

PROBLEM QUESTION ON CONSIDERATION (1)

One of the difficult areas and indeed one of the frequently examined areas in the sphere of consideration is the issue of past consideration. To recap, let us revisit the definition of consideration provided by Justice Lush in the case of *Currie v Misa*. Lush said as follows:

- "a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other"

Put simply, consideration is what one party is giving or promising, in exchange for what is being given or promised by the other party to the contract.

It is absolutely essential that consideration arises at the time a contract is agreed or after a contract has been agreed. Thus it goes without saying that if consideration is the price for the promise, consideration provided before an agreement has been reached can never be regarded as part of the price for the promise. In such circumstances the act will be construed as a gratuity or gift. An example will help here. If David agrees to service my car and then proceeds to fit new alloy wheels and a top of the range satnav totally without having agreed this with me and I being pleased with the work agree to pay him an extra £400. If I later say that I am not prepared to pay for the additional work and products, David will not be able to enforce payment. The agreement was for a car service. My promise to pay for the additional services and products came after David carried out his act (which was not in the car service agreement). This is past consideration and under the common law rule in *Stilk v Myrick*, past consideration is not good consideration. Agreements falling within this area cannot be enforced.

This concept in itself is not too difficult to grasp, but the waters become muddied when we acknowledge that there are exceptions to this rule. The exceptions stem from the really old case of *Lampleigh v Braithwait*. The exceptions are:

1. The act must have been carried out at the promisor's request
2. The parties must have understood that the act would be rewarded in some way
3. The payment must have been capable of legal enforcement had it been promised beforehand.

In the example above any claim would fall at the first hurdle, in that the additional acts were most certainly not carried out at the promisor's request. The rule was applied in the later case of **Re Casey's Patents [1892]** and more recently restated in **Pao On v Lau Yiu Long**.

Let us look at another example.

Dora is Maisy's cleaner. She cleans for 4 hours each week and is paid £25. Last week, Maisy asked Dora if she would be prepared to do extra for her as she is having a garden party on Saturday evening and all of the patio furniture needs polishing, the conservatory windows need cleaning and the decking needs to be scrubbed. Dora carried out the additional tasks which took her 6 hours.

Maisy was extremely pleased with Dora's work and told her that there would be a bonus in her pay packet.

When Dora was paid at the end of the week she was surprised to see only £25 in her pay packet especially due to the fact that she had worked 10 hours instead of her usual four, in cleaning the deck, windows and furniture as requested. Maisy has now refused to pay her. She says that her promise of payment came after the additional cleaning had been carried out.

In such circumstances, Dora may be entitled to enforce Maisy's promise. If we apply the exceptions to the rule of past consideration, we can see that Dora carried out the cleaning at the promisor's i.e. at Maisy's request. The parties would have understood that the work would be rewarded in some way, as Dora is Maisy's employee and it is usual that if an employee works extra hours they are paid for them. Finally, it goes without saying that the payment would have been capable of legal enforcement if it had been promised beforehand. It was a simple agreement for cleaning services – which is a perfectly legitimate agreement.

Faced with this question then, you would initially explain that the issue centred on the area of contract law falling under consideration. You would define consideration and explain how it is an essential ingredient of a contract. You would then hopefully identify that the issue lay in the area of past consideration. You should define past consideration and the exceptions to the rule, citing any relevant case law. You would then apply the law to the facts as they are presented and hopefully reach a fully reasoned conclusion.

Let us try this with the aim higher example from the optimise contract law textbook.

Alex sees his neighbour Paul in the local pub. Alex is aware that Paul operates an airport shuttle service. Alex asks Paul if he can take him and his wife to the airport next Thursday. At the airport he promises to pay Paul £25 upon his return from Marbella. Can Paul enforce the payment?

You will note that no agreement on price is made in the pub. It may well be that Alex is asking Paul a favour as a neighbour. Paul certainly has not mentioned payment. We are told that when they reach the airport, Paul tells Alex that he will pay him £25 upon his return.

Here you would explain that the issue concerned consideration. It may appear to you initially that this is just a favour between two neighbours – It may even prompt you to ask whether there was an intention to create legal relations. The promise to make the payment comes after Paul has driven Alex to the airport. This should prompt you to discuss past consideration. You should explain that past consideration will not constitute good consideration and cite the relevant case law. The act of driving Alex to the airport was carried out before any promise of payment was made. Mention such cases as *Re McArdle* or *Roscorla v Thomas*. You should then consider whether any of the exceptions apply. Precedent arises from *Lampleigh v Braithwait* and the later cases such as *Pao on v Lau Yiu Long* should be discussed here and the possibility of whether any of the stated exceptions could apply in the current case. You will probably conclude that there may be grounds for Paul to recover the money, but you need to make it very clear to the examiner how you came to this conclusion. So,

for example, state that the act of Paul driving Alex to the airport had been carried out at the promisor's request, that is, at Alex's request. A strong argument could be put forward to suggest that the parties would have understood that the act would be rewarded in some way. Alex knew that Paul undertook airport runs for a living and human common sense would tell him that he did not operate the service for free. Finally state that this type of agreement would be enforceable if the promise had been made beforehand, it is a very normal kind of transaction.