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A2 GCE LAW

G156/01/RM Law of Contract Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G156 LAW OF CONTRACT
SPECIAL STUDY MATERIAL

SOURCE MATERIAL**SOURCE 1**

Extract adapted from *Contract Law*. 9th Edition. Ewan McKendrick. Palgrave Macmillan. 2011. pp 69–70, 72–74, 77–9.

The orthodox interpretation of consideration is that it is based upon the idea of ‘reciprocity’; that a promisee should not be able to enforce a promise unless he has given or promised to give something in exchange for the promise or unless the promisor has obtained (or been promised) something in return.

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The first rule of the doctrine of consideration is that consideration must be sufficient but it need not be adequate. That is to say, the courts will not enforce a promise unless something of value is given in return for the promise. That is what is meant by saying that consideration must be ‘sufficient’.

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It is clear that ‘natural affection of itself is not a sufficient consideration’ ... a son’s promise not to bore his father with complaints ... was held not to be good consideration ... but the decision is open to attack on two possible grounds.

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The first is that it ignored the ‘practical benefit’ which the father obtained in being freed from the complaints of his son. ... That this is so can be demonstrated by reference to the case of *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327. The defendants ... put a cottage on the market for £205,000. Both the claimant and a Miss Buckle were interested in purchasing the property and made competing bids. The claimant made a bid of £200,000 which the defendants accepted ‘subject to contract’. The next day Miss Buckle increased her offer to £210,000 and acceptance of the claimant’s offer was withdrawn. ... The claimant threatened to seek an injunction to halt the sale to Miss Buckle and also said that he would inform her of his loss of interest in the property so that she would be free to lower her offer [As a result,] it was agreed that the property should be sold to the claimant for £200,000 But in breach of the agreement the cottage was sold to Miss Buckle The claimant sued the defendant for damages Peter Gibson LJ said that ... consideration was provided by the claimant agreeing not to carry out his threat to make trouble with Miss Buckle the removal of that ‘nuisance’ provided ‘some consideration’

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Until recently the rule which English law adopted was that performance of an existing contractual duty owed to a promisor was no consideration for a [contract of variation]. The rule was not a popular one: indeed, it was once stated that it has done ‘most to give consideration a bad name’ Professor Atiyah has argued that [it] cannot be accommodated within the ‘benefit/detriment’ analysis because, as a matter of fact, [in the leading cases] there was a benefit to the promisor and a detriment to the promisee but nevertheless there was held to be no consideration.

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[There are two exceptions to the original rule]. The first arises where the promisee has done, or has promised to do, more than he was obliged to do under his contract. ... 35
 The second situation arises where, before the new promise was made, circumstances had arisen which entitled the promisee to refuse to carry out his obligations under his contract. In *Hartley v Ponsonby* (1857) 7 E&B 872, 17 of a crew of 36 deserted and only four or five of the remaining crew were able seamen. [I]t was held that the seamen were entitled to enforce the master's promise [of extra pay] 40

[A] more wide-ranging attack on [the rule] ... was launched by the Court of Appeal in what is now the seminal case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

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The Court of Appeal adopted a very pragmatic approach to the issue. They held that the defendants had obtained a practical benefit ... and that practical benefit was, for this purpose at least, sufficient to constitute consideration. 45

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The case does not formally challenge the rule that a promise to perform an existing duty owed to the promisor does not constitute consideration, and cases can still be found in which the rule continues to be affirmed But the width of the exception recognised in *Williams* may suggest that little is left of the traditional rule. 50

SOURCE 2

Extract adapted from *Chappell & Co Ltd v The Nestlé Co Ltd* [1960] AC 87 HL.

The defendants ran a promotion in which they would supply gramophone records in return for 1s. 6d. and three wrappers from bars of Nestlé milk chocolate. The question of whether or not the chocolate bar wrappers formed part of the consideration for the records was an essential element of the question the House of Lords had to consider. By a bare majority, the House of Lords held that they were part of the consideration.

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Per Lord Reid:

To determine the nature of the contract one must find the intention of the parties as shown by what they said and did. The Nestlé Co's intention can hardly be in doubt. They were not setting out to trade in gramophone records. They were using these records to increase their sales of chocolate ... The inducement was something calculated to look like a bargain, a record at a very cheap price.

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The requirement that wrappers should be sent was of great importance to the Nestlé Co; there would have been no point in their simply offering records for 1s. 6d. each. ... It is a perfectly good contract if a person accepts an offer to supply goods if he (a) does something of value to the supplier and (b) pays money: the consideration is both (a) and (b).

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Per Lord Somervell of Harrow:

I think [the wrappers] are part of the consideration. They are so described in the offer. ... They are so described in the record itself It is said that when received the wrappers are of no value to Nestlés. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record ... was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration.

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SOURCE 3

Extract adapted from *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* [1990] 1 All ER 512, Court of Appeal.

Per Glidewell LJ:

It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under an existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise. However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed Interesting though it is, no reliance can in my view be placed on this concept in the present case.

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There is, however, another legal concept of relatively recent development which is relevant, namely, that of economic duress. Clearly if a sub-contractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the sub-contractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because [it was] entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since [the early nineteenth century], and no doubt led ... to a rigid adherence to the doctrine of consideration.

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Accordingly, [following a range of cases], the present state of the law on this subject can be expressed in the following proposition:

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- (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.

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Per Russell LJ:

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I would have welcomed the development of argument, if it could have been properly raised in this court, on the basis that there was here an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding.

[Recent cases demonstrate that] whilst 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 In the late twentieth century I do not believe that the rigid approach to the concept of consideration ... is either necessary or desirable.

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SOURCE 4

Extract adapted from *Anson's Law of Contract*. 29th Edition. Beatson, Burrows & Cartwright. Oxford University Press. 2010. pp 111–113.

The rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt [can be traced back to the early seventeenth century]

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The rule was considered and reaffirmed by the House of Lords nearly three centuries later in *Foakes v Beer* (1884) 9 App Cas 605:

Dr Foakes was indebted to Mrs Beer [to] the sum of £2,090. Mrs Beer agreed that if Foakes paid her £500 in cash and the balance of £1,590 in instalments she would not take 'any proceedings whatever' [against him]. Foakes paid the money exactly as required, but Mrs Beer then claimed an additional £360 as interest on the ... debt. When sued, Foakes pleaded that his duty to pay interest had been discharged by the promise not to sue. 5 10

Their Lordships ... held that ... there was no consideration for the promise. Foakes therefore remained bound to pay the additional sum. 'It is' said the Earl of Selborne, 'not really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation'.

Lord Blackburn recognized that business people 'do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights', particularly where the credit of the debtor is doubtful, but the House of Lords decided that a practical benefit of that nature is not good consideration. In *Re Selectmove Ltd* [1995] 1 WLR 474 it was said in *obiter dicta* that the principle that 'practical' benefit may amount to consideration recognized in *Williams v Roffey* could not, consistently with the doctrine of precedent, be extended to an obligation to make payment because 'it would in effect leave the principle in *Foakes v Beer* without any application'. 15 20

If, however ... the thing done or given by the promisee debtor is different from that which the recipient was entitled to demand, however slight the difference, it will be sufficient consideration for the promise to discharge. Even the performance of the identical obligation will be effective if it is to take place at an earlier date or in a different place. 25

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It has been argued that [this] rule ... is supportable on the ground that the law should not favour a person who is excused money which he ought to pay any more than a person who is promised money which has not been earned. On the other hand, it is open to the criticism that it not only runs counter to ordinary commercial practice but that, taken in conjunction with the rule that the law will not inquire into the adequacy of consideration, it may lead to absurd results. 30

SOURCE 5

Extract adapted from *Contract Law*. 8th Edition. Elliott & Quinn. Pearson Education Ltd. 2011. pp 102–6, 109–10.

[A late nineteenth century landlord and tenant case is usually seen as the starting point for the doctrine of promissory estoppel. The] principles were applied 70 years later by Denning J in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. The claimant owned a block of flats. In September 1939, it had leased the block to the defendant, who planned to rent out the individual flats. ... Unfortunately ... the Second World War had just broken out, and many people left London, making it difficult to find tenants. ... The claimant therefore agreed that the defendant could pay just half the ground rent stipulated in the lease. By 1945, the flats were full again, and the claimant sought the full ground rent for the last two quarters of 1945.

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[Denning L stated, *obiter*,] that the claimant would not have been entitled to recover the rent for the period 1940–1945, even though there was no consideration for the promise to accept the reduced rent In fact, this reasoning ... went further [than the nineteenth century case.] In the earlier case the landlord's rights had effectively been only temporarily suspended, but in *High Trees*, Denning J declared that the landlord's claim ... for the period 1940–1945 had been destroyed

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The precise extent of the doctrine of promissory estoppel is still unclear. What is clear is that the following conditions must be fulfilled before the doctrine can be applied. The cases suggest that there must already be a contractual relationship between the parties There must be an obvious and unambiguous promise not to enforce a person's full legal rights The promisee must have acted in reliance on the promise As an equitable doctrine, promissory estoppel will only be applied where it would be inequitable for the promisor to go back on what was promised, and insist on their strict legal rights.

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Promissory estoppel can usually only be used to prevent rights being exercised for a period of time; it cannot destroy them for ever. ... Promissory estoppel cannot be used to create entirely new rights or extend the scope of existing ones, only to prevent the enforcement of rights already held; it has been described as being 'a shield and not a sword'.

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Both promissory estoppel and the decision in *Williams v Roffey* have been seen as potentially major challenges to the requirement of consideration When the doctrine of promissory estoppel first appeared, it was widely thought to have eliminated the need for consideration. However, it is now clear that that is not the case. The doctrine can only be used where a contract has already been created, for which consideration will have been required. Further ... the doctrine cannot create new rights. In addition, as an equitable doctrine, its protection cannot be claimed as of right.

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Williams v Roffey could also affect the rules on ... promissory estoppel. ... [I]f in a case like *High Trees* there was a practical benefit to the landlord in reducing the rent ... would that bar him from later returning to his strict rights by giving reasonable notice? So far, we do not know

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[In 1937 the Law Revision Committee proposed a range of fundamental reforms to the law relating to consideration and promissory estoppel.]

SOURCE 6

Extract adapted from *Combe v Combe* [1951] 1 All ER 767 CA.

In this case a wife sued her former husband to enforce an agreement in which he promised to give her £100 annually. Having not received anything for almost seven years, the claimant took the defendant to the King's Bench Division of the High Court. The claimant was successful at first instance and the defendant appealed to the Court of Appeal. The appeal was allowed. 5

Per Denning LJ:

It is to be observed that [the claimant] herself has an income of her own of between £700 and £800 a year, whereas her husband has only £650 a year. ... Byrne J, held ... that there was no consideration for the husband's promise to pay his wife £100, but, nevertheless, he held that the promise was enforceable on the principle stated in *Central London Property Trust Ltd v High Trees House Ltd* ... because it was an unequivocal acceptance of liability, intended to be binding, intended to be acted on, and, in fact, acted on. 10

Much as I am inclined to favour the principle of the *High Trees* case, it is important that it should not be stretched too far lest it should be endangered. It does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties. 15

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Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, although not of its modification or discharge. I fear that it was my failure to make this clear in *Central London Property Trust Ltd v High Trees House Ltd* which misled Byrne, J, in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. [That is not correct. The wife can only enforce the promise if there was consideration for it]. 20 25



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