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*Paweł Słup**

The Doctrine of Consideration in English Law and Its Fading

1. Introduction

The idea of reciprocity is an essence of law of obligations. Although some legal systems recognise the concept of unilateral legal acts, the main sources of legally binding obligations are usually contracts, as it is obvious that the vast majority of promises between people are bargains. The legal system, however, cannot recognise all given promises as enforceable. First of all, it would paralyse the litigation as the courts would be overflown with thousands of irrational, trivial claims. Secondly, it might cause some problems with evidences, as many promises are not made in writing or in other special form, but simply orally. However, above all, it seems that guaranteed enforceability of all promises may lead to unjust outcomes, as it would be immoral to regulate the lives of citizens too deeply.

Therefore there is a need to formulate some legal criteria, which can restrict the scope of state coercion in social relationships. It is important for every legal system to create a distinction between those obligations, which can be lawfully binding for parties, from those which remain at most in the sphere of morality. One of the most popular ways to achieve it is to impose some formal requirements on bargains, and this is done in most of the European jurisdictions. Those formalities are crucial especially in the trade of highly valuable objects, such as real estate or enterprises, and allow the law to achieve a certain level of predictability.

However, common law jurisdictions, such as England,[1] have developed, apart from formal requirements, another way to distinguish between

* Uniwersytet Warszawski, Wydział Prawa i Administracji, ul. Krakowskie Przedmieście 26/28, 00–927 Warszawa, e-mail: slup.pawel@gmail.com.

[1] English law used to require a higher level of formalities needed in the process of formation of a contract, but nowadays it is no longer its significant feature, thus a distinction between legally

legally binding and non-binding promises – the concept known as the doctrine of consideration. Civil law jurisdictions generally lack this element in a formation or variation of a contract. For instance German law provides that if the promise is gratuitous it must be confirmed by notary or court document, yet the lack of form is cured by the performance of the promise.[2] French Civil Code, among four requirements of a valid contract does not need consideration.[3] Furthermore, proposed frameworks for common European contract law principles do not view it as a condition of a valid contract. UNIDROIT's set of rules for international contracts describes contract as based on a 'mere agreement',[4] while two leading academical proposals of set of common European contract law rules require only parties' intention and a sufficient agreement in order to conclude a valid contract.[5] Similarly, the official project of resolution on Common European Sales Law presented by European Commission, apart from the two abovementioned elements, requires additionally only sufficient 'content and certainty to be given legal effect'.[6] Although the project has been suspended, it reflects reluctance toward consideration as an additional element of contract. Scots law does not recognise consideration as a necessary requirement of a contract, either. Louisiana, another mixed jurisdiction, refuses to accept consideration requirement

binding and non-binding promises is achieved mainly by the doctrine of consideration; E. McKendrick, *Contract Law*, London 2017, p. 66. However, see Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), Law of Property Act 1925 ss 52 and 54(2), Consumer Credit Act 1974 ss 60 and 61, Bills of Exchange Act 1882 s 3(1).

[2] § 518 Bürgerliches Gesetzbuch (BGB).

[3] Pursuant to Art. 1108 of *Code Civil* four requisites are essential for the validity of an agreement: (1) The consent of the party who binds himself; (2) His capacity to contract; (3) A definite object which forms the subject-matter of the undertaking; (4)A lawful cause in the obligation.

[4] International Institute for the Unification of Private Law, *Unidroit Principles Of International Commercial Contracts* 2016, p. 95, art. 3.1.2; https://www.unidroit.org/english/principles/contracts/principles2016/principles 2016-e.pdf, 29.08.2016.

[5] O. Lando, H. Bale, *Principles of European Contract Law*, Hague 2000, p. 14, Article 2:101; C. von Bar [et al.] *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, p. 195, II. 4:101.

[6] 52011PC0635, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Art. 30 sec. 1; https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/? uri=-CELEX:52011PC0635&from=EN, 29.08.2018.

and focuses on the agreement element of the bargain.[7] Even some common law jurisdictions restrict necessity of consideration only to a formation of a contract.[8] English law, however at least at face value, seems to be clinging to the doctrine.

The aim of this paper is the present the current major problems concerning the doctrine of consideration in the English law discussed in the literature. The presentation leads to a question to what extent the doctrine still plays any useful role and serves its functions. Therefore the definition, selected basic rules concerning the doctrine and the use of it in the light of appropriate case law will be presented with some necessary comments on related concepts, such as promissory estoppel and the doctrine of 'practical benefit'. Occasionally, some comparative remarks will be expressed. It will be argued that consideration in English law has gone through many changes since the establishment of its orthodox rules in 19th century, and it will be questioned whether, especially taking into account the judicial decisions over past thirty years, it is still a useful concept in English law.

2. Definition and Orthodox Rules of Consideration

Consideration is based on the idea of reciprocity, and can be easily characterised with a phrase '*quid pro quo*'. It may be described as a requirement that the promisee must enter into a bargain by doing something or by promising, at the other's request;[9] some commentators define it also as 'the requirement of mutuality'.[10] Traditionally consideration is defined as a requirement that 'something of value' should be given for a promise in order to make it enforceable.[11] It is sometimes

[7] Civil Code of Louisiana, Art. 1906: 'A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished'. See also Art. 1966: 'An obligation cannot exist without a lawful cause'.

[8] USA: 2-209(1) of the Uniform Commercial Code; New Zealand Court of Appeal decision in Antons Trawling Co Ltd v Smith [2003] 2 NZLR 23 (CA).

[9] N. Andrews, *Contract Rules. Decoding English Law*, Cambridge 2016, p. 53.

[10] T. Arvind, *Contract Law*, Oxford 2017, p. 56.

[11] E. Peel, G. Treitel, *The Law of Contract*, London 2013, p. 72.

perceived as 'reason for the enforcement of a promise' or the reason being 'the justice of the case'.[12] It has been also conceptualised as 'the price for which the promise of the other is bought'.[13] In the orthodox approach, this should either cause some detriment to the promisee or some benefit to the to the promisor, but only one limb of this test needs to be satisfied.[14] In practice, however, consideration is usually a transfer of assets or property from one party to another, and therefore causes both detriment and benefit simultaneously.

It has been noticed that legal formalities in general, and consideration in particular, serve three main functions: an evidentiary, a cautionary and a channelling one.[15] The evidentiary function means that consideration provides a proof of an existence of a valid contract. It is easier to establish whether the contract exist if both parties had previously exchanged mutual benefits. The cautionary function refrains parties from undertaking reckless legal actions. This is clearly seen in English law, as the practical effect of the doctrine is that it prohibits enforcement of gratuitous promises, unless made under seal. The channelling function means that consideration is a simple test of enforceability of a contract. It gives the contract a 'badge of enforceability', therefore it serves similar purposes as a stamp for a coin.[16]

It was submitted that this role of consideration has been recognised by civil law systems as well, as both in continental and common law jurisdictions a person who promises to make a gift is only liable if he puts his promise in the prescribed form in order to demonstrate a serious intention to be bound. At this point most European legal systems are at one because the requirement provides reliable evidence that a promisor really intended to be bound by his promise.[17] Consideration is also sometimes

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[12] P.S. Atiyah, *Consideration in Contracts: A Fundamental Restatement*, Canberra 1971, p. 60.

[13] Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] UKHL 1.

[14] G. Treitel, *An Outline of the Law of Contract*, London 1975, p. 30.

[15] L. Fuller, *Consideration and Form*, CLR 1941, p. 800.

[16] R. von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 2, Breittof und Härtel 1883, p. 494.

[17] K. Zweigert, H. Kötz, *Introduction to Comparative Law*, trans. T. Weir, Oxford 2011, p. 397, 399.

compared to the notion of *causa* in civil law systems, yet it should be distinguished from the motive for contracting.[18] The role of *causa* is to 'justify' the reason for contracting, what implies a certain level of court's inquiry, whereas the role of consideration is mainly evidential – it helps to establish parties' intention.[19] However, both consideration and *causa* notions are used to distinguish legally binding promises from those not enforceable.[20] The consideration, similarly to *causa* in causational obligations, alongside with offer and acceptance and the requirement of intention to enter into a contract, remains the core element of a legally binding bargain. Yet it seems that by clinging to the search of mutual consideration, the Common law weakens a genuine enquiry into the serious intention to be bound.[21]

English law has developed several important rules concerning the consideration, but the frames of this article do not allow to present all of them in detail. Therefore the focus will be put on these ones, which appear to be the most controversial ones from the perspective of recent judicial decisions, and which are fundamental to understand the development of the doctrine.

Although the doctrine is distinct from the concept of privity, it is strongly connected with the general rule that only a party to a contract can enforce it.[22] Originally a party couldn't sue or be sued under a contract unless a consideration has been provided. It is known as a rule that "consideration must move from the promisee'.[23] However, it is not necessary that it moves to the promisor. There is no need for a direct benefit to the promisor, so even entering by a promisee into contract with a third

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[18] Thomas v Thomas (1842) 2 QB 851.

[19] M. Whincup, *Contract law and Practice: the English System, with Scottish, Commonwealth, and Continental comparisons*, Alphen aan den Rijn 2006, p. 74.

[20] G. Marini, *Critical comparative contract law* [in:] *Comparative contract law*, ed. P.G. Monateri, Cheltenham 2017, p. 107.

[21] M. Hogg, *Promises and Contract Law. Comparative Perspectives*, Cambridge 2011, p. 275.

[22] Tweddle v Atkinson [1861] EWHC J57; Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] UKHL 1.

[23] H. Beale, *Chitty on Contracts. 32nd Ed. Consolidated Mainwork Incorporating Second Supplement. Volume I – General Principles*, Westlaw UK 2018, pp. 4–37.

party can be viewed as a valid consideration.[24] The enactment of *The Contracts (Rights of Third Parties) Act 1998* allowed third parties to enforce a contract to which was not concluded by them. Pursuant to section 1 of the act, a third party may enforce terms of the contract under two alternative circumstances. Firstly if the third party is specifically mentioned in the contract as someone authorised to do so, or secondly if the contract 'purports to confer a benefit' on him. It seems as the original strictness of the rules of privity has been seriously weakened by the legislation. Therefore as an exemption based on the Act, a party may sue or be sued under a contract even if he or she has not provided consideration for this contract.

The value of consideration should be viewed in the eyes of law. According to Lush J, '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'.[25] Although it was suggested that consideration should have economic value, it can practically be nominal.[26] The courts should not generally examine the value of consideration, allowing the parties to measure it subjectively. Thus it can be said that the consideration should be sufficient, but not necessarily adequate. This contributes to some degree of fiction in the application of the doctrine and leads to ridiculous results. A gratuitous promise in principle remains unenforceable, but the promise made in exchange for a peppercorn is legally binding. Given the fact consideration can be symbolical or nominal, it clearly serves more as an additional formality concerned with gratuitous contracts than a serious material requirement of validity.[27]

Generally, performance of an existing legal duty cannot constitute a valid consideration.[28] On the grounds of public law the rule refrains officials from seeking additional remuneration for their duties, which they

[24] Re Charge Card Services [1987] Ch. 150.

[25] Currie v Misa (1875) LR 10 Ex 153.

[26] White v Bluett (1853) 23 LJ Ex 36; Thomas v Thomas (1842) 2 QB 851.

[27] See S. Atiyah, S.A. Smith, *Atiyah's Introduction to the Law of Contract*, Oxford 2005, p. 119.

[28] Collins v Godefrey (1831) 1 B & Ad 950.

own to the public without the need for payment. A similar rule applies also to contractual duties, and therefore performance of a pre-existing contractual duty cannot be viewed as a valid consideration. It can be justified on the grounds that it would be wrong to allow the contracting party to rely on its own breach of duty. Such a reasoning is often traced back to *Stilk v Myrick*.[29] In this classic 19th century case a captain of the ship promised his sailors wages of two deserters, who had fled from the ship after docking in Cronstadt. The wages were to be paid providing the crew still serves on the ship on its journey back to England. After reaching the destination, however, the captain refused to pay promised amount. The court refused to award money to the sailors, as they had agreed to work during the whole journey.

Unfortunately, the two reports that discuss this case differ on the reasoning of the judgment.[30] According to Espinasse's report plaintiff's claim failed on the grounds on public policy. If the plaintiff had been successful with his claim, this would have encouraged opportunistic behaviour of the seamen, and it was unacceptable in the harsh conditions of Napoleonic warfare. The legal rule has been, however, derived from the Campbell's report, in which the claim was unsuccessful because the sailors had not provided any additional consideration for increased wages. This law has been confirmed also by later judgments, not necessarily based on the specific circumstances of Napoleonic times. In *Atlas Express v Kafco (Importers & Distributors) Ltd*[31] the defendant successfully argued that the plaintiff had given no consideration for the promise to pay more money because he was merely performing an existing contractual duty.

According to orthodox rules of consideration, part payment of a debt cannot be viewed as a good consideration in the eyes of law. The binding authority on the rule is *Foakes v Beer*,[32] although it can be traced

[29] [1809] EWHC KB J58.

[30] E. McKendrick, *Contract*…, p. 81.

[31] [1989] QB 833.

[32] [1884] UKHL 1.

back to *Pinnel's Case*.[33] In this case sir Edward Coke stated that 'payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole', even if the creditor had accepted a lesser sum as a satisfaction for the whole. The reason for the rule is to prevent an impecunious debtor from taking advantage from his financial position by compelling the creditor to accept part payment. Part payment, however, may extinguish the whole debt if it was done before the due date or there was additional gift moving from the debtor.

In *Foakes v Beer* the House of Lords by applying the reasoning from *Pinnel's Case* affirmed the general rule on part payment. Unfortunately for the defendant, he was caught by a rule which was never intended to apply in to circumstances such as his own[34]. He did not compel his creditor to accept part payment in any way. The House of Lords, however, allowed the plaintiff to seek balance from the defendant, even if the parties had earlier agreed to waive the amount. The majority of the Lords rejected the argument endorsed by Lord Blackburn that part payment can be often more beneficial to the creditor than strict insistence on his legal rights.[35] This judgment came under criticism. It has been noticed that it may work extreme injustice in practice, for denying the validity of a gratuitous promise, should be distinguished from denying the validity of a gratuitous waiver of a debt.[36]

Since its origin, the doctrine of consideration has gone many changes and its orthodox rules has been subjected to many modifications, mainly through later judicial decisions. Some of these changes can be noticed since the end of the Second World War, as courts took this time more activist approach to the new economic reality. A fundamental revision of the doctrine have been done, however, over the past thirty years together with the wider use of the promissory estoppel and emergence of 'practical benefit' doctrine.

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[33] (1602) 5 Co Rep 117a.

[34] P. Richards, *Law of Contract*, Harlow 2017, p. 86.

[35] E. Peel, G. Treitel, *The Law…*, p. 131.

[36] P.S. Atiyah, *An Introduction to the Law of Contract*, Oxford 1961, p. 71.

3. Promissory Estoppel

The first major, true exception to the strict orthodox rules of consideration came with the advent of a promissory estoppel concept.[37] This was done at larger scale after the decision in *High Trees* case,[38] where Denning J allowed to apply promissory estoppel as a judicial device designed to overcome the strict rules of consideration doctrine if the promise which 'was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on'. In this case the court decided that it was inequitable for the landlord to claim for arrears of rent, which he had previously reduced for the time of war, even if the tenants gave no consideration for the lower rent.

A name 'estoppel' is not of English origin, however. It comes from the Latin *stupa*, meaning hemp or tow.[39] Just like these resources were used to fill or block a hole or gap, promissory estoppel is used to reduce shortcomings of the doctrine of consideration. Such is also the role of equity in general – to limit the rigidity of common law rules. The concept of promissory estoppel bears some resemblance to *culpa in contrahendo* rule in continental jurisdictions, as it is based on the same assumption that it would be dishonest to withdraw from one's promise, if the other party had previously relied on it. However, unlike *culpa in contrahendo*, promissory estoppel cannot be used as a basis of action. The party can use it rather as a 'shield' than a 'sword'. It does not create any new cause of action where none existed before; so that, where a promise is made which is not supported by any consideration, the promisee cannot bring an action.[40]

The application of promissory estoppel is subject to certain requirements. Firstly, there should be a 'clear' or 'unequivocal' promise or representation. This means that the promise should be 'aimed' at promisor's legal rights and intended to amend the legal relationship between

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[37] Hughes v Metropolitan Railway Co [1877] 2 App Cas 439.

[38] Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130.

[39] M. Whincup, *Contract*…, p. 92.

[40] Combe v Combe [1951] 2 KB 215.

the parties. The test for 'clearness' or 'unequivocalness' is an objective one, so the court will assess with the standard of reasonable person's understanding. Secondly, the promisee must have relied on the promise in his behaviour, and some *dicta* require additionally 'detriment' in reliance on the promise.[41] To establish reliance on the promissory estoppel, the promisee should show that he somehow changed his course of actions after receiving a promise from the other party. Thirdly, it must be 'inequitable' for the promisor to go back on his promise. Promissory estoppel is an equitable doctrine, and therefore the court will apply it with a discretion. However, pursuant to the maxim 'he who comes to equity must come with clean hands' courts will not apply the estoppel if there was some impropriety on the promisee's side.[42] As a general rule the effect of promissory estoppel is that it does not extinguish legal rights, but only suspends their enforcement.[43]

It is not a surprise that promissory estoppel was used over the past thirty years as a legal concept diminishing the scope of the doctrine of consideration. In *Collier v. P & MJ Wright (Holdings) Ltd*[44] *Collier* was jointly and severally liable with two partners for a commercial loan. Initially all debtors were repaying the amount in monthly instalments, but later the two partners got into financial difficulties. *Collier*, however, was still repaying his instalment, and he claimed he had agreed with his creditor to release him from liability for the other partners' shares of the loan. He repaid his part of the debt, but *P & MJ Wright* later sued him for the rest of the money. Arden LJ decided that part payment of the debt is a sufficient reliance required to establish the estoppel, and *Foakes v Beer* is not applicable in this case. According to the leading judgement, under circumstances indicated in *High Trees*, a part payment of debt can satisfy

[41] Fontana N.V. v Mautner (1979) 254 E.G. 199; Peel, Treitel, 114.

[42] D & C Builders Ltd v Rees [1965] EWCA Civ 3.

[43] However, see Arden LJ in Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA Civ 1329 at [37]: 'The effect of promissory estoppel is usually suspensory only, but, if the effect of resiling is sufficiently inequitable, a debtor may be able to show that the right to recover the debt is not merely postponed but extinguished (…)'.

[44] [2007] EWCA Civ 1329.

creditor's right to full amount, even if there is a lack of consideration from the debtor.

Therefore it may be argued that the rule derived from *Collier* serves similar purposes as the concept of nominal consideration – the principle that neither law nor equity enforces gratuitous promises is again practically turned into fiction.[45] The equity was used here not to mitigate the common law rules in certain factual circumstances, but to create a counter-rule to reduce the inconvenience of consideration requirement. The evolution of promissory estoppel undoubtedly provided successful defence in cases concerning claims based on part payment and restricted the severity of the rule in *Foakes v Beer*. This was, however, done at the cost of coherent application of the doctrine of consideration.

4. The Doctrine of 'Practical Benefit'

Yet the major strike on the doctrine of consideration came earlier with the bold decision in *Williams v Bros & Nicholls (Contractors) Ltd.*[46] Facts of the case were not complicated. Defendants contracted plaintiff for some carpentry work to help them in their refurbishment business. The carpenter fell into financial difficulties and asked employers to increase his pay. Roffey Bros initially agreed, as they were afraid of delay and wanted to avoid the penalty clause, but later refused to pay Williams the increased amount. Surprisingly, the court decided in favour of the plaintiff. At first, it may look just and reasonable, as the court properly countervailed defendant's dishonesty. This judgment is, however, difficult to reconcile with many previous decisions and caused some confusion among legal scholars, who view it as 'an important staging post in the transformation of our conception of consideration'.[47]

Williams undoubtedly was under pre-existing contractual obligation to do his carpentry work. According to the orthodox approach to the doctrine, he provided no consideration in exchange for higher pay, which

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[45] A. Trukhtanov, *Foakes v Beer: reform at common law at the expense of equity*, LQR 2008, nr 124, p. 367.

[46] Williams v Roffey Bros & Nicholls (Contractors) Ltd [1989] EWCA Civ 5.

[47] J. Adams, R. Brownsword, *Contract, consideration and the critical path*, MLR 1990, nr 53, p. 541.

he had demanded. It seems that the judges in *Williams v Roffey* did not want to decide contrary to the well-established rules in *Stilk v Myrick* and subsequent cases. Therefore they needed to use the concept of 'practical benefit'. Unfortunately, it is not clear what exactly did the judges mean when saying about 'practical benefit'[48], although it seems that traces of this concept can be noticed in Lord Blackburn's opinion in *Foakes v Beer*. The 'practical benefit' in *Williams* may be just the fact that defendants avoided penalty clause, yet it may be also stated that it is a combination of different factors. Anyway, it is hard not to see any 'practical benefit' in *Stilk v Myrick* as well, a leading authority on pre-existing duty rule, as the captain obviously was benefitted by the fact that his ship successfully sailed back to London.

Surprisingly however, the judges did not decide to overrule *Stilk v Myrick*, but instead, they distinguished it on its facts. It was indicated that such a decision would leave the doctrine of consideration without any use because judges in subsequent cases would find consideration at any price in order to reach the desired result.[49] The notion of 'practical benefit' contributes to watering down the original meaning of consideration and developing its blurry and complex image. Thus on the one hand *Williams v Roffey* reaffirms the existence of consideration requirement in formation of contract but on the other, it deprives it of its former significance.

Furthermore, the court when deciding *Williams*, unfortunately, omitted the analysis of *Foakes* case. This naturally needed to be rectified by later judgments, and again led to more inconsistency in settled case law. In *Re Selectmove Ltd* Gibson LJ held that 'if the principle of *Williams v Roffey Bros Ltd* is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v Beer* without any application'.[50] Assuming that 'right' means 'original', following the path of *Foakes v Beer* in *Re Selectmove* brings back the doctrine of consideration on its right track. It is, however, difficult to reconcile it with the reasoning in *Williams*

[48] E. McKendrick, *Contract*…, p. 84.

[49] N. Hird, A. Blair, *Minding your own business – Williams v Roffey revisited*, JBL 1996, p. 254.

[50] [1993] EWCA Civ 8.

v Roffey. The nature of 'practical benefit' is the same in both cases: either the other party gains some factual advantage from part payment or not.

Yet *Re Selectmove* does not appear to the last word on the problems with 'practical benefit' and part payment of the debt. In recent case *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [51] the Court of Appeals distinguished *Pinnel's Case*, *Foakes v Beer* and *Re Selectmove*. The Court of Appeal's decision upheld the trial judge's conclusion that on the ground of practical benefit there was a consideration for MWB's promise to continue the licence agreement, despite its right to terminate the contract. But unlike in *Williams v Roffey*, and similarly to *Foakes v Beer* and *Re Selectmove*, Rock promised to pay money it already should have paid, not to perform works. The effect of the ruling is that an agreement to accept part-payment of a debt in satisfaction of the whole amount will be binding if it can be shown that the creditor gains a benefit 'in practice' in addition to the receipt of the payment.[52] Unfortunately, although the court again used the doctrine of 'practical benefit' to restrict the severity of part payment rules, its meaning still remains vague and unconceptualized. However, the case has reached Supreme Court now and it would be appreciated if the court casted more light on the application of the controversial doctrine.

The decision in *Williams v Roffey*, although seems just in its outcome, created a significant anomaly in the coherent application of the doctrine of consideration. But this could not have been done without some previous decisions, which advanced important exceptions from the original rules of it. When the judges were deciding *Williams* it had been already established, mainly through the judgments authored by Lord Denning, that in some circumstances a performance of existing legal duty can be a valid consideration;[53] the doctrine of promissory estoppel had been established that time as well.

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[51] [2016] EWCA Civ 553.

[52] M. Roberts, *MWB Business Exchange Centres Ltd: The Practical Benefit Doctrine Marches On*, MLR 2017, p. 351.

[53] Ward v Byham [1956] 1 WLR 496; Williams v Williams [1957] 1 WLR 14.

5. Conclusions

Despite many upheavals and confusion created by various decisions, it still seems that 'consideration remains a fundamental principle of the law of contract'.[54] Yet the doctrine, once applied more coherently, has gone over the past thirty years through fundamental changes and developed a complex structure. The concept has moved away from its original function of providing a motive for why a promisor must be bound.[55] Undoubtedly the doctrine of consideration once had a broader meaning than it does today.[56] Many legal problems that once used to be tackled with it are today more likely to be decided on different grounds.

Therefore some cases decided over the past thirty years are very difficult to reconcile with their legal precedents, and consequently the image of the doctrine became blurry and complex. On the one hand, recent decisions confirm its original, narrow rules. In *WRN Ltd v Ayris*[57] a promise to perform an existing contract was not held to constitute consideration. On the other hand many judgments go along with controversial *Williams* and *Collier*. Such is the case *Pitt v Phh Asset Management Ltd*[58] where it was held on the grounds of 'practical benefit' that agreement not to pursue litigation is treated as a valid consideration, even if the claim turned later to be baseless. The application of the doctrine is unpredictable and therefore creates some chaos in the judicial

Furthermore, attempts to reconcile early judgments on consideration with these given over the past thirty years lead to some kind of a paradox. Cases such as *Williams* and *Collier* appear to end with a just result, but they do not follow the path of their well-established precedents. However, the law in cases such as *Stilk* endorses some dishonesty because a retreat from one's promises cannot be viewed moral. Thus maybe the statement of Lord Mansfield in *Lee v Muggeridge*[59] that the existence of a previous

[54] Lord Toulson in Prime Sight Ltd v Lavarello [2014] AC 436, [30].

[55] J. M. Smits, *Contract Law. A Comparative Introduction*, Cheltenham 2015, p. 86.

[56] Atiyah, [2005], p. 113.

[57] [2008] EWHC 1080.

[58] [1993] 4 All FR 961.

[59] (1813) 5 Taunt 36, 46.

moral obligation is a sufficient consideration for a gratuitous promise was rejected too easily?[60]

It seems, however, that true roots of all evil are not decisions over the past thirty years, but the older ones, these which established basic rules concerning consideration. *Foakes v Beer* created very inconvenient legal rule, which prevents parties from seeking mutual agreements. This resulted in an invention of exceptions to this rule, such as promissory estoppel (or even economic duress[61]). Perhaps it was also wrong to assume that *Stilk v Myrick* was decided on the grounds of consideration. Courts could have taken advantage of the discrepancies between the reports, followed the approach of Lord Kenyon in *Harris v Watson*,[62] and decided *Stilk* on the grounds of public policy. Instead, by applying the reasoning based on consideration they chose to open Pandora's box.

Other orthodox rules of the doctrine were put under scrutiny as well. This is for instance with the rule concerning the economic value of consideration. It was submitted that consideration should be sufficient but not necessarily adequate. Yet it is hard to understand why in *Lipkin Gorman v Karpnale Ltd*[63] worthless gaming chips were held not to constitute a consideration while in *Chappell & Co Ltd v Nestle Co Ltd*[64] similarly worthless three wrappers were held to be a part of consideration. Additionally, *The Contracts (Rights of Third Parties) Act 1998* restricted the harshness of the rule that consideration must move from the promisee, as it allowed to enforce the contract terms by third parties who did not provide consideration.

Even assuming that the consideration is a reasonable doctrine, which used to serve a number of functions, the way of applying it over the past thirty years definitely lacks consistency. There are too many exceptions to the principle, what leads to its 'fading' against the background

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[60] On 'The Moral Obligation Doctrine' see P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford 2000, p. 162.

[61] The Alev [1989] 1 Lloyd's Rep 138.

[62] (1791) Peake 102.

[63] [1988] UKHL 12.

[64] [1959] UKHL 1.

of many exemptions to it. All legal concepts aiming to restrict the scope of consideration, such as promissory estoppel or the notion of 'practical benefit', undoubtedly help to achieve the just outcome of a litigation. Yet in many cases if there was no requirement of consideration, the equitable result would be achieved without the reference to these concepts.

It has been remarked that the paternalistic doctrine goes against the liberal foundations of the law of contract, as it restricts the scope of individual autonomy to enter into binding legal relationships.[65] Some critical voices arguing that the doctrine should be abolished have been already raised in the first half of 20th century.[66] Other commentators, however, argue that despite its flaws, the doctrine of consideration have had such an impact on the law of contract that and abolition of it would create at least as many problems as it would solve.[67] No matter the chances for any deep reform of English contract law in this aspect are currently little, the question whether the doctrine of consideration despite its 'fading' still plays any useful part in English contract law remains valid.

Looking from the perspective of a judge, if 'useful' means 'allowing the court to achieve easily the desired outcome of the litigation' – the doctrine plays its role well. The vague borders and blurry image of it provide the court with a wide discretion that allows rescinding a contract easily on the grounds of lack of consideration in it. However, looking from the perspective of a contracting party, if 'useful' means 'necessary' in terms of formation of a contract, it can be easily noticed that the doctrine of consideration is not an essential requirement for the existence of a properly working contract law system.[68] Its channelling function can be easily substituted by different means, such as ordinary formal requirements.

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[65] H. Collins, *Contract and Legal Theory* [in:] *Legal Theory and Common Law*, ed. W. Twinning, Oxford 1986, pp. 143–144.

[66] R. Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?*, HLR 1936, nr 49, p. 1225–1253. See also critical remarks on consideration [in:] Editorial Committee Of The Modern Law Review, *The Law Revision Committee's Sixth Interim Report*, MLR 1937, nr 1, pp. 100–107.

[67] P.S. Atiyah, *An Introduction…*, p. 76.

[68] M. Hogg, *Promisses…*, p. 275.

Yet from the general perspective, if 'useful' means 'being beneficial to the legal system by providing its stability', the doctrine is not serving its meaning properly. The decisions over the past thirty years show a significant level of inconsistency with their precedents. It is not clear when courts will apply orthodox rules of consideration, and when they will rely on these controversial ones derived from cases such as *Williams* or *Collier*. As the analysis of judicature gives no clear answer to this problem, it leads to some unwanted unpredictability in English law.

Summary

Despite all its criticism, the doctrine of consideration, together with offer and acceptance and the requirement of intention to enter into a contract, remains the core element of a legally binding bargain and a fundamental principle of the English law of contract. Yet its development in the second half of 20th century raises some questions to what extent it still serves its functions. Particularly judicial decisions over the past thirty years are difficult to reconcile with formally still binding precedents. Due to the emergence of concepts such as 'practical benefit' or promissory estoppel the original scope of the doctrine of consideration has been radically restricted, what leads to its gradual 'fading' against the background of many exceptions to it. The aim of this paper is to look at the most significant cases and essential rules of the doctrine, and to ask whether despite its 'fading', the doctrine still plays any useful role in English law.

Keywords: contract law, doctrine of consideration, promissory estoppel, practical benefit, reciprocity

Paweł Słup,
Uniwersytet Warszawski, Wydział Prawa i Administracji,
ul. Krakowskie Przedmieście 26/28, 00-927 Warszawa, Polska
e-mail: slup.pawel@gmail.com.