

Which considerations
are most incongruent
with common essay



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It is generally accepted within the law of contract that the ideal[s] of contractual fairness and liberty should prevail in contractual disputes.

Central to these ideals is the doctrine of consideration and the principles within this doctrine such as, the lack of adequacy needed for consideration and the rules derived from both *Stilk v Myrick* [1809] 2 Camp 317 and *Esp. 129* and *Williams v Roffey* [1991] 1 Q. B. 1. Rationality and commercial practice it could be argued have been shunned in favour of upholding some of these principles.

Using adequacy of consideration and the principles developed in *Stilk v Myrick* and *Williams v Roffey* I shall argue why these two aspects are most incongruent with common sense and commercial practice but should be maintained to uphold contractual fairness. I perceive these two aspects to be most incongruent with common sense and commercial practice. In relation to adequacy of consideration the English courts ignorance could be viewed as lacking common sense and betraying commercial practice. In addition the contradiction intrinsic in the judgements of *Stilk* and *Williams* has twisted the area of consideration and created confusion as to what would be common sense and commercial practice. This essay shall argue that rationality has to be occasionally sacrificed in order to satisfy the requirements of fairness and liberty within contracts. This essay shall attempt to make the point that while there are aspects within these two areas that are incongruent with common sense and commercial practice, judges deserve more credit for the formulation and development of this doctrine as it does for the most part protect fairness in contract.

This essay shall make the further point that the doctrine of consideration still serves a useful purpose in contract law. The principle of adequacy of consideration can be divided into aspects which coincide and conflict with ideals of common sense and commercial property. Although inconsistent this principle is fundamental in the doctrine of consideration and therefore should be maintained. With regards to adequacy of consideration the opinion of English courts is that ‘..

. the courts do not, in general, ask whether adequate value has been given... r whether the agreement is harsh or one-sided1’.

Simply meaning that if contracting parties have come to an agreement the court shall not consider the reasonableness of the agreement so long as there has been no duress or undue influence. This guiding principle has the potential to breach traditional definitions of common sense; if inadequate value has been given by the promisee for the promisor’s promise and the promisee incurs no detriment then there can be no consideration. In the case of *Hamer v Sidway* [1891] 27 NE 256 both Atiyah and Treitel consider that, ‘...

here the uncle promised his nephew \$5000 if he refrained from smoking... The promise was held to be enforceable,’ it continues that ‘ the nephew plainly incurs no detriment in fact by forbearing from smoking...

In the court’s view it was sufficient that the nephew restricted his lawful freedom of action with certain prescribed limits upon the faith of the uncle’s agreement. 2’ It could be rationalised that the nephew conferred not only the health benefits but also financial benefits from restraining himself from
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taking part in the activities that he and his uncle agreed to. The financial benefits it could be said are obtained through the saving made by not purchasing liquor, tobacco and from not gambling thus clearly lacking any relevant aspect of common sense. It could further be asserted that this guiding principle of adequacy of consideration fails to champion the main purpose of the doctrine of consideration, which is the protection of gratuitous and onerous promises.

As Treitel writes, ' where an agreement is legally binding on the ground that it is supported by nominal consideration, the doctrine of consideration does not serve its main purpose of distinguishing between gratuitous and onerous promises. ' There is a strong case to establish that the nephew's consideration in *Hamer v Sidway* was nominal due to the fact that by incurring the detriment to his freedoms that he did automatically benefit, while '... there was no benefit to the uncle.

.. 4' This case could be contrasted to that of *White v Bluett* (1853) 23 LJ Ex 36 as it was decided here that it was not good consideration for the son to forgo his personal freedoms by giving up the right to complain to his father. Nevertheless, there are very strong arguments to support the principle that some aspects adequacy of consideration should be untouched by the courts thus conforming to common sense and commercial practice. As Treitel reasons that, ' the courts are not equipped to develop a system of price control, and their refusal, as a general rule to concern themselves with the adequacy of consideration is a reflection of this fact. 5' Regardless of how many other parts of adequacy of consideration are incongruent with common

sense and commercial practice the latter dictum has to be maintained in order to protect the ideal of contractual liberty.

As Tillotson states, ' the operation of the doctrine of consideration within classical freedom of contract principles called for a bargain, but not necessarily a good bargain in business terms; parties were free to set their own price on their promises. 6' There is a general perception that this will theory should guide the formation of contracts and Tillotson's statement shows the importance of this within adequacy of consideration. This perception has been developed from the nineteenth century and there has been a line of reasoning to say that it may be open to discrimination and exploitation. As Gilmore suggests, ' it seems apparent to the twentieth century mind...

not to the nineteenth century mind, that a system in which everybody is invited to do his own thing, at whatever cost to his neighbour, must work... to the benefit of the rich and powerful7' However, even though the adequacy of consideration principle potentially opens the weaker parties to the vulnerability of being exploited by such rich and powerful it would be undesirable with the liberty of commercial practice to subscribe limits as to what is appropriate value within a contract. The logistical problems of the courts attempting, for example, to set a system of price control are substantial, raising questions such as, who decides the value of transactions between parties? There is also the problem of infringement of contractual liberty which would breach capitalist theology and laissez-faire economics. ' I suppose laissez-faire.

.. comes down to something like this: If we all do exactly as we please, no doubt everything will work out for the best. ' If the judiciary or indeed the legislature were to practice an interventionist culture with regards to adequacy of consideration it would erode our modern day consumer market by undermining freedom of commercial practice. The essay shall now turn to analyse the implications of Williams v.

Roffey on, the doctrine of precedent within contract law particularly focusing on the law concerned with performing a duty that a promisee is already obliged to perform to a promisor. Williams v. Roffey, despite Russell L. J's insistence to the contrary, has challenged the authority of Stilk v.

Myrick thus raising issues as to whether ideal[s] within common sense and commercial practice have been contravened. The doctrine of precedent has not been followed thus resulting in inconsistency in contract law and instability in commercial practice. In Williams v. Roffey the Court of Appeal was at pains to express the fact that the decision was not a contradiction of Stilk v.

Myrick. As Russell L. J. conveys, ' for my part I wish to make it plain that I do not base my judgment upon any reservation as to the correctness of the law long ago enunciated in Stilk v. Myrick.

A gratuitous promise, pure and simple, remains unenforceable... But where.. . a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration. 9' As Mindy Chen-Wishart

indicates, ' a confirmatory promise, therefore, has not ' counted' as valid currency for the purchase of contract rights. To say now that it can count because it confers a ' practical benefit' on the promisor is a trick..

. It cannot disguise the fact that practical benefit neither confers any enforceable benefit additional to that contained in the original contract, nor buys any enforceable expectation to the reciprocal promise to pay more. 10' The same factors could be maintained with regards to Williams v. Roffey as a promisee could intentionally delay their work so as to secure a more lucrative contract from a promisor in effect re-establishing the anxiety that the judges in Stilk v. Myrick attempted to eliminate.

This case can be viewed in relation to Stilk v. Myrick where the judgement went in favour of the promisor on the basis that '... a successful claim would open up the prospect of sailors on the high seas making unreasonable and extortionate demands upon their masters as the price for performing their contractual duty..

. ' or '... because he had not provided consideration for the master's promise as he had only done what he was already contractually obliged to do.

11' Williams has opened the door to exploitation and significantly set different directives for when the doctrine of consideration is applied as McKendrick states, '... owing English law in the direction of the conclusion that consideration should only be a requirement for the formation of contract and that it should not be required for the modification of a contract.

... the doctrine of consideration has been extended, with not very happy results, beyond its proper scope, which is to govern the formation of contracts and has been made to regulate the discharge of contracts. 12' In order for companies to structure and obtain the best and most beneficial contracts common sense and good commercial practice are foremost. There has to be a good understanding as to the guidelines to the formation, modification and substance of contracts among other things.

This essay argues that an ambiguity with regards as to what is held to be practical benefit can be seen to be incongruent with commercial practice. Williams has contradicted *Stilk v Myrick* and set new limits as to what is termed 'Practical Benefit'. On this Chen-Wishart judges that, 'Despite strenuous insistence to the contrary, *Roffey* clearly overturns the pre-existing duty rule which *Stilk v Myrick* is authority..

. Practical benefit moving from the promisee is enough. 13' She goes on to discuss more specifically the point of practical benefit by saying, 'Despite strenuous instance in *Roffey* that gratuitous promises not under seal are unenforceable, the reality of this position will depend on how rigorously the courts are prepared to limit the notion of practical benefit. 14' This essay however, recognises the shortcomings regarding commercial practice that were in the first place fashioned as a result of *Stilk v Myrick*. According to Smith, 'It has been argued, unconvincingly, that the true ground of decisions like *Stilk* was public policy, the captain in those days being at the mercy of his crew.

15' It is significant to remind one of the assertion made earlier, derived from Gilmore suggesting that the rich can manipulate this system as there was some practical benefit to be gained here. ' What is crucial is that the promisor gains some tangible benefit from the rearrangement and that no economic duress or fraud is exerted to give rise to that promise. 6' The decision in *Stilk* contrasts to *Williams* and it could be argued that it is the basis for the inconsistency that has accrued as opposed to *Williams*. In *Hartley v Ponsonby* (1857) 7 E; B 872 the situation was very much the same as in *Stilk* and the courts held that the seamen were entitled to enforce the promise. *Williams* therefore can be seen as part of the correction to the possible error that has been created by *Stilk* or as, '..

. the judges emphasised the need for a more flexible notion of consideration in this context. 8' This essay asserts therefore, that the weaknesses regarding the inconsistency of emphasis on both respecting contractual liberty and protecting weaker contractual parties within this particular part of consideration is incongruent with commercial practice and common sense. It establishes both inconsistency and unpredictability in the doctrine of consideration and clearly identifies a somewhat instable aspect to contract law. However, consideration must exist so as to maintain fairness within contracts. Although it has become evident that particular aspects of the doctrine of consideration are incongruent with commercial practice, despite this, it is somewhat common sense for these inconsistencies to exist and the doctrine undoubtedly, should, in general abide with such ideals.

There are certain theories that attempt to explain the role that contract law should play and does play. These theories are the reliance and will theory. <https://assignbuster.com/which-consideration-are-most-incongruent-with-common-essay/>

The school of thought known as the will theory would claim that the doctrine of consideration has an important role to play in contract law. It also argues that all promises should be enforceable, nevertheless the doctrine of consideration is a feature that prevents this from happening in order to accord with common sense and commercial practice and should be maintained as such. Such commentators as Fried have alleged, ' There exists a convention that defines the practise of promising and its entailments. This convention provides a way that a person may create expectations in others.

By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, then to break it. 19' However, this raises issues of whether societal conventions should be scrutinised by the courts. In a rebuttal to this view Smith states, ' The underlying flaw in Fried's argument is the idea that societal conventions should be enforced. A convention may very well reflect the beliefs and expectations of a societal majority, but this is hardly adequate justification to give a legal sanction to that convention. 0' It would be unprecedented for the doctrine of consideration to be abandoned, as consideration is the basis upon which a large portion of decisions is taken regarding enforceable promises and the features that go along with what makes a promise enforceable, such as benefit/detriment analysis as some reliance theorists would argue.

As previously argued Williams has made consideration more flexible and possibly raised the spectre of whether the doctrine of consideration is now required at all. The doctrine is principally concerned with fairness, which is

covered in the same way by other parts of contract law. Atiyah has made one of the more stinging attacks on the doctrine of consideration saying, ‘..

. one of the principal reasons for the present divergence between the conventional account of the law and its actual operation arises from the more general beliefs about the existence of a set of artificial and irrational rules termed the doctrine of consideration. 21’ This essay believes that this may inherently be true however, even though these rules may be ‘artificial and irrational’ the purpose that they serve to protect fairness are vital for laissez-faire economics. Furthermore, even though it has been alleged that there are limits upon which parties can rely upon their strict legal rights²², liberty has many a time been sacrificed in favour of fairness and this essay argues that the doctrine of consideration continues this distinguishment and for that reason should not be abandoned. This essay concludes that adequacy of consideration has aspects within it that could be argued are incongruent with common sense and commercial practise.

The fact that the courts do not assess the value of consideration opens the door to the possible exploitation of this aspect of consideration. Furthermore, it does not make commercial sense that literally gaining rubbish is good consideration²³. However, on the other hand this essay believes that this is the only way that the courts can function so that contractual liberty is not infringed upon. Furthermore, that the contradictions that have been created with regards to performing a duty one is contractually obliged to perform may show a lack of common sense and possibly harm commercial practise. Nonetheless, it determines that ‘practical benefit’ as that gained in Williams

conforms to both common sense and commercial practise, even though there are other parts are incongruent.

Finally, it would be fundamentally wrong '... to treat a whole doctrine of the law as irrational thus implying an extraordinary lack of faith in the intelligence of former judges.

.. and perversity in the erection of a system of precedent. 24' By arguing that the whole doctrine of consideration lacks common sense as some reliance theorists are leaning towards is arrogant.

The concept of consideration has been widened from its original basis as a reason to enforce promises, 25 nevertheless judges are some of the most intelligent people of their time, attempting to overcome some of the hardest issues that require their intervention.