contains all essential terms and was intended to be legally binding, failure to agree the remaining terms will not deprive the interim agreement of its contractual force.

CHAPTER 5

Consideration

5.1 Introduction to Consideration

Consideration is not a necessary element of contracts in civil law systems, but is an essential requirement of common law contracts. The common law position is that an agreement is generally unenforceable as a contract if it lacks consideration, even if the parties have reached a *consensus ad idem* by which they actually intended to be legally bound. Consideration is something of value to the promisor or detriment to the promisee which is provided by the promisee at the promisor's request. It is the price of the bargain.

In civil law systems, it is usually enough that the parties have reached an agreement accompanied by an intention to be legally bound. The giving of something valuable in exchange for the promise is often useful in proving intention to be legally bound, but the intention can be established without it. In most civil law systems, therefore, consideration is entirely ancillary to intention.

The common law rules governing consideration have their origins on the threshold of modern English history during the reign of Queen Elizabeth I (1558–1603). In this period, as the feudal order gradually faded in the face of an emerging commercial society, there developed a need for a readily ascertainable sign that the parties to an agreement intended to establish legally enforceable relations.

A sealed deed was for centuries one such sign,[1] and the giving of consideration became an alternative. It is this feature of consideration which causes some writers to characterise it as a requirement of form in common law contracts. But a deed was necessarily a written instrument and most people were still illiterate. Deeds were also inconvenient as they required the involvement of drafting specialists and their preparation could delay the completion of the transaction.

The exchange of things of value (including promises to provide things of value) became the customary sign that the parties earnestly considered

1 See above, section 2.3.

their agreement to be legally enforceable. The common law, being the juridical expression of the customs and expectations of the people as a whole, absorbed this practice and transposed it into a legal doctrine.

The element of formality in the doctrine of consideration was evidence of the pull which mediaeval life still exercised on the consciousness of the people. That this same formality pointed to an agreement which would be enforced independently of the social rank or status of the parties indicated a countervailing and stronger pull. This was a pull in the direction of a society, economy and polity based not on land, agriculture and title, but on commerce, industry and an expanded realm of liberty.

Wherever sealed deeds or consideration were used, businessmen could more confidently know which of their agreements were legally enforceable and which of them were merely understandings. The inclusion of consideration in the agreement was thus a conspicuous pledge that it would indeed be legally enforceable. As the New Zealand Court of Appeal has recently observed, the 'importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself.'[2] When the promisor offered not simply for a handshake, but explicitly for something of value, both he and the promisee would know that they had crossed a line from mere understandings into the territory of legally enforceable bargains. This was true even—or perhaps especially—where the agreed consideration was something of only nominal value, such as a peppercorn. Here we glimpse the etymology of the word 'consideration'. Both parties could point to a sign which indicated that they had definitely considered the matter and agreed to undertake legally enforceable obligations towards each other.

Conversely the absence of consideration provided in common law jurisdictions, constructive and almost irrebuttable proof that the parties did not intend to establish a contractual relationship. The proof was constructive because consideration in its legally technical sense may not actually be about intention at all; the law nevertheless effectively construed it to be a sign of contractual intention. The proof was irrebuttable because, until substitutes for consideration in the form of promissory estoppel and practical benefit emerged, the absence of consideration always defeated contractual liability even where both parties actually intended to create legal relations. The role of consideration in defeating contractual liability has its uses.

2 *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 at 59–60.

Morris R Cohen

The Basis of Contract
46 Harvard Law Review 553 (1933) at pp 571, 572–574.

Contract law is commonly supposed to enforce promises. Why should promises be enforced? … [It] is the view of Kantians like Reinach that the duty to keep one's promise is one without which rational society would be impossible. There can be no doubt that from an empirical or historical point of view, the ability to rely on the promises of others adds to the confidence necessary for social intercourse and enterprise. But as an absolute proposition this is untenable. The actual world … is not one in which all promises are kept, and there are many people—not necessarily diplomats—who prefer a world in which they and others occasionally depart from the truth and go back on some promise. It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep all one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.

Consideration—or rather its absence—is a useful device for separating bare promises from binding contracts.

By the middle of the 20th century, consideration had become an irremovably-entrenched feature on the common law landscape although its formalities and complexities were in ever-increasing discord with changed community customs and expectations. The absence of consideration could defeat contractual liability in ways which increasingly offended such expectations. The common law reacted to this in typical fashion—not by abolishing consideration in a grand stroke, but by gradually adapting it to changed social conditions with piecemeal qualifications.

One such adaptation was the introduction in mid-century of promissory estoppel, which allows a promise unsupported by consideration to be legally enforceable in certain relatively limited circumstances. Another was the recognition of a 'practical benefit', in certain circumstances, to provide support for the alteration of contractual terms without the need for fresh consideration.

The recognised circumstances and the revised rules and principles to which they give rise are, under the aegis of the common law, highly adaptive to the community's changing customs and expectations. Indeed in some jurisdictions, the common law has in recent times significantly extended the reach of promissory estoppel and practical benefit so as to further diminish the range of situations in which contracts require consideration. These developments have already impacted upon Hong Kong's common law of contract.

5.2 Definition of Consideration

Attempts to define consideration in common law jurisdictions almost invariably start with the classic formulation of Lush J in *Currie v Misa*:[3]

> 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forebearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.'

This formulation indicates the broad range of things which may serve as consideration. Valid consideration need not be money, although money is the form which consideration usually takes. It is enough if the consideration, whatever its precise form, comprises 'some right, interest, profit, or benefit' moving to one of the contracting parties. Alternatively, it may consist of 'some forbearance, detriment, loss, or responsibility' flowing from the other party. Lush J's broad formulation of consideration built on a much earlier and more succinct expression of the same idea according to which consideration was a 'loss or inconvenience suffered by one party at the request of the other.'[4]

Usually the consideration will be a benefit and a detriment simultaneously. When P pays $100 to V in exchange for a service from V, the payment is both a detriment to P and a benefit to V. Conversely, the performance of the service by V is both a detriment to V and a benefit to P. In this situation, P's payment of $100 is consideration for V's service, and V's service is consideration for P's payment of $100.

In the case of bilateral contracts (where P makes a promise in exchange for a promise from V) the consideration is valid on each side even where it remains entirely executory. In other words, a promise of consideration is itself valid consideration. Thus where P promises to pay $100 in exchange for a promise from V to provide a service, both P and V have furnished consideration by the making of their respective promises. According to Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*:[5]

> 'I am content to adopt from the work of Sir Frederick Pollock ... the following words as to consideration: "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."'

Unilateral contracts present a slightly different picture. A unilateral contract is one in which a party makes a promise in exchange for an act. This situation is typical of, but not limited to, reward cases. P promises

3 (1875) LR 10 Ex 153 at 162. See also *Man Sun Finance (International) Corp Ltd v Wong Kwan-Man* [1982] HKLR 146, at 151 (HKHC).

4 *Bunn v Guy* (1803) 4 East 190, 102 ER 803.

5 [1915] AC 847 at 855.

to pay $100 in return for a requested act from V (eg the return of lost property). P does not seek a promise from V that the requested act will be performed, and V is under no contractual obligation to perform the act. Nor is P under any obligation to pay $100 until V actually performs the act. Once V performs the act, however, he supplies consideration for P's promise.

Lush J's definition is useful for indicating the breadth of things which may be regarded as consideration, but it is not comprehensive. In particular, it does not refer to three elements which are essential to the common law doctrine of consideration: (i) consideration must be sufficient, but need not be adequate; (ii) consideration must not be in the past; (iii) consideration must move from the promisee at the promisor's request.

5.3 Sufficiency of Consideration

(a) Adequate value not required

The essentially formal nature of consideration is most clearly seen in the rule that consideration need not be an adequate, fair or reasonable price for the promise it is said to support. It is enough that the consideration be something of value to the promisor or detriment to the promisee. This rule has been part of the common law of contracts since at least 1587 at which time it was held that 'when a thing is to be done by the plaintiff, be it ever so small, this is a sufficient consideration to ground an action.'[6] Even something of only slight or nominal value will be sufficient consideration provided it is worth more than nothing; thus a promise to sell the most valuable property will be supported by consideration if the agreed price is $1 or a peppercorn.

Indeed once the promisor has requested something from the promisee in exchange for the promise, a very strong presumption is raised that the thing requested is of benefit to the promisor even if it possesses little or no intrinsic, commercial or market value.

Chappell & Co Ltd v The Nestlé Co Ltd

House of Lords
[1960] AC 87; [1959] 2 All ER 701; [1959] 3 WLR 168

Chappell (the plaintiff/appellant) owned the copyright in a piece of music titled Rockin' Shoes. Nestlé (the defendant/respondent) arranged for a performance of Rockin' Shoes to be recorded on vinyl disks for sale to the public. Such an undertaking was a breach of Chappell's copyright unless it fell within the

6 *Sturlyn v Albany* (1587) Cro Eliz 67, 78 ER 327.

the existence of a particular fact or state of affairs; the parties' rights are thus only indirectly affected. As Ribeiro PJ observes, this renders redundant the question as to whether estoppel by convention can be used as both a sword and a shield. Rather, because it operates on the facts rather than directly creating rights, it 'may, in the circumstances of the particular case, result in an otherwise ineffective or incomplete cause of action being made viable'. Estoppel by convention may, therefore, support a cause of action where none otherwise exists, but is not in itself either a cause of action or a defence. Thus in *Lajom v Cathay Pacific Airways Ltd*,[213] Reyes J was of the view that the flight attendants would have had a valid claim against Cathay Pacific even if their contracts of employment were not in terms conferring a right to automatic annual pay rises; estoppel by convention would have 'changed' the facts concerning the contracts by preventing Cathay Pacific from arguing that no such pay rises were in fact provided for.

213 [2005] HKCU 262 (HKCFI).

CHAPTER 7

Intention to Create Legal Relations

7.1 Introduction to Intention

Not all agreements are enforceable. Even where an offer has been accepted, the terms are certain, and the promises are supported by consideration, the agreement will not be an enforceable contract if the parties lacked an intention to be legally bound

As the range of things which could be regarded as consideration expanded during the course of the 19th century, the usefulness of consideration in providing a clear and unambiguous sign of contractual intent diminished somewhat. It became increasingly easy to identify the existence of consideration, but there were many situations where common sense indicated that no intention to create legal relations existed. This was particularly true in relation to agreements of an essentially domestic or social character.

In order to deal with this development, there emerged in the common law of the late 19th and early 20th centuries a separate requirement of contractual intention as an essential element of a valid contract. The requirement of an intention to be contractually bound plays, however, a less important role in the common law of contract than it does in civil law systems. In the case of commercial agreements, the common law will readily imply an intention to be contractually bound (*animus contrahendi*) where consideration is present.

Where, however, there are reasonable grounds to suppose that an intention to create legal relations was absent in an agreement's conclusion (most notably in the case of domestic or social agreements) common law courts will not infer the existence of contractual intention from the mere presence of consideration. Rather, the party asserting the existence of a contract must furnish separate evidence of *animus contrahendi*.

In stark contrast to most civil law systems, the role of intention to be legally bound plays a merely auxiliary role to that of consideration in establishing the existence of a contract at common law. Most of the

juridical load which is borne by intention in the contract law of civil law systems is borne, in the common law of contracts, by consideration.

At common law, this area of contract doctrine is dominated by two rebuttable presumptions. The first of these is the presumption that parties to an agreement of a domestic or social character do not intend their agreement to be contractually binding. The second presumption is a mirror image of the first; parties to an agreement of a commercial character do intend their agreement to be contractually binding. In each case the presumption can be rebutted by sufficient evidence indicating that reasonable persons in the position of the parties would have possessed a contrary intention at the time the agreement was concluded.

7.2 Domestic Agreements

Among the most common types of agreements are those made among family members residing together. Every day, countless agreements are made by which cohabiting family members undertake to do things for each other, often in exchange for reciprocal undertakings. A husband might promise to collect the children from school today in return for a promise by the wife to perform the task tomorrow. A parent might offer to pay a child some pocket money in exchange for the child performing some chores. A child might offer to buy his parent a meal if the parent will quit smoking. In each case, the terms may be sufficiently certain, and there is consideration for the promises—but can it reasonably be said that the parties intended that the law might be used to enforce the agreements?

Sun Er Jo v Lo Ching

High Court
[1996] 1 HKC 1; [1995–2000] HKCLRT 14

The plaintiff was a 90-year-old mother of five adult children. After a falling out with her children concerning certain financial and property transactions, she commenced proceedings against them primarily for breach of trust. One of her claims, however, was for repayment of expenses in raising her youngest son while the family resided in Shanghai. Although it was not clear whether this part of the claim was based in contract (none of the parties were legally represented), the trial judge disposed of it on contract grounds.

Yeung J (judgment delivered in Chinese): In relation to Madam Sun's claim for rearing expenses from Lo Kun, it was right and proper that parents bring up their children and this did not form a basis for a compensation claim. Family arrangements made between parents and children, husband and wife, or brothers and sisters were generally not legally binding, unless it was shown that they have clearly intended to enter into legal relations. Therefore, Madam Sun could not claim back the RMB100,000 from Lo Kun. *Balfour v Balfour*[1] applied.

As Yeung J elected to treat the plaintiff's claim against her youngest son as one based in contract, he could just as easily have disposed of it on the basis that there had been no offer, no acceptance, no certainty of terms and no consideration. He chose, instead, to base his finding on a lack of intention to create legal relations. In so doing he recognised that agreements between close family members are 'generally' not legally binding unless a clear intention to the contrary is shown. Why should this be so? The answer lies in the English authority which Yeung J invoked.

Balfour v Balfour

Court of Appeal (England and Wales)
[1919] 2 KB 571; [1918–1919] All ER Rep 860; 88 LJKB 1054; 121 LT 346

The defendant was a British imperial civil servant based in Ceylon, where he lived with his wife. In November 1915, they returned to England for a visit. Some ten months later at the end of his leave period, the defendant returned to Ceylon but his wife remained behind on medical advice. Before departing, the defendant agreed to pay his wife £30 per month towards her maintenance until they could be reunited. Subsequently, the defendant wrote to his wife suggesting that they should henceforth live apart. The wife obtained a decree nisi of divorce, and commenced proceeding against the defendant for breach of his contract in respect of his non-payment of the promised maintenance. The wife succeeded at trial, and the defendant appealed.

Atkin LJ: ... The defence to this action on the alleged contract is that the husband says he entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make agreements between themselves, agreements such as are in dispute in this action, agreements for allowances by which the husband agrees that he will pay to his wife a certain sum of money per week or per month or per year to cover either her own expenses or the necessary expenses of the household and of the children, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given.

To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement.

1 [1919] 2 KB 571, [1918–1919] All ER Rep 860.

living together in amity. In *Merritt v Merritt*[3] a husband and wife reached an agreement, after they had separated, whereby the husband would pay £40 per month in maintenance. The wife agreed to meet the monthly mortgage repayments out of that sum, and the husband promised to transfer title to her once the obligations to the mortgagee had been discharged. The Court of Appeal held the agreement to be an enforceable contract. According to Lord Denning MR, whereas it is appropriate to presume that domestic agreements between spouses living in amity are not intended to be legally binding:[4]

> '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 presumption against contractual intention extends also to other close family relationships, such as those between parent and child. In *Jones v Padavatton*,[5] a mother promised her daughter that if the daughter gave up a well-paying job in the United States and moved to London in order to study for the bar, she would pay the daughter a monthly allowance of $200. The idea was that the daughter would eventually qualify for the bar, then move back to Trinidad to practice law and live near her mother. The daughter agreed and moved to London in 1962, but after the daughter had spent some time in London the arrangement changed; instead of paying a monthly allowance, the mother bought a house in London in which the daughter lived rent-free and from which she derived income from the rent paid by boarders. After five years, the daughter had made very slow progress in her bar exams, and the mother sought possession of the house. The daughter resisted on the grounds that she was entitled to possession of the house pursuant to a contract with her mother. The English Court of Appeal held unanimously that there was no enforceable contract. Salmon LJ took the view that the terms of the agreement lacked sufficient certainty. Danckwerts and Fenton-Atkinson LJJ rested their judgments primarily on a lack of intention to create legal relations. According to Danckwerts LJ:[6]

> 'There is no doubt that this case is a most difficult one, but I have reached a conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements. *Balfour v Balfour* was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother. This, indeed,

3 [1970] 2 All ER 760, [1970] 1 WLR 1211.
4 [1970] 2 All ER 760 at 762.
5 [1969] 2 All ER 616, [1969] 1 WLR 328.
6 [1969] 2 All ER 616 at 620.

> seems to me a compelling case. The mother and the daughter seem to have been on very good terms before 1967. The mother was arranging for a career for the daughter which she hoped would lead to success. … What was required was an arrangement which was to be financed by the mother and was such as would be adaptable to circumstances, as it in fact was. The operation about the house was, in my view, not a completely fresh arrangement, but an adaptation of the mother's financial assistance to the daughter due to the situation which was found to exist in England. It was not a stiff contractual operation any more than the original arrangement.'

That the decision in *Jones v Padavatton* was, as Danckwerts LJ acknowledged, a difficult one was because of the subject matter of the agreement, and the extensive consequences for each party in its execution. The agreement involved serious commitments on each side which went well beyond the payment of a modest maintenance allowance, and tended to suggest an arrangement that was not of a purely domestic character. The daughter, in particular, gave up a well-paying job and changed her country of residence for a period of years in reliance on the agreement. The mother, for her part, purchased a house in London. The factor which tipped the balance in the judgments of Danckwerts and Fenton-Atkinson LJJ was the vagueness in the terms of the mother's promises. This lack of contractual clarity contributed to their Lordships' findings that no binding contract was intended.

Indeed it seems that the existence of a family relationship between the parties, while important to the existence of a presumption against contractual intention, is less significant than the subject matter of the agreement itself. In *Fong Huen v Anthony Wong*,[7] an agreement between the plaintiff and his son-in-law by which the plaintiff delivered his daughter's title deeds into the daughter's possession in exchange for a promissory note from the son-in-law was held to be enforceable (the son-in-law needed his wife's title deeds as security for a bank loan in order to start a new business). In *Pearce v Merriman*,[8] it was held that a tenancy agreement under which a husband paid rent to his wife was a legally enforceable contract. In *Errington v Errington and Woods*[9] an agreement between a property owner on the one hand, and his son and daughter-in-law on the other, by which the property owner agreed to transfer title to the couple if they met all the monthly mortgage repayments, was held to be an enforceable contract.

7 [1975] HKLR 21 (HKSC).
8 [1904] 1 KB 80.
9 [1952] 1 KB 290, [1952] 1 All ER 149, [1952] 1 TLR 231. In *Hardwick v Johnson* [1978] 2 All ER 935, [1978] 1 WLR 683, per Roskill and Browne LJJ, an agreement by which a property owner agreed to let her son and daughter-in-law reside in the house in return for £7 per week towards paying off the purchase price was held to be an enforceable contractual licence.