

Micro-teaching: Concepts of Law: The Concept of *Consideration* in Contract Formation in Common Law Contracts

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Abstract: This paper shares the experience of using an illustrative approach to teaching the concept of *consideration* in the formation of Common Law contracts. The focus is on teaching and learning rather than attempting to provide a legal treatise.

Consideration is a particularly abstract concept of the *Common Law* legal system and one which is foreign to the thinking of people from a *Civil Law* jurisdiction. In the author's experience, students have traditionally had difficulty absorbing, and more particularly, articulating the concept. Yet, without *consideration* there can be no enforceable contract. Hence understanding the concept is fundamental to all business (and other) contractual transactions.

The paper looks at statements of law from a number of sources and then outlines an illustrative whiteboard approach in the classroom to approaching the concept. Finally the author looks at before and after samples of actual student responses to an assignment task requiring articulation of the concept.

Key words: legal concepts, legal English, doctrine of consideration, contract formation

Abstrakt: *Consideration* je vysoce abstraktní pojem právního systému Common Law, který je pro lidi uvažující v jurisdikci občanského práva cizí. Tento článek se zaměřuje na sdílení zkušeností s používáním ilustrativního přístupu k výuce konceptu *consideration* při tvorbě smluv v rámci Common Law. Důraz je kladen na výuku, cílem není právní pojednání.

Introduction and Context

Law and (implicitly) legal language are an integral part of business courses, banking and insurance, real estate, design and other areas of intellectual property protection; as law regulates society, the list is endless. Teachers of law, and legal English, are not necessarily lawyers. Without disciplined preparation and understanding, teaching legal concepts can be fraught with all the dangers inherent in the misapplication or breach of legal obligations by graduates in their chosen fields; errors in teaching represent bad teaching. Teachers should have an understanding of the unique nature of legal English¹ as well as awareness of how to teach applied law².

¹ See Cooper, P. K. (2010) 'Special languages: Insight into the Language of the Law'. *Lingua Terminologica. Soubor vědeckých statí*. Metropolitní Univerzita Praha. Praha 2010.

² For general support in this area see the website of the EU Legal Teachers' Association (EULETA) www.euleta.org. See also Day, J. (2011. 2nd ed.) *International Legal English. Teacher's Book*. Cambridge. Cambridge University Press.

The paper which follows aims to assist teachers of contract law with both the substantive law applying to the Common Law doctrine of *consideration* as well as providing a straightforward approach to teaching an abstract concept. Over a period of some years the author deviated in his teaching of the concept of *consideration* from using a traditional textbook and lecture approach to an illustrative approach. A review of assessment responses to a question on the elements of contract formation (offer+acceptance+consideration = contract) revealed a far greater understanding of the concept when using the illustrative approach described herein, over the earlier formulaic approach. The latter tended to produce more confused responses as well as responses which had been clearly 'lifted' from textbooks or dictionaries; responses from which it was far more difficult to be satisfied that the students showed understanding.

The students the subject of this study were all taking a course called *Aspects of Contract and Negligence for Business*³ prescribed as a mandatory subject for the UK Higher National Diploma in Business, which acts as a foundation diploma for students progressing to a bachelor's degree in International Business Management (a further one year of study). Students tended to be in the age range of 18–22, they were from a wide range of countries and almost exclusively using English as their second language. It could reasonably be assumed that students had not grown up with, even subliminally, the language of English contract law, let alone the Common Law concepts. Many took the subject in their first semester of studies and whilst some came from a private-enterprise family background most had no business experience and little commercial life experience. In this way concepts of business were still undeveloped and there was something of a fear of studying law. None of the students were law students and many approached the subject with no idea of what law had to do with business. At this level it is probably safe to say that previous learning had focused on facts rather than abstract concepts.

There was no prescribed coursebook for students, leaving resources to the teacher's discretion. The institutional library had no legal texts and one legal dictionary. The author surmises that this situation may be mirrored in other institutions which do not teach law as a degree course, leaving teachers to seek reliable and comprehensible resources at their own expense. Of course there are hundreds of legal textbooks on contract law published for lawyers and law students, but the teacher of legal subjects in business and other non-law courses is probably seeking resources at a less technical level.⁴

³ Edexcel BETC Level 4

⁴ An example of such resources is the long established *Nutshell* Series published by Thomson. Sweet & Maxwell for UK law. Be careful however as there is also a *Nutshell* series published by West Publishing which deals with US law. See also Footnote 2.

Consideration as an essential element of Common Law contract formation

As one of the essential elements in the formation of a Common Law contract, the concept of *consideration* must certainly be learned and understood by students of contract law. In addition, students of legal English need some understanding of the word *consideration*, as not only is its legal English meaning without parallel in general English, but also it is a frequently-occurring word in contracts throughout the Anglo-American legal jurisdiction, as the following examples illustrate:

From a US Bill of Sale:

'Know all by these presents that in *consideration* of the sum of ... paid to the undersigned, The undersigned hereby bargains, sells, transfers, and conveys ...'⁵ (emphasis added)

From a US Employment Contract:

'The Board and the Superintendent have mutually agreed to enter into the following Contract ...for and in *consideration* for the mutual promises and *consideration* contained herein ...' (emphasis added).⁶

From a UK tenancy agreement:

'In *consideration* of the Landlord letting certain premises to the Tenant, the Tenant letting those premises from the Landlord ...' (emphasis added).⁷

If we look at definitions of *consideration* in legal dictionaries⁸ we see definitions which either seem too simplistic, or rather abstract definitions (of an abstract concept) which are not readily understood without a deeper understanding.

An example of the simplistic is:

consideration. The price, in money, goods, or some other reward, paid by one person in exchange for another person promising to do something, which is an essential element in the formation of a contract.⁹

and of the abstract:

⁵ Stevens-Ness Law Publishing Co., Portland, Oregon. Form No. 237 Bill of Sale (short form) available at www.stevensness.com. Last accessed 12 January 2015.

⁶ http://www.kellerisd.net/district/leadership/Documents/SuperintendentContract_July2012.pdf. Last accessed 25 February 2015.

⁷ <http://www.lawdepot.co.uk/contracts/tenancy-agreement/?loc=GB#.VO3Jmy7lyel>. Last accessed 25 February 2015.

⁸ Dictionaries have been exemplified as, without an institutional law library, they are the most accessible legal resource.

⁹ Collin, P. H. (2004) *Dictionary of Law*, 4th ed., London. Bloomsbury

consideration n. An act, forbearance, or promise by one party to a contract that constitutes the price for which he buys the promise of the other¹⁰. Consideration is essential to the validity of any contract other than one made by deed.

Without consideration an agreement not made by deed is not binding.¹¹

(Note here the contrast with agreements made by deed – more on that later).

That definition is then expanded by stating that the:

‘... doctrine of consideration is governed by four major principles:

- (1) A valuable consideration is required ...
- (2) Consideration need not be adequate but it must be sufficient ...
- (3) Consideration must move from the promisee.¹²
- (4) Consideration may be executory or executed but must not be past. ...’

None of the above, it is suggested, can be understood or explained without further study.

In fact, in this second definition, the example given by Martin & Law for the principle that *consideration* must move from the promisee could be misleading in the wrong hands.

They exemplify as follows:

Thus if X promises to give Y £ 1000 in return for Y’s promise to give employment to Z, Z cannot enforce Y’s promise, for he has not supplied the consideration for it.¹³

This seems to exemplify what consideration is *not* rather than what it is. Further, whilst it *could* be interpreted as saying that ‘Consideration must move from the promisee’, it appears to the author that the concept, as stated, is rather too abstract. This example seems to stand more for principles of *privity of contract* and for concepts related to *third party beneficiary* contracts; issues which were certainly central in the case which follows.

The leading case supporting this concept of *consideration* moving from the promisee is *Tweddle v Atkinson*¹⁴ in which Crompton J stated: ‘...the consideration must move from the party entitled to sue upon the contract’.¹⁵ But does this mean that only one party must provide (need provide) consideration? Or can Compton J’s statement be limited to the facts in this case, without ruling out the concept of the provision of mutual consideration? It is submitted that Compton’s statement should be limited to its facts.

¹⁰ Here it is not clear which party is doing the buying.

¹¹ Martin, E. & Law, J. (eds)(2006) *Oxford Dictionary of Law*.

¹² Essentially here the party responding to the offer.

¹³ *ibid*

¹⁴ [1861] EWHC QB J57 Queen’s Bench Division

¹⁵ Traditionally this has been interpreted as meaning the *promisee*.

This was a case involving an agreement whereby the father of a bride and the father of a groom agreed to gift a marriage settlement to the groom.¹⁶ The action, for performance, was brought by the groom against the estate of his father-in-law. The action failed, largely on the basis of Compton's statement above. Clearly no consideration moved from the groom, but, it is submitted, that this does not preclude a case where *both* parties to a contract provide consideration, such as in a purchase and sale agreement, or indeed in the three examples above, namely a Bill of Sale, employment contract and tenancy agreement, in each of which there are mutual promises, and in each of which *both* parties would be entitled to sue under the contract. In reality agreements to gift are today generally dealt with by deed, rather than by contract, thereby circumventing the consideration problem.

For reasons expanded upon later, this paper is aligned with Duxbury's comment 'that whilst it (*Tweddle v Atkinson*) stands as good law for the concept that consideration must move from the promisee, it cannot be held as authority to state that the promisor need not provide consideration'.¹⁷

Day¹⁸ provides us with some psychological relief by stating that: 'This word is one of the lawyer's basic *terms of art*, but even lawyers sometimes misconceive the word...' and that: 'The common-law term *consideration* is the least transparent of the three essential elements'¹⁹

But this must also act as a warning in our teaching.

What complicates matters further, especially for those teaching business students who are unlikely ever to practise law, and many of whom are reluctantly taking a non-elective subject, is that there are two theories prevailing in connection with the concept of *consideration* in contract formation. These are known as:

- (i) The *benefit-detriment* theory; and
- (ii) The *bargain* theory.

and they are conceptually different.

The *benefit-detriment* theory is an *either/or* theory in which, for there to be *consideration*, a contract must be *either* to the benefit of the promisor *or* to the detriment of the promisee. However, following the principle stated in *Tweddle v Atkinson* there *must* be detriment to the promisee.

¹⁶ Until the *Married Women's Property Act* 1870 the assets of a woman (including gifts) devolved upon her husband upon marriage. The husband, in turn, was expected to support his wife.

¹⁷ Duxbury, R. (2003) *Contract Law*. London. Sweet & Maxwell. p20

¹⁸ Day (2006:79)

¹⁹ The other two essential elements of contract formation being *offer* and *acceptance*.

The *bargain* theory (also known as the *mutuality* or *reliance* theory) is based more on *mutuality* and looks at the exchange that takes place between the parties.

Day endorses this latter theory in the following statement and examples:

‘Both parties provide consideration for the other party.’

For example:

E.g. 1: Party A may agree to sell a farm (= consideration) in exchange for party B’s million dollars (= consideration). E.g. 2: Party C may agree to provide clerical work (=consideration) in exchange for food and shelter from party D (=consideration).²⁰

The American online legal dictionary edited by Farlex Inc also supports this principle by stating:

‘In a bilateral contract – an agreement by which *both parties exchange mutual promises* – each promise is regarded as sufficient consideration for the other.’²¹(emphasis added)

Note the concept of mutual promises reflected in the US employment contract referred to in Footnote 2 hereof. Note also the consideration flowing from the Landlord in the lease referred to in Footnote 3, and, depending on your interpretation of the drafting in that document, also from the Tenant, but certainly from the Landlord.

However, it cannot be seen as an American-only doctrine as Professor Peter Jaffey of Brunel University London, in a 1997 conference paper states: ‘Under the doctrine of consideration in English law, for an agreement to be enforceable it must involve an *exchange or bargain* by which *both parties* are to receive a *benefit*.’²² (again, emphasis added). Note however that Jaffey makes no reference to a *detriment*.

This concept of mutuality is again echoed in the highly-regarded *Osborn’s Concise Law Dictionary* which states: ‘*consideration*. To constitute a simple contract an agreement must amount to a bargain, *each* of the parties paying a price for that which he receives from the other. This price is referred to as consideration’.²³ (again, emphasis added)

I grew up (in the Australian jurisdiction) with the *bargain* theory, and it is that which I teach.

²⁰ *ibid*

²¹ Ref: <http://legal-dictionary.thefreedictionary.com/consideration>. Farlex Inc.(Last accessed 20 December 2014)

²² Ref: Jaffey, P. *A new version of the reliance theory*. Conference Paper. SPTL Conference. Warwick University. September 1997

²³ Ref: Woodley, M. (ed)(2005) *Osborn’s Concise Law Dictionary*, 10th ed., London, Sweet & Maxwell

Teaching methodology

Again bearing in mind that my students are young (18–22 year old) business students whose mother tongue is rarely English, after many years of trial and error of understanding, I found it most effective to teach this concept two ways.

1. By using an illustrative approach;
2. By teaching *agreement to gift* at the same time and by way of contrast.

Using boardwork, I start with the following matrix, using a simple contract context such as the sale and purchase of a computer for £ 100:

	Benefit ²⁴	Detriment
Seller		
Buyer		

The next stage is to pose the following Q & A and mark the boxes

- Q.1: What is the benefit to the seller? A.1: Gaining £ 100
 Q.2: What is the loss (detriment) to the seller? A.2: Loss of the computer
 Q.3: What is the benefit to the buyer? A.3: The Computer
 Q.4: What is the loss (detriment) to the buyer? A.4: Paying £ 100

So we will either tick all boxes or complete them as follows:

	Benefit	(Loss) Detriment
Seller	£ 100	Computer
Buyer	Computer	£ 100

Completing all boxes shows that the agreement is supported by *consideration*.

I then compare this with a Gift as follows:

²⁴ Note: the fact that I am teaching the bargain theory is not hampered by the use of the terms *benefit* and *detriment* as I am teaching at a level where it is not necessary for them to know of the competing theories. All that I want them to understand is that *consideration* requires *mutuality* based on an exchange of promises.

	Benefit	(Loss) Detriment
Donor (you)	Nil ²⁵	£ 100
Donee (Charity)	£ 100	Nil

From what has been established in the first matrix (purchase and sale agreement), it is clear that there is no *consideration* in the gift context.

The students not only universally follow the boardwork and understand the concept, as presented, but are also actively engaged in the learning. Undoubtedly this approach also appeals to the visual learner.

I then briefly explain that a promise to donate to a charity can be enforceable by documenting the agreement as a *Deed under Seal*. The students seem to understand red seals!

Student responses

Some sample student responses to a requirement to show understanding of the concept of *consideration* in contract formation:

BEFORE using the illustrative approach:

- Consideration = something being given and something being given up
- Consideration is illustrated by the situation with the uncle as he considered the horse to be his when he does not hear from his nephew. Even if the nephew could promise to sell the horse the consideration must move from the promises.
- Consideration is usually a value that is given to the first party when the conditions of the contract are performed. This could be considered such as payments which is exchanged for a product or service.
- The decision of the story was that the court decided that William Guy was the third person and related to any issue in the contract which tell us that the agreement should be created by promisor and promisee.
- Consideration in legal terms means that both parties have exchanged something of value and in this case Miss Carlill (*sic*) exchanged her money for the smoke balls.

The **BEFORE** responses are unclear and inconsistent. It is perhaps notable that some students seek to explain the concept by reference to cases rather than stating the principle of law and then using a relevant case to illustrate the principle.

AFTER using the illustrative approach:

- Consideration means that a contract is valid where each party has given something valuable up, '*suffer a detriment*' and received something in return, '*gain a benefit*'.

²⁵ I often have to explain that 'a good feeling' is not a benefit *at law*. And even something such as a tax deduction for the donor, would not compete all boxes.

For example, consideration can be found where one party buys a chair from the other one for £ 10.

Party 1:

Benefit = gaining new chair

Detriment = losing money B £ 10

Party 2:

Benefit = gaining the money B £ 10

Detriment = losing the chair

- Consideration refers to what one party is giving or promising in exchange for what is being given or promised from the other side according to the agreement. Thus each party in the contract must gain a benefit and suffer a detriment for consideration to exist. For instance, if party A sells a computer to party B for £ 100, party A gains a benefit of receiving £ 100 and suffer a detriment of losing the computer at the same time. Party B gains a benefit of receiving the computer and suffers a detriment of losing £ 100. Therefore in this case there exists consideration between party A and party B. However in the example of X giving £ 100 to the Red Cross charity, there is no consideration and thus no contract because X does not gain any benefit from giving £ 100 and Red Cross does not suffer any detriment.
- In contract law *Consideration* is involved with the deal of the contract. It is based on an exchange of promises. Each party of a contract must receive a benefit or suffer a detriment and the benefit or detriment is regarded as *consideration*.

In the **AFTER** responses the students are not only providing more consistent responses, but they are also using clear examples and appear to be more confident and show clearer understanding. Note however that the third student has taken an either/or approach, no doubt from a text or on-line reference rather than board work in class.

The discourse above highlights the dangers faced by those without a legal background in teaching abstract legal concepts. Indeed, as Day noted (see footnote 12) even lawyers are not immune from a lack of clarity of understanding. In teaching legal English there is often a need to explore beyond word level into the principles underpinning a legal concept, and then to consider how an explanation and its presentation will be received by students. This paper has also highlighted a situation of conflicting concepts and how the teacher must take time to study and understand concepts without relying unwaveringly on a given text; jurisdictional issues may also apply, for example in differences between US legal concepts and British and Commonwealth legal concepts. Finally, this paper has attempted to show that by linking teaching with assessment and by adjusting the teaching methodology students have become more closely aligned with what has been taught and are able to more clearly present complex concepts.

Conclusion

In teaching and learning terms, the best conclusion that can be reached is that this illustrative approach works; students show understanding. For the teacher, whether trained in law or not, this analysis shows not only the level of understanding that the teacher must acquire in lesson preparation, but also that decisions may have to be made as to how much is taught and how much withheld. In this process law students should perhaps be fully exposed to the parallel theories surrounding the concept of *consideration*, and then expected to research and prepare case reports on situations where litigation has touched on whether or not *consideration* was present. For business students however a teacher may aim for general understanding in order to leave students with a legacy of awareness to help avoid situations arising for those students in their future careers.

As well as highlighting some of the problems in teaching legal concepts, this case study may give readers cause to think of other areas of their teaching in which an illustrative approach may help override difficulties which may arise in teaching and learning legal concepts.

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Bionote

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