

Diagram 3B gives you an overview of the doctrine of **consideration**.

At its most basic, the doctrine says that: a party can only enforce a promise if she has given consideration in exchange for it.

The *problem* is that, it's difficult to be precise about what *counts* as valuable consideration. This diagram shows the nature and location of the uncertainty; and the organic nature of the consideration doctrine.

1. Courts have described what amounts to good consideration in different ways that are not entirely consistent with each other.

1.1 Firstly, the most common definition from *Currie v Misa*: focuses on the idea of benefit to the promisee or detriment to the promisor. Usually, there is both benefit *and* detriment but either one is enough. Even so, it is sometimes hard to find *either* in any meaningful sense.

1.2 Second, the courts have also referred to 'legal' and 'factual' benefit or detriment. **Factual** benefit is anything that the *promisee recipient* regards as valuable. But, this may not be valid consideration because it does not confer **legal** benefit. I.e. value in the eye of the law.

But since the landmark case of *Williams v Roffey*, *factual or practical benefit* is good consideration in some circumstances.

1.3 Thirdly, the courts sometimes rely on the idea of **request** to establish value. The idea is that, even if the value of the thing given is questionable (eg chocolate wrappers), it is valuable **in law**, simply because the recipient wanted it and *asked* for it.- And courts can even *imply* this request.

1.4 Fourthly and in contrast, something that the recipient does not regard as valuable may be treated as valid consideration if there is otherwise a good reason to enforce the recipient's promise. Unfortunately, this led Professor Treitel to talk about consideration being invented by the courts.

These definitions make the scope of consideration uncertain and potentially very wide. You can read about each in more detail in Chapter 3.1.3 of the textbook.

2. The wide and uncertain scope of valid consideration is exacerbated by the general rule that consideration need not be adequate. / Because people value things differently, what they exchange does not need to be of equivalent value in the market place. This so called 'subjectivity of value' - expands the potential scope of valid consideration in the following ways:

2.1 Consideration can be **nominal**; in theory a peppercorn or a chocolate wrapper can make a reciprocal promise of a house worth £10million enforceable.

2.2 It is good consideration for you to agree not to sue someone or to settle your dispute with them (called forbearance to sue or compromise of claim). It doesn't matter that you could not have won and so gave nothing of **real** value. It's enough that you honestly *believed* your claim was good.

2.3 If I perform or promise to you to perform a pre-existing duty that I already owe to a third party, I give good consideration for your promise- this is because you derive a benefit and I suffer a legal detriment because now you can also sue me for breach.

2.4 If I perform (or promise to perform) a pre-existing contractual duty that I already owe to you, this was traditionally not recognized as good consideration for your reciprocal promise to pay me more because, in return, you get no more from me than you were already entitled to.

The same applies if you promise to accept less from me than I originally owe you- again, you get nothing in exchange for your relieving promise.

What was required in both cases was *additional* legal benefit to you.

But after *Williams v Roffey* and *MWB v Rock*, it's enough if you get a factual or *practical* benefit, such as not having to deal with the unpalatable consequences of my breach or getting something rather than nothing. If so, your promise to pay more or to accept less, is enforceable. Of course, the issue of economic duress (that can invalidate the contract variation) lurks in the background.

The upshot of all this is that *any* promise is potentially enforceable. But, of course, not every promise *should* be enforced. So, how does the law control or restrain this potentially run-away liability?

3. This is achieved by the general principle that consideration must be of value in the **eye** of the **law** and that eye will *not* see certain things as valuable. In this way, the law can keep a check on each of the expansionary tendencies I have mentioned:

3.1 So, it's said that *mere motive* is not good consideration; it's not enough that you have *reasons* for promising me something; to enforce your promise, I must give you something in exchange that the law regards as valuable. That's why, it's often said that love and affection are not good consideration.

3.2 Similarly, a promise may be **illusory** and so not good consideration- eg if I say 'For £500,000 I will build you a house, *if I feel like it*' I cannot enforce your promise to pay the money.

3.3 And again, I give no consideration if the court decides that the agreement is just a **conditional gift**. Eg if you tell me 'I'll give you £5,000 if I win the lottery', I can't enforce the payment when you do.

3.4 My *compromise or forbearance of my claim against you* is not good consideration if it is in bad faith; ie if I don't genuinely believe that my claim is valid in law.

3.5 Normally, the focus is on the *economic* value, however small, of any alleged consideration. Such benefits are tangible, and it's generally said that intangible benefits, such as 'love and affection' or not to complain, are not valuable consideration. On the other hand, if we take seriously that people value things differently and that, if they ask for something, it must be valuable to them, then the bar against intangible benefits is not logically sustainable, although it will be hard to value in damages.

3.6 So, when there's a good policy reason to support the enforcement of the reciprocal promise, courts *have* accepted intangible benefits as valuable consideration. For example, in *Ward v Byham*, the court recognized the mother's promise, not only to look after her child, but also to make her 'happy', as good consideration – this meant she could enforce the father's promise to contribute £1 a week to the child's upkeep. The court rejected the father's argument that the mother was doing no more than she was already legally obliged to do because, at that time, only mothers, and not fathers, were obliged to bring up so-called 'illegitimate children'.

3.7. I've already mentioned the recent expansionist tendency of recognizing valid consideration in promises of 'more for the same' or 'the same for less'.

Of course, if there is **no** practical benefit, the contract modification is not enforceable. The issue is **what 'practical benefit' means**.

3.8 The general rule is that a promise to perform (or the performance) of an **existing public duty** such as to render emergency services by ambulance or fire engine is *no* consideration for a reciprocal promise. The law refuses to recognize the undoubted factual value to the recipient because it is concerned to prevent opportunistic exploitation and corruption in public life.

3.9 But, where enforcement would *not* undermine such public policies, courts can circumvent the bar by 'finding' that *more* was promised than was strictly owed under the pre-existing legal duty. For example if more police or security was provided than they judged strictly necessary.

4. Another restriction is the rule that past consideration is not good consideration. Since my consideration must be something given or done *in response to* (or in return for you're your promise, logically this can't be *before* you makes the promise. If it is, there is no enforceable contract; my consideration is past. It's treated as a gift from me that later prompts your gratuitous promise.

5. BUT, your promise *is* enforceable if the court finds that it falls within the exception of the so called implied assumpsit rule. According to this, my original act *is* valuable consideration if:
 - It is done in response to your actual (or even implied) request, and
 - It was understood at the time that my act would be paid for.

This diagram helps us to see that the consideration doctrine is not a series of logical and consistent rules. Rather, it is a dynamic system that has built in room to expand or contract as the courts judge the merits of the case.