Chapter 3

The making of contracts (2) – consideration

General remarks

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 9427 3] 74–94.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 79–120.

The problem here is how to deal with the enforcement of gratuitous promises. A gratuitous promise means a promise for which the promisee does nothing in return. Every legal system recognises that to enforce all gratuitous promises would be undesirable, since there is too great a risk that the promisor may have given his word lightly on the spur of the moment and without proper reflection, for example to extricate himself from an awkward or embarrassing situation. A gratuitous promise will therefore only be enforced if it was made in a way which shows that the promisor must have known what he was doing and intended to be legally bound.

In English law this is done by saying that a promise will not be enforced unless it is either made by deed or 'supported by consideration'. The traditional method of making a deed, dating from the Middle Ages, was to attach a seal to the document and then hand it over ('signed, sealed and delivered') so that a promise in a deed was often referred to as a promise 'under seal'. However, the law was changed by the Law of Property (Miscellaneous Provisions) Act 1989, so that a deed made by an individual no longer requires a seal, though the signature must be witnessed. If a promise is made by deed it is binding, even though gratuitous, because the promisor's use of the formality of a deed amply demonstrates the seriousness of the transaction. Although consideration **usually** implies the giving of something of value in return for the promise, so that the promise is not gratuitous, it is important to realise that it is a major function of the doctrine of consideration to enable **economically** gratuitous promises to be made enforceable without even a deed through the device of nominal (or minimal) consideration, as where A agrees to sell his new Rolls Royce to B for £1. It may seem paradoxical but consideration is best thought of as essentially a formality, like a deed, and certainly not as a concept related to real economic value.

In a number of cases the courts have, consistently with this approach, been satisfied with considerations which really had no economic value at all. A large part of the difficulty of the case law on consideration stems from the fact that the courts have sometimes apparently put the doctrine into reverse and denied the existence of a legally acceptable consideration although there was clear commercial value given in return for the promise.[1]

[1] *See 'Performance of an existing duty' and 'Part payment of a debt', later in this chapter.*

The concept of consideration used by the courts in these cases is clearly opposed to, and inconsistent with, that upon which the validity of nominal consideration is based.

In one line of cases of this second kind, the doctrine of consideration is used at best as a convenient device for refusing enforcement of promises to which objection might be made on wider grounds of policy – thus sparing the court the task of an explicit statement of the policy issues.

Another notorious principle makes a creditor's promise unenforceable for lack of consideration, in this artificial sense, when there seems to be no real objection to the enforcement of the promise on policy grounds. It is perhaps not surprising that Lord Denning's most famous attempt to reform the law should have been directed at this aspect of the doctrine of consideration. One of the questions you will have to grapple with is the extent to which Lord Denning's attempted reform in fact succeeded.[2]

[2] *See 'Promissory estoppel', later in this chapter.*

It should be noted that the courts do not openly recognise the inconsistency between these two uses of the doctrine of consideration but speak as if there was a single coherent principle.

The definition of consideration

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 1980 8] 79–82.

Poole, J. *Casebook on Contract Law*. (London: Blackstone, 2001) fifth edition [ISBN 1 8417 4217 1] 116–118.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 79–88.

In the 'classic' definition the essence of consideration is said to be benefit to the promisor **or** detriment to the promisee, see:

- *Currie* v *Misa* (1875).

Because of the rule that 'consideration must move from the promisee', detriment to the promisee will be present in nearly all cases and benefit to the promisor is often merely a by-product of this detriment, but either one is sufficient. It must be remembered, however, that 'detriment' does not necessarily imply suffering net loss or disadvantage: the promisee incurs a detriment by doing an act, making a promise or refraining from doing an act, however small or insignificant, provided that it has been agreed that she should do the act, etc. 'in return for' the promise. See:

- *Combe* v *Combe* (1951).

Note also the difficulty of deciding whether doing the act is in return for the promise or merely a condition attached to it – the test is the intention of the parties as shown (objectively) by 'what they said and did'. See:

- *Chappell* v *Nestle* (1960).

Activities

1. Define 'executory' and 'executed' consideration, respectively.
2. Person A orders a TV set from a department store over the telephone. The set is to be delivered to her home and she is to pay on delivery. Does this arrangement constitute a binding agreement? If so, what is the consideration for A's promise to pay? What other promises is she making?

The adequacy of consideration

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 9427 3] 83–88.

Poole, J. *Casebook on Contract Law*. (London: Blackstone, 2001) fifth edition [ISBN 1 8417 4217 1] 119–142.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 90–97.

The most important rule of law with regard to consideration is that it need not be adequate. It is said that it must have 'some value in the eye of the law' but, consistent with the principle that a nominal consideration is good consideration, the value may be slight, indeed negligible. See:

- *Chappell* v *Nestle* (1960) for a good modern illustration of the 'peppercorn theory' of consideration.

'Value' is essentially a subjective matter, that is, a thing has value if the parties attribute value to it. See:

- *Haigh* v *Brooks* (1839).

Compare the similar approach to the compromise of doubtful claims. See:

- *Callisher* v *Bischoffsheim* (1870): the parties' belief that the claim was valid, though it was not, meant that by agreeing not to pursue the claim the plaintiff gave up something of value
- *Pitt* v *PHH Asset Management* (1993): nuisance value of a threat to seek an injunction, even though none would have been granted.

Note also:

- *Alliance Bank* v *Broom* (1864): creditor's forbearance to enforce his rights as consideration for debtor's promise.

On the other hand, a promise will not be a valid consideration if it is too vague or uncertain – but some degree of vagueness is clearly acceptable. Contrast:

- *White* v *Bluett* (1853)
- *Ward* v *Byham* (1956).

Note that, in some of the cases of 'trifling' consideration, the courts seem to be classifying obligations as contractual when the particular issue might be thought to fall more naturally under the heading of some other kind of obligation. See:

- *Bainbridge* v *Firmstone* (1838): liability of 'bailee', here a borrower, to restore the goods to the owner in their original state. (Is the person who borrows gratuitously not under such an obligation?)
- *De la Bere* v *Pearson* (1908): negligent financial advice – the problem would now be seen as one of liability in tort.

Activities

1. Which of the following decisions is most in accordance with the spirit of the 'peppercorn' theory of consideration:
   - *White* v *Bluett*
   - *Ward* v *Byham* or
   - *Pitt* v *PHH Asset Management*?
2. Can it be good consideration to promise:
   a. to give up smoking
   b. to work hard for an exam?[3]

[3] *Compare* Hamer *v* Sidway.

Past consideration

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 9427 3] 101–103.

Poole, J. *Casebook on Contract Law.* (London: Blackstone, 2001) fifth edition [ISBN 1 8417 4217 1] 143–150.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 82–85.

The general rule is said to be that the consideration must be provided as part of the same transaction as the promise: a detriment previously incurred by the promisee or a benefit previously conferred on the promisor will not be good consideration. In other words, past consideration is not good consideration. See:

- *Roscorla* v *Thomas* (1842)
- *Re McArdle* (1951).

Most of this rule is, however, swallowed up by the exceptions to it – especially by the cases allowing past services to be good consideration for a later promise to pay or to do some other act in return. See:

- *Lampleigh* v *Brathwait* (1615)
- *Re Casey's Patents* (1892)
- *Pao On* v *Lau Yiu Long* (1979).

Note especially the statement in *Pao On* of the three requirements for the operation of this exception and the flexibility of the second requirement, an (objectively) 'inferred' intention that the services should be remunerated.

Activity

C and D are business colleagues. They have been attending a meeting which has gone on so long that D has missed the last train home. As the place where the meeting was held is 100 miles from D's home, C offers to drive D home. When they reach D's home, she thanks C and promises to pay him £50 'for his trouble'. Is this promise binding?

Performance of an existing duty

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 9427 3] 88–93.

Poole, J. *Casebook on Contract Law.* (London: Blackstone, 2001) fifth edition [ISBN 1 8417 4217 1] page 151.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 100–117.

The promisee may already be under a duty imposed by law, for example as in

- *Collins* v *Godefroy* (1831)

or by contract (with the promisor or with a third party) to perform the act, a duty which is now asserted as consideration for the promise. Can this be valid consideration? It may well be that the promisee in such a case does not incur any detriment the law can recognise, but it by no means follows that the promisor obtains no benefit when performance of the promisee's duty is secured by a promise of further payment. To make a cash payment may be far cheaper and more convenient than to take legal proceedings (assuming that an **effective** legal remedy exists, which may not be the case). The difficulty is that, if the promisee is admitted to be providing consideration by performing or promising to perform his existing duty, he may be tempted to take unfair advantage of the strong bargaining position this puts him in. The 'safe' solution therefore was to deny that performance of the promisee's existing duty could be consideration, see:

- *Stilk* v *Myrick* (1809): or was the decision indeed based on public policy?

The courts were always remarkably flexible in applying this rule: it does not apply where the promisee 'goes beyond his duty' by however little, see:

- *Hartley* v *Ponsonby* (1857)
- *Ward* v *Byham* (1956)
- *Glasbrook Bros* v *Glamorgan CC* (1925)
- *Harris* v *Sheffield United* (1987).

The Court of Appeal has now opened a door to the recognition of the benefit to the promisor as good consideration even where the promisee does not exceed his existing (contractual) duty, see:

- *Williams* v *Roffey* (1990).

The precise limits of this decision still need to be worked out but it must be significant that the court placed particular emphasis on the facts that the defendants hoped to avoid incurring penalties under their own main contract and that the plaintiff had not used any form of economic (or other) duress. See

- *Re Selectmove Ltd (1995)*
- In *Atlas Express v Kafco (1989)* there was clear economic duress and the promise of additional payment was also held to be unenforceable for want of consideration.

Note that the performance or promise of performance of a duty owed by contract to a third party has already been fully accepted as consideration. See:

- *Shadwell* v *Shadwell* (1860)
- *Scotson* v *Pegg* (1861)
- *New Zealand Shipping* v *AM Satterthwaite* (1975)
- *Pao On* v *Lau Yiu Long* (1979).

Activities

1. Who has to decide how many police officers are 'required' to maintain order at a football ground? Do you think that the *Glasbrook* decision might open the way to abuse by the police authorities of their position?
2. Is the distinction between a duty owed to a third party and a duty owed to the promisor logical? Does the benefit to the promisor differ in the two cases?
3. What is the consideration for the promise of a pay rise?

Part payment of a debt

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 9427 3] 90–93.

Poole, J. *Casebook on Contract Law.* (London: Blackstone, 2001) fifth edition [ISBN 1 8417 4217 1] 143–149.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 100–117.

The most obvious refusal by the courts to accept commercial benefit as providing good consideration occurs with the so-called Rule in Pinnel's Case, affirmed by the House of Lords in

- *Foakes* v *Beer* (1884).

By this rule the creditor is allowed to go back on what seems to be a perfectly sensible arrangement and insist on full payment of the debt because part payment 'cannot be' consideration for the creditor's promise to forgo the balance of the debt.

The artificiality of the rule is emphasised by the ease with which it can be evaded, any fresh consideration (however minimal) will be sufficient, and the courts' readiness to make exceptions to it. See, for example:

- *Hirachand Punamchand* v *Temple* (1911).

However, the continued existence of the rule and its potential for injustice prompted Lord Denning to put forward the idea of 'promissory estoppel' as a counter to the Rule in Pinnel's Case.[4]

[4] *See next section.*

Activities

1. What justification was given for allowing payment by a third party to be an exception to the Rule in Pinnel's Case? Do you find it convincing?
2. How many other ways of avoiding the Rule can you think of?
3. Can the reasoning in *Williams* v *Roffey* be applied to a promise of part payment of a debt?[5]

[5] *Compare* Re Selectmove Ltd *(1995).*

Promissory estoppel

Essential reading

McKendrick, E. *Contract Law*. (Basingstoke: Macmillan, 2000) fourth edition [ISBN 0 3337 9427 3] 108–121.
Poole, J. *Casebook on Contract Law*. (London: Blackstone, 2001) fifth edition [ISBN 1 8417 4217 1] 151–174.

Further reading

Furmston, M.P. *Cheshire, Fifoot and Furmston's Law of Contract*. (London: Butterworths, 2001) 14th edition [ISBN 0 4069 3058 9] 107–116.

This is the name usually given to the principle stated by Lord Denning (then Denning J) in

- *High Trees* (1947)

which he asserted, relying on

- *Hughes* v *Metropolitan Railway* (1877)

would have prevented the lessors from going back on their promise to accept a reduced rent, in spite of the absence of consideration for the promise because of Pinnel's case. Although convenient, the name promissory estoppel is rather misleading, for in

- *Jorden* v *Money* (1854)

the House of Lords held that only a representation of **fact,** not a promise, can give rise to an estoppel, and the principle of 'promissory' estoppel has nothing in common with estoppel in its original sense. Estoppel is a much over used word, being applied to at least two other principles with which the *High Trees* case is not concerned – 'proprietary' estoppel and the 'estoppel by convention' illustrated by

- *Amalgamated Investment and Property* v *Texas Commerce International Bank* (1981).

It is most important not to think of the various types of estoppel as being merely species of the same genus and in particular not to assume that they have the same or similar rules.

Particular attention should be given to the limits on the *High Trees* principle which have been recognised or revealed in later cases. See especially:

- *Combe* v *Combe* (1951): 'shield not a sword' This was confirmed in

  Baird v *Marks & Spencer* (2001): the doctrine does not found a cause of action.
- *Woodhouse* v *Nigerian Produce Marketing* (1972)
- *The Scaptrade* (*Scandinavian Trading* v *Flota Petrolera*) (1983): there must be a clear representation by the creditor that he will not enforce his strict rights
- *D and C Builders* v *Rees* (1966): a creditor may resume his strict rights if this is 'not inequitable'
- *Tool Metal Manufacturing* v *Tungsten Electric* (1955): a creditor may resume his strict rights on giving notice that he wishes to be paid the full amount and then allowing a reasonable time for the debtor to comply; this means that the principle does not extinguish obligations, but merely suspends them.

Note the uncertainty over whether the debtor must have acted 'to his detriment'. See:

- *Ajayi* v *Briscoe* (1964).

Contrast:

- *Societe Italo-Belge* v *Palm Oils (Malaysia) (The Post Chaser)* (1982).

Note the similarity between 'waiver' and 'forbearance' and the *High Trees* principle.[6]

[6] *See Furmston, M.P.* Cheshire, Fifoot and Furmston *(2001) 624–627.*

Activities

1. In deciding whether or not it was inequitable for the creditor to go back on his promise, what might the court take into account? Would it look at an unexpected improvement in the debtor's finances, for example?
2. What about a sudden deterioration in the debtor's position?[7]
3. If the creditor has promised to give the debtor more time to pay (e.g. 'until your business picks up'), could he cancel the concession by giving reasonable notice under the *Tool Metal* principle? If so, what is the practical importance of the *High Trees* principle?
4. What does the principle really add to that of *Hughes* v *Metropolitan Railway* (1877)? Contrast Lord Denning's reasoning with that of the other judges in:
   - *W.J. Alan* v *El Nasr* (1972)
   - *Brikom Investments* v *Carr* (1979).
5. Would it not be inconsistent with *Foakes* v *Beer* if the principle could be used to extinguish debts? If so, how could a judge sitting in the High Court overcome a contrary decision of the House of Lords? If *Hughes* v *Metropolitan Railway* is said to be inconsistent with *Foakes* v *Beer,* how did the House of Lords in *Foakes* v *Beer* fail to notice that fact?
6. Would it be consistent with *Foakes* v *Beer* to say that, in the case of a promise not to enforce a periodic payment such as rent, the *High Trees* principle can have the effect of extinguishing the right to those payments which fall due before the expiry of due notice by the creditor to resume his strict rights?

[7] *Compare* Williams *v* Stern *(1879).*

Summary

Consideration has a relatively large amount of case law but only a small number of examinable features. It is therefore essential to demonstrate a thorough knowledge of the cases when answering questions on this topic. The section headings in this chapter correspond closely to the themes on which the examiner can draw.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- distinguish between executory, executed and past consideration, and their respective effects
- define and apply the requirement of adequacy of consideration
- discuss the extent to which performance of an existing duty can be consideration
- discuss the scope and effect of the rule in Pinnel's Case and the promissory estoppel principle.

Sample examination question

Alban's house was badly damaged by a storm in March. He engaged Bruno, a builder, to repair the damage. Bruno told Alban that the work would cost £4,000 and that it would be finished by 1 May. Alban wanted to put the house up for sale in May and accepted Bruno's terms.

Bruno started work early in April but his progress was hampered by bad weather. Two weeks later he informed Alban that he could only continue the work if Alban agreed to raise the contract price to £5,000, to cover overtime costs. Reluctantly Alban promised to pay the new price. Bruno then completed the repairs before the end of April and sent Alban his bill for £5,000 but Alban said that he was now in financial difficulties and could only afford to pay £3,000. Fearing that he would otherwise receive no payment at all, Bruno accepted £3,000 in full settlement. Bruno recently learned that Alban plans to go to Africa on safari for two months later this year.

Advise Bruno whether he has a right to any further payment from Alban.