CONSIDERATION, NECESSARY?

Sony Liew Sze Jie
Graduated with an LLB Second Class Upper Honours from the University of Liverpool; former student of HELP University.

Generally speaking, the doctrine of consideration is one of the key ingredients in the formation of a valid contract. It is a paramount component of any legally binding system of contract law, and without it, any contract will be considered ineffective or unenforceable. One may ask, for example, what would English courts do with a contract without consideration? Is that contract still enforceable? Should English courts do without the doctrine of consideration and only decide cases based on the presence of intention to create legal relations? Do other jurisdictions take into account consideration? And finally, are the English courts heading in the right direction? This article will discuss the aforementioned issues and attempt to provide a clear picture on the matter.

History

In the 16th and 17th centuries there was no single doctrine of consideration; there were instead a number of considerations which were recognised as adequate to support an action for a breach of promise. The doctrine of consideration was only accepted as an integral part of the new law of contract in the 1700s and throughout the early part of the 1800s.

In *Pillans v Van Mierop*,[1] the court held that consideration was only evidence of the intention of the parties to be bound, and that, this is evidenced in deeds and commercial contracts.

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[1] [1765] 3 Burr 1664.

In *Hawkes v Saunders*,[2] Lord Mansfield held that:

> When a man is under a moral obligation, which no court of law or equity can enforce; promises, the honesty and rectitude of the thing is a consideration. The ties of conscience upon an upright mind are a sufficient consideration.

Rann v Hughes[3] overruled Lord Mansfield's decision on the consideration point. Furthermore, the theory itself was repudiated in 1840 in *Eastwood v Kenyon*[4] where Lord Denman condemned the whole principle of moral obligation. The claim by the plaintiff would be dismissed as disclosing no cause of action. A pecuniary benefit, voluntarily conferred, is not a sufficient consideration to support a subsequent promise to reimburse.

Definition of Consideration

The traditional approach identified consideration as a benefit to the promisee and a detriment to the promisor. In *Currie v Misa*,[5] Lush J defined consideration and quoted:

> A valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.[6]

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2 [1782] 1 Cowp 289.
3 (1788) 4 Brown 27 & 7 T.R. 350.
4 (1840) 11 A & E 438, 113 ER 482 (QB).
5 [1875] LR 10 Ex 153.
6 ibid 162.

Alternatively, it could also be defined as the price requested by the promisor, in exchange for which the promisor's promise was bought. In *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd*,[7] Lord Dunedin defined consideration 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.

Example

Consideration can arise from a number of instances. Firstly, as an example, if Y enters into a contract to buy a mobile phone from Z for $1,000, Y's consideration is the $1,000, and Z's consideration is the mobile phone. Secondly, if Y signs a contract with Z such that Y will renovate Z's house for $5,000, Y's consideration is the service of renovating Z's house, and Z's consideration is the $5,000 paid to Y. Y may, as a separate matter, also sign a contract with Z such that Y will not repaint his own house in any other colour than white in exchange for $500 paid to him by Z. Although Y did not promise to carry out a positive action, Y did promise to withhold from doing something that he was allowed to do, and as such, Y did provide valuable consideration. Y's consideration to Z is the forbearance in painting his own house in a colour other than white, and Z's consideration to Y is $500 per year. On the other hand, if Y signs a contract to buy a car from Z for $0, Z's consideration is the car, but Y has given no consideration, and so there is no valid contract.

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7 [1915] AC 847.

Is Consideration Really That Important?

In *Tweedle v Atkinson*,[8] the principle stated supported the general rule that only the contracting party can sue or can be sued upon. The plaintiff was the son of John Tweedle who had, before the making of the agreement, married the daughter of William Guy. Before the marriage, William Guy, in consideration of the proposed marriage, had promised a marriage portion - which had not been performed at the time of making of the agreement. The plaintiff had not yet been paid the $200 by William Guy, who had subsequently died. The plaintiff then sued Guy's executor for the $200.

It was held that the plaintiff's action would be dismissed. Wrightman J established that no stranger to the consideration can take advantage of a contract, even though the contract itself was made for his benefit. Blackburn J considered that natural love and affection are not a sufficient consideration where upon an action of assumpsit may be founded. Crompton J held that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit; and similar to Blackburn J, agreed that natural love and affection is insufficient consideration for a promise upon which an action may be maintained. The presence of consideration is therefore crucial for any party to enforce the contract, and this is subjected to the criteria that the party seeking to bring enforcement must firstly fulfil the doctrine of privity. Thus, in this respect, the doctrine of consideration is rigid and inflexible.

Furthermore, the consideration provided must be sufficient, not only in terms of what could qualify as proper consideration, but also in terms of the amount to be provided. In *Pinnel's Case*,[9] it was held that where a sum of money was owed by a party to another, the debtor must provide the exact consideration as promised

[8] [1861] 1 B & S 393 (QB).
[9] (1602) 5 Co Rep 117 (Court of Common Pleas).

in the agreement for the creditor to release him. It is not sufficient if the sum paid was less than the sum owed, because under the debt contract, the debtor has done only what he was legally obliged to, but not to the extent which the promise required him to carry out. This means that although the debtor (in this case, the defendant) did provide some consideration, it was not enforceable in court. The plaintiff was hence entitled to judgment because of the defendant's 'insufficient pleading'. This decision was also applied in *D & C Builders Ltd v Rees*[10] and *Foakes v Beer*.[11]

Exceptions to the General Rule

However, there are numerous exceptions to the rules stated. Firstly, where the creditor accepts part-payment by the debtor as sufficient satisfaction for the whole of the debt, this would become legally enforceable regardless of whether the partial repayment was more beneficial or less than if the whole payment had been repaid. Lord Denning in *Central Property London Trust Ltd. v High Tree House Ltd*[12] suggested in an *obiter dictum*, that where the conditions of promissory estoppel were satisfied, a creditor could not go back on a promise to accept less (and not to sue for the balance) as it would be inequitable to do so despite the insufficient amount of consideration to support the promise. Essentially, the creditor may not break a promise to not enforce payment of the whole sum where the promise had been relied upon by the debtor.[13] In this case, the plaintiff's claim for repayment of debt by the debtor succeeded only to the extent that the repayment period was not covered by the promise to not enforce payment; the promise to reduce the rent was binding even though it had been given without consideration, but it only served as a defence for the period specified in the promise.

[10] [1966] 2 QB 617.
[11] (1884) 9 App Cas 605.
[12] [1947] KB 130.
[13] ibid 164.

In *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*,[14] the main principle was that an informal gratuitous promise does not amount to a contract. However, Glidewell LJ and Purchas LJ came to the decision that the promise was legally binding despite the absence of consideration in its strictest meaning (which required that the promisor incur some manner of detriment in exchange for a benefit). This decision was based upon legal and objective analysis which also accounted for the factual benefit to the promisor arising from making the promise.[15] On the facts, although the plaintiff had not been required to undertake any work additional to his original contract, the advantages which the defendants hoped to obtain from the additional work by the plaintiff (avoidance of penalty and the need to engage another sub-contractor) were sufficient consideration for the extra payment to the plaintiff. As such, the existence of a detriment to the defendants was not a required element when deciding the existence of consideration.

Aside from that, in a surprising turn of events, the decision in the case of *Antons Trawling Co. Ltd v Smith*[16] seemed to have regressed to that of *Hawkes v Saunders*, to the extent that it stated that the presence of consideration is not a necessary element for a legally enforceable contract. Barangwanath J in his judgment quoted:

> The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intentions clear by entering into legal relations and have acted upon an agreement to a variation, in the absence of policy reasons to the contrary, they should be bound by their agreement.[17]

[14] [1991] 1 QB 1 (CA).
[15] Jill Poole, *Contract Law* (9th edn, OUP 2008) 136.
[16] [2003] 2 NZLR 23.
[17] Poole (n 15).

Here, the judge seemed to have ignored the element of consideration and only decided the case based upon the intention to create legal relations.

In the light of the above discussion, it would seem as though the general rule on the necessity of consideration in the formation of a valid contract seems flexible, for though the judges repeatedly mention its necessity, they ultimately find exceptions and loopholes to it. To this extent, it becomes arguable that consideration might not really be a pre-requisite of a legally valid contract. In fact, comparisons with other jurisdictions illustrate this point very well.

Comparison with Other Countries

In France, there is no element of consideration in contract law. It merely requires that the parties in contract have a lawful cause and if unlawful or illegal, the contract will be considered as void, as stated in Article 1108 and Article 1131 of the French Civil Code.

Furthermore, Article 1165 states that:

> Contracts have effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case provided for in Article 1121.

This means that even a third party need not provide any consideration or suffer any detriment either. Article 1121 elaborates that one can contract for the benefit of a third party, and it creates for the inheritor a direct right contrary to the undertaking party.[18] In this respect, consideration is not at all required for the formation of a contract under French law.

[18] Michael H Whincup, *Contract Law and Practice* (Kluwer Law International 1996) 79.

Denmark adopts a similar stance as France where its laws do not insist on consideration but do recognise contracts for the benefit of third parties. If the purpose of an agreement between A and B is to support C, C can enforce the agreement.[19]

The Netherlands does not apply the concept of consideration as it is unknown in Dutch law. Privity of contract as according to Dutch law is on the whole in line with English law, though the law requires that any contract made for the benefit of a third party must have its terms and conditions accepted by the third party before he or she can enforce the right conferred to him. In fact, case law allows some much-discussed exceptions to the rule that a third party cannot be obligated or disadvantaged by the mode of its contract.[20] On this point, although the third party would be bound to the terms and conditions of the contract, it still does not necessitate the provision of consideration by him or her.

In Germany, there is no concept of consideration or estoppels. The only method available under German law to challenge the validity of a contract is to use *Rechtsmisbrauch*, which means an abuse of rights that will render a contract unenforceable. As for third parties, Article 328 of the German Civil Code states that a contract may stipulate performance for the benefit of a third party, so the third party acquires the direct right to demand performance.[21] This is largely in line with French and Danish laws.

In Italian law, a contract is considered valid if it satisfies the agreement, if it is of a lawful subject matter, and of appropriate form and complies with the concept of *causa* (purpose) as provided by Article 1325 of the Italian Civil Code. Furthermore, Articles 1322-5 makes it a condition that for a contract to be enforceable, an agreement must perform a social and economic function deemed

[19] ibid.
[20] ibid.
[21] ibid.

useful and worthy of protection by the law. Article 1418 states that an agreement which lacks *causa* or in which the *causa* is illegal makes that particular contract unenforceable. An agreement may lack *causa* because it is ineffective, as where by mistake a person contracts to buy that which is already his. But if both parties make an illegal agreement, the absence of *causa* itself makes the contract invalid as provided by Article 1345 and Article 1418.[22] This seems very similar to the French law which says that a contract to buy a house for the purposes of prostitution is invalid because the purposes of the parties are illegal. Thus, the *causa* requirement is not the same as the English consideration rule. It is therefore easier to make contracts in favour of third parties, as expressed legitimately by Article 1411.

Spanish law has no requirement for consideration. It however follows the Italian and French law which applies the *causa*, in the provision of Article 1261 of the Spain Civil Code. *Causa* is akin to consideration in that it may be the "lending, granting or promise of a thing or service by the other party", but it is quite distinct that it may exist also in gratuitous promises. In addition, Article 1275 provides that contracts without *causa* or with unlawful *causa* are of no effect or void. Estoppel plays no specific rule in Spanish law although there exists the fundamental element of good faith in contracts as stated in Article 7 which prevents a person from denying his own words or conduct in circumstances where what he has said or done was clearly intended to affect his legal rights.[23]

In Swedish law, there is no rule of consideration. The *Contracts Act* only requires an acceptance in accordance with an offer for the contract to be binding.[24]

The Malaysian legal system is different from the English system in two aspects. Firstly, *Section 2(d)* of the *Contracts Act 1950* states that 'a contract may move from the promisee or any other person' which means that consideration can

[22] ibid.
[23] ibid.
[24] ibid.

move from a third party. It is distinctive from the English law which requires that only a promisee who had provided consideration can sue the promisor. Secondly, there is an exception to invalidity of agreements without consideration. *Section 26(a)* provides that natural love and affection is consideration and is binding in Malaysia and is subject to three requirements; that it is to be expressed in writing, registered, and that the parties stand in near relation to each other.

Under Malaysian law, much like the UK, there thus remains the consideration requirement, which is understandable considering its status as a Commonwealth country. However, as the reader may have noticed, other jurisdictions place little or no emphasis on consideration as a necessary element of a valid contract under the law.

A Substitute for the Doctrine of Consideration

The doctrine of consideration is a doctrine that is under attack. In fact, the Law Revision Committee proposed that a promise in writing should be enforceable even if not supported by consideration.[25] In addition, they also suggested that where a promise is relied upon by the promisee it should be binding on the promisor.

In the New Zealand Court of Appeal, *Antons Trawling Co. Ltd* v *Smith*[26] the court concluded the existence of a binding variation to an employment contract based purely on the existence of a reliance of the alteration promise. Interestingly, it did so without seeking to rely on the principle of factual benefit in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*.[27]

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[25] Law Revision Committee (UK), *The Statute of Frauds and the Doctrine of Consideration* (Sixth Interim Report, Cmd 5449, 1977).

[26] ibid.

[27] ibid.

Furthermore, international re-statements on contract law find no role for the doctrine. Article 2.101 of the Principles of European Contract Law states that a contract is concluded if the parties intend to be legally bound and they reach sufficient agreement without any further requirement. On top of that, the *Contract (Rights of Third Parties) Act 1999* allows a third party who did not supply any form of consideration to sue.

This author is of the opinion that there will likely be a gradual progression away from the technical analysis of benefit or detriment and towards the more impressionistic notion of inducement. In time, judges would have a larger scope of freedom to decide according to the nature of the proceedings whether the agreements and promises should be treated as binding.

Conclusion

In conclusion, there is no doubt that the doctrine of consideration plays an important role in the English Legal System. However, this is dampened by the fact that there exist numerous instances where consideration itself is deemed expendable as a criterion for a legally binding contract. Indeed, many other countries place little or no recognition on the doctrine of consideration, yet they function just as well when it comes to contractual legality. In fact, in the years to come, the UK courts themselves might just find themselves coming to a decision on a case based only on the parties' intention to create legal relations without paying much attention to consideration.