**Topic 2  Consideration**

**STEP 1: Is there a contract?**

1) Which party is alleging a contract?

2) State the three elements of a contract
   (a) Agreement (offer and acceptance)
   (b) Intention to create legal relations; and
   (c) Consideration

3) Show briefly that agreement and contractual attention are satisfied, and that the issue concerns consideration

**STEP 2: Define consideration**

Pollock: The Price one Pays for another’s Promise (‘The 3 Ps’).

Consideration is, in short, reciprocity. For example, the Defendant promises something to the Claimant. This promise is not reciprocal unless the Claimant has given or promised something in exchange for the Defendant’s promise. That ‘something’ is consideration, and without it a contract is unenforceable.

Other definitions:

- Some right, interest, profit or benefit accruing to the party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken (*Currie v Misa*).
- Act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is brought (*Dunlop v Selfridge*).

**STEP 3: Identify the consideration and problems (if any). Explain rules, exceptions and cases. Apply to facts**

1) Consideration need not be adequate, but must be sufficient (*Chappell v Nestle*)

2) Consideration must have some economic value (*Thomas v Thomas*)
3) Is forbearance i.e. not doing something, good consideration?
   - General rule: no, due to public policy issues (floodgates argument) (White v Bluett)
   - Possible exception: if it involves giving up one’s legal rights (Hamer v Sidway – US case)

STEP 4: Has there been any variation of terms? Is the variation agreed, and good consideration offered, or is there a problem? Explain rules/exceptions/cases/apply to facts.

1) Is past consideration good consideration?
   GENERAL RULE: No (Eastwood v Kenyon)
   EXCEPTION: Yes, if all the following three conditions are satisfied (Pao On v Lau Yiu Long):
   (a) the act was carried out at promisor’s request (Lampleigh v Brathwait);
   (b) the parties understood from the beginning that the act was to be rewarded in some way (Re Casey’s Patents); and
   (c) all other requirements for a valid, binding contract exist.

2) Is A’s performance of his existing contractual duties good consideration in exchange for a promise from B to pay more?
   GENERAL RULE: No (Stilk v Myrick)
   EXCEPTION 1: Yes, if A exceeds his duties in some way, or confers extra benefit on B (Hartley v Ponsonby). However, this is a question of:
   - fact and degree; and
   - public policy
   EXCEPTION 2: Yes, provided that all the following criteria (‘The Glidewell Principles’) are satisfied (Williams v Roffey Bros):
   (a) there is a contract for goods/services in return for payment;
   (b) B doubts whether A will complete his obligations;
   (c) B promises additional payment if A completes his obligations on time;
   (d) as a result of giving this promise, B obtains a practical benefit or obviates a disbenefit; and
   (e) B’s promise to pay extra is not given as a result of economic duress or fraud on the part of A
      - Duress to Person: Only has to be a reason, not the reason (Barton v Armstrong)
      - Duress to Goods: ‘but for’ test (The Siboen & The Sibotre)
      - Economic Duress (DSND Subsea v Petroleum Geo):
        - Lack of practical choice for victim;
        - which is illegitimate; and
        - which was a significant cause for entering into contract
3) **Is A’s performance of his existing contractual duties to a third party good consideration?**

**YES:** a promise to do something can amount to consideration even if the promisor is already bound to perform this obligation for another party (Scotson v Pegg).

4) **Is the performance of one’s public/legal duties good consideration?**

**GENERAL RULE:** No (Collins v Godefroy)

**EXCEPTION:** Yes, if:
- not contrary to public policy (Williams v Williams); and
- public duty is exceeded (Glasbrook Bros)

5) **Is the part payment of undisputed debts good consideration for a promise by the creditor to forgo the balance?**

**GENERAL RULE:** No (Foakes v Beer)

**EXCEPTION 1 - (Pinnel’s Case):** part payment is good consideration if the debtor:
- gives something different; or
- pays early.

**EXCEPTION 2 - Promissory Estoppel (High Trees House):**

**STEP 1:** Define promissory estoppel

Where a promisor has, by words or conduct, made a promise to the other party (the promisee) to forgo a legal right, once the promisee has acted on this promise he will have a good defence to any claim brought by the promisor which is inconsistent with the promise.

**STEP 2:** When will promissory estoppel apply?

Promissory estoppel will apply if all the following conditions are fulfilled (P.R.I.D.E.):
- **P - PROMISE:** There must be a promise to waive a legal right, which must be intended to be acted upon by the other party (Hughes v Met)
- **R - RELIANCE:** The promisee must act upon the promise, but he need not have acted to his detriment, only have altered his behaviour (Ajayi v RT Briscoe and Alan v El Nasr)
- **I - INEQUITABLE:** It must be inequitable/unjust for the promisor to go back on this promise and insist on his full legal rights (D&C Builders v Rees)
- **D - DEFENCE:** Promissory estoppel will not give rise to a cause of action - it is a shield not a sword (Combe v Combe)
- **E - EFFECT:** The effect is to extinguish or suspend legal rights? (see below).

N.B. The rule in Williams v Roffey cannot be extended to cases involving the part payment of undisputed debts (Re Selectmove)
STEP 3: Effect of promissory estoppels

- Usually operates to suspend promisor’s legal rights. In such cases the promisor may resume these rights by giving promisee reasonable notice (*Tool Metal v Tungsten*)
- In cases where promisee cannot resume his original position, promissory estoppel may operate to permanently extinguish promisor’s legal rights (*Ajayi v RT Briscoe*)
- Effect on one-off debts is uncertain. *May* possibly operate to waive payment (*D&C Builders*), but likely the whole sum would be due in the future.

STEP 5: Conclude