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# CONTRACT LAW

*Sixth Edition*

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OXFORD

# Contents

|   |     |
|---|-----|
| Table of cases  | ix  |
| Table of primary legislation  | xix |
| Table of secondary legislation and other jurisdictions  | xxi |
| <b>1</b> Agreement  | 1   |
| <b>2</b> Agreement problems   | 29  |
| <b>3</b> Enforceability issues: Intention to be bound, consideration, and promissory estoppel | 47  |
| <b>4</b> Privity and third party rights   | 72  |
| <b>5</b> Terms and breach of contract   | 96  |
| <b>6</b> Exemption clauses and unfair contract terms  | 119 |
| <b>7</b> Remedies for breach of contract  | 141 |
| <b>8</b> Contractual impossibility and risk: Frustration and common mistake                   | 166 |
| <b>9</b> Misrepresentation  | 190 |
| <b>10</b> Duress and undue influence  | 213 |
| Outline answers   | A1  |
| Glossary  | A7  |
| Index   | A11 |

**Central London Property Trust Ltd v High Trees House Ltd (High Trees House) (1947)**  
(Denning J)

**FACTS:** The landlords of a block of flats promised to reduce the rent charged to tenants during the bombing in the Second World War when the tenants were unable to sublet. The reduced rent was paid until September 1945 when the landlords claimed to receive the full rent.

**HELD:** Despite the fact that the tenants had provided no consideration to support the promise to accept less rent, the landlord could not go back on that promise, because of the tenants' reliance on it, until it was no longer inequitable to do so. *Obiter:* the landlord was unable to recover the balance on the rental payments while this estoppel operated.

**Defence only**

In English law promissory estoppel operates purely as a defence by the promisee to an action by the promisor where the promisor seeks to go back on this promise, e.g. Berry attempts to go back on its promise to Axel to accept the £750 as discharging the debt and not claim the £250 balance.

In English law, promissory estoppel cannot be used as means by which to create fresh rights (*Combe v Combe* (1951)). This is sometimes expressed in terms that the doctrine is a 'shield not a sword'.

**Combe v Combe (1951) (CA)**

Husband's promise to pay ex-wife was not supported by consideration, and promissory estoppel could not apply on the facts because (i) this was a formation issue rather than an alteration to an existing contract and (ii) in any event, promissory estoppel operates as a defence where a promisor goes back on a promise not to sue. It could not be used to create fresh rights for the ex-wife.

**REVISION TIP**

Examiners may well formulate questions involving consideration, alteration promises, and promissory estoppel around the factual scenarios in *Roffey*, *MWB*, and *High Trees*. You are advised to be familiar with these facts and decisions.

**When will the promissory estoppel doctrine operate?**

This depends on identifying the conditions for its operation:

- (i) There must be a clear promise that *existing* legal rights will not be fully enforced. The context is alteration promises since the doctrine applies to promises which forgo or amend existing legal rights.
- (ii) The promise must be intended to be binding and to be acted upon and it must in fact be acted upon. The essential element is reliance, but it need not be detrimental reliance. *WJ Alan & Co. Ltd v El Nasr Export and Import Co.* (1972): need to have been led to act differently.

## STEP 4: WAS ANY CONSIDERATION SUPPLIED BY THE PROMISEE?

the Axel–Berry example, it would not be enough for Axel to claim that payment of some of the debt is preferable to securing none at all to Berry (*Foakes v Beer*). If, however, Berry's decision to accept part payment was because Axel was about to launch a new product and this would create fresh supply opportunities for Berry, acceptance of part payment means Berry's commercial relationship with Axel can continue (when it otherwise might not have done should Berry have taken action to recover the balance)—and this points to an *additional* factual benefit (and good consideration) in relation to the promise to accept less.

The CA's analysis in *MWB* is controversial because it goes against the traditional view that *Foakes* denied the enforceability of alteration promises to accept less, even if a factual benefit could be identified.

The CA's decision in *MWB* was reversed by the SC (2018) but on a different ground, namely that the purported alteration was not binding because a clause in the contract precluded an oral alteration (modification) of the contract. As such, the SC considered it unnecessary to tackle the consideration issue. Lord Sumption recognized that there were 'arguable points of distinction' between *Roffey* and *Foakes* but conceded that the arguments were 'somewhat forced'. This casts doubt on the CA's analysis in *MWB*, but the SC did not overturn the CA on the consideration point. Lord Sumption also suggested *Foakes* was probably ripe for re-examination, but such re-examination should be left for a future case.

After the SC's judgment in *MWB*, Kerr J in *Simantob v Shavleyan (t/a Yacob's Gallery)* (2018) considered himself bound by *Selectmove* and concluded, consistent with *Foakes*, that a factual benefit could not amount to consideration in the part payment of a debt context.

### Other recognized forms of consideration to support Berry's promise

There are other recognized ways (apart from via factual benefits) to provide the necessary independent consideration, so that Berry would be bound by its promise and unable to sue for the £250 balance of the debt:

- Paying a smaller sum *in advance* at the creditor's (Berry's) request (additional benefit/detriment; this is in fact the *ratio* in *Pinnel's Case*).

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#### Practical example

If Berry had asked Axel to pay £750 in full satisfaction on 15 September when the full debt was repayable on 1 October then Axel would provide consideration for Berry's promise to forgo the balance.

---

- Payment of a smaller sum *at a different place* at the creditor's (Berry's) request (additional benefit/detriment).

If Berry has asked Axel to pay £750 in full satisfaction on 1 October but in Birmingham when the full debt was repayable in London on that date, this would be a detriment to Axel; and because Berry requested it, it would be a benefit to Berry.

## STEP 4: WAS ANY CONSIDERATION SUPPLIED BY THE PROMISEE?

### What constitutes a factual benefit?

In *Williams v Roffey* the factual benefits were identified as:

- the fact the promisor intended to avoid having to make payment for late performance under a penalty clause in its contract with the building owner; and
- the fact the promisor was seeking to avoid the difficulty of finding another subcontractor to complete the work.



### REVISION TIP

The practical example is based on *Roffey*, as, it seems, are many problem question scenarios. They are not difficult to spot, i.e. often a construction contract and evidence of difficulties in meeting a contractual deadline with consequences for the promisor. Given the importance of *Roffey*, it is advisable to be familiar with the facts; the fact the promise was found to be supported by consideration (and hence the need to establish consideration to support alteration promises), and the nature of *Roffey* consideration (students often get this last part wrong, which can undermine the effectiveness of the law stated correctly elsewhere).

If, as seems to be the case, factual benefits are judged subjectively by the promisor, consideration ought not to be difficult to establish, as the promisor would not agree to pay more unless they subjectively considered this to be of benefit. It is only if factual benefit is to be viewed objectively that any difficulty is likely to arise in establishing the existence of a binding promise to pay more.

It follows that consideration means something more than the price for which the promise of the other was bought in this context of alteration promises to pay more.

*Scenario 2: Alteration promises to accept less than the promisee is legally bound to pay (or perform) under an existing contract*

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#### Practical example

##### Simple debt

Axel Ltd (debtor) owes its supplier Berry Ltd (creditor) £1,000 due on Friday 1 October.

On 1 October Berry agrees to accept £750 in full payment and promises not to sue for the £250 balance because Axel is having cash flow problems.

Is Berry's promise enforceable or can Berry go back on its promise and sue Axel for the balance of £250?

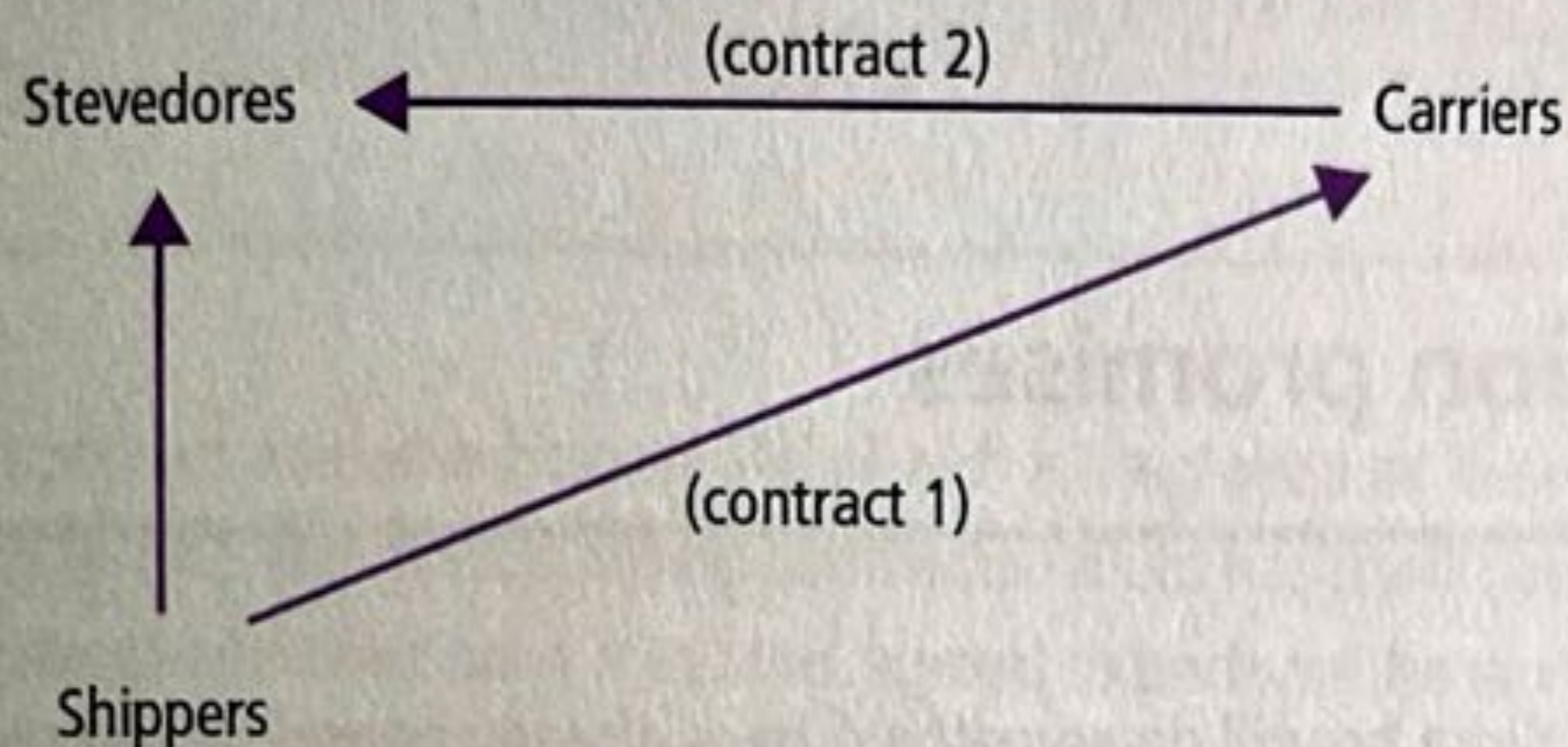
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As with all promises not in deeds, to be enforceable, any promise to alter the terms of a debt contract must be supported by consideration. Since promising to perform an existing duty (paying the debt) is not a good consideration because there is no additional benefit or detriment in law; promising to perform only part of that duty cannot be consideration (*Pinnel's Case* (1602) and *Foakes v Beer*).

## STEP 4: WAS ANY CONSIDERATION SUPPLIED BY THE PROMISEE?

### *New Zealand Shipping Co. Ltd v AM Satterthwaite & Co. Ltd, The Eurymedon* (1975) (PC)

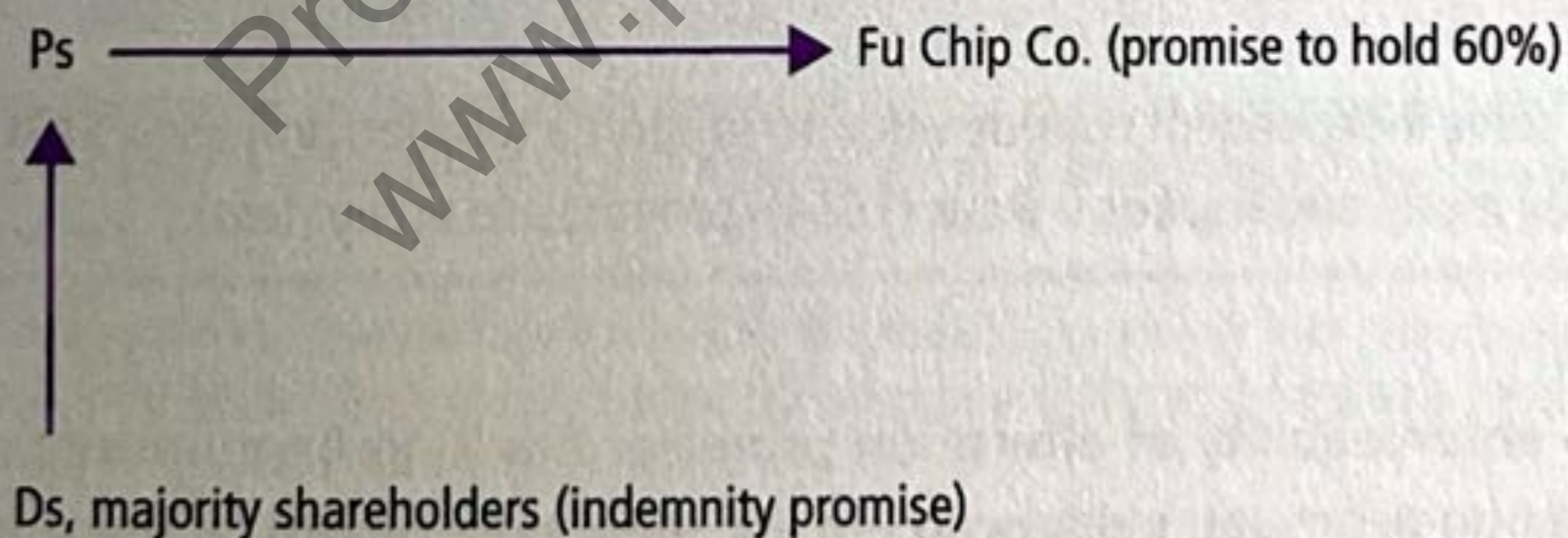
Figure 3.2 *The Eurymedon*



- The first contract was made between the shippers and the carriers for carriage of machinery. This contract contained a Himalaya clause (exemption from liability for servants, agents, and independent contractors).
- The carriers then made the second contract with the stevedores whereby the carriers employed the stevedores to unload goods at the port of destination.
- The Privy Council recognized a third contract between the shippers and the stevedores, based on the shippers' unilateral promise of exemption made to the stevedores. **The stevedores could enforce this promise of exemption because they had provided consideration by unloading the goods.** This was the performance of an existing contractual duty owed to a third party to this contract, namely to the carrier under the second contract. (See Figure 3.2.)

### *Pao On v Lau Yiu Long* (1980) (PC)

Figure 3.3 *Pao On v Lau Yiu Long*



**FACTS:** The plaintiffs acquired shares in the Fu Chip Co. The defendants were majority shareholders who were concerned about a fall in the value of their holding if the plaintiffs decided to sell these shares. The plaintiffs were persuaded to make a promise to the Fu Chip Co. that they would not sell 60% of their shares for one year. They made this promise at the request of the defendants and on the basis that they would be protected if the share price fell and they were unable to sell this 60% in that period. The defendants later made a promise to indemnify the plaintiffs against such a loss. Was this promise enforceable by the plaintiffs?

**HELD:** The plaintiffs had provided consideration for the indemnity promise by promising the Fu Chip Co. that they would retain the shares. This amounted to promising to perform an existing duty owed to a third party to the indemnity contract, namely to the Fu Chip Co. (See Figure 3.3.)



## DON'T FALL INTO THE TRAP

The nature of the agreement is more significant than the identities of its parties. You should not think that all agreements between relatives would be characterized as domestic or social. If the nature of the agreement is commercial, e.g. concerning a family business, then the fact the parties are brothers would not bring this agreement within the presumption of no intention to be legally bound. The presumption would be that which is applicable to a commercial agreement (*Snelling v John G Snelling Ltd* (1973)). There is also a link between establishing an intention to create legal relations and the need for the agreement to be sufficiently certain (Chapter 2), i.e. an absence of certainty indicates that there was no intention to create legal relations (*Blue v Ashley* (2017), *Pretoria Energy Co. (Chittering) Ltd v Blankney Estates Ltd* (2023)).

### 3.5 Step 3: Was the promise contained in a deed?

In a problem question, it is unlikely that the promise will be contained in a deed because, if it was, it would mean that the examiner would not be asking you to demonstrate the existence of consideration to support such a promise.

#### Definition

A deed is a legally binding document which is expressed as a deed, is validly executed as a deed (i.e. it is signed in the presence of witnesses who attest to the signature), and is delivered as a deed (s. 1(2) and (3) Law of Property (Miscellaneous Provisions) Act 1989).

### 3.6 Step 4: Was any consideration supplied by the promisee to support the promise made by the promisor?

#### 3.6.1 Identifying consideration

Was the promise broken a *formation* promise, or was it an *alteration* promise?

#### 3.6.2 Formation promises

Consideration is whatever is asked for and given in exchange for the promise (Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd* (1915): the price for which the other's promise is bought).

- In the case of a bilateral contract, each party's promise is the consideration to support the promise given by the other. Therefore, parties to a bilateral contract are bound on the exchange of promises although neither has yet undertaken any performance of those promises.

# Enforceability issues

Intention to be bound,  
consideration, and promissory  
estoppel

# 3

## KEY FACTS

- Only enforceable promises in an agreement can be relied upon before the courts.
- To be enforceable, a formation promise (promise made as part of an agreement where there is no existing agreement between these parties covering this subject matter) requires (i) an intention to be legally bound by the promise (known as intention to create legal relations) and (ii) either the promise to be expressed in the form of a deed (indicating that any promise is taken seriously), or the party seeking to enforce the promise of the other to show they have given something in exchange for that promise (i.e. it is a bargain, as opposed to a gratuitous promise or gift).
- Intention to be legally bound is judged objectively through the use of two presumptions. These may be rebutted by clear evidence to the contrary. Domestic or social agreements are presumed not to be intended to have legally enforceable consequences. To rebut this presumption there needs to be reliance, certainty of terms, and evidence of the seriousness of the promise. In contrast, parties to commercial agreements are presumed to intend to be legally bound unless there are clear words indicating the absence of a promise or that the parties have agreed to be bound in honour only.
- Consideration means an act or a promise given in exchange for the promise (i.e. the price for which the other's promise was bought). Consideration need not be adequate but must be sufficient. This means the courts will not examine whether what has been given in exchange is of equivalent value; but some acts or promises are not recognized by the law as being valid consideration, e.g. past consideration and the performance of an existing legal duty.
- In order to enforce an alteration promise, a party must also show that it has provided **consideration for, or purchased, that promise**. Performing an existing contractual formation

If, however, the mistake does not relate to a term of the contract but to a collateral matter or matter relating to the quality of the subject matter, then it will not be fundamental and will not prevent agreement.

### Smith v Hughes (1871)

**FACTS:** D alleged P knew D required old oats (and not new oats which had been purchased) and that therefore the contract was void for mistake.

**HELD:** There was a valid contract. There was no misrepresentation or term that the oats sold had to be old and therefore this was a collateral matter (relating to the quality of the subject matter) which did not affect the agreement reached between the parties.

### Mistakes as to identity

This occurs where one party is mistaken as to the identity of the other contracting party (a term of the contract) and the other knows of the mistake (usually because they will have fraudulently misrepresented their identity).

#### Practical example

Alex sells his bicycle to Becky because she represents that she is Victoria Pendleton (the Olympic cyclist). He allows her to take the bicycle on credit in return for a promise of the cash the following day. In the meantime Becky sells the bicycle to Charlie for cash and disappears. Charlie knows nothing about how Becky acquired the bicycle but pays a discounted price as Becky tells him she needs a quick sale since she is emigrating to Australia the following day.

Alex wants the return of his bicycle from Charlie. Charlie claims he paid for the bicycle and it is now his.

- This type of mistake will only render the contract VOID if it is *fundamental*.
- If it is not a fundamental mistake, then the contract will only be voidable (capable of being set aside) for fraudulent misrepresentation.

This distinction between void and voidable is particularly important where the goods have been sold by the rogue to an innocent third party:

- The goods can only be recovered from that third party if the contract was void, so that the rogue had no title (ownership) to pass on.
- If the contract with the rogue was merely voidable for fraudulent misrepresentation, the right to set aside the contract will have been lost when an innocent third party acquires rights in the goods. In such circumstances the innocent third party can keep the goods.

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