

Sweet & Maxwell

TREITEL

THE LAW OF CONTRACT

SIXTEENTH EDITION

.....

EDWIN PEEL



Thomson
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have called a "condition precedent" can thus operate as, or have the effect of, a condition subsequent.⁵⁵⁹

Parties must not prevent occurrence of condition A third possibility is that, before the event occurs, the main obligations have not accrued; but that in the meantime neither party must do anything to prevent the occurrence of the event. Thus in *Mackay v Dick*⁵⁶⁰ an excavating machine was sold on condition that it could excavate at a specified rate on the buyer's property. The buyer's refusal to provide facilities for a proper trial was held to be a breach. Similarly, the seller would have been in breach, had he refused to subject the machine to a proper test. The same principle is illustrated by a case⁵⁶¹ in which a professional footballer was transferred for a fee, part of which was to be paid only after he had scored 20 goals. Before he had done so, the new club dropped him from their first team, and they were held to be in breach as they had not given the player a reasonable opportunity to score the 20 goals.

In the absence of any express term,⁵⁶² the duty not to prevent the occurrence of the condition has been explained as resting on an implied term and this may limit the scope of the duty in a number of ways. For example, the implied term may only be to the effect that a party will not prevent fulfilment of the condition, so that he is not in breach simply by doing nothing;⁵⁶³ or that he will not deliberately prevent the occurrence of the condition;⁵⁶⁴ or (even more narrowly) that he will not wrongfully do so.⁵⁶⁵ The latter type of implication may allow a party to engage in certain kinds of deliberate prevention but not in others: e.g. it may allow a company which has promised an employee the opportunity of earning a bonus to deprive him of that opportunity by going out of business, but not by simply dismissing him, before the bonus has become due.⁵⁶⁶

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Approval of one party The sort of implied term referred to in the previous paragraph can be excluded by an express contrary provision;⁵⁶⁷ in particular, by a provision making the operation of a contract dependent on the "satisfaction" of one party with the subject-matter or other aspects relating to the other's performance.⁵⁶⁸ Thus, it has been held that there was no contract where a house was bought "subject to satisfactory mortgage";⁵⁶⁹ and where a boat was bought "subject to satisfactory

⁵⁵⁹ *Total Gas Marketing Ltd v Arco British Land Ltd* [1998] 2 Lloyd's Rep. 209 at 221, 224.

⁵⁶⁰ (1881) 6 App. Cas. 251; cf. *Shipping Corp of India v Naviera Letasa* [1976] 1 Lloyd's Rep. 132; *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep. 598; *Cream Holdings Ltd v Davenport* [2011] EWCA Civ 1287; [2012] B.C.L.C. 365. Contrast *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep. 483 (duty to co-operate in bringing about the event negated by terms of the contract).

⁵⁶¹ *Bournemouth & Boscombe Athletic FC v Manchester United FC*, *The Times* 22 May 1980. cf. *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716; [2004] 1 Lloyd's Rep. 381 at [21]-[22]; *Luxor (Eastbourne) Ltd v Cooper* [1940] A.C. 108, para.16-098.

⁵⁶² See *King Crude Carriers SA v Ridgebury November LLC* [2024] EWCA Civ 719; discussed below, para.2-113.

⁵⁶³ *Taylor v Rive Droite Music Ltd* [2005] EWCA Civ 1300; [2006] E.M.L.R. 4 at [160].

⁵⁶⁴ See *Blake & Co v Sohn* [1969] 1 W.L.R. 1412.

⁵⁶⁵ See *Thompson v ASDA-MFI Group Plc* [1988] Ch. 241.

⁵⁶⁶ Example based on *Thompson v ASDA-MFI Group Plc* [1988] Ch. 241; and para.16-098.

⁵⁶⁷ See *Micklefield v SAC Technology Ltd* [1990] 1 W.L.R. 1002.

⁵⁶⁸ *Schweppé v Harper* [2008] EWCA Civ 442; [2008] B.P.I.R. 1090 at [70].

⁵⁶⁹ *Lee-Parker v Izett (No.2)* [1975] 1 W.L.R. 775.

survey"⁵⁷⁰ it was held that the buyer was not bound if he expressed his dissatisfaction,⁵⁷¹ in spite of the fact that such expression was a deliberate act on his part which prevented the occurrence of the condition. The same is true where goods are bought on approval and the buyer does not approve them,⁵⁷² and where an offer of employment is made "subject to satisfactory references," and the prospective employer does not regard the references as satisfactory.⁵⁷³ There is some apparent conflict in the authorities on the question whether the law imposes any restriction on the freedom of action of the party on whose satisfaction the operation of the contract depends. In one case⁵⁷⁴ a proposed royalty agreement relating to the use by a manufacturer of an invention was "subject to detailed evaluation of production and marketing feasibility" by the manufacturer. It was held that his discretion whether to enter into the contract was "unfettered by any obligation to act reasonably or in good faith"⁵⁷⁵ and that, as his satisfaction had not been communicated⁵⁷⁶ to the other party, the agreement had not acquired contractual force. On the other hand, where a ship was sold "subject to satisfactory completion of two trial voyages" it was said that such a stipulation was to be construed as "subject to bona fides".⁵⁷⁷ The distinction between the two lines of cases turns, ultimately, on the construction of the agreement.⁵⁷⁸ It has also been held that the party on whose satisfaction the operation of the contract depends must at least provide facilities for, or not impede, the inspection referred to in the agreement.⁵⁷⁹ Of course if the result of the inspection is unsatisfactory, the principal obligation of the contract will not take effect.⁵⁸⁰

One party under duty to use reasonable efforts A fourth possibility is that, before the event occurs, the main obligations have not accrued but that one of the parties undertakes to use reasonable efforts to bring the event about (without absolutely undertaking that his efforts will succeed).⁵⁸¹ This construction was applied, for instance, where land was sold subject to the condition that the purchaser should obtain planning permission to use the land as a transport depot: he was

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⁵⁷⁰ *Astra Trust Ltd v Adams & Williams* [1969] 1 Lloyd's Rep. 81; doubted in *The Merak* [1976] 2 Lloyd's Rep. 250 at 254; and in *Ee v Kakar* (1979) 40 P. & C.R. 223.

⁵⁷¹ But if the buyer declared his satisfaction the seller would be bound even though the survey was not objectively satisfactory: *Graham v Pitkin* [1992] 1 W.L.R. 403 at 405.

⁵⁷² cf. Sale of Goods Act 1979 s.18, r.4.

⁵⁷³ *Wishart v National Association of Citizens' Advice Bureaux* [1990] I.C.R. 794.

⁵⁷⁴ *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651.

⁵⁷⁵ *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651 at 662.

⁵⁷⁶ For the requirement of communication, see *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651 at 660; the requirement may be satisfied by conduct from which satisfaction can

be inferred, e.g. where a buyer of goods on approval retains them without notifying rejection for more

than the stipulated or a reasonable time: Sale of Goods Act 1979 s.18, r.4(b).

⁵⁷⁷ *The John S Darbyshire* [1977] 2 Lloyd's Rep. 457 at 464; cf. *BV Oliehandel Jongkind v Coastal*

International Ltd [1983] 2 Lloyd's Rep. 463; contrast *The Junior K* [1988] 2 Lloyd's Rep. 583 at

589 (where the words were held to negative contractual intention); *Novus Aviation Ltd v Alubaf Arab*

International Bank BSC [2016] EWHC 1575 (Comm); [2017] 1 B.C.L.C. 414 at [64]. See also *El*

Awadi v Bank of Credit & Commerce International SA [1990] 1 Q.B. 606 at 619; and in an analogous

context, *The Product Star (No.2)* [1993] 1 Lloyd's Rep. 397 at 404 (para.2-098, text to fn.498).

⁵⁷⁸ *Schweppé v Harper* [2008] EWCA Civ 442; [2008] B.P.I.R. 1090 at [71]; *Novus Aviation Ltd v*

Alubaf Arab International Bank BSC [2016] EWHC 1575 (Comm); [2017] 1 B.C.L.C. 414 at [66].

⁵⁷⁹ *The Merak* [1976] 2 Lloyd's Rep. 250; cf. *Ee v Kakar* (1979) 40 P. & C.R. 223.

⁵⁸⁰ As in *The John S Darbyshire* [1977] 2 Lloyd's Rep. 457.

⁵⁸¹ See the discussion in para.2-115 of the decision in *Astor Management AG v Atalaya Mining Plc*

[2018] EWCA Civ 2407; [2019] 1 B.C.L.C. 409 where one party was required to use "all reason-

able endeavours".

bound to make reasonable efforts to obtain the permission, but he was free from liability when those efforts failed.⁵⁸² Similarly, where goods are sold "subject to export (or import) licence", the party whose duty it is to obtain the licence⁵⁸³ does not prima facie promise absolutely that a licence will be obtained,⁵⁸⁴ but only undertakes to make reasonable efforts to that end.⁵⁸⁵ The principal obligations to buy and sell will not take effect if no licence is obtained;⁵⁸⁶ but if the party who should have made reasonable efforts has failed to do so he will be liable in damages,⁵⁸⁷ unless he can show that any such efforts which he should have made would (if made) have necessarily been unsuccessful.⁵⁸⁸

2-112 Effect of failure to perform It will be seen that in cases falling within the second, third and fourth categories discussed above, a distinction must be drawn between two types of obligation: the principal obligation of each party (e.g. to buy and sell) and a subsidiary obligation, i.e. one not to withdraw, not to prevent occurrence of the condition, or to make reasonable efforts to bring it about. One view is that the party who fails to perform the subsidiary obligation is to be treated as if the condition had occurred; and that he is then liable on the principal obligation. Thus, in *Mackay v Dick*⁵⁸⁹ the buyer was held liable for the price. An alternative view is that the court should award damages for breach of the subsidiary obligation: in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach.⁵⁹⁰

2-113 Doctrine of fictional fulfilment The doctrine of "fictional" or "deemed" fulfilment of the condition which is said to arise from the decision in *Mackay v Dick* was the subject of review by the Court of Appeal in *King Crude Carriers SA v Ridgebury November LLC*.⁵⁹¹ In that case, the parties entered into a contract for the purchase of a ship,⁵⁹² under which a deposit was payable, but only after the open-

⁵⁸² *Hargreaves Transport Ltd v Lynch* [1969] 1 W.L.R. 215 (condition not satisfied); *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch. 424 (similar condition satisfied); contrast *Tesco Stores Ltd v Gibson* (1970) 214 E.G. 835 (no obligation on purchaser to apply for planning permission).
⁵⁸³ As to which party has this duty, see *HO Brandt & Co v HN Morris & Co* [1917] 2 K.B. 784; *AV Pound & Co v MW Hardy & Co* [1956] A.C. 588.
⁵⁸⁴ The prima facie rule may be excluded by express words which do, on their true construction, impose an absolute duty; e.g. *Peter Cassidy Seed Co Ltd v Osuustukkukauppa* [1957] 1 W.L.R. 273; *Czarnikow Ltd v Centrala Handlu Zagranicznego "Rolimpex"* [1979] A.C. 351 at 371; *Pagnan SpA v Tradax Ocean Transport SA* [1987] 3 All E.R. 565; *Yates and Carter* 1 J.C.L. 57.
⁵⁸⁵ *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 K.B. 679; *Colonial Import-Export v Loumidis & Sons* [1978] 2 Lloyd's Rep. 560; *Gamerco SA v ICM Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226 at 1231. Where the contract is expressly subject to the approval of a public authority, there may not even be a duty to make reasonable efforts to secure that approval: see *Gyllenhammar Partners International v Sour Brodegradevna Industrija* [1989] 2 Lloyd's Rep. 403.
⁵⁸⁶ *Charles H Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 Lloyd's Rep. 89 at 92-93; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497 at 501.
⁵⁸⁷ e.g. *Malik v Central European Trading Agency* [1974] 1 Lloyd's Rep. 279; *Agroexport v Cie Europeenne de Cereales* [1974] 1 Lloyd's Rep. 499.
⁵⁸⁸ *Overseas Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep. 608 at 612.
⁵⁸⁹ (1881) 6 App. Cas. 251; para.2-109.
⁵⁹⁰ *Bournemouth & Boscombe Athletic FC v Manchester United FC*, *The Times* 22 May 1980; cf. *The Blankenstein* [1985] 1 W.L.R. 435 (para.18-023); *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] Q.B. 290; *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 Lloyd's Rep. 515.
⁵⁹¹ [2024] EWCA Civ 719; [2025] 1 All E.R. 179.
⁵⁹² There were several contracts in materially identical terms.

ing of an escrow account which was not possible because the buyer, in breach of contract, failed to provide the necessary documentation. The Court of Appeal held that the seller was entitled to recover the deposit.⁵⁹³ According to Popplewell LJ, there was a "consistent body of case law"⁵⁹⁴ in support of the principle that "an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract".⁵⁹⁵ The legal basis for the principle was said to lie in the maxim that one party should not be entitled to take advantage of their own wrong⁵⁹⁶ and that it represented the "presumed contractual intention of the parties".⁵⁹⁷ Some of the criticism of the doctrine of fictional fulfilment was addressed by confining it to the accrual of a debt and stressing that it does not dispense with the requirement of causation. Thus, the buyer in *Mackay v Dick* was entitled to prove that the excavating machine would not have excavated at the rate required in any event, but it had not pleaded such a case.⁵⁹⁸ In the *King Crude Carriers* case, no question of causation arose because on any view it was the buyer's breach which caused the escrow account not to be opened and prevented the debt, in the form of the deposit, from accruing.⁵⁹⁹

Conditions for the benefit of one party Where a condition is inserted entirely for the benefit of one party, that party may waive the condition.⁶⁰⁰ He can then sue⁶⁰¹ and be sued⁶⁰² on the contract as if the condition had occurred. Obviously this rule does not apply to cases falling within the first of the categories discussed above, in which there is no contract at all before the condition occurs.

⁵⁹³ An unpaid deposit may be recoverable as damages in any event; see *The Blankenstein* [1985] 1 W.L.R. 435, discussed at para.18-023. In the *King Crude Carriers* case, the buyer argued that, if dealt with as a claim in damages, subsequent events showed that the deposit would either not have been paid over to the seller, or would have been paid back.
⁵⁹⁴ In addition to *Mackay v Dick*, see: *Hotham v The East India Co* (1787) 1 Term Rep. 639 (deemed condition precedent to a liability in damages); *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108 at 148; *Panamena Europea Navigacion Compania Limitada v Frederick Leyland & Co Ltd* [1947] A.C. 428; *Wm Cory & Son Ltd v London Residuary Body & Western Riverside Waste Authority* Unreported 5 November 1990; *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No.3)* [2002] C.L.C. 207 at [106]-[107]; *Geys v Société Générale* [2012] UKSC 63; [2013] 1 A.C. 523 at [131]. See also *Rolls-Royce Holdings Plc v Goodrich Corp* [2023] EWHC 1637 (Comm) at [244]-[246].
⁵⁹⁵ *King Crude Carriers SA v Ridgebury November LLC* [2024] EWCA Civ 719; [2025] 1 All E.R. 179 at [77]. So expressed, it was necessary to distinguish cases where a seller of goods has no action for the price because property has not passed (Sale of Goods Act s.49(1)) even though non-fulfilment of this "condition" is due to the buyer's breach (see *Colley v Overseas Exporters (1919) Ltd* [1921] 1 K.B. 302), for the reasons suggested at [65]-[71]; para.21-007.
⁵⁹⁶ See paras 6-072, 18-005.
⁵⁹⁷ *King Crude Carriers SA v Ridgebury November LLC* [2024] EWCA Civ 719; [2025] 1 All E.R. 179 at [81].
⁵⁹⁸ *King Crude Carriers SA v Ridgebury November LLC* [2024] EWCA Civ 719; [2025] 1 All E.R. 179 at [88].
⁵⁹⁹ *King Crude Carriers SA v Ridgebury November LLC* [2024] EWCA Civ 719; [2025] 1 All E.R. 179 at [88].
⁶⁰⁰ *Irwin v Wilson* [2011] EWHC 326 (Ch).
⁶⁰¹ *Wood Preservation Ltd v Prior* [1969] 1 W.L.R. 1077; contrast *Heron Garages Properties Ltd v Moss* [1974] 1 W.L.R. 148.
⁶⁰² *McKillop v McMullan* [1979] N.I. 85.

2-115 **Condition may cease to apply** In light of subsequent events, a condition precedent may no longer apply, or cease to have effect. Whether it does so depends on the construction of the contract. In *Astor Management AG v Atalaya Mining Plc*⁶⁰³ payment of the price for the sale of a copper mine was deferred and became payable when two conditions had been fulfilled: governmental authorisation to restart mining activities and the securing of a debt facility by the buyer to allow for such activities to begin. The authorisation was granted, but the buyer raised for necessary funds as equity finance, rather than as debt. The court held that, while the first condition might have ceased to apply if, for example, the need for authorisation was dispensed with by the local government, the second did not.⁶⁰⁴ The parties had deliberately chosen to require that finance was raised by the buyer as debt and not in the form of equity, not least because part of the consideration for the seller was the receipt of shares in the buyer and the value of those shares would be reduced if the buyer raised equity finance.⁶⁰⁵ To guard against the risk that the buyer might choose not to raise debt finance, it was required to use “all reasonable endeavours” to secure a debt facility. The buyer was found not to have breached that obligation because equity finance was the only form of funding that was reasonably available.⁶⁰⁶ The unsatisfactory outcome that the buyer might avoid paying much of the price for a mine that was now profitable was avoided on the basis that it was only the provision for *deferred* payment which was not enforceable. The price itself was still due and became payable under other provisions of the contract.

⁶⁰³ [2018] EWCA Civ 2407; [2019] 1 B.C.L.C. 409.
⁶⁰⁴ *Astor Management AG v Atalaya Mining Plc* [2018] EWCA Civ 2407; [2019] 1 B.C.L.C. 409 at [33].
⁶⁰⁵ As indeed occurred, reducing the seller's shareholding in the buyer from 16 per cent to less than 1 per cent.
⁶⁰⁶ There was no appeal on this issue from the decision below; [2017] EWHC 425 (Comm); [2017] 1 Lloyd's Rep. 476.

CHAPTER 3

CONSIDERATION¹

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¹ Shatwell 1 Sydney L.R. 289; Sutton, *Consideration Reconsidered* (1974); Chen-Wishart (2013) 13 O.U.C.L.J. 209.

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1. INTRODUCTION

(A) GENERAL

3-001

General rule In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed² or supported by some "consideration". The purpose of the requirement of consideration is to put some legal limits on the enforceability of agreements even where they are intended to be legally binding³ and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality.⁴ The existence of some sort of limit is not a peculiarity of English law, e.g. in some civil law countries certain promises which in England are not binding for "want of consideration" cannot be enforced unless they are made in some special form, e.g. by a notarised writing. The view was, indeed, put forward at one time that consideration was only evidence of the intention of the parties to be bound, and that (at any rate in the case of certain commercial contracts), such evidence could equally well be furnished by writing.⁵ But the view that agreements (other than those contained in deeds) were binding without consideration merely because they

² See para.3-170.
³ See Ch.4.
⁴ See Chs 8-11.
⁵ *Pillans v Van Mierop* (1765) 3 Burr. 1663.

were in writing was rejected in England over 200 years ago,⁶ though it has been revived as a proposal for law reform.⁷ The present position therefore is that English law limits the enforceability of agreements (not in deeds) by reference to a complex and multifarious body of rules known as "the doctrine of consideration".

Doctrine based on reciprocity This doctrine is based on the idea of reciprocity: "something of value in the eye of the law"⁸ must be given for a promise in order to make it enforceable as a contract. An informal gratuitous promise therefore does not amount to a contract.⁹ A person or body to whom a promise of a gift is made from purely sentimental or charitable motives gives nothing for the promise; and the claims of such a promisee are less compelling than those of a person who has given (or promised) some return for the promise.¹⁰ The invalidity of informal gratuitous promises of this kind can also be supported on the ground that their enforcement could prejudice third parties such as creditors of the promisor.¹¹ Such promises, too, may be rashly made;¹² and the requirements of executing a deed or giving value provide at least some protection against this danger.

Promises struck down for want of consideration The doctrine of consideration has, however, also struck at many promises which were not "gratuitous" in any ordinary or commercial sense. These applications of the doctrine were brought within its scope by stressing that consideration had to be not merely "something of value", but "something of value in the eye of the law".¹³ The law in certain cases refused to recognise the "value" of acts or promises which might well be regarded as valuable by a layman. This refusal was based on many disparate policies; so that "promises without consideration" included many different kinds of transactions which, at first sight, had little in common. It is this fact which is the cause of the very great complexity of the doctrine; and which has also led to its occasional unwarranted extensions and hence to demands for reform of the law.¹⁴

(B) DEFINITIONS

Benefit and detriment The traditional definition of consideration concentrates on the requirement that "something of value" must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value), or some benefit to the promisor (in that he may receive value).¹⁵ Usually, this detri-

⁶ *Rann v Hughes* (1778) 7 T.R. 350n.; 4 Bro. P.C. 27.
⁷ See para.3-176.
⁸ *Thomas v Thomas* (1842) 2 Q.B. 851 at 859.
⁹ *Re Hudson* (1885) 54 L.J. Ch. 811; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1 at 19.
¹⁰ cf. Eisenberg 47 U. of Chi. L. Rev. 1; 85 Cal. L. Rev. 821; Chen-Wishart (2013) 13 O.U.C.L.J. 209.
¹¹ *Eastwood v Kenyon* (1840) 11 A. & E. 438 at 451.
¹² *Beaton v McDivitt* (1988) 13 N.S.W.L.R. 162 at 170. It is often easier to promise to make a gift than actually to make one.
¹³ See fn.8; para.3-006.
¹⁴ See para.3-176.
¹⁵ *Currie v Misa* (1875) L.R. 10 Ex. 153 at 162. See also *Cooke v Oxley* (1790) 3 T.R. 653 at 654; *Bainbridge v Firmstone* (1838) 8 A. & E. 743 at 744; *Thomas v Thomas* (1842) 2 Q.B. 851 at 859; *Bolton v Madden* (1873) L.R. 9 Q.B. 55 at 56; *Gore v Van der Lann* [1967] 2 Q.B. 31 at 42; *Midland Bank & Trust Co Ltd v Green* [1981] A.C. 513 at 531; *Modahl v British Athletics Federation Ltd* [2001] EWCA Civ 1447; [2002] 1 W.L.R. 1192 at [50]; cf. [2002] 1 W.L.R. 1192 at [103].

the buyer's promise to pay. It is, however, also well settled that mutual promises can be consideration for each other. Hence if a seller promises to deliver goods in six months' time and the buyer to pay for them on delivery, there is an immediately binding contract from which neither party can withdraw, though, of course, performance cannot be claimed till the appointed time. Implied, though, of express, promises can constitute consideration for each other.³³

Some difficulty has been felt in explaining the rule that mutual promises can be consideration for each other. At first sight, it might seem that the mere giving of a promise was not a detriment, nor its receipt a benefit, so as to make the counter-promise binding. It will not do to say that the person making the promise suffers a detriment because he is legally bound to perform it; for if this assumption is made about one of the promises, it must also be made of the other, so that the "explanation" assumes the very point in issue. Probably the reason for the rule is simpler. A person who makes a commercial promise expects to have to perform it (and is in fact under considerable pressure to do so). Correspondingly, one who receives such a promise expects it to be kept. These expectations, which can exist even where the promise is not legally enforceable,³⁴ are based on commercial morality, and can properly be called a detriment and a benefit; hence they satisfy the requirement of consideration in the case of mutual promises. But there must, at least, be a counter-promise from the promisee: "A promise does not become contractually binding simply because the making of the promise is potentially advantageous to the promisor".³⁵

As a general rule, a promise is regarded as consideration for a counter-promise only if its performance would also have been so regarded.³⁶ It follows that a mere promise to accept a gift cannot be consideration for the promise to make it. Similarly, we shall see that a debtor who actually pays part of a debt does not thereby provide consideration for the creditor's promise to release the balance, and the position is exactly the same if the debtor *promises* part-payment in return for the creditor's counter-promise to accept the part-payment in full settlement.

3-009 Invented consideration Normally, a party enters into a contract with a view to obtaining the consideration provided by the other, e.g. the buyer wants the goods and the seller the price. But English courts often 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,³⁸ or the promisee may not have consciously realised that he was giving what was, in fact, consideration.³⁹ They may also regard the possibility of some prejudice to the promisee as a detriment without regard to the question whether it has in fact been suffered.⁴⁰ These practices may be called "inventing consideration", and the temptation to adopt one or the other of them is particularly strong when the act or forbearance which was actually bargained for cannot be

³³ *The Aramis* [1989] 1 Lloyd's Rep. 213 at 225. But a mere proposal falling short of a promise does not suffice: *The Kaliningrad and Nadezhda Krupskaya* [1997] 2 Lloyd's Rep. 35 at 39.

³⁴ cf. *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 at 581.

³⁵ *Ashia Centur v Barker Gillette LLP* [2011] EWHC 148 (QB) at [20].

³⁶ *Thorp v Thorp* (1702) 12 Mod. 445 at 449; *Re Dale* [1994] Ch. 31 at 38.

³⁷ See para.3-099.

³⁸ See, e.g. paras 3-031-3-032, 3-163-3-165; cf. *Pollway Ltd v Abdullah* [1974] 1 W.L.R. 493; *Zuckerman* 38 M.L.R. 384; *Thornely* [1975] C.L.J. 26; *The Alev* [1989] 2 Lloyd's Rep. 138 at 147.

³⁹ *Pitts v Jones* [2007] EWCA Civ 1301; [2008] Q.B. 76.

⁴⁰ e.g. fn.42.

regarded as consideration for some reason which is thought to be technical and without merit. In such cases, the practice of inventing consideration may help to make the operation of the doctrine of consideration more acceptable; but the practice may also be criticised⁴¹ on the ground that it gives the courts a wide discretion to hold promises binding (or not) as they please. Thus the argument that the promisee *might* have suffered prejudice by acting in reliance on a promise is in some cases made a basis of decision,⁴² while in others precisely the same argument is rejected.⁴³ The courts have not been very consistent in the exercise of this discretion and its existence is a source of considerable uncertainty in this branch of the law.

Motive and consideration In *Thomas v Thomas*⁴⁴ a testator shortly before his death expressed a desire that his widow should during her life have the house in which he lived, or £100. After his death, his executors "in consideration of such desire" promised to convey the house to the widow during her life or for so long as she should continue a widow, "provided nevertheless and it is hereby further agreed" that she should pay £1 per annum towards the ground rent, and keep the house in repair. In an action by the widow for breach of this promise, the consideration for it was stated to be the widow's promise to pay and repair. An objection that the declaration omitted to state part of the consideration, namely the testator's desire, was rejected. Patteson J said: "Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law, moving from the [claimant]."⁴⁵ This remark should not be misunderstood: a common motive for making a promise is the desire to obtain the consideration; and an act or forbearance on the part of the promisee may fail to constitute consideration precisely because it was not the promisor's motive to secure it, e.g. where A promises to give B £1,000 and B thereupon buys a diamond ring. What Patteson J meant was that a motive for promising does not amount to consideration unless two further conditions are satisfied, viz: (i) that the thing secured in exchange for the promise is "of some value in the eye of the law",⁴⁶ and (ii) that it moves from the promisee.⁴⁷ Consideration and motive are not opposites. The former concept is a subdivision of the latter. The consideration for a promise is (unless it is nominal or invented)⁴⁸ always a motive for promising; but a motive for making a promise is not necessarily consideration for it in law. Thus the testator's desire in *Thomas v Thomas* was a motive for the executors' promise, but not part of the consideration for it. The widow's promise to pay and repair was another motive for the executors' promise and did constitute the consideration.

⁴¹ Holmes, *The Common Law*, p.292. In the US there is less need to invent consideration because of the existence of a broad doctrine of promissory estoppel: see para.3-090.

⁴² *Shadwell v Shadwell* (1860) 9 C.B. (N.S.) 159 at 174; the consideration was said by Erle CJ to consist of the possibility that the promisor "may have made a most material change in his position ...".

⁴³ In *Offord v Davies* (1862) 12 C.B. (N.S.) 748; the argument of counsel (at 750) that "the plaintiff might have altered his position in consequence of the guarantee" was rejected, Erle CJ being again a member of the court.

⁴⁴ (1842) 2 Q.B. 851.

⁴⁵ *Thomas v Thomas* (1842) 2 Q.B. 851 at 859; cf. *Hadley v Kemp* [1999] E.M.L.R. 589 at 625.

⁴⁶ See paras 3-027-3-055.

⁴⁷ See paras 3-023-3-026.

⁴⁸ See para.3-009, para.3-014. In *Thomas v Thomas* (1842) 2 Q.B. 851 the consideration may not have been adequate, but it was not nominal: cf. para.3-015; and *Westminster CC v Duke of Westminster* [1991] 4 All E.R. 136 at 146 (reversed in part on other grounds (1992) 24 H.L.R. 572).

3-011 Consideration and condition *Thomas v Thomas* also illustrates the difference between consideration and condition.⁴⁹ The claimant's remaining a widow was not part of the consideration but a condition of her entitlement to enforce the executors' promise. Similarly, in *Carlill v Carbolic Smoke Ball Co*⁵⁰ the claimant provided consideration for the defendants' promise by using the smoke-ball; but her catching influenza was only a condition of her entitlement to enforce that promise. In these cases, the promisee can be said to have performed the condition, but such performance was not requested by the promisor.⁵¹ Where the promisee's performance of the condition is (or can reasonably be regarded as having been) so requested, it can constitute consideration,⁵² e.g. where A promised B to convey a plot of land to B if B built a house on it, B could enforce the promise after he had built the house.⁵³

3-012 Limited effects of promises without consideration A promise that is not supported by consideration may nevertheless give rise to certain legal effects. In particular, English law places certain restrictions on the revocability of a promise where the promisee has acted on it in a way that the promisor could have anticipated but had not requested; and it may give a remedy against a promisor who would be unjustly enriched if he were allowed freely to revoke his promise after such action in reliance on it by the promisee. These limited legal effects of promises without consideration will be discussed later in this chapter.⁵⁴ Here, it is only necessary to emphasise that they do not give such promises the full consequences of binding contracts. Thus, the restrictions on their revocability may be only temporary⁵⁵ and breach of the promise may not entitle the injured party to the full loss of bargain damages normally awarded for breach of contract,⁵⁶ or may not entitle him to them as of right.⁵⁷ Only a promise supported by consideration (or one made in a deed) has these full contractual effects. The limited effects of promises without consideration may therefore have mitigated some of the rigours of the strict doctrine; but they have not eliminated consideration as an essential requirement of a binding contract.⁵⁸

2. ADEQUACY

(A) CONSIDERATION NEED NOT BE ADEQUATE

3-013 Under the doctrine of consideration, a promise has no contractual force unless some value has been given for it. But the courts do not, in general, ask whether

⁴⁹ i.e. a contingent condition: see para.2-105.

⁵⁰ [1893] 1 Q.B. 256; para.2-010.

⁵¹ cf. *Dickinson v Abel* [1969] 1 W.L.R. 295.

⁵² cf. *Ellis v Chief Adjudication Officer* [1998] 1 F.L.R. 184.

⁵³ See *Raffaele v Raffaele* [1962] W.A.R. 29; Allan, 79 L.Q.R. 239; cf. *Re Soames* (1897) 13 T.L.R. 439; *Errington v Errington* [1952] 1 K.B. 290 (para.2-054); *The Castle Alpha* [1989] 2 Lloyd's Rep. 383 at 387.

⁵⁴ See paras 3-073-3-090, 3-110-3-151.

⁵⁵ See paras 3-083, 3-112-3-114, 3-125.

⁵⁶ See Ch.20.

⁵⁷ See para.3-139.

⁵⁸ See para.3-085.

adequate value has been given,⁵⁹ or whether the agreement is harsh or one-sided.⁶⁰ The reason for this is not that the courts cannot value the promise of each party; they have to do just this when assessing damages.⁶¹ It is rather that they should not interfere with the bargain actually made by the parties. The fact that a person pays "too much" or "too little" for a thing may be evidence of fraud or mistake, or induce the court to imply a term as to the quality of the subject-matter, or be relevant to the question whether a contract has been frustrated,⁶² but it does not of itself affect the validity of the contract. This state of the law sometimes causes dissatisfaction, e.g. when it is said that "excessive" prices are charged for goods or services or accommodation. Such problems are, however, more appropriately dealt with by special legislation or by administrative measures than by the ordinary process of civil litigation. The courts are not well equipped to develop a system of price-control, and their refusal, as a general rule, to concern themselves with the adequacy of consideration is a reflection of this fact. At the same time, the general rule is subject to a number of exceptions, to be discussed later in this book.⁶³ These indicate that the courts are (even where the legislature has not intervened) by no means insensitive to the problem of unequal bargains; but in none of them is a promise held invalid merely because adequate value for it has not been given. Some additional factor is required to bring a case within one of the exceptions, e.g. the existence of a relationship in which one party is able to take an unfair advantage of the other. The general rule remains that "no bargain will be upset which is the result of the ordinary interplay of forces".⁶⁴

(B) NOMINAL CONSIDERATION

Sufficiency of nominal consideration The rule that consideration need not be adequate makes it possible to evade the doctrine of consideration, in the sense that a gratuitous promise can be made binding by means of a nominal consideration, e.g. £1 for the promise of valuable property, or a peppercorn for a substantial sum of money. Such cases are merely extreme applications of the rule that the courts will not judge the adequacy of consideration.⁶⁵ If, however, it appears on the face of the agreement that the consideration must as a matter of arithmetic be worth less than the performance of the counter-promise, there would seem to be no contract, e.g. if A promised to pay B £100 in return for £1 to be simultaneously paid by B. It is assumed in the example that both sums are simply to be paid in legal tender. An agreement to exchange a specific coin or coins of a particular description for a sum of money greater than their face value (e.g. 20 shilling pieces bearing the date 1900

⁵⁹ *Haigh v Brooks* (1840) 10 A. & E. 309 at 320; *Wild v Tucker* [1914] 3 K.B. 36 at 39; cf. *Langdale v Danby* [1982] 1 W.L.R. 1123; *Brady v Brady* [1989] A.C. 755 at 775.

⁶⁰ *Gaumont-British Pictures Corp v Alexander* [1936] 2 All E.R. 1686; *Midland Bank & Trust Co Ltd v Green* [1981] A.C. 513 at 532. cf. para.10-049, fn.263.

⁶¹ See para.20-023 and following.

⁶² e.g. in the coronation cases, paras 19-042-19-044.

⁶³ See paras 10-049-10-051, 11-121, 21-034.

⁶⁴ *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326 at 336 (Lord Denning MR).

⁶⁵ Atiyah, *Essays on Contract* (1990), p.194 argues that there is no logical connection between the two rules, relying on the fact that many of the US courts recognise the principle that consideration need not be adequate, while rejecting the device of nominal consideration. The answer to this argument lies in Holmes' aphorism (*The Common Law*, p.1) that "the life of the law has not been logic; it has been experience": American courts which reject the device of nominal consideration do so on policy grounds which have nothing to do with logic.