

The doctrine of consideration essay sample

Law



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The doctrine of consideration has been a basis for a considerable discussion over many years. In 1937, the doctrine of consideration was under appraisal by the English Law Revision Committee. They recommended that “ the difficulty and possible injustice resultant from the doctrine of consideration hoist the question whether it presents countervailing drawbacks which validate its withholding.” Additionally they recognized that the French Civil Code finds ‘ cause’ as the significant component in a contract. In Germany, the law looks at the ‘ intention’ of the parties that compose the contract. Both societies do not recognize the doctrine of consideration, however they are both extremely developed legal systems, and they function without the difficulties that our society experiences with the doctrine of consideration. Also they admitted that, even though there was much support for the obliteration of this doctrine, it was “ so deeply embedded in...law that any measure which proposed to do away with it altogether would almost certainly arouse suspicion and hostility.”

The English Law Revision Committee thus suggested modifying the doctrine to get rid of those aspects which may cause both hardship and needless inconvenience. The committee believed that this was a fundamental course of action for the doctrine of consideration to prevent adversity and unnecessary inconvenience. The recommendations made by the committee were not enacted by the Parliament of the United Kingdom. The courts have, by decisions made on particular cases, made an effort to apply the recommendations made by the committee to reduce the hardship and unnecessary inconvenience that the doctrine of consideration may cause. Cases such as *Williams v Roffey Bros & Nicholls (Contractors) Pty Ltd* ,

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd , and Waltons Stores (Interstate) Ltd v Maher are some cases that the courts have used as a vehicle to put in place some of the recommendations made by the English Law Revision Committee.

Consideration can best be defined as per Sir Fredrick Pollock: “ 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” The basic rules of consideration are that:

- Consideration must be present in every ‘ simple’ contract
- Consideration can be ‘ executory’ or ‘ executed’, though it cannot be ‘ past’, as past consideration is no consideration.
- Consideration must move from the promisee though not necessarily to the promisor
- Consideration does not have to be adequate, in that the consideration moving from the promisee must have value by which the law will recognise, but does not necessarily have to reflect the value of the promise made to the promisee
- Consideration must not be so vague that it becomes illusory
- And that consideration must be sufficient, thereby being recognisable in the eyes of the law.

The English Law Revision Committee recommended that the opportunity should be taken to “ prune away from the doctrine those aspects of it which create hardship or cause unnecessary inconvenience.” The aspects the Committee refers to are those such as:

- Past consideration is no consideration;
- A promise to perform an existing duty is no consideration;
- A part payment of a debt is no consideration; • And that consideration must move from the promisee.

One principle of consideration is that a promise to perform an existing duty is no consideration. This was the case in *Stylk v Myrick*. In this case Stylk was a member of a ship's crew. As two seamen from his crew had deserted, Myrick offered to share the wages of the two deserters amongst the remaining crew. Upon arrival at the ship's destination, Myrick failed to pay the extra wages. The matter was heard before court which ruled in favour of Myrick. The principle adopted here was that the performance of an existing duty provided no consideration for the promise to be enforceable. The courts have since, by way of exercising judicial creativity, incorporated some of the recommendations made by the English Law Revision Committee into common law. One case which demonstrates this is that of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*. In this case Roffey Bros, who had been contracted to refurbish a block of flats, subcontracted the carpentry work to Williams. Williams ran into financial difficulties before completing the job, so Roffey Bros agreed to increase payment to Williams in order for the flats to be completed. When Roffey Bros failed to pay Williams the amount owing, Williams sued Roffey Bros. Roffey Bros used the *Stylk v Myrick* case, arguing that Williams was only performing the duties which he had already been contracted to perform resulting in no consideration being provided by Williams for extra payment.

The courts held that Williams had provided Roffey Bros with a practical benefit, such as Roffey Bros not having to find another contractor, and having to make payments under penalties clauses under the main contract, which in turn amounted to sufficient consideration which binds Roffey Bros to their promise of payment. This is a clear example of the courts utilising their judgements so as to not cause hardship or unnecessary inconvenience. The courts distinguished the *Stylk v Myrick* case from the *Williams v Roffey Bros* case by stating that the former was a case involving contracts at sea and that the courts had to be careful with their decisions so as not to leave captains of ships at the mercy of their crew members. If the same rationale was used in *Stylk v Myrick* as was used in *Williams v Roffey Bros*, *Stylk* provided *Myrick* with a practical benefit, that being that *Myrick* was able to make it to the port in sufficient time, and not having to source an extra seaman. Therefore the outcome of that case could possibly be different in light of the *Williams v Roffey* case. This is a good example where the rule that performance of an existing duty is no consideration, has been altered to take into account other details so as to make the doctrine more flexible.

To further demonstrate this point, the *Williams v Roffey* case has been further applied to *Musumeci v Winadell Pty Ltd*. The court held in this case that *Musumeci* a small fruit and vegetable business, had provided *Winadell* (the shopping centre from which *Musumeci* leased premises) a practical benefit by continuing the lease. This practical benefit was sufficient consideration to make their agreement for rent reduction binding. The courts decided that performance of an existing duty did not result in lack of consideration in this case, hence setting precedent that performance of an

existing duty alone, is not sufficient to result in no consideration. This in turn adds flexibility to the doctrine of consideration.

Another principle of consideration is that consideration must move from the promisee. The Trident General Insurance Co Ltd v McNiece Bros Pty Ltd case is another example whereby the court has sought to move away from the rigid principles of consideration to build a more flexible one so as not to cause hardship. In this case Trident General Insurance Co Ltd (Trident) had issued a public liability policy in favour of the owner of a building site (Blue Circle). This policy covered Blue Circle Limited, all its subsidiary, associated and related companies, all contractors and sub-contractors and/or suppliers.

A crane operator, working under the direction of McNiece Bros P/L a contractor for Blue Circle, was injured at the site. The operator brought action against McNiece who in turn sought indemnity from Trident via the courts. The courts ruled in favour of McNiece, and stated that " it was ...time for the court to reconsider some of its common law rules and where necessary, amend them if their application provided harsh and unjust results." They also stated however that they are not going to abandon the doctrine of privity, and the extent of this judgement would only be limited to the insurance industry. This decision however does not abolish the doctrine of privity, as it is very much still prevalent in such cases as Visic v State Government Insurance Co Ltd and Winterton Constructions Pty Ltd v Hambros Australia Ltd , whereby claims for injuries under a third party's insurance failed.

The case of Walton Stores (Interstate) Ltd v Maher provided some changes to the doctrine of promissory estoppels. In this case, Maher owned a commercial property, which he had been negotiating to lease to Waltons Stores. As part of the agreement, Walton's required the existing building to be demolished and a new building constructed according to their specifications. Maher, through his solicitors, made Waltons aware that they did not want to demolish the existing building until it was clear that there would be no problems with the agreement. Walton's solicitors had responded that Waltons had verbally agreed, but that they were waiting to receive formal instructions. After the demolition of the building and half way through the construction of the new building, Walton's informed Maher that they were not going to proceed. Maher took the matter before the Supreme Court. The court found on both first instance and on appeal in favour of Maher on the basis of common law estoppel. As a result of this decision, promissory estoppel, which was previously only used to defend against legal action, can now be used to both commence and defend against legal action. Another result of this case is that promissory estoppel, in the way permitted by the court, effectively negates both the requirement that consideration is required in simple contracts and that it must come from the party suing to the party being sued.

The decisions in the previously discussed cases of Williams v Roffey Bros, Trident General Insurance Co Ltd v McNiece Bros, and Waltons Stores v Maher, have resulted in a more flexible and useful doctrine of consideration. They are examples of the courts utilising judicial creativity to amend certain principles in consideration to make a more flexible and useful doctrine to

avoid hardship and unnecessary inconvenience. It is my view that when the courts experience cases, such as those previously discussed, whereby a strict application of the doctrine of consideration may cause any hardship or unnecessary inconvenience, the courts will be flexible in its application. Through the use of these decisions, they are attempting to update the principles of the doctrine of consideration so that it meets the needs of today's society.

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