NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

3.3 Consideration

Consideration is the price paid (not necessarily in monetary terms) for the promise of the other party. If you do not pay for (or 'buy') the promise of the other then you cannot enforce that promise. For example, say a person (D) promise to come to P's house each week during the summer to mow P's lawn. This promise is not enforceable by P unless P gives something in return for the promise of the mowing. P might pay for the mowing or promise to fix D's car or provide D with certain goods. The point is that P must promise something in exchange for D's promise to mow the lawn, otherwise D's promise is gratuitous and unenforceable. Of course for a contract to be enforceable it must comply with the other elements of a contract such as agreement and intention to create legal relations.

The price of one party to buy the other's promise is said to be **detriment** to that person. So the detriment to P in the example above is the payment for the mowing, the fixing of the car as the case may be. Of course there is a detriment to D as well because he has to mow the lawn. But there are also **benefits** to each so that in ordinary case each person in a contract receives a benefit but suffers a detriment. The definition of consideration is expanded on below.

To try and determine if consideration is present in a given situation judges have developed certain rules. The main ones are:

(a) Consideration is not the equivalent of a moral obligation. For a time in English legal history it was a belief, widely held, that consideration was equal to the requirement to fulfill a moral obligation. This is no longer the case now – some **legal obligation** must be present to constitute 'sufficient' consideration.

(b) The following are definitions of sufficient consideration:

Some right, interest, profit, or benefit according to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

An act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

(c) Consideration may be **executed**, i.e. an act/forbearance given for a promise, or executory, i.e. a promise given for a person.

An example of the former is where a person, knowing of a reward offered, finds a lost dog and returns it thereby completing the act in exchange for the promise of a reward. All that is then outstanding is for the owner to fulfil the promises.

Executory consideration is more common, for example where a party promises to sell a car in exchange for the other's promises to pay N500,000.00. The contract is formed at that point and the subsequent hand over of the car and transfer documents in return for the money is the performance of the contract. This may take place much later in time.

In contract of service, a promise to perform work in exchange for a period to pay wages if valuable executory consideration.

In either the executed or executory situation the consideration if valid.

(d) Consideration **need not be adequate** as compared with the promise given. For practical reasons, and as a result of the influence of the laissez faire doctrine, courts have refused to enquire whether the consideration moving from one party is adequate. So long as there is some consideration which the courts regard as **sufficient** there will be no further enquiry to see if each party received a fair deal.

See Chappell & Co. Ltd v Nestle Co Ltd [1960] AC 87. Notice here that the court held that the wrappers around chocolate bars amounted to sufficient consideration.

(e) To be sufficient, the consideration must not be too vague or indefinite. It has been held that an undertaking to lead 'a good moral life' was too indefinite, as was a son's promise not to bore his father. See also *Shiels v Drysdale* (1880) 6 VLR 126 where a promise by a person to transfer 'some of his land' was too vague.

(f) Consideration must move from the plaintiff. As a general rule, only the person who has paid the price for a promise can sue on it. To return to the example used above concerning the lawn mowing, assume that the agreement was that in return for D doing the mowing P agreed to pay D N1,000.00 per week. We now have consideration but only P or D can sue the other on their promise. If for example, P's promise to do the mowing even if she had a strong interest in keeping the house tidy. P's mother has not given anything to buy D's promise to P.

The rule that consideration must move from the plaintiff overlaps with another fundamental principle of contract law known as

privity of contract. In essence privity of contract means that only parties to a contract can sue on it.

(g) Consideration is not valid if it is **past**, i.e. if the plaintiff's act or promise alleged to amount to consideration occurred before the defendant's promise. *See Roscorla v Thomas* (1842) 114 ER 496. Turner, Note that the important point here is that only after the sale was completed did X make the promise about the horses' nature.

An apparent exception to this is the case of *Lampleigh v Braithwaite* (1615) 80 ER 255.

The defendant who had killed a man, asked the plaintiff to try to obtain a free pardon from the king. L incurred expense in his efforts to do this and B subsequently promised to pay him £100 for his trouble. The defendant failed to pay this amount and L sued on the promise. The court, although the consideration for the promise appeared to be past, found for the plaintiff on the grounds that the subsequent promise of the $100 merely acknowledges the indebtedness and defines the amount of compensation, which to that point, has not been defined.

(h) As a general rule consideration is not sufficient if the plaintiff simply carrying out an **existing obligation.** The reason for this rule is that the plaintiff must pay a price for the defendant's promise and this cannot be shown if the plaintiff is only doing what he/she otherwise would have to do anyway. If the plaintiff does something more than carry out an existing obligation then this will amount to consideration.

In this context there are three classes of obligations:

(i) The performance of an existing public or legal duty;
(ii) The performance of an existing contractual duty owed by the plaintiff to the defendant; and
(iii) The performance of an existing contractual duty owed by the plaintiff to a third party.

3.4 Existing Public or Legal Duty

Performance of an existing public or legal duty is not good consideration. See *Collins v Godfrey* (1831) 109 ER 1040. Here because A was under a duty to attend court anyway he did not 'pay' for B's promise to remunerate him for the attendance. However, if the plaintiff does something more than he/she is required to do, then, something more will amount to consideration.

Glasbrook v Glamorgan Council [1925] AC 270

The police force of the council were charged with the protection of a coal mine during a certain industrial trouble. The view of the police was that a mobile guard would provide sufficient protection but the colliery owners insisted on the posting of a stationary guard and the House of Lords held that it was for the police to decide what amounted to adequate protection and that the fact that the police had provided protection of the type over and above that which they considered necessary was sufficient consideration to support the promise of payment which had been made by the colliery owners.

3.5 Existing Contractual Duty

Plaintiff in Contract with Defendant

If a plaintiff is already under a contractual to do something for the defendant, a subsequent promise by the defendant to pay him more to do it will not be enforceable.

If a creditor is owed a sum of money by a debtor then a promise by the creditor to accept a lesser sum in full satisfaction will not be enforceable by the debtor. The question is what consideration has moved from the debtor to buy creditor's promise to forgo the balance? The answer is none because the defendant is simply carrying out an existing contractual obligation. This principle was upheld in *Foakes v Beer* (1884) 9 App Cas 605.

With this type of case you have two (potential) contracts. The first one is the contract, which brings about the original debt; the second one is the promise by the creditor to forgo the balance of the debt in payment of the lesser amount, to, which of course the debtor agrees. If the second potential contract were valid then the creditor would not be able to go to court to claim the balance because the original debt is extinguished by the second agreement. However the second contract to be valid must be supported by consideration. There is obviously consideration moving from the creditor because that person has agreed to forego a legal right (to claim the balance) but the question is what consideration has the debtor provided for this new contract? The answer is none unless the debtor does something more such as pay the lesser amount on an earlier date or in a different place at the convenience of the creditor (*see Pinnel's case below*). If the debtor does provide new consideration then you have what is called an ***accord and satisfaction*** (see below).

The rule in *Foakes v Beer* has been criticized on the basis that a creditor should be able to come to an amount of money less than the total debt

but in full satisfaction and for the debtor to be protected against the creditor claiming the balance at some time in the future.

The rule in Foakes v Beer also does not apply where there is a composition of creditors. It occurs where creditors at a meeting agree to accept so much in the naira for their debts, e.g. fifty kobo in the naira. Here the Bankruptcy Act itself gives the debtor protection against the creditors attempting to recover the balance of the debt. Also even if the Bankruptcy Act is not involved the creditors may be bound by any such arrangement if all the creditors agree. For a creditor to go back on an acceptance of a lesser sum by proceeding for the balance, would amount to a fraud against the other creditors.

Recent case law has suggested a relaxing of this principle. The United Kingdom Court of Appeal considered the issue in Williams v Roffey Bros and Nicholls (Contractors) Ltd [1990] 1 AII ER 512.
This case, a contractor agreed to pay a sub-contractor more than the amount originally contracted for if the sub-contractor, who was experiencing financial difficulties, completed the work on time, the contractor being subject to a penalty clause in the head contract. The court found that the practical benefit and commercial advantage to the contractor of completion as promised constituted consideration in the absence of fraud or duress.

The parties can also avoid a problem with consideration by incorporating their agreement in a deed.

Another alternative is where one party, rather than trying to complete his obligations by offering less than his full performance, offers something different to his/her original obligation under the contract. See Pinnel's case (1602) 77ER 237. If, for example, instead of asking the creditor to accept N80,000 in satisfaction of a debt for N10,000 he/she offers N80,000 plus an antique vase, the original contract may be discharged by the creation of the new contract. This is referred to as **accord and satisfaction.** The **accord** refers to this new agreement and the **satisfaction** to the consideration given for it. The consideration must comprise something different to what the person giving it is already under a legal obligation to do and should be of some benefit to the creditor. Accord and satisfaction also comes up later under the module on Discharge of Contracts.

3.6 Plaintiff in Contract with Third Party

This is the exception to general rule that doing something you are already obliged to do is not good consideration. The leading authority is *Shadwell v Shadwell* (1860) 9C BNS 159 concerning an arrangement between an uncle and his nephew.

In that case the nephew promised to marry his fiancée in return for the uncle's promise of an annuity. The nephew already had an existing contractual obligation to marry his fiancée, who was a **third party,** if not one of the parties to the arrangement under examination, (between the uncle and the nephew). The issue was, whether the nephew gave good consideration to his uncle for the latter's promise to pay him an annual sum when all the nephew did, was carry out an existing contractual obligation to marry his fiancé. The court held that he had enforced the uncle's promise. On its face result goes against the *Foakes v Beer* rule and can only be explained by the presence of the third party (the niece).

3.7 Promissory Estoppel

The courts have also avoided the necessity for consideration by the application of a principle referred to as promissory (or equitable) estoppel.

The notion of 'estoppel' is that a court will in some cases prevent (stop) a person from changing their position where that change will operate to the detriment of another. The point will become clearer when some example are discussed below but for the moment you should just be aware that it is a remedy that (in certain circumstances) one party can use estoppel to stop the other from pursuing a certain course of action. In the present context it means the court will prevent a person from going back on their **promise** which is one form of estoppel. The doctrine came about to try and relieve the harshness of the strict rule of consideration in cases where there is an existing contractual duty, as discussed above.

This is a relatively recent development in the law. Its first modern indication can be traced to *Central London Property Trust v High Trees House Ltd* [1947] KB 130. In this case, and like cases on promissory estoppel, the court is moved by the injustice of one person going back on their word. There are however clearly defined **elements** of promissory estoppel as set out by Graw (1993, pp 92-3).

(a) Some form of pre-existing legal relationship between the parties under which rights either existed or were expected to be created. That relationship can be – but need not be – contractual …

(b) A promise, undertaking or assurance (which may be either express or implied as long as it is clear, unambiguous and unequivocal), by one party that he or she will not insist on his or her strict legal rights. That promise, undertaking or assurance must be given in circumstances which raise in the other party's mind an expectation (or assumption) that promise, undertaking or assurance will be honoured even though it is not supported by consideration.

(c) An actual reliance by that other party on the promise, undertaking or assurance in that he or she subsequently behaves on the assumption that the promise, undertaking or assurance will be honoured;

(d) An element of detriment is that, because he or she acts on the assumption, the promisee is placed in a worse position (when the assumption turns out to be false), that he or she would have been in had the promise, undertaking or assurance never been made at all…

(e) An element of unconscionability. This is necessary because, as Mason C.J. pointed out in Verwayen's case: 'a voluntary promise is generally not enforceable… The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss'. Consequently, before a court will grant any sort of relief, the party pleading promissory estoppel must show that it would be unjust or inequitable to allow the other party to resile from his or her promise, undertaking or assurance. In most cases, as in Verwayen, this can be established simply by showing the twin elements of reliance and consequent detriment. However, it will not be established if the promisee's own behaviour has, itself, been in some way unconscionable or reprehensible.

(Source: Graw 1995, P. 180)

The leading Australia case inthearea is Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387:

Waltons Stores, a retailer, negotiated with Maher for the lease of commercial premises. Under the proposal Maher was to demolish an

existing structure on the site and erect a new building to be leased by Waltons. After discussions between the solicitors for both parties, the necessary documents were drawn up. Certain amendments were proposed by Maher's solicitors. Waltons' solicitors said they believed approval for the amendments would be forthcoming from their client, adding: "We shall let you know tomorrow if any amendments are not agreed to." Some days later Maher's solicitors, have heard nothing about the amendments submitted "by way of exchange" documents executed by their client for signature by Waltons.

Receipt of these document was not acknowledged for nearly two months as Waltons were privately reconsidering their position in view of impending policy changes to their future trading operations. Meanwhile, Maher sought finance for redevelopment of the site, and proceeded to demolish the existing building which Walton became aware of shortly afterwards. Erection of the new building was begun to ensure completion by the required date but when it was 40 per cent completed, Maher was advised by Waltons' solicitor that Waltons did not intend to proceed with the transaction. No binding contact to lease the premises had been concluded between the parties as there had been no exchange of documents. Maher's action for damages against Waltons succeeded in both the New South Wales Supreme Court and the Court of Appeal, whereupon Waltons appealed to the High Court.

It was held that the appeal would be dismissed. The majority of the High Court was of the view that Maher had assumed that exchange of contracts would take place as a mere formality. The inaction of Waltons in retaining the executed documents and doing nothing constituted clear encouragement or inducement to Maher to continue to act on the assumption that the lease was proceeding. It was unconscionable for Waltons, knowing that Maher was exposing himself to detriment by acting on the basis of a false assumption, to adopt such a course of inaction which had encouraged Maher to proceed. "To express the point in the language of promissory estoppel, [Wlatons] is estopped in all the circumstances form retreating form its implied promise to complete the contract" (at 408 per Mason C.J. and Wilson J).

An example of where the doctrine was unsuccessful was austotel Pty Lted c Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582:

This case involved negotiations for the grant of a lease in a shopping complex then in the course of erection. Negotiations were at an advanced stage, F's particular specifications, including hydraulic, electrical and mechanical designs, being used by the builder and F's having ordered much new equipment for installation in the store, F had issued a letter to A's financiers indicating its preparedness to lease the

store. When F learnt that A was negotiating with a third party it sought an order that A be required to grant it a lease, relying on Waltons Stores. The application failed before the Court of Appeal. Crucial to the majority decision was the fact that the rent for the total area had not been finalized because F was found to have been deliberately keeping its options open on this question. The parties to the negotiations were, in the majority's view, playing a cat and mouse game trying to tie the others down without committing themselves. In the words of Kerby "We are not dealing with ordinary individuals invoking the protection of equity from the unconscionable operation of a rigid rule of the common law…nor were the parties lacking in advice either of a legal character or of technical expertise …" Court should be careful to conserve relief of that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of businessmen: 16 NSWLR at 585.

The doctrine of promissory estoppel is an example of the court, placing less significance on the strict requirement for consideration. The doctrine can have wide implication in relation to commercial transactions

4.0 CONCLUSION

In order to constitute a contract, there must be an intention to create legal relation such intention is personal in commercial or business transaction. The reverse is the case in family or social agreements. Consideration is another basic requirement in even simple contract. The courts have ensured a number of rules revolving around consideration. You need to know these rules. Promissory estoppel, in all its ramification, cannot be sufficiently stressed.

5.0 SUMMARY

You have learnt the elements of a valid contract – offer, acceptance, intention to create legal relations and consideration. Other conditions which we shall learn in the next unit are relevant to enforceability rather than the validity of contracts.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the presumption that applies to:

(a) domestic or social agreements
(b) commercial agreements

How are these presumptions rebutted?

2. A, an accountant promised his nineteen year old daughter B, an accountancy student, that he would pay B N5000 per week if she helped out at the practice on Saturday and Sunday mornings. B worked four weekends in a row before the pressures of study forced her to quit. A has not paid B anything and B wishes to know whether she can legally recover the ₦20,000 accrued. Advise her.

3. In his book, the Discipline of Law; (Butterworths, London, 1979), Lord Denning said the following about High Trees:

> *Looking back over the last 32 years since the High Trees case it is my hope that the principles then stated – and the extension of them – will come to be accepted in the profession. The effect has been to do away with the doctrine of consideration in all but a handful of cases ... it has been replaced by the better precept; 'My word is my bond", irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbor –on which the neighbor relies – he should not be allowed to go back on it. In stating the principles, and its extension, the lawyers use the archaic word "estoppel',*

(a) Discuss
(b) Do you believe that the role of consideration in the formation of contracts is in decline?

4. …. the post rule is still likely to have some influence on how the common law deals with electronic communications in the future. Discuss.

ANSWER TO SELF ASSESSMENT EXERCISE

1. Point-Form Approach

The following approach is appropriate to a problem in this area.

Point-Form Approach to Intention

Step 1 is the agreement social or commercial

Step 2 (a) If it is **social,** the law presumes **that there is no intention to create legal relations.**

(b) If it is **commercial,** the law presumes **that there is intention to create legal relations.**

Step 3 Is there any evidence to **rebut the relevant presumption?**
Step 4 Is this evidence sufficient to **rebut the presumption?**

Step 5 Therefore the parties did/did not intend to create legal relations.

2. Algorithmic Approach