

Diagram 4C gives you an overview of the doctrine of consideration. At its most basic, the doctrine says that for a promise to be enforceable, the promise must have given *something valuable*, some consideration, in exchange for it. The trouble is that it is difficult to be precise about what *counts* as valuable consideration and this diagram shows the nature and the locations of that uncertainty.

1. Courts have described what amounts to good consideration in different ways that are not entirely consistent.
 - 1.1 First, the most common definition comes from *Currie v Misa*: which focuses on the idea of **benefit** to the recipient or **detriment** to the giver of the consideration. Usually, there is both benefit *and* detriment but either one is enough. Even so, occasionally it's hard to find either in any meaningful sense.
 - 1.2 Second, the courts also refer to 'legal' and 'factual' benefit or detriment. **Factual** benefit is anything which the *recipient* regards as valuable. But this may not be valid consideration because it confers no **legal** benefit. Legal benefit is what's generally required, but confusingly, *factual* or, sometimes called, *practical benefit* is occasionally said to be enough.
 - 1.3 Third, the courts sometimes rely on the idea of **request** to establish value. The idea is that, even if the value of the thing is questionable (e.g. chocolate wrappers), it is valuable 'in law', simply because the recipient wanted it and *asked* for it. Moreover, the courts can even *imply* such requests.
 - 1.4 Fourth and in contrast, something which the recipient does not regard as valuable may be treated as consideration if there is an otherwise good reason to enforce the recipient's promise. In this sense, Treitel talks about consideration being **invented** by the courts.

These definitions are not consistent and they make the scope of consideration both uncertain and potentially very wide. You can read more about each one in chapter 4.1.

- 2 The problem of the 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 is

called 'subjectivity of value' and it expands the potential scope of valid consideration in the following ways:

- 2.1 Consideration can be **nominal**; a peppercorn or chocolate wrappers will make a reciprocal promise of a house worth £10million enforceable.
- 2.2 It is good consideration if you agree not to sue someone or to settle your dispute with them (i.e., if you **forbear** to sue on, or **compromise** your claim). It doesn't matter that you could not have won and so gave nothing of real value. It is enough that you honestly *thought* your claim was good.
- 2.3 Normally, the focus is on the economic value, however small, of any alleged consideration. But, this **tangible** measure slides into the **intangible** if we take seriously that people value things differently and that if they *request* something, it must be of value to them. In this way, courts have accepted as valuable consideration: keeping one's own child happy, a wife behaving respectably, and satisfaction at the marriage of a family member.
- 2.4 If A performs for or promises to B to perform a **pre-existing duty already owed to C**, A gives good consideration for B's reciprocal promise. Although A suffers no detriment, B derives a benefit.
- 2.5 If A performs for or promising to perform a **pre-existing contractual duty owed to B**, this is good consideration for B's reciprocal promise to pay more. Previously, A would've been regarded as having conferred no *legal* benefit and so could not enforce B's promise to pay more, because B gets no more from A than he was already entitled to. But after *Williams V Roffey Brothers*, B's promise to pay more *is* enforceable if B gets a *factual* or *practical* benefit, and B *will* receive this, because otherwise B wouldn't have agreed to pay A more for it.

The upshot of all this is that *any* promise is potentially enforceable. But, not every promise *should* be enforced; so how does the law control or restrain this potentially runaway 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. Thus, the law can keep a check on each of the expansionary tendencies that I have identified.
- 3.1 So, it is said that *mere motive* is not good consideration; it's not enough that the A has reasons for promising B something; to enforce A's promise, B must have given A something in exchange for it, which the law regards as valuable. That's why it's often said that love and affection is not good consideration.
- 3.2 Similarly, B gives no consideration if his promise is really *illusory*: e.g. if B says 'Give me £300,000 and I will build you a house, if I feel like it' B cannot enforce A's promise to pay the money.
- 3.3 And again B gives no consideration if she has merely satisfied the condition of the A's *gift*. E.g. if A tells B 'I will give you £5,000 when you graduate', B cannot enforce the payment when she graduates.
- 3.4 B's *compromise or forbearance of claims* in respect of A is not good consideration if it is in done bad faith; i.e. if B does not genuinely believe that her claim is valid.
- 3.5 Intangible benefits such as 'promising not to complain' or otherwise cause trouble may not be valuable in the eye of the law because the law should not support someone who threatens to behave badly.
- 3.6 Policy reasons also deny value to B's performance or promise to perform a *pre-existing public law duty*. It would encourage bribery, extortion or corruption in public life, if for example, the Fire Brigade, police, ambulance or other public officials could charge extra for doing what they were already legally obliged to do.
- 3.7 **Contract modifications** is a troublesome area of the law. I've already mentioned the recent expansionist tendency of recognizing valid consideration in promises of 'the same for more'. The long standing authority of *Stilk v Myrick* said that B confers no *legal* benefit on A, and that is enough. A's promise to pay more will only be enforceable if the courts somehow find **no** practical benefit to A, in B's promise to do the same thing.

3.8 The courts have upheld the rule in *Foakes V Beer* and refused to recognise good consideration in B's promise to do 'less for the same' from A even if it confers 'practical benefit' on A. In reality, 'a bird in the hand may be worth two in the bush', but the eye of the law will not recognize it. This is impossible to square with *Williams V Roffey's* recognition of good consideration in promises of 'the same for more', which is proportionally identical to promises of 'less for the same'.

- 4 Another restriction is the rule that **past consideration** is not good consideration. Since **B's** consideration must be something given or done *in response to* (or in return for) A's promise, logically this can't be *before* A makes the promise. If it is, there is no enforceable contract; B's consideration is past. It is just a gift which prompts a later gift from A..
- 5 BUT, A's promise *is* enforceable if the court finds that it falls within the exception of **implied assumpsit**. According to this, B's original act *is* valuable consideration if:
- It is done in response to A's actual (or implied) request, and
 - It was understood at the time that the act would be paid for.

This diagram helps us see that the consideration doctrine is not a series of logical and consistent rules. Rather, it is a dynamic system which has some room for expansion or contraction as the courts judge the merits of enforcing any promise.