

CONSIDERATION

INTRODUCTION

The mere fact of agreement alone does not make a contract. Both parties to the contract must provide consideration if they wish to sue on the contract. This means that each side must promise to give or do something for the other. (Note: if a contract is made by deed, then consideration is not needed.)

For example, if one party, A (the promisor) promises to mow the lawn of another, B (the promisee), A's promise will only be enforceable by B as a contract if B has provided consideration. The consideration from B might normally take the form of a payment of money but could consist of some other service to which A might agree. Further, the promise of a money payment or service in the future is just as sufficient a consideration as payment itself or the actual rendering of the service. Thus the promisee has to give something in return for the promise of the promisor in order to convert a bare promise made in his favour into a binding contract.

DEFINITION

Lush J. in *Currie v Misa* (1875) LR 10 Exch 153 referred to consideration as consisting of a detriment to the promisee or a benefit to the promisor:

“... 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 definition given by Sir Frederick Pollock, approved by Lord Dunedin in *Dunlop v Selfridge Ltd* [1915] AC 847, is as follows:

“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.”

TYPES OF CONSIDERATION

1. EXECUTORY CONSIDERATION

Consideration is called "executory" where there is an exchange of promises to perform acts in the future, eg a bilateral contract for the supply of goods whereby A promises to deliver goods to B at a future date and B promises to pay on delivery. If A does not deliver them, this is a breach of contract and B can sue. If A delivers the goods his consideration then becomes executed.

2. EXECUTED CONSIDERATION

If one party makes a promise in exchange for an act by the other party, when that act is completed, it is executed consideration, eg in a unilateral contract where A offers £50 reward for the return of her lost handbag, if B finds the bag and returns it, B's consideration is executed.

RULES GOVERNING CONSIDERATION

1. CONSIDERATION MUST NOT BE PAST

If one party voluntarily performs an act, and the other party then makes a promise, the consideration for the promise is said to be in the past. The rule is that past consideration is no consideration, so it is not valid and cannot be used to sue on a contract. For example, A gives B a lift home in his car. On arrival B promises to give A £5 towards the petrol. A cannot enforce this promise as his consideration, giving B a lift, is past. See:

Re McArdle [1951] 1 All ER 905.

EXCEPTIONS TO THIS RULE:

(A) PREVIOUS REQUEST

If the promisor has previously asked the other party to provide goods or services, then a promise made after they are provided will be treated as binding. See:

Lampleigh v Braithwait (1615) Hob 105.

(B) BUSINESS SITUATIONS

If something is done in a business context and it is clearly understood by both sides that it will be paid for, then past consideration will be valid. See:

Re Casey's Patents [1892] 1 Ch 104.

Note: The principles in *Lampleigh v Braithwait* as interpreted in *Re Casey's Patents* were applied by the Privy Council in:

Pao On v Lau Yiu Long [1980] AC 614

(C) THE BILLS OF EXCHANGE ACT 1882

Under s27(1) it is provided that any antecedent debt or liability is valid consideration for a bill of exchange. For example, A mows B's lawn and a week later B gives A a cheque for £10. A's work is valid consideration in exchange for the cheque.

2. CONSIDERATION MUST BE SUFFICIENT BUT NEED NOT BE ADEQUATE

Providing consideration has some value, the courts will not investigate its adequacy. Where consideration is recognised by the law as having some value, it is described as "real" or "sufficient" consideration. The courts will not investigate contracts to see if the parties have got equal value. See:

Chappell & Co Ltd v Nestle Co Ltd [1959] 2 All ER 701.

3. CONSIDERATION MUST MOVE FROM THE PROMISEE

The person who wishes to enforce the contract must show that they provided consideration; it is not enough to show that someone else provided consideration. The promisee must show that consideration

"moved from" (ie, was provided by) him. The consideration does not have to move to the promisor. If there are three parties involved, problems may arise. See:

Price v Easton (1833) 4 B & Ad 433

4. FOREBEARANCE TO SUE

If one person has a valid claim against another (in contract or tort) but promises to forbear from enforcing it, that will constitute valid consideration if made in return for a promise by the other to settle the claim. See:

Alliance Bank v Broom (1864) 2 Dr & Sm 289.

5. EXISTING PUBLIC DUTY

If someone is under a public duty to do a particular task, then agreeing to do that task is not sufficient consideration for a contract. See:

Collins v Godefroy (1831) 1 B & Ad 950.

If someone exceeds their public duty, then this may be valid consideration. See:

Glassbrooke Bros v Glamorgan County Council [1925] AC 270.

6. EXISTING CONTRACTUAL DUTY

If someone promises to do something they are already bound to do under a contract, that is not valid consideration. See:

Stilk v Myrick (1809) 2 Camp 317.
cf *Hartley v Ponsonby* (1857) 7 E & B 872.

The principle set out in *Stilk v Myrick* was amended by the following case. Now, if the performance of an existing contractual duty confers a practical benefit on the other party this can constitute valid consideration. See:

Williams v Roffey Bros Ltd [1990] 1 All ER 512.

7. EXISTING CONTRACTUAL DUTY OWED TO A THIRD PARTY

If a party promises to do something for a second party, but is already bound by a contract to do this for a third party, this is good consideration. See:

Scotson v Pegg (1861) 6 H & N 295.

8. PART PAYMENT OF A DEBT

See next handout for details.