

## PART V – CONSIDERATION

### I BENEFIT/DETRIMENT REQUIREMENT

#### A Definition

In order to be enforceable, a promise must, inter alia, be supported by valid consideration. The authorities on consideration implicitly give effect to two requirements:

- That a benefit or detriment be incurred; and
- That there is a link between that benefit or detriment and the promise it is alleged to support

**Definition:** a valuable consideration may consist in *either*:

- a) Some right, interest, profit, or benefit accruing to one party; or
- b) Some forbearance, detriment, loss of responsibility given or undertaken by the other

(*Currie v Misa* per Lush J).

In most cases, the consideration given in return for a promise will constitute both a benefit to the promisor and a detriment to the promisee (eg, by giving money to the promisor).

Examples of benefit to the promisor:

- Having services rendered
- Receiving money, goods, or property
- Being offered a promise to do either of these, or to refrain from doing something that disadvantages the promisor

Note that if B makes a promise in return to A's promise, this will confer a benefit on A because A will have enforceable legal rights against B, and it will also be a detriment to B because B will be obliged to perform the promise (*Pecke v Redman*).

#### B Reliance

A distinction is drawn between an act performed as the agreed price of a promise (valid consideration), and an act performed in reliance upon a promise (not valid consideration). Acting in reliance does not provide any benefit to the promisor, whereas performing the agreed price of a promise is furthering the interests of the promisor.

According to reliance theory, contractual and non-contractual promises should be distinguished by determining whether the promise has been relied upon by the other party. An argument that this theory has a role to play in defining valid consideration was firmly rejected by Kirby P and McHugh JA in *Beaton v McDivitt*, reliance is insufficient to circumvent the consideration requirement.

**Beaton v McDivitt:**Facts

- McDivitts heard that their land may be rezoned and that this would lead to substantially higher rates being payable
- They decided to subdivide their land in order to minimise rates payable
- They agreed that Beaton would occupy part of the land they proposed to subdivide, rent free; they also agreed to transfer the land *when* the rezoning took place
- However, this never happened
- Beaton took possession of the land, built a house and an access road, and remained on the land for several years
- When the McDivitts and Beaton had a falling out, the McDivitts ordered Beaton off the land
- Beaton sued to enforce the promise that the land would be transferred

Issue

- Did Beaton provide consideration for the McDivitt's promise to transfer the land that satisfied the bargain requirement?

Reasoning

- Factors going towards establishing the benefit/detriment requirement:
  - Benefit of lower rates to the McDivitts
  - Beaton's working the land
    - This is a mutual benefit, so doesn't satisfy the requirement
    - The Beaton's would have made improvements anyway, so does not constitute a benefit
- Young J (trial judge):
  - Bargain requirement not satisfied but consideration met because of reliance
    - Quid pro quo: Beatons had not given anything up
  - The contract had been frustrated because the rezoning never eventuated
  - No contractual obligations
- Kirby P:
  - Benefit/detriment requirement not satisfied
    - Need to satisfy the consideration requirement
    - Consideration must move from the promisee to the promisor, by incurring a benefit or detriment as part of the bargain
  - No 'reliance exception' to the bargain requirement
    - The parties did not talk about improvements to the land until after agreement, so it couldn't be consideration
  - Because no bargain, unnecessary to consider whether the contract is frustrated
  - No contract formed
- McHugh JA:
  - Sufficient consideration (working the land); doing so was an implied request at the time of the contract (in relation to building the road)
    - Consideration requires a bargain (*Australian Woollen Mills; Currie*)
    - However, on the facts, this bargain was established
  - Contract not frustrated – implied duty to cooperate despite no rezoning taking place
  - Contract formed
- Mahony JA:

- Sufficient consideration (working the land)
- Contract frustrated – reasonable time elapsed since possible rezoning
- No contract formed

#### Decision

- Majority: no contract was formed, either because the bargain requirement was not satisfied or the contract had been frustrated
- Minority: a contract was formed because sufficient consideration was provided and it was not frustrated by lapse of time

#### Notes

- The different conclusions reached by Kirby P and McHugh JA are in large part due to differences in factual analysis
  - Kirby P: no benefit or detriment because the Beatons gave nothing to the McDivitts
  - McHugh J: agreed that benefit/detriment important, but viewed working the land as a valid detriment

## II BARGAIN REQUIREMENT

### A Definition

There must be a link between the promise and the consideration said to support it.

**Definition:** the benefit conferred/detriment suffered must be given in return for the promise it is said to support (*Australian Woollen Mills Pty Ltd*).

Note the statements by Hamson CJ:

*Consideration, offer, and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain.*<sup>1</sup>

The connection between consideration and promise is assessed objectively. In order to be established, there needs to be a request (whether implied or express) by the promisor for the promisee to do the act done or perform the services performed (*Australian Woollen Mills*).

### B Unilateral Contracts

#### ***Australian Woollen Mills v Commonwealth:***

##### Facts

- The plaintiff sought to enforce the Commonwealth's promise to pay a wool subsidy (see above §3)

<sup>1</sup> Hamson CJ, 'The Reform of Consideration' (1938) 54 *Law Quarterly Review* 233, 233-4.

Issue

- Did the plaintiff perform an act capable of constituting consideration?

Reasoning

- Their buying of more wool than they would have had the Commonwealth not promised to pay the subsidy constitutes a detriment
- However, the buying of wool is not sufficiently connected with the promise to pay a wool subsidy, so the bargain requirement is not satisfied
- Ask: has there been an (alleged) promise/request by the promisor (express or implied)?
  - Do they have something to gain by requesting the promisee to act in the way they did?
  - If so, it is more likely that an implied request will be found
- Note the distinction between conditional promises and unilateral contracts
  - Conditional promises (“I will give you X if you do Y”) – performance of Y is valid consideration
  - Unilateral contracts (“I will give you X”) – acts in reliance on the promise are not valid consideration

Decision

- Because AWM’s purchase of additional wool could not be said to be in exchange for the Commonwealth’s promise to pay the subsidy (even if in reliance upon the promise), the bargain requirement had not been satisfied
- Consequently, no consideration was provided and the contract is unenforceable

### III ADEQUACY OF CONSIDERATION

#### A Principle

Consideration must be sufficient but need not be adequate (*Thomas v Thomas* – £1 rent paid to keep the house of the plaintiff’s deceased husband in repair; clearly inadequate, but sufficient in the eyes of the law).

Gross inadequacy of consideration maybe relevant when considering vitiating factors (eg, fraud, mistake, disability), but it does not factor into determinations of consideration.

Unequal consideration is irrelevant. Consideration does not have to be proportionate to the benefit derived under the contract. Thus, a promisee can suffer a very small detriment yet derive a very large benefit from the promise and still have provided adequate consideration.

#### ***Woolworths Ltd v Kelly:***

Reasoning

- Kirby P gives several reasons why Courts do not consider the adequacy of consideration:
  - It is difficult to determine what value individuals place on consideration
    - It is too difficult for courts to determine value (especially where sentimental value or personally significant factors are involved)
  - Expertise of lawyers and the judiciary is limited (though damages assessment

- suffer a similar shortcoming)
  - It would increase the need for complex evidence (practical)
- Economic justifications
  - It would result in decreased certainty (important)
  - Not considering adequacy facilitates resource transfers by minimising transaction costs
- Contractual theory justifications
  - Lets people choose the value to ascribe to items of consideration, rather than the courts
  - Thus, represents a truer conception of the parties' intentions
  - However, this assumes people are rational and *equal* – in reality, consideration is rarely used as the definitive measure of the value of a promise, and the extent of consideration is usually stipulated or otherwise controlled by the stronger party
- The value of consideration is not examined because of the belief that the will of the parties should not, where possible, be challenged or supervened by the Courts'
  - Eg, gifts, discounted consideration for family/friends
  - This reason is connected with will theory; however, it again ignores the unequal positions often occupied by promisor and promisee
  - In practice, the requirement of consideration is circumvented by the use of nominal considerations (eg, undertaking onerous obligations in return for \$1)

#### Notes

- There are, however, reasons why the courts should consider the adequacy of consideration moving from the promisee
  - Contract law should look at fairness, to a degree, where inequality pervades the relationship between the parties
  - Considering the adequacy of consideration could force the stronger party to agree to provide fairer consideration (ie, more reflective of the true value of the promise)
- An objective test is used in other areas of contract law – surely evaluating the adequacy of consideration should be the same
  - Sufficiency = things that the court views as valid forms of consideration
  - Sufficiency is objective
  - Adequacy = quality or extent of the form of consideration provided
  - Adequacy is subjective, and not considered by the courts
- It remains to be seen whether courts are indeed incapable of assessing the adequacy of consideration – they make similar calculations and judgments already in the context of assessing damages
- It might also be possible to find a middle ground between a requirement that consideration be adequate and refusing to consider adequacy at all
  - Such a rule already exists in the form of sufficiency
  - This grants courts sufficient powers to determine what constitutes valid consideration whilst maintaining the appearance of respecting the intentions of the parties

## B *Sufficiency of Consideration*

There are two main forms of consideration which are insufficient:

- Past consideration
- Existing legal duties

### 1 Past consideration

Past consideration is something given gratuitously or in relation to other, *prior* promises (that have already been acted upon by the promisor). Past consideration is not sufficient to ground a new promise.

This rule most commonly arises in situations where, after a contractual transaction has been completed, one of the parties makes an additional promise which the other seeks to enforce.

#### ***Roscorla v Thomas:***

##### Facts

- Thomas sold Roscorla a horse for £30
- Later, at Roscorla's request, Thomas promised that the horse was 'sound and free from vice'
- The horse turned out to be very vicious
- Roscorla sought damages for breach of contract

##### Issue

- Was consideration provided by Roscorla for the promise made by Thomas that the horse was sound?

##### Reasoning

- The obligations of the parties under the original contract were merely to sell the horse in exchange for £30; consideration was provided in the form of the payment for sale
- The promise Roscorla was attempting to enforce (that the horse was sound) was not an element of the original contract

##### Decision

- Because the promise being enforced was not part of the original contract, consideration for that original contract could not constitute consideration for the additional promise
- Because no additional consideration was provided in respect of the additional promise, no contractual liability exists in relation to the horse's soundness

##### Notes

- This outcome may seem unfair, but it is important to remember that the law of contract is not the source of the unfairness
- If the requirement of soundness was really that important to the promisee, she should have asked at the point in time when the original promise was made, and not after the sale had taken place
- In this sense, the enforceability of a promise is the responsibility of the party to whom it is made

Note, however, that *executed consideration* (that is, consideration which forms part of some transaction or bargain, such as the finding of a dog in a contract to find the dog) can be valid consideration, so long as the performance is not made before acceptance. If that were the case, the performance may not be related to the promise to adequately satisfy the bargain requirement.

An exception to the past consideration rule exists in relation to promises to pay for services. Where it is implied that the performance of services will be paid for, then performance of those services will constitute good consideration for a subsequent promise to pay for them (*Re Casey's Patents; Stewart v Casey*).

## 2 Existing legal duties

**Definition:** neither

- the performance of an existing legal duty; nor
- the promise to perform an existing legal duty

are considered sufficient consideration to support a contract.

This rule is most likely to arise where

- Contractual obligations are varied; or
- An original contract is terminated (upon consent of the parties) and a new contract is substituted in its place

In such cases, rights or duties are given up by the parties so that they can promise to abide by them again.

### ***Stilk v Myrick:***

#### Facts

- 2 sailors abandoned the voyage of a ship
- The captain was short-staffed, so he offered an additional salary to the remaining members of the crew if they returned the ship to port safely
- The crew did bring the ship back to port, but the captain refused to pay
- The crew sued the captain for breach of contract

#### Issue

- Had the sailors provided consideration for the promise of the captain to increase their salary?

#### Reasoning

- The sailors claimed that their bringing the ship back to port was sufficient consideration for the captain's promise
- However, the sailors were already obliged to bring the ship back safely as part of their existing duties as crew members
- Thus, the consideration provided was the performance of an existing legal duty and is insufficient to support a new promise by the captain
- It is also noted that the legal duties involved are firmly based in contract law, and not policy considerations

#### Decision

- Because no fresh consideration was provided, the captain's promise is unenforceable

There are several exceptions to the rule that performing or promising to perform an existing legal duty is insufficient consideration. In particular, where

- Fresh consideration is provided
- **A practical benefit is derived**
- The promise is made to a third party (assuming they are not already the recipient of the same contractual obligations from the promisee)
- **A compromise or forbearance to sue is reached**
- The contract is terminated and replaced

the existing legal duty rule may not apply.

Terminating the contract is the safest way to remove a dispute from the ambit of the operation of the existing legal duty rule. By terminating totally, rights are given up by each party (a detriment), which constitutes fresh consideration for their restoration by the new contract.

a) *Bona fide compromise exception*

An important qualification to the existing legal duty principle is that a promise to perform an existing legal duty is sufficient consideration when it is given by way of a bona fide compromise of a disputed claim. Such a compromise might take the form of forgoing legal action (ie, promising not to sue). However, so long as the compromise is bona fide (genuine), it does not matter if the promisee actually had a cause of action (*Wigan v Edwards*).

***Wigan v Edwards:***

Facts

- E entered into a contract to buy a house from W
- E was concerned about defects in the house
- E refused to complete the contract unless the defects were remedied (though at this stage he had no contractual right to do so)
- In response, W promised to rectify listed defects and repair major defaults for a period of five years
- The transaction was completed, even though W had not yet rectified all of the listed defects
- W then refused to fix the other defects, including a cracked concrete slab
- E sued W for breach of contract
- W argued that no consideration had been provided to support his promise to rectify the defects in the house

Issue

- Was consideration provided by Edwards for Wigan's promise to fix the defects?

Reasoning

- The plaintiff (Edwards) argued that sufficient consideration was constituted by:
  - Receiving payment quickly (as opposed to refusing to complete the sale)
  - Not suing W
- This consideration clearly satisfies the benefit/detriment test, because it benefits W
- This consideration also satisfies the bargain requirement, because it is related to W's promise to repair the defects by way of an implied request by W for the money to be paid
- However, the consideration made by E formed part of an existing legal duty (ie,

<p>completing the contract of sale)</p> <ul style="list-style-type: none"> <li>• Even so, the existing legal duty rule does not apply where a bona fide compromise is made by the promisee <ul style="list-style-type: none"> <li>○ E forewent what he thought was a valid claim against W for defects</li> <li>○ It is not necessary to actually give up a legitimate claim</li> <li>○ It only matters that, subjectively, the party suffering the ‘detriment’ thought honestly (and reasonably) that it was a legitimate claim</li> </ul> </li> </ul> <p><u>Decision</u></p> <ul style="list-style-type: none"> <li>• Because sufficient consideration was provided by Edwards, Wigan was contractually bound to rectify the defects in the house for the stated period</li> </ul>
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*Wigan* may be distinguished from *Stilk* by noting that in the latter case no bona fide compromise was reached between the sailors and the captain, since the sailors forewent no rights under their contracts with the captain in return for his promise; whereas in the former case, Edwards forewent what he thought was a genuine claim in contract against Wigan and in doing so provided consideration.

#### Checklist for application:

- State the existing legal duty rule (prima facie promise to perform an existing legal duty insufficient consideration [*Stilk*])
- State the relevant exception (consideration will be sufficient if the promise to perform the existing legal duty is given as part of a bona fide compromise of a claim [*Wigan*])
- Ask:
  - Has one party asserted s/he is not bound to perform?
  - Did this party act honestly and reasonably?
  - Did this party then perform as a result of the new promise?
- If it arises on the facts that the party making the assertion did not have a legal right not to perform, it does not matter, so long as they acted honestly and reasonable (*Wigan*)
- Note, where appropriate, theoretical underpinnings of the exception:
  - Certainty
  - Efficiency
  - Transaction costs (but note the requirement of consideration itself)

#### b) *Practical benefit exception*

Where

- A has entered into a contract with B; and
- B as reason to doubt that A will be able to complete his/her side of the bargain; and
- B therefore promises an additional payment; and
- As a result, B obtains a practical benefit or obviates a ‘disbenefit’; and
- B’s promise is not given as a result of economic duress or fraud on the part of A

Valuable consideration may still be provided by the performance by A of a legal duty which he is already obligated to complete under the original contract with B.

The essential feature of this exception, which was formulated in *Williams v Roffey Bros*, is that B obtains a practical benefit by inducing A to complete his obligations.

***Williams v Roffey Bros:***Facts

- R was contracted by another party to build 27 flats; R sub-contracted carpentry work to W as part of the project
- Before work was complete, W experienced financial difficulties and was concerned he may not be able to complete the work
- To avoid inconvenience, R agreed to pay W an additional £575 per flat completed
  - In doing so, R derived a benefit by not being penalised for late completion of the flats or having to hire another contractor
- W substantially finished the work on 8 flats but stopped work when R refused the additional amount it had promised
- R engaged another carpenter to complete the work; Williams sued in respect of the promised additional sum

Issue

- Did W provide consideration for R's promise to pay additional money for each flat?

Reasoning

- W was already obliged to build the flats, so no additional consideration was provided for the new promise by R to pay more
  - Prima facie, the existing legal duty rule prevents W's completion of the flats from constituting consideration for a promise subsequent to their being under a duty to perform that work
- R's defence was that W did not provide consideration other than a promise to perform his obligations under the existing contract, so there could be no promise
  - Additionally, the technical point is advanced that the flats were only 'substantially finished', so no payment should be made at all (the contract was for completed flats only)
- Despite this, the Court recognises an exception to the existing legal duty rule where, as here:
  - A has entered into a contract with B (satisfied)
  - B as reason to doubt that A will be able to complete his/her side of the bargain (satisfied, since R was aware of W's financial difficulties)
  - B therefore promises an additional payment (satisfied, £575)
  - As a result, B obtains a practical benefit or obviates a 'disbenefit' (satisfied, since R did not have to find another subcontractor or incur a late completion penalty)
  - B's promise is not given as a result of economic duress or fraud on the part of A (satisfied, since R could also have found another contractor and W's financial difficulties were genuine)

Decision

- Because each of the factors used to formulate the exception are met on the facts, the existing legal duty rule does not apply
- Thus, consideration was provided by W for R's promise and the additional payment is recoverable

Notes

- Arguably, the existing legal duty rule does not survive this decision
- As a result, *Williams v Roffey Bros* is criticised on the basis of reducing certainty between contracting parties as to whether previously owed legal duties can form valuable consideration
  - Classical contract theorists would note that it should not matter if there is

- consideration; what is important is giving recognition to the wills of the parties and the promises made thereby
- The law and economics movement would note that contracts are necessary to transfer resources with certainty, but, where possible, costs of providing consideration should be avoided to minimise transaction costs
    - Thus, allowing existing legal duties to form consideration can reduce overheads (good)
    - However, certainty is also needed to ensure assets gravitate to their most valued use; uncertainty is created by the exception (bad)
  - Feminist legal theorists might consider the exception as allowing weaker/disadvantaged parties to overcome the stringent requirements of consideration; however, it might also allow stronger parties to enforce strict contracts where a lack of consideration might previously have limited their enforceability
  - *Williams v Roffey* is unlike, but consistent with, *Stilk v Myrick* in that the latter case saw the defendant placed in a situation of economic duress (as a result of which he promised the sailors additional salary); consequently, the exception would not apply there

In *Williams*, additional payment was given to the party who was looking unable to complete the original contract. However, it is equally possible for a promise to charge less (such as by reducing rent) to form the basis of an exception to the requirement of fresh consideration. This issue was considered in an Australian context by *Musumeci v Winadell*.

### ***Musumeci v Winadell:***

#### Facts

- Musumeci leased a fruit shop from Winadell
- At a later point in time, W leased another store in the same complex to a chain fruit store
- M's business decreased due to sales lost to the chain, and W agreed to reduce the rent
  - In doing so, W is able to keep M as a tenant in his complex and maintain a stream of income
- W attempted to resile from the agreement to reduce the rent and sought the full amount from M; M sued for breach of contract

#### Issue

- Did M provide consideration for W's promise to reduce his rent?

#### Reasoning

- The practical benefit exception is considered and accepted, subject to the following requirements
  - The exception should also apply where the party modifying the terms of the agreement grants a concession rather than a promise for additional payment
    - Eg, a reduction in rent (as is the case here), as opposed to an increase in the agreed payment (as in *Williams*)
  - There should be increased protection against unconscionable conduct and undue influence
    - This limits the scenarios in which the party modifying the terms may be said to be under no economic duress, so as to prevent the promisee who is suffering hardship from extorting a reduction/increase in rent/fees from the promisor
    - Thus, if the promisor is under financial pressure to retain the promisee

- as a contractor/tenant, consideration for the promise to increase fees/reduce rent may not be valuable where work continues/rent continues to be paid
- Essentially, this modification gives the court discretion to apply the exception in circumstances only where it is satisfied that the promise to reduce rent/increase fees has not been extorted
  - There is to be express consideration of the contingencies and expense of litigation
    - In considering whether W (the lessor) derived a benefit from granting a reduction in rent to M (the tenant), regard will be had for the expense (ie, detriment) of having to sue the tenant in the event that they walk away from the lease
    - Avoiding the detriment of having to sue the promisee for the uncompleted work/remaining rent (as provided for by the original terms) confers a benefit upon the promisor

#### Decision

- On the facts, Winadell's promise to charge less rent is supported by Musumeci's conferral of a benefit upon the promisor in the forms of avoiding:
  - An empty shop (lost rental revenue)
  - Having to sue Musumeci for the outstanding rent
- Because the promise was not made as a result of duress or fraud, and concessions to charge less are equally recognisable under the exception to promises to pay more, adequate consideration was provided and the promise is enforceable by Musumeci

#### Notes

- Santow J's adjustments to the exception are, in part, a concession that a promise to charge less should be treated the same as a promise to pay more (as in *Williams*)
- Critics: gives the Court more discretion in finding duress; notions of fairness raise difficulties and their inconsistent application could, ironically, lead to potentially unjust outcomes

The making of contractual promises may also constitute good consideration, even where a contract previously enforcing the same promise is terminated in order to be substituted by the new contract (*Brambles Holdings*).

### ***Brambles Holdings v Bathurst:***

#### Facts

- See above §2.2 [liquid waste storage]

#### Issue

- Was valid consideration provided for the new contract by Bathurst City Council?

#### Reasoning

- Ipp JA: the letter dated 19 September 1991 was clearly written on the assumption that the terms relate to a new contract
  - Bathurst's promise to allow Brambles to retain 1.1 cents per litre of the waste processing fee is valid consideration for Brambles' offer to repudiate the existing contract in favour of the new agreement

Decision

- The new contract is enforceable because valid consideration was provided in exchange for Bathurst's promise

C *Deeds*

If the promise is made out in a contract under seal (a deed), consideration is not required. Thus, deeds need not be supported by consideration to be enforceable (*Ballantyne v Phillott*).

D *Estoppel*

There is considerable overlap between cases in which consideration is in issue and those which seek to invoke an equitable remedy. Where good consideration cannot be established, a promise might also create rights enforceable by estoppel.

**IV THEORETICAL RESPONSES**A *Collins: The Law of Contract (1993)*

Collins notes two classes of objections to the doctrine of consideration:

- Should not be the sole test by which contractual obligations may be created
  - To some extent this criticism has been incorporated into the law
  - Consideration no longer provides the exclusive test of contractual liability
  - There are many other theoretical basis which justify the imposition of contractual liability (eg, estoppel, rectification, unjust enrichment, statutory remedies)
- The doctrine serves no worthwhile purpose

Collins identifies several possible rationales for the existence of the doctrine, but concludes that each either fails to concord with modern legal practice or ignores other factors:

- Possible rationales for the doctrine of consideration:
  - It fulfils the function of the formal requirement of writing (eg, buying goods in a supermarket)
    - When parties suffer a detriment as part of an exchange, more likely to be conscious of possible reliance by the other party and the seriousness of the bargain
    - But: casual, donative promises may be made with due seriousness and intention to create contractual relations, yet remain unenforceable because of a lack of consideration – therefore, an additional formal requirement exists
  - It is a means of distinguishing between fair and unfair contracts
    - Weak, because if anything unfairness is produced *as a result of* the requirement of consideration
    - Role of state is not to impose a particular moral code upon all citizens through contract law – tests of enforceability delineate proper sphere of state intervention

- Doctrine of consideration cannot represent a moral qualification to enforceability because it does not treat serious/intended obligations as binding consistently
- It can be explained according to the liberal harm principle
  - Detrimental reliance by the promisee or unjust enrichment at the expense of the promisee justify enforcing the contract
  - But notions of benefit and detriment are unfit to be applied to executory contracts – there, satisfying consideration creates the benefit and detriment, so if these factors are used to explain themselves, the result would be a circular rationale
- It has an economic role
  - Tests of enforceability limit the enforcement of promises to those which increase the total wealth of a society
  - Thus, excludes donative promises ('sterile transactions') because they don't transfer resources to a more valued use
  - But the test cannot distinguish between value-enhancing and worthless transactions – resources can be transferred to a more valued use without providing consideration for that transfer
  - And surely the requirement of consideration just adds to transaction costs
- Libertarian arguments
  - The consideration requirement allows for minimal state/court intervention
  - That is, it allows the parties to decide what promises to make binding according to what they consider to be valuable benefits or obligations to be derived under it

Having concluded that none of the established rationales adequately explains the doctrine, Collins proposes a model based on detrimental reliance:

- Detriment is a crucial justification for state intervention
- Requirement should be an intention to encourage the promisee to act to their economic detriment by relying on the promise
  - An estoppel-like proposal?
- Casual or donative promises do not have the requisite intention to induce reliance – just to confer a benefit, and so do not attract liability
  - But many such promises are, and are known to be, relied upon – such as the charity upon its donors
  - Unconvincing exception
- Damages for breach of executory contracts should be linked to the extent of the opportunity costs incurred (whether a contract could have been made with someone else instead)
  - But this threatens to undermine the certainty of concluded bargains by allowing rescinding parties to do so at minimum cost to themselves where they have knowledge that the other party has had no other enquiries
  - Undermines the value of a promise

Regardless of which rationale is accepted, there appears to be some discordance between the description of the present law and the theoretical justification for legal tests of enforceability. This seems indicative of the necessity (and desirability) of reforming the doctrine of consideration, to ensure that its practical application meets theoretical justifications offered in its defence.

It must also be remembered that, as the nature of transactions change – so that the number of relying parties, the discrepancy between consideration and value of the promise, and the potential extent of the detrimental relying are all increasing considerably – so too must the nature of consideration change, so that there may conceivably come a time when the requirement is no longer necessary. One could not go so far as to say that that time is now, because there are still

several somewhat convincing (if mutually exclusive) justifications for maintaining some way to delineate between enforceable and unenforceable obligations in terms of benefit and detriment. However, when more appropriate tests of enforceability are devised, the common law must be prepared to unburden itself of the doctrine of consideration – something that, given the emergence of alternative equitable remedies – seems highly probable.

## B *Other Positions*

### 1 *Will theory*

- The doctrine of consideration has the potential to interfere with the original interests and intentions of parties, as, eg, where they intend a promise to be binding but provide no legally recognised consideration
- Assessment of consideration leaves open to the parties to what extent it need be required, allowing them to practically negate its operation if they so choose
- However, the imposition of consideration onto the overriding framework governing promise enforcement remains a barrier to the realisation of the parties' true intentions

### 2 *Moral force of promises*

- Promises should be sufficiently binding in themselves to be enforceable
- Consideration for the promise is unnecessary; only the promise matters

### 3 *Law and economics*

- The requirement of consideration adds to transaction costs, and increases overheads; it is thus inefficient
- However, it could also increase certainty (assuming it were invoked consistently and applied in a predictable manner)
- Equally, though, inconsistent application could reduce certainty and jeopardise important commercial interactions, limiting the ability of parties to negotiate efficient terms