) is quite famous as this is the case where Lord Denning's obiter dictum extended the traditional estoppels to

that of promissory or quasi estoppels. It established the principle that in certain circumstances, a promise conferred to another party can be binding regardless of the absence of consideration.

Though, it should be noted that limitations do exist, such as the fact that the promise should not be illegal such as in the case of *Evans v Amicus Healthcare Ltd* [2003] and is generally suspensory as in the case of *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] where it was held that the promisor was merely being estopped from enforcing his full legal right. It must also be inequitable for the promisor to break his promise, otherwise as in the cases of *D & C Builders v Rees* and the *Post Chaser* [1982], such reliance on promissory estoppels would be futile as the courts seek only to compensate and not enrich and return parties who had suffered detriments to their previous status. The requirement that there should be a pre existing contractual relationship between the parties would support the argument that the parties were varying the terms of the contract and not creating a new contract. Lord Denning held otherwise however, in the case of *Evenden v Guildford City FC* [1975] with the view that such need was not vital. As to the need for reliance, generally, a party would have to rely on the promise to his detriment. Again, this is rebutted by Lord Denning who claims that the reliance need not necessary be to a party's detriment as in the case of *W J Alan & Co v El Nasr* [1972] while an Australian case, *Legone v Hately* established that at least potential detriment must be shown. Basically, the principle of promissory estoppels in the UK have yet to be capable of being established as a cause of action, and is merely for defensive purposes only, as stated in the case of *Combe v Combe* [1951]. Probably this is to say that the doctrine of promissory estoppels was not to create a new cause of action. Other countries, however, differ, in the sense that it can be a cause of action should it be reasonable such as in the American case of *Cohen v. Cowles Media Co.* [1991] and the Australian case of *Waltons Stores v Maher* [1988].

The case of *Waltons Stores v Maher* [1988] might be more of an interest to the English courts in the sense that English and Australian Law have very much in common and so, decisions were held to be highly persuasive authority. The doctrine of promissory estoppels was the basis of argument in this case and yet the judges have chosen to depart from most of the principle limitations of the doctrine. It was a controversial case in the sense that the doctrine was used as a cause of action where there were none pre-existing contractual relationship between the parties and yet the judges decided in favor of the claimant. This may be justified by the argument that the objective of the doctrine is to avoid the situation where a party is led to suffer a detriment, being so, the courts should be able to extend the restrictions imposed to achieve this.

In more recent cases, it is suggested that if a promise is made in the spirit of genuine attempt to resolve difficulties which have arisen during the performance of the contract, then there was no duress, extortion or improper pressure, the court would be willing to enforce such a promise even if it means that the courts must invent consideration. Clearly this shows that ultimately, it is at the discretion of the judges to whether how any case is decided. Thus it is debatable whether there is truly a need for simple contracts to require consideration. It would seem that the difference in decisions of the current and past cases shows that the law on consideration had gradually developed over time and no longer remains quite as rigid as it originally was in the past. This could be because, when society gradually advances, ideas and principles change from time to time and the law, being flux, adapts accordingly. So, while in the past, the want of consideration could be vital as it provides evidence and defeats fraudulent claims. However, such a role, in the light of today, is of a less importance. Though, by the end of the day, the truth remains that regardless of whether what one might think regarding if the doctrine of Consideration serves any useful purpose, as it does not generally seem to give rise to problems. If the English Courts wishes to enforce a contract, they will be creative enough to find

consideration. Such as in the case of Bowerman v ABTA [1996], where the parties who read ABTA's poster before contracting with travel agents were held to have given consideration for a contract with ABTA by choosing to deal with their members. Thus, English courts are peculiar in the sense that, for them, there is always consideration if one is to look hard enough.

Therefore, it could be submitted that the trend of more recent developments in regards to the requirement of consideration seems to suggest that it will only be a matter of time before the doctrine of consideration is further eroded or abandoned altogether.

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