6

Form, Consideration and Intention

No legal system can sensibly say that every promise, or every agreement, gives rise to contractually binding obligations. There may well be moral and social obligations to keep one's promises and to give effect to agreements which one has entered into. But not all promises and agreements which have moral or social force should necessarily have legal force. The question is how to define those promises and agreements which should be brought within the law of contract—and therefore in what circumstances persons deserve the protection of the law to get some form of remedy for the fact that a promise which was made to them has not been kept, or an agreement has been broken.

This is an issue on which legal systems divide.[1] Civil systems do not have a problem about the proper approach to apply. Some will simply stress that the question is whether the promisor intended to be bound by his promise. Others will look for a 'cause' in an obligation or an agreement in order to validate it. But all systems will see some role for formalities in the creation of contracts. Common law systems also make some use of formalities, but the core doctrine here is a unique product of the common law: the doctrine of *consideration*. We shall see that this doctrine gives the notion that a contract is a bargain between its parties. We shall also see, however, that there is some unease in the common law at limiting the enforceability of promises and agreements to bargains—and that there have been some attempts to extend the doctrine, or even to give legal force to promises and agreements in the absence of consideration. This is a matter on which different common law jurisdictions take different views, and so on some points we shall look at the state of the law outside the English common law.

[1] For a survey of European jurisdictions, see J Gordley (ed), *The Enforceability of Promises in European Contract Law* (Cambridge, Cambridge University Press, 2001); H Kötz and A Flessner, *European Contract Law*, vol 1, T Weir (trans) (Oxford, Clarendon Press, 1997), ch 4.

I. Formality in the Formation of Contracts

1. Specific Formalities for Specific Contracts

We have already seen that English law occasionally provides for specific formal rules relating to the formation of specific contracts.[2] But these are relatively The Statute of Frauds 1677 contained a range of rules requiring writing by way *evidence* for the enforcement of particular types of contract,[3] but almost all of have now been repealed. All that remains is the part of section 4 which writing signed by the guarantor or his agent before a contract of guarantee enforced against him, although in the modern law new formality requirements been introduced for certain types of contract. For example, a contract of insurance cannot be evidenced in court without a written insurance policy;[4] and are statutory requirements for the execution of certain consumer credit agreements without which the agreement can be enforced against the debtor only on the of the court.[5] Most significantly, there is also now a strengthened requirement writing as a condition of the existence of a contract for the sale or other of an interest in land (that is, a contract for the sale of land, or a contract other transaction which will create or transfer an interest in land). This requirement is imposed by section 2 of the Law of Property (Miscellaneous Provisions) Act

> A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.[6]

Each party to a contract for the sale or other disposition of an interest in land someone on his behalf, must sign the document (or one of identical exchange documents). If the requirements as to writing and signature are not complied with there is *no contract*. There must of course still be an agreement between the parties which satisfies the general rules governing the formation of contracts—including offer and acceptance[7] and (as we shall see later in this chapter) consideration. But that agreement does not become a contract until the additional requirement of writing set out in section 2 is satisfied.

[2] Above, p 56.

[3] For further details, see above, pp 56–57. The Statute of Frauds was adopted in other common law jurisdictions, and is largely retained in the United States: EA Farnsworth, *Contracts*, 4th edn (New York, Aspen, 2006) ch 6.

[4] Marine Insurance Act 1906 s 22.

[5] Consumer Credit Act 1974, pt V.

[6] For a detailed discussion of s 2 of the 1989 Act see EH Burn and J Cartwright, *Cheshire & Burn's Modern Law of Real Property*, 18th edn (Oxford, Oxford University Press, 2011) 966–78; and on the law as it stood before that Act (under Law of Property Act 1925 s 40, which was a re-enactment of the old provision of the Statute of Frauds requiring written evidence signed by the defendant or his agent before the contract could be enforced against him), see *Cheshire & Burn* 961–66.

[7] *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (CA) 293 (Evans LJ).

2. A General Formality: the Deed

In contrast with those specific requirements for specific contracts, there is also a general formality recognised by English law: the *deed*. This is a formal transaction used for various purposes, including transfers of the property rights in land, which do not concern us here. What is relevant for our context is that if a promise, or an agreement, is contained in a deed it becomes enforceable by virtue of the formality of the deed, even if the promise would not be otherwise binding because it is not supported by consideration. One could take a different perspective on the matter and say that, since the effect of the doctrine of consideration is to exclude gratuitous promises from the law of contract,[8] a deed is in effect a formality which is *required* for a legally effective promise of a gift. When looked at this way, the civil lawyer might think that there is not really a substantive difference between his system and the common law if (as is common amongst the civilian jurisdictions) his system does exclude gratuitous promises from contracts but subjects gifts to special formality rules. However, this is not the way in which the common lawyer sees it. A contract need be supported by consideration. But, quite separately, a promise or agreement contained in a deed is enforceable by virtue of the deed—and, indeed, the law relating to deeds becomes generally applicable to the obligations set out in the deed, including rules which sometimes go beyond the normal rules of the law of contract.[9]

The reason for this difference between deeds and (informal) contracts is historical. If we look back to the thirteenth and fourteenth centuries, we find that actions of debt (to enforce promises of money) could be brought only if there was a deed; actions of 'covenant' (to enforce promises of performance), although they had been enforced by virtue of the agreement, became enforceable only if the agreement was evidenced by a deed. But our modern law of (informal) contracts developed at a later stage, mainly from the fifteenth to the seventeenth centuries, from a quite different line of cases—the action of 'assumpsit', an off-shoot of the action of trespass.[10] In the modern law, we have the relics of these two separate sources of promissory obligations: deeds retain a quite separate force of their own; and promises contained in simple agreements—whether written or oral—are enforceable without a deed, but only if the promise is supported by consideration.[11]

[8] Above, p 127.

[9] The limitation period to enforce an obligation contained in a deed is 12 years from its breach (rather than 6 years for informal contracts): Limitation Act 1980 s 8 (as part of a general review of the law of limitation of actions, the Law Commission has proposed bringing the two into line, although these proposals have not been adopted: below, p 286); and a promise can be enforceable by virtue of a deed even if it is not part of an agreement—the deed can be a unilateral act (a 'deed poll') naming the beneficiary: Lord Mackay of Clashfern (ed), *Halsbury's Laws of England* vol 32, 5th edn (London, Butterworths, 2012) paras 203, 261.

[10] JH Baker, *An Introduction to English Legal History*, 4th edn (London, Butterworths LexisNexis, 2002) 318–20.

[11] *Rann v Hughes* (1778) 7 TR 350n, 101 ER 1014.

The particular formality required for a valid deed has changed over the [illegible]. At common law,[12] a deed had to be in writing on parchment or paper; sealed [illegible] the promisor; and 'delivered' by him (that is, not a mere physical delivery, [illegible] delivery accompanied by words or conduct signifying his intention to be bound [illegible] the provisions in the deed). Originally, a seal had to take the form of wax, impressed with a formal seal or signet ring—or even the party's fingernail. Signature was not necessary: the seal was the personal indication of the party's agreement to the deed. In practice this formality degenerated, and during the twentieth century it became common for parties simply to attach a red circle of paper to the document to serve as the seal—and the courts began to accept as a valid deed a pre-printed document which identified the place for the seal to be affixed but where the parties had not in fact attached a seal of any kind but had signed the document instead and had their signatures witnessed.[13] This was taken to the logical next step by section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 which abolished the requirement of sealing for deeds by individuals, and also removed the rule that a deed must be written on paper or parchment. In their place it introduced requirements that a deed must be clear on its face that it is intended to be a deed and that the individual must sign the deed in the presence of a witness who sees his signature (or, if he cannot sign, the individual can direct someone else to in his presence and in the presence of two witnesses). A company incorporated under the Companies Act 2006 may execute a deed either by affixing the common seal of the company, or by the signature of a director and the secretary or of two directors, or by the signature of one director in the presence of a witness.[14]

It will be evident from this brief account that formalities for contracts in English law centre around writing—as in all modern legal systems; but that the writing formalities can be achieved between the parties themselves. Notarisation is not used within the domestic English law of contract.[15] Registration requirements exist for certain property transactions—most notably for land.[16] But the formalities for contracts are purely private.

[12] *Goddard's Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396, 399–400.

[13] *First National Securities Ltd v Jones* [1978] Ch 109 (CA).

[14] Companies Act 2006 s 44, expanding provisions first introduced by Companies Act 1989 s 130 for companies not incorporated under the Companies Act sealing remains an indispensable requirement.

[15] Although there has existed since the Middle Ages a profession of notary in England, it did not develop here has it did in continental Europe, and domestic English law never developed a requirement of authentication of private law documents by a notary: see, eg, W Holdsworth, *A History of English Law*, vol V, 3rd edn (London, Methuen & Co, 1945) 115. Notaries in England are generally employed in international transactions to authenticate documents as required by other legal systems: see generally *www.thenotariessociety.org.uk*.

[16] Land Registration Act 2002, replacing Land Registration Act 1925. Not all land is yet registered but the Land Registry is working to create a comprehensive land register for England and Wales. For formalities relating to land, see Burn and Cartwright, *Cheshire & Burn's Modern Law of Real Property*, above, n 6, ch 25.

The Avoidance of Formalities

In recent years the courts have considered whether the formality requirements for [illegible] contracts, guarantees and deeds are absolute. For various reasons parties may [illegible] comply with the formality requirements—they may not know them; may in [illegible] omit to follow them properly; or may simply find them too onerous and take [illegible] as to whether the other party will challenge the transaction on the ground [illegible] failure to satisfy the formality requirement.

[illegible] particular issue has arisen: whether a party who has agreed to the contract [illegible] did not insist on the formality at the time can later be heard to say that the [illegible] is not valid, or (in the case of guarantees) is not enforceable, where the [illegible] party has relied on his express or implied representation that the agreement [illegible] and binding—that is, whether a party can be 'estopped' from challenging [illegible] contract on the basis of the statutory requirements.[17]

[illegible] courts have considered this question for each separate formality by looking [illegible] policy underlying the statutory requirement of formality. In relation to [illegible] for the sale of land, the Court of Appeal in *Yaxley v Gotts*[18] held that a [illegible] who was promised an interest in a building if he undertook work on the [illegible] could be granted the interest (or at least an interest which protected his [illegible]) under the doctrine of proprietary estoppel, in spite of the fact that the [illegible] was not contained in a contract which complied with section 2 of the Law [illegible] (Miscellaneous Provisions) Act 1989. Beldam LJ said:

> [illegible] general principle that a party cannot rely on an estoppel in the face of a statute [illegible] upon the nature of the enactment, the purpose of the provision and the social [illegible] behind it. This was not a provision aimed at prohibiting or outlawing agreements [illegible] kind, though it had the effect of making agreements which did not comply [illegible] the required formalities void. This by itself is insufficient to raise such a significant [illegible] interest that an estoppel would be excluded.[19]

[illegible] court was able to hold that the statute by its own language, as well as by its [illegible] as evidenced by the background to its enactment,[20] indicated that to give [illegible] to an informal agreement through the doctrine of proprietary estoppel would [illegible] necessarily undermine the policy requiring written contracts for the sale of land. [illegible] recently, the House of Lords in *Cobbe v Yeoman's Row Management Ltd*[21]

[illegible] 'estoppel' see below, pp 138–39.

[illegible] Ch 162 (CA).

[illegible] 191.

[illegible] court relied on, inter alia, the report of the Law Commission proposing the provision, [illegible] for Contracts for Sale etc of Land' (Law Com No 164, 1987), which at pp 18–20 discussed [illegible] as a means of giving effect to an agreement which would not comply with the formality. For [illegible] approach to interpretation of statutes and the use of background information such as Law [illegible] Reports see above, p 30.

[illegible] UKHL 55, [2008] 1 WLR 1752.

cast doubt on whether the doctrine of proprietary estoppel should be allowed to avoid the formality requirements of section 2 of the 1989 Act. It will not apply at least in the case of experienced commercial parties who know the formality requirements for the formation of the contract and yet do not follow them, or more generally where the parties intend to make a formal contract setting out the terms of their agreement but have not yet done so.[22] However, a stronger suggestion by Lord Scott that proprietary estoppel can never avoid the statutory formality on the basis that "Equity can surely not contradict the statute"[23] did not take account of earlier cases such as *Yaxley v Gotts*, and has not generally been adopted.[24]

In *Shah v Shah*[25] the Court of Appeal applied dicta in *Yaxley v Gotts* to hold that the requirements of section 1 of the 1989 Act were also not absolute, in the case that a party who had not in fact executed a document as a deed in compliance with the section could be estopped from denying it. The document in the case expressed to be a deed, and was signed and delivered by the defendants. The defect of formality came in its witnessing—it was attested, but by someone who signed as witness after the defendants had signed but not (as required by the Act) in their presence. The Court of Appeal held that the delivery of the document constituted an unambiguous representation of fact that it was a deed on which the claimant had acted in reliance on that fact and on the deed having validity and on the obligations it purported to contain. Following *Yaxley v Gotts* they considered the policy behind the Act, and the Law Commission Report which had proposed it, and concluded that estoppel could be permitted to avoid some, but not all, of the formality requirements. Pill LJ said:

> there was no statutory intention to exclude the operation of an estoppel in all circumstances or in circumstances such as the present. The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature. Failure to comply with the additional formality of attestation should not in itself prevent a party into whose possession an apparently valid deed has come from alleging that the signatory should not be permitted to rely on the absence of attestation in his presence. It should not permit a person to escape the consequences of an apparently valid deed he has signed, representing that he has done so in the presence of an attesting witness, merely by claiming that in fact the attesting witness was not present at the time of signature.[26]

[22] *Ibid* [27] (Lord Scott), [71], [91] (Lord Walker); *Herbert v Doyle* [2010] EWCA Civ 1095, [2011] 1 EGLR 119, [57].
[23] *Ibid* [29].
[24] See, eg, *Whittaker v Kinnear* [2011] EWHC 1479 (QB), [27]–[30].
[25] [2001] EWCA Civ 527, [2002] QB 35.
[26] *Ibid* [30].

The question arose before the House of Lords in *Actionstrength Ltd v International Glass Engineering*[27] as to whether estoppel can be used to avoid the requirement of the Statute of Frauds that a contract of guarantee be evidenced in writing. The House held that there was no estoppel on the facts, but a majority appears to have assumed that there could in an appropriate case be such an estoppel, as long as the guarantor made a representation about its validity beyond simply making the promise of the guarantee itself, and the beneficiary of the guarantee has relied on that representation.

II The Doctrine of Consideration

1 Consideration: the Basic Principle

The basic idea underlying the doctrine of consideration is that, where A makes a promise to B, the promise is contractually binding and enforceable by B only where B has done, or promised to do, something for A in return for A's promise: in effect, B earns the right to enforce A's promise by doing or promising something in exchange for it. This doctrine gives English law the notion of a contract as a bargain. The promise by A to make a gift to B is not a contract, even if B accepts the offer to make the gift (and therefore the parties have an agreement about the gift) because B has provided no consideration: since it is to be a gift, he has neither done nor promised to do anything in return for it. The doctrine of consideration therefore has the effect of excluding promises of gifts from the scope of the law of contract. This does not mean that a promise of a gift cannot be made to be enforceable: as we have already seen, it can be enforceable by virtue of being contained in a deed executed by the promisor.[28] Moreover, once the promise of a gift has been carried out, the gift is effective to transfer the property in the subject-matter of the gift to the donee: the law will respect a completed transfer even if it is gratuitous. English law is therefore not opposed to giving effect to a gratuitous disposition. But it excludes *promises* of gifts from the scope of informal contracts.

2 Consideration: Particular Rules

There are various particular rules within the doctrine of consideration, which can be set out in the following points (keeping throughout the example of A making a promise to B):

[27] [2003] UKHL 17, [2003] 2 AC 541.
[28] Above, p 123.

A. Consideration is provided by B when he does, or promises to do, something at A's request

There are three points here.

First, the exchange of mutual promises is sufficient to make the [illegible] binding. For example, where A and B agree today that next week A will give [illegible] his car in return for B giving A £1000, the contract is concluded today. [illegible] contract, where the obligations of both parties are to be performed in the [illegible] is called an 'executory' contract. If, on the other hand, B has performed his [illegible] promise, or done the act which was requested by A as the price of his promise, [illegible] consideration is said to be 'executed'.

Secondly, if it is to be consideration to enforce A's promise, B's promise [illegible] act must have been given or done at A's request. B's spontaneous promise [illegible] act, even if it was foreseeable by A, is not sufficient. For example, in [illegible] *v Combe*[29] a man promised his wife during their divorce proceedings that he would make annual maintenance payments to her after the divorce. The wife later claimed that, relying on his promise, she forbore to apply to the Divorce Court for a maintenance order and that this justified her enforcing the husband's promise. However, the Court of Appeal held that the husband's promise was not binding as a contract, since the wife had not promised the husband that she would not apply to the Divorce Court for maintenance, and her failure to apply to the Court was not at the husband's request. There was a causal link between his promise and her forbearing to go to court, but that is not sufficient to make it consideration if it was not requested by the husband either expressly or impliedly. Without such a request the promise or act cannot be *in return for* the promise which is being enforced and so cannot be consideration for the promise. We shall see later, however, that in some circumstances reliance on a promise, even though the reliance was not requested by the promisor, can justify some legal effect being given to the promise through the doctrine of promissory estoppel.[30]

Thirdly, 'doing' or 'promising to do' can equally include 'not doing' or 'promising not to do'. Forbearance can be consideration as long as it satisfies the other requirements (it is at the other party's request, is of value, and so on, as we shall see below). Compromise agreements typically involve an agreement by one party not to pursue his action in return for a payment by the other of a sum in settlement of the claim.

[29] [1951] 2 KB 215 (CA).
[30] Below, p 138.

B. Consideration involves B doing or promising something which is to his detriment and/or to A's benefit

The justification for B having the right to enforce A's promise is that he has suffered some 'detriment' in return for the promise; or that A must fulfil his promise because A has obtained a 'benefit' from B:

> 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.[31]

In most cases consideration is both to the detriment of B and to the benefit of A. For example, where B pays or promises to pay £1,000 for A's car, B's payment or promise is 'detriment' to him (he incurs a payment, or undertakes a binding obligation to pay the money), and at the same time an equivalent 'benefit' to A (he obtains the benefit of the money or of the obligation to receive the money). This is the typical model of a contract where there is simply an agreed exchange between the two parties. But a contract may exist where at first sight there is no such direct exchange: for example, if A agrees to give his car to B in return for B paying (or promising to pay) £1,000 to C. Here, B's payment (or promise to pay) is consideration for A's promise, because B has undertaken a 'detriment' at the request of A, in return for A's promise. The fact that the sum of £1,000 is to be paid to a third party does not prevent it in law being consideration, because it is sufficient that B suffers a detriment in return for the promise, without enquiry as to what benefit it constitutes for A.[32] However, one can rationalise it as still being 'benefit' to A because the fact that A has requested it is enough to show that it is beneficial to him to have the payment made to C.

By contrast, there are situations where the courts have been prepared to hold that a benefit to A is sufficient even if there is no detriment to B. This is the case in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,[33] in which the Court of Appeal held that a party to a contract (B) who repeats his promise to perform his existing obligations in return for a promise from the other party (A) to increase the payments to be made under the contract provides consideration for the promise of increased payments where, although B is not suffering any additional detriment because he is not undertaking any additional obligations, A obtains a 'practical benefit' arising out of the assurance of complete and timely performance. This case is discussed further below.[34]

[31] *Currie v Misa* (1875) 10 Exch 153, 162 (Lush J).
[32] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA) 271 (Bowen LJ: using smoke ball was sufficient and therefore consideration: 'Inconvenience sustained by one party at the request of the other is enough to create a consideration;' but there was in fact also a benefit to the other party through the promotion of their product).
[33] [1991] 1 QB 1 (CA).
[34] Below, p 135.

We have already noted that the making of a *promise* can be sufficient detriment without it yet being performed: a promise in return for a promise creates an executory contract, in advance of either party in fact incurring the detriment by starting to perform.[35]

C. For B's promise or act to be consideration it must have some (economic) value

There are two points here.

First, B's promise or act need not be the payment or promise of money, but it must be capable of being valued in economic terms. It is not sufficient that the promise is designed to satisfy some moral duty of the promisor. For example in *Thomas v Thomas*[36] A (the executors of B's husband, who had recently died) agreed to transfer a cottage to B for her life, declaring that it was (i) in consideration of her deceased husband's desire to provide a home for B; and (ii) in return for B paying £1 a year towards the ground rent payable for the premises by A to a superior landlord. It was held that this agreement was binding because of the promise of the £1, and not because of deceased husband's wishes or the executors' desire to satisfy a moral obligation arising from the deceased husband's wishes:[37]

> Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff.[38]

Secondly, although the courts will require B to provide something which is capable of being valued in economic terms, they will not enquire into whether the bargain between the parties is fair or balanced. It is said that the courts will not investigate the 'adequacy' of the consideration. So a contract under which A promises to transfer his car (which is in fact worth £1,000) to B in return for B's promise or payment of £1 can be a valid contract in English law. The promise or payment of £1 is good consideration. The reason usually given for this is that it is for the parties, and not for the courts, to set the balance in the agreement. There must be *an* exchange before the transaction falls within the law of contract. But the courts do not make (or adjust) the contract to provide for an objectively 'fair' exchange: the value which the parties themselves put on what they are exchanging is their own affair. This gives the English law of contract a commercial, market-oriented view.

This does not mean that the courts are insensitive to disadvantageous contracts; simply that the doctrine of consideration does not deal with this issue. If one of the parties is demonstrably in a weaker bargaining position, the courts will take into account the fact that the terms of the contract appear to be significantly disadvantageous to him as a factor which might point to the stronger party having exercised undue influence in order to obtain the contract on favourable terms; or it might be classed as an 'unconscionable bargain'.[39]

However, these doctrines only render the contract voidable at the instance of the weaker party. If the doctrine of consideration were to be used to deal with this, it would have the consequence that the contract would not be formed if it was objectively imbalanced: not only would this be too paternalistic as a general rule but also it would prevent parties and the courts from deliberately taking advantage of the rule that consideration need not be adequate.

The parties may well use the rule in order to ensure that a promise is binding. They agree on a transaction which is, or which might risk being analysed as substance gratuitous, the promise by the 'donee' to give some nominal consideration (such as a token amount of money, or a token thing such as a peppercorn) is a device to bring the gift within the law of contract. In admitting such transactions as contracts, the courts are in effect colluding with the parties to allow what is in substance a gift to be recharacterised as a contract. This is not a concern to the English lawyer, although the civil lawyer may be surprised by it. Some legal systems have rules designed to prevent the parties pretending that a gift is a contract—not because a gift cannot be a contract, but because the pretence is likely to involve an attempt to evade some other rule of law, such as tax on gifts or the rules against gratuitous alienation of property to defraud creditors or to disinherit members of the family who have inalienable succession rights. English law will sometimes have similar concerns, but it does not use the law of contract to address them.[40] On the contrary, contracts for 'nominal'

[35] *Centrovincial Estates plc v Merchant Investors Assurance Co* Ltd [1983] Com LR 158 (CA) (Slade LJ: 'provided only that the offeree has given sufficient consideration for the offeror's promise it is nothing to the point that the offeree may not have changed his position beyond giving the promise requested of him').

[36] (1842) 2 QB 851, 114 ER 330.

[37] *Ibid* 859, 333–4 (Patteson J). In argument the civilian notion of *causa* was discussed; and art 1131 of the French Civil Code was cited (through its citation in the then-current edition of *Chitty on Contracts*). The exclusion of motive as a justification of the enforceability of a promise, and the insistence on an exchange of value in return for the promise, shows that the doctrine of consideration is fundamentally different from the doctrine of *la cause* in French law and other systems which draw its principle from the French Civil Code: cf B Nicholas, *The French Law of Contract*, 2nd edn (Oxford: Clarendon Press, 1992) 123.

[38] [The rule that consideration must move from the promisee is one aspect of the doctrine of privity of contract: below, p 230.].

[39] For undue influence and unconscionable bargains see below, ch 7.

[40] There is no general tax on *inter vivos* gifts in England. Gifts made within seven years before death are brought back into account for inheritance tax on death, but the Inheritance Tax Act 1984 s 3 does not provide for this by determining whether there is a 'gift' or not, but whether the transaction has reduced the value of the person's estate. Similarly, under the Inheritance (Provision for Family and Dependants) Act 1975 s 10 the court may reverse a disposition made 'for less than full valuable consideration' less

consideration are not at all uncommon in England, where professional advisers draft contracts and insert a provision for nominal consideration to be paid so as to ensure that the obligations are binding. We have already seen that the parties can make an enforceable promise of a gift if the donor undertakes the promise in a deed.[41] In such a case, the donor's intention to make a gift is respected; and the use of nominal consideration can be justified on the same grounds. If a person is obviously making in substance a promise of a gift, but chooses to ask for some nominal sum or thing in return, and there are no other grounds to challenge it (such as duress or undue influence, which will be considered separately) it must be because he wishes to bring his promise within the scope of contract, and so intends his promise to be binding.

The courts, too, may sometimes take advantage of the rule which does not require consideration to be adequate, in order to give contractual effect to a promise which is not otherwise binding. That is, they may sometimes 'find' consideration even though it is not evident that the parties had it in mind that there was an exchange or a contract. An example of this is *De la Bere v Pearson*,[42] where the Court of Appeal found a contract between a newspaper and a reader who (in response to a general invitation to readers to write to the newspaper) asked for investment advice and the name of a good stockbroker. The newspaper provided him with the name of an unsuitable stockbroker and he suffered loss. The newspaper published some letters but not the claimant's letter nor their reply, but the court held that there was consideration for the contract in that the prospect of publication of the claimant's letter would tend to increase the sales of the newspaper. This was very artificial, but at the time there was no ground of liability in tort given that the newspaper was not fraudulent but only negligent. When the law of tort later developed to cover economic loss caused through reliance on careless advice Lord Devlin recognised the artificiality of cases such as *De la Bere v Pearson*, and made clear that they should now be analysed within the law of tort, not contract.[43] But there are also other cases where the courts have been prepared to find consideration on very slim grounds, in order to ensure that an undertaking can be given contractual effect. Indeed, one can say that the courts are reluctant to find that there is no consideration, particularly where the agreement is between commercial parties who have assumed that their agreement is a binding contract. The courts will therefore look carefully into whether the thing done or

than six years before the death with the intention of defeating an application for financial provision by dependents. Fraud on creditors is dealt with under the Insolvency Act 1986 ss 238 and 423 by allowing the reversal of transactions which are made without consideration or at a consideration significantly less than the value given in exchange.

[41] Above, p 123.
[42] [1908] 1 KB 280 (CA)
[43] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 528. See also above, p 61.

promised by B has any value.[44] But if B promises something which has no value at all, or is entirely illusory, it cannot be consideration—such as where B agrees to accept A's promise of payment to settle a dispute when B knows that he has no valid claim to be settled.[45]

In the case of a *variation* of an existing contract, the courts have gone further, and have said that, as long as one party obtained a *practical benefit* as a result of the other party's promise, then that may be sufficient. This is discussed further below.[46]

B's promise or act must be done at the same time as A's promise: 'past consideration' is insufficient

A bargain involves the exchange of promises or acts which are linked—the time of performance need not necessarily be linked, but the promises must themselves be linked and agreed upon contemporaneously. And so if A and B agree that A will deliver his car to B next week if B pays the price today, there is a valid contract because the promises (the car in return for the money) were exchanged by reference to each other, although the time for A's performance is deferred. On the other hand, if B rescued A from drowning in the river last week, and A promises today that, in return for last week's rescue, A will pay £1000, the promise is not enforceable *unless* it was made clear last week by B that he would expect to be paid in return for the rescue. This rule was stated by Lord Scarman in the Privy Council in *Pao On v Lau Yiu Long*:

> An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.[47]

A practical example of this rule is that if the buyer of goods is to obtain an express assurance about the goods, beyond the conditions implied by law into such contracts,[48] he must do so at the time of the sale because he cannot rely on

[44] Eg *Pitt v PHH Asset Management* Ltd [1994] 1 WLR 327 (CA) (firm offer and 'lock-out' agreement for sale of property: purchaser's agreement to withdraw threat of proceedings for injunction to prevent negotiations with third party, and agreement to proceed swiftly if the contract went ahead, was consideration even though they were of doubtful value).
[45] *Wade v Simeon* (1846) 2 CB 548, 564–5; 135 ER 1061, 1067. If B mistakenly believes that he has a valid claim his agreement not to pursue it still has value and so can be consideration: *Callisher v Bischoffsheim* (1870) LR 5 QB 449, 451–2, even if A knows that the claim is not valid: *Cook v Wright* (1861) 1 B & S 559, 569, 568; 121 ER 822, 825–6.
[46] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA); below, p 135.
[47] [1980] AC 614 (PC) 629.
[48] Sale of Goods Act 1979 s 14; below, p 206.

the fact that he has already bought the goods as consideration for the seller's [illegible] assurance.[49]

E. An act done, or promise made, by B which he is already under a contractual obligation to perform in favour of a third party can be good consideration

We have already seen that there is a valid contract if A agrees to give his [illegible] B in return for B paying (or promising to pay) £1,000 to C. The promise to pay money to a third party is sufficient consideration.[50] However, if B already owed £1,000 to C, he would in fact be undertaking no new burden—no 'detriment'. But this does not prevent the promise being good consideration, because the fact that B has an existing obligation in favour of C is nothing to do with A: although B undertakes no additional detriment by making the promise to A, A obtains the benefit of a direct right against B to have the money given to C. This was established in the middle of the nineteenth century,[52] and confirmed most recently by the Privy Council.[53]

F. An act done, or promise made, by B which he is already under a contractual obligation to perform in favour of A, or which he has a legal obligation to perform, cannot be good consideration, unless A obtains some additional benefit

It is less easy for B to be allowed to say that he provides consideration by doing something which he is already under a duty to do under the general law, or under a contract with A.

In the case of a general legal obligation, it appears that B would be using the obligation in order to make a profit from a contract with A. If B's duty is a public duty, then there are reasons of public policy to prevent this, although not if B's promise or performance goes beyond what he had a duty to do.[54] But if the duty is not a general public duty but in the nature of a private obligation, it is not clear that the courts would take such a strict line. Certainly in *Ward v Byham* Lord Denning thought that the performance of a legal obligation by B could be consideration—because in fact it provided a benefit to A, even if it was a benefit which he was technically entitled by virtue of the pre-existing legal obligation to

[49] *Roscorla v Thomas* (1842) 3 QB 234, 114 ER 496.
[50] Above, p 129.
[51] Above, p 129.
[52] *Scotson v Pegg* (1861) 6 H & N 295, 158 ER 121.
[53] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 (PC) 168.
[54] *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 70 (HL) (police provided protection beyond that which they had a public duty to offer, so contract for performance of services was valid).
[55] [1956] 1 WLR 496 (CA).

perform. In that case, the father of a child promised to pay the mother (from whom he was separated) £1 a week if the child was 'well looked after and happy'. It was held that by looking after the child the mother provided consideration for the promise of the money, even though she had a duty by statute[56] to maintain her own child. Lord Denning said:

> the mother, in looking after the child, is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise; and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.[57]

The thinking behind Lord Denning's judgment became very significant in a later case concerning performance of a duty owed not by law but by contract with the other party. This is the trickiest situation. If B performs or promises something to A which A was already entitled to require him to do it is not consideration—because it does not give A anything new: A receives no additional benefit, and B incurs no additional detriment. It is as if B were promising to give A something which already belongs to A. This is the analysis which the courts have traditionally made. So in *Stilk v Myrick*[58] where two sailors deserted during a voyage and the captain agreed to divide the wages of the deserters between the remaining crew who agreed to continue to work, the crew could not enforce the promise of the extra money because their terms of engagement already included the duty to cope with emergencies and so they undertook no obligation beyond that which they already owed to the captain.

That strict approach was relaxed, however, by the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*.[59] The main contractor on a building project promised to increase the payments to be made to one of his sub-contractors in circumstances where the sub-contractor was in financial difficulties and the main contractor was worried that the work would not be completed on time. Late completion would result in the contractor having to pay penalties under his own contract with the building owner. The court rejected the main contractor's

[56] National Assistance Act 1948 s 42 (the child was illegitimate; the duty under the statute was on the mother and not the father).
[57] [1956] 1 WLR 496, 498. Morris LJ at 498–99 emphasised that the consideration was in ensuring that the child would be happy.
[58] (1809) 2 Camp 317, 170 ER 1168. It was different in *Hartley v Ponsonby* (1857) 7 El & Bl 872, 119 ER 1471 where on the desertion of 17 out of a crew of 36 the sailors who agreed to remain only for additional wages were doing more than they were already contractually entitled to do because it became dangerous to continue.
[59] [1991] 1 QB 1 (CA).

argument, based on *Stilk v Myrick*, that the subcontractor gave no consideration because he had promised nothing beyond that which he already owed under the contract (to complete the work, on time). Instead, the judges focused not on what detriment was suffered by the subcontractor in repeating his promise to do the work (there was none), but on what *benefit* was received by the main contractor in return for his promise to pay the additional money. The decision in *Hartley v Byham*[60] paved the way for this decision because it allowed the court to look for 'practical benefit' received by the main contractor. And one can detect other lines of thinking in the judgments.

First, that there is a risk in such re-negotiations that one party, such as a subcontractor, may put pressure on the main contractor to increase the payment because he is taking advantage of the main contractor's need to get the job completed. But if this is an underlying concern the older cases—such as *Stilk*—were decided when the only way of dealing with such a concern was through the doctrine of consideration and so a strict line was taken. But in the modern law there is now a developed doctrine of duress, which includes a threat to break a contract within the notion of 'economic duress'.[61] The doctrine of duress is a more flexible tool, which allows the court to look at the particular circumstances in which one party agreed to increase the payment due under the existing contract, and only makes the agreement voidable rather than preventing its coming into existence. Therefore:

> The modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement … [T]he courts are more ready in the presence of this defence being available in the commercial context to look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid.[62]

Secondly, the court was influenced by the fact that this was a sensible agreement between commercial parties; and they are very reluctant to find that such an agreement fails for lack of consideration. Moreover, there is a strong emphasis on the court's desire to give effect to the intention of the parties:

> whilst consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early 19th century when *Stilk v. Myrick* was decided by Lord Ellenborough C.J. In the late 20th century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v. Myrick* is either necessary or desirable. Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.[63]

[60] Above, n 55.
[61] Below, pp 183–85.
[62] [1991] 1 QB 1, 21 (Purchas LJ).
[63] *Ibid* 18 (Russell LJ).

In *Williams v Roffey Bros* the Court held that the main contractor did obtain a 'practical benefit' in return for its promise to pay the additional money, because it would secure the timely completion of the contract and so avoid the payment of penalties under its own contract, and would also avoid the trouble and expense of finding a replacement sub-contractor, as well as obtaining the benefit of certain changes to the payment arrangements. The main contractor had not been subjected to duress in agreeing the increased price—indeed, the main contractor offered to increase the price in order to solve the sub-contractor's financial difficulties and to secure his continued performance.

The decision in *Williams v Roffey Bros* was controversial. It has been followed at first instance, but with some hesitation about whether it can stand with the existing authorities,[64] and it remains to be seen whether the relaxation of the doctrine of consideration in this area will be confirmed by the Supreme Court.

Part-payment of a debt is not consideration for the release of the balance

We have seen that the decision in *Williams v Roffey Bros* relaxed the doctrine of consideration to allow the variation of an existing contract for services by B in return for payment by A, where A promised to increase the payment in return for B simply repeating his promise to perform the services, as long as the promise had the effect of giving A a 'practical benefit' in return for his promise to pay. As the case-law currently stands, this cannot be translated into a similar rule for part-payment of a debt. If B owes a debt to A, and A agrees to relinquish part of it in return for B simply paying the balance but without B giving A some practical advantage (such as by paying the balance earlier than is due under the contract or by giving something in place of the foregone balance of the debt) the balance remains enforceable. Part-payment of a debt is not consideration for the release of the balance of the debt. This was set out by the Court of Common Pleas in *Pinnel's Case*:

> payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.[65]

This principle was confirmed and applied by the House of Lords in 1884 in *Foakes v Beer*,[66] in holding that an agreement to accept payment of a debt by instalments

[64] *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128, [108]: 'But for the fact that *Williams v Roffey Bros* was a decision of the Court of Appeal, I would not have followed it' (Colman J); *Adam Opel GmbH v Mitras Automotive UK Ltd* [2007] EWHC 3252 (QB) at [42]: 'I am bound to apply the decision … whatever view I might take as to its logical coherence' (David Donaldson QC). See also the discussion of *Re Selectmove* [1995] 1 WLR 474 (CA), below.
[65] (1602) 5 Co Rep 117a, 77 ER 237.
[66] (1884) 9 App Cas 605 (HL).

did not have the effect of cancelling the interest that accrued during the instalment period. However, it must be noted that two members of the House, Lord Selborne and Lord Blackburn, would have preferred a less rigid rule. Lord Blackburn said

> all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole … where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.[68]

However, the House regarded the well-established rule in *Pinnel's Case* as one which they should follow, even though of course it was not binding on them. This is a good illustration of the reluctance of the courts to overturn long-standing principles of the common law.[69]

Looking at the question afresh, one might think that Lord Blackburn's argument points towards an application of the principle in *Williams v Roffey Bros*; in effect he argued that the debtor who agrees to accept less than the full payment of the debt will do so because he recognises a benefit in doing so: the receipt of some money now, for certain, rather than risking the uncertainty of whether the debt will in practice be enforceable. This argument—that the strictness of the rule in *Pinnel's Case* has been superseded by the decision in *Williams v Roffey Bros*—was put to the Court of Appeal in *Re Selectmove*.[70] But the Court refused to accept it, not because they could not see merit in the extension of *Williams v Roffey Bros* to this situation, but because they regarded themselves as bound by the decision of the House of Lords in *Foakes v Beer* in relation to the part payment of a debt.[71] This step—and the full implications of the relaxation of the doctrine of consideration as already effected by the Court of Appeal in *Williams v Roffey Bros*—therefore awaits a decision of the Supreme Court.

III. Promissory Estoppel

1. The Core Principle of Estoppel: Reliance on a Representation

There are various forms of 'estoppel' in English law.[72] The core meaning of this rather unusual word is quite simple, as explained by Lord Denning:

[67] *Ibid* 613.
[68] *Ibid* 622.
[69] Above, p 21.
[70] Above n 64, 479–81.
[71] The same approach was taken in *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA 1329, [2008] 1 WLR 643, [6].
[72] J Cartwright, 'Protecting Legitimate Expectations and Estoppel in English Law' *Electronic Journal of Comparative Law* (vol 10.3, Dec 2006: www.ejcl.org/103/art103-6.pdf).

> the word 'estoppel' only means stopped. You will find it explained by Coke in his *Commentaries on Littleton* (19th ed, 1832), vol. II, s. 667, 352a. It was brought over by the Normans. They used the old French 'estoupail.' That meant a bung or cork by which you stopped something from coming out. It was in common use in our courts when they carried on all their proceedings in Norman-French.[73]

In essence, a party who is 'estopped' is stopped, or prevented, from denying something. Under 'estoppel by convention', for example, where the parties to a transaction act on an assumed state of facts or law, communicated by each party to the other, then each party is estopped from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.[74] In any litigation between the parties neither is allowed to argue that the facts or the law are not as they had both assumed. And similarly under 'estoppel by representation' a person who has made a representation to another may be estopped from denying the content of his representation.

2. The Modern Development of Promissory Estoppel in English Law

'Estoppel by representation' is well established in English law, but it was restricted to representations of *existing fact*, and not to statements of intention, or promises.[75] A party who had made a representation of fact would not be permitted to lead evidence to contradict that fact in an action by or against the party to whom he had made the representation and who had relied on it—had changed his position in some way to his detriment on the faith of the representation. The doctrine of promissory estoppel is a development of this to cover representations as to future conduct: promises. Two separate lines of development are relevant here: proprietary estoppel and promissory estoppel.

In the first place, *proprietary estoppel* is now a well-established doctrine within land law, developed in a line of cases dating from the mid-nineteenth century.[76] Where one party (A) makes a representation or promise to another party (B) to the effect that B has or shall have an interest in, or right over, A's property, or acquiesces in B's mistaken belief that he has or shall have such an interest or right, then if A intends B to act in reliance on the representation, promise or

[73] *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283 (CA) 316–17.
[74] *Republic of India v Indian Steamship Co Ltd* (No 2) [1998] AC 878 (HL) 913.
[75] *Jorden v Money* (1854) 5 HL Cas 185, 214–15, 226–27; 10 ER 868, 881–82, 886.
[76] Especially *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129, 170; *Wilmott v Barber* (1880) 15 Ch D 96, 105–106. This doctrine might also apply outside land law, but still within the law of property: *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204 (CA) 218. See generally Gray and Cartwright, *Cheshire and Burn's Modern Law of Real Property*, above, n 6, 906–22, Ch 43.