

Contract, Consideration and Consistency

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Abstract:

This article seeks to continue the debate on the proper role of consideration in the formation of executory contracts at common law. It first attempts to identify the place of consideration within the theoretical framework of contract by outlining the arguments that have been made regarding the possible functions of consideration and how they correspond with the broad theories of contract. Two possible functions of consideration are identified. The first is that consideration is an indicator of an exchange. The second is that consideration is evidence that a promise or promises were made with due deliberation and with an intention that the promise or promises would be legally binding. The article then compares these two possible functions with the application of the doctrine of consideration and concludes that the evidential function is the only possible function that is consistent with the application. It then concludes by arguing that if consideration has an evidential function, alternative forms of evidence should be accepted in substitution for consideration and that therefore consideration should not be an essential element of the formation of contract. It also argues that if consideration was seen in this way, most of the problems commonly associated with the doctrine would be resolved.

Introduction

In 1937, the English Law Revision Committee published its sixth interim report which included, amongst other things, recommendations on the reform of the doctrine of consideration.¹ In addition to considering specific aspects of the doctrine, the Committee was required to make recommendations as to whether consideration should continue to be a required element for the formation of a simple contract.²

The Committee identified some difficulties associated with the doctrine of consideration. These included:

1. The rule that a promise recorded in writing that was not recorded in the form of a deed under seal was not enforceable in the absence of a consideration from the promisee.³
2. The rule that past consideration is no consideration.⁴
3. The rule that a promise to perform an existing duty is no consideration and the rule in *Pinnel's case*⁵ that a promise by a creditor to accept a sum of money less than the debt owed in satisfaction of the debt is not enforceable.⁶
4. The rule that a contract will not be formed, unless consideration moves from the promisee.⁷

¹ English Law Revision Committee (Cmd 5449), Sixth Interim Report, *The Statute of Frauds and the Doctrine of Consideration*, as published in (1937) 15 CAN. B Rev. 585

² English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 1

³ English Law Revision Committee (Cmd 5449), Sixth Interim Report, paras.29-30

⁴ English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 32

⁵ (1602) 5 Rep 117a

⁶ English Law Revision Committee (Cmd 5449), Sixth Interim Report, paras. 36, 33-35

⁷ English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 37

5. The rule that a promise to keep an offer open for a specified period of time is not enforceable, unless the promisee gives a consideration in return for keeping the offer open.⁸
6. The rule that in the case of a unilateral contract, completed performance of the promisee's consideration is required for the formation of the contract.⁹

The Committee noted that many of the members of the Committee were inclined to abolish the doctrine “root and branch”.¹⁰ But the Committee as a whole recognized that the doctrine was so deeply embedded in the common law that its abolition might “arouse suspicion and hostility”.¹¹ It chose instead to propose reforms of the doctrine designed to eliminate “most of its mischievous features.”¹²

The report of the commission was never implemented¹³, but since that report, steps have been taken by the judiciary to correct some of the mischiefs of the doctrine identified by the Revision Committee.¹⁴ In some jurisdictions, statutory interventions have resulted in a reversal of some of the key difficulties of the doctrine identified by the commission.¹⁵ Despite these changes, many of the difficulties identified by the committee remain and the doctrine remains conceptually problematic.

⁸ English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 38

⁹ English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 39

¹⁰ English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 27

¹¹ English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 27

¹² English Law Revision Committee (Cmd 5449), Sixth Interim Report, para. 27

¹³ Jack Beatson “Reforming the Law of Contracts for the Benefit of Third Parties, A second bite at the Cherry” (1992) 45 CLP 1 at 10-14

¹⁴ *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130; *Williams v Roffey Bros & Nicholls (Contractors) Limited* [1991] 1 QB 1 (CA).; *Antons Trawling Company Ltd v Smith* [2003] 2 NZLR 23

¹⁵ E.g. Contracts (Privity) Act 1982 (New Zealand) ; Contracts (Rights of Third Parties) Act 1999 (England and Wales)

In this article I will argue that there is a sound conceptual basis for the proposition that consideration is best viewed so providing evidence of the existence of an agreement, the fact that the promisor has not made the promise in haste without due deliberation and that the promisor intended the promise to be legally binding.

If that is the proper role of consideration then it follows that other evidence of the matters consideration seeks to prove should be accepted as an alternative to the requirement of consideration when determining whether a Contract has been formed. Consideration then would not be an essential requirement to establish the formation of a Contract, but only one of a number of ways through which the necessary evidential issues can be proved.

The decisions of the Courts, do not overtly describe consideration in the way that I propose it should be understood, with perhaps two exceptions. But it cannot be said with certainty that there is any consensus at a conceptual level, of the function of consideration.

The essay will first attempt to derive the potential functions of consideration in terms of contract theory. The essay will then discuss whether the application of the doctrine is consistent with the function of consideration derived from contract theory.

Finally I will argue that there is one conception of consideration that is consistent with contract theory and with application of the doctrine.

Theoretical context

In order to understand consideration in the context of contract theory, it is necessary to first consider the nature of consideration and the purpose that it serves. There are three main explanations of the purpose of consideration.

Reason to enforce

First, consideration indicates that there is a good reason to enforce a promise. The absence of consideration means there is good reason not to enforce a promise.

According to this explanation consideration was used by the courts in the eighteenth and nineteenth centuries as a mechanism to avoid enforcing agreements in cases involving, for example, unconscionable conduct, undue influence, duress, or illegality. Consideration could also be used as a justification for enforcing an agreement if the parties had made a reciprocal bargain or the promisee had suffered a detriment in reliance on the promise.¹⁶

Indicator of mutual exchange or bargain

Secondly, consideration may be explained as a mechanism that distinguishes between donative and gratuitous promises on the one hand and mutual exchanges of promises on the other. This explanation is based on two alternative premises. First, donative and gratuitous promises have no economic value. An exchange of promises will lead to an increase in the wealth of society. Donative and gratuitous promises can only redistribute wealth.¹⁷ Alternatively, promises have an intangible value associated with the donative intent of the promise, the good feelings that come from generosity. This value is degraded or eliminated if the donative promise can be enforced because the

¹⁶ P.S. Atiyah *Essays on Contract* (Clarendon Press, 1994) 180 - 187

¹⁷ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 222.

enforcement of the promise is inconsistent with the element of generosity.¹⁸

According to these views, consideration is indicative of a mutual exchange of promises, and when consideration is present, the promises should be enforced because combined, they have value. In the absence of consideration, a promise has no value and should not be enforced.

Formality

Thirdly, consideration is one of a number of formalities that are required before a promise will be enforced. Other recognised formalities include the sealing, or signing before a witness, a written deed recording the promise, or the requirement that certain categories of transactions are evidenced in writing. In civil law systems, certain promises must be recorded in writing and signed before a notary before they will be enforced. Formalities serve three purposes. First, the formalities provide evidence of the existence or content of the promise.¹⁹ Secondly, they provide a check against promises made on impulse without considered deliberation.²⁰ Thirdly they provide a legal framework that allows a promisor to express an intention in a legally effective way.²¹ The question remains, which of these explanations is consistent with contract theory.

It is now necessary to consider each of these possible functions in relation to the different theories of contract in an attempt to identify the role consideration plays at a conceptual level. It is not the purpose of this essay to critique these theories.

¹⁸ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 223.

¹⁹ Lon L. Fuller *Consideration and Form* (1941) 41 *Colum.L.Rev* 799 at 800

²⁰ Lon L. Fuller *Consideration and Form* (1941) 41 *Colum.L.Rev* 799 at 800

²¹ Lon L. Fuller *Consideration and Form* (1941) 41 *Colum.L.Rev* 799 at 801

Promissory Theory

Promissory theories are rights based theories derived from Kantian Principles.²²

According to these theories, a promise is the communication of an intention to undertake an obligation.²³ The obligation is created by the act of making the promise itself and not by reliance on the promise by the promisee.²⁴ A promise creates an obligation because it is intrinsically valuable. There are a number of possible explanations as to why promises are valuable. For example, by making a promise, the promisor creates an expectation that the promise will be kept. The promisee's expectation is founded on the premise of mutual trust. It is a social convention that it is morally wrong to create the expectation and then breach the promise.²⁵

Alternatively, a promise creates an exclusive relationship between the promisor and the promisee and, where the promise is kept, a relationship of trust and respect develops. The encouragement of such relationships is a good thing.²⁶ The obligation created by the promise imposes a duty on the promisor to carry out the promise. If the promisor breaches the promise, the promisee suffers harm by virtue of the breach.²⁷

If promissory theory is the foundation of contract law, it is necessary to identify the role of consideration in that context. If the role of consideration is to provide a reason to enforce or to decline to enforce a promise, then it would be difficult to reconcile promissory theories with consideration. There are a number of reasons that, in terms of the realist explanation of consideration, have been invoked as a reason to enforce

²² Fried 17, Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 141

²³ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 57

²⁴ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 58

²⁵ Fried 17

²⁶ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 74 -76

²⁷ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 76

promises. These include reliance on the promise, or a prior moral obligation to perform the act promised. In terms of the promissory theories, the reason for enforcement comes from the fact that the promise was made, and no additional reasons are required to justify enforcement. The reasons invoked for not enforcing a promise include duress, unconscionable bargains, illegality, and a lack of intention to be legally bound. It can be argued that promises made under duress, in unconscionable circumstances, or involving illegality, are not promises that have any intrinsic value, and are not worthy of recognition. It can be argued that if a promise is made without any intention on the part of the parties that it will be binding, then no expectation is created, and therefore a lack of such an intention would suggest that any words spoken constituted a statement of intention and not a promise. If these reasons for not enforcing a promise required some legal mechanism to identify them, consideration in the realist sense might have a role to play. But in the modern law of contract, all of these reasons for not enforcing a promise are recognised independently of the doctrine of consideration. If there are no additional reasons for the enforcement of a contract beyond the intrinsic value of the promise itself, then consideration becomes superfluous in terms of promissory theory.

The proposition that only promises made as part of a mutual exchange or bargain should be enforced is also inconsistent with promissory theories. According to these theories, a promise is intrinsically valuable. This value is not diminished by the lack of a reciprocal promise. Therefore, consideration as an indicator of a bargain has no role to play in terms of the promissory theories.

A requirement that certain formalities be carried out by the parties to an agreement to render the promise enforceable is not essential in terms of promissory theory. But it is not inconsistent with promissory theory.²⁸ The obligation is still created by the promise. The requirement of formalities provides evidence that the promise was in fact made and that the promisor did not make the promise on impulse or without deliberation. If the promise is made using a legally recognised formality, this provides evidence that the parties intended the promise to be legally binding. A formality requirement plays a procedural role independent of the conceptual basis of promissory theory.

Conceptually consideration only has a role in terms of promissory theory if its function is to provide evidence that a promise was made after proper deliberation and with the intent that it should be legally binding.

Reliance Theory

Reliance theory is based upon the premise that contractual obligations are designed to ensure that where M makes a promise to F which induces F to rely on the promise to her detriment, then M should compensate F for losses suffered by her as a result of that reliance.²⁹

If the function of consideration is to provide a reason for the promise consideration cannot be relevant if reliance is the basis of liability. A reason for enforcing a promise may include an act of reliance, but it may also include many other reasons that have

²⁸ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 65

²⁹ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 78

nothing to do with reliance. On this understanding of the function of consideration, the concept is overly broad.

If on the other hand consideration is an indicator of a bargain, consideration is not broad enough. While the existence of an exchange may in some circumstances be consistent with reliance, in others there may be no reliance at all. For example where two parties exchange mutual promises, it may be said that they have struck a bargain. But there will be no reliance until one of the parties acts to their detriment on the promise made by the other party. The existence of an exchange does not necessarily indicate acts of reliance.

As with the promissory theories, a requirement of certain formalities is not essential to reliance theories, but neither is it inconsistent.³⁰ The obligation is created by the promisee's act of reliance. But evidence corroborating the existence of the promise, or of proper deliberation by the promisor, or of the intention of the parties to be bound, serves a useful procedural purpose that does not impinge on the underlying theory.

Consideration as an indicator of an exchange or as a reason for the promise has no role in reliance theories. But as a formal requirement, it performs a useful function that is not inconsistent with the theoretical basis of liability.

Transfer Theories

Transfer theories postulate that a contract is a transfer of rights. No new rights are created by the agreement of the parties as there are in promissory and reliance

³⁰ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 65

theories. A contract transfers existing rights held by one party to the other. In the case of an executory contract, what is transferred is the right to the performance of a future act by the other party.³¹

The idea that existing rights of the parties are transferred from one party to another by virtue of their agreement is central to transfer theories. The very fact that they have agreed is sufficient, and it follows that no other reasons for enforcing the right transferred is necessary. As with the promissory theories, reasons not to enforce an agreement, such as duress or illegality for example, are dealt with in the modern law of contract by rules independent of the doctrine of consideration. Consideration, in the sense of a reason for the enforcement of a promise, is unnecessary in terms of transfer theories.

However, the relevance of consideration as the indicator of a bargain in transfer theory is not so clear. If the focus of transfer theories is the agreement of the parties, it is difficult to see why an exchange or bargain is an essential feature of the formation of a contract. M may agree to pass ownership of a chattel to F, and she may agree to accept ownership. There is no exchange, but in terms transfer theory, it might be supposed that a right to receive ownership has been transferred to F, even although she has given nothing in return. However Professor Benson proposes that there can be no contractual transfer without consideration. This is based on the premise that, by necessary implication, the doctrine of offer and acceptance requires that each party acts in order to obtain a return act from the other party.³² Gratuitous promises are one sided promises in which one party is not required to give anything in return for the

³¹ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 98

³² Peter Benson "The Unity of Contract Law" in Peter Benson Ed. *The Theory of Contract Law ; New Essays* (Cambridge University Press, 2001) 152

promise. It follows that a gratuitous promise is not actionable.³³ The purpose of consideration is to distinguish exchange promises that can transfer rights and gratuitous promises which cannot.³⁴ On this view, consideration as an indicator of exchange will be a necessary element of the formation of contract.

As with the promissory and reliance theories, the requirement for certain formalities as a requirement for contract formation is not essential to transfer theories, but neither is it inconsistent.³⁵ If an exchange is not conceptually an essential element of offer and acceptance, the transfer of rights arises solely from the agreement of the parties and no other requirements are needed. But, the formality function could satisfy a procedural need for evidence corroborating the existence of the promise, or of proper deliberation by the promisor, or of the intention of the parties to be bound. But even if an exchange is essential to a transfer of rights, as Professor Benson suggests, that does not preclude consideration performing the role of a formality requirement as well.

Utilitarian Theories

In terms of utilitarian economic efficiency theory, the role of contract is to promote efficient behaviour that maximises welfare in society. Efficiency theory is based on the fundamental assumption that mutual exchanges are beneficial to both parties and therefore maximises welfare. A gratuitous or donative promise on the other hand is beneficial in economic terms to only one party and does not maximise welfare. By enforcing agreements to exchange, and not enforcing donative or gratuitous

³³ Peter Benson "The Unity of Contract Law" in Peter Benson Ed. *The Theory of Contract Law ; New Essays* (Cambridge University Press, 2001) 170

³⁴ Peter Benson "The Unity of Contract Law" in Peter Benson Ed. *The Theory of Contract Law ; New Essays* (Cambridge University Press, 2001) 171

³⁵ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 65

agreements, the law of contract provides an incentive to enter into the former.³⁶ It follows that the law of contract requires a mechanism to distinguish between gratuitous and donative agreements and agreements to exchange. Consideration as an indicator of an exchange or bargain provides that mechanism. Efficiency theory does not imply the need for any additional limitations on contract formation such as other reasons for enforcing the agreement. While a requirement for formalities is not inconsistent with the theory, it does not preclude consideration of having more than one function. Consideration as a formality could be an additional, but subsidiary function in terms of the economic efficiency theory. In any event, the fundamental assumption of economic efficiency theory makes the identification of an exchange essential to the formation of contract.

There are other utilitarian theories have been proposed in an effort to explain phenomenon of contract. Rather than the maximisation of the economic welfare, these theories promote respectively distributive justice, the valuable relationships that arise from people making and keeping agreements, and the autonomy of the individual.³⁷ On the face of it there appears to be no need in these theories for a distinction between gratuitous or donative promises on the one hand and exchanges on the other. The promotion of distributive justice, valuable relationships and the autonomy of the individual may equally be served by encouraging donative promises as much as reciprocal promises. But these theories as yet are not fully developed, and it would be premature to come to a definite conclusion on the point.

Conclusion

³⁶ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 108 to 110

³⁷ Stephen A. Smith *Contract Theory* (Oxford University Press, 2004) 136 to 140

It is apparent from the theoretical context outlined above that there is a theoretical basis for postulating that the function of consideration is either an indicator of a bargain, or to provide an evidential formality requirement. There appears to be no theoretical basis for the proposition that the purpose of consideration is to identify a reason to enforce a promise.

It is clear that consideration is conceptually unnecessary if promissory or reliance theories provide the theoretical foundation for contractual liability. The role of consideration is not so clear in relation to the transfer theories. Considered broadly, the absence of the concept of consideration does not appear to be fatal to these theories. But in terms of Professor Benson's formulation, the very existence of an agreement depends upon there being a reciprocal exchange between the parties. Consideration as an indicator of an exchange is therefore an essential element of the formation of contract in terms of this formulation. Consideration is also an essential element in the formation of contract in terms of utilitarian economic efficiency theory because its basic assumption is that exchanges are more efficient than gratuitous or donative promises and should be encouraged by the law of contract.

In terms of both economic efficiency theory and Professor Benson's formulation of transfer theory, consideration serves to distinguish reciprocal exchanges from gratuitous and donative promises. The distinction is required for different reasons, but the function is the same.

However, in terms of all the theories discussed, the possibility remains open that there is a procedural role for consideration if it is seen as a formality requirement. A

formality function may not be an essential conceptual element for the formation of contract, but as a procedural requirement, it is not inconsistent with any of the theories discussed.

We are left with two possible functions for consideration derived from contract theory. But, do either of these functions coincide with the application of the doctrine of consideration?

Historical context

The use of the term consideration has a long history in the common law. The concept of mutual exchange has an even longer history. By the fourteenth century, an action in debt required proof of *quid pro quo*.³⁸ This reflected the essential element of reciprocity. An action for the recovery of a debt could not succeed without evidence that the creditor had granted a benefit to the debtor.

In the fifteenth century, in actions on the case for non-performance of a contract, it was necessary for the plaintiff to establish that the defendant had received *quid pro quo*.³⁹ When the term consideration was first used in actions on *indebitatus assumpsit* in the sixteenth century, it appeared, at least in part, to reflect the notion that reciprocity was required to establish liability.⁴⁰ It is possible that the strict requirement of a reciprocal exchange in the action for debt was carried over into *indebitatus assumpsit* without much thought about why this might be desirable. But

³⁸ S.J. Stoljar *A history of Contract at Common Law* (Australian National University Press, Canberra, 1975) at 9-11; David Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) at 80

³⁹ David Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) at 83

⁴⁰ David Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) at 142; Kevin M. Teevan *A history of the Anglo-American Law of Contract* (Greenwood Press, 1990) at 40

there may have been other explanations for the concept of consideration during its early evolution. In some sixteenth century cases the term *causa* was used rather than *consideration*. In civilian jurisdictions, *causa* was the reason or motive for the promise.⁴¹ The reason for a promise might be the plaintiff's expectation of receiving the benefit of a bargain with the defendant. But *causa* may have been found in some early cases in the actions carried out by plaintiffs in reliance on the alleged promises of defendants.⁴² It may be that the requirement for consideration was considered essential in order to prove a causal connection between the loss suffered by the plaintiff and the promise made by the defendant.⁴³ To make that connection the plaintiff would have to demonstrate that the defendant's promise provided the motivation for the plaintiff to act for the benefit of the defendant.⁴⁴

It would appear that by the beginning of the 17th century, there were a number of possible underlying explanations that might explain the requirement for consideration in an action for *indebitatus assumpsit*. The first possibility is that the requirement for reciprocity, carried over from the action in debt, was based on the premise that only simple contracts involving bargains should be enforced. But there does not appear to have been a philosophical objection to the enforcement of contracts that did not constitute a bargain. Deeds under seal had long been enforceable without any requirement for reciprocity. The second possibility is that in the case of simple contracts a reason or motive for the promise needed to be identified for the promise to be enforceable. But what was the purpose of requiring the plaintiff to plead a reason

⁴¹ Kevin M. Teevan *A history of the Anglo-American Law of Contract* (Greenwood Press, 1990) at 40

⁴² Kevin M. Teevan *A history of the Anglo-American Law of Contract* (Greenwood Press, 1990) at 40

⁴³ S.J. Stoljar *A history of Contract at Common Law* (Australian National University Press, Canberra, 1975) at 47

⁴⁴ S.J. Stoljar *A history of Contract at Common Law* (Australian National University Press, Canberra, 1975) at 47-48

or motive for the promise? The third possibility is that consideration was necessary in order to prove the causal connection between the loss suffered by the plaintiff and the breach of promise by the defendant. All three of these possibilities may be explained if consideration is seen as a means of providing corroboration for the plaintiff's allegation that an oral contract had in fact come into existence. Without that corroboration, in many cases, the word of the plaintiff was the only direct evidence available on the point. A requirement to plead consideration compelled the plaintiff to corroborate the allegation that a contract existed. This could be done by the plaintiff proving an act done or a promise made in return for the promise of the defendant. It could also be done by proving some other reason or motive for the promise such as an act of reliance on the defendant's promise by the plaintiff. Having corroborated the allegation as to the existence of the contract, consideration tended to confirm a causal link between the promise of the defendant and the loss suffered by the plaintiff.

In *Pillans and Rose v Van Mierop and Hopkins*⁴⁵, Lord Mansfield considered the case in the apparent belief that the purpose of consideration was to provide evidence of the existence of a contract. The case involved a merchant named White who asked the plaintiffs to honour a bill for the payment of £800 to Clifford. The plaintiffs agreed on condition that White would confirm his credit with a suitable merchant house. White responded by nominating the defendants, who were merchants in London. This being acceptable to the plaintiffs, they honoured the draft and paid the money to Clifford. They then wrote to the defendants, seeking confirmation that they would accept bills that the plaintiffs wished to draw in about a month's time for £800 on the credit of White. The defendants responded, confirming that they would accept such

⁴⁵ *Pillans and Rose v Van Mierop and Hopkins* 3 Burr. 1663 (1765)

bills. But before the bills were drawn, White became insolvent. The defendants gave notice of this fact to the plaintiffs forbidding them to draw upon them. Despite this, the plaintiffs did attempt to draw on the defendants, who refused to pay on the bills. The plaintiffs brought an action against the defendants seeking to recover their loss.

By way of defence, the defendants argued that there was no consideration moving from the plaintiffs in return for their promise to accept the bills.

If it is accepted that consideration is indicative of a bargain, the defendants' argument was correct, the plaintiffs had given no consideration. But the court approached the matter in a very different way. Lord Mansfield concluded that the lack of consideration by the plaintiffs did not assist the defendants. His decision was based on the premise that:

*"..... the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds &c. *I there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle."*⁴⁶

There is a considerable degree of logic in this approach. It introduces a degree of consistency between covenants, specialties and bonds on the one hand and simple contracts on the other. Covenants, specialties and bonds do not require consideration. On the basis of Lord Mansfield's approach, neither did simple contracts. He adopted a uniform approach to all agreements where evidence of a promise was required. For

⁴⁶ *Pillans and Rose v Van Mierop and Hopkins* 3 Burr. 1663 at 1669

covenants and the like, the evidence was a deed under seal. Certain specified types of contract were unenforceable under the Statute of Frauds without written evidence of their existence. For verbal contracts, the word of the party alleging that a contract had been formed was not sufficient evidentially. Corroborating evidence was needed as a substitute for a written document to satisfy the courts that there really was an agreement between the parties. That evidence could take the form of consideration. In order to prove consideration, the plaintiff would in effect have to acknowledge before the court that both parties had made reciprocal promises. Such an acknowledgement added credence to the plaintiff's claim that a contract had been formed. But where a simple contract was evidenced in writing, the written document itself provided the corroboration. Therefore according to Lord Mansfield, consideration was unnecessary.

Lord Mansfield was not alone in concluding that consideration was not necessary on the facts of this case. Wilmot J. noted that he could find no cases where a contract was held to be a nudum pactum where it was recorded in writing.⁴⁷ He then discussed civilian law principles on the subject, and concluded that English law on the issue was exactly the same as the Roman law, that is, that where an agreement is recorded in writing, no consideration is required.⁴⁸ Wilmot J. went on to conclude that in any event there was consideration on the facts in that by accepting the credit from the defendant, the plaintiff gave up the right to recover from White. Acton J. concurred with the other judges on the issue of consideration.

⁴⁷ *Pillans and Rose v Van Mierop and Hopkins* 3 Burr. 1663 at 1670

⁴⁸ *Pillans and Rose v Van Mierop and Hopkins* 3 Burr. 1663 at 1671

It would be surprising if all three judges in this case had decided to depart radically from the legal principles relating to consideration as they were understood in 1765.

There is nothing in the judgments to indicate that this was an attempt to reform the doctrine of consideration.

It has been suggested that Lord Mansfield in *Pillans v Van Mierop* treated consideration as evidence of the parties' intention to be bound.⁴⁹ However, the issue of intention to be bound is not discussed in any of the judgments.

The decision in *Pillans v Van Mierop* was overruled by the House of Lords in 1778.⁵⁰ Delivering the opinion of the Judges, Lord Chief Baron Skynner is reported to have said:

*For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it.*⁵¹

This statement of the law does not require consideration to consist of an exchange between the parties. It does require that the promisor derives some advantage or convenience as a result of making the promise. An exchange might meet this requirement if the promisee provides that advantage or convenience, but the possibility is open for the advantage or convenience to come from the surrounding circumstances rather than the promisee. It is therefore open to argue that consideration

⁴⁹ John Burrows, Jeremy Finn and Stephen Todd, *The Law of Contract in New Zealand* (3rd edition, Lexis Nexis, 2007), p93; H.G. Beale (Ed), *Chitty on Contracts*, (29th edition, Sweet & Maxwell, 2004), p 216; J.W.Carter. Elizabeth Peden and G.J. Tolhurst, *Contract Law in Australia* (5th edition, Lexis Nexus Butterworths, 2007), p 106

⁵⁰ *Rann v Hughes* 101 ENG REP 1014n. (H.L.1778)

⁵¹ *Rann v Hughes* 101 ENG REP 1014n. (H.L.1778)

under this formulation is consistent with the view that its purpose is to provide evidence. However, in relation to the decision in *Pillans v Van Mierop*, Lord Chief Baron Skynner is reported to have said:

*All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they are merely written and not specialties, they are parol, and a consideration must be proved.*⁵²

It would make little sense if consideration provided evidence, but alternative evidence, such as a written record of the agreement, was not acceptable. This would suggest that the House of Lords in this case did not consider that consideration was evidence.

Through the nineteenth there were a number of cases in which it was laid down that consideration must pass from the plaintiff (promisee).⁵³ These cases represent what was to become the orthodox understanding of consideration as the indicator of an exchange or bargain. Although this view became widely accepted, contract law has not been applied consistently with the theoretical justification for the enforcement of exchanges.

Consistency of the Application with the Theory

There are two alternative explanations derived from theory for the function of the consideration rule. But is the law, as it is applied in the courts, consistent with either

⁵² *Rann v Hughes* 101 ENG REP 1014n. (H.L.1778)

⁵³ *Thomas v Thomas* (1842) 2 QB 851;

of these explanations? There are a number of reasons for doubting that consideration is required because the law will only enforce exchanges.

Donative and Gratuitous Promises

First, donative and gratuitous promises can be enforced in the courts. This is done through the execution of a deed under seal. A promise made by one party to the other party will be enforced even although the other party has given nothing in return.

There is a requirement for certain formalities. Historically, the promisor affixed their seal to the deed. In modern times it is more common to require the signature of the promisor on the deed to be witnessed by a third party. The requirement of a written deed recording the promise and a witnessed signature satisfies a formality function.

The written deed and witnessed signature provide evidence that the promise was made, that the promisor has not acted on impulse in making the promise. The fact that the parties have taken the trouble to prepare and execute a deed is clear evidence that their intention is that the promise recorded in the deed will be legally binding. But there is no requirement for an exchange. If the law is restricted to only enforcing exchanges on utilitarian grounds of economic efficiency, then deeds under seal should not be enforced in the absence of consideration. There is a similar contradiction in relation to Professor Benson's transfer theory.

Nominal Consideration

Secondly, it is well established that in determining whether, in any given case, the requirement for consideration has been met, the courts will not look into the adequacy of the value of that consideration.⁵⁴ If one party gives a consideration that has no

⁵⁴ Thomas v Thomas (1842) 2 QB 851

more than a nominal value in return for the other party's consideration that is valuable, the nominal consideration is sufficient for the formation of a contract. Commonly called the peppercorn principle, the recognition of nominal consideration is inconsistent with economic efficiency theory. A contract for nominal consideration is no different in the terms of the theory from a gift. It is merely redistributive and does not maximise welfare.

Nominal consideration is not inconsistent with Professor Benson's formulation of transfer theory. While offer and acceptance implies a reciprocal exchange, it does not necessarily require an equal exchange. Nominal consideration will still provide an indicator that there are two sides to the transaction.

The recognition of nominal consideration is consistent with the view that consideration is a formality requirement. The fact that the parties have taken the deliberate step of specifying nominal consideration is evidence that they intend their agreement to be legally binding. There would be no other plausible explanation for doing so.

Variations of Contract

Thirdly, there have recently been changes to the rules relating to the variation of contracts which do not accord with the view that consideration is indicative of an exchange. For nearly 200 years the variation of the terms of a contract was governed by the rule in *Stilk v Myrick*.⁵⁵ According to the rule, the parties to a contract could vary the terms of that contract, by entering into a new contract that complied with all

⁵⁵*Stilk v Myrick* (1809) 2 Camp 317

the requirements for its formation. One of those requirements was good consideration. To be good consideration for the variation, it had to be something different from the consideration that passed between the parties in terms of the original agreement. If an agreement to vary a contract is a contract in its own right, this would appear to be logical in terms of the doctrine. At the point in time when the variation was agreed to, the consideration exchanged in the original agreement would be either past consideration or a pre-existing contractual obligation to the other party. But the rule in *Stilk v Myrick* has been heavily criticised on the basis that it is artificial and unrealistic in modern commercial transactions.⁵⁶

In *Williams v Roffey Bros & Nicholls (Contractors) Limited*⁵⁷ the rule was modified. The case involved a dispute between the head contractor for the refurbishment of a block of flats and one of its sub-contractors. In the original contract, the sub-contractor had agreed to carry out carpentry for a total sum of £20,000. Unfortunately the agreed price made it uneconomic for the sub-contractor, and part way through the work he got into financial difficulties. The head contractor was keen to complete the contract on time, due to a clause in the head contract providing for penalties if the refurbishment was not completed by a specified date. The head contractor approached the sub-contractor and offered to increase the original sub-contract price by £10,300 payable by instalments at a rate of £575 for each completed flat. The plaintiff accepted the increased price and continued to work on the refurbishment but after completing 8 more flats he ceased work altogether. The head contractor had to engage another carpenter to complete the work and incurred a penalty due to a delay in completion of the refurbishment. The sub-contractor sought payment for the

⁵⁶ B Reiter, *Courts, Consideration & Common Sense* (1977) 27 *U TLJ* 439

⁵⁷ *Williams v Roffey Bros & Nicholls (Contractors) Limited* [1991] 1 *QB* 1 (CA)

additional 8 flats that had been substantially completed, but the head contractor declined to pay. The sub-contractor therefore brought a claim against the head contractor alleging a breach of the sub-contract as varied. In defence the head contractor submitted that there was no consideration for the promise to pay the additional sum, because, in completing refurbishment of the 8 flats, the sub-contractor had done no more than what he was already obliged to do under the original sub-contract.

Before the English Court of Appeal, counsel for the head contractor acknowledged that the head contractor may have received practical benefits from the variation of the sub-contract. The delay in completion, and the consequent penalties the head contractor was obliged to pay under the head contract would have been eliminated or at least reduced. It would have ensured that the sub-contractor continued with the work and did not breach his contract, and it would have avoided the trouble and expense of engaging someone else to complete the work.⁵⁸ However it was argued that these practical benefits were not benefits recognised by the law as consideration.

After considering a number of decisions on the matter, Glidewell LJ put the following proposition:

“(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A’s promise to perform his

⁵⁸*Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 11

*contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) these promises are not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise so that the promise will be legally binding".*⁵⁹

Glidewell LJ then went on to comment that the court was not overruling *Stilk v Myrick*, but was merely refining the rule.⁶⁰ The English Court of Appeal's decision in *Williams v Roffey Bros & Nicholls (Contractors) Limited* has received judicial support in New Zealand and, with some modification, in Australia.⁶¹

Consideration for a variation of contract may, in the light of *Williams v Roffey Bros & Nicholls (Contractors) Limited* consist of a practical benefit. But what is a practical benefit? It is not synonymous with a bargain or exchange. It can arise from circumstances quite incidental to the agreement made by the parties.⁶² Professor Coote has argued that the effect of the decision is to turn any benefits arising from the performance of the original contract by the promisee into good consideration⁶³ and that in these circumstances consideration will always be present unless the original contract was of no benefit at all to the promisor.⁶⁴ He concluded that such an

⁵⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 15-16

⁶⁰ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 16

⁶¹ *Attorney General for England and Wales v R* [2002]2 NZLR 91; *Machirus Properties Ltd v Power Sports World* (1987) Ltd (1999) 4 NZConvC 193,066; *Musumeci v Winadell Pty Ltd* (1994)34 NSWLR 723. See also J.W. Carter, Anrew Phang Jill Poole "Reaction to Williams v Roffey" (1995) 8 JCL 248

⁶² Mindy Chen-Wishart "Consideration: Practical Benefit and the Emperor's New Clothes" in Jack Beatson and Daniel Friedman eds *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995)

⁶³ Brian Coote *Consideration and Benefit: In Fact and In Law*. (1990) 3 JCL 23

⁶⁴ Brian Coote *Consideration and Benefit: In Fact and In Law*. (1990) 3 JCL 23 at 25

extension of what constitutes consideration would compromise the whole doctrine.⁶⁵

Practical benefit is not synonymous with exchange, and the introduction of this new concept is inconsistent with the notion that only exchanges should be enforced.

While the practical benefit formulation in *Williams v Roffey Bros & Nicholls (Contractors) Limited* was followed in a number of common law jurisdictions, the evolution of consideration as it applies to variations of contract may not have ended with the new concept of practical benefit. In *Antons Trawling Company Ltd. v Smith*⁶⁶ the Court of Appeal of New Zealand concluded that *Stilk v Myrick* could no longer stand and that consideration for an agreement to vary existing contractual terms was no longer necessary.

Antons Trawling Company Ltd. v Smith concerned an alleged oral variation of a contract between Smith and Antons Trawling Company Limited (Antons). Antons operated a small fleet of fishing trawlers in the New Zealand exclusive economic zone. The company owned individual transferable quota (ITQ) allowing them to catch specified species of fish within New Zealand fisheries waters. In 1994, Antons employed Smith under a contract of engagement as the master of one of their fishing trawlers. Under this agreement the master was entitled to a percentage of the value of the catch. The agreement also required Smith to engage in experimental or exploratory fishing if directed to do so by Antons. The agreement provided for a daily rate to be paid to Smith where experimental or exploratory fishing was being carried out.

⁶⁵Brian Coote *Consideration and Benefit: In Fact and In Law*. (1990) 3 *JCL* 23 at 29; see also Brian Coote 'Consideration and the Variation of Contracts' [2003] *NZLRev* 361 at 364

⁶⁶*Antons Trawling Company Ltd. v Smith* [2003] 2 *NZLR* 23

In June 1994 Smith and Barbarich, an officer of Antons, had a verbal discussion about carrying out some exploratory fishing in an effort to establish the commercial viability of a particular fishery. Smith agreed to undertake the exploratory fishing, and in return, Barbarich agreed that the company would sign over 10 percent of any ITQ allocated by the Ministry of Agriculture and Fisheries as a result of the exploratory fishing. After the results of the exploration were made available to the Ministry, new ITQ was issued to Antons. However, Antons did not transfer any of that ITQ to Smith. Smith brought an action against Antons for breach of the contract as varied. In defence of the claim, Antons submitted that the alleged contract between Smith and Antons was not supported by consideration, on the basis that under the terms of the agreement Smith was required to do no more than he was already obliged to do under the original contract of engagement. This submission was made in reliance on a *Stilk v Myrick*.

The Court of Appeal considered *Williams v Roffey Bros* and Professor Coote's criticisms of that case. They also considered Professor Reiter's criticisms of the rule in *Stilk v Myrick*.⁶⁷

The Court of Appeal concluded:

“We are satisfied that Stilk v Myrick can no longer be taken to control such cases as Roffey Bros”, Attorney-General for England and Wales, and the present case, where there is no element of duress or other policy factors suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr

⁶⁷B Reiter, *Courts, Consideration & Common Sense* (1977) 27 U TLJ 439

Smith of the benefit of what Antons promised he should receive would be inconsistent with the essential principle underlying the law of contract that the law will seek to give effect to freely accepted reciprocal undertakings. 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 have already made such intention clear by entering into legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement. Whichever option is adopted, whether that of Roffey Bros or that suggested by Professor Coote and other authorities, the result is, in this case, the same.”⁶⁸

Removing the legal requirement for consideration for the variation of the contract reconciles the two major difficulties identified by commentators. The strict application of the rule in *Stilk v Myrick* will no longer result in the artificial and unrealistic commercial transactions identified by Reiter.⁶⁹ With the elimination of the requirement of a practical benefit, the problems associated with that concept also disappear. This decision is based on the premise that consideration, at least in the context of promises to vary an existing contract, has an evidential function and that an exchange is not essential to the enforceability of a promise in this context. But the decision goes beyond creating another exception to the general rule that only exchanges should be enforced. It specifically recognises that consideration as evidence is not essential if there is other evidence available that performs the same evidential function.

⁶⁸ *Antons Trawling Company Limited v Smith* [2003] 2 NZLR 23 at 45

⁶⁹ B Reiter, *Courts, Consideration & Common Sense* (1977) 27 U TLJ 439

Consideration in the absence of an exchange

It is not difficult to find authorities where the Courts struggle to find consideration. It has been suggested that in some cases, the courts will invent consideration in order to do justice in the case before them.⁷⁰ Whatever motives the courts have in these cases, they are difficult to justify in terms of the view that consideration is an indicator of an exchange. A complete analysis of all such cases is not possible in this essay, but some examples should suffice to illustrate the point.

In *Shadwell v Shadwell*⁷¹, the plaintiff received a letter from his uncle that stated:

My dear Lancey,

I am glad to hear of your intended marriage to Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150l. yearly during my life and until your annual income derived from your profession of a Chancery barrister, shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require.

Your ever affectionate uncle,

Charles Shadwell

The plaintiff did marry Ellen Nicholl. The plaintiff practised as a Chancery barrister, but he alleged that his annual income never reached 600 guineas. Over the years the uncle did pay some of the annual payments of 150l, but not all. When the uncle died, the plaintiff sued his estate, claiming the outstanding balance.

⁷⁰ G. Treitel "Consideration" in H.G. Beale General Editor *Chitty on Contracts* (29th edition, Sweet & Maxwell, 2004) at 221

⁷¹ *Shadwell v Shadwell* (1860) 9 CB (N.S.) 159

The executors of the estate sought to defeat the claim by demurrer, alleging, inter alia, that there was on the pleadings no consideration moving from the plaintiff in return for the uncle's promise to pay the annual sum of 150l. The plaintiff responded submitting that the act of proceeding with the marriage to Ellen Nicholl was consideration moving from the plaintiff. In a dissenting opinion Byles J rejected that submission on the grounds that on a proper reading of the uncle's letter, there was no request by him for the plaintiff to proceed with the intended marriage.⁷² Erle CJ for the majority adopted a different approach, finding that the plaintiff suffered a loss at the request of his uncle in that he:

*“...may have made a most material change in his position and may have incurred pecuniary liabilities, resulting in embarrassments, which were in every sense a loss if the income which had been promised should be withheld; and, if the promise was made in order to induce the parties to marry, the promise so made would be in legal effect a request to marry.”*⁷³

There was nothing in the pleadings that alleged that the plaintiff had made any material change in his position or that he had incurred any pecuniary liabilities in reliance on the promise made by his uncle. Nevertheless, Erle C J found that the possibility of a change of position or pecuniary liability was sufficient consideration from the plaintiff for the uncle's promise.

There was no exchange on these facts. The uncle did not seek a promise from the plaintiff that he would marry Ellen Nicholl. The uncle's letter was clearly written after

⁷² *Shadwell v Shadwell* (1860) 9 CB (N.S.) 159 at 175

⁷³ *Shadwell v Shadwell* (1860) 9 CB (N.S.) 159 at 174

the plaintiff had made his intention to marry Ellen Nicholl known. There was nothing in the letter expressly or impliedly that could be construed as a promise by the plaintiff to marry Ellen Nicholl. The courts other alternative was to find consideration in the possibility that the plaintiff might in the future have relied on the uncle's promise. But the same could be said for every promise ever made. In reality he plaintiff did not take on any obligations. There was no reciprocal exchange. The uncle's promise was gratuitous.

It is interesting to note that the uncle's promise was evidenced in writing which confirms the existence of the promise and that it was made after due deliberation. The written document is not consideration, but it is an alternative form of evidence that performs the same function as consideration as a formality.

In *Pollway Ltd. and Anor v Abdullah*⁷⁴ the first plaintiff was the vendor of real estate. The second plaintiff was employed by the vendor to sell the property at auction. The defendant was the successful purchaser at the auction. At the completion of the auction the purchaser signed a memorandum of purchase. Under the terms of the memorandum, the purchaser was required to pay a deposit of 10% of the purchase price to the auctioneer as agents for the vendor. The purchaser gave a cheque for the deposit to the auctioneer. The cheque specified the auctioneers as the payees. Prior to settlement of the sale, the purchaser stopped his cheque without any justifiable reason. When the cheque was presented by the auctioneer, it was dishonoured. The purchaser was given an opportunity to comply with his obligations under the contract, but he refused to do so. The vendors took this refusal as a repudiation of the contract, and

⁷⁴ *Pollway Ltd. and Anor v Abdullah* [1974] 1 W.L.R. 493 (CA)

proceeded to sell the property to another purchaser. The price obtained on the second sale was only £50 less than the price agreed to by the defendant.

Presumably because the loss suffered as a result of the repudiation of the contract was relatively small, the vendor and the auctioneer sued the purchaser on the cheque. At first instance, the county court judge found for the purchaser on the basis that the vendor had elected to terminate the contract following the purchaser's repudiation, and that consequently there was a total failure of consideration given by the vendor. This finding was based on the view that the vendor's consideration was the promise to transfer title to the property to the purchaser. Once the contract was terminated, that obligation no longer existed.

The Court of Appeal unanimously disagreed. Roskill L.J. expressed concern at the effect the lower court's decision would have on agents acting for principals in the ordinary course of their business, and said⁷⁵:

“... a conclusion which has so startlingly inconvenient a commercial result requires to have its foundation in point of law closely analysed before it can be accepted as correct.”

The Court of Appeal upheld the lower court's finding that the vendor could not succeed in suing on the cheque on the grounds that the vendor was never a holder of the cheque.

⁷⁵ *Pollway Ltd. and Anor v Abdullah* [1974] 1 W.L.R. 493 at 495

Roskill L.J. went on to find that there were three separate contracts between the parties.⁷⁶ First, there was the contract between the vendor and the auctioneer, engaging the auctioneer to sell the property on behalf of the vendor. Secondly, there was a contract between the vendor and the purchaser for the sale and purchase of the property. Thirdly, there was a contract between the auctioneer as payee of the cheque, and the purchaser as drawer of the cheque. The consideration given in return for the cheque by the auctioneer was to warrant to the defendant their authority to sign a memorandum of sale on behalf of the vendors and to receive the cheque and diminution of the purchaser's obligation to pay the full amount of the purchase price to the vendor.⁷⁷

This third contract implied by the court does not in any real sense involve an exchange between the parties. The purchaser gives the cheque to the auctioneer. But the auctioneer as the agent of vendor does not receive the cheque for their own benefit. The auctioneer is a conduit between the vendor and purchaser. By giving the cheque to the auctioneer, the purchaser is in effect giving the amount of the cheque to the vendor. The auctioneer by acting as the vendor's agent warrants that he has authority to act on behalf of the vendor. But that warranty arises from the law of agency, independently of the contract.⁷⁸ There is no exchange between the auctioneer and the purchaser in this case.

But there is the cheque given by the purchaser. A cheque is written evidence of the existence of purchaser's promise to pay the deposit and that the promise was not made on impulse.

⁷⁶ *Pollway Ltd. and Anor v Abdullah* [1974] 1 W.L.R. 493 at 496

⁷⁷ *Pollway Ltd. and Anor v Abdullah* [1974] 1 W.L.R. 493 at 497

⁷⁸ Cite for agents authority to act for the principal

In *Attorney-General for England and Wales v R*⁷⁹, the plaintiff on behalf of the Crown of the United Kingdom bought an action in the New Zealand courts against a former member of the British Special Forces now resident in New Zealand. The plaintiff sought orders to prevent the defendant from publishing details of military operations in which he was involved during the first Iraq war. Three books on the subject by other authors had already been published. These described a patrol code-named Bravo Two Zero, a military operation carried out by a group of British Special Forces personnel that included the defendant. This operation was unsuccessful, and three members of the patrol were killed in action. All but one of the members of the patrol were captured. Two of these books were written by members of the patrol. Some of the remaining members of the patrol were concerned that the accounts of the operation given in the books were not accurate, and in particular, that one of the books laid the blame for the failure of the operation, unjustly in their view, on one of their fallen comrades.

The resulting discontent in the Special Forces community and security concerns over the potential public identification of Special Forces personnel by the publication of the books, prompted the Ministry of Defence to take steps to prevent future publication of the details of military operations without their prior consent. All members of the Special Forces were required to enter into a confidentiality contract not to disclose any information or make any statements about the work of the Special Forces without express prior authority in writing from the Ministry. In return the Ministry agreed not to return the Special Forces personnel concerned in each case to

⁷⁹ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91

their parent unit in the British Army. The defendant signed a standard agreement prepared by the Ministry of Defence that stated:

*“In consideration of my being given a(continued) posting in the United Kingdom Special Forces from 28 October 96 (date) by MOD, I hereby give the following solemn undertaking binding me for the rest of my life: ...”*⁸⁰

The document then outlined specific obligations of the defendant relating to the disclosure of information. Some months later, the defendant resigned from the Special Forces and returned to civilian life in New Zealand.

The defendant still wished to tell his version of the Bravo Two Zero story in order to, in his view, put the record straight. He wrote a book. Prior to publication, he and his publisher arranged for copies to be sent, as a courtesy, to various interested parties, including the United Kingdom’s Ministry of Defence. The Attorney General for England and Wales on behalf of the Crown commenced proceedings in the New Zealand Courts seeking to prevent publication.

The defendant opposed the claim on the grounds, inter alia, that the Crown had given no consideration for this alleged contractual obligation. The defendant argued that the Crown was not as a matter of law able to fetter its discretion to dismiss him at will by agreeing in the contract not to dismiss him from the Special Forces. Therefore, he argued, such a promise could not be good consideration.

This proposition was not disputed by the Crown. But it was submitted that the consideration given by the Crown was not the promise not to dismiss, but the act of

⁸⁰*Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 102

forbearing to dismiss after the alleged contract was signed. In the New Zealand Court of Appeal this submission was accepted on the following reasoning:

1. A promise by the Crown to fetter its power to dismiss at will is not enforceable and therefore such a promise cannot be consideration.⁸¹
2. Consideration can consist of executory consideration by one party in return for executed consideration by the other.⁸²
3. Consideration can be an act that is done after the contract is made.⁸³
4. If for some reason the consideration specified in the contract is insufficient, the party attempting to enforce the contract may nevertheless point to some other act that would be sufficient, even where that act was not specified in the contract.⁸⁴
5. While the promise not to dismiss the defendant was a fetter on the Crown's power to dismiss at will, forbearing to dismiss after the contract was entered into was not a fetter on that power and could be consideration if it was referable or in response to the promise of the defendant and was of value to the defendant.⁸⁵

⁸¹ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 108 Ln 10

⁸² *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 106 Ln 35

⁸³ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 106 Ln 40

⁸⁴ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 107 Ln 16

⁸⁵ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 108 Ln 12

6. The Ministry responded to the defendant's promise of confidentiality by not dismissing him from the Special Forces and thereby provided consideration.⁸⁶
7. In promising confidentiality, the defendant was implicitly requesting the Ministry not to dismiss him from the Special Forces.⁸⁷

The decision of the Court of Appeal was the subject of an appeal to the Judicial Committee of the Privy Council. The Judicial committee agreed with the reasoning given by the Court of Appeal on the issue of consideration.⁸⁸

In this case the Crown's consideration is the forbearance to return R to his parent unit. This act comes after the contract is said to have been formed. The Crown, by performing the act that it could not legally promise to do has retrospectively given consideration. It is difficult to see what the Crown has given in exchange for R's confidentiality obligation. While they did not return R to his parent regiment, they could have at any time. By performing the act they could not promise to do for a single day or a single hour, would that have been a sufficient consideration? There was no reciprocal exchange in this case. In return for his promise of confidentiality, R received nothing more than what he already had, the possibility that he could at any time be returned to his parent regiment.

As in the two previous cases, the existence of the promise was evidenced in writing, signed by the plaintiff. It was clear that the plaintiff deliberated before he agreed to

⁸⁶ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 108 Ln 17

⁸⁷ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at 108 Ln 21

⁸⁸ *Attorney-General for England and Wales v R* [2004] 2 NZLR 577 at 585

the terms from his reluctance to sign. The fact that the agreement was phrased in terms of consideration implies that the parties intended it to be legally binding.

In *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.*⁸⁹ the respondent purchased a drilling machine from a company in the United Kingdom. The drilling machine was shipped to New Zealand by the Federal Steam Navigation Company Ltd (Federal). The appellant carried out stevedoring work for Federal and generally acted in the capacity of Federal's agent in New Zealand. In their capacity as an agent of Federal, the appellant received the Bill of Lading for the drilling machine on its arrival in New Zealand. During the unloading from the ship, the drilling machine was damaged due to the negligence of the appellant. The Bill of Lading contained an exclusion clause in the following terms:

“It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment...”

The majority opinion delivered by Lord Wilberforce concluded that the agent of a party to a contract may, if certain requirements are met, receive a benefit specified in

⁸⁹ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd* [1974] 1 All ER 1015 (PC)

the contract for the agent, even if the agent is not party to the contract. One of the requirements is that consideration moves from the agent.⁹⁰

After noting the commercial nature and complexity of the relationship between all parties concerned, and noting a number of situations in daily life, where consideration can be difficult to identify, his Lordship commented:

*These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.*⁹¹

His Lordship concluded that the exclusion of liability was intended by the parties to cover the carriage of the drilling machine from loading to discharge, whether it was the other party or their agents or subcontractors, who carried out the work.⁹²

His Lordship then proceeded to analyse the contract contained in the bill of lading as follows:

1. The bill of lading created a unilateral bargain between the appellant and the respondent made through Federal as an agent.⁹³

⁹⁰ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 at 1019

⁹¹ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 at 1020

⁹² 1020

⁹³ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 at 1020 para d Ln 4

2. The unilateral bargain became a full contract when the appellant performed its services by discharging the drilling machine. That act for the benefit of the respondent was the consideration given by the respondent in return for the exclusion of liability for the appellant.⁹⁴
3. The fact that the appellant was already under a contractual obligation to Federal to carry out those services, did not invalidate the same consideration passing from the appellant to the respondent.⁹⁵

In their dissenting speeches, Viscount Dilhorne and Lord Simon of Glaisdale accepted that it was open to the parties to create a unilateral bargain. But they concluded that the language of the bill of lading could not be construed as an offer open to acceptance by carrying out a specified action while, at the same time, that action provided executed and instant consideration. The wording clearly constituted an agreement, and in terms of the agreement there was no consideration moving from the appellant.⁹⁶

The dissenting speeches highlight the lengths the majority was prepared to go to in order to find consideration. As one of the dissenting speeches pointed out, to construe the agreement as a unilateral offer was to re-write the agreement.⁹⁷

⁹⁴ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 para e Ln 6

⁹⁵ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 at 1021 para a Ln 2

⁹⁶ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 at 1023 and 1031

⁹⁷ *The New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.* [1974] 1 All ER 1015 at 1024 and 1032

The majority found that the agent's consideration was the act of discharging the drilling machine. But this was something the agent was already contractually bound to do in its contract with its principal, Federal. There was no real exchange between the appellant and the agent in terms of economic efficiency theory. But there was evidence in the written terms of the bill of lading that the intention of the parties (the appellant and Federal) was to exclude liability for Federal's agents.

Conclusions on Consideration as Indicative of an Exchange

The application of the law of contract, and the consideration rule itself is not consistent with the premise that consideration is indicative of an exchange. If the theory underpinning the requirement for consideration is that only exchanges should be enforced, then gratuitous promises should not be enforced. But the law does enforce such promises if they are recorded in the form of a deed under seal. The recognition of nominal consideration by the courts suggests that the purpose of consideration is not to identify an exchange in terms of economic efficiency theory. There are cases where consideration has been found by the courts where there has been no exchange that would be consistent with either efficiency theory or Professor Benson's formulation of transfer theory. It cannot be said that the application of the doctrine of consideration is consistent with the theory that consideration is an indicator of an exchange. But does the alternative view that the purpose of consideration is to provide evidence of the existence of the contract and the intentions of the parties to be legally bound, provide a more consistent explanation?

Evidence

If consideration has the evidential function suggested by Fuller, it follows that other evidence that performs the same function, would justify the enforcement of a promise. Instead of consideration being a required element of the formation of contract, it would become one of a group of substitutable evidential requirements, any one of which would justify the enforcement of the promise. If consideration is seen in this way, the difficulties associated with the orthodox view of consideration and identified by the English Law Revision Committee in 1937, would be resolved:

1. A donative or gratuitous promise could be enforced if there is evidence that the promise was made with due deliberation and with the intention that it be legally binding. At present, that promise can only be enforced if the promise is recorded in writing and the promisor's signature is witnessed. Such a distinction is anachronistic in modern times.
2. The strict application of the rule that past consideration is not sufficient would no longer be necessary. In cases where past consideration of the promisee provides clear evidence that the promise of the promisee was made with due deliberation and with an intention that it be binding, the promise could be enforced. But where a promise made by a promisee has no apparent connection with the subsequent promise of the promisor, the contract would not be enforced. This is a more satisfactory distinction.

3. The difficulties associated with the rule that a promise to perform an existing legal duty is insufficient consideration, and particularly the rule in *Pinnel's Case*⁹⁸ would be resolved. In relation to pre-existing duties generally, if there is evidence that the promisor made the promise after deliberation and with the intention that it would be legally binding, there is no reason in principle not to enforce the promise in the absence of policy considerations to the contrary. For example, it may be against policy to enforce contracts where public officials receive contractual benefits in return for carrying out their public duty. This would be undesirable. It is true that consideration will prevent such transaction from being enforced, but for this purpose it is a blunt instrument. It will also prevent enforcement in circumstances where no policy reasons exist. In relation to the rule in *Pinnel's case*, allowing a debtor to enforce a contract with a creditor in which the parties have agreed that the creditor will accept a lesser sum in full satisfaction of the debt would be enforceable if there was evidence that the creditor's promise was made with due deliberation and was intended to be legally binding. This would recognize the commercial utility of such arrangements. There are no policy reasons why such agreements should not be enforced.

4. The commercial impracticality of the inability to enforce promises to keep offers open where no separate consideration is given for the promise would be resolved. Again, all that will be required as evidence that the promise to keep the offer open was made after due deliberation, and with an intention that be binding.

⁹⁸ *Pinnel's Case* (1602) 5 Rep 117a

5. The rule that consideration must move from the promisee can give rise to anomalous situations. If A, B and C are parties to a contract, where A promises to pay a sum of money to C in return for B's promise to perform a specified task for A, this rule denies C the right to sue A for non-payment because C has given no consideration. There appears to be no reason in principle why C, as a party, should not be able to enforce the contract. If all that was required for the formation of the contract was some evidence that the promise was made after due deliberation, and with the intention that the legally binding, the absence of consideration would not be fatal to C's claim.
6. One of the key difficulties in relation to unilateral contracts is the common law requirement that the act performed by the promisee as consideration must be completely performed before the contract is formed. However if consideration has an evidential function, the fact that the promisee has only partly completed the required performance may be sufficient evidence that the promise was made after due deliberation and was intended to be legally binding.

There are other benefits of viewing consideration as evidence. First, the rules for the formation of an original contract would be the same as those applying to variations of contract and the doctrine would be internally consistent. There would be no need to redefine consideration in terms of a practical benefit, or to create a specific exception for variations. The rules for the formation of a variation of contract would also accord with commercial reality.

Secondly, the courts would have no need to force the facts of cases to fit the technical requirements of the orthodox view of consideration. Where the existence of

consideration from the promisee is in doubt, the courts would be able to look to other evidence at the promisor made the promise with due deliberation and the parties intended at the promise would be legally binding.

Conclusion

The English Law reform committee and its sixth interim report identified a number of problems associated with the doctrine of consideration. Avoiding the inclination on the part of some of its members to recommend the abolition of the doctrine, the committee chose instead to recommend the reform of many of the rules that make up the doctrine. But in their report the committee did not discuss the theoretical basis of the law of contract. In making its recommendations, it therefore took the risk that, by making exceptions to the rules of the doctrine, they might create inconsistencies and anomalies at the conceptual level. For example, its recommendation that agreements recorded in writing should be enforceable in the absence of consideration would have created a theoretical inconsistency if the theoretical function of consideration was to distinguish between an exchange and a gratuitous or donative promise.

This essay has sought to identify a conceptual basis of consideration that is consistent with contract theory, and with the application of contract law. It appears that if consideration is an indicator of reciprocal exchange by the parties to a contract, then one is forced to accept that the theoretical basis of contract law is either the utilitarian economic efficiency theory or Professor Benson's formulation of transfer theory. A requirement for an exchange is superfluous to any of the other theories of contract law. A requirement for an exchange is also inconsistent conceptually with other rules of contract law, including the enforceability of deeds under seal, the acceptance of

nominal consideration as good consideration, and the redefinition of what constitutes consideration (or the removal of the requirement for consideration altogether in New Zealand) for agreements to vary a contract. It is also inconsistent with decisions of the courts, where consideration is found in circumstances where no exchange, in the ordinary meaning of that term, took place.

Alternatively, if consideration performs an evidential role as suggested by Fuller, that role is not inconsistent with any of the theories of contract. If the further step is taken, of accepting that other evidence that performs the same evidential function that Fuller suggests is a substitute for consideration, then there would no longer be any inconsistencies. On this alternative view of consideration, most of the problems with the orthodox view of the doctrine of consideration identified by the English Law Revision Committee in its sixth interim report would also be solved.

One of the great strengths of the common law is its ability to evolve and adapt to meet the changing needs of the society it serves. The inconsistencies and contradictions resulting from the orthodox view of consideration, and the problems associated with the various rules within the doctrine suggest that the orthodox view of consideration does not meet society's needs. Perhaps it is time for the recent developments in the context of the variation of contracts to be applied to the law of contract generally.

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