OCR
RECOGNISING ACHIEVEMENT

SPECIMEN

ADVANCED GCE

LAW

Unit G156: Law of Contract Special Study

Specimen Special Study Materials

UNIT G156 MATS

INSTRUCTIONS TO TEACHERS

- May be opened and given to candidates upon receipt.

INSTRUCTIONS TO CANDIDATES

- This copy may **not** be taken into the examination room.

SOURCE 1

Consideration means some thing which is of some value in the eye of the law, moving from the plaintiff: it may be of some benefit to the plaintiff or some detriment to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration.

Adapted from the judgment of Patteson J in *Thomas v Thomas* [1842] 2 QB 851

SOURCE 2

It has been settled for well over three hundred years that the courts will not inquire into the 'adequacy of consideration'. By this is meant that they will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems unfair. The promise must, indeed, have been procured by the offer of some return capable of expression in terms of value. A parent, who makes a promise 'in consideration of natural love and affection' or to induce his son to refrain from boring him with complaints, as in *White v Bluett*, cannot be sued upon it, since the essential elements of a bargain are lacking. But if these elements be present the courts will not balance the one side against the other. The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium.

A modern illustration of the premise that it is for the parties to make their own bargain is afforded by the current practice of manufacturers to recommend the sale of their goods by offering, as an inducement to buy, something more than the goods themselves. In *Chappell & Co Ltd v Nestle Co Ltd* (1960) the plaintiffs owned the copyright in a dance tune. Nestle offered records of the tune to the public for 1s 6d, but required, in addition to the money, three wrappers of their sixpenny bars of chocolate. When they received the wrappers they threw them away. Their main object was to advertise the chocolate, but they also made a profit on the sale of the records. The plaintiffs sued the defendants for infringement of copyright. The defendants offered royalty based on the price of the record. The plaintiffs refused the offer, contending that the money price was only part of the consideration and that the balance was represented by the three wrappers. The House of Lords by a majority gave judgment for the plaintiffs. It was unrealistic to hold that the wrappers were not part of the consideration. The offer was to supply a record in return, not simply for money, but for the wrappers as well.

Adapted from *Cheshire, Fifoot and Furmston's Law of Contract* Furmston (1996) Butterworths pp. 84-7

SOURCE 3

The question is whether the three wrappers were part of the consideration. I think that they are part of the consideration. They are so described in the offer. 'They [the wrappers] will help you to get smash hit recordings.' It is said that, when received, the wrappers are of no value to the respondents, the Nestle Co Ltd. This I would have though to be irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be goods consideration if it is established that the promissee does not like pepper and will throw away the corn.

Adapted from the judgment of Lord Somervell in *Chappell and Co Ltd v Nestle Co Ltd* [1960] AC 87

SOURCE 4

Although a nominal consideration will suffice at law, there are cases in which the act or forbearance, promised or performed, is of such a trifling character that it becomes doubtful whether it can be regarded as consideration at all.

The reason for this rule, however, is not to be found in the trifling value of the consideration, but in the requirement that it must be given in exchange for the promise.

This last requirement also explains the general rule that 'past consideration' is no consideration. This means that an act done before the promise was made cannot normally be the consideration for it. Consideration is, for example, past where, after an employee has retired, his employer promises to pay him a sum of money in recognition of his past services. The same is true where goods are sold and at some later time the seller gives a guarantee as to their quality. But there is obviously some elasticity in the notion of past consideration. If the promise and the previous act are substantially one transaction, the consideration is not past merely because there is a (relatively short) interval of time between them.

An act for which no recompense was fixed before it was done can constitute consideration for a subsequent promise to pay for it if it was done at the request of the promisor, if the understanding of the parties when it was done was that it was to be paid for, and if a promise to pay for it would, had it been made in advance, have been legally enforceable. The rule covers the common case in which services are rendered on a commercial basis, but the rate of remuneration is only agreed after they have been rendered. On the same principle, a past promise made at the request of one party can constitute consideration for a counter-promise later made by that party.

Adapted from *An outline of the Law of Contract* GH Treitel (1995) Butterworths pp. 32-33

SOURCE 5

The rule in English law is that 'past consideration is no consideration'. In defining consideration, consideration for a promise has to be given in return for a promise, in other words, there has to be a causal link between the two promises in order for the contract to be enforceable. If a party makes a promise subsequent to some action carried out by the other party, then that promise can only be regarded as an expression of gratitude, a gift, and nothing more.

It should be noted carefully that past consideration means past in relation to the promise that the plaintiff is seeking to enforce and not in relation to the time at which the plaintiff is seeking to enforce the defendant's promise.

Two cases traditionally illustrate the principle as regards past consideration: *Roscorla v Thomas* (1842) 3 QB 234 and the modern authority *Re McArdle* (1951) Ch 669.

In *Lampleigh v Braithwait* (1605) Braithwait had killed another man and asked Lampleigh to secure a pardon. Lampleigh went to considerable effort to secure the pardon for Braithwait who subsequently promised to pay Lampleigh £100. Braithwait then failed to pay the £100 and was sued. Clearly on the basis of past consideration, the efforts of Lampleigh were in the past in relation to the promise to pay and he should have failed in his action. The court, however, held that the original request by Braithwait in fact contained an implied promise that he would reward and reimburse Lampleigh for his efforts. Thus the previous request and the subsequent promise were part of the same transaction and as such were enforceable.

It should be noted that the principle only applies if the plaintiff's services had been rendered at the defendant's request and that it was implicit that both parties must have understood that the plaintiff's services would have to be paid for. Further, the implication of the promise to pay normally only arises in a commercial relationship between the parties.

The principle in *Lampleigh v Braithwait* has been affirmed and restated by Lord Scarman in *Pao On v Lau Yiu Long* [1975] 3 All ER 65 as follows:

An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated further by a payment or the conferment of some other benefit and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.

Adapted from *The Law of Contract* Paul Richards (1997) Pitman pp. 49-50

SOURCE 6

In many contractual situations, it makes perfectly good sense for a party to promise an extra reward in return for the other party performing what he is already obliged to do. Provided that the promise is given freely, it is irrational for the law to obstruct the enforcement of the promise by insisting on the classical requirement of exchange (particularly in the light of the development of an independent doctrine of economic duress). Having greater regard for commercial considerations than for classical theory, in the landmark case of *Williams v Roffey Bros and Nicholls (Contractors) Ltd*, the Court of Appeal held that a promise by A to carry out his existing contractual obligations to B may count as good consideration in relation to a promise freely given by B to pay A an additional sum for the performance of these obligations.

Given the long-standing interpretation of *Stilk v Myrick* in the standard text books how could the plaintiff be entitled to recover any part of the additional payments? It might be argued that in *Stilk v Myrick* the promise was gratuitous, or that the promisor derived no benefit, but these lines of argument seem to be question-begging, and unconvincing. The better answer, and the one most explicitly accepted by Purchas LJ must be that *Stilk v Myrick* was a case involving what would now be recognised as economic duress. Even if we accept, however, that there was no economic duress in *Williams v Roffey* what consideration did the plaintiff provide?

Building on the analogous cases of *Ward v Byham*, *Williams v Williams*, and *Pao On v Lau Yiu Long*, Glidewell LJ summarised the legal position as follows:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to B in return for payment by B; and

(ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and

(iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and

(iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and

(v) B's promise is not given as the result of economic duress or fraud on the part of A; then

(vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.'

But in the light of **(iv)** what practical benefit did accrue to the defendants?

Counsel for the defendants in *Williams v Roffey* conceded that the promise to pay additional sums secured some practical benefit. In particular, it improved the chances of the plaintiff continuing to work which, in turn, meant that the defendants might avoid having to pay liquidated damages for late completion, and might avoid the inconvenience and expense involved in engaging another carpenter to complete the sub-contract work. The point is that the defendants, guided by economic imperatives, preferred to cut their losses rather than gain a Pyrrhic victory by standing on their legal rights.

Adapted from *Key Issues in Contract* John Adams and Roger Brownsword (1995) Butterworths

SOURCE 7

The Board agrees with the submission of counsel for the plaintiffs that the consideration expressly stated in the written guarantee is sufficient in law to support Lau's promise of indemnity. An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance. All three features are present in this case. The promise given by Fu Chip under the main agreement not to sell the shares for a year was at Lau's request. The parties understood at the time of the main agreement that the restriction on selling must be compensated for by the benefit of a guarantee against a drop in price: and such a guarantee would be legally enforceable. The agreed cancellation of the subsidiary agreement left, as the parties knew, the Paos unprotected in a respect in which at the time of the main agreement all were agreed they should be protected.

Adapted from the judgment of Lord Scarman in *Pao On v Lau Yiu Long* [1979] 3 All ER 65 PC

SOURCE 8

The colliery owners repudiated liability on the grounds that there was no consideration for the promise to pay for the police protection and that such an agreement was against public policy. The case was tried by Bailhache J and he entered judgment for the plaintiffs saying: "There is an obligation on the police to afford efficient protection, but if an individual asks for special protection in a particular form, for the special protection so asked for in that particular form, the individual must pay."

This decision was affirmed by a majority on appeal (Banks and Scrutton LJJ; Atkin LJ dissenting). The colliery owners now appeal and ask that judgment should be entered for them.

It appears to me that there is nothing in the first point made for the colliery owners that there was no consideration made for the promise. It is clear that there was abundant consideration. The police authorities thought that it would be best to give protection by means of a flying column of police, but the colliery owners wanted the 'garrison' and promised to pay for it if it was sent.

Adapted from the judgment of Viscount Cave LC in *Glassbrook Bros Ltd v Glamorgan County Council* [1925] AC 270 HL

SOURCE 9

What consideration has moved from the plaintiff to support the promise to pay the extra £10 300 added to the lump sum provision? In the particular circumstances there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April. The defendants were on risk that as a result of the bargain that they had struck the plaintiff would not, or indeed possibly could not, comply with his existing obligations without further finance. As a result of the agreement the defendants secured their position commercially. There was, however, no obligation added to the contractual duties imposed upon the plaintiff under the original contract. Prima facie this would appear to be a classic *Stilk v Myrick* case. It was, however, open to the plaintiff to be in deliberate breach of the contract in order to 'cut his losses' commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to establishing sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment on the facts the judge was entitled to reach the conclusion that consideration existed. I would not disturb that finding.

Adapted from the judgment of Purchas LJ in *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512 CA

SOURCE 10

While consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early nineteenth century when *Stilk v Myrick* was decided. In the late twentieth century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v Myrick* is either necessary or desirable. Consideration there must still be but in my judgment the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.

Adapted from the judgment of Russell LJ in *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512 CA

SOURCE 11

If a party performs an act which is merely a discharge of a pre-existing obligation, there is no consideration, but where a party does more than he was already bound to do, there may be consideration. The pre-existing obligation may arise out of a contract between the same parties, under the public law or out of a contract with a third party.

In relation to the first category, the question to be asked is whether the party claiming to have given consideration has done any more than he was bound to do under a previous contract with the other party. If the answer is no, then there is no consideration furnished for the further promise of the other contracting party.

The third category which is traditionally examined under this heading considers the situation where one party is claiming to have given consideration by doing what he was already bound to do under a pre-existing contract with a third party. However, this category can be distinguished from the previous two in the sense that the performance of the pre-existing duty owed to a third party will invariably be regarded as sufficient consideration for a promise given by the promisee.

Shadwell v Shadwell and *Scotson v Pegg* are often stated as authorities for the principle although the reasoning in the judgments are not without some flaws. Nevertheless, any doubts regarding the validity of the principle were swept away in *New Zealand Shipping Co v AM Satterthwaite & Co* (1975), where on appeal to the Privy Council, the rule in *Scotson v Pegg* was applied. It was held by Lord Wilberforce that 'An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration and does so in the present case: the promisee obtains the benefit of a direct obligation which he can enforce.'

This decision was given further approval by the decision of the Privy Council in *Pao On v Lau Yiu Long* (1980).

Adapted from *Law of Contract* WT Major and Christine Taylor (1996) Pitman pp.53-57

BLANK PAGE

BLANK PAGE

BLANK PAGE

Copyright Acknowledgements:

Sources

Source 1: Adapted from the judgment of Patteson J in Thomas v Thomas [1842] 2 QB 851

Source 2: Adapted from Cheshire, Fifoot and Furmston's Law of Contract Furmston (1996) Butterworths pp. 84-7

Source 3: Adapted from the judgment of Lord Somervell in Chappell and Co Ltd v Nestle Co Ltd [1960] AC 87

Source 4: Adapted from An outline of the Law of Contract GH Treitel (1995) Butterworths pp. 32-33

Source 5: Adapted from The Law of Contract Paul Richards (1997) Pitman pp. 49-50

Source 6: Adapted from Key Issues in Contract John Adams and Roger Brownsword (1995) Butterworths

Source 7: Adapted from the judgment of Lord Scarman in Pao On v Lau Yiu Long [1979] 3 All ER 65 PC

Source 8: Adapted from the judgment of Viscount Cave LC in Glassbrook Bros Ltd v Glamorgan County Council [1925] AC 270 HL

Source 9: Adapted from the judgment of Purchas LJ in Williams v Roffey Bros and Nicholls (Contractors) Ltd [1990] 1 All ER 512 CA

Source 10: Adapted from the judgment of Russell LJ in Williams v Roffey Bros and Nicholls (Contractors) Ltd [1990] 1 All ER 512 CA

Source 11: Adapted from Law of Contract WT Major and Christine Taylor (1996) Pitman pp.53-57