# CONSIDERATION V CAUSATION

## IN THE CONTEXT OF S142 OF THE INHERITANCE TAX ACT 1984

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***There are a number of circumstances in which it will be advantageous to a taxpayer that some part of a tax planning arrangement is other than for consideration. In at least some of those circumstances, HMRC have contended that mere causation is sufficient to establish such consideration. This article will use deeds of variation pursuant to the Inheritance Tax Act 1984, s142(1), and the requirement as to the absence of consideration at s142(3), as a worked example of this potential issue. It is contended that causation is (generally) not sufficient.***

## Consideration vs causation

It is submitted that as a matter of first principles causation is not sufficient to establish consideration, at least in circumstances in which the relevant chain of causation is unilateral and not bilateral.

The starting point is that the term consideration when used in legislation will generally be given the meaning it has in contract law.

C&E Comms v. Apple and Pear Development Council [1985] STC 383 was a decision of the Court of Appeal as to whether the taxpayer made taxable supplies so as to be entitled to claim credit for input tax for VAT purposes. The point turned on the proper construction of the Finance Act 1972 (as amended by the Finance Act 1977) Section 6(2)(a), which provided that "supply" in this part of this Act includes all forms of supply, but not anything done otherwise than for a consideration." At 389, Fox LJ stated the following (with which Kerr and Lawton LJJ agreed at 393d-e):

> ***The word 'consideration' is a term of art in English law, and I think that, used in an English statute, it must be assumed to bear its ordinary meaning in the law, save in so far as the provisions of the statute indicate some other meaning.***

The Court of Appeal went on to find at 389i that there was nothing in the 1972 Act that led it to suppose that another meaning was intended for the term in that case[1]. This is consistent with the general approach to the construction of any technical legal term that is used in legislation, as summarised for example in Bennion, Bailey and Norbury on Statutory Interpretation (8th, 2020) at paragraph 22.5.

HMRC appear to accept that in at least some circumstances consideration should mean what it does in contract law. This includes IHTM28382 as to IHT ("In law, consideration is an act or promise to do (or not to do) something in return for value, and the value given is enforceable.") and NMWM04040 as to the National Minimum Wage[2].

1 Notably, the Court of Appeal considered that although the term consideration had the meaning given to it in contract law, that did not necessarily require that all of the (other) requirements for a contract were present, or that a contract had been formed.

2 NMWM04040 notably also recognises that the approach in contact law to the 'intention to create legal relations' may also be material in that particular context, including that "there may be no such intention in certain family, domestic or social arrangements."

That said, it may be that there are circumstances (at least in theory) in which the legislative context shows that the term consideration is to mean something different; e.g. that mere causation would suffice.

Secondly, it is well-established that as a matter of English contract law, consideration is mutual and requires reciprocity[3]. Per C&E Comms at 289g-h:

**… "In its usage in English law the central feature of consideration is reciprocity (see Treitel Law of Contract (6th edn, 1983), p 51). Something is given in return for something else. It may, for example, be a promise or a benefit to the promisor. But whatever its form, I think that reciprocity is involved. It is essentially mutual.**

**This need for mutuality highlights the basic inadequacy in an analysis rooted in causation. Lawyers generally conceive of causation as a chain of events flowing from one point to another. It is a line (or, at least, need only be a line) and not a circle. The caveat in brackets in the previous sentence flags that the point can only be taken so far, and that in some circumstances there may be no material difference between saying: 'A did X in consideration of Y from B' and 'A did X because of Y from B'. The crucial difference, it is submitted, is that between the unilateral (which is generally treated as a gift) and the bilateral (which is capable of being a contract).**

**This is well-captured in the decision of the Court of Appeal (Criminal Division) in R. v. Braithwaite [1983] 1 W.L.R. 385. The appeal concerned the proper construction of the term "consideration" in the Prevention of Corruption Act 1906. Lord Lane CJ, giving the judgment of the Court, held at 391G:**

**"In our judgment the word " consideration " connotes the existence of something in the shape of a contract or a bargain between the parties. … The word "gift" is the other side of the coin, that is to say it comes into play where there is no consideration and no bargain. …"**

## Application to s142[4]

In outline, subject to a number of detailed requirements and exceptions, s142 enables the beneficiaries of an estate to rearrange (by way of variation or disclaimer) what is to pass to them so that the outcome better suits their interests. This will typically be where some advantageous tax planning was not undertaken by the now deceased testator, which the beneficiaries seek to put in place. So long as the requirements of s142 are met, the variation will be treated for IHT purposes as if it had been effected by the testator in the first place, with retrospective effect.

By s17(a) of the 1984 Act, a variation to which s142(1) applies is not itself is not a transfer of value. However, s142(3) provides as follows:

***Subsection (1) above shall not apply to a variation or disclaimer made for any consideration in money or money's worth other than consideration consisting of the making, in respect of another of the dispositions, of a variation or disclaimer to which that subsection applies.***

The application of s142(3) – and the 'external' consideration that it provides for – has been considered, to the knowledge of the author, in the following two cases.

In Lau v. HMRC [2009] S.T.C. (S.C.D.) 352, a Scottish appeal concerning s142(3), Special Commissioner Michael Tildesley OBE had to determine whether a disclaimer had been made for consideration. Mr Lau's will provided for £665,000 (free from IHT) legacies to his two daughters and stepson (Mr Harris), with a larger residue to his surviving spouse Mrs Lau (Mr Harris' mother). Mr Harris and the two daughters disclaimed their legacies by a deed of variation. A few days after the correspondingly-enlarged residue was transferred to Mrs Lau, she transferred £1m to Mr Harris[5]. HMRC contended that s142(3) applied. Mr Harris, along with his mother, contended the £1m payment was instead pursuant to other, unrelated arrangements and was not linked to the disclaimer. Their evidence was found to be incredible and unreliable (see especially paragraphs 92-93) and s142(3) was found to apply: paragraph 102.

The decision was one of Scottish law but that was explicitly found to be immaterial (see paragraph 105; and the approach to Lau in Vaughan below). HMRC's case is recorded in the judgment in terms of there being a "direct causal relationship" between the renunciation and the payment (see paragraph 10). The taxpayer does not seem to have challenged that, either at all or to the effect that consideration required something more. Rather, the case appears to have been contested on the basis of whether or not there was a causal relationship between the two payments (see paragraphs 86, 91, 94, 98 and 102). That said, it was clear that the ultimate issue was consideration (see e.g. paragraphs 87, 91 and 103), and the summary of the law at paragraph 87 refers to an exchange and/or a quid pro quo. In any event it would seem that the findings on the facts, including as to admissions that were found to be "fatal" to the taxpayer's case (paragraph 101), were found sufficient to dismiss the appeal.

3 It is beyond the scope of this article to summaries the law in this area and the reader is referred to works such as Chitty on Contracts (34th, 2021), Chapter 6.

4 See also the example of a similar issue in the context of nil rate band debt schemes: Kessler and John on Drafting Trusts and Will Trusts (14th, 2019), Third Appendix.

5 The Judge found that similar payments were proposed as to the two daughters but it is unclear to the author whether those were ever made.

Vaughan-Jones v. Vaughan-Jones [2015] EWHC 1086 (Ch) was a claim by executors for rectification of a deed of variation so that it would satisfy the requirements of s142; in particular s142(2) as to the need for the deed to state the intention that s142(1) is to apply. Mr Vaughan-Jones' will had passed his residuary estate in equal shares to his surviving spouse and three sons. The deed of variation gave the entire residue to the spouse. HMRC did not seek to be joined as a party but referred the Court by way of a letter to a number of points. This included the potential application of s142(3), the decision in Lau, that it appeared to HMRC that the variation had been made with the intention that the spouse would make payments back to the sons, and that such payments had been made. The Court granted rectification and held that it did not need to decide the s142(3) issue, that being a potential matter for the First Tier Tribunal in the future.

On the face of the judgment, HMRC did not adopt the same argument as to causation in Vaughan as it had in Lau: the word consideration does not appear and all references are to consideration. That said, this lack of a reference may only reflect a combination of HMRC's limited involvement and that the Court ultimately considered that it did not need to decide the point. Whether because or despite of that, to the extent that Lau might have been said to provide some support for the contention that causation alone is sufficient (which is doubtful for the reasons above), the dicta in Vaughan provide a helpful correction; at least as a general direction of travel. Vaughan held that Lau was a decision on its own particular facts that established no general proposition of law beyond that the onus of proof on the issue of consideration rests on the taxpayer (paragraphs 50-51). Further, it was accepted that consideration in this context is both (1) "a technical expression", and (2) one "which requires a bargain" (paragraphs 50-51).

It would be fair to say that the focus of the above paragraphs of the judgment were on whether a legally enforceable obligation had arisen, such that the spouse could not then simply change their mind; as opposed to whether consideration meant what it does as a matter of contract law. Nor does the word contract appear in the judgment. Nonetheless, at least as a general direction of travel, the analysis in Vaughan provides a helpful correction to the extent that Lau steered off course.

## Conclusion

It remains open to a taxpayer to contend that the term consideration, in the context of s142, requires more than causation. Subject to the context of particular legislation suggesting otherwise, the better view is that this starting point will generally hold.