ELLIOTT & QUINN'S
CONTRACT LAW

FRANCES QUINN

Pearson

TWELFTH EDITION

Elliott and Quinn's Contract Law

Consideration must be of economic value

It is sometimes said that consideration must have some 'economic' value, though, as the Nestlé case shows, this economic value may be negligible. What this principle basically seems to mean is that there must be some physical value, rather than just an emotional or sentimental one. In **Thomas** *v* **Thomas** (discussed above), for example, the claimant suggested that following her husband's wishes was part of the consideration, but the court rejected this argument because they said the husband's wishes had no economic value (though in the event this did not alter the outcome of the case, as the widow's own promise was consideration).

Similarly, in **White** *v* **Bluett** (1853), a father promised not to make his son repay money he had borrowed, if the son promised not to keep boring him with complaints. The court held that the son's promise was not sufficient consideration to make his father's promise binding, because it had no economic value. We can contrast this approach with the American case of **Hamer** *v* **Sidway** (1891), where a man promised his 15-year-old nephew $5,000 if he refrained from drinking, smoking, swearing and gambling until he was 21. The nephew did so, and on his 21st birthday, wrote and asked for the money. His uncle said he would give it to him when he was older, with interest, and the nephew agreed. The uncle died before paying the money, and his estate was sued for it. But had consideration been given for the promise? Lawyers for the uncle's estate argued that the nephew had not given anything; in fact, he had benefited by not doing things that were bad for him. But the court disagreed: not doing things that he had a legal right to do could count as consideration.

Consideration can be a promise not to sue

If one party has a possible civil claim against the other, a promise not to enforce that claim is good consideration for a promise given in return. If, for example, Ann crashes into Ben's car, Ben might agree that he will not sue Ann if Ann pays for the damage, and Ben's promise not to sue will be consideration for Ann's promise to pay.

In **Alliance Bank Ltd** *v* **Broom** (1864), Broom had an overdraft of £22,000 with the bank, and they asked him to provide some security. Mr Broom promised to do so, but never did, and as a result the bank sued him. Mr Broom argued that there was no consideration for his promise to provide security, but the court held that the consideration was provided by the bank's implied promise not to sue for a while, giving Mr Broom time to provide security, even though they did sue shortly afterwards.

Where forbearing to enforce a legal claim is offered as consideration, there must have been some intention actually to bring proceedings. In **Miles** *v* **New Zealand Alford Estate Co** (1886), a company had bought some land which it was dissatisfied with. The seller later promised to make certain payments to the company, and the company alleged that it had provided consideration for this promise by not taking legal proceedings to rescind the contract when they found the problems with the land. This argument was rejected by the Court of Appeal, which held that there was no consideration for the vendor's promise, because there was no evidence that the buyers ever really intended to bring proceedings to rescind.

In the same case, it was pointed out that if the party who has the claim believes it to be legally valid, but it turns out not to be, the promise will still be good consideration if that party had honestly believed they had a valid claim – so in the car accident example above, even if it subsequently transpires that for some reason Ben could not have successfully sued Ann anyway, Ben's

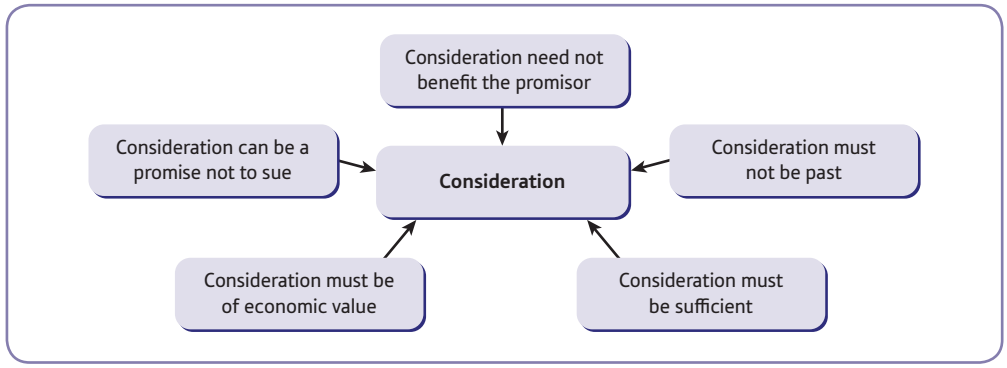

Figure 6.2 Consideration

promise not to sue is still valid consideration, providing Ben honestly believes he has a claim against Ann.

One party's promise not to enforce an existing claim can only provide consideration if the promise given in return was actually induced by the promise not to enforce the claim. In **Combe** *v* **Combe** (1951), a husband and his wife were involved in divorce proceedings, during which he promised to pay her an annual allowance. She later brought an action to enforce this promise and argued, among other things, that she had given consideration for it by not exercising her right to apply to the court for a maintenance order. It was held that this could not be consideration because her husband had not asked her not to apply to the court, and therefore his promise had not been made in return for her promising not to do so.

This principle can be a difficult one to apply. In **Alliance Bank** *v* **Broom,** the defendant did not ask the bank not to sue, yet the bank's forbearance to do so was held to constitute consideration. However, the decision has been explained on the basis that by promising to supply security, the debtor was by implication asking the bank not to sue.

Contracts (Rights of Third Parties) Act 1999

Following the Contracts (Rights of Third Parties) Act 1999, a term in a contract is sometimes enforceable by a third party. It is not necessary for consideration to have been given by the third party. This issue is discussed more fully in Chapter 13.

Performance of an existing duty

Where a promisee already owes the promisor a legal duty then, in theory, performing that duty should not in itself be consideration – if the promisee does nothing more than they are already obliged to do, they are suffering no detriment and the promisor is only getting a benefit to which he or she was already entitled. In most cases, the courts have observed this principle but, as we shall see, in recent years they have found consideration in the performance of an existing duty, causing some controversy in the process.

Existing duties can be divided into three main categories: public duties; contractual duties to the promisor; and contractual duties to a third party.

Existing public duty

Where a person is merely carrying out duties they are legally obliged to perform – such as a police officer protecting citizens, or a juror listening to evidence – doing that alone will not be consideration. In **Collins** *v* **Godefroy** (1831), the claimant had been summoned to give evidence in a court action. The defendant promised to give him six guineas for doing so, but later refused to pay. The claimant tried to enforce the promise, but it was held that since he was legally obliged to give the evidence, doing so could not be considered consideration for the promise. Clearly there are public policy reasons, as well as technical legal ones, for this principle.

However, where a promisee is under a public duty, but does something which goes beyond what they are bound to do under that duty, that extra act can amount to consideration. In **Glasbrook Brothers Ltd** *v* **Glamorgan County Council** (1925), Glasbrook Brothers were the owners of a coal mine in South Wales. Their employees went on strike and Glasbrook Brothers asked the police to place a guard at the coal mine during the strike. The police refused to do this as they considered that regular checks by a mobile police patrol would be sufficient to protect the mine. The mine owners therefore offered to pay the police £2,200 to cover the extra cost of having the police stationed at the mine full time during the strike. When the strike was over, the mine owners refused to pay. They argued that the police had an existing duty to protect the mine and therefore had provided no consideration for their promise to pay. The House of Lords held that the police had provided an extra service which did amount to consideration. The police were merely under a public duty to maintain law and order and could choose how they achieved this. Viscount Cave LC said:

> If in the judgment of the police authorities, formed reasonably and in good faith, the garrison was necessary for the protection of life and property, then they were not entitled to make a charge for it.

As on the facts this was not the case, they were entitled to charge for the extra service.

In the later case of **Harris** *v* **Sheffield United Football Club Ltd** (1988), the football club sought to rely on the above reasoning to argue that they should not have to pay for police officers attending their ground at home matches. They argued that a big police presence was necessary to maintain law and order. But the case was distinguished. In **Glasbrook Brothers,** the coal mine owners could not call off the strike, so the threat to law and order was not their fault. But in the present case, the football club chose to hold football matches on Saturday afternoons to get maximum attendance. This created a bigger risk to law and order so the necessity for the large police presence was self-induced. As a result, the police services had to be paid for. Conversely, in **Leeds United** *v* **Chief Constable of West Yorkshire Police** (2014), the issue was who should pay for policing on the streets around (but outside) the ground on match days, and the High Court said policing these areas was part of the police's normal role in upholding law and order and so the club were not liable to pay for it.

In **England** *v* **Davidson** (1840), the defendant offered a £50 reward for information about a burglary of his house. The claimant supplied such information, but as he was a police officer, the defendant said he was already under a duty to give information about a crime and refused to pay. The court found that supplying the information was consideration: a relevant factor was that the officer was not involved in the burglary investigation and the court considered that the service given was not one he was already 'bound to render'.

The case of **Ward** *v* **Byham** (1956) illustrates the willingness of the courts to find evidence of some consideration where public policy reasons seem to demand that a promise be binding. Ms Ward and Mr Byham lived together from 1949 to 1954, and in 1950 had a daughter. In 1954, Mr Byham threw Ms Ward out of the house, but kept their daughter with him. Some months later, Ms Ward asked to take the child to live with her, and Mr Byham wrote to say that she could do so, and he would pay £1 a week maintenance, provided that she could 'prove that [the daughter] will be well looked after and happy', and that the little girl was allowed to decide for herself whether or not she wanted to go and live with her mother. Ms Ward duly took their daughter. Mr Byham paid the maintenance as agreed for seven months, but stopped when Ms Ward married another man. She sued for the money. Mr Byham alleged that there was no consideration because, as the mother of an illegitimate child, she was already under a statutory duty to maintain the little girl, so her promise to do so was not consideration. On the facts, the majority of the court held that there was a valid contract, because her promise to see that their daughter was happy, and to allow her to choose which parent she wanted to live with, went beyond her statutory duty, and could therefore be consideration for Mr Byham's promise to pay maintenance.

Existing contractual duty to the promisor

The position on contractual duties and consideration has changed in recent years, and the implications of the change are still rather unclear. In the past, the rule was that performance of an existing contractual duty owed to a promisor was not consideration, as illustrated by two nineteenth-century shipping cases.

Key Case **Stilk *v* Myrick (1809)**

In Stilk *v* Myrick, two sailors deserted a ship during a voyage and the captain was unable to find replacements for them. The eight remaining crew members were promised extra wages for sailing the ship back home short-handed, but when they arrived back in London, the captain refused to pay the extra money. The sailors sued for it, but the court held that there was no consideration for the captain's promise; the sailors had already contracted to sail to their destination and back, and that was all they had done.

Legal Principle

Performance of an existing contractual duty owed to a promisor is not normally consideration.

In **Hartley** *v* **Ponsonby** (1857), half the crew deserted a ship, and the rest were promised extra money to carry on working the ship to Bombay. Again, at the end of the voyage the captain refused to pay the extra money and the claimant sued. In this case the court held that there was consideration, because the crew had become so small that the remainder of the voyage was more dangerous than it had been when they made their contracts. In agreeing to carry on, the claimant was taking on duties beyond those in his original contract, and had therefore provided consideration for the promise to pay extra.

Paying more or less than agreed

A major exception to the rule that performing an existing duty does not amount to consideration came in the following case.

Key Case Williams *v* Roffey (1991)

In **Williams *v* Roffey,** these principles were reconsidered by the Court of Appeal. Roffey were a building firm with a contract to refurbish a block of flats. They subcontracted the carpentry work on the project to Williams, agreeing to pay him £20,000 for the work. But before the work was finished, it became obvious that Williams had financial problems, which would prevent him finishing the work on time. Roffey's agreement with the owners of the flats contained a penalty clause, which meant Roffey would lose out if the complete project was not finished on time. Roffey agreed that the original contract price had been too low, and their representative approached Williams, offering an extra £10,300 on top of the agreed price of £20,000 in return for finishing the job on schedule. The agreement also included changes to the working arrangements: instead of Williams working on several flats at once, he would finish one at a time, so allowing other contractors doing different work to come in more quickly after him. When the carpentry work was done, Roffey refused to honour their promise to pay the extra £10,300, so Williams sued for breach of contract. The Court of Appeal found that Roffey's promise to pay extra was supported by valuable consideration: in return for Williams finishing the job on time, Roffey would avoid losing money under the penalty clause in their contract with the building's owners, and the cost and inconvenience of finding another contractor to finish the job, and had also benefited from the altered working arrangements. Even though Williams was only doing what he had originally contracted to do, Roffey was receiving extra benefit.

As a result of **Williams *v* Roffey,** the law now seems to be that if one party's promise to perform an existing contractual duty to supply goods or services confers an additional practical benefit on the other party, then, providing that no duress is involved, it will be sufficient consideration to make a promise given in return binding, even though in legal terms they are only agreeing to carry out their existing contractual duty. The case has caused much interest in the world of contract law, and some of its possible implications are discussed later in this chapter.

Legal Principle

If one party's promise to perform an existing contractual duty to supply goods or services confers an additional practical benefit on the other party, then, providing that no duress is involved, it will be sufficient consideration to make a promise given in return binding.

Williams *v* Roffey concerned an agreement for a contracting party to pay more than was originally agreed; what about agreements to accept less? Where someone owes another money and cannot pay the full amount, they will sometimes offer to pay a smaller sum, on condition that the creditor promises to accept it as full settlement for the debt – in other words, agrees not to sue later for the full amount. The traditional approach, spelt out in the following case, was that even if such an agreement is made, it is only binding if the debtor provides some consideration for it by adding some extra element.

Key Case Pinnel's Case (1602)

In **Pinnel's Case**, Pinnel sued Cole for £8 10s, which Cole owed on a bond (a promise under seal to pay money). The debt had become due on 11 November. Cole argued that at Pinnel's request, he had given him £5 2s 6d on 1 October, which Pinnel had accepted in full settlement of the debt. Pinnel actually won the case on a technicality, but the court made it clear that had it not been for that technicality, they would have found in favour of Cole, because of the fact that he had made payment earlier than the due date, and this amounted to fresh consideration for the promise to accept less than the full amount. The court stated: 'Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole but a change in time or mode of payment, or the addition by the debtor of a tomtit, or canary or the like will suffice to constitute consideration for the [creditor's promise to forgo his debt].'

Legal Principle

If a debtor offers to pay a reduced sum back to the lender in full and final settlement and the lender agrees to accept it, this agreement will only be binding if the debtor provides some extra element that can be treated as consideration.

The rule in **Pinnel's Case** means that if the debtor pays early, or in a more convenient place, or gives something else as well as the part-payment, the creditor is receiving some benefit and the debtor some detriment, and this is fresh consideration for the creditor's new promise to accept part-payment and not insist on getting the whole amount. Suppose, for example, Ann lends Ben £100, and they agree that Ben will pay the money back in one month's time. If Ann arrives on the appointed date, to find that Ben only has £40, and will only hand over that amount if Ann agrees that it is in full settlement for the debt, Ann can agree to this, and still sue Ben for the other £60 later. Ben has given no consideration for Ann's promise to accept the part-payment, and so the promise is not binding. If, however, Ben pays the £40 before the month is up, or offers Ann £40 and a book, then if in either of these circumstances Ann agrees to accept the part-payment as full settlement, that promise will be binding because Ben has given consideration for it.

The rule was approved in **Foakes** *v* **Beer** (1884). Mrs Beer was owed £2,090 by Dr Foakes, on what is known as a judgement debt. She could have obtained a court order for the seizure and sale of his property to pay the debt, but instead she agreed that he could give her £500 immediately, and pay the rest in instalments. If he did this, she said, she would not take legal action. Interest is usually payable on a judgement debt, but their agreement did not mention this. However, when Dr Foakes had paid off the debt, Mrs Beer asked for the interest as well. Dr Foakes refused to pay it, relying on their agreement. Mrs Beer sued, claiming that there was no consideration for the agreement. The House of Lords upheld her claim by applying the rule in **Pinnel's Case**: payment of part of the debt did not in itself constitute consideration for Mrs Beer's promise to forgo the balance.

Once **Williams** *v* **Roffey** was decided, there was a question to be asked: did the practical benefit doctrine also apply to debts? If a practical benefit contained in an agreement to pay more than the agreed price could amount to consideration, could a practical benefit in an agreement to accept less have the same effect? The question was asked of the Court of Appeal in **Re Selectmove Ltd** (1995), which concerned an alleged arrangement between the Inland Revenue and Selectmove under which it was claimed that it had been agreed that Selectmove could pay off its tax liabilities by instalments. Despite this alleged arrangement, the Inland Revenue later demanded immediate