

BSc (Hons) Year 1

Principles of Business Law Coursework

1. Lennard read in his local paper that Barry was selling his car for £2,000. After examining the car Lennard told Barry that he was prepared to pay £1,500. Barry replied that they should split the difference and therefore he would accept £1,750. Lennard then told Barry that he needed time to think it over. Barry then said “you must give me an answer by the Monday of next week”. On the Monday Lennard sent a facsimile message to Barry’s workplace, and for good measure, a letter to Barry’s home address in which he stated the following: “I am happy to give you £1,750 for the car. Will you take a post-dated cheque?” Barry did not see the facsimile message that had been buried under a pile of paper on his desk and Lennard’s letter was not received until two days after posting. In the meantime Barry had written to Lennard saying that the car was no longer for sale.

Advise Lennard

2. Critically assess the extent to which the performance of existing duties may be said to amount to sufficient consideration.

Part One

Lennard is in the position whereby he has accepted an offer after negotiations, only to find out later that the car is no longer for sale. The problem lies in the fact that he has been made an offer and accepted it. There are two issues to consider; firstly was this a valid exchange, and secondly, is this exchange therefore binding as a contract.

The first issue to consider is whether or not there is actually a contract between the two parties. For there to be a contract, a number of criteria must be satisfied. In this case, has an offer been made by one party, and accepted by the other; has there been consideration made by either party; and was there an intention to create legal relations. All of these need to be present, at least, for a contract to be valid.

An offer is an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as the person to whom it is addressed accepts it. The offer must not be too vague i.e. there must be a definite intention to adhere to its terms. It is important however to distinguish an offer from an invitation to treat. In the case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (1953)*, it can be seen that the display of goods on sale was merely an invitation to treat, and that the offer was made upon the presentation of those goods at the cashier’s desk. Similarly, an advertisement in a local newspaper, as in Lennard’s case, can also be seen as an invitation to treat, with the offer being made upon actual contact between the two parties. In practice it is sometimes difficult to make the distinction between ‘offer’ and ‘invitation to treat’, as the word offer is not essential. This can be seen in the case of *Carlill v Carbolic Smoke Ball Company (1893)*, when

it was held that in the particular circumstances of the case, there was an offer that was capable of being accepted. The statement had been accompanied by the intimation that a sum had been deposited with a bank to meet potential claims. A reasonable person could have taken the promise as being seriously intended, and there was nothing to prevent such a promise from being made to the world at large.

An offer may be terminated in certain circumstances. A counter offer terminates the original offer. Where an acceptor makes a counter offer the original offer is deemed to have been rejected and cannot be subsequently accepted. It is sometimes difficult to distinguish a counter offer from a request for further information. In Lennard's case, he made a counter offer of £1,500 after Barry's offer of sale for £2,000. Barry made a counter offer of £1,750 which was the amount Lennard asked for time to think on.

Acceptance is a final and unqualified expression of consent to the terms of an offer. A mere acknowledgement of an offer does not amount to acceptance; nor is there acceptance by a person who replies with an intention to order a product being offered. Where an offer makes alternative proposals, the acceptance must be clearly directed to the part being accepted.

When parties carry on negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as whether they agreed at all. Courts are often then required to look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though either parties, or one of them, had reservations not expressed in the correspondence.

Acceptance must be communicated to the offeror and there will be no acceptance until this has taken place. However, the exception to this is 'the postal rule'. There are many possible answers to the question of when the postal rule actually comes into effect. Such an acceptance could take effect when it is actually communicated to the offeror, when it arrives at his address, when it should, in the ordinary course of post, have reached him, or when posted. Each of these solutions is subject to objections on the grounds of convenience and justice. This is particularly true where the acceptance is lost or delayed in the post. Acceptance by post constitutes an exception to the general rule of exception, and is normally effective as soon as a correctly stamped addressed envelope is posted. Intention to use the postal system as a means of communication will be implied in the absence of any contrary evidence. Proof of postage is required to make this fully binding.

The operation of the principle is seen in the cases of *K & R Adams v Lindsell (1818)* and *Household Fire Insurance Company v Grant (1879)*. In the former it was held that acceptance was made in the course of posting and was effective when posted. The latter reinforced this, adding that it is still true despite possible non-arrival.

In the case of faxes, the communication rule applies in full in that acceptance is only binding upon the offeror receiving it, rather than upon it being sent.

Lennard offered consideration in sending a fax and by posting a letter of acceptance. If a fax were the sole means of communication, then Lennard would not be able to sue, as the fax needed to have been received and read by Barry. In sending a letter Lennard ensured acceptance was communicated. It was effective upon him posting the letter.

In the case of Lennard and Barry, Lennard would be advised to sue for breach of contract, which could result in a small claim. An invitation to treat was made in the advertisement in the newspaper. Lennard made an offer to Barry of £1,500. Barry then made a counter offer of £1,750. Acceptance was communicated by Lennard, the inquiry of method of payment not being a request for further information, as it would not influence the decision to accept. The posted letter being a valid and binding acceptance, Barry is liable to sell the car to Lennard.

Part Two

The courts will only enforce a promise where the promisor receives some benefit, either direct or indirect, in return for having made the promise. Consideration is, in the words of Sir Frederick Pollock, *'the price for which the promise is bought'*. The word *'price'* used in this context should not be interpreted too literally. It does not always connote something of tangible or material value. Let us look at an example: promises themselves are regarded as consideration. The basic feature of the doctrine is that *'something of value in the eyes of the law'* (as in *Thomas v Thomas (1842)*) must be given for a promise in order to make it enforceable as a contract.

There are a number of rules governing consideration which serve to explain, in part, the nature of this much argued element of contract law. Firstly, the act claimed to represent consideration for another party's promise to pay must not precede that promise, or it will be treated as past consideration and the promise will merely be gratuitous, e.g. if someone offers payment after a job has been completed, and they then don't pay, you can't sue for breach of contract due to it being past consideration.

Secondly, common law rule prevents a party from enforcing a contract unless he or she has contributed consideration, i.e. consideration must move from the promisee. There have been, however, considerable exceptions have been created by the Contracts (Rights of Third Parties) Bill 1999.

Another governing rule of consideration regards sufficiency. Consideration must be of material value, or at least capable of being assessed in financial terms. Settling a case out of court involves a contract under which one party agrees not to sue the other provided that the other pays an agreed sum of compensation. The consideration for the compensation is the promise not to sue, e.g. in *Alliance Bank v Broome (1864)* a bank provided consideration for the defendant's promise to give security for a loan by promising not to take action to recover it. Consideration may be sufficient without being adequate in that provided the alleged consideration is of financial value, it is irrelevant that it is not an adequate return. Sufficiency usually involves taking on

some new obligation in return for the other party's promise of payment. Performing an existing legal duty does not generally amount to sufficient consideration.

Where two parties have made a contract, a subsequent promise of additional payment to encourage performance is not a binding contractual promise. The promisee is already contractually bound to perform and is therefore not providing fresh consideration. The courts may take a more generous attitude to similar situations if satisfied that the public interest is not adversely affected and that enforcing the promise would produce the fairest outcome. This is justified by finding that the promisee has exceeded the scope of their legal duty. The excess represents consideration. Added justification is extracted from finding that the promisee in carrying out the legal duty has actually conferred a benefit on the promisor or enabled him to avoid some material disadvantage.

The promise to perform an existing public duty does generally not amount to consideration, e.g. *Collins v Godefroy* (1831) in which an obligation to appear as a witness in a case was held not to amount to consideration for a promise of reward since this merely constituted the carrying out of an obligation imposed by statute.

However, a promise to do more than existing public duty will amount to consideration and will therefore be enforceable. In *Glasbrook Brothers v Glamorgan County Council* (1925) the police were offered £2,000 to provide a special guard for a coalmine during a strike. It was held that they could recover this amount because the special guard went beyond the ordinary police duty to protect property. Similarly, in *Harris v Sheffield United FC* (1987), the police authority was held to be entitled to payment for providing officers inside the ground.

Much difficulty arises in determining whether a person who does, or promises to do, what he was already legally bound to perform thereby provides consideration for a promise made to him. As he was already legally bound to do the act, he suffers no legal detriment, although possibly suffers a factual detriment which could be more troublesome to him than to pay damages. The promissory may also gain factual benefit, as damages may not fully compensate him for the loss that he would suffer should the duty be broken.

Mr Justice Denning has said that the performance of an existing duty, or the promise to perform it, was of itself good consideration. This radical view has not been widely accepted, but the requisite of consideration has been mitigated by recognising that it can be satisfied where the promisee has conferred a factual (as opposed to legal) benefit on the promissory.

The two sides of the debate as to whether the performance of existing duties may be said to amount to sufficient consideration, can be summarised by the two well known cases of *Stilk v Myrick* (1809) and *Hartley v Ponsonby* (1857). In the former there was insufficient consideration to make the captain's promise enforceable; whilst the latter expounds the fact that the depletion of the crew and the length of the journey was so great that the crew's existing contractual duties were discharged, and that their taking on a new set of duties amounted to sufficient consideration for the captain's promise of more pay.

There is no straightforward conclusion to this argument, as in many other scopes of law. There is, however, significantly more validity and backing to the argument that expounds the view that the performance of existing duties does not amount to sufficient consideration.

Bibliography

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G.H. Treitel

Internet Article from *Richmond Chambers*

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