Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

James Devenney

p. 33

3. Consideration and Intention to Create Legal Relations

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans, suggested answers, and other features. This chapter explains the doctrine of consideration and other elements necessary for the enforceability of an agreement, such as an intention to create legal relations. The doctrine of consideration is shaped by three important rules: traditionally consideration must move from the promisee (a party must provide consideration if he is to sue on a promise); consideration must be sufficient but need not be adequate (both parties need only contribute something of value in the eyes of the law to the bargain, however disproportionate); and performance of an existing contract does not normally constitute sufficient consideration for any modification in the terms of that contract. The chapter also looks at the equitable doctrine of promissory estoppel.

Keywords: contract law, doctrine of consideration, intention to create legal relations, promissory estoppel, completed act, practical benefit

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- Understanding the nature and development of the doctrine of consideration;
- The types of consideration: executory and executed;

- The rule that consideration must move from the promisee;
- The rules on past consideration;
- The rule that consideration must be sufficient but need not be adequate;
- Understanding of the actions or promises which the courts do not recognize as valuable consideration;
- The principle and operation of promissory estoppel;
- Awareness that as well as the other elements necessary for the formation of a contract, there must be an intention to create legal relations.

Key debates

Debate: should both consideration and an intention to create legal relations be necessary for an agreement to be enforceable under the Law of England and Wales?

Debate: should it be necessary to establish consideration to modify contracts?

Should parties be free to modify a contract in situations where it is, in effect, advantageous to both parties even where this leads to 'invented consideration' (as was arguably the case in ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** **[1991] 1 QB 1**)?

p. 34

Debate: the scope and effect of promissory estoppel under English law.

Should the Law of England and Wales adopt a different theoretical approach such as that taken in ***Walton Stores (Interstate) Ltd v Maher*** **(1988) 164 CLR 387** (Australia)?

Question 1

Gaia is a successful technology consultant who is about to launch a new business, RoboWiz, that specializes in the sale and supply of 'intelligent industrial robots' to the manufacturing sector. She hires a stand at the prestigious World Industrial Technology Exhibition (WITE) in London, to demonstrate the range and capabilities of the robots.

Exprop contracts with Gaia to erect the exhibition stand for £10,000. Gaia also persuades *Tech Weekly*, a new London-based publication that is seeking to raise its profile among the business community, to advertise the presence of RoboWiz's exhibition stand at the WITE for free.

Gaia is determined that her WITE exhibition stand projects the right image so she subsequently promises to pay Exprop an extra £2,000 to make sure 'it has a wow factor'. She also promises to pay £1,000 to Securefest, a company employed by WITE to provide security for the exhibition, if its employees can keep a 'watch' on her stand.

The RoboWiz stand is a great success but Gaia refuses to pay Exprop the extra £2,000 and also refuses to pay Securefest its £1,000. *Tech Weekly* is being pursued by some creditors so Gaia promises to pay it £3,000 for the advertising of her exhibition stand. However, she later withdraws her promise to *Tech Weekly* after looking at the state of her private finances, despite *Tech Weekly* having already incurred additional costs in anticipation of receiving that money.

Discuss the legal position of all the parties involved.

Caution!

■ Do not write everything you know about consideration: be selective to keep your answer relevant to the question.

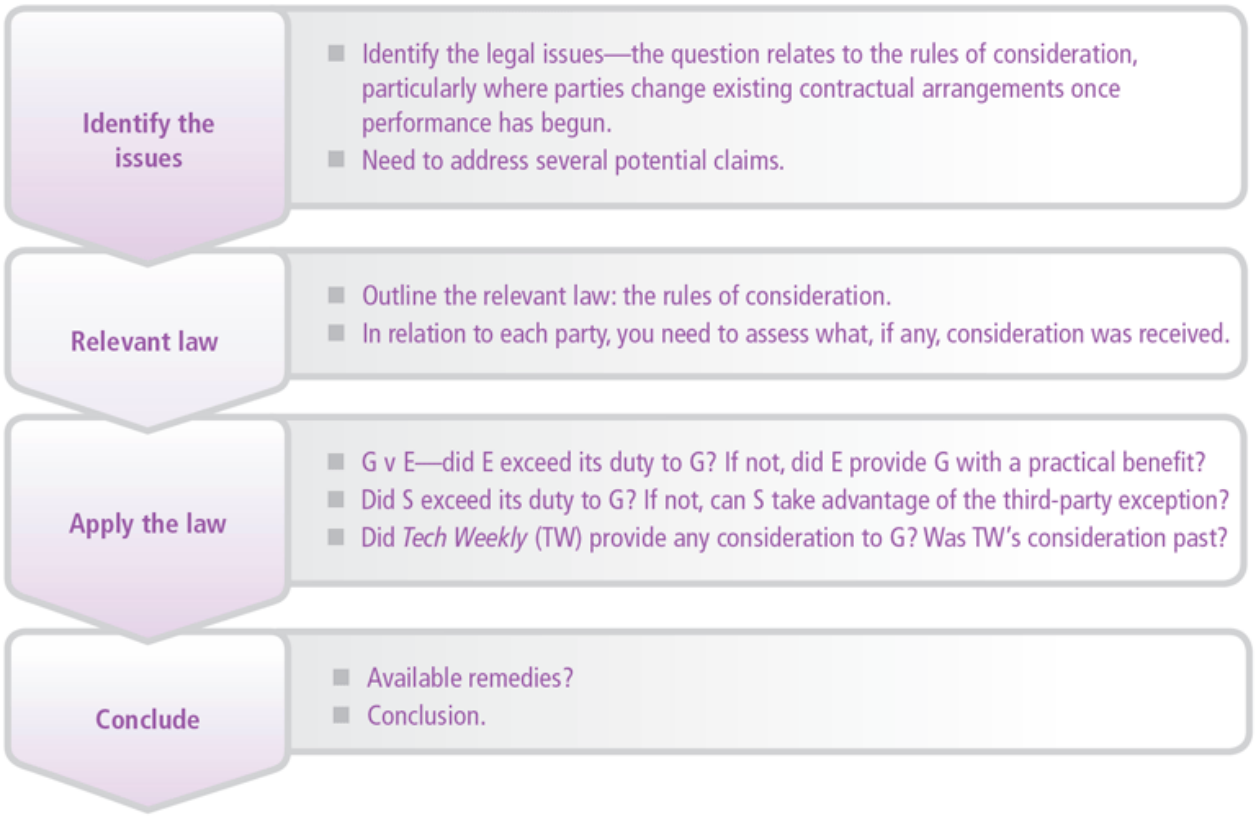
■ Address all of the areas raised by the question.

■ Using the IRAC method should ensure that you demonstrate the relevance of the law and how it applies to the facts.

■ Make sure that you advise all of the parties.

p. 35

Diagram answer plan



Suggested answer

This question concerns sufficiency of consideration, past consideration, third party consideration, and promissory estoppel.[1]

[1] Answers to problem questions do not need the same type of formal introduction as essay answers. In the IRAC structure, an opening paragraph should analyse the facts to identify the legal issues raised, outlining the questions the answer will address.

Gaia (G) v Exprop (E)

G and E[2] clearly initially entered into an enforceable contract: intention to create legal relations will be presumed where two businesses have reached an agreement[3], while G's promise to pay E £10,000, in return for the erection of the stand, clearly constitutes consideration on both sides. Can E claim the

additional £2,000? This will depend on whether or not E has provided separate consideration for this additional promise. ↵ Courts do not normally inquire into the **adequacy** of the consideration[4] provided by either party as long as there is clear evidence that both have contributed *something of value in the eyes of the law* to their bargain (the *sufficiency* of consideration rule). However, where A performs an existing contractual duty to B it is normally assumed this does not represent sufficient consideration for any additional payment from B, particularly as A has not suffered any further legal detriment in doing so. For example, in ***Stilk v Myrick* (1809) 2 Camp 317**, some crew members deserted during a voyage so the captain promised to share their wages among the remaining crew if they stayed on board until the final destination. It was held that the sailors had not provided additional consideration as they were merely performing their existing contractual duty.[5] However, if the promisee *exceeds* their contractual duty (or promises to do so) a court will treat this as sufficient consideration for an additional payment. In ***Hartley v Ponsonby* (1857) 7 E & B 872** the scale of desertion by the crew was so great that it became dangerous to continue the voyage. This freed the sailors from their existing contractual commitments and enabled them to negotiate a new contract with increased remuneration. On the facts of this question it is unclear whether E has exceeded its existing contractual duty[6]. Arguably E is simply performing an existing contractual duty in erecting the exhibition stand, but if it agrees to incur extra costs beyond those set out in the contract and/or it agrees to exceed the level of performance stipulated (in order to give the stand a 'wow factor'), E could claim the additional £2,000.

p. 36

[2] In problem questions with a number of parties and a complex factual scenario, using subheadings can help to separate out the various relationships. Apply the IRAC structure for each.

[3] The question does not raise any specific issues regarding the intention of the parties to create legal relations, but making this statement and perhaps referring to an appropriate legal authority could bring extra marks.

[4] Identify and explain the law relevant to the issues. When deciding whether a contract modification is enforceable, treat 'exceeding one's duty' (***Hartley v Ponsonby***) separately from 'acquiring a practical benefit' (***Williams v Roffey***).

[5] Explaining a key case here.

[6] Apply the law. The facts of questions may lack clarity: this is to encourage you to discuss alternatives.

Assuming E fails on that point, what other options might it pursue? More recent case law has suggested[7] that if G (the promisor) has obtained a factual benefit, enforcement of the additional promise is possible as acknowledging commercial reality and the underlying intentions of the parties. For example, in ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** **[1991] 1 QB 1**,[8] the defendant building contractors were refurbishing a block of flats. The carpentry work was subcontracted to the plaintiff who subsequently encountered financial difficulties and was unable to complete the work. The defendants offered the plaintiff an additional £10,000 to complete the (contracted) work on time, thereby potentially avoiding payment to a third party of any liquidated damages for late completion of the overall contract or the need to hire alternative carpenters. As there was no evidence of economic duress, the Court of Appeal concluded that the defendants had obtained a practical benefit from the arrangement, making payment of the additional £10,000 enforceable. In G's case, there seem to be three possible conclusions.[9] First, if E agreed to exceed the original contract specification, E will have provided consideration in the traditional sense (a *legal* benefit). Accordingly, E could rely on ***Hartley v Ponsonby*** to claim the extra money. Secondly, if E did not agree to exceed the original contract specification, E might argue, applying ***Roffey***, that G has nevertheless secured a *practical* benefit from

p. 37 ↵ taking possession of an exhibition stand that matches her enhanced expectations. If so, G's promise to pay the additional £2,000 may be enforceable. Thirdly, if the exhibition stand conforms to the original contract and G secures no other practical benefit E will be unable to claim the extra money. The final decision will depend on the court's interpretation of the actual wording used in the contract to describe the exact features of the desired exhibition stand.

[7] A key point in this area of law.

[8] Explain this key case.

[9] Having applied the law, here conclude and advise. Where the facts are not clear, identifying alternative outcomes can bring additional marks.

Gaia (G) v Securefest (S)

When G promises to pay S £1,000 for keeping an eye on her stand she is, effectively, paying S to perform an existing contractual duty that it owes to WITE (a third party). Performance of an existing duty owed to a third party is a good consideration: the question is whether S provided sufficient consideration to support this separate contract.[10] Assuming the court decides that the 'agreement' between G and S was sufficiently clear and intended to be legally binding, it would likely follow the decisions in ***New Zealand Shipping Co. Ltd v AM Satterthwaite & Co. Ltd (The Eurymedon)*** **[1975] AC 154** and ***Pao On v Lau Yiu Long*** **[1980] AC 614** and find the presence of consideration: S has suffered a detriment by making itself potentially liable to two different parties if it fails to perform its security duties and G has secured a benefit by being able to sue S directly.[11] On this reasoning G must pay S the £1,000.[12]

[10] Identify the legal issues raised.

[11] Apply the law to this aspect of the problem.

[12] Advise G.

Gaia (G) v *Tech Weekly* (TW)

Have the parties entered into an enforceable contract?[13] G promised to pay TW *after* it had advertised her exhibition stand. The doctrine of consideration demands a contemporaneous exchange of consideration by the parties; where one party performs an act constituting consideration *before* any promise to pay for it has been given, the consideration is said to be 'past' and unenforceable (see ***Roscorla v Thomas*** **(1842) 3 QB 234**—a promise that a horse was 'sound' *after* it had been sold was treated as past consideration). G's promise may therefore be unenforceable. However, there is an exception to this rule,[14] where: first, the promisor must have asked the promisee to perform the act; secondly, it must reasonably be assumed that the promisee would be remunerated; finally, the payment must have been legally enforceable had it been promised in advance. If these three conditions are met, the subsequent promise becomes enforceable (see ***Lampleigh v Braithwaite*** **(1615) Hob 105**; ***Re Casey's Patents*** **[1892] 1 Ch 104**; ***Pao On***). Unfortunately, on this basis TW is unlikely to succeed[15] as it agreed to act without payment, thereby undermining any argument that it expected to be remunerated. Arguably, therefore, no enforceable contract would exist. TW would not then fall within the exception to the rule on past consideration, making G's promise unenforceable.[16]

13 Identify the legal issues raised.

14 Explain the relevant law.

15 Apply the law.

16 Having applied the law, conclude and advise on this aspect of the problem.

p. 38

↵ However, when courts consider sufficiency of consideration by both parties they tend to adopt a reasonably flexible approach. Consider ***De La Bere v Pearson* [1908] 1 KB 280** where the defendant owners of a newspaper invited readers to submit letters requiring the advice of a financial expert. The plaintiff sent in a question that was printed, received some advice, acted upon said advice, and lost money as a consequence. The court found that there was sufficient consideration to support a contract. The plaintiff had allowed his letter to be published, thereby receiving the benefit of some advice. The defendant had benefited from being able to print readers' letters, which might have improved the circulation of its newspaper. Applying this reasoning to our facts suggests a similar outcome. G received consideration via the free publicity of her exhibition stand while TW potentially raised its profile among potential advertisers and thereby gained an important commercial advantage. If a contract did exist, G's subsequent promise of payment is clearly attempting to modify her *existing contract* with TW but what consideration does TW, at that stage, give in return?

Looking for extra marks?

■ A good answer may briefly discuss whether Gaia's request for 'a wow factor' was too vague to be legally enforceable.

■ Extra marks are possible for noting a public policy dimension to ***Stilk***: it discouraged sailors from threatening mutiny to increase their wages (see the Espinasse report of ***Stilk* (1809) 6 Esp 129**).

■ Critiquing the decision in ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** and its treatment in subsequent cases might gain additional marks, but try to avoid 'essay-style' discussion in answers to problem questions.

■ Identifying alternative outcomes can bring additional marks. TW may argue that G is estopped from withdrawing her promise of payment but remember that promissory estoppel is not a principal cause of action but is primarily a 'defence'.

Question 2

Cheatham & Steele wish to expand the productivity and efficiency of their manufacturing processes. They borrow £100,000 from Grabbit & Runne, merchant bankers. The agreed period of the loan is five years: £20,000 to be repaid each year together with interest at 40 per cent on the capital outstanding.

After repayment of £20,000 with interest, Cheatham & Steele suffer a lengthy industrial dispute which makes it impossible for them to pay the next £20,000 due. There is a possibility that the company may become insolvent. Cheatham & Steele draw the attention of Grabbit & Runne to this
p. 39
↲ and the consequential risk to their unsecured loan. With this in mind, Grabbit & Runne agree to the postponement for a year of payment of the £20,000 due and the waiver of all interest payable.

However, four months later Grabbit & Runne also experience severe financial problems and request Cheatham & Steele to pay the outstanding instalment and interest owing without further delay. Cheatham & Steele refuse to do this and suggest that only £10,000 of the loan could be paid but that this would cause them severe hardship in the circumstances.

Advise Grabbit & Runne.

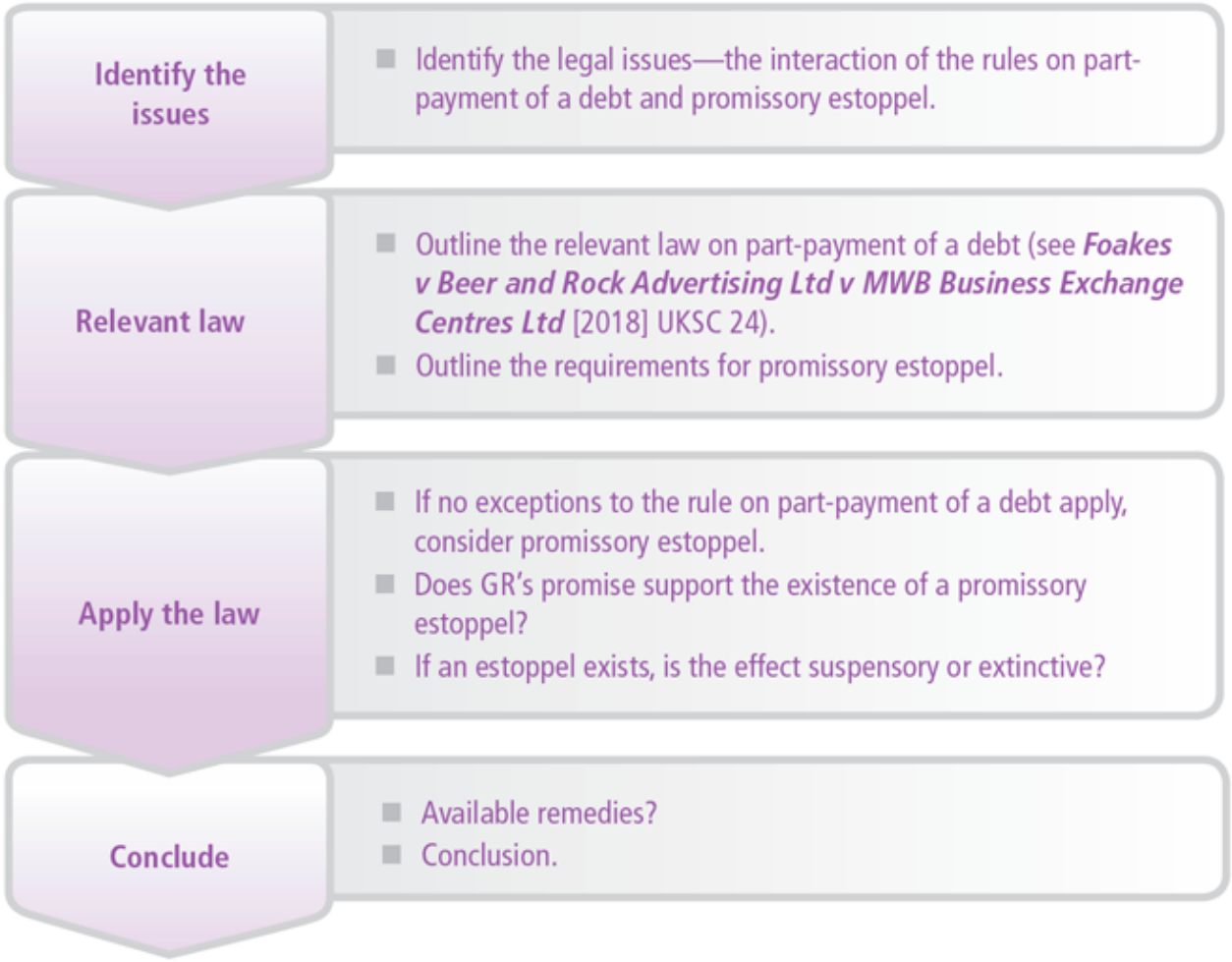
Caution!

■ The facts of problem questions are often designed to raise a variety of legal issues. Read the question carefully and note all the issues raised. Use the IRAC method to make sure your answer has a clear structure and deals with all of the issues.

■ Many students find estoppel perplexing. Read the leading decisions and, in particular, the judgments of Lord Denning for their clear explanations.

■ Merely setting out the requirements of estoppel with little or no application to the problem will lead to a poor mark.

Diagram answer plan



p. 40

Suggested answer

This problem concerns the doctrines of consideration and promissory estoppel.[1] The question here is whether Grabbit & Runne (G&R) can request Cheatham & Steele (C&S) to pay the outstanding loan instalment and interest owing without further delay. Under the original contract between C&S and G&R it is clear that G&R is entitled to the outstanding loan instalment and interest without further delay. However, there has been an attempted variation of that contract. Is the variation enforceable (with the result that G&R would not be entitled to *immediately* claim the outstanding loan instalment and G&R may not be able to claim the relevant amount of interest at all)? Presumably, as the parties are acting in a commercial capacity, there is an intention to create legal relations. However, did C&S provide consideration to G&R for the postponement of the loan instalment? Did C&S provide something different or extra (a *legal* benefit) in return for the variation promise? It would seem that

G&R have not received a legal benefit as they have a pre-existing contractual right to full and prompt payment in any event. The long-established rule for payment of debts is that a creditor is, generally, not bound by a promise to accept a partial payment in full settlement and may claim the remainder from his/her debtor (see ***Pinnel's Case* (1602) 5 Co Rep 117a**; ***Foakes v Beer* (1884) 9 App Cas 605**). Has this rule been softened by ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1**? In other words, would it be sufficient for C&S to demonstrate that G&R obtained a *factual* benefit (perhaps on the basis that if C&S were to become insolvent, G&R would be unlikely to recover most/all of the loan)? Following the Court of Appeal decision in ***Re Selectmove* [1995] 1 WLR 474** it was generally understood that ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1** did not apply to promises to accept *less* (as opposed to promises to pay *more*). However, the decision of the Court of Appeal in ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2016] EWCA Civ 553** has challenged that understanding (the case involved a promise to reduce the fee for a licence of some business premises). In ***Rock Advertising Ltd*** the Court of Appeal were of the opinion that part-payment was not per se sufficient consideration. Nevertheless, the Court of Appeal were of the opinion that ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1** could apply to promises to accept less *if* the promisor received *some factual benefit beyond part-payment*. On the facts of ***Rock Advertising Ltd*** such a factual benefit was found in the promisor not having to find another occupier for the premises. The case was appealed to the Supreme Court (**[2018] UKSC 24**) but the Supreme Court declined to discuss the relationship ↵ between ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1** and ***Foakes v Beer* (1884) 9 App Cas 605** (the 'tension' between these lines of authority continues to cause difficulty for trial judges: see ***Simantob v Shavleyan (t/a Yacob's Gallery)*** [2018] EWHC 2005 (QB) (appealed [2019] EWCA Civ 1105)).

p. 41

[1] This paragraph is a good illustration of IRAC. Opening sentences clearly identify the legal issue(s), then identify and explain the relevant law.

Arguably the variation promise is not supported by consideration (*legal* or *factual*),[2] which, prima facie, would mean that G&R is not bound by their promise to accept partial payment from C&S (ie postponing the loan instalment). However, the possibly harsh effect of the rule in ***Pinnel's Case*** is mitigated by a possible means of bypassing the part-payment rule: the doctrine of promissory estoppel.

[2] Using IRAC, apply the part-payment rule to the facts.

The basic notion of estoppel is that A makes certain representations or promises to B upon which B relies or acts in some way.[3] If A wishes to change his/her mind, to go back on his/her representation or promise, he/she *may* be prevented or estopped from doing so. In ***Central London Property Trust Ltd v***

High Trees House Ltd* [1947] KB 130**,[4] Denning J famously applied the notion of promissory estoppel to the law of contract by drawing on the equitable principles in ***Hughes v Metropolitan Ry* (1877) 2 App Cas 439**. In ***High Trees, the plaintiffs leased a block of flats to the defendants in 1937 at a ground rent of £2,500 *per annum* but in 1940 agreed to reduce this rent by half because few of the flats were let in the wartime conditions. At the start of 1945 most of the flats were let again but the defendants were still paying the reduced rent. The plaintiffs then demanded the full rent, testing their claim by suing for the last two quarters of 1945. It was held that the claim should succeed as the agreement of 1940 was only intended as a temporary arrangement for wartime conditions and it had ceased to operate early in 1945. Denning J also said that, although the defendants had provided no consideration for the plaintiffs' promise to reduce the rent, the plaintiffs could not have recovered the full rent for the period covered by the 1940 agreement. The plaintiffs would be estopped from denying the force of the 1940 agreement where the promise was 'intended to be binding, intended to be acted on, and in fact acted on' (per Denning J).

[3] In setting out the conditions for a promissory estoppel, identify and explain the law relevant to the issues.

[4] Explain this key case.

If this principle were to be applied here,[5] it may mean G&R would be estopped from going back on their promise to postpone for a year payment of the £20,000 due and the waiver of all relevant interest payable. The requirements for promissory estoppel are: the parties must have a legal relationship which gives rise to rights and duties between them: here C&S and G&R do have a contractual relationship. There must be a promise or representation that the promisor will not insist on his/her strict legal rights; this promise must be clear and unequivocal but it can be implied or made by conduct (eg ***Hughes v Metropolitan Ry***) and need not be express: here this requirement is

p. 42 ↵ satisfied in an unambiguous, express promise. In ***Combe v Combe* [1951] 2 KB 215** it was established that promissory estoppel may be used 'as a shield but not a sword' (per Birkett LJ): here C&S are defending themselves against possible action by G&R. Finally, the promisee must have relied or acted upon the representation in some way and it must be inequitable for the promisor to revoke his/her promise. Here we can see that C&S relied on G&R's promise because they postponed paying the loan instalment.

[5] Apply the law to the facts of the problem.

Regarding reliance and equity, it seems that the promisee does not have to have acted to his/her detriment (compare ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd*** **[2016] EWCA Civ 553** where Kitchin LJ felt that the key issue was whether or not it was inequitable for the promisor to go back on the promise). Indeed, Lord Denning consistently argued (see ***WJ Alan & Co. Ltd v El Nasr Export & Import Co.*** **[1972] 2 QB 189**; ***Brikom Investments Ltd v Carr*** **[1979] QB 467**) that repudiation of the promise was, in itself, inequitable. In ***The Post Chaser*** **[1981] 2 Lloyd's Rep 695**, Robert Goff J emphasized that a promisor will not be allowed to enforce his/her original contractual rights 'where it would be inequitable having regard to the dealings which have thus taken place between the parties', and that even if a promisee *benefited* from the promise it might still be inequitable to revoke. Here, C&S clearly benefit immediately from the postponed payment but suffer hardship when it is revoked, arguably suggesting that such revocation might be inequitable. Conversely,[6] in ***Rock Advertising Ltd*** Kitchin LJ stated:

> I do not for my part think that it can be said, consistently with the authorities, including … ***Foakes v Beer*** and … ***Selectmove***, that in every case where a creditor agrees to accept payment of a debt by instalments, and the debtor acts upon that agreement by paying one of the instalments, and the creditor accepts that instalment, then it will necessarily be inequitable for the creditor later to go back upon the agreement and insist on payment of the balance.

[6] An examiner would expect an answer to deal with both argument and counter-argument.

Moreover G&R might point to their own dire financial position as a valid reason to retract the promise, leaving the court to balance G&R's alleged ability to withdraw against C&S's plea of estoppel.

In concluding, it is worth noting that the need to act equitably applies to the promisee as well as the promisor. Should the promisee extract the promise by duress it will not be inequitable for the promisor to resile. The promisee's conduct must be blameless for equitable protection: 'he who comes to equity must come with clean hands'. In ***D & C Builders Ltd v Rees*** **[1966] 2 QB 617**, the plaintiffs agreed to accept £300 from the defendant in settlement of £482, principally because of their desperate financial position; there was evidence that ↵ the defendant knew of this and took advantage of it in getting the plaintiffs' promise to accept the lesser sum. Therefore, it was not inequitable for the plaintiffs to withdraw the promise. On the facts here, there is no clear evidence of duress. Although C&S 'draw the attention of G&R' to their financial position and the possible risk to G&R's loan, this is unlikely to be viewed unfavourably by the court assuming they were telling the truth.

p. 43

The final question raised by the problem is the effect of the ***High Trees*** doctrine on the obligations owed by the parties:[7] is the effect of the estoppel suspensory or extinctive? It is usually said that promissory estoppel suspends rights rather than extinguishing them. The promisor may revive his/

her normal rights provided that he gives the promisee reasonable notice of his/her intention to do so (eg ***Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd*** **[1955] 1 WLR 761**). G&R may therefore be able—provided C&S was given reasonable notice—to request C&S to pay the outstanding instalment without further delay (although the law is unclear on what period of notice should be given before returning to the original contract).

7 Identify and explain the law.

However, the law in this area is unclear.[8] The suspensory nature of the doctrine can be seen in the ***High Trees*** case but estoppel may extinguish rights if it is impossible for the promisee to return to the previous position and perform the original obligation (eg ***Birmingham & District Land Co. v L & NW Ry*** **(1888) 40 Ch D 268**). There is authority that the doctrine may be extinctive, even though such performance is not impossible, if it would be inequitable to revoke the promise. In ***Collier v P and MJ Wright (Holdings) Ltd*** **[2007] EWCA Civ 1329, [2008] 1 WLR 643**,[9] the majority of the Court of Appeal was controversially prepared to argue that a promise to accept part-payment of a debt in full satisfaction of the whole debt created a *permanent* estoppel, as reviving the remainder of the debt would invariably have been inequitable for the promisee in the circumstances. Nevertheless, if the court decides that an estoppel is only suspensory it is unclear how this might affect continuing obligations such as paying off a debt in instalments. If there is an agreed reduction in the debt and a postponement, on expiry of the notice can the promisor claim the full amount for the future only or is he/she entitled to future payments and the balance of those which fell due during the period of postponement? Much depends on the intentions of the parties. Here there seems to be an agreed postponement of time with an intended revival of full rights on its expiry, but arguably the right to interest on one year's payment might be extinguished.

8 In applying the law, it is important to address any areas of uncertainty. This is an opportunity to address the authorities and discuss possible alternative outcomes.

9 Note that ***Collier v P and MJ Wright (Holdings) Ltd*** **[2007] EWCA Civ 1329, [2008] 1 WLR 643** was merely a preliminary (interlocutory) decision and such a decision is often regarded as a relatively weak authority. On the other hand, the Court of Appeal in ***Rock Advertising Ltd*** appeared to approve it.

In conclusion, the court must balance the deferment of payment sought by C&S against G&R's insistence on an immediate reinstatement of existing contractual rights.[10] This balance can normally be achieved ↵ by requiring the promisor to give reasonable notice before his/her rights can revive, thereby reconciling the rule in ***Foakes v Beer*** with the doctrine of estoppel in that the creditor's rights are not extinguished but merely suspended. However, the preliminary decision in ***Collier*** suggests that certain judges may to go further by, in effect, using promissory estoppel as another 'common law' exception to ***Foakes***.[11]

p. 44

[10] Conclude and advise.

[11] A first-class answer may speculate in this way, but always remember to keep it relevant to the facts of the question.

Looking for extra marks?

■ Difficulties in applying estoppel offer scope for better students to demonstrate their analytical abilities. To answer a question on this topic well you must understand the balance of interests between B's reliance on A's promise and whether it is inequitable for A to revoke his/her promise.

■ Remember that promissory estoppel is a possible exception to the part-payment rule, so explain the main rules first.

■ Extra marks may be available for noting that the rule on partial payment has been criticized for not reflecting commercial reality (see ***Couldery v Bartrum* (1881) 19 Ch D 394**), and there are several exceptions to it. In ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at [18]** Lord Sumption JSC stated that ***Foakes v Beer* (1884) 9 App Cas 605** is 'probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum'.

Question 3

Consideration is often a mere fiction devised to make a promise enforceable and, as such, serves little purpose. It would be advantageous to abolish consideration and leave the more satisfactory requirement of intention to create legal relations as the test of an agreement's enforceability.

Discuss.

Caution!

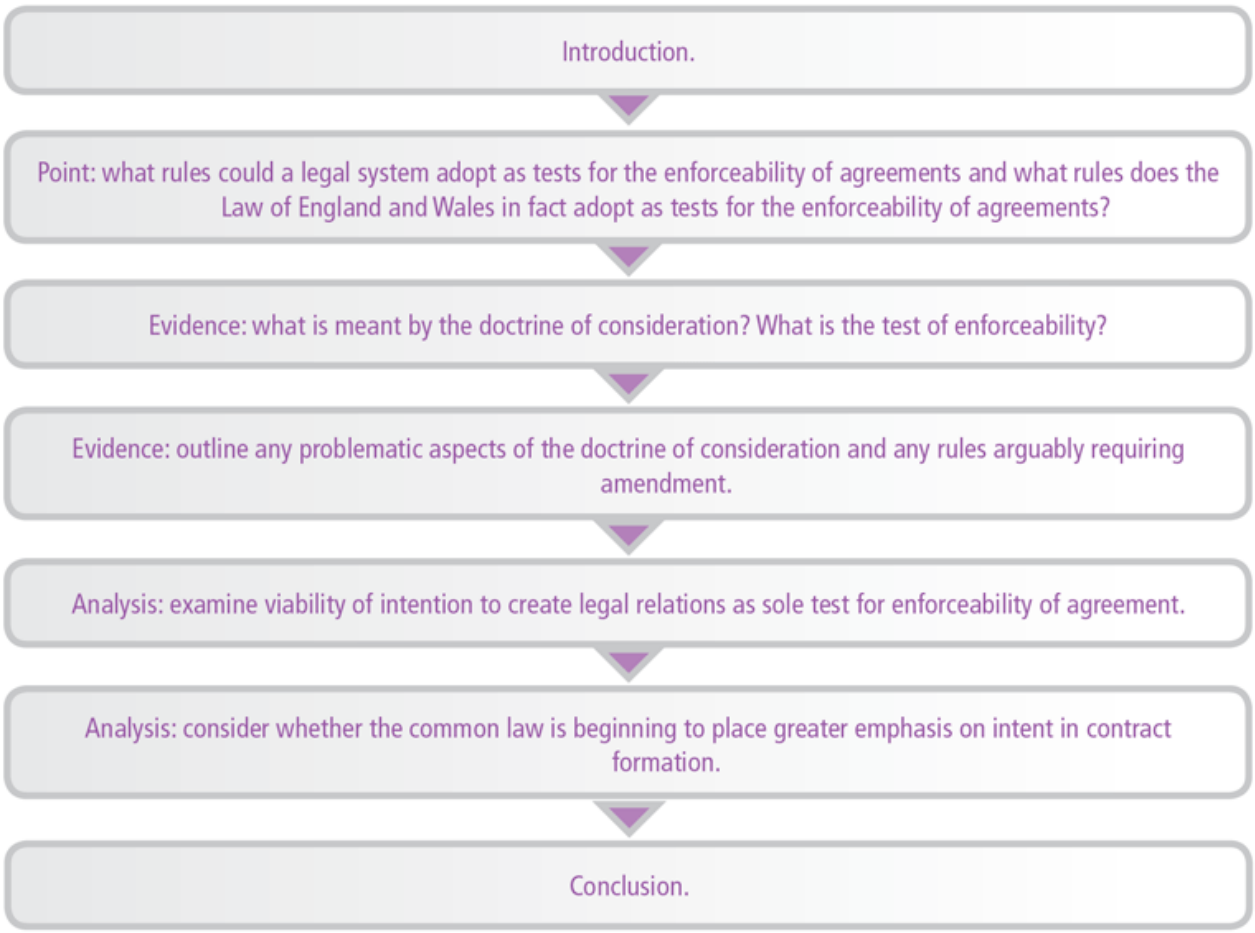
■ Questions like this require you to think about the view expressed and discuss it. You must not merely reiterate all you know about consideration.

■ Examiners like answers which show that you can think about, criticize, and reach sensible conclusions on the issues raised by the specific question.

■ To ensure a clear structure for essays, use the PEA (point, evidence, and analysis) method to make sure you have dealt with all aspects of the question.

p. 45

Diagram answer plan



Suggested answer

The question suggests that consideration is a 'fiction' and an undesirable test of the enforceability of an agreement, and proposes intention to create legal relations as a preferable test of enforceability.[1] Consideration and intention to create legal relations both relate to the nature and substance of an agreement, which might suggest that they could perform a similar function. In fact, there are a number of tests which could be used to determine the enforceability of an agreement within a particular legal system.[2]

[1] Try to keep introductions to essays quite short and relevant to the question.

[2] Here is the first point. Following the answer plan, address what rules a legal system could adopt as tests for the enforceability of agreements. Support the answer with evidence.

First, in order to be enforceable, all contracts *might* require a degree of form such as writing or a deed. This would arguably provide a degree of certainty, deter fraud, and embody, almost as a necessity, that the parties intend legal relations; however, it would be virtually impossible to insist upon writing for *all* contracts today. Writing is demanded in certain exceptional cases; for example, contracts for the sale of land must be in writing, and strict formalities are sometimes ↵ necessary where one party may abuse the other's inexperience and lack of bargaining power (eg consumer credit agreements). At the other extreme, it is theoretically possible to make *all* agreements enforceable but this notion is equally impractical. Other options might look to the seriousness of intent alone or evidence of reliance on the promise, or a combination of both. In principle, many European countries view all lawful and serious agreements as contracts. On the other hand, English law uses consideration as a key test for a contract's enforcement and, in so doing, is said to look for a bargain or exchange between the parties. However, English law also demands intention to create legal relations as a separate requirement for a contract's enforcement (see ***Balfour v Balfour* [1919] 2 KB 571**). Consequently, the role played by consideration must be ascertained and it should be asked whether intention might perform it better.

p. 46

A dominant theory of consideration is one of an exchange of values, or bargain, between the parties: A must show that he or she has bought B's promise.[3] However, the overall influence of the idea of freedom of contract means that, although some consideration is necessary, it need not be adequate. Bargains can be unequal, yet enforceable, as in ***Thomas v Thomas* (1842) 2 QB 851**, for example.[4] Under ***Chappell & Co. Ltd v Nestlé Co. Ltd* [1960] AC 87**, a contracting party may generally ask for whatever consideration he/she desires, even if it is valueless.[5] To this extent, perhaps, consideration could be viewed as a 'fiction'.[6] The doctrine of consideration evidently does not ensure fairness of bargains; rather, the doctrine of consideration distinguishes bargains from gratuitous promises by requiring a token exchange. Professor Atiyah argued ('Consideration: A Restatement' in *Essays on Contract* (1986)) that consideration was originally the *reason* for the enforcement of a promise.[7] It is a small step to see the token element in bargains as merely evidence that both parties take the agreement seriously; that is, as evidence of intention to create legal relations. One advantage in the token approach is that it provides a touchstone for intention. Consideration could therefore be seen as simply one test of enforceability which serves the same function as intent. However, to address whether consideration performs that function as efficiently as if intent were the sole test for enforceability, we must look at the established problems with the doctrine.[8]

[3] Here is another point. Explain what is meant by the doctrine of consideration in the law of England and Wales and the test of enforceability under the doctrine.

[4] The PEA structure can also work within paragraphs, aiding the clarity of the discussion. So, for example, here is the point.

[5] The point is supported by evidence from case law authority.

[6] Next, provide the analysis. Remember to keep demonstrating the relevance of the answer to the question.

[7] The quality of an answer can be improved by including a reference to academic views.

[8] Point: address any problems in the principles of consideration and discuss whether any rules should be amended.

In relation to adequacy of consideration, it is arguable that in supporting the notion of unequal consideration the law may wrongly invest an act of duress with the legitimacy of a so-called 'bargain'. Adequacy of consideration assumes there is valid consideration where A sells his/her Rolls-Royce to B for a nominal amount, but is it not more likely that some duress or blackmail might have prompted such an arrangement? In sufficiency of consideration, the cases which ↵ establish that performance of an existing contractual duty are insufficient consideration (eg ***Stilk v Myrick* (1809) 2 Camp 317**; ***Hartley v Ponsonby* (1857) 7 E & B 872**) are really concerned with protecting the creditor from the economic duress of his/her debtor (as, at one time, the Law of England and Wales did not recognize a defence of economic duress). The rule was carried to a logical conclusion in ***Foakes v Beer* (1884) 9 App Cas 605**, a case which is traditionally regarded as authority for the proposition that part-payment of a debt cannot amount to consideration which would discharge the debtor from the remainder of the debt, thereby leaving the creditor free to claim the amount owing. Consideration achieves a purpose but at what cost? At its worst, the requirement of consideration prevents us from transparently distinguishing a 'desirable' agreement, which ought to be enforced, from an 'undesirable' agreement. Although, it seems, there has been some softening of the position following ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2016] EWCA Civ 553**, the starting point is that a part-payment of a debt is not, *per* se, sufficient consideration for the discharge of the remainder of the debt, even where the agreement was a freely negotiated and sensible business arrangement. It seems unduly restrictive that the discharge of a debt by payment of a lesser amount cannot be

p. 47

accommodated within the existing law on consideration. Certainly, the decision in ***Re Selectmove Ltd* [1995] 1 WLR 474** strongly suggests that the decision in ***Foakes v Beer*** should be reconsidered by the Supreme Court or addressed by legislation; and it is, perhaps, unfortunate that the Supreme Court in ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24** declined to explore this issue (this has left the law in an unsatisfactory state and difficult to apply: see ***Simantob v Shavleyan (t/a Yacob's Gallery)* [2018] EWHC 2005 (QB) (appealed [2019] EWCA Civ 1105)**).

The foregoing might be evidence that it could be advantageous to abolish consideration, but what could replace it?

If intention to create legal relations became the sole test, it would avoid some of the difficulties caused by the rigidity of the doctrine of consideration. For example, the courts could examine and enforce 'legitimate' bargains and invalidate 'illegitimate' bargains as having been exacted through improper threats or pressure. The evolution of a doctrine of economic duress, and an awareness that duress must be distinguished from commercial hard bargaining, has arguably removed one of the main justifications for retaining the rules of consideration.

A concern that gifts would become enforceable as promises if intention became the sole test of a contract's enforceability seems unrealistic. Intent would simply become the test for the enforceability

p. 48 ↵ of agreements; the parties would still not intend that most social and domestic gifts became binding contracts. However, the courts would have the ability to examine factors other than consideration in deciding whether promises should be enforceable. Much would depend on the nature of the promise and the promisee's response to it: for example, the presence of writing or other formalities might be significant, as would the promisee's direct reliance on the promise.

Similarly, the criticism that the courts would have to devise rules of intention to address new problems is unfounded: intention is an existing and established requirement for the formation of a contract. Why should intention not become the dominant requirement, retaining the essence of consideration but subservient to intent? The courts would not have to 'begin again' but would be required merely to adjust the concept of a bargain within the rules of intention. If the parties genuinely intended a token bargain it would not cease to be enforceable, but a freely negotiated part-payment of a debt, for example, would become enforceable provided there was intention evident in the mutual benefits received. This would appear to be a more modern approach.

The decision in ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1** may point the way ahead.[9] The defendants were building contractors with a contract to refurbish a block of flats; the carpentry was subcontracted to the plaintiffs who were in financial difficulties and falling behind with the work. Delays might have resulted in the defendants paying liquidated damages to a third party under the refurbishment contract, so they offered the plaintiffs extra money to complete the work on time. When the defendants refused to pay the extra sum, the Court of Appeal held that the plaintiffs should succeed, emphasizing that, although the plaintiffs were only performing their existing contractual duty, the defendants obtained a *factual*, real benefit and there was no duress

tainting the bargain. ***Stilk v Myrick*** was subjugated to the rules of intent. The court enforced the freely negotiated variation, while the essence of consideration was preserved by focusing on the benefit received. Significantly, the court could almost certainly have found consideration in the revised methods of payment introduced by the parties (eg a restructuring of the payments' schedule): the decision might then have accorded more with established doctrine; however, the Court of Appeal deliberately chose a more radical route. ***Roffey*** has the potential to revolutionize the rules of consideration or, alternatively, remain limited to variations of existing contracts where a realistic benefit is obtained. Although the court in ***Re Selectmove Ltd*** was constrained by the House of Lords' decision in ***Foakes v Beer***, Peter Gibson LJ saw 'the force of the argument' in extending ***Roffey*** to part-payment of debts; and in ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd*** **[2016] EWCA Civ 553** the Court of Appeal limited the scope of ↵ ***Re Selectmove Ltd***. Some critics have already argued that it is undesirable to substitute the vagaries of intent and duress for the certainty of consideration. This approach might wish to see the opposite conclusion reached on the facts of ***Roffey*** but it is arguably artificial and outmoded to justify such an outcome in the context of the modern law.

p. 49

[9] The argument put forward here is quite sophisticated and likely to attract extra marks. Note that the overall argument remains coherent even without this paragraph.

Why might there be apprehension in regarding intent as the sole test of contractual enforceability when, for example, criminal law is heavily reliant on the concept? The contract law doctrine of promissory estoppel functions well with the notions of intent, reliance, and inequity. It is therefore strongly arguable that intent should become the dominant principle in the formation of contract,[10] with the essence of consideration retained within a revised conception of a freely negotiated bargain.

[10] Conclusion relates to the specific question, demonstrating how your answer meets its requirements.

Looking for extra marks?

■ The essay concerns consideration and intention to create legal relations, so address both areas. You could also discuss the problem of past consideration and its exceptions, for additional marks.

■ Recognize the importance of a clear conclusion which closely relates to the question set.

■

Remember: regardless of your overall conclusion, you gain high marks for the quality of your argument, your evidence, and your analysis of the issues raised by the question.

Question 4

Build-High has a contract to build a new housing estate for Fields Trust. Each of the houses on the estate will have a conservatory and the erecting of these has been subcontracted to Clearview. Work begins but within two months Clearview is unable to pay the wages of its employees owing to a cash flow problem. The employees refuse to continue working until this problem has been resolved. Build-High, who have been informed of this strike, are already concerned about the progress of Clearview in erecting the conservatories, especially as the Fields Trust recently disclosed that long delays might result in the loss of prospective buyers for the newly built houses. Build-High enter into a new agreement to pay Clearview an additional £10,000, thereby avoiding the inconvenience of finding an alternative builder to finish the conservatories. Clearview pays its employees all outstanding wages, and the employees return to work and complete two more conservatories. At this point Build-High refuse to pay the extra £10,000 as the Fields Trust has gone into liquidation.

Clearview's financial problems have been exacerbated by their dealings with another house builder, Lakeland. Clearview had been subcontracted by Lakeland to build conservatories for a number of recently completed houses, at a total price of £100,000. Lakeland now admits that it is

p. 50 ↲ encountering difficulties in selling these houses and therefore proposes to reduce their sale prices. However, this requires its subcontractors to agree to a reduction in their own previously agreed levels of remuneration. A number of the subcontractors, including Clearview, agree to reduce their outstanding claims by 20 per cent, thereby enabling Lakeland to reduce the sale price of its houses, a number of which are thereupon sold.

Discuss.

Caution!

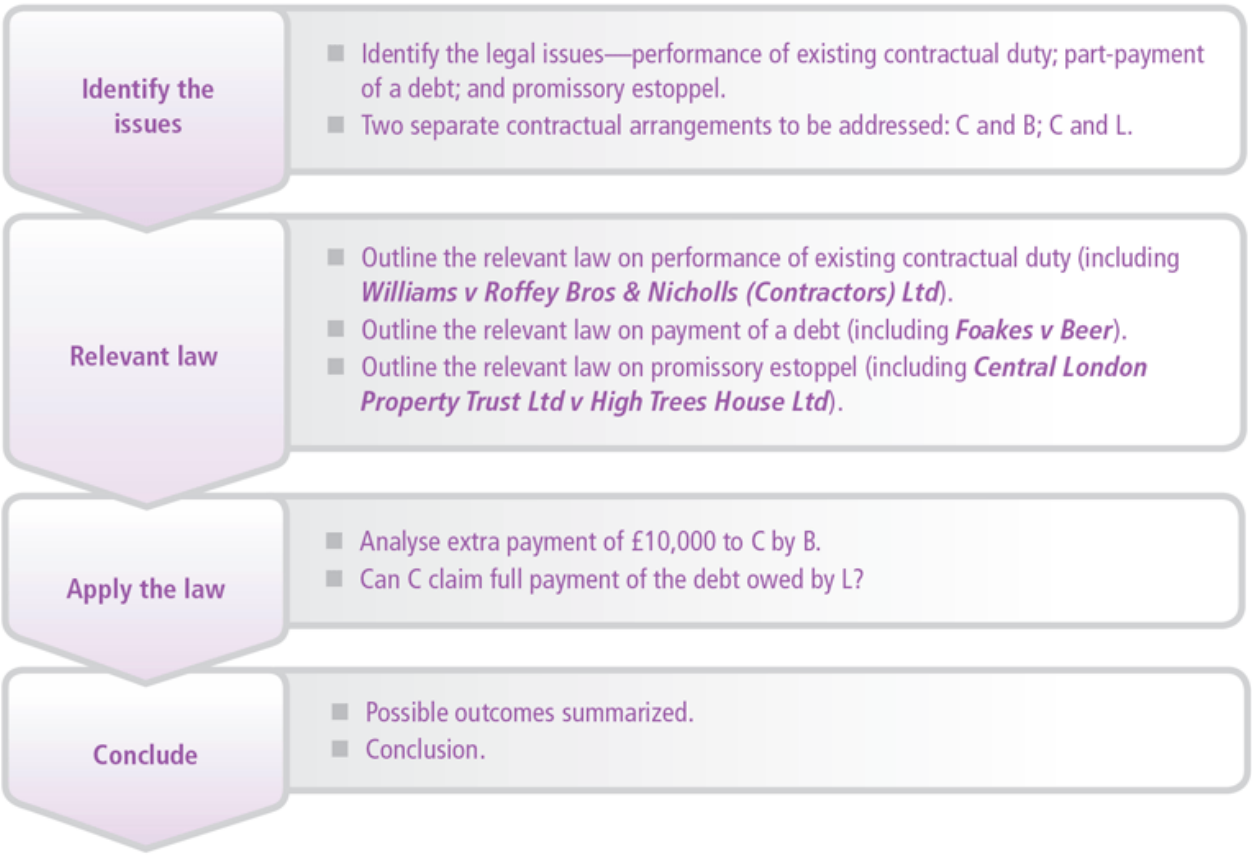
■ This problem question covers two of the more difficult aspects of consideration: performance of an existing contractual duty and the relationship with promissory estoppel.

■ The question refers to two separate contractual arrangements, Clearview/Build-High and Clearview/Lakeland; you might find it sensible to deal separately with each contractual relationship. Make appropriate cross-references to avoid unnecessary repetition in your answer.

■

A clear structure is important where there are a number of contractual relationships; following the IRAC method can help you demonstrate the relevance of the law and how it applies to the facts.

Diagram answer plan



p. 51

Suggested answer

This question concerns the doctrines of consideration and promissory estoppel. Each contractual relationship will be addressed separately.

Clearview (C) v Build-High (B)

The main problem for Clearview is that it does not appear to have done anything extra in return for the payment of £10,000 promised by Build-High.[1] ***Stilk v Myrick* (1809) 2 Camp 317** traditionally suggested that performance of a contractual duty must be exceeded to establish sufficient

consideration for any additional payment (eg ***Hartley v Ponsonby* (1857) 7 E & B 872**). Here, it appears C did not agree to perform its contractual duties differently, or complete them earlier, or even use a different standard of materials; if C simply continued to perform its normal contractual duties, then prima facie C could not claim the additional £10,000.

[1] Following the IRAC model, the first paragraph should analyse the facts of the question to identify the legal issues raised. Is the extra payment of £10,000 to C intended to ensure the continued performance of existing contractual duties, or is C being expected to exceed these duties?

However, C has a second argument based on ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1**, which refined and limited the ***Stilk v Myrick*** principle.[2] If C can show that B received a 'practical' benefit' (or obviated a recognizable disbenefit) from C's continuing to perform its existing contractual duty, then any promise of additional payment by B may become enforceable. In ***Roffey*** it was held that the main contractor (operating similarly to B) received certain practical benefits by promising to pay the plaintiffs an additional £10,000 in order to secure their continued performance of the contract: they avoided the inconvenience of finding other carpenters to complete the work (and the possibility of being charged more), circumvented the possible enforcement by their employers of a liquidated damages clause for late completion, and agreed a different method for paying the plaintiffs. Here the second point may be relevant[3]—there appears to be no liquidated damages clause enforceable against B for late completion although damages for breach of contract may be obtainable.

[2] Next question: has B gained some practical benefit from paying C the extra money in order to secure continuing performance of its contractual duties? Apply the decision in ***Roffey*** to the facts of this problem.

[3] The existence of a set completion date would strengthen C's argument as timely performance by C would avoid any claim by Fields Trust against B for late completion.

Whether the avoidance of inconvenience is a sufficient 'practical benefit' for the decision in ***Roffey*** to be invoked is not clear for several reasons.[4] First, it is unclear whether the court in ***Roffey*** would have accepted that *each* of the benefits received by the main contractor was sufficient in its own right to demonstrate sufficient consideration. Secondly, it is unclear whether/when B could be sued by Fields Trust for late completion (avoidance of the penalty clause in ***Roffey*** was probably the most influential factor). Thirdly, C may have subjected B to some form of economic duress, which would undermine

p. 52

reliance upon ***Roffey*** and its requirement of a practical benefit (although this seems ↵ unlikely particularly if, as in in ***Roffey***, it was B who offered the additional payment, rather than responding to any demand from C).

[4] The question may not give all the facts necessary to reach a firm conclusion; speculate up to a point, but not too far from the question facts.

A further point is whether the parties formally rescinded their original agreement and replaced it with a new contract in which C would be paid more. In ***Compagnie Noga D'Importation et D'Exportation SA v Abacha (No. 2)*** **[2003] EWCA Civ 1100, [2003] 2 All ER (Comm) 915**, the Court of Appeal held that in such circumstances it is not the old agreement which compels the performance of any revised obligations but the new agreement. Consequently, ***Stilk v Myrick*** will not apply if (a) the old agreement was rescinded and (b) either the rescission/new agreement was underpinned by consideration. Here, point (b) applies as both parties had further duties to perform under the original agreement (B to complete the conservatories and C to pay for them)—the mutual surrender by B and C of their rights to enforce performance of each other's executory promises will amount to consideration for the new agreement.

Finally, if C fails on all of these points, the only remaining argument is that B is estopped from revoking its promise to pay an additional £10,000.[5] Following the decision in ***Central London Property Trust Ltd v High Trees House Ltd*** **[1947] KB 130**, C must establish that it relied upon the payment to continue working, that it had not acted inequitably in obtaining B's promise (eg that the reason for stopping work on the conservatories was not misrepresented), that B's promise to pay was clear and intended to be binding, and that it was now too late to revoke the promise as some of the conservatories had been completed. However, although these conditions are met, the courts have stressed that promissory estoppel cannot create new rights (see ***Combe v Combe*** **[1951] 2 KB 215**); rather, it is a defensive measure to prevent inequitable conduct by the promisor (a 'shield, not a sword'). Therefore, C cannot rely upon promissory estoppel to claim the £10,000 as this would amount to *enforcing* the additional payment by B.

[5] Can C use the principles of promissory estoppel to compel payment of the additional £10,000?

Clearview (C) v Lakeland (L)

Lakeland's difficulty[6] is that the part-payment rule established in ***Pinnel's Case* (1602) 5 Co Rep 117a** and confirmed by the House of Lords in ***Foakes v Beer* (1884) 9 App Cas 605** limits the ability to extinguish existing debts unless full payment has been made. In ***Foakes***, the creditor mistakenly thought that the debtor had repaid the whole of an outstanding debt in full. In fact, as it was a judgment debt, the debt had attracted additional interest which had not yet been repaid. The House of Lords ruled that a creditor is not bound by either a promise to accept a smaller sum or its actual payment by the debtor. Such a promise amounts to nothing more than a promise to accept performance of *part* of an existing duty owed to the creditor, the ↵ debtor consequently providing no consideration. The position is then similar to ***Stilk v Myrick*** except that in part-payment of debts the debtor seeks to discharge an existing obligation rather than securing extra payment for its performance. Therefore, C should have a strong argument for entitlement to the full contract price (ie a sum equivalent to the amount by which the debt had been reduced). However, there are a number of exceptions to the part-payment rule; a possible exception that might apply here is that of a 'composition agreement by creditors'.[7] If all the creditors of L have agreed with each other, and with L, to reduce their debt claims against L, they may be bound by any ensuing debt-reduction arrangement (see ***Good v Cheesman* (1831) 2 B & Ad 328**). However, it is possible that L approached only some of its creditors (on an individual basis), rather than all of the creditors agreeing with each other to the debt reduction.

p. 53

[6] Does C have a right to claim full payment of the debt with L?

[7] What is the effect of other contractors also agreeing to accept a lower sum in full satisfaction of their own debts? Such a point may attract additional marks.

If C is not bound by any 'composition agreement', L's next argument would be that C derived a *practical* benefit from the agreed part-payment:[8] surely if L sells more of its properties C will have a greater chance of recovering the majority of its outstanding debt rather than none at all? However, the Court of Appeal decision in ***Re Selectmove*** seemed to suggest that the decision in ***Roffey*** cannot be used to undermine the part-payment of debt principle accepted by the House of Lords in ***Foakes v Beer***. If so, L's argument on this principle would be unlikely to succeed.[9] However, the decision of the Court of Appeal in ***Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2016] EWCA Civ 553** has challenged that understanding of ***Re Selectmove*** (***Rock Advertising Ltd*** involved a promise to reduce the fee for a licence of some business premises). In ***Rock Advertising Ltd*** the Court of Appeal were of the opinion that part-payment was not per se sufficient consideration. Nevertheless, the Court of Appeal were of the opinion that ***Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1** could

apply to promises to accept less *if* the promisor received *some factual benefit beyond part-payment*. On the facts of ***Rock Advertising Ltd*** such a factual benefit was found in the promisor not having to find another occupier for the premises. The case was appealed to the Supreme Court (**[2018] UKSC 24**) but the Supreme Court declined to discuss the relationship between ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** **[1991] 1 QB 1** and ***Foakes v Beer*** **(1884) 9 App Cas 605**. On the current facts, it might be questioned whether C receives a benefit beyond part-payment.

8 No need to reiterate the facts of ***Roffey*** here.

9 A conclusion such as this provides clear advice as required by the question.

L's final argument must be that C is estopped from recovering the full debt.[10] Using the ***High Trees*** principle, L can show that C made a clear promise which was intended to modify an existing contract, that L relied upon C's promise to accept less (ie L reduced the sale prices of its properties) and that there is no evidence of inequitable dealing ↵ by L. This last point might be problematic if L unfairly pressurized its various subcontractors into subsidizing the proposed price reduction (see ***South Caribbean Trading Ltd v Trafigura Beheer BV*** **[2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128**). Nevertheless, if an estoppel is established, the court must decide whether its effect is permanent or of only limited duration. The normal principle is that estoppel is suspensory rather than extinctive, and that once the promisor (C) has given reasonable notice the original contract will once again be enforceable (eg ***Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd*** **[1955] 1 WLR 761**). The only exceptions are where the promisee (L) would find it impossible to resume its original position (eg ***Birmingham & District Land Co. v L & NW Ry*** **(1888) 40 Ch D 268**) or it would be inequitable to insist upon such resumption in the circumstances (eg ***Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)*** **[1980] 2 Lloyd's Rep 245**), in which case the promisor's original rights will be permanently extinguished. Here, L has already sold some properties at a discounted price and it therefore seems too late for C to withdraw its promise to accept part-payment from L. C's only possible counter-argument is to question the extent to which the ***High Trees*** principle can be used to circumvent the House of Lords' decision in ***Foakes v Beer***. While the principle of promissory estoppel was subsequently accepted by the House of Lords (eg ***Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd*** **[1955] 1 WLR 761**) the extent to which the principle can be relied upon to protect a straightforward part-payment of debt issue remains unclear, although the preliminary ruling in ***Collier v P and MJ Wright (Holdings) Ltd*** **[2007] EWCA Civ 1329, [2008] 1 WLR 643** suggests courts may be prepared to employ estoppel in this way. Indeed in ***Rock Advertising Ltd*** Kitchin LJ stated:

p. 54

> I do not for my part think that it can be said, consistently with the authorities, including … ***Foakes v Beer*** and … ***Selectmove***, that in every case where a creditor agrees to accept payment of a debt by instalments, and the debtor acts upon that agreement by paying one of the instalments, and the creditor accepts that instalment, then it will necessarily be inequitable for the creditor later to go back upon the agreement and insist on payment of the balance.

[10] Addressing possible alternative arguments demonstrates understanding of the range of possible outcomes arising from the issues.

p. 55

Looking for extra marks?

■ Apply the legal rules to the issues and come to conclusions on each issue. Be selective to ensure that your answer is relevant to the question.

■ Remember: 'Consideration must be sufficient but need not be adequate'. Cases such as ***Thomas v Thomas* (1842) 2 QB 851** demonstrate that even though the respective contributions of the parties may be grossly disproportionate, provided both have supplied value recognized by the law the contract will be enforced.

■ You could outline the requirements to establish economic duress, but do so only briefly to avoid straying too far from the main points raised by the question.

Taking things further

■ Atiyah, P.S., 'Consideration: A Restatement' in *Essays on Contract* (Oxford: Oxford University Press 1986), Ch. 8.

A critique of the modern doctrine of consideration as a requirement for formation of contracts.

■ Capper, D., 'Consideration in the Modification of Contracts' in Merkin, R. and Devenney, J., *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Oxford: Routledge 2018), Ch.7.

Explores recent case law in this area.

■ Chen-Wishart, M., 'Consideration: Practical Benefit and the Emperor's New Clothes' in Beatson, J., and Friedman, D., *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press 1995), Ch. 5.

A critique of the 'illusory' notion of practical benefit in ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** **[1991] 1 QB 1**.

■ Nolan, D., 'Following in their Footsteps: Equitable Estoppel in Australia and the United States' (2000) 11(2) *King's College Law Journal* 201.

Offers a non-UK viewpoint.

■ Treitel, G.H., 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 ALJ 439.

Explores the flexibility of the doctrine of consideration in response to Atiyah's criticism.

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