CONSIDERATION UNDER THE ENGLISH LAW AND THE MALAYSIAN CONTRACTS ACT 1950: A COMPARATIVE STUDY

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Abstract

Consideration is one of the most important elements to constitute a valid and enforceable contract. Being so, it has caused confusion among the law students and lawyers alike. Provision of different laws has worsen the situations and this is especially so in Malaysia.

The contract law of Malaysia, which is governed by the Malaysian Contracts Act 1950[1], is a statutory law drafted similar to that of the Indian Contract Act[2]. As far as the Indian Contract Act is concerned, one famous author, Sir Frederick Pollock[3], has said that the characteristic of that Act was that it was a code of the English Law. That author may be true, but it should be noted that not all provisions under the English Contract law are codified into that Act and even some of the codified provisions are in disagreement to the English contract law. An obvious departure from the English law can be seen in cases on past consideration.

Therefore, the primary objective of this study is to analyse the differences between the Malaysian Contracts Act 1950 and the English law insofar as consideration is concerned. The study, however, is not confined to these two laws only infact it extends to the Indian position.

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1. Contracts Act 1950, Act 136, Revised 1974.
2. Indian Contract Act, Act IX of 1872.
3. POLLOCK, Sir Frederick; POLLOCK & MULLA on Indian Contract and Specific Releif Act; p. xi.

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CHAPTER ONE

CONSIDERATION : FUNCTION, DEFINITION AND GENERAL ROLE

The presence or absence of consideration has been the crucial factor in developed English law ever since the sixteenth century. It is natural to assume that the adoption of such a test is connected to some underlying theory as to why agreements are enforced. 'Consideration' has been forcefully argued as a word long rooted in the language of English law and denotes its fundamental attitude to contract and that when the lawyers in the middle of the sixteenth century, evolved through the action of assumpsit, a general contractual remedy, they decided that it would not avail to redress the branch of any and every promise, whatever its nature. It has been said, in particular, that it was decided that assumpsit was not to be used to enforce a gratuitous promise so that plaintiff must show that the defendant's promise upon which he was suing, was part of a bargain to which he himself has contributed to. Therefore it has been persuasively argued that the doctrine of consideration represents the adoption by English law of the nation that only bargains should be enforced. Consideration at this point has been said to mean a reason for the promise being binding, fulfilling something like the role of causa or cause in continental system.[1]

Throughout the seventeenth and the eighteenth century, the doctrine of consideration had been accepted as an integral part of the new law of contract. However, its pride of place was challenged when Lord Mansfield was made the Chief Justice of the King's Bench where in the case of FILLANS v VAN MIEROP[2] he treated consideration as merely an evidence of the parties

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1. FIFOOT, History and sources of the Common Law
   HAMSON, 54 L.Q.R 233
   SIMPSON A.B.W; A History of the Common Law of Contract: The Rise of Assumpsit (1975)

2. (1756) 3 Burr. 1663

intention to be bound and refused to recognise it as the vital criterion of a contract. This attack of Lord Mansfield was, however, repelled in HAWK v HUGHES[3] where it was proclaimed that,

> " all contracts are by the laws of England distinguished into agreements by specialty and agreements parol; nor is there any such third class ..... as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved."

Lord Mansfield's second attack on consideration was much more unpleasant. While endorsing consideration as essential to a contact he defined it in terms of moral obligation as he did in HAWKS v SAUNDERS[4]. However it was repudiated a hundred years later in the case of EASTWOOD v KENYON[5] when Lord Denman condemned the whole principle of moral obligation being an innovation of Lord Mansfield, and that to destroy it would be to restore the pure and original doctrine of the common law. He further pointed out that the logical inference from the acceptance of moral duty as the sole test of an actionable promise would be the destruction of consideration. The law insisted some additional factor to the defendant's promise, whereby the promise became legally binding; but if no more was needed than the pressure of conscience, this would operate as soon as the defendant voluntorily assumed an undertaking.

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3. (1878) 7 Term Rep 350
4. (1782) 1 Cowp 289
5. (1840) Ad & El 438