1. **Source: ENFORCING PROMISES Consideration and Intention in the Law of Contract,**

**Dena Valente**

A THEORY OF CONTRACT

Because any evaluation of which promises ought to be enforced is influenced by one’s assumptions about the purpose of contract law, it is necessary to briefly explain the theory of contract on which the remainder of this paper will proceed. It must be emphasised that the following discussion is not intended to be a comprehensive analysis of contract theories.

1. Promise

A promise is the communication of an intention to undertake or assume an obligation.1 This paper will analyse contract in terms of promise.2 That is not to say that all promises should be legally enforceable. A contract involves a promise or promises made in a manner which the law recognises as sufficient to undertake a legally binding obligation.3 It must also be stressed that it is not suggested contracts ought to be enforced simply because they involve promises. The mere act of promising may create a moral obligation to keep the promise,4 but some further justification is required for why the promise ought to be enforceable as a contract.5

2. Reasonable Expectation

One theory, propounded by Adam Smith and endorsed by many commentators and judges, is that contracts should be enforced because they induce reasonable expectations.6 This theory is consistent with the remedies for breach of contract. The 1 Stephen A Smith Contract Theory (Oxford University Press, New York, 2004) at 57; Brian Coote “The Essence of Contract: Part II” (1988) 1 JCL 183 at 192. 2 It is important to note that the view that contract is based on promise, while being the orthodox approach (Smith, ibid, at 56), is by no means universally accepted. It has been suggested that contractual obligations are imposed to prevent us from harming others whom we induce to rely on us (see, for example, Lon Fuller and William Perdue “The Reliance Interest in Contract Damages” (1936) 46 Yale L J 52), or that a contract is a transfer of rights (Peter Benson, “The Unity of Contract Law” in Peter Benson (ed) The Theory of Contract Law: New Essays (Cambridge University Press, Cambridge, 2001)). 3 Coote “The Essence of Contract: Part II”, above n 1, at 195. This is the approach adopted in the Restatement (Second) of Contracts, § 1, which defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” 4 Because the promisor chooses to invoke a social convention the function of which is to give the promisee an expectation of performance (Charles Fried Contract as Promise: A Theory of Contractual Obligation (Harvard University Press, Cambridge, 1981) at 16). 5 T M Scanlon “Promises and Contracts” in Peter Benson (ed) The Theory of Contract Law: New Essays (Cambridge University Press, Cambridge, 2001) at 99-100. 6 Brian Coote “The Essence of Contract: Part I” (1988) 1 JCL 91 at 103-104; Johan Steyn “Contract law: fulfilling the reasonable expectations of honest men” (1997) 113 LQR 433; Joseph M Perillo &

4

ordinary remedy is damages calculated according to the expectation measure,7 or specific performance if monetary damages are inadequate.8 Essentially, the promisor must perform the promise or compensate the promisee by paying the monetary equivalent of performance.9 Thus contract law protects the promisee’s reasonable expectation of performance. Expectation is objectively assessed.10 The court will consider what a reasonable person in the promisee’s position would have expected to obtain as a result of the promise. A promisor is not required to fulfill unreasonable expectations.

One possible justification for protecting reasonable expectations is psychological. The promisor, by making the promise, gives the promisee hope that it will be performed. If the promisor fails to perform, it causes a sense of injury or deprivation in the promisee.11 While this reasoning may be consistent with our sense of morality, it provides no basis for turning a moral obligation to perform into a legal one. There are many circumstances in which someone causes disappointment to another, but the law does not (and should not) intervene.12 For example, if I promise to meet you for coffee, you may have a reasonable expectation that I will do so. My failure to show up may cause you a sense of deprivation or injury. But it would be absurd if casual, social promises of this nature were legally binding.

The better view is that the loss caused to the promisee by the promisor’s breach is not merely psychological. When the promisor undertakes a legal obligation, this confers on the promisee a right to have the promise performed.13 In economic terms, the promisee has gained an asset in the form of a guarantee of performance or legal redress. If the promise is not performed, the promisee is deprived of a real right and should be compensated for that loss.14 However, this proposition begs the question of how to determine when a promisor undertakes a legal obligation, as opposed to a moral one. A promise which is only morally binding cannot give the promisee a legally enforceable right to performance or compensation.

Helen Hadjiyannakis Bender Corbin on Contracts, Vol 2: Formation of Contract (Revised ed, West Publishing Co, St. Paul Minnesota, 1995) at 20; Roscoe Pound “Promise or Bargain?” (1958-1959) 33 Tul L Rev 455 at 471. 7 Coxhead v Newmans Tours (1993) 6 TCLR 1 at 13 (CA). 8 Attorney-General for England and Wales v R [2002] 2 NZLR 91 at [94]. 9 Smith, above n 1, at 59-60. 10 Steyn, above n 6, at 434. 11 Fuller and Perdue, above n 2, at 57. 12 Coote, “The Essence of Contract: Part I” above n 6, at 104-105. 13 Smith, above n 1, at 72. 14 Note that this is different to the transfer theory advanced by Benson (above n 2, at 132-137), which asserts that when a contract is made the promisor transfers to the promisee a proprietary right in the actual thing promised. This theory has been convincingly refuted by Smith (above n 1, at 101-102). Except in cases of transfers of specific objects, the contracting party does not own the ‘thing’ to be transferred prior to contracting.

5

Lord Steyn, writing extra-judicially, has remarked that giving effect to the reasonable expectations of the parties is “the central objective of the law of contract.”15 While protecting the promisee’s reasonable expectations is an important objective, the mere fact that a promise produces corresponding expectations does not explain why it should be enforceable as a contract. If reasonable expectation was the sole basis of contract, then virtually all promises would be contracts. To the contrary, many promises give rise to a reasonable expectation of performance, but neither party expects or intends that they should be legally binding.

3. Intention

Fried argues that it is necessary to enforce promises because “respect for others as free and rational requires taking seriously their capacity to determine their own values.”16 If promisors are permitted to go back on their promises without being held accountable, their choice to invoke the social convention of promising is not taken seriously. As autonomous individuals, we should be entitled to undertake binding obligations if we desire. This is a variation on the will theory, which holds that contracts are inherently worthy of respect because they are an expression of human will or intention.17

There are several problems with this theory. First, it still fails to explain why only some promises are legally binding. If promises were enforced simply because they reflect the free and rational choices of autonomous individuals, then all promises made free of duress or undue influence would be enforceable. What distinguishes contractual obligations from mere promises is that the parties intend not only that the promise be performed, but that if it is not, the promisee can obtain legal redress. Thus, to form a contract, the promisor must intend to undertake a legal obligation.18 It would generally be unfair to force a promisor to perform or compensate the promisee for a casual promise which was never intended or understood to be legally binding.

However, a theory which justifies contractual obligation solely on the basis that it reflects the intention of the promisor to enter into a legal obligation is also

15 Steyn, above n 6, at 434. 16 Fried, above n 4, at 20. 17 Coote “The Essence of Contract: Part I” above n 6, at 99. 18 See Balfour v Balfour [1919] 2 KB 571, where the English Court of Appeal held that the mere existence of an agreement between husband and wife, in the form of a promise supported by consideration, will not ordinarily create a contract because the parties “did not intend that [the promise] should be attended by legal consequences” (per Atkin LJ at 578-579).

6

inadequate, as it entails a subjective theory of intent.19 The result would be an entirely one-sided theory of individual autonomy.20 The promisor could outwardly manifest an intention to be legally bound, thereby inducing the promisee to reasonably expect performance or a legal remedy, but the promisor would not be bound if that was not his subjective intention. The promisee would have no way of knowing whether he had a right to performance or not. This is why intention to be legally bound must be ascertained objectively from conduct of the parties.21 Whether a promisor subjectively intended to be bound is not pertinent, just as it is irrelevant whether the promisee subjectively expected the promisor to perform.

4. Intention and Corresponding Expectation

The preceding discussion has shown that contract cannot be justified solely on the basis of the promisor’s exercise of will, nor solely on basis of the promisee’s reasonable expectations. It is submitted that the interaction of the intention of the promisor and the expectation of the promisee converts a promise into a contractual obligation. Both must relate to the legal enforceability of the promise as opposed to its moral force. The promisor must conduct himself in a manner that would lead a reasonable person in the promisee’s position to believe that he intended to be legally bound. The promise will then have contractual force because it would induce a reasonable promisee to expect performance or equivalent compensation. In such circumstances, it would be unfair to permit the promisor to renege. So, while the central objective of contract law is to protect the reasonable expectations of the promisee, the promisee’s expectations will only be ‘reasonable’ if the promisor has induced the promisee to believe that he is undertaking a legal obligation. The promisor’s objectively manifested intention corresponds with the promisee’s reasonable expectation.

In an executory bilateral contract, each party will both intend to undertake a legal obligation and reasonably expect that the other party will perform his obligation. But this theory of contractual obligations is equally applicable to unilateral and gratuitous promises.22 In such cases only the promisor will have an intention to

19 Michael J Trebilcock The Limits of Freedom of Contract (Harvard University Press, Cambridge, 1993) at 165. 20 Ibid. 21 RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC 14, [2010] 1 WLR 753 at [45]; Edmonds v Lawson & Anor [2000] All ER 31 at [21]; Chas S Luney Ltd v State Bank of South Australia HC Christchurch CP 49-93, 9 November 1994 at 12; Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601 at 610; Albert v Motor Insurers Bureau [1972] AC 301 at 339. 22 At present such promises are not generally enforceable at Common Law (unless contained in a deed or amounting to a unilateral contract), because of the consideration requirement, which is discussed in Part II of this chapter.

7

undertake a legal obligation, and only the promisee will have a reasonable expectation of performance. Those promises which are currently enforced as unilateral contracts would also fall within this category.

This theory explains why only promises intended to be legally binding are enforced, while also accounting for the fact that intention must be objectively assessed. It achieves the optimum balance between the interests of the parties, by ensuring that promisees are not deprived of reasonably expected benefits, while also protecting promisors from liability to compensate for illegitimate expectations.

5. Conclusion

The law should recognise a promise as a contract when a reasonable person in the promisee’s position would expect performance or equivalent compensation. This will be so when the promisor has outwardly manifested an intention to undertake a legal obligation. To the extent that the law imposes further restrictions on the enforceability of promises, the freedom of autonomous individuals to contract is restricted. The intentions of the parties will be frustrated if what they perceive to be a legally binding obligation is unenforceable. The imposition of any additional requirement for contract formation must therefore have a strong justification to outweigh its potentially adverse effects.

1. **Consideration**

**Source: THE MODERN LAW OF CONTRACT, Fifth edition, Professor Richard Stone, LLB, LLM Barrister, Gray’s Inn Visiting Professor, University College, Northampton**

3.2 CONSIDERATION OR RELIANCE

The doctrine of consideration is one of the characteristics of classical English contract law. This provides that no matter how much the parties to a ‘simple contract’ may wish it to be legally enforceable, it will not be so unless it contains ‘consideration’. What does the word mean in this context? It is important to note that it does not have its ordinary, everyday, meaning. It is used in a technical sense. Essentially, it refers to what one party to an agreement is giving, or promising, in exchange for what is being given or promised from the other side. So, for example, in a contract where Ais selling B 10 bags of grain for £100, what is the consideration? A is transferring the ownership of the grain to B. In consideration of this, B is paying £100. Or, to look at it the other way round: B is paying A £100. In consideration for this, Ais transferring to B the ownership of the grain. From this example it will be seen that there is consideration on both sides of the agreement. It is this

74 The Modern Law of Contract

10 Section 36A(5). 11 Ibid. 12 The only situation where a contract must be made by deed to have full effect is a lease of land for more than three years: Law of Property Act 1925, ss 52, 54(2). Even here the lease will have some effect in equity, and will be enforceable, provided it is in writing (Walsh v Lonsdale (1882) 21 Ch D 9), and subject to any intervening third party rights (for example, if the landlord sells the land). 13 Limitation Act 1980, s 8(1). 14 Ibid, s 5.

mutuality which makes the agreement enforceable. If B simply agreed to pay A£100, or A agreed to give B the grain, there would be no contract. The transaction would be a gift and not legally enforceable. The history of the development of this doctrine is a matter of controversy. Some writers have argued that a study of the history of the English law of contract shows that ‘consideration’ when first referred to by the judges meant simply a ‘reason’ for enforcing a promise.15 According to this view, such ‘reasons’ could be wide ranging. It was only in the late 18th century at the earliest,16 and probably not until the production of the first contract textbooks in the second half of the 19th century,17 that the doctrine of consideration came to be regarded as consisting of the fairly rigid set of rules which it is now generally regarded as comprising. The approach here is to deal with the doctrine as it currently appears to be, but to keep in mind that there are alternative tests of contract enforceability. The main alternative is the concept of ‘reasonable reliance’. This will be discussed more fully at the end of this chapter,18 but a brief outline will be given here, in order to put the discussion of consideration in a proper perspective. The concept of reliance as the basis for enforceability is that it is actions, and reliance on those actions, that creates obligations, rather than an exchange of promises (as under the classical doctrine of consideration). Thus, the window cleaner who, having checked that you want your windows cleaning, then does the work, does so in reliance on the fact that you will pay for what has been done. This is suggested to be a more accurate way of analysing many contractual situations than in terms of the mutual exchanges of promises, which forms the paradigmatic contract under the classical model.19 Once this principle is accepted, it then opens the door to enforcing agreements where there is nothing that the classical law would recognise as ‘consideration’, provided that there is ‘reasonable reliance’. This is accepted to a greater or lesser extent by many common law jurisdictions,20 but has only received limited support to date by the English courts – though some recent decisions purportedly based on ‘consideration’ can be argued to be more accurately concerned with ‘reliance’.21 We will return towards the end of the chapter to consider further questions about the theoretical basis of consideration,22 and whether it is developing in a way which may perhaps have links to its historical origins. At that point it will also be worth looking more generally at the question of whether consideration still retains its dominant position at the heart of the English law of contract, or whether the growth in situations where promises may be enforceable in the absence of consideration means that its role needs further reassessment. In the meantime, in the discussion of consideration in the following sections, the tension between the classical theory and the more modern trends towards reliancebased liability needs to be kept in mind, and will be highlighted at various points.

Chapter 3: Tests of Enforceability 75

15 See, for example, Simpson, 1975a, Chapters IV–VII, and in particular p 321; Atiyah, 1986, Chapter 8. This is discussed in more detail below, at 3.13.1. 16 See, for example, Rann v Hughes(1778) 7 Term Rep 350n; 4 Bro PC 27. 17 For example, Anson’s Law of Contract, first published in 1879. 18 Below, 3.13.2. 19 See Chapter 1, 1.1. 20 For example, the United States, Australia, New Zealand and Canada – see below, 3.13.2. 21 For example, Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1; [1990] 1 All ER 512 – discussed below, at 3.7.8. 22 Below, 3.13.1.

3.3 BENEFIT AND DETRIMENT

It is sometimes said that consideration requires benefit and detriment. The often-quoted, but not particularly helpful, definition of consideration contained in Currie v Misa23 refers to these elements: Avaluable consideration, in the sense of the law, may consist either in some, right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. In other words, what is provided by way of consideration should be a benefit to the person receiving it, or a detriment to the person giving it. Sometimes, both are present. For example, in the contract concerning the sale of grain discussed in the previous section, B is suffering a detriment by paying the £100, and A is gaining a benefit. B is gaining a benefit in receiving the grain, A is suffering a detriment by losing it. In many cases, there will thus be both benefit and detriment involved, but it is not necessary that this should be the case. Benefit to one party, or detriment to the other, will be enough. Suppose that A agrees to transfer the grain, if B pays £100 to charity. In this case, B’s consideration in paying the £100 is a detriment to B, but not a benefit to A. Nevertheless, B’s act is good consideration, and there is a contract. In theory, it is enough that the recipient of the consideration receives a benefit, without the giver suffering a detriment. It is difficult, however, to think of practical examples of a situation of this kind, given that the traditional rule is that consideration must move from the promisee.

3.4 MUTUALPROMISES

The discussion so far has been in terms of acts constituting consideration. It is quite clear, however, that a promise to act can in itself be consideration. Lord Dunedin, in Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd,24 for example, approved the following statement from Pollock, 1902 (emphasis added): An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable. Suppose, then, continuing the example used above, that on Monday, A promises that he will deliver, and transfer the ownership of the grain to B on the following Friday; and B promises, again on Monday, that when it is delivered she will pay £100. There is no doubt that there is a contract as soon as these promises have been exchanged, so that if on Tuesday B decides that she does not want the grain, she will be in breach. But, where is the consideration? On each side, the giving of the promise is the consideration. A’s promise to transfer the grain is consideration for B’s promise to pay for it, and vice versa. The problem is that this does not fit easily with the idea of benefit and detriment. A’s promise is only a benefit to B, and a detriment to A, if it is enforceable. But, it will only be enforceable if it is a benefit or a detriment. The argument is circular, and cannot therefore explain why promises are accepted as good consideration.25 There is no easy answer to this paradox,26 but the undoubted acceptance by the courts of promises as good

76 The Modern Law of Contract

23 (1875) LR 10 Ex 153, 24 [1915] AC 79. 25 Cf Atiyah, 1986, p 191. 26 Though Treitel has suggested that an unenforceable promise may nevertheless constitute a benefit or detriment – Treitel, 1976.

consideration casts some doubt on whether benefit and detriment can truly be said to be essential parts of the definition of consideration. It may be that the concept simply requires the performance, or the promise to perform, some action which the other party would like to be done. This approach ignores the actual or potential detriment. Alternatively, if it is thought that the idea of benefit and detriment is too well established to be discarded, the test must surely be restated so that consideration is provided where a person performs an act which will be a detriment to him or a benefit to the other party, or promises to perform such an act. On this analysis, benefit and detriment are not so much essential elements of consideration, as necessary consequences of its performance.

3.5 CONSIDERATION NEED NOT BE ‘ADEQUATE’ BUT MUST BE ‘SUFFICIENT’

The view that the element of ‘mutuality’ is the most important aspect of the doctrine of consideration is perhaps supported by the fact that the courts will not generally inquire into the ‘adequacy’ of consideration. ‘Adequacy’ means the question of whether what is provided by way of consideration corresponds in value to what it is being given for. This is to be distinguished from the question of whether consideration is ‘sufficient’, in the sense that what is being offered in exchange is recognised by the courts as being in law capable of amounting to consideration. This issue is discussed further below. Looking first, however, at the question of adequacy, the reluctance of the courts to investigate this means, for example, that if I own a car valued at £20,000, and I agree to sell it to you for £1, the courts will treat this a binding contract.27 Your agreement to pay £1 provides sufficient consideration for my transfer of ownership of the car, even though it is totally ‘inadequate’ in terms of its relationship to the value of the car. This aspect of consideration was confirmed in Thomas v Thomas.28 The testator, Mr Thomas, before his death, expressed a wish that his wife should have for the rest of her life the house in which they had lived. After his death, his executors made an agreement with Mrs Thomas to this effect, expressed to be ‘in consideration’ of the testator’s wishes. There was also an obligation on Mrs Thomas to pay £1 per year, and to keep the house in repair. It was argued that there was no contract here, because Mrs Thomas had provided no sufficient consideration. The court took the view that the statement that the agreement was ‘in consideration’ of the testator’s wishes, was not using ‘consideration’ in its technical contractual sense, but expressing the motive for making the agreement. The actual ‘consideration’ was the payment of £1 and the agreement to keep the house in repair. Either of these was clearly recognised as good consideration, even though the payment of £1 could in no way be regarded as anything approaching a commercial rent for the property. This approach to the question of ‘adequacy’ may be seen as flowing from a ‘freedom of contract’ approach. The parties are regarded as being entitled to make their agreement in whatever form, and on whatever terms they wish. The fact that one of the parties appears to be making a bad bargain is no reason for the court’s interference. They are presumed to be able to look after themselves, and it is only if there is some evidence of

Chapter 3: Tests of Enforceability 77

27 This assumes that there is no evidence of any improper behaviour on the part of the purchaser to induce the sale at such a low price, such as misrepresentation (see Chapter 10), duress (see Chapter 12) or the exercise of ‘undue influence’ (see Chapter 13). 28 (1842) 2 QB 851.

impropriety that the court will inquire further.29 The mere fact that there is an apparent imbalance, even a very large one, in the value of what is being exchanged under the contract, will not in itself be the catalyst for such further inquiry. It might be thought that with the decline of the dominance of ‘freedom of contract’ during the 20th century this aspect of the doctrine of consideration might have also weakened, but there is no evidence of this from the case law.30

3.5.1 Economic value

Turning to the question of the ‘sufficiency’ of consideration (that is, whether what is offered is capable of amounting to consideration), in coming to its conclusion in Thomas v Thomas, the court pointed out that consideration must be ‘something which is of some value in the eye of the law’.31 This has generally been interpreted to mean that it must have some economic value. Thus, the moral obligation which the executors might have felt, or been under, to comply with the testator’s wishes would not have been sufficient. An example of the application of this principle may perhaps be found in the case of White v Bluett.32 A father promised not to enforce a promissory note (that is, a document acknowledging a debt) against his son, provided that the son stopped complaining about the distribution of his father’s property. It was held that this was not an enforceable agreement, because the son had not provided any consideration. As Pollock CB explained:33 The son had no right to complain, for the father might make what distribution of his property he liked; and the son’s abstaining from what he had no right to do can be no consideration. The courts have not been consistent in this approach, however. In the American case of Hamer v Sidway,34 a promise not to drink alcohol, smoke tobacco, or swear, was held to be good consideration, and in Ward v Byham35 it was suggested that a promise to ensure that a child was happy could be good consideration. Even in cases which have a more obvious commercial context, the requirement of economic value does not seem to have been applied very strictly. An example is Chappell v Nestlé.36 This case arose out of a ‘special offer’ of a familiar kind, from Nestlé, under which a person who sent in three wrappers from bars of their chocolate could buy a record at a special price. For the purpose of the law of copyright, it was important to decide whether the chocolate wrappers were part of the consideration in the contract to

78 The Modern Law of Contract

29 See note 27, above. Campbell has argued that the fact that there appear to be exceptions to the basic principle, in that adequacy will be relevant in raising suspicions of, for example, duress or undue influence, means that this basic principle of classical theory is ‘metaphysical nonsense’: Campbell, 1996, p 44. 30 See, for example, Chappell & Co Ltd v Nestlé Co Ltd [1960] AC 87; [1959] 2 All ER 701, discussed below, at para 3.5.1. 31 [1842] 2 QB 851, at p 859 (perPatteson J). 32 (1853) 23 LJ Ex 36. 33 Ibid, p 37. If the son did actually comply with his father’s request, there is an argument that a ‘reliance’-based approach would allow the son to recover (subject only to the question of whether this was a situation where there was an intention to create legal obligations – for which see Chapter 4). 34 (1891) 27 NE 256; 124 NY 538. This case may reflect the greater willingness of United States courts to accept ‘reasonable reliance’ as a basis for contractual liability – see below, 3.13.2. 35 [1956] 2 All ER 318. 36 [1960] AC 87; [1959] 2 All ER 701.

buy the record. The House of Lords decided that they were, despite the fact that it was established that they were thrown away by Nestlé, and were thus of no direct value to them. The only economic value in the wrappers that it is at all possible to discern is that they represented sales of chocolate bars, which was obviously the point of Nestlé’s promotion. This is, however, very indirect, particularly as there was no necessity for the person who bought the chocolate to be the same as the person who sent the wrappers in. In contrast to this decision, the House of Lords held in Lipkin Gorman v Karpnale Ltd37 that gambling chips, given in exchange for money by a gambling club to its customers, did not constitute valuable consideration. The case concerned an attempt to recover £154,693 of stolen money which had been received in good faith by the club from a member of the club. If ‘good consideration’ for the money had been given by the club, then the money could not be recovered by the true owner. What the club had given for the money were plastic chips which could be used for gambling, or to purchase refreshments in the club. Any chips not lost or spent could be reconverted to cash. This was not regarded by the House of Lords as providing consideration for the money, but simply as a mechanism for enabling bets to be made without using cash. If the contract had been one for the straightforward purchase of the chips then presumably the transfer of ownership of the chips to the member would have been good consideration, since the club presumably made such a contract when it bought the chips from the manufacturer or wholesaler. The fact that the amount of money paid by the member far exceeded the intrinsic value of the chips (that is, their value as pieces of coloured plastic, rather than as a means of gambling), would have been irrelevant under the principle discussed above relating to the adequacy of consideration. The conclusion that on the facts before the court the chips themselves were not consideration must, therefore, be regarded as being governed by the situation in which they were provided. The contractual relationship between the member and the club is probably best analysed in the way suggested by Lord Goff, who took the view that the transaction involved a unilateral contract under which the club issuing the chips agreed to accept them as bets, or indeed, in payment for other services provided by the club. The case should not be treated as giving any strong support to the view that consideration must have some economic value. An example of the lengths to which the courts will sometimes go to identify consideration is De La Bere v Pearson.38 The plaintiff had written to a newspaper which invited readers to write in for financial advice. Some of the readers’ letters, together with the newspaper’s financial editor’s advice, were published. The plaintiff received and followed negligently given advice which caused him loss. Since the tort of negligent misstatement was at the time unrecognised, the plaintiff had to frame his action in contract. But where was the consideration for the defendants’ apparently gratuitous advice? The purchase of the newspaper was one possibility, but there was no evidence that this was done in order to receive advice. The only other possibility, which was favoured by the court, was that the plaintiff, by submitting a letter, had provided free copy which could be published. This was thought to be sufficient consideration for the provision of the advice, which it would be implied should be given with due care. This is a case which might well be considered to be dealt with by using ‘reasonable reliance’ as a basis for liability. If it was reasonable in all the circumstances for the plaintiff to rely on the defendant’s advice, and he did so to his detriment, he should be able to recover

Chapter 3: Tests of Enforceability 79

37 [1992] 2 AC 548. 38 [1908] 1 KB 280.

compensation.39 Such an approach would be more satisfactory than the technical arguments about consideration in which the court was obliged to indulge in applying the classical theory. The sufficiency of consideration has recently been considered in a different context in Edmonds v Lawson.40 The Court of Appeal was considering whether there was a contract between a pupil barrister and her chambers in relation to pupillage. The problem was to identify what benefit the pupil would supply to her pupilmaster or to chambers during the pupillage. The court noted that the pupil was not obliged to do anything which was not conducive to her own professional development. Moreover, where work of real value was done by the pupil, whether for the pupilmaster or anyone else, there was a professional obligation to remunerate the pupil. This led the court to the conclusion that there was no contract between the pupil and pupilmaster, because of lack of consideration. They came to a different view, however, as to the relationship between the pupil and her chambers. Chambers have an incentive to attract talented pupils who may compete for tenancies (and thus further the development of the chambers). Even if they do not remain at the chambers (for example, by moving to another set, or working in the employed bar or overseas), there may be advantages in the relationships which will have been established. The conclusion was that:41 On balance, we take the view that pupils such as the claimant provide consideration for the offer made by chambers … by agreeing to enter into the close, important and potentially very productive relationship which pupillage involves. The court was therefore prepared to accept the general benefits to chambers in the operation of a pupillage system as being sufficient to amount to consideration in relation to contracts with individual pupils, without defining with any precision the economic value of such benefits. As these cases illustrate, the requirement of ‘economic value’ is not particularly strict. Indeed, in the overall pattern of decisions in this area, it is the case of White v Bluett (1853) which looks increasingly out of line. The flexibility which the courts have adopted in this area has led Treitel to refer to the concept of ‘invented consideration’.42 This arises where the courts ‘regard an act or forbearance as the consideration for a promise even though it may not have been the object of the promisor to secure it’; or ‘regard the possibility of some prejudice to the promisee as a detriment without regard to the question of whether it has in fact been suffered’.43 This analysis has been strongly criticised by Atiyah as an artificial means of reconciling difficult decisions with ‘orthodox’ doctrine on the nature of consideration.44 He argues that if something is treated by the courts as consideration then it is consideration, and that Treitel’s ‘invented’ consideration is in the end the same thing as ordinary consideration. If some cases do not, as a result, fit with orthodox doctrine, then it is the doctrine which needs adjusting.45

80 The Modern Law of Contract

39 This, in effect, would now be likely to be the position under the tort of negligent misstatement – discussed in Chapter 10, 10.3.4. 40 [2000] 2 WLR 1091. 41 Ibid, at p 1101. 42 See Treitel, 1976, and also 1999, p 67. 43 Ibid. 44 Atiyah, 1986, p 183. 45 Ibid. Atiyah, of course, argues for a broader concept of consideration anyway, as simply being a ‘reason’ for the enforcement of a promise or obligation. This is discussed further at 3.13.1.

As we have seen, the issue of the ‘sufficiency’ of consideration looks to the type, or characteristics, of the thing which has been done or promised, rather than to its value. In addition to the requirement of economic value, which as we have seen is applied flexibly, there are two other issues which must be considered here. The first is the question of so called ‘past consideration’. The second is whether the performance of, or promise to perform, an existing duty can ever amount to consideration.

3.6 PAST CONSIDERATION IS NO CONSIDERATION

Consideration must be given at the time of the contract or at some point after the contract is made. It is not generally possible to use as consideration some act or forbearance which has taken place prior to the contract. Suppose that I take pity on my poverty-stricken niece, and give her my old car. If the following week she wins £10,000 on the football pools, and says she will now give me £500 out of her winnings as payment for the car, is that promise enforceable? English law says no, because I have provided no consideration for it. My transfer of the car was undertaken and completed without any thought of payment, and before my niece made her promise. This is ‘past consideration’ and so cannot be used to enforce an agreement. A case which applies this basic principle is Roscorla v Thomas.46 The plaintiff had bought a horse from the defendant. The defendant then promised that the horse was ‘sound and free from vice’, which turned out to be untrue. The plaintiff was unable to sue on this promise, however, since he had provided no consideration for it. The sale was already complete before the promise was made. Amore recent example of the same approach is Re McArdle.47 William McArdle left a house to his sons and daughter. One of the sons was living in the house, and carried out various improvements to it. He then got each of his siblings to sign a document agreeing to contribute to the costs of the work. The document was worded in a way which read as though work was to be done, and that when it was completed, the other members of the family would make their contribution out of their share of William McArdle’s estate. If that had been a true representation of the facts, then, of course, it would have constituted a binding contract. But, as Jenkins LJ pointed out:48 The true position was that, as the work had in fact all been done and nothing remained to be done … at all, the consideration was a wholly past consideration, and therefore the beneficiaries’ agreement for the repayment … of the £488 out of the estate was nudum pactum, a promise with no consideration to support it. This being so, the agreements to pay were unenforceable.

3.6.1 The common law exceptions

The doctrine of past consideration is not an absolute one, however. The courts have always recognised certain situations where a promise made subsequent to the performance of an act may nevertheless be enforceable. The rules derived from various

Chapter 3: Tests of Enforceability 81

46 (1842) 3 QB 234. 47 [1951] Ch 669; [1951] 1 All ER 905. 48 Ibid, p 678; p 910.

cases have now been restated as a threefold test by the Privy Council in Pao On v Lau Yiu Long.49 Lord Scarman, delivering the opinion of the Privy Council, recognised that:50 ... an act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. For the exception to apply, the following three conditions must be satisfied. First, the act must have been done at the promisor’s request. This derives from the case of Lampleigh v Braithwait,51 where the defendant had asked the plaintiff to seek a pardon for him, in relation to a criminal offence which he had committed. After the plaintiff had made considerable efforts to do this, the defendant promised him £100 for his trouble. It was held that the promise was enforceable. Secondly, the parties must have understood that the act was to be rewarded either by a payment or the conferment of some other benefit. In Re Casey’s Patents,52 the plaintiff had managed certain patents on behalf of the defendants. They then promised him a one-third share in consideration of the work which he had done. It was held that the plaintiff must always have assumed that his work was to be paid for in some way. The defendants’ promise was simply a crystallisation of this reasonable expectation and was therefore enforceable. Thirdly, the payment, or conferment of other benefits, must have been legally enforceable had it been promised in advance. There is little that needs to be said about this. It simply means that the usual requirements for a binding agreement must apply. The effect of these tests is that consideration will be valid to support a later promise, provided that all along there was an expectation of reward. It is very similar to the situation where goods or services are provided without the exact price being specified. As we have seen, the courts will enforce the payment of a reasonable sum for what has been provided. That is, in effect, also what they are doing in situations falling within the three tests outlined above. It is an example of the courts implementing what they see as having been the intention of the parties, taking an approach based on third party objectivity.53 It can also be argued that the whole common law doctrine of ‘past consideration’ could be dealt with more simply, and with very similar results, by an overall principle of ‘reasonable reliance’. Thus, in Re McArdle, the son did the work before any promise was made by his siblings. He did not, therefore, act in reliance on their promises. By contrast, in Lampleigh v Braithwait and Re Casey’s Patents the work was done in reliance on a promise or expectation of payment. The advantage of an analysis on these lines is that it involves one general principle governing all situations, rather than stating a general rule and then making it subject to exceptions. This is not, so far, however, the approach of the English courts, which prefer to adhere to at least the form of classical theory.

3.6.2 Exceptions under statute

Two statutory exceptions to the rule that past consideration is no consideration should be briefly noted. First, s 27 of the Bills of Exchange Act 1882 states that: Valuable consideration for a bill [of exchange] may be constituted by (a) any consideration sufficient to support a simple contract, (b) an antecedent debt or liability.

82 The Modern Law of Contract

49 [1980] AC 614; [1979] 3 All ER 65. 50 Ibid, p 628; p 74. 51 (1615) Hob 105; 80 ER 255. 52 [1892] 1 Ch 104. 53 For which, see Chapter 2, at 2.3.1.

The inclusion of (b) indicates that an existing debt, which is not generally good consideration for a promise,54 can be so where it is owed by a person receiving the benefit of a promise contained in a bill of exchange. The second statutory exception is to be found in s 29(5) of the Limitation Act 1980 which provides that where a person liable or accountable for a debt55 acknowledges it the right ‘shall be treated as having accrued on and not before the date of the acknowledgment’. The acknowledgment must be in writing and signed by the person making it.56 The relevance of this provision to the current discussion is that if the acknowledgment is in the form of a promise,57 it will have the effect of extending the limitation period for recovery of the debt, even though no fresh consideration has been given. The statute is thus in effect allowing ‘past consideration’ to support a new promise.

3.7 PERFORMANCE OF EXISTING DUTIES

Can the performance of, or the promise to perform, an act which the promisor is already under a legal obligation to carry out, ever amount to consideration? Three possible types of existing obligation may exist, and they need to be considered separately. These are first, where the obligation which is alleged to constitute consideration is already imposed by a separate public duty; secondly, where the same obligation already exists under a contract with a third party; and, thirdly, where the same obligation already exists under a previous contract with the same party by whom the promise is now being made.

3.7.1 Existing duty imposed by law: public policy

Where the promisee is doing something which is a duty imposed by some public obligation, there is a reluctance to allow this to be used as the basis of a contract. It would clearly be contrary to public policy if, for example, an official with the duty to issue licences to market traders was allowed to make enforceable agreements under which the official received personal payment for issuing such a licence. The possibilities for corruption are obvious. It would be equally unacceptable for the householder whose house is on fire to be bound by a promise of payment in return for putting out the fire made to a member of the fire brigade. The difficulty is in discerning whether the refusal to enforce such a contract is on the basis that it is vitiated as being contrary to public policy,58 or because the consideration which has been provided is not valid. The case law provides no clear answer. The starting point is Collins v Godefroy.59 In this case, a promise had been made to pay a witness, who was under an order to attend the court, six guineas for his trouble. It was held that this promise was unenforceable, because there was no consideration for it. This seems to have been on the basis that the duty to attend was ‘a duty imposed by law’. In cases where the possibilities for extortion are less obvious, there has been a greater willingness to regard performance of an existing non-contractual legal duty as being good consideration, though it must be said that the clearest statements to that effect have come

Chapter 3: Tests of Enforceability 83

54 See, eg,Roger v Comptoir d’Escompte de Paris(1869) LR 2 CP393. 55 Or other ‘liquidated pecuniary claim’. 56 Limitation Act 1980, s 30(1). 57 It need not be so:Surrendra Overseas Ltd v Government of Sri Lanka[1977] 1 WLR 565, at p 575. 58 This is discussed further in Chapter 16. 59 (1831) 1 B & Ald 950; 120 ER 241.

from one judge, that is, Lord Denning. In Ward v Byham,60 the duty was that of a mother to look after her illegitimate child. The father promised to make payments, provided that the child was well looked after, and happy, and was allowed to decide with whom she should live. Only the looking after of the child could involve the provision of things of ‘economic value’ sufficient to amount to consideration. But, the mother was already obliged to do this. Lord Denning had no doubt that this could, nevertheless, be good consideration:61 I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. The other two members of the Court of Appeal were not as explicit as Lord Denning, and seem to have regarded the whole package of what the father asked for as amounting to good consideration. This clearly went beyond the mother’s existing obligation, but, as has been pointed out,62 did not involve anything of economic value. So, on either basis, the decision raises difficulties as regards consideration. Lord Denning returned to the same point in Williams v Williams,63 which concerned a promise by a husband to make regular payments to his wife, who had deserted him, in return for her promise to maintain herself ‘out of the said weekly sum or otherwise’. The question arose as to whether this provided any consideration for the husband’s promise, since a wife in desertion had no claim on her husband for maintenance, and was in any case bound to support herself. Once again, Lord Denning commented:64 ... a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest. Once again, the other members of the Court of Appeal managed to find in the wife’s favour without such an explicit statement. What this quote from Lord Denning makes clear, however, is that he regards the rule against using an existing non-contractual duty as consideration as being based on the requirements of the public interest, which would arise in the examples using government officials of one kind or another. Where this element is not present, however, he is saying that an existing duty of this kind can provide good consideration. The law on this issue remains uncertain but, in view of the position in relation to duties owed to third parties, and recent developments in relation to duties already owed under a contract with the promisor (that is, in the case of Williams v Roffey),65 it seems likely that Lord Denning’s approach would be followed. There does not seem to be any general hostility in English law to the argument that an existing duty can provide good consideration. In other words, performance of, or the promise to perform, an existing ‘public’ duty imposed by law can be good consideration, provided that there is no conflict with the public interest.66

84 The Modern Law of Contract

60 [1956] 2 All ER 318. 61 Ibid, p 319. 62 Above, 3.5.1. 63 [1957] 1 All ER 305. 64 Ibid, p 307. 65 [1991] 1 QB 1; [1990] 1 All ER 512 – discussed below, at 3.7.8. 66 This is an area in which a ‘reliance’-based approach might not provide any more straightforward answers. It would still be necessary to exclude situations where public policy suggests that payments should not be enforceable. In other situations where there is a ‘duty’, the question would still arise as to whether the claimant’s actions were undertaken in reliance on the defendant’s promise, or simply because they were under a duty. This would be a question of fact, however, rather than law.

3.7.2 Public duty: exceeding the duty

Whatever the correct answer to the above situation, it is clear that if what is promised or done goes beyond the existing duty imposed by law, then it can be regarded as good consideration. This applies whatever the nature of the duty, so that even as regards public officials, consideration may be provided by exceeding their statutory or other legal obligations. The point was confirmed in Glasbrook Bros v Glamorgan CC.67 In the course of a strike at a coal mine, the owners of the mine were concerned that certain workers who had the obligation of keeping the mines safe and in good repair should not be prevented from carrying out their duties. They sought the assistance of the police in this. The police suggested the provision of a mobile group, but the owners insisted that the officers should be billeted on the premises. For this, the owners promised to pay. Subsequently, however, they tried to deny any obligation to pay, claiming that the police were doing no more than fulfilling their legal obligation to keep the peace. It was held by the House of Lords that the provision of the force billeted on the premises went beyond what the police were obliged to do. Viscount Cave LC accepted that if the police were simply taking the steps which they considered necessary to keep the peace, etc, members of the public, who already pay for these police services through taxation, could not be made to pay again. Nevertheless, if, at the request of a member of the public, the police provided services which went beyond what they (the police) reasonably considered necessary, this could provide good consideration for a promise of payment. This rule is now generally accepted, so that wherever the performance of an act goes beyond the performer’s public duty it will be capable of providing consideration for a promise. In relation to the police, however, the position is now dealt with largely by statute. Section 25(1) of the Police Act 1996 states that: The chief officer of a police force may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the police authority of charges on such scales as may be determined by that authority. In Harris v Sheffield Utd FC,68 which concerned the provision of policing for football matches, the court confirmed the approach taken in Glasbrook. Moreover, in applying the predecessor to s 25 of the Police Act 1996,69 the Court of Appeal held that if a football club decided to hold matches and requested a police presence, such presence could constitute ‘special police services’ even though it did not go beyond what the police felt was necessary to maintain the peace. A ‘request’ for a police presence could be implied if police attendance was necessary to enable the club to conduct its matches safely. The football club was therefore held liable to pay for the services provided. It seems, therefore, that the holding of an ‘event’ to which the public are invited, but which cannot safely be allowed to go ahead without a police presence, will lay the organisers open to paying for ‘special services’. To that extent, the position has gone beyond that which applied in Glasbrook, in that under the statute the police can receive payment even though they are

Chapter 3: Tests of Enforceability 85

67 [1925] AC 270. 68 [1987] 2 All ER 838. 69 That is, s 15 of the Police Act 1964, which used the same wording as s 25 of the 1996 Act.

only doing what they feel is necessary to keep the peace. The Court of Appeal’s decision in Harris clearly applies to sporting events and entertainments. It is unclear whether it could apply to political rallies or demonstrations, though Balcombe LJ stated that in his view political events fell into a different category:70 I do not accept that the cases are in pari materia and I do not consider that dismissal of this appeal poses any threat to the political freedoms which the citizen of this country enjoys. Nevertheless, the effect of the interpretation of the statutory provisions adopted in Harris means that in certain circumstances the police can receive payment for doing no more than carrying out their duty to maintain public order.

3.7.3 Existing contractual duty owed to third party

If a person is already bound to perform a particular act under a contract, can the performance of, or promise to perform, this act amount to good consideration for a contract with someone else? Suppose that A is contractually bound to deliver 5,000 widgets to B by 1 June. B is to use these widgets in producing items which he has contracted to supply to C. C therefore has an interest in A performing the contract for delivery to B on time, and promises A£5,000 if the goods are delivered by 1 June. Can A enforce this payment by C if the goods are delivered to B on the date required? Perhaps somewhat surprisingly, the courts have given a clear positive answer to this question. In other words, they have been quite happy to accept that doing something which forms part, or indeed the whole, of the consideration in one contract can perfectly well also be consideration in another contract. The starting point is the case of Shadwell v Shadwell.71 An uncle promised his nephew, who was about to get married, the sum of £150 a year until the nephew’s annual income as a barrister reached 600 guineas. The uncle paid 12 instalments on this basis, but then he died, and the payments ceased. The nephew sued the uncle’s estate for the outstanding instalments, to which the defence was raised that the nephew had provided no consideration. The nephew put forward his going through with the marriage as consideration. At the time, a promise to marry was as between the parties a legally enforceable contract.72 Nevertheless, the majority of the court had no doubt that performance of this contract could be used as consideration for the uncle’s promise, on the basis that that promise was in effect an inducement to the nephew to go through with the marriage. Erle CJ recognised that there was some delicacy involved in categorising the nephew’s marriage to the woman of his choice as a ‘detriment’ to him, but nevertheless considered that in financial terms it might well be. He put the issue in these terms:73 ... do these facts shew a loss sustained by the plaintiff at his uncle’s request? When I answer this in the affirmative, I am aware that a man’s marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss: yet, as between the plaintiff and the party promising to supply an income to support the marriage, it may well be also a loss. The plaintiff may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld.

86 The Modern Law of Contract

70 [1987] 2 All ER 838, at p 850. 71 (1860) 9 CBNS 159; 142 ER 62. 72 This is no longer the case as a result of the Law Reform (Miscellaneous Provisions) Act 1970, s 1. 73 (1860) 9 CBNS 159, at p 173; 142 ER 62, at p 68.

Moreover, a marriage, while primarily affecting the parties to it, ‘may be an object of interest to a near relative, and in that sense a benefit to him’. Thus, not only was going through with the marriage a ‘detriment’ to the nephew, it was also a ‘benefit’ to his uncle. On this basis, there was no doubt that it could constitute good consideration for the promise to pay the annuity. The dissenting judge in Shadwell, Byles J, was not convinced that the uncle’s promise was made on the basis that it was in return for the nephew’s getting married. There is some force in this view of the facts,74 and a possible construction of the case is that the majority of the court was ‘inventing’ consideration, because it felt that the nephew had relied on his uncle’s promise. If the nephew had organised his affairs on the basis that he would continue to receive the payment – a reliance reinforced by the fact that payments had been made regularly over 12 years – then it would be unfair to withdraw it.75 Such an analysis is relevant to the general issue of ‘reliance’ as an alternative to consideration, as discussed at the end of this chapter. It is, however, the majority view in Shadwell v Shadwell that has been accepted by later courts, and the case is therefore taken as authority for the proposition that performance of a contractual obligation owed to a third party can be good consideration to found a contract with another promisor.

3.7.4 Duty to third party: commercial application

The approach taken in Shadwell v Shadwell was subsequently applied in a commercial context in Scotson v Pegg,76 where it was held that the delivery of a cargo of coal to the defendant constituted good consideration, even though the plaintiff was already contractually bound to a third party to make such delivery. It was more recently accepted as good law in New Zealand Shipping Company Ltd v Satterthwaite (The Eurymedon).77 Goods were being carried on a ship. The carriers contracted with a firm of stevedores to unload the ship. The consignees of the goods were taken to have promised the stevedores the benefit of an exclusion clause contained in the contract of carriage, if the stevedores unloaded the goods. The Privy Council viewed the stevedores’ performance of their unloading contract as being good consideration for this promise. As Lord Wilberforce said:78 An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to consideration and does so in the present case: the promisee obtains the benefit of a direct obligation which he can enforce.

3.7.5 Performance or promise?

In all three cases so far considered, it has been performance of the existing obligation which has constituted the consideration. Can a promise to perform an existing obligation also amount to consideration? Take the example used at the start of this section, where A is bound to deliver goods to B on 1 June, and C promises A £5,000 if he does so. We have seen that, if A does deliver by the specified date, he will, on the basis of Shadwell v Shadwell and Scotson v Pegg, be able to recover the promised £5,000 from C. What if,

Chapter 3: Tests of Enforceability 87

74 Which appears to have been accepted by Salmon LJ in Jones v Padavatton [1969] 2 All ER 616, at p621. 75 See the comments of Collins, 1997, at pp 61 and 76. 76 (1861) 6 H & N 295. 77 [1975] AC 154; [1974] 1 All ER 1015. 78 Ibid, at p 168; p 1021.

however, Aalso promises to C that he will deliver by 1 June? In other words, the contract, instead of being unilateral (‘if you deliver to B by 1 June I will pay you £5,000’) becomes bilateral? Apromises to deliver by June 1; C promises £5,000. Is A’s promise to perform in a way to which he is already committed by his contract with B, sufficient consideration for C’s promise, so that, if A fails to deliver on time C, as well as B, may sue A? The reference by Lord Reid in the quotation given above to ‘an agreement to do an act’ would suggest that a promise is sufficient, though the facts of The Eurymedon itself clearly involved a unilateral contract (‘if you unload the goods, we promise you the benefit of the exclusion clause’). The issue was, however, addressed more directly by the Privy Council in Pao On v Lau Yiu Long,79 where it was held that such a promise could be good consideration. Citing The Eurymedon, Lord Scarman simply stated:80 Their Lordships do not doubt that a promise to perform, or the performance of, a preexisting contractual obligation to a third party can be valid consideration. Given the general approach to consideration, under which promises themselves can be good consideration, this decision is entirely consistent. The law on this point is, therefore, straightforward and simple. The fact that what is promised or performed is something which the promisor is already committed to do under a contract with someone else is irrelevant. Provided it has the other characteristics of valid consideration, it will be sufficient to make the new agreement enforceable.

3.7.6 Existing duty to the same promisor

The issue of whether performance of an existing duty owed to the same promisor can be good consideration is the most difficult one in this area. If there is a contract between A and B, and Athen promises B additional money for the performance of the same contract, is this promise binding? It would seem that the general answer should be ‘no’. It is normally considered that once a contract is made, its terms are fixed. Any variation, to be binding, must be mutual, in the sense of both sides offering something additional. If the promise is simply to carry out exactly the same performance for extra money, it is totally one sided. It would amount to a rewriting of the contract, and so should be unenforceable.81 This approach was, until recently, taken to represent English law on this point. The authority was said to be the case of Stilk v Myrick.82 The dispute in this case arose out of a contract between the crew of a ship and its owners. The crew had been employed to sail the ship from London to the Baltic and back. Part way through the voyage some of the crew deserted. The captain promised that if the rest of the crew sailed the ship back without the missing crew, the wages of the deserters would be divided among those who remained. When the ship returned to London, the owners refused to honour this promise. It was held that the sailors could not recover. The basis for the decision in Stilk v Myrick is not without controversy, not least because of the fact that it was reported in two rather different ways in the two published reports (that is, Campbell and Espinasse).83 There was, for example, some suggestion that this decision was based on public policy, in that

88 The Modern Law of Contract

79 [1980] AC 614; [1979] 3 All ER 65. 80 Ibid, p 632; p 76. 81 This illustrates the difficulty which the classical doctrine of consideration has in dealing with relational contracts, where the modification of obligations may well be necessary and expected: see Chapter 1, 1.3. 82 (1809) 2 Camp 317; 170 ER 1168; 6 Esp 129; 170 ER 851. 83 See, for example: Luther, 1999; Gilmore, 1974, pp 22–28.

there was a risk in this type of situation of the crew ‘blackmailing’ the captain into promising extra wages to avoid being stranded. This had been the approach taken in the earlier, similar, case of Harris v Watson.84 This issue, and the alternative views of Stilk v Myrick, is one to which we shall need to return later. For the moment, however, we will deal with the case in the way in which it has been traditionally treated as part of the ‘classical’ law of contract. This view of it has been based on the judgment of Lord Ellenborough, as reported by Campbell. He seemed to base his decision on the lack of consideration, rather than the public policy. The remaining crew were only promising to do what they were already obliged to do under their existing contract, and this could not be good consideration. The desertion of part of the crew was just part of the normal hazards of the voyage. Campbell’s report records Lord Ellenborough’s views in the following way:85 There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London, they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed … the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safely to her destined port. It might have been otherwise if they had not contracted for the whole voyage, and had been free to leave at the time of the desertion, or if the captain had ‘capriciously’ dismissed part of the crew (rather than some sailors having deserted). Such circumstances would fall outside the normal hazards of the voyage. Thus, in either of these cases, the remaining crew might not have been compelled by the original contract to proceed with the voyage, and would therefore have provided good consideration by agreeing to do so. On the facts which had actually occurred, however, they had not provided any consideration for the promise of extra money, and so could not recover it.

3.7.7 Going beyond the existing duty

It is implicit in Stilk v Myrick that if the crew had gone beyond their existing duty, then they would have provided good consideration. In addition to the examples given by Lord Ellenborough, the decision in Hartley v Ponsonby86 suggests that a certain level of desertion may in fact give rise to a situation falling outside the normal hazards of the voyage. In this case, a ship which had started out with a crew of 36 had, at the time that the relevant promise was made to the plaintiff, only 19 left, of whom only four or five were able seamen. In this situation, it was held that the voyage had become so dangerous that it was unreasonable to require the crew to continue. In effect (though the decision does not use this terminology), the original contract with the plaintiff had been ‘frustrated’,87 and therefore a fresh contract on the revised (more favourable) terms could be created. The performance of, or promise to perform, actions which are inside an existing duty cannot, however, amount to consideration.

Chapter 3: Tests of Enforceability 89

84 (1791) Peake 102. 85 (1809) 2 Camp 317, at p 319; 170 ER 1168, at p 1169. 86 (1857) 7 E & B 872. 87 The doctrine of frustration is fully discussed in Chapter 17.

3.7.8 Are-consideration: Williams v Roffey88

The true basis for the decision in Stilk v Myrick is not without dispute, not least because of the differences noted above between the two published reports.89 Nevertheless, the analysis outlined above (based mainly on Campbell’s report) has been accepted and applied, almost without question, in many cases.90 In 1990, however, a decision of the Court of Appeal cast some doubt on its scope, and continued validity. The case was Williams v Roffey Bros & Nicholls (Contractors) Ltd,91 which was concerned with a contract to refurbish a block of flats. The defendants were the main contractors for this work, and had engaged the plaintiffs as sub-contractors to carry out carpentry work. The agreed price for this was £20,000. Part way through the contract, the plaintiffs got into financial difficulties, at least in part because the contract price for the carpentry work was too low. The defendants were worried that the plaintiffs would not complete the work on time, or would stop work altogether. There was a penalty clause in the main contract under which the defendants would have been liable in the event of late completion. The defendants therefore promised to pay the plaintiffs a further £10,300, at a rate of £575 for each flat completed. On this basis, the plaintiffs continued to work on the flats, and completed a further eight. Because, at this stage, it seemed that the defendants were going to default on their promise of additional payments, the plaintiffs then ceased work, and subsequently sued for the additional sums in relation to the eight completed flats. The county court judge found for the plaintiffs, and the defendants appealed. The main issue before the Court of Appeal was whether there was any consideration for the promise to make the additional payments. The defendants argued that since the plaintiffs in completing, or promising to complete, the work on the flats, were only doing something they were already bound to do under the existing contract with the defendants, they provided no new consideration. In considering these arguments, Glidewell LJ first outlined the benefits (as identified by counsel for the defendants) that accrued to the defendants from the plaintiffs’ continuation with the contract. These were:92 ... (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the sub-contract; (ii) avoiding the penalty for delay; and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work. In the view of Glidewell LJ and the rest of the Court of Appeal, this was enough to support the defendant’s promise to make the additional payments. In reaching this conclusion, all members of the court were at pains to stress that they were not suggesting that the principle in Stilk v Myrick was wrong, but that the present case could be distinguished from it.

90 The Modern Law of Contract

88 [1991] 1 QB 1; [1990] 1 All ER 512. 89 See, for example: Luther, 1999; Gilmore, 1974, pp 22–28. 90 For example, North Ocean Shipping Co Ltd v Hyundai Construction Co [1979] QB 705; [1978] 3 All ER 1170; Atlas Express v Kafco[1989] QB 833; [1989] 1 All ER 641. 91 [1991] 1 QB 1; [1990] 1 All ER 512. 92 Ibid, p 11; p 518.

3.7.9 Williams v Roffey: effect on Stilk v Myrick93

The basis on which the court distinguished Williams v Roffey from Stilk v Myrick is not wholly clear from the judgments. Similar benefits to those identified could be said to have been present in Stilk v Myrick. For example, as a result of his promise, the captain did not have to seek replacement crew, avoided delays, and made sure the existing crew continued to work.94 The main reason for distinguishing Stilk v Myrick seems in fact to have been related to the alternative, public policy, basis for the decision mentioned above. In other words, the court regarded it as significant that there was in Williams v Roffey no question of improper pressure having been put on the defendants. Indeed, it was they who suggested the increased payments. The result is that the position as regards duties owed to the promisor is closely assimilated to the position in relation to duties owed to third parties. Thus, Glidewell LJ summarised the current state of the law as follows:95 ... (i) if Ahas 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 Ahas 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 Aan additional payment in return for A’s promise to perform his contractual obligations on time; and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit; then (vi) the benefit to B is capable of being consideration for B’s promise, so that the promise will be legally binding. Williams v Roffey is clearly very significant as regards defining the limits of valid consideration, and undoubtedly has the effect of widening those limits. Promises to perform existing obligations can now amount to consideration, even between contracting parties. Nevertheless, within these wider limits, consideration must still be found, as Russell LJ makes clear:96 Consideration there must ... be but in my judgment the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties. This statement indicates the fact that despite the extensive intervention by Parliament to control various aspects of the contractual relationship in particular situations, where the courts are concerned with a business transaction between parties who are more or less equal, they still adhere to the classical principles of freedom of contract. The starting point is to decide what the parties have agreed, and what their intentions were. Once these have been identified the courts will as far as possible give effect to them, unless there is a good reason for taking another approach. In Williams v Roffey the courts were faced with what appeared to be a clear arrangement entered into voluntarily, and which in the end has the potential to be for the benefit of both parties. In such a situation arguments taking a narrow view of scope of the doctrine of consideration, which might allow one party to escape the effects of a promise, freely given, from which it had gained some advantage were inappropriate and unnecessary.

Chapter 3: Tests of Enforceability 91

93 For further discussion of the potential implications of Williams v Roffey, see Halson, 1990; Hird and Blair, 1996. 94 See also Lee v GEC Plessey Telecommunications[1993] IRLR 383, discussed below. 95 [1991] 1 QB 1, p 16; [1990] 1 All ER 512, p 521. 96 Ibid, p 18; p 524.

The approach taken in Williams v Roffey has subsequently been applied in two first instance decisions concerning commercial contracts – that is, Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2),97 and Simon Container Machinery Ltd v Emba Machinery AB.98 In both cases, the avoidance of the other party withdrawing from a contract was held to be sufficient ‘practical benefit’ to provide consideration for a new promise designed to keep them ‘on board’. In Lee v GEC Plessey Telecommunications,99 Williams v Roffeywas cited as supporting the view that in the context of a contract of employment, the employees provide sufficient consideration for an award of enhanced pay or redundancy terms by continuing to work under the contract. The abandoning by the employee of any argument that the pay should be even higher or the terms even more favourable means that ‘the employer has secured a benefit and avoided a detriment’.100 If this is taken at its face value, then it clearly consigns Stilk v Myrick to history. The seamen in accepting the offer of additional money and not continuing to bargain for more would be providing sufficient benefit to the employer and suffering sufficient detriment themselves to amount to consideration for the Master’s promise. Another response to Williams v Roffey and the subsequent cases is to suggest that, despite the fact that the decisions are put in the language of consideration, they are in fact examples of the courts basing contractual liability on reasonable reliance. In other words, the carpenters in Williams v Roffey had relied on the promise of extra money in completing the flats, and it was therefore right (in the absence of any suggestion of impropriety on their party in extracting the promise) that they should be able to recover this. The application of this principle to Stilk v Myrick would also lead to the seamen being able to recover, on the basis that their continued crewing of the ship was based on the promise of extra payment. The questions then become ones of fact – was any improper pressure applied? was there in fact any reliance?101 – which are likely to be easier to determine than technical arguments based on what precisely constitutes consideration.

3.7.10 Limitation on Williams v Roffey

One limitation on the effect of the decision in Williams v Roffey was made clear by the Court of Appeal in Re Selectmove.102 The case concerned an assertion by a company that it had made a binding contract with the Inland Revenue under which it could, effectively, pay off its tax liabilities by instalments. The Inland Revenue argued that this agreement was not binding on them, because the company provided no consideration for the agreement to accept instalments: it was only promising to do something (paying its debts) which it was already obliged to do. The Court of Appeal, while deciding the case in favour of the Inland Revenue on another point, considered whether Williams v Roffey could apply in this situation. The company argued that the arrangement was to the Inland Revenue’s ‘practical benefit’, because it meant that the company could stay in business, and therefore be more likely to meet its debts. The Court of Appeal, however,

92 The Modern Law of Contract

97 [1990] 2 Lloyd’s Rep 526. 98 [1998] 2 Lloyd’s Rep 429. 99 [1993] IRLR 383. 100 Ibid, p 389. 101 In other words, could it be shown that as a matter of fact the sailors did not rely on the promise, but would have continued to work in any case? 102 [1995] 2 All ER 534; [1995] 1 WLR 474.

felt that this would be the case in relation to any agreement to pay by instalments.103 To treat this as providing consideration would be in direct conflict with the leading House of Lords’ decision on part payment of debts, that is, Foakes v Beer,104 which had not even been cited in Williams v Roffey. The effect of Foakes v Beer is that promises relating to the payment of existing debts have to be treated as a separate category from promises concerned with other types of existing contractual obligation. In general a promise to pay a debt in instalments after the due date (or the payment on the due date of less than was owed) will not amount to consideration for any promise by the creditor (such as to accept such method of payment, or to remit the whole debt where only partial payment was tendered). The reversing of the decision in Foakes v Beer was a matter for the House of Lords, or Parliament, and could not be undertaken by the Court of Appeal. The current position is, therefore, that in relation to a promise to supply goods or services, a renewed promise to perform an existing obligation can be good consideration if the other party will receive a ‘practical benefit’, but that in relation to debts, a promise to make payment will only be consideration if accompanied by some additional benefit, such as payment early or, perhaps, in a different place.105

1. **Intention to be legally bound**

**Source: THE MODERN LAW OF CONTRACT, Fifth edition, Professor Richard Stone, LLB, LLM Barrister, Gray’s Inn Visiting Professor, University College, Northampton**

In addition to the tests of the existence of a contract dealt with in the previous chapters, the courts will also sometimes inquire whether, despite the fact that offer, acceptance and consideration can be identified, the parties did really intend to create a legally binding relationship. In line with the traditional approach that the courts regard themselves simply as ‘referees’ or ‘umpires’ giving effect to the parties’ intentions, it is only where the parties themselves have entered into an agreement which they intend to be legally binding that the courts will treat it as a contract. As with other tests of the parties’ intentions, the courts take an objective approach, looking at what they have said and done and the context in which they have been dealing with each other. This was confirmed recently in Edmonds v Lawson,1 where Lord Bingham said:2 Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by requiring into their respective states of mind. Collins has suggested that this ‘objective’ approach may well not coincide with reality:3 In cases where the issue is litigated, it seems likely that one party intended a legal agreement and the other wanted the agreement to be merely morally binding. This contradiction removes any possibility of justifying the limits of contracts on the basis of the joint intent of the parties. We are forced to the conclusion that the courts must rely upon hidden policy considerations when determining the intentions of the parties. We are not, however, in fact ‘forced’ to this conclusion. In many cases, rather than the parties having different intentions, they may not, at the time of entering into their agreement, have thought about the issue at all.4 In such a situation the courts will adopt the approach, which they also adopt in other areas where there is later disagreement as to the parties’ intentions at the time of contracting,5 of asking what the reasonable person in the position of the parties would have been likely to intend. This is the way in which the issue is dealt with in the proposed Principles of European Contract Law, Art 2.102 of which simply states that:6 The intention of a party to be legally bound by contract is to be determined from the party’s statements or conduct as they were reasonably to be understood by the other party. Although this approach may be used as a device to bring ‘policy’ considerations into the law, it is also capable of acting as a means of coming to an ‘objective’ view in an area where the parties’ evidence as to their respective states of mind is in conflict. Another way of approaching the issue of ‘intention’ would be through formal requirements. It would be possible to require, for example, that an agreement, to be legally binding, must be in writing, and have within it a clause confirming that it is intended to be legally binding. In one particular situation, relating to the enforceability of collective agreements between trade unions and employers, this is precisely what has

1 [2000] 2 WLR 1091. 2 Ibid, p 1099. 3 Collins, 1997, p 99. 4 See, for example, the comments by Upjohn LJ in Coward v Motor Insurers Bureau [1962] 1 All ER 531, p 536, and by Lord Cross in Albert v Motor Insurers Bureau[1971] 2 All ER 1345, pp 1369–70. 5 See Chapter 2, 2.3.1. 6 Lando and Beale, 2000.

CHAPTER 4

INTENTION TO CREATE LEGAL RELATIONS

been required.7 As has been explained in earlier chapters, however, generally the English law of contract does not require formalities. Verbal agreements are enforceable, and no particular forms of words are required. It can be argued, however, the requirements of offer, acceptance and consideration, discussed in Chapters 2 and 3, may be regarded in themselves as indications of an intention to enter into a legally binding contract. If the parties have taken the trouble to specify their obligations in a way which makes them clear and unambiguous (as required by ‘offer and acceptance’), and the agreement has the element of mutuality required by the doctrine of consideration, this may reassure a court that legal enforceability was intended. If, for example, a transaction which would otherwise appear as a gift has consideration introduced artificially, this may well be strong evidence of an intention to make a contract. The transfer of the ownership of a valuable painting, worth £50,000, which involves the recipient giving the supplier £1 in exchange would fall into this category. There would be no point in the recipient giving the money, unless the intention is to make the transaction of transfer into a contract, and the parties into ‘seller’ and ‘buyer’. The introduction of consideration is in this case therefore evidence of an intention to create legal relations. Taking this approach to its logical conclusion some have argued that there is no need for a separate heading of intention,8 and this point will be discussed below.9 The generally accepted view, however, is that although this analysis has some force, there are nevertheless some agreements which may have all the other characteristics of a contract, but which are clearly not meant to be treated as legally binding. If the parties to an apparently binding commercial agreement specifically state that it is not to have legal consequences, surely the courts should pay attention to this? Certain domestic arrangements may also raise difficulties. If, for example, there is an agreement between a man and a woman that he will cook a meal for them both, in return for her providing the wine to go with it, this may involve an offer, acceptance, and consideration, but no one would expect it to be regarded as legally binding. If she failed to turn up, he would not be able to sue for the cost of preparing the meal. Given, however, that no formalities are required, and that offer, acceptance and consideration can be identified, how are those agreements which are intended to be binding to be distinguished from those which are not? The evidence of the parties themselves is likely to be unreliable, so some other means of determining the issue must be found. In fact, as we have noted above, English law operates on the basis of an ‘objective’ approach, based on what a reasonable person in the position of the parties would have been likely to have intended. This approach is assisted by the of ‘presumptions’ as to intention, which differ according to whether the agreement is to be regarded as ‘domestic’ or ‘commercial’. These two categories of agreement must therefore be looked at separately.10

116 The Modern Law of Contract

7 See s 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 – discussed further below, at 4.3. 8 Eg, Hepple, 1970. 9 At 4.4. 10 Unger, from a ‘critical legal studies’ perspective, suggests that the division between ‘family’ and ‘commercial’ agreements can be explained by the conflict between the principle of freedom to contract, and the counterprinciple ‘that the freedom to choose the contract partner will not be allowed to work in ways that subvert the communal aspects of social life’: Unger, 1983, pp 60–66.

4.1 DOMESTIC AGREEMENTS

The leading case in this category is Balfour v Balfour.11 This involved an agreement between husband and wife, resulting from her inability (due to illness) to return with him to his place of work, in Ceylon. He agreed to pay her £30 per month while they were apart. Later the marriage broke up, and the wife sued the husband for his failure to make the promised payments. The Court of Appeal held that her action must fail. Two members of the court centred their decision on the lack of any consideration supplied by the wife. Atkin LJ, however, stressed that even if there were consideration, domestic arrangements of this kind are clearly not intended by the parties to be legally binding. He used the example of the husband who agrees to provide money for his wife in return for her ‘maintenance of the household and children’.12 If this was a contract then each would be able to sue the other for failure to fulfil the promised obligation. As regards this possibility, Lord Atkin commented:13 All I can say is that the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The onus was on the wife to establish a contract, and she had failed to do so. Lord Atkin’s judgment is the one which has received most attention in subsequent case law, and has been taken as establishing the position that in relation to domestic agreements there is a presumption that they are not intended to be legally binding. There are two points to be noted here. First, the notion of the ‘domestic’ agreement should be taken as relating more to the subject matter than the relationship between the parties. If, for example, a woman agrees to sell her brother her car for £1,500, there seems little reason to deny this agreement the status of a contract, and it should be presumed to be binding, unless there is evidence to the contrary. On the other hand, social arrangements between friends who are not related, or household agreements between a couple living together, but not married, should come in to the category of ‘domestic’, and will therefore be presumed not to be binding. An example of the former situation is Coward v Motor Insurers’ Bureau,14 where an agreement between workmates to share the cost of transport to work was held not be legally binding.15 Secondly, the rule is simply based on a presumption, and it will be possible for that presumption to be rebutted. In Merritt v Merritt,16 for example, an arrangement between husband and wife similar to that agreed in Balfour v Balfour, but here made in the context of the break up of the marriage, was held to be legally binding. Lord Denning distinguished Balfour v Balfourin the following terms:17

Chapter 4: Intention to Create Legal Relations 117

11 [1919] 2 KB 571. 12 Ibid, p 579. 13 Ibid. 14 [1963] 1 QB 259; [1962] 1 All ER 531. 15 Cf Albert v Motor Insurers Bureau [1971] 2 All ER 1345, where, in relation to a very similar situation, Lord Cross (who alone dealt with the issue in the House of Lords) took the view that there was an intention to enter into a contract (despite the fact that it was unlikely that either party would have considered taking legal action to enforce it). 16 [1970] 2 All ER 760. 17 Ibid, pp 761–62.

The parties there [that is, in Balfour v Balfour] were living together in amity. In such cases, their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations. The context in which the agreement was made was such therefore that, although it prima facie concerned a domestic matter, the support of a wife by her husband, the presumption that it was not intended to be binding was rebutted. What will be the position in relation to agreements other than between spouses? The same principles apply, as is shown by Simpkins v Pays.18 This involved an agreement which is of relevance to the increasing numbers of people involved in national lottery ‘syndicates’. The plaintiff, the defendant, and the defendant’s granddaughter lived in the same house. They regularly entered a newspaper ‘fashion’ competition, which required the listing of eight items in order of merit. Each of the three women made a listing, and the three entries were submitted on one form. There was no fixed arrangement as to who paid the entry fee or the postage, but the form was submitted in the defendant’s name. When one of the lines won £750, which was paid to the defendant, the plaintiff sued to recover a third share of this. The judge held that there was, on the evidence, an agreement to ‘go shares’ if one of the lines won,19 and that this was intended to be legally binding. His reasons for coming to this conclusion are not very clear, but seem to relate to the fact that there was a ‘mutuality in the arrangement between the parties’. Having heard the evidence of the parties he felt that their agreement went beyond the ‘sort of rough and ready statement’ made in family associations which would not be intended to be binding.20 There was a clear understanding as to what would happen in the event of a win, and this agreement was meant to be enforceable. The fact that all the surrounding circumstances may need to be considered was again stressed by Devlin J in Parker v Clark.21 Here a young couple (the plaintiffs) agreed to live with older relatives (the defendants), and help look after them. In exchange, the plaintiffs were promised that the defendants’ house and contents would be left to them. The arrangement did not work out, and the plaintiffs, having moved out, sued for damages. Devlin J noted that:22 ... a proposal between relatives to share a house, and a promise to make a bequest of it, may very well amount to no more than a family arrangement … which the courts will not enforce. On the other hand, it was possible for such an arrangement to be legally binding:23 The question must, of course, depend on the intention of the parties, to be inferred from the language they use and from the circumstances in which they use it. In this case, the fact that the plaintiffs had disposed of their own house in order to move in with the defendants suggested that this was intended to be a binding agreement. The presumption that there is no intention in domestic agreements was again held to be rebutted.

118 The Modern Law of Contract

18 [1955] 3 All ER 10. 19 Ibid, p 12. 20 Ibid. 21 [1960] 1 All ER 93. 22 Ibid, p 100. 23 Ibid.

Although the cases so far considered may suggest that it is relatively easy to see on which side of the dividing line an arrangement between relatives should fall, in some cases the decision may be very finely balanced. This is demonstrated by Jones v Padavatton,24 where the four judges who considered the facts divided 2:2 as to whether on not they indicated an intention to create legal relations. In this case, the alleged contract was between a mother and daughter. The mother, who lived in the West Indies, promised her daughter, who was at the time working in the United States, that if she (the daughter) would go to England to study for the Bar, she (the mother) would pay her $200 per month. The daughter agreed to this arrangement, which began in February 1962. In 1964 the mother bought a house in which the daughter was to live, supporting herself by letting out some of the rooms. This replaced the previous arrangement of monthly payments. In 1967, with her daughter still unsuccessful in the Bar examinations, the mother sought possession of the house. The daughter’s defence was based on there being a contract between herself and her mother. The trial judge was convinced by the daughter’s evidence to this effect, and held that there was a contract. On appeal this view was supported by Salmon LJ, who felt that, among other things, neither party could have ‘intended that if, after the daughter had been in London, say, for six months, the mother dishonoured her promise and left her daughter destitute, the daughter would have no legal redress’.25 The other two members of the Court of Appeal disagreed. Fenton Atkinson LJ noted the vagueness of the arrangements, and the fact that in crossexamination the daughter had admitted that she had refused to see her mother when the latter had come to the house in London because ‘a normal mother doesn’t sue her daughter in court’.26 In conclusion, his view was that:27 At the time when the first arrangements were made, the mother and daughter were, and always had been, to use the daughter’s own words, ‘very close’. I am satisfied that neither party at that time intended to enter into a legally binding contract, either then or later when the house was bought. The daughter was prepared to trust the mother to honour her promise of support, just as the mother no doubt trusted the daughter to study for the Bar with diligence, and to get through her examinations as early as she could. There was, therefore, never any contract between them, and the mother was entitled to succeed.28 This case perhaps serves to illustrate the importance of deciding whether the initial presumption is for or against there being a legal relationship. If there had been a presumption in favour of intention to create legal relations inJones v Padavatton, which the mother had to rebut, it is not inconceivable that the result would have gone the other way. The fact that it was a ‘domestic agreement’ meant that the presumption went against there being an intention to be legally bound, and thus made it easier for the mother to succeed in her argument. Finally, it should be noted that the question of whether or not, if the agreement is broken, the innocent party would in practice go to the courts to enforce it, should not be regarded as being conclusive as to whether there was an intention to create legal relations. There are many minor commercial agreements (for example, the arrangement for

Chapter 4: Intention to Create Legal Relations 119

24 [1969] 2 All ER 616. 25 Ibid, p 622. He found, however, that the contract could not have been intended to last for more than five years, and so on that basis the mother was entitled to succeed in her action for possession. 26 Ibid, p 625. 27 Ibid. 28 Danckwerts LJ delivered a judgment to the same effect, relying primarily on Balfour v Balfour [1919] 2 KB 571.

newspapers to be delivered by a local newsagent) where the parties would be unlikely to consider it to be worth involving the courts to remedy a breach. Nevertheless, such agreements are clearly intended by the parties to affect their legal relations, and to create binding obligations.29 Moreover, even in relation to substantial commercial transactions, research has shown that parties often prefer to settle disputes in ways which do not involve recourse to lawyers.30 This does not mean that they do not intend their agreements to be legally binding. As noted in Jones v Padavatton,31 the fact that the parties would not be expected to sue each other may be relevant if such expectation is based on the relationship between the parties (for example, mother and daughter), but even then it cannot be conclusive.

4.2 COMMERCIALAGREEMENTS

If the agreement is not a ‘domestic’ one, then it will be regarded as ‘commercial’. This will mean that the presumption is that the agreement is intended to be legally binding. It was confirmed in Edmonds v Lawson32 that this could include an agreement which was primarily educational – as with the agreement between a pupil barrister and her chambers. The trouble taken by the chambers in selecting pupils, and the importance to the pupil of obtaining a pupillage suggested that the arrangement was not intended to be binding in honour only. The fact that the relationship was also governed by the Bar Council’s regulations, and that it was unlikely in practice that a chambers would sue a pupil who defaulted, did not prevent it from being intended to be legally binding. In Edwards v Skyways,33 Megaw J emphasised that there will be a heavy onus on a party to an ostensibly commercial agreement who wishes to argue that the presumption has been rebutted. In that case, the plaintiff was a pilot who had been made redundant. As part of the arrangements for this, he was offered and accepted a payment which was stated to be ‘ex gratia’. The company then found that the terms which had offered would be more expensive for it than it had realised, and denied that there was any legal obligation to make the payment. The judge held that ex gratia did not mean ‘not legally binding’, but simply recognised that prior to the offer being made there had been no obligation to make such a payment. Once it had been made, however, and accepted as part of the redundancy arrangement, it was capable of being legally binding, and there was no evidence to overturn the presumption that this should be the case. A similar reluctance to overturn the presumption is shown by the House of Lords’ decision in Esso Petroleum Ltd v Commissioners of Customs and Excise.34 This concerned a ‘special offer’ of a common type, under which garage owners offered a free ‘World Cup Coin’ to every purchaser of four gallons of petrol. The coins could be collected to make a set, but had minimal intrinsic value. Promotional advertising will often be considered as a ‘mere puff’, and not intended to be legally binding. As discussed earlier, in relation to

120 The Modern Law of Contract

29 That is, in the example just given, on the part of the newsagent, to deliver papers each day, and on the part of the customer, to settle the bill at regular intervals. See also the comments of Lord Cross in Albert v Motor Insurers Bureau [1971] 2 All ER 1345, p 1370, and Salmon LJ in Jones v Padavatton [1969] 2 All ER 616, p 622. 30 See, for example, Macaulay, 1963; Beale and Dugdale, 1975; Lewis, 1982. 31 [1969] 2 All ER 616. 32 [2000] 2 WLR 1091. 33 [1964] 1 WLR 349. 34 [1976] 1 All ER 117.

offer and acceptance, however, the case of Carlill v Carbolic v Carbolic Smoke Ball Co35 shows that in appropriate circumstances it can be found to be intended to create a legal relationship, on the basis of a unilateral contract. Similarly, in the Esso case, the majority of the House of Lords held that there was a unilateral contract under which the garage proprietor was saying ‘If you will buy four gallons of my petrol, I will give you one of these coins’. The minority (Viscount Dilhorne and Lord Russell) felt that there was, however, no intention to create legal relations. As Viscount Dilhorne put it, if this arrangement was held to be a contract:36 ... it would seem to exclude the possibility of any dealer ever making a free gift to any of his customers, however negligible its value, to promote his sales. Moreover, he did ‘not consider that the offer of a gift of a free coin is properly to be regarded as a business matter’. The majority, however, viewed what was being done as clearly a ‘commercial’ transaction. As Lord Simon commented:37 Esso and the garage proprietors put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in the setting of business relations ... The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage to themselves from the scheme, an advantage in which the garage proprietors would share. The decision thus emphasises the difficulty faced by a commercial organisation in avoiding legal liabilities in connection with any transaction which it enters into with a view to commercial advantage. The advantage here was indirect (neither Esso nor the garages benefited directly from the exchange of the coins for petrol), but was nevertheless sufficient (that is, in terms of the likely increased sales of petrol which would result) to bring the presumption of an intention to create legal relations into play. It is possible, however, by using sufficiently explicit wording, to rebut the presumption even in relation to a clearly commercial agreement. This is commonly done in relation to agreements relating to the sale of land which are generally stated to be ‘subject to contract’, even where a price has been agreed between the parties. This is intended to ensure that they are not binding until fully considered written contracts have been exchanged.38 An example of a similarly explicit attempt to exclude ‘intention to create legal relations’ is to be found in Rose and Frank Co v Crompton Bros.39 This case was concerned with a continuing agency arrangement between two companies. The agreement contained within it an ‘Honourable Pledge Clause’, which specifically stated that it was not entered into as ‘a formal or legal agreement’, but was ‘only a definite expression and record of the purpose and intention’ of the parties. The parties ‘honourably pledged’ themselves to the agreement in the confidence ‘that it will be carried through by each of the … parties with mutual loyalty and friendly co-operation’.40 The Court of Appeal held

Chapter 4: Intention to Create Legal Relations 121

35 [1893] 1 QB 256 – see above, 2.6.6. 36 [1976] 1 All ER 117, pp 120–21. 37 Ibid, p 121. 38 Note also the formalities required for this type of contract by the Law of Property (Miscellaneous Provisions) Act 1989, s 2(1). See also the comments of Atiyah, 1995, pp 159–62. 39 [1925] AC 445. 40 Ibid, p 451.

that this should not be regarded as creating a legally binding agreement. To hold otherwise would be to frustrate the clear intentions of the parties:41 I can see no reason why, even in business matters, the parties should not intend to rely on each other’s good faith and honour, and to exclude all idea of settling disputes by any outside intervention … If they clearly express such an intention, I can see no reason in public policy why effect should not be given to their intention. The House of Lords agreed with the Court of Appeal that the overall agency arrangement was not legally binding, and could therefore be terminated without notice. In relation to particular orders placed under the agreement, however, they preferred the dissenting view of Lord Atkin in the Court of Appeal that such orders were enforceable contracts of sale. The ‘honour clause’ applied only to the general framework agreement, and not to specific orders made under it. Once again, therefore, the presumption of legal enforceability prevails in relation to commercial dealings, and the rejection of this by the parties is interpreted strictly so as to apply only in the limited circumstances to which the rejection most clearly applies. ‘Honour clauses’ have long been included on football pools’ coupons, with the effect that the promoter is under no contractual obligation to pay winnings to a person who has submitted a coupon with a winning line (‘the punter’).42 It has now been confirmed by the Court of Appeal that such a clause must be taken to apply also to any agreement between the punter and a collector of coupons who then forwards them to the promoter. In Halloway v Cuozzo,43 the collector had failed to forward the plaintiff’s coupon, which contained a winning line. The Court of Appeal held that the collector had no contractual liability towards the punter. Moreover, the lack of intention to create legal relations also prevented the creation of duty of care, so that there was no liability in the tort of negligence either. Public policy arguments may also influence a decision as to whether there is intention to create legal relations. In Robinson v HM Customs and Excise,44 the claimant was an informer for the Customs and Excise. He tried to bring a contractual claim for the payment of reasonable remuneration and expenses. It was held, however, that there was no intention to create legal relations in respect of the supply of information by the claimant. The payments were discretionary and dependent on results (for example, arrests, seizures of illicit goods) and there were reasons of public policy why the court could not become involved in inquiring into these matters.

4.3 COLLECTIVE AGREEMENTS

Some problems of intention to create legal relations have arisen in the area of ‘collective agreements’. By this it is meant that agreements between trade unions and employers, or employers’ organisations, as to the terms and conditions of work of particular groups of employees. Each employee will have a binding contract of employment with the employer, but some of the terms of this agreement (for example, as to rates of pay) may specifically be stated to be subject to the current collective agreement between employer and trade union. What is the status of the collective agreement itself? It is clearly made in

122 The Modern Law of Contract

41 [1923] 2 KB 261, p 288 (perScrutton LJ). 42 Jones v Vernons Pools[1938] 2 All ER 626; Appleson v H Littlewood Ltd[1939] 1 All ER 464. 43 CA, 9 February 1999, unreported. 44 (2000) The Times, 28 April.

a commercial or business context, and therefore it would seem that there should a presumption of legal enforceability. The issue was considered by the High Court in Ford Motor Co Ltd v AEF.45 Ford were seeking an injunction restraining the trade union from calling strike action by its members. Part of Ford’s argument depended on establishing that the collective agreements which it had reached with the AEF were legally binding. In deciding this issue, Geoffrey Lane J took the view that it was necessary to look at the general context in which such agreements were made. An objective view of whether they were intended to be enforceable should take account of not only the wording of the agreements themselves, and their nature, but also ‘the climate of opinion voiced and evidence by the extra-judicial authorities’46 (here, he had in mind the Donovan Report on industrial relations which had recently been published,47 and academic writing on the issue). Taking these matters into account:48 Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in the legal sense and are not enforceable at law. To make them legally binding would require ‘clear and express provisions’ to that effect. This judgment seems to draw on a much wider range of factors than the other cases in this area in order to determine the issue. It is probably the case, however, that such an approach was a result of the particular sensitive context (that is, industrial relations) rather than being indicative of the way the issue should be dealt with more generally. The Ford decision should not, therefore, be regarded as indicating any general departure from the presumption of legal enforceability which attaches to agreements in the commercial area. As far as collective agreements themselves are concerned, the matter is now dealt with by statute. Section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that collective agreements are ‘conclusively presumed not to have been intended by the parties to be’ legally enforceable. The only exception is where the agreement is in writing, and expressly stated to be legally enforceable. We thus have here a presumption against legal enforceability which is even stronger than that which operates in relation to domestic agreements. It cannot be rebutted by taking account of verbal statements, or by looking at the context, but only by a clear intention committed to writing. This, therefore, is one of the few occasions in which English law requires formality in the making of an agreement, if it is to be legally enforceable.

4.4 IS AREQUIREMENT OF INTENTION NECESSARY?

At the beginning of this chapter, reference was made to the argument that the insistence on a requirement of intention in addition to the other elements of validly formed contract (offer, acceptance, consideration) is unnecessary. This view has been taken by, for example, Williston in the United States,49 and Hepple in the United Kingdom.50 Hepple argues that the problems with this area derive largely from a failure to take account of the

Chapter 4: Intention to Create Legal Relations 123

45 [1969] 2 QB 303. 46 Ibid, pp 329–30. 47 Cmnd 3623, 1968. 48 [1969] 2 QB 303, pp 330–31. 49 Williston, 1990. 50 See Hepple, 1970.

particular approach to consideration adopted by Lord Atkin in Balfour v Balfour.51 He points out that, in defining consideration in terms of ‘mutual promises’ or as ‘a benefit received by one party or a loss suffered by the other’, Lord Atkin failed to add that the benefit or loss, or indeed the mutual promises, ‘must be received as the price for the other’. Hepple argues that many domestic agreements may involve mutual promises, ‘and yet not be ... contract[s] because the promise of the one party is not given as the price for the other’.52 In other words, the concept of the bargain is central to the test of enforceability of contracts under English law and the vital elements in the identification of a bargain are offer, acceptance and consideration. These three elements should be treated together as indicating a bargain. Thus an analysis which tries to separate out agreement (that is, offer and acceptance) from consideration is missing the point of why the courts started looking for evidence of these three elements in the first place:53 This separation of agreement from consideration … has resulted in a fundamental point being overlooked. This is that the common law recognised at an early stage that usually parties do not define their intention to enter into legal relations. Consequently, the fact that they have cast their agreement into the form of bargain (offer, acceptance, consideration) provides an extremely practical test of that intention. This test of bargain renders superfluous any additional proof of intention. Accordingly, Hepple regards the courts as falling into error in trying to identify an additional element of intention in cases such as Ford Motor Co Ltd v AEF.54 This only results ‘in the use of unnecessary legal fictions’. The argument may be justified as according with the principle that matters of the intention of the parties must be decided objectively. In other words, can the party who claims that he or she thought that the agreement was intended to be enforceable be said to have acted reasonably in this assumption?55 The presumption would be that as long as offer, acceptance and consideration were present, and no specific statement had been made about enforceability, then it would be intended to be legally binding. Social and domestic agreements could still be excluded from enforceability either because no reasonable person expects them to be legally binding, and therefore an assumption that they are would be unreasonable, or because what is given in exchange in such agreements is not generally to be regarded as good consideration. In either case, no ‘bargain’ is created. This line of argument is in effect introducing a rule of formality into the formation of contracts. The formal requirements become not writing, or signature, but ‘offer’, ‘acceptance’ and ‘consideration’. The parties who go through the process of making an agreement which contains these elements will, in the absence of specific and explicit evidence to the contrary, be deemed to have made a ‘bargain’ and therefore a binding agreement. Although this has some attractions, it is submitted that it does not truly represent the English common law approach to contracts. This is based, not only in relation to formation, but in many other areas as well, on the basis that the court is trying to give effect to the intention of the parties. This is the overriding concept, and the evidence which may go towards establishing whether any intention to create a legal relationship existed, and if so, what it was intended to be, is subsidiary. For that reason,

124 The Modern Law of Contract

51 [1919] 2 KB 571. 52 Hepple, 1970, p 128. 53 Ibid. 54 [1969] 1 WLR 339. 55 Cf Principles of European Contract Law, Art 2.102.

the courts legitimately remain concerned to establish the existence or absence of intention, even if other indicators of a binding agreement are present. The existence of the presumption of enforceability in commercial agreements does not contradict such an approach. It simply allows it to operate in a way which is efficient, and does not encourage the parties to an agreement to become involved in unnecessary disputes as to their supposed intentions.