

Lesson Four

Consideration

4.1 What is consideration?

Consideration basically signifies *some benefit or advantage going to one party or some loss or detriment suffered by the other party*. Consideration is defined as valuable in the eye of the law when it consists either of *some right, interest, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other*. Thus consideration does not only consist of profit by one party but also exists where the other party abandons some legal rights in the present, or limits his legal freedom of actions in the future as an inducement for the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does thereby undertake some burden or loses something which in the contemplation of the law may be of value.

Consideration in a contract usually involves the parties on either side doing or refraining from doing some acts. The presence of valuable consideration which is in the nature of some right, interest, benefit or profit which may be provided for or some forbearing, detriment, or loss given or undertaken by the other party.

In the alternative consideration may be defined as an act or forbearance of the one party, or promise thereof. It is *the price for which the promise of the other is bought*, and the promise thus given for value is enforceable.

Consideration must flow from one party to another.

Put simply the plaintiff must answer one of the following questions:

1. What did you do for the defendant?
2. What did you suffer at his request that gives you the right to bring this action against him?

The answer to any of these two questions will prove the existence or otherwise of consideration.

4.2 Forms of Consideration

Generally, consideration may take three forms viz: *Executory, Executed or Past*.

4.2.1 Executory Consideration

Consideration is termed executory where the defendant's promise is exchanged for the plaintiff's promise. This is very common in commercial transactions where actual performance is to come later e.g. sale of goods, where delivery and payment are to be made in the future. This is an example of a promise for a promise.

4.2.2 Executed Consideration

Consideration is termed executed where the defendant's promise is given in return for performance of an act e.g. offers of reward. The difference between the two i.e. executory and executed considerations is that in the case of the former both parties are liable while in case of the later it is only the offeror that is liable. This is an example of a promise for an act.

4.2.3 Past Consideration

It is a promise that comes later as after the performance of an act. In law past consideration is no consideration at all because the promise comes after the performance of the act as such it is unenforceable against the offeror. In this regard the following case is relevant.

A testator left a house jointly to his children. The wife of one of the children, who was living in the house with her husband, spent a lot of money making improvements and carrying out alterations to the house. Later on the other children jointly signed a document agreeing to pay her N40,000 for expenses in improving the house. It was held that the promise was not binding on the children, because her consideration was a past one.

4.3 Exceptions to the Rule of Past consideration.

Past consideration will support a simple contract; if the consideration was given at the request of the dependent in such a case a subsequent promise to pay is binding.

Thus in *Lampleigh v. Braithwaite* (1616) Hob 105

The defendant requested the plaintiff to obtain for him a free pardon from the King. The plaintiff incurred some expenses. Subsequently the defendant promised to pay him N10,000 for his trouble. It was held that the promise was enforceable as it coupled itself with the previous request.

It was held that an act done before the giving of a promise to make a payment or to confer some other benefits can sometimes be consideration for the promise.

1. The act must have been done at the promisor's request;
2. The parties must have understood that the act was to be remunerated whether by payment or the conferment of some other benefits;
3. Payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.

These three conditions, especially the third condition may be regarded as having finally laid the misconception of *Lampleigh's* case to rest; moreover, it make the situation under discussion i.e. prior request to be hardly regarded as an exception to the rule of past consideration.

The second exception is acknowledgement of debt which had been barred by the limitation act. However, here there must be present consideration in form of forbearance to sue.

Note that consideration must move from the promisee with the possible exception of contract of guarantee.

4.4 Adequacy of Consideration

Consideration need not be adequate but must be of some value. No consideration is too small or too much provided there is no fraud, duress or misrepresentation.

4.4.1 Natural love and affection does not in Law constitute consideration.

In *Kardus v. Executors of Doherty* (1938) 4 W A C A 78

The plaintiff obtained in a trial court an order that he was entitled to live on a property which was part of the Estate of which the defendants were executors. During his lifetime Doherty allowed the plaintiff to live on the property in consideration of some favours. After his lifetime, the executors wrote to the plaintiff informing him that the Board of executors have decided to dispose up all of the properties except No. 23 Bamgbose Street, which the board decided to reserve for the occupation of the plaintiff to remain at all time. The defendants contended *inter alia*:- that the plaintiff has given no consideration for the letter on which his entire case rested. It was held that the letter was not based on any valuable consideration. It was in consideration of the wishes of the deceased that the executors wrote the letter and that was in law no consideration at all.

4.4.2 Forbearance to sue is good consideration.

Tsede v. Nubwasa (1962) 1 GLR 335

Nubwasa, a relative of the defendant incurred a debt in the course of his employment to the plaintiff. When he was asked to pay the debt he took the defendants promised to pay the debt on behalf of their relative within one week. They also gave a note of guarantee to that effect. They were only able to pay a small amount of the debt. The plaintiff took action against them for the balance. The defendants argued that there was no consideration for the promise to pay the debt and therefore the contract was unenforceable. The court held that a promise without new consideration to pay a debt already incurred by a third party would not be sufficient to support a simple contract.

However, an agreement to forbear from instituting legal proceeding to enforce a legal or equitable right or demand is sufficient consideration for the promise of the debtor or third party to pay the debt.

It is also settled in law that there need not be an express promise to forebear. It is sufficient if the circumstances exist from which such a promise may be implied.

4.4.3 Consideration must be legal and capable of performance

Any consideration which is not capable of performance is no consideration at all. Thus in this case a servant was promised N4,000 in consideration of a promise made by him that he would cancel the debt which was due to his master.

4.4.4 Consideration where the plaintiff is under a public duty

A person cannot recover money promised to him in return for the performance of or a promise to perform a duty, which is already imposed on him by law. The reason is that there will be no consideration for the subsequent promise.