

Consideration & Intention

Consideration

Consideration may be defined as what one party to an agreement is giving, or promising, in exchange for what is being given or promised from the other side. It provides the mutuality which makes an agreement enforceable.

Consideration involves a detriment to the party providing it, or a benefit to the party receiving it.

Mutual promises are sufficient to constitute consideration.

Consideration need not be 'adequate'. The value of what is provided by way of consideration does not have to match what is being given in exchange: *Thomas V Thomas (1842)*.

Consideration must be 'sufficient'. It must be of economic value (*White V Bluett - 1853*), but this requirement is not applied very strictly: *Chappell V Nestle (1960)*; *De La Bere V Pearson (1908)*.

Past consideration is no consideration: *Re McArdle (1951)*. But note the exceptions as set out in *Pao On V Lau Yiu Long (1980)*, where there is (1) a prior request; (2) an exception of payment; and (3) the payment would have been legally enforceable if promised in advance.

Performance of Existing Duties

The performance of existing duties:

| Imposed by Law

This may well not amount to consideration (*Collins V Godefroy - 1831*) unless something additional is provided (*Glasbrook V Glamorgan CC - 1925*). But note Lord Denning's opposing view (*eg Williams V Williams - 1957*).

| Owed to a Third Party Under Another Contract

This will be good consideration: *Shadwell V Shadwell (1860)*; *The Eurymedon (1975)*; *Pao On V Lau Yiu Long (1980)*.

| Owed to Same Promiser Under a Contract

The position is uncertain. *Stilk V Myrick (1809)* states that this is not a good consideration, unless something additional is provided (*Hartley V Ponsonby (1857)*; *Williams V Roffey (1990)*), however, has established a potentially broad exception to this.

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Consideration & the Variation of Contracts

An agreed variation which is supported by consideration will be fully enforceable.

| The Concept of Waiver

A party may waive rights under a contract for a fixed period, or until notice is given to terminate the waiver:
Charles Rickards V Oppenheim (1950).

This was a common law doctrine, now taken over by equity.

Note the link with estoppel, which operates in a similar way in relation to statements of existing fact only:
Jorden V Money (1854).

| The Doctrine of ' Promissory Estoppel'

Invented by Denning in *Central London Property Trust V High Trees House (1947)* (relying on *Hughes V Metropolitan Rly - 1877*) - 'a promise intended to be binding intended to be acted upon and in fact acted on, is binding in so far as its terms properly apply'.

Promissory Estoppel & Consideration

Promissory estoppel does not destroy the doctrine of consideration, because:

- | It only applies where there is an existing legal relationship: *Durhim Fancy Goods Ltd V Michael Jackson (Fancy Goods) Ltd (1968)*;
- | The promisee must have relied on the promise - though not necessarily to the promisee's detriment: *WJ Alan & Co V EL Nasr Export & Import Co (1972)*;
- | The doctrine can only be used as a shield not a sword: *Combe V Combe (1951)*;
- | It must be inequitable for the promisor to go back on the promise: *D & C Builders V Rees (1966)*; *The Post Chaser (1982)*;
- | The doctrine is , at least in some circumstances, only suspensory in its effect: *Tool Metal Manufacturing Co V Tungsten Electric Company (1955)*. Note that is not clear to what extent this can or should apply outside the context of 'continuing' contracts (such as leases, or agreements for royalty payments).

Promissory estoppel & the Part Payment of Debts

The doctrine of promissory estoppel and the part payment of debts may be taken to limit the common law rule as laid down in *Pinnel's case (1602)* and *Foakes V Beer (1884)* (that is , that payment of less than is owed on the due date can never satisfy the full debt, though payment early, or at a different place, or with something other than money, may do so).

Other Types of Estoppel

Note 'Estoppel by Convention' (*Amalgamated investment and Property Co Ltd V Texas Commerce International Bank Ltd-1981*); and also 'Proprietary Estoppel' (*Carbb V Arun District Council - 1975*).

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Atiyah's View of Consideration

Atiyah argues that 'Consideration' originally meant a 'reason for enforcing an agreement'. Problems have arisen from a misunderstanding of the case of *Jorden V Money*, and the development of a rather rigid doctrine of consideration. It would be more satisfactory to return to a concept of 'reasonable reliance' as the basis for enforcing agreements, as opposed to the current very formalistic approach, as exemplified by *Foakes V Beer*.

Intention to Create Legal Relations

The identification of an intention to create legal relations depends on presumptions:

| Domestic Agreements

Presumed not to be intended to be legally binding: *Balfour V Balfour (1919)*. Presumption can be rebutted, for example, where agreement is made in connection with the break-up of a marriage (*Merritt V Merritt - 1970*), or one party has undertaken a major commitment indicating an intention to be legally bound (*Parker V Clark - 1960*).

| Commercial Agreements

Will be presumed to be binding, and this presumption will be difficult to rebut: *Edwards V Skyways - 1964*. Very clear words will be needed in order to do so: *Rose & Frank Co V Crompton Bros - 1925*. Note also the effect of 'comfort letters' as discussed in *Kleinwort Benson V Malaysian Mining Corporation - 1989*.