

# Chapter 2: Consideration

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## Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the CILEx syllabus:

- 4 Understand the doctrine of consideration

## 2.1 Introduction

As noted in **Chapter 1**, an agreement needs to be supported by consideration to be legally enforceable. Consideration means something which is of some value in the eyes of the law – it is the price for which the promise of the other is bought. In **Currie v Misa [1875]** consideration was defined as:

*“some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”.*

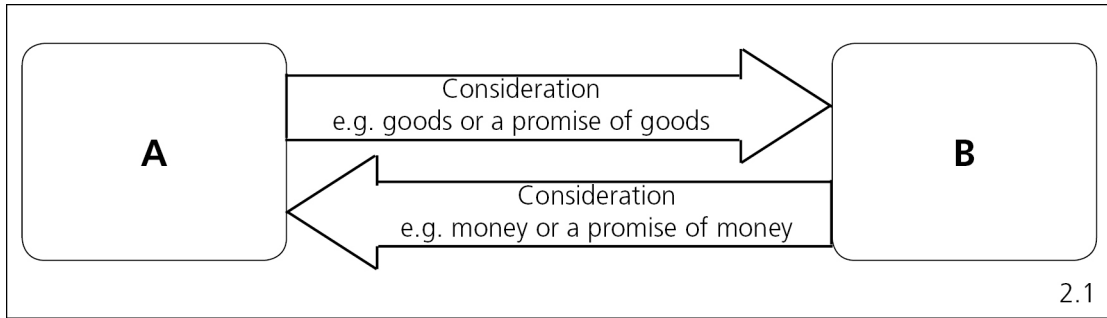
Defining consideration in terms of detriment and benefit is very much a 19th-century concept and one which is not popular today. It is arguably preferable to think in terms of a claimant buying a defendant’s promise by performing some act in return for it or by the claimant making a counter-promise (an exchange). The definition of consideration given by Sir Frederick Pollock, approved by Lord Dunedin in **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915]**, is:

*“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.”*

An easy way to think of consideration is as “the price paid for the promise”, or alternatively the quid pro quo element of the contract. Subject to certain exceptions outlined in this chapter, all contractual promises must be supported by some consideration. The consideration must be of **sufficient** value – this means that it must have some legal worth. It does not need to have economic value. Why? Because courts have historically been more concerned with enforcing people’s bargains, rather than regulating the fairness of their bargains.

This is why you may have heard that a promise can be enforced for the price of a peppercorn or a pound – consideration is symbolic of the legal value of your promises. Commonly the consideration in a contract is the **promise** of performance, rather than performance itself. This means that a contract has legal effect from the moment it is agreed, and that it can be enforced even if that party is not yet due to pay or perform.

These important themes can be summarised in the diagram below.



Consideration is required to be present in all contracts except those made by deed (a written document which complies with certain formalities, for example, the document must make it clear that it is intended to be a deed, it must be signed and witnessed, etc. (**Law of Property (Miscellaneous Provisions) Act 1989**)).

This chapter is concerned with explaining what promises or actions will be considered by the courts as capable of constituting consideration. It also looks at a situation where the courts have found that a promise can, to a certain extent, be enforceable even if the other party has provided no consideration. This involves the equitable doctrine of “promissory estoppel”.



### Sue’s football club contracts

Remember Kelly’s friend Sue (see **1.5**)? Sue is a self-employed decorator and has run into some problems with some contracts she has recently carried out with her local football club Blackmoor Ladies Football Club. She understands that the club is having some financial problems.

The club manager, Evelyn, asked her to paint the changing rooms last Friday at very short notice so that they would be ready for an important home game on Saturday. Evelyn told her that the club’s finances were so precarious that they couldn’t afford to pay her in cash but would give her a voucher for a free weekend for two at a local hotel which had been given to the club for a raffle. Reluctantly, Sue had agreed but is now regretting it, especially as she has just split up from her boyfriend. Can she charge her usual rates instead?

Sue attended the home game on Saturday. Afterwards, in the bar, the bar manager, Percy, asked her to help him for the evening as he was short-staffed. She agreed but in the rush there was no time to discuss payment. The club is now refusing to pay her. Was a valid contract created?

## 2.2 Types of consideration

One theme in this area is when the consideration is provided. This is important because it helps us analyse whether the consideration has any legal value – whether it is said to be “sufficient”.

There are two different ways in which a claimant may purchase the defendant’s promise.

**Executory consideration** consists of a promise made in return for a promise – where both promises are still to be performed – such as a contract between a buyer and seller for the future delivery of a car on credit. Following on from the distinction above between unilateral and bilateral contracts, this would relate to bilateral contracts.

**Executed consideration** occurs when one of the two parties has done all that they are required to do, leaving any outstanding liability on the other party – for example, where there is a promise of a reward if lost property is returned, as found in unilateral contracts. If the property is returned by B to A, then B has fulfilled their part of the contract, and is said to have executed their consideration, whilst A’s consideration – payment of the reward – is still outstanding.

## 2.3 Consideration must move from the promisee

English contract law has traditionally required that consideration moves from the promisee, though this rule has now been affected by the **Contracts (Rights of Third Parties) Act 1999 (CRTPA 1999)**, discussed in **Chapter 9**.

Where the traditional rule applies, a person to whom a promise has been made can enforce it only if they have provided consideration for it. For example, if A promises to wash B’s car if B promises to pay C £10, then if A does, in fact, wash the car and B subsequently fails to pay the £10 to C, C cannot enforce the contract against B since C has not furnished any consideration. It may, of course, be possible for A to enforce the promise against B. The rule is really a corollary of the rule that only the parties to a contract can sue on the contract (the rule of **privity of contract**), since, if a person furnishes no consideration, they take no part in the bargain and, as such, no part in the contract.

An illustration of the rule may be seen in ***Tweddle v Atkinson [1861]*** where the partners’ fathers each agreed to pay a sum of money to the new husband after a marriage and agreed between themselves that the husband would have a right of action to sue should either parent fail to pay. The wife’s father died before he could make the payment and his executors refused to pay. The husband sued the executors. It was held that his action must fail because he had furnished no consideration under the agreement.

It should be noted that whilst the consideration must move from the promisee, it need not move to the promisor. The promisee may suffer some detriment at the request of the promisor which may confer no benefit on the promisor, for example, giving up a job.

As noted above, **C(RTP)A 1999** now provides that where A and B make a contract with the intention that C shall have an enforceable right under it, C may be able to enforce this right. This is discussed in more detail in **Chapter 9**.

## 2.4 Consideration must be of some value

The rule is that consideration must be **sufficient** but need not be **adequate**.

What this means is that the law requires the parties to have entered into a bargain where each side has provided something of value that the courts can see. The courts are not generally interested in whether this is the full market value, or whether the contract is a fair bargain. That is for the parties to negotiate for themselves. The term “sufficiency” describes something that the courts can see of value that makes the bargain binding, whilst “adequacy” may describe the full value of something. Hence, the law requires consideration to be something of sufficient value, but not necessarily the full or adequate market value. Thus, the law would not intervene if parties agree to the sale of a used car for £5,000 which is actually valued at £600. The law leaves parties to determine the terms of their bargain – and does not intervene to reverse “bad bargains”.



### Sue's football club contracts

The hotel weekend voucher does have some value, even if it is not worth as much as Sue would normally charge in cash. The court will not be interested in whether or not it is a fair price for Sue's work – she will not be able to claim for a cash payment instead.

### 2.4.1 Adequacy of consideration

It is well settled that the courts will not enquire into the adequacy of consideration: only its sufficiency. Natural love and affection cannot, of itself, be adequate or sufficient consideration since it has no economic value. Thus, in **Thomas v Thomas [1842]** the claimant's husband expressed the wish that the claimant, if she survived him, should have the use of the house. After his death the executor, the defendant, agreed to allow her to occupy the house, first because of her husband's wishes and, second, on payment by her of £1 per annum. The court held that the desire of the deceased husband for his wife to live in the house was not part of the consideration but that the paying of £1 per annum was. Similarly, in **White v Bluett [1853]** a son's promise not to bore his father by constantly complaining could not amount to consideration in return for the father's promise not to sue him on a promissory note.

It seems from the above cases that the consideration offered does have to have some form of economic value, but what if this is present, albeit disproportional to the consideration offered in return? The question to be dealt with by the courts here is whether acts or omissions having little economic value can support the promise of the other party. The principle may be seen in **Chappell**

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