

## RE-EXAMINATION OF THE RULE ON ADEQUACY OF CONSIDERATION IN CONTRACTS

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### Abstract

*The doctrine of consideration is one of the most fiercely debated aspects of the law of contract in Common Law jurisdictions. Consideration emerged during the sixteenth century as an element of actions in assumpsit (breach of promise or undertaking). It has suffered criticism from judges and academics alike. But despite its controversial status, it remains an essential requirement for the formation of contracts not in deed form. From time immemorial, the common law has clearly provided that a promise by a party to perform an act that he or she is already legally bound to perform is not good consideration. Accordingly, a promise received in exchange is not enforceable. This is so whether the promise would have the effect of creating a new contract or modifying the terms of an existing contract. The rule has from time to time been the subject of judicial criticism but nevertheless operated with full vigor until 1991. Hitherto, (except in unilateral contract situations) consideration subsisted in the promises made by the parties at the instant of exchange rendering the promises thenceforth mutually enforceable. The contract or the modified contract effectively existed from that time, unconcerned with what the parties hoped to gain from the exchange or what each in fact gained. The focus of this article is the re-examination of the rule on adequacy of consideration in contracts.*

**Keywords:** Contract, Offer, Acceptance, Consideration, Adequacy

### 1.0 Introduction

A trend runs through the entire gamut of the law of contract, the central purpose been to impose a duty on parties to carry out their respective obligations under it, failing which a party who defaults or refuses to discharge his obligations under the contract will be liable for a breach of contract.<sup>1</sup> What distinguishes a contract from a mere agreement<sup>2</sup> is the fact that if one of the parties fails to honour or discharge his/her promises, the other party may take legal action.<sup>3</sup> On the basis of the principle of law encapsulated in the maxim *ex turpi causa non-oritur actio*, that is, an action does not arise from a base cause; a court does not generally enforce a contract or transaction tainted with illegality or contrary to public policy.<sup>4</sup> It is apposite therefore to lay in vivid terms the principal and nature of law of contract especially as it affects the Nigerian business climate.<sup>5</sup>

Through the doctrine of consideration, contract is largely restricted to the realm of bargains involving an exchange of value between two parties. This is not the only possible approach to contract; in fact, it is unique to Common Law systems.<sup>5</sup> Civil law jurisdictions and the mixed legal systems of Scotland

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<sup>1</sup> P S Atiyah, *Essays on Contract* (Oxford University Press, New York, 1990).

<sup>2</sup> P Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge University Press, Cambridge, 2001).

<sup>3</sup> H Beale and Others (eds), *Cases, Materials and Text on Contract Law* (Hart Publishing, Oxford, 2002).

<sup>4</sup> I Sagay, *Nigerian Law of Contract* (Ibadan: Spectrum Books Ltd 2000).

<sup>5</sup> A Keith, *Business Law* (7<sup>th</sup> edn London: Thomson 2002) 18.

and South Africa do not require consideration for contract formation. The debate surrounding the doctrine of consideration is part of a larger and more fundamental question: which promises should the law enforce? The answer to that question depends on one's view as to why the law of contract exists, and what it should aim to achieve.

Stemming from the rule that a bargain founded upon sufficient consideration be present in order to found a contract came another rule, most famously expressed in the seminal English case of *Stilk v Myrick*.<sup>6</sup> Essentially, Lord Ellenborough held that a promise to perform, or actual performance of, a duty that the promisor was already contractually bound to perform cannot amount to good consideration. In other words, just as consideration must move from each of the parties to form a contract, so too must both parties provide additional consideration where they intend to modify it. This principle came to be known as the 'existing legal duty rule'. In *Harris v Watson*<sup>7</sup> it was said that the rule was founded upon public policy, in that it would prevent parties making extortionate demands of one another during the life of their contract. Whilst it may have this effect, Lord Ellenborough in *Stilk v Myrick* stressed that the rule was in fact founded upon the rules of contract law; agreements to give effect to one-sided modifications were void not because they encouraged impropriety, but because they lacked mutual consideration.<sup>8</sup> This was the view which took root.

One consequence of the consideration requirement is that gratuitous promises are unenforceable unless contained in a deed. In some sense, all promises which are not supported by consideration may be viewed as gratuitous. However, here 'gratuitous' will be used to refer to promises made for purely altruistic motives, such as a promise to make a gift.<sup>9</sup> Unlike in French law, where a donor's intention to make a gift is sufficient 'cause' to support a contract,<sup>10</sup> at Common Law the promisor's altruistic motives are not consideration.<sup>11</sup> This point is illustrated by *Chambers v Commissioner of Stamp Duties*.<sup>12</sup> The plaintiff's mother held a mortgage over his property. She attempted to forgive some of the interest owing over a number of years, recording each forgiveness in writing. Blair J held that, although the mother had clearly intended to forgive the debt, that intention had not been carried out in law. A gift can only be made by deed or actual delivery.<sup>13</sup> Though the forgiveness was recorded in writing, it was not a deed, and the thing being gifted (a chose in action) was not capable of delivery.<sup>14</sup> Blair J's finding was upheld in the Court of Appeal. There was no evidence of any "bargain" for good consideration between the mother and son.<sup>15</sup> The Court confirmed that "a mere intention to forgive,

<sup>6</sup> (1809) 2 Camp. 317; 170 ER 1168.

<sup>7</sup> (1791) Peake 102; 170 ER 94.

<sup>8</sup> *Ibid.*

<sup>9</sup> This is in contrast to promises which are not supported by consideration but are collateral to an exchange (e.g. a firm offer or variation of one party's rights or obligations under an existing contract). Such promises are not 'gratuitous' in the sense of being made for altruistic motives. They are generally made in the hope of self-benefit. For example, a firm offer is made in the hope of eventually securing a contract.

<sup>10</sup> B Nicholas, *French Law of Contract* (London: Butterworths 1982) 118.

<sup>11</sup> *Thomas v Thomas* (1842) 114 ER 330, 334.

<sup>12</sup> [1943] NZLR 504.

<sup>13</sup> *Ibid.*, 521.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, 527.

which remains in an unperfected state, is, in itself, of no effect either at law or in equity.”<sup>16</sup> It is against this backdrop that this article re-examines the rule on adequacy of consideration in contracts.

## 2.0 Conceptual Clarification

This section examines concepts that are relevant to this study.

### 2.1 Contract

A contract may be defined as an agreement enforceable by the law between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises.<sup>17</sup> Abiola Sees contract as simple an agreement made between two or more competent parties which the law will enforce.<sup>18</sup>

Generally, at common law only a party to a contract or persons who are privy to a contract can sue and be sued on it. In other words, a stranger to a contract cannot sue or be sued on a contract even if it was made for his benefit or purported to give him a right to sue. In *Anuruba v E.C.B Ltd*,<sup>19</sup> one Nicholas Osuji on 24<sup>th</sup> July 1995 entered into a written agreement with the 1<sup>st</sup> respondent for the sale of a motor vehicle to the respondent for the sum of ₦100, 000 and the 1<sup>st</sup> respondent paid the sum of ₦70 00 to the seller. It was agreed between the seller and the 1<sup>st</sup> respondent that the letter would give possession of the motor vehicle to the appellant who would use same as a taxi in trust for the 1<sup>st</sup> respondent.

Whereupon, the appellant took an overdraft of ₦100, 000 from the 1<sup>st</sup> respondent and it was agreed that the appellant would repay the overdraft and interest from the proceeds of his use of the motor vehicle as a taxi, and that upon full payment of the overdraft and accrued interest on or before January 31<sup>st</sup> 1996, the 1<sup>st</sup> respondent would pay the balance purchase of ₦30, 00000 for the motor vehicle and the appellant would acquire ownership of the motor vehicle. In furtherance to the agreements before the said Nicholas Osuji and the 1<sup>st</sup> respondent and the agreement between the motor vehicle and the 1<sup>st</sup> respondent, the motor vehicle and its documents were handed over to the appellant who started using the motor vehicle as a taxi. But after operating for about 4½ months, the appellant was only able to pay the sum of ₦14,200 into his account with the 1<sup>st</sup> respondent. Consequently, the 1<sup>st</sup> respondent took possession of the motor vehicle.

The court dismissed the appellant’s suit. It however, made what it called consequential order to the effect that the 1<sup>st</sup> respondent should not sell the motor vehicle until a given date in order to enable the appellant pay the balance sum owed to the 1st respondent. The appellant was dissatisfied with the judgment of the trial court and he appealed to the Court of Appeal, the Court of Appeal dismissed the appeal and that generally, at common law, only parties to a contract or persons who are privy to a contract can sue and be sued on it. In other words, a stranger to a contract cannot sue even if it was

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<sup>16</sup> *Ibid*, 530.

<sup>17</sup> D Keenan, *Advanced Business Law* (10<sup>th</sup> edn London: Pitman Publishing Ltd. 1997).

<sup>18</sup> S Abiola, *Introduction to Business Law in Nigeria* (Lagos: Malthouse Press Ltd. 2005).

<sup>19</sup> (2005) 10 NWLR (Pt 933) 20.

made for his benefit, or purport to give him a right to sue. This is because such stranger has nothing to do with the offence and more importantly, because he did not give any consideration to the offeror. However, by notice of the equitable doctrine of constructive trust a party to a contract can constitute himself a trustee of rights under a contract for a third part and as such confer such third party with rights in the contract which are enforceable at equity.

## 2.2 Consideration

For a promise to be enforceable as a contract in Common Law jurisdictions, it must either be contained in a deed or supported by consideration.<sup>20</sup> Lord Dunedin defined consideration in *Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*<sup>21</sup> as ‘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’.

This notion of consideration as the price paid for a promise has been adopted in common law countries.<sup>22</sup> Consideration may take the form of a benefit conferred on the promisor, a detriment incurred by the promisee at the promisor’s request, or a promise to confer a benefit or suffer a detriment.<sup>23</sup> For example, in an ordinary contract of sale, the consideration given for the promise to transfer title to the property can be either a promise to pay the purchase price, or actual payment. The consideration must be given in response to the promise, or, if given prior to the promise, at the promisor’s request and in such a manner that it can be reasonably understood as forming part of the same transaction.<sup>24</sup> A new promise that is not supported by new consideration is unenforceable; past consideration is insufficient.<sup>25</sup>

Through the doctrine of consideration, the Common Law purportedly requires a “mutual exchange” to form a contract. This reflects the fact that the Common Law models its concept of contract on commercial transactions, in contrast to legal systems such as France and Scotland, which have a broader understanding of the place of contract in society.<sup>26</sup> The Common Law courts will not, however, inquire into the adequacy of the consideration.<sup>27</sup> The ‘exchange’ need not be of equivalents. In *Mountford v Scott*,<sup>28</sup> an option to purchase land granted in return for payment of £1 was held to be binding, although “the £1 consideration for Mr. Scott's option was merely a token payment to clinch the bargain and did not in any real sense represent a purchase price for the grant of the option.”<sup>29</sup> The New Zealand Court of Appeal in *Melmerley Investments Ltd v McGarry* confirmed that “a Court is concerned only with the presence of consideration and does not make an assessment of the comparative value of the acts or promises of the parties towards one another.”<sup>30</sup> Nominal consideration is sufficient.<sup>31</sup>

<sup>20</sup> *Moschi v Lep Air Services Ltd* [1973] AC 331, 346.

<sup>21</sup> [1915] AC 847, 855.

<sup>22</sup> *Rothmans of Paul Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 523, 328.

<sup>23</sup> *Attorney-General for England and Wales v R* [2002] 2 NZLR 91.

<sup>24</sup> *Pao On v Lau Yiu-Long* [1979] HKLR 225, 234.

<sup>25</sup> *Bob Guinness v Salomonsen* [1948] 2 KB 42.

<sup>26</sup> D Harris and D Tallon (eds), *Contract Law Today: Anglo-French Comparisons* (Clarendon Press, Oxford, 1989) 386.

<sup>27</sup> *Sturlyn v Albany* (1587) 1 Cro Eliz 67, 68.

<sup>28</sup> *Mountford v Scott* [1975] Ch 258.

<sup>29</sup> *Ibid*, 261.

<sup>30</sup> *Melmerley Investments Ltd v McGarry* CA141/01, 6 November 2001, 21.

<sup>31</sup> *Ibid*.

### 3.0 Contract Formation: Elements of a Valid Contract

There are some basic under pins that ought to be present without which a contract cannot be binding or enforceable at law. These essential ingredients are: offer, acceptance, consideration intention to create legal relations and capacity to contract.

#### 3.1 Offer

An offer is an announcement of a person's willingness to enter into a contract. An offer is thus a proposition made by one party (Offeror) to another (Offeree) indicating his willingness to be contractually bound on certain terms provided that those terms are accepted by the other party. An offer may be made expressly or implied from the conduct of a party. It may be made to a particular person or in some cases, to the public at large, where the contract, which eventually comes into being, is a unilateral one; where there is a promise on one side for an act on the other. An offer can thus be made to the public at large. In *Carlill v Carbolic Smoke Ball*,<sup>32</sup> the defendant company who was the manufacturer of a product named Carbolic Smoke ball advertised in a newspaper to the effect that it would pay \$100 to any person who used its product in a specific manner for a minimum of two weeks, and still catches influenza. The defendant further stated that it, had deposited a sum of \$1.000 at the Alliance Bank, Regency street to show our sincerity in the matter!! The plaintiff bought one of the products and used it as specified and still caught influenza. The plaintiff brought an action to compel the defendant is pay her the \$100. The defendant contended in its defense that the advertisement was a mere puff, a statement of confidence in their product and a promise in honour, which was not intended to crate legal relations. That the advertisement was not an offer as it was impossible to contract with the whole world. The defendant was held liable to pay the plaintiff. The court held that the advertisement was not a contract with the world but a unilateral offer and that any one that performs the terms of the offer brings himself into a contractual relationship with the defendant.

An offer is distinguishable from an invitation to treat, for a preposition to amount to an offer but not a mere request, it must be definite, certain and unequivocal. Whilst an invitation to treat remains a mere offer to negotiate. In *Payne V Cave*<sup>33</sup> it was held that an advertisement stating that an auction will be held is not on offer but an invitation to treat. When the auctioneer commences and asks for bids from those attending, the bids are the offer. A contract comes into existence when the auctioneer knocks down his hammer. Until the time any bidder who has not made up his mind to be bound may withdraw his bid.

A capable person must make the offer. In *Ajayi Obe v Executive Secretary, Family Planning Council of Nigeria*<sup>34</sup> the plaintiff was interviewed for a post in the defendant's establishment. The chairman of the interview panel (instead of the secretary) told the plaintiff that he had been offered the job but no letter of offer came from the secretary. It was held that there was no valid offer because a capable person

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<sup>32</sup> (1893) 1QB 256.

<sup>33</sup> (1919) 2 KB 15.

<sup>34</sup> (1957) SC 24.

did not make the offer. In *Olaopa v Obafemi Awolowo University*<sup>35</sup> with a view to erecting commercial building on that concession area in the education zone Ibadan, the respondent invited the appellant to a meeting where he was briefed to design how best to develop their acres of land in the concession area. Before a formal contract could be reached between the parties, the appellant made the design and delivered it together with the quantity survey to the respondent. He forwarded his claim for his fees for the first stage of the work. The respondent refused to pay. The appellant then commenced action at the High Court to recover this said sum. The respondents demanded that there was a contract between them. The court held that they there was no contract between the respondent and the appellant.

### 3.2 Acceptance

An acceptance is an unequivocal final expression by the offeree that he agrees to the terms of the offer as conveyed to him by the offeror. By acceptance of the offer, a contract is said to come into existence as it underscores the bilateral nature of a contract. In *Orient Bank (Nig) Ltd. v Bilante International Ltd.*,<sup>36</sup> the respondent a customer of the appellant bank applied for a loan of Eighteen Million Naira. The appellant made a formal offer of the loan in a letter containing all the terms. The letter was concluded with a statement kindly confirm the above agreement reached at today's meeting by signing and returning the duplicate of the letter. Rather, the respondent wrote another letter containing additional terms outside the terms contained in the appellant's letter. The Court of Appeal held that the respondent's letter constituted a counter offer. Acceptance must be absolute and unconditional. One important form of conditional assert is an acceptance subject to contract meaning that the parties do not intend to be bound until a formal contract is prepared and signed. A counter offer is a rejection of the original offer and has the effect of cancelling the original offer. Where it appears that the offeree is merely asking something which is more in the nature of a question seeking further clarification or information before making up his mind his request for information will not destroy the offer. In *UBA v Tejumola & Sons Ltd.*,<sup>37</sup> the defendants offered to take a lease of the plaintiff's building for a period of 15 years at the rent of N215 per square meter. The letter was boldly headed "subject to contract" the plaintiff accepted the offer and specifically stated that the lease would commence in the 1<sup>st</sup> of May 1982. The defendant thereafter requested for several expensive renovations to the building, which were carried out by the plaintiff. The defendant later refused to go on with the transaction and contended that there was no contract. The Supreme Court held that there was no contract.

Counter offer if accepted by the original offeror, a contract may come into existence, this is in view, of the modern practice of making quotations and placing orders with conditions attached, so that the terms and conditions of the contract which may eventually be made may not be those which the original offeror put forward, since, these may have been changed as a result of battle of forms between the parties.<sup>38</sup>

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<sup>35</sup> (1997) 7 NWLR (Pt 512) 204.

<sup>36</sup> (1997) 8 NWLR (Pt 515) 37.

<sup>37</sup> (1988) 2 NWLR (Pt 79) 662.

<sup>38</sup> B MacDougall, 'Consideration and Estoppel: Problem and Panacea' [1992] (15) *Dalhousie Law Journal*, 265.

Silence does not constitute acceptance. The offeree must indicate his assent either in words, in writing or by conduct. As a general rule a mere intention to accept does not constitute an acceptance. This rule is apposite as it prevents aggressive businessman from forcing others into contractual relation against their will. Where the mode of acceptance is not prescribed, the mode of acceptance will depend on the offer and the surrounding circumstances. Thus, an oral offer implies an oral acceptance. If the offer is by telegram, fax or e-mail then a prompt reply is implied and it is safer to reply by the same means. However, where the offeror has prescribed the mode of acceptance but does not insist on any that mode the rule at common law is that the offered can accept by any mode that is either as fast or faster than the mode prescribed. Where the offeree adopts another mode of acceptance, he must be prepared to bear the risk of his acceptance not arriving as fast as it would have been if he had followed the mode prescribed. In *Afolabi v. Polymera Industries (Nig) Ltd*,<sup>39</sup> the plaintiff who was appointed as an agent of the defendant requested to a “please read study, carefully and sign the duplicate copy attached, signifying your agreement to all points as listed above and return at your earliest convenience for records”. There was no evidence that the plaintiff ever returned the signed duplicate. It is held that there was no acceptance.<sup>40</sup>

### 3.3 Consideration

At Common law, a promise not under seal is enforceable only if it is made in return for another promise or an act; whether a positive act or forbearance.<sup>41</sup> It is part of a bargain. This requirement of *quid pro quid*; that is, ‘something for something’ is called ‘consideration.’ Keith Sees the expression as some benefit accruing to one party, or some detriment suffered by the other.<sup>42</sup> Abiola defines the term as the “price” which one party pays for the promise or act of another side.<sup>43</sup> Pollock sees it as: an act or forbearance of one part 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.<sup>44</sup>

In *Curie v Misa*,<sup>45</sup> it was held that consideration consist of some rights, interests, profits or benefits accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Keenan<sup>46</sup> opines that the definition of the term as adopted by the House of Lords in *Dunlop v Selfridge*<sup>47</sup> is preferred because it properly describes executed consideration by including acts and forbearances and executory consideration by referring to the fact that a promise to do something in the future also amounts to consideration.

If a bargain consists of mutual promises, each promise is the consideration for the other. The contract is concluded as soon as the promises have been exchanged and the consideration is said to be executory,

<sup>39</sup> (1967) 1 All NLR 149.

<sup>40</sup> A Keith, *Business Law* (7<sup>th</sup> edn London: Thomson, 2002).

<sup>41</sup> *Ibid*.

<sup>42</sup> Keith (n 40) 23.

<sup>43</sup> S Abiola, *Introduction to Business Law in Nigeria* (Lagos: Malthouse Press Ltd. 2005).

<sup>44</sup> I Sagay, *Nigerian Law of Contract* (Ibadan: Spectrum Books Ltd. 2000).

<sup>45</sup> (1875) LR 10.

<sup>46</sup> D Keenan, *Advanced Business Law* (10<sup>th</sup> edn London: Pitman Publishing Ltd. 1997) 19.

<sup>47</sup> (1915) AC 847.

which simply means that the consideration to support each promise is another promise and not a performed; executed act. When the consideration is executory, the contract itself is bilateral in the sense that there are two promises for the law to enforce. If the bargain consists of a promise in return for an act, the contract is concluded when the offeree has performed the act. There is thus only one promise to be enforced and the consideration for it is an act already completed. Hence the consideration is said to be executed and the type of consideration is unilateral in nature. By this, it means that before a party can enforce a contract, he/she must show that he has furnished consideration for the contract. Consideration must have some value in the eyes of the law; it must be something of value, reasonably ascertainable and definite.<sup>48</sup>

### **3.4 Intention to Create Legal Relations**

The law will not necessarily recognize the existence of a contract enforceable in a court of law simply because of the presence of mutual promises, it is necessary to establish also that both parties made the agreement with the intention of creating legal relations so that if the agreement was broken the party offended would be able to exercise legally enforceable remedies. Intention to create legal relations is viewed from the standpoint of whether the agreement is a social, domestic or commercial agreement. In domestic agreement like the case of *Balfour v Balfour*,<sup>49</sup> a husband who worked in Ceylon promised to pay his wife £30 when she had to stay in England for medical treatment. The court held that interspouse agreements occur where there are mutual promises and where there is consideration but they are not contracts because the parties did not intend that they should be attended by legal consequences.

Such a presumption may however be rebutted as where the parties expressly state their intention to be legally binding or where the contract is clearly of business nature. Moreover, if a husband and wife are separated their agreements must be treated like agreements between strangers. In *Merritt v Merritt*,<sup>50</sup> M, who had deserted his wife, agreed in writing to transfer the former matrimonial home into her sole name if she paid off the outstanding mortgage installments. When the wife had done so, M. refused to transfer the house but the agreement was held to be enforceable.

### **4.0 The Rule on Adequacy of Consideration in Contracts**

It is crucial to examine whether sufficient consideration means that consideration is adequate. Traditionally, courts distinguished legally sufficient benefit or detriment as opposed to factual benefit or detriment. It is obvious, that consideration must be sufficient, meaning that it must be something of value in the eyes of the law, but does not need to be adequate which is received in return. In *Chappell & Co Ltd v Nestlé Co Ltd*<sup>51</sup> Nestlé factory promised to send a record to people who sent in postal order for 1s. 6d. and three chocolate wrappers. This case illustrates that benefit or detriment must be legally sufficient and that the law is not concentrated on the economic value of the consideration. The next point to consider is what benefits and burdens are legally sufficient. In *White v Bluett*,<sup>52</sup> son sued father's

<sup>48</sup> R N Clive, *General Principles of Law of Contract* (3<sup>rd</sup> edn London: Sweet & Maxwell 1983).

<sup>49</sup> (1919) 2 KB 571.

<sup>50</sup> (1970) LWLR 28.

<sup>51</sup> (1960) AC 87.

<sup>52</sup> (1853) 23 LJ Ex 36.

executors because the father had promised to pay him in return for him to stop complaining about property distribution. Court stated that the son did not have right to complain, because his father could decide how to distribute his property and giving up his habit of complaining was not provided any consideration. This case illustrates that promise to perform an act cannot be vague or uncertain. To sum up, good consideration will be even if the values of the things exchanged are not equivalent but it still needs to have some economic value.<sup>53</sup>

#### **4.1 Enforcement of Bargains by the Court**

It is crucial to analyse the meaning of bargain in contract law. Bargain meaning can be illustrated as a deal or exchange where two parties involve the exchange of something they requested from each other. In *Chappell & Co Ltd v Nestlé Co Ltd*, the court emphasized, that Nestle promise was a bargain, because Nestle requested chocolate wrappers as the consideration and it makes benefit conferred on Nestle. Traditional bargain analysis was done in *Combe v Combe*<sup>54</sup> case, where a man promised his ex-wife to pay 100£ but she could not apply to the court for maintenance. Crucial factor in this case was that court did not find evidence that Mr Combe asked her not to apply to the court. This case illustrates that an act which was done by the plaintiff to detriment or loss can only be consideration if it was requested by the defendant. In *Pneumatic Tyre Co. Ltd v Selfridges & Co. Ltd*<sup>55</sup> case court developed that consideration is the price which promise of the other party is bought. In other words, this judgment illustrates that every promisor intends to get something in return for the promise and he intends to create a bargain and promise which is given for value is enforceable. In *Shadwell v Shadwell*<sup>56</sup> where uncle, who promised his nephew if he married his fiancée he would get annual sum of money until his income reach a certain level. The guidelines for this situation are simple question whether uncle bargains for his nephew marriage to his fiancée. In this particular case court ruled performance of a contractual obligation owed to a third party is a good consideration. Court ruled that in this particular situation nephew had either incurred a detriment by marrying his fiancée or had conferred a benefit on his uncle. This benefit is related to the fact that the uncle must have wanted that his nephew married his fiancée. To sum up, promise is legally binding when the promisor has received a benefit from the promisee or the promise has been relied on the promisee, who would now lose something if the promise is broken.<sup>57</sup>

#### **4.2 Performance of Existing Duty and Legal Benefit**

There are three different situations: existing contractual obligation and non-existing contractual obligations owed to third parties and existing contractual obligations owed to promisor. All these three situations are very important, but existing contractual obligations owed to promisor is related to economic duress and estoppel.<sup>58</sup> One of the reasons why court developed duress and promissory estoppels doctrine was to protect a promisor from contractual modifications. Performance of contractual obligation already owed to the promisor can be easily explained: X makes promise to Y in exchange for doing Y something that Y is already contractually obliged to do. It is important to determine whether

<sup>53</sup> M Hogg, 'Perspectives on Contract Law from a Mixed Legal System' [2009] (29) *OJLS*, 643.

<sup>54</sup> (1951) 2 KB 215.

<sup>55</sup> (1915) AC 847, 855.

<sup>56</sup> (1860) 9 CB NS 159.

<sup>57</sup> M McBryde, 'Promises in Scots Law' [1993] (42) *ICLQ*, 48.

<sup>58</sup> D M Walker, *The Law of Contracts and related Obligations in Scotland* (3<sup>rd</sup> edn, Edinburgh: T&T Clarke, 1995) 9.

there is consideration for X promise if Y does nothing more as Y is obliged to do. This is well illustrated by *Stilk v Myrick*,<sup>59</sup> where two sailors deserted the ship during the voyage to London and the captain promised to share their wages between the remaining crew if they continue the voyage. The captain failed to enforce his promise because crew did not provide consideration for captain's promise to pay extra, they only fulfilled contractual obligation to sail ship to London. *Stilk v Myrick* case can be contrasted with *Hartley v Ponsonby*,<sup>60</sup> where the court illustrated that a promise to pay more can be only enforceable if a legal benefit can be found, because the crew did more than it was expected of them to do. This doctrine seemed to be dominant until the controversial judgment in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>61</sup> case. In this case court took different legal approach than in *Stilk v Myrick* case because Roffey had to pay extra payments to Williams in order to finish the work on time. Court ruled that, Roffey obtains practical benefit because they avoid special penalty clause in their contract and more structured payment scheme was put. This judgement developed that if promisor X obtains practical benefit or obviates a disbenefit it is sufficient consideration for promisor X new promise.

#### 4.3 Consideration and Economic Duress

All parties must act freely if they want to enter into legally binding contract. If party X is forced to make a contract with party Y by threat of violence that renders the contract voidable. In *Occidental Worldwide Investment Corp. v Skibs*,<sup>62</sup> the court developed that duress could take the form of economic duress. Atiyah argues that it is better to concentrate on the nature of choice which is related to reasonableness of the alternatives.<sup>63</sup> Indeed, cases illustrate that consideration and economic duress are often related. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* court find the consideration as factual benefit was the absence of duress, but the court took different legal approach and ruled that in *Adam Opel GmbH v Mitras Automotive*,<sup>64</sup> the court although identified consideration but there were all necessary requirements for economic duress and the contract was voidable. There are two main fundamental factors which helps the court usually to identify whether the pressure to breach contract can lead to duress. The first one is the legitimacy of the pressure and the second one is causative effect of the pressure. The court illustrated that *Williams v Roffey Bros & Nicholls (Contractors) Ltd* can be typical example when the pressure can be legitimate to pay more than the party was obliged to pay, because the promisor enjoyed practical benefit from the promise.

#### 4.4 Estoppel and Consideration

The doctrine of estoppel made clearly that it is possible to enforce the promises where one cannot constitute all traditional requirements of consideration. Academic writers usually illustrate Estoppel as a fundamental principle which prevents party X from making an allegation that contradicts what has previously stated as the truth to party Y. The main purpose of estoppel is to enforce the promises which are not supported by consideration. Although, there are different types of estoppels: estoppel by representation, estoppel by convention, but only promissory estoppel is closely related to this article,

<sup>59</sup> (1809) 2 Camp. 317; 170 ER 1168.

<sup>60</sup> (1875) 7 ER 872.

<sup>61</sup> (1991) 1 QB 1.

<sup>62</sup> (1976) 1 Lloyd's Rep 293.

<sup>63</sup> P S Atiyah, *Essays on Contract* (Oxford University Press, New York, 1990).

<sup>64</sup> (2008) EWHC 3205 (QB).

because promissory estoppel is associated with the future conduct in the context of contract law. In *Hughes v Metropolitan Railway Co*,<sup>65</sup> the court firstly recognised the promissory estoppel doctrine, moreover, this case became more famous for being used to support the decision in *Central London Property Trust Ltd v High Trees House Ltd*,<sup>66</sup> where landlord promised to reduce half of the price during the war, because of lack of tenants. After the war, landlord forgot his promise and claimed the full contract price for the war years. The key question was whether the promise to reduce price was legally enforceable. Court estopped landlord from claiming extra rent and formulated High Trees principle which illustrates creative use of estoppel.

## 5.0 Conclusion

The doctrine of consideration has a long, though by no means uncontroversial, history in the Common Law. The continued existence of the requirement is a result of its embedded status, combined with the relative lack of unjust results produced by the doctrine in the courts. The latter aspect is primarily attributable to the increasingly flexible approach of judges, who ‘find’ consideration in the form of a practical benefit to the promisor, and the recognition by lawyers that there is little point in seeking to enforce gratuitous promises as contracts. consideration requirement has undesirable consequences. This is true in practice, due to the unenforceability of gratuitous promises unless in deed form, and the potential for valuable arrangements collateral to exchanges to be defeated. It is even more true in theory; consideration is unjustified both as a tool for restricting contract to the realm of bargains, and as a formal requirement. It is capable of defeating the legitimate intentions of parties who wish to undertake legally binding obligations. Consideration should be relegated to the status of one form of evidence that a promisor intended to be bound. The court’s foremost inquiry should be into the objectively manifested intention of the promisor, however that intention is substantiated.

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<sup>65</sup> (1877) 2 App Cas 439.

<sup>66</sup> (1947) KB 130.