

FOR YOUR CONSIDERATION: OLD RULES, PRACTICAL BENEFIT
AND A NEW APPROACH TO CONTRACTUAL VARIATION

Mark A. Giancaspro

A thesis submitted for the degree of Doctor of Philosophy

School of Law
The University of Adelaide

April 2014

Dedicated to Tony, my late father. I did it Dad. Hope I made you proud.

Also dedicated to Leah, my beautiful sister in Heaven, and to my mother Joy who does so much for me. This one's for you.

TABLE OF CONTENTS

| | |
|---|-------------|
| Abstract | ix |
| Declaration | xi |
| Acknowledgements | xiii |
| | |
| Introduction | 1 |
| Context | 3 |
| Aim, Scope and Significance of the Thesis..... | 9 |
| Overview of the Thesis | 14 |
| | |
| Chapter One: Consideration and the Existing Legal Duty Rule | 17 |
| Covenant and Debt | 19 |
| Assumpsit | 20 |
| Rise and Fall of the ‘Moral’ Basis for Consideration | 22 |
| 19 th Century Developments | 23 |
| The Essential Elements of Consideration..... | 25 |
| Benefit/Detriment | 25 |
| Bargain | 25 |
| The Existing Legal Duty Rule..... | 27 |
| Duties Imposed by Law | 28 |
| Duties Imposed by Contract Proffered to a Third Party | 29 |
| Duties Imposed by Contract Between Promisor and Promisee..... | 30 |
| The Part-Payment of Debt Principle | 41 |
| Treatment of the Existing Legal Duty Rule | 44 |
| Common Law Countries..... | 44 |
| Civil Law Countries | 52 |
| International Contracts | 54 |
| Other Means of Enforcing Unilateral Contract Modifications..... | 56 |
| Conclusion..... | 56 |
| | |
| Chapter Two: The Practical Benefit Principle | 59 |
| Williams v Roffey Bros & Nicholls (Contractors) Ltd | 61 |
| The Meaning of ‘Practical Benefit’ in <i>Williams v Roffey</i> | 65 |
| Judicial Method in <i>Williams v Roffey</i> | 72 |
| Was the Decision in <i>Williams v Roffey</i> ‘Correct’? | 83 |
| Conclusion..... | 85 |
| | |
| Chapter Three: Australian and International Treatment of Practical Benefit | 87 |
| Australian Endorsement: <i>Musumeci v Winadell Pty Ltd</i> | 89 |
| Further Domestic Treatment of the ‘Practical Benefit’ Principle | 95 |
| International Reactions to <i>Williams v Roffey</i> | 103 |
| England..... | 103 |
| New Zealand..... | 112 |
| Canada | 113 |
| Singapore..... | 114 |
| Conclusion..... | 115 |

| | |
|---|------------|
| Chapter Four: Judicial Application and Internal Coherence of the Practical Benefit Principle | 117 |
| The Neglect of Element (ii)..... | 120 |
| The Inconsistency of Element (ii)..... | 123 |
| How a Peppercorn Undoes Element (iii)..... | 125 |
| The Effect of Elements (iii) and (iv) on Bargain Theory..... | 126 |
| The Defect in Element (v)..... | 127 |
| Conclusion..... | 127 |
| Chapter Five: The Conceptual Dilemmas with Practical Benefit | 129 |
| The Conflict with the Existing Legal Duty Rule..... | 131 |
| Benefits Already Due..... | 134 |
| Benefits Not Bargained For..... | 135 |
| Finding a Bargained-For Exchange..... | 138 |
| Further Issues with the Unilateral Contract Analysis..... | 140 |
| When Does a Variation Become a Contract Under the Practical Benefit Principle?... | 142 |
| Movement from the Promisee..... | 145 |
| Does Practical Benefit Have Limits?..... | 147 |
| Finding Limits..... | 153 |
| The Need for ‘Practicality’ – Must the Benefit(s) be Adequate?..... | 155 |
| The Remedial Value of Practical Benefit..... | 158 |
| Extending Practical Benefit to Contractual Formation?..... | 160 |
| The ‘Moral Hazard’ Problem..... | 162 |
| Conclusion..... | 163 |
| Chapter Six: Practical Benefit Missing the Point? A Suggestion for Reform | 165 |
| Identifying the ‘Real’ Issue in <i>Williams v Roffey</i> | 168 |
| Why Require Consideration for Contract Modifications?..... | 172 |
| Efficiency Considerations..... | 172 |
| Security Trumping Autonomy..... | 173 |
| Alternative Methods of Enforcing Unilateral Contract Variations..... | 177 |
| The Seal..... | 177 |
| Fresh Consideration..... | 177 |
| Compromise of Disputed Claim or Forbearance to Sue..... | 178 |
| Mutual Rescission/Replacement..... | 179 |
| Promissory Estoppel..... | 180 |
| Waiver..... | 188 |
| The Modern Need for Flexibility..... | 191 |
| Sociological Basis..... | 192 |
| Practical Basis..... | 195 |
| A Suggestion for Reform..... | 198 |
| Weighing the Alternatives..... | 200 |
| The Need for Caution..... | 202 |
| Developing a Strategy for Reform..... | 204 |
| Future Directions..... | 213 |
| Conclusion | 215 |
| Bibliography | 223 |
| Cases..... | 225 |

| | |
|------------------------------------|-----|
| Legislation | 229 |
| Articles/Books/Reports | 230 |
| Treaties | 237 |
| Other Instruments | 237 |
| Government Reports/Documents | 237 |
| Speeches | 237 |
| Dictionaries | 237 |
| Theses | 237 |
| Digital Newspapers | 237 |
| Websites | 238 |
| Other Internet Materials | 238 |

ABSTRACT

Critical to the formation of a valid contract under Anglo-Australian law is that 'consideration' pass between the parties. In simple terms the consideration is whatever is given in return for a promise in order to make it legally binding, and can be regarded as the 'price' of the promise. Traditionally, this is in the nature of a benefit to the promisor or a detriment to the promisee. This requirement has existed since at least the 13th Century AD and has prompted the development of a number of subsidiary principles, one of which is the existing legal duty rule. This stipulates that a promise to do something that the promisor was already contractually bound to do cannot amount to good consideration.

The existing legal duty rule has caused difficulties for parties seeking to vary their agreements. With the development of increasingly complex methods of doing business and our exponentially growing reliance upon technology, contracts have increased in intricacy and lifespan and their vulnerability to changes in economic, social or other conditions has consequently been amplified. Whilst the rule does safeguard against extortion, by disentitling parties from bargaining to receive more in return for what they originally agreed to do, the case law demonstrates that it is an impediment to one-sided contractual variations which are made honestly, without impropriety, and often as a matter of convenience. The English Court of Appeal in 1989 appeared to recognise this and attempted to generate an exception to the rule – the 'practical benefit' principle. However, this principle has itself caused difficulties and been heavily criticised by both courts and commentators.

At a time when the Australian Government is reviewing the Australian law of contract, it is appropriate to re-examine this issue. This thesis critically analyses the existing legal duty rule and consideration requirement for variations and concludes that they are inconvenient and outmoded. It focuses upon the English Court of Appeal's attempts to soften the rigidity of these principles and critically examines the practical benefit principle as well as the extensive body of case law addressing it. It is argued that this principle was itself not the best solution and is not a viable means of enforcing one-sided contract variations.

The thesis then recommends reforms which, it will be argued, will more efficiently fulfil the protectionist role of the existing legal duty rule without precluding one-sided variations. Alternatives are considered before it is ultimately recommended that the consideration requirement for modifications be abolished and that the normal rules of contract as well as the vitiating doctrines, particularly economic duress, act as safeguards. This suggestion for reform is intended to reemphasise the overarching theme of the thesis: that the practical benefit principle was a poor solution to the problem in *Williams v Roffey* and is an unsatisfactory means of satisfying the consideration requirement so as to render one-sided variations enforceable.

DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

The discussion of the case law pertaining to practical benefit in Chapters 2 and 3, as well as some of the concepts and arguments appearing in Chapters 4 and 5, featured in, or inspired parts of, the following article published in the *Journal of Contract Law*:

Mark Giancaspro, 'Practical Benefit: An English Anomaly or a Growing Force in Contract Law?' (2013) 30(1) *Journal of Contract Law* 12.

This article was predominantly based upon a paper I presented at a national conference in November 2011:

Mark Giancaspro, 'Practical Benefit: An English Anomaly or a Growing Force in Contract Law?' (Paper presented at the Advanced Contract Law Conference, Adelaide, 11 November 2011).

Some of the discussion which features in Chapter 6, where alternative methods of enforcing unilateral contract variations are discussed, also featured in, or inspired parts of, the following article published in the *University of Western Australia Law Review*:

Mark Giancaspro, 'The Rules for Contractual Renegotiation: A Call for Change' (2014) 37(2) *University of Western Australia Law Review* 1.

I give consent to this copy of my thesis when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the Copyright Act 1968.

I also give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library catalogue, and also through web search engines, unless permission has been granted by the University to restrict access for a period of time

SIGNED

DATE

ACKNOWLEDGEMENTS

I still vividly remember the day that I formally undertook the higher research journey at the University of Adelaide. The then Postgraduate Coordinator, Professor Judith Gardam, invited me into her office in the afternoon of Christmas Eve 2009 to discuss the possibility of me undertaking a PhD. I opted to enrol in a Masters by Research but midway through my candidature was encouraged to ‘upgrade’ to the Doctorate. And so it was that I dedicated the last three years to writing this thesis. It has been one of the most challenging periods of my life but, simultaneously, one of the most rewarding. There are so many people without whom this would never have been possible.

First and foremost, I thank my mother, Joy Giancaspro. You have been my rock throughout this entire degree and loved and supported me the whole way. You persistently encouraged me to do my best and reach for the stars, and you vested me with the belief and confidence to get me through the tough times. Words alone cannot express how invaluable you were through this journey. Thank you so much Mum.

I want to thank my brothers Darren and Adam Giancaspro and their wives Rosalyn and Jodi respectively. You have all been fabulous supports the whole way and those little chats we had about my progress did more for me than you will ever know.

To my supervisors, Andrew Stewart and John Gava. Thank you for mentoring me throughout my candidature. I find it difficult to express my gratitude for the countless hours you both spent reading and critiquing my thesis and perusing the complete draft. I only hope that my work reflects your immense support and the many great ideas and works to which I was exposed through your teaching. No matter how busy you both were, you always made time for me. You have both been exceptional role-models and friends and I thank you dearly for your efforts.

Thank you to my friends who helped distract me from the pressures of postgraduate research and who constantly made me laugh along the way. Special mention must go to Camron Slessor, Ryan Rodda, Adam Besednjak, Saritha Krishnan and Jessica De Pieri. Thanks also to my little brother, Chris Mara. Even though you drove me crazy the whole time, you also kept me motivated. You’re the best.

Thank you also to the members of the University of Adelaide ‘Thesis Writing Group’: Gabrielle Appleby, Kate Brandon, Mark Bruerton, Peter Burdon, Samaneh Hassanli, Paul Leadbeter, Renae Leverenz, Beth Nosworthy, Anna Olijnyk, Manuel Solis, Matthew Stubbs, Adam Webster and Vanessa White. At some point you have all been a part of the ‘TWG’ and provided me with fantastic feedback on my research and writing. I also acknowledge the staff of the Sir John Salmond Law Library at the University of Adelaide for their assistance with research, particularly Margaret Priwer.

Finally, I thank the University of Adelaide for three things: first, for giving me the opportunity to complete my Doctorate at this fine institution; second, for providing me with the resources and support to undertake my research; third, for your award of a Faculty of the Professions Divisional Scholarship. This scholarship was vital in providing financial support to me for the duration of my candidature. I literally could not have completed this thesis without this support and I am truly grateful for the University’s

generosity in this regard. It is an honour to have completed my PhD at this great institution.

INTRODUCTION

On 27 July 2012 the Olympic Stadium in London, England came alive with noise, colour and excitement as the venue for the opening ceremony of the 2012 Summer Olympic Games. The £27 million spectacle lasted almost four hours and, as is tradition, featured the involvement of numerous famed musicians and celebrities. The closing act was none other than legendary guitarist and former member of English rock giants *The Beatles*, Sir Paul McCartney. He delighted the 60,000 strong audience with a rousing rendition of classic Beatles ballads *The End* and *Hey Jude* before drawing the ceremony to a close.

Putting aside the theatrical aspects of this event, it is interesting to consider the agreement between the London Organising Committee of the Olympic Games (LOCOG), Sir Paul and the ensemble of other stars enlisted to perform on the night.¹ The cast of celebrity performers had originally offered to perform for free but LOCOG insisted upon paying each of them the token sum of £1 – less than 1/20th the cost of the cheapest ticket for the ceremony.² It is not only comically short of the fee these artists could command at a similar event, but was seemingly unnecessary given their collective offer to perform free of charge. So why did LOCOG insist upon making such a trivial payment? The answer lies in a medieval doctrine of contract law, one which continues to inform (and often complicate) business agreements in contemporary times: the doctrine of consideration. This thesis examines one of the doctrine's more contentious features in the modern age: the notion that a 'practical benefit' can suffice as consideration to support a contractual variation.

1. Context

The doctrine of consideration emerged in England during the latter part of the Middle Ages (circa 1200 AD onwards). Whilst its history and essential elements are canvassed in Chapter 1, it is important here to identify some of its attendant principles in order to provide a context. The first of these is that sufficient consideration must pass between the parties in order for a valid and binding contract to be formed. A mere gratuitous promise to do something for another party without them providing anything in return will lack legal force for want of consideration. Hence, in the Olympic example described above,

¹ Others to perform included Mike Oldfield, Dizzee Rascal, Underworld and Emeli Sande.

² 'Olympic Opening Ceremony Stars Earn Token £1', *The Guardian* (online), 30 July 2012 <<http://www.guardian.co.uk/sport/2012/jul/30/olympic-opening-ceremony-stars-pound>>.

LOCOG offered £1 in return for the musical artists' services in order to create a legally enforceable contract.³ That such a token amount gave rise to a formal legal relationship is testament to the importance of the consideration doctrine to the law of contract some 800 years after its genesis.

Stemming from the rule that a bargain founded upon sufficient consideration be present in order to found a contract came another rule, most famously expressed in the seminal English case of *Stilk v Myrick*.⁴ The case is discussed at length in Chapter 1, but essentially Lord Ellenborough held that a promise to perform, or actual performance of, a duty that the promisor was already contractually bound to perform cannot amount to good consideration. In other words, just as consideration must move from each of the parties to form a contract, so too must both parties provide additional consideration where they intend to modify it. This principle came to be known as the 'existing legal duty rule'. In *Harris v Watson*⁵ it was said that the rule was founded upon public policy, in that it would prevent parties making extortionate demands of one another during the life of their contract. Whilst it may have this effect, Lord Ellenborough in *Stilk v Myrick* stressed that the rule was in fact founded upon the rules of contract law; agreements to give effect to one-sided modifications were void not because they encouraged impropriety, but because they lacked mutual consideration.⁶ This was the view which took root.

The existing legal duty rule has since caused great difficulty for parties seeking to vary their contractual agreements, because it fails to appreciate that it is sometimes essential for them to make unilateral modifications.⁷ There are many legitimate reasons why parties might agree to give more (or accept less) in return for what they were already contractually entitled to receive. As Collins argues, such an agreement

³ It was, of course, open to LOCOG to incorporate the otherwise gratuitous arrangement into a deed. Deeds, or agreements 'under seal', transfer or affirm the transfer of property or some other interest: *R v Morton* (1873) LR 2 CCR 22, 27 (Bovill CJ). An agreement made under seal is enforceable even where one of the parties derives no advantage from it: *Morley v Boothby* (1825) 3 Bing 107; 130 ER 455; *Pratt v Barker* (1829) 1 Sim 1; 57 ER 479. Therefore, by utilising a deed, the joint pledge made by the musicians concerned would have been rendered legally enforceable. See further Chapter 6, Part III.

⁴ (1809) 2 Camp. 317; 170 ER 1168 ('*Stilk v Myrick*').

⁵ (1791) Peake 102; 170 ER 94.

⁶ *Stilk v Myrick* (1809) 2 Camp. 317, 319; 170 ER 1168, 1169. See further Chapter 1, Part VI.

⁷ The term 'unilateral modification' is used throughout this thesis to describe one-sided modifications where one party promises additional consideration and the other merely promises to perform or maintains their existing contractual obligation(s). Conversely, 'bilateral modification' refers to a modification which affects both parties' obligations.

may reflect a recognition that the original contract price was based upon a mistake about the burdens entailed, or an error in drafting the terms of the contract so that they do not fully accord with the intentions of the parties, or it may be a response to changing circumstances which render performance more onerous.⁸

It is true that some parties may have sinister motives and force unilateral variations to secure additional benefits. For example, a building contractor may exploit their advantageous position and halt performance midway through construction in order to extract additional money from the other party.⁹ Alternatively, a contracted fisherman may haul their catch to harbour but demand increased wages before offloading the cargo.¹⁰ In the overwhelming majority of cases, however, it is far more likely that such promises are in fact made in response to a *genuine need* on the part of the requesting party. Commercial experience and reported cases support this view and indicate that concessions of this kind are frequently made in practice.¹¹ They might, for example, be aimed at counteracting changes in economic, social or other conditions such as labour shortages,¹² financial hardship,¹³ governmental intervention,¹⁴ market movement¹⁵ and even natural disasters.¹⁶

Whilst parties can normally allocate risk effectively through the terms of their agreements by, for example, using price adjustment mechanisms, renegotiation clauses and force majeure clauses, this is not always done and in any event there is 'a limit to human foresight'.¹⁷ Moreover, the risks and inconvenience involved in pursuing litigation for breach of contract, as well as the difficulty and bother of obtaining substitute performance, may make the promisee's promised performance worth more to the

⁸ Hugh Collins, *The Law of Contract* (Cambridge University Press, 4th ed, 2003) 344.

⁹ *Lingenfelder v Wainwright Brewery Co.* 15 SW 844 (1891).

¹⁰ *Alaska Packers Association v Domenico* 117 F. 99 (9th Circ, 1902).

¹¹ H K Lucke, 'Non-Contractual Arrangements for the Modification of Performance: Forbearance, Waiver and Equitable Estoppel' (1991) 21 *University of Western Australia Law Review* 149, 152. Indeed, if only from a reputational perspective, a promisee would be foolish to try and exploit the other party to their agreement. Potentially profitable future transactions with the same party or others in the industry may be lost and they would also face societal condemnation if their actions became known to the public: David Charny, 'Nonlegal Sanctions in Commercial Relationships' (1990) 104(2) *Harvard Law Review* 373, 393; Christine Jolls, 'Contracts as Bilateral Commitments: A New Perspective on Contract Modification' (1997) 26 *Journal of Legal Studies* 203, 231.

¹² See, eg, *Stilk v Myrick* (1809) 2 Camp. 317; 170 ER 1168.

¹³ See, eg, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

¹⁴ See, eg, *Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1955) 56 SR (NSW) 323.

¹⁵ See, eg, *Bishop v Busse* 69 Ill. 403 (1873) (spike in costs prompted by increased demand for carpentry services following the Great Chicago Fire of 1871).

¹⁶ See, eg, *Goebel v Linn* 47 Mich. 489 (1882) (loss of stock due to heatwave); *United States v Cook* 257 US 523 (1922) (rise in construction costs prompted by earthquake damage).

¹⁷ Cheng Han Tan, 'Contract Modifications, Consideration and Moral Hazard' (2005) 17 *Singapore Academy of Law Journal* 566, 579. See also Roger Halson, *Contract Law* (Longman, 2001) 390.

promisor than any right of action against them.¹⁸ Alternatively, a promisor may simply react to feelings of guilt¹⁹ or feel compelled to commit a selfless act of generosity with the added benefit of maintaining amicable relations with the other party.²⁰ To understand why the Anglo-Australian law of contract disregards these factors, it is necessary to examine the origins of the existing legal duty rule.

The existing legal duty rule emerged in England at a time when the protection of seamen aboard vessels on the high seas was a paramount concern for the British Government.²¹ As will be discussed further in Chapter 1, maritime trade was one of the United Kingdom's primary industries and it was therefore vital that the law discouraged extortionate behaviour between sailors and their masters in their contractual dealings with one another. As Reiter explains:

At a time when maritime trade was critical to the country and sailors were regarded as performing public duties much as are the firemen or police officers of today, it was understandable that the law should not want to tempt undedicated seamen, whatever might be the merits of the particular sailors in [*Harris v Watson*] or [*Stilk v Myrick*]. (There may also have been a fear of allowing overly generous captains to bind the shipowners back in England).²²

A developed doctrine of economic duress did not exist in England during the Napoleonic war era and so, as will be explained later in this thesis, the rule came to operate as a 'surrogate' in this regard.²³ It became the shield against extortion in unilateral modification cases and the primary gauge of enforceability.

Of course times have changed dramatically from when *Stilk v Myrick* was decided. With the development of increasingly complex methods of doing business and our exponentially growing reliance upon technology, contracts have increased in intricacy and lifespan and their vulnerability to such changes in economic, social or other

¹⁸ Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27(3) *The Yale Law Journal* 362, 380-1; Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 26-7.

¹⁹ Rember Meyer-Rochow, 'The Requirement of Consideration' (1997) 71 *Australian Law Journal* 532, 536.

²⁰ Corneill A Stephens, 'Abandoning the Existing Legal Duty Rule: Eliminating the Unnecessary' [2008] 9 *Houston Business and Tax Journal* 355, 387.

²¹ See Chapter 1, Part VI and Chapter 6, Part II.

²² B J Reiter, 'Courts, Consideration and Common Sense' (1977) 27 *University of Toronto Law Journal* 439, 461 (n 83). See also *Harris v Watson* (1791) Peake 102, 103; 170 ER 94, 94 (Lord Kenyon).

²³ Sir Gunther Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Press, 2002) 14. See further Chapter 6, Part II.

conditions has consequently been amplified.²⁴ The conditions of our modern economy demand that parties be permitted to modify their agreements with as little encumbrance as possible.²⁵ Moreover, in contemporary times there exists a variety of more sophisticated and established legal doctrines – such as economic duress – which can adequately guard against extortion in contractual renegotiations.²⁶ Unfortunately, however, the existing legal duty rule continues to arbitrarily preclude unilateral variations.

This thesis will argue that the existing legal duty rule is an unsatisfactory tool for gauging the enforceability of post-contractual modifications. It will be shown how, owing to the times in which it was created, the rule was based upon a suspicion of duress in unilateral renegotiations. This theoretical basis for the rule reflects the now outmoded judicial mentality of 19th Century England. It will be argued that the consideration requirement, in the renegotiation context, is a dinosaur; a relic of centuries past which often defies the desires of contractual parties. As Steyn submits:

The question may be asked why the law should refuse to sanction a transaction for want of consideration where parties seriously intend to enter into legal relations and arrive at a concluded agreement. If the court refuses to enforce such a transaction for no reason other than that the parties neglected to provide for some minimal or derisory consideration, is it not arguably a decision contrary to good faith and the reasonable expectations of the parties?²⁷

Existing methods of satisfying the consideration requirement for unilateral contract modifications – i.e. utilising deeds, tendering nominal consideration, rescinding and replacing the original contract – are often costly, inconvenient, unavailable or even unknown to the parties.²⁸ As Chapter 6 will explain, the existing legal duty rule also runs contrary to sociological evidence which indicates that people typically do not structure and administer their agreements according to the law of contract, seldom resort to its processes when disputes arise and expect some measure of flexibility in contractual

²⁴ Burton F Brody, 'Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation' (1975) 52(2) *Denver Law Journal* 433, 434-5. See also Kevin M Teeven, 'Development of Reform of the Preexisting Duty Rule and its Persistent Survival' (1996) 47(2) *Alabama Law Review* 387, 419-20.

²⁵ See Chapter 6, Part IV.

²⁶ See Chapter 6, Part V.

²⁷ Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, 437.

²⁸ See Chapter 6, Part V.

relationships to adjust the terms of the agreement whenever necessary in order to ensure its success and encourage additional dealings in the future.²⁹

When *Williams v Roffey Bros & Nicholls (Contractors) Ltd*³⁰ came before the English Court of Appeal in 1989, Glidewell, Russell and Purchas LJ appeared both to recognise the inadequacies of the existing legal duty rule and to attempt to strike a balance between protecting parties from extortion and permitting them to make honest unilateral contract variations in the absence of any *tangible* additional consideration being proffered by the promisee. The members of the Court generated the ‘practical benefit’ principle; a rule which in simple terms states that the actual or promised performance of an existing legal duty *can* amount to consideration in return for the other party’s promise to give something more, so long as it confers upon the latter a ‘practical benefit’ or obviates a disbenefit for them.³¹

The notion of practical benefit has spread throughout the common law world and met with varying degrees of acceptance.³² Whilst it was clearly designed to circumvent the existing legal duty rule by providing an unorthodox means of satisfying the consideration requirement in renegotiations, it has in fact attracted its own problems both conceptually and in application. The practical benefit test has been haphazardly applied or even disregarded altogether,³³ whilst the principle itself appears to conflict with a number of other established common law principles and is conceivably limitless in scope.³⁴ Courts and commentators around the world continue to grapple with the practical benefit principle and it represents one of the most controversial and problematic aspects of contract law today. Unless the context otherwise provides, references to ‘practical benefit’ in this thesis refer to the principle as originally articulated by the English Court of Appeal in *Williams v Roffey*.

This thesis argues that *Williams v Roffey* was rightly decided but for the wrong reasons. Enforcement of the unilateral variation in that case was objectively the fairest and most appropriate outcome. The plaintiff should have been entitled to the additional money

²⁹ See Chapter 6, Part IV.

³⁰ [1991] 1 QB 1 (*Williams v Roffey*).

³¹ See Chapter 2.

³² See Chapters 2 and 3.

³³ See Chapter 4.

³⁴ See Chapter 5.

promised to him by the defendants. The Court of Appeal was therefore right to attempt to avoid the application of the existing legal duty rule, however the method by which they did so was completely inapposite. The Court endeavoured to pay reverence to the rule and simultaneously render it inapplicable by creating a principle capable of detecting consideration moving from the promisee in circumstances where, objectively, there was none. This rule, and the concomitant requirement of consideration for variations, clearly perturbed the Court and yet both were left intact.

The most sensible solution would have been removal of the consideration requirement for variations, which would have achieved the desired result in *Williams v Roffey* without the attendant problems that the practical benefit principle attracted. This principle was simply an improvised means of finding consideration so as to enforce the renegotiation within the traditional bargain mould. The Court of Appeal's efforts were laudable but the practical benefit principle was the incorrect solution to the problem in that case and represents an inappropriate means of enforcing similar unilateral variations in analogous cases. It is submitted that reform of the doctrine of consideration in the renegotiation context is essential; abolition of the consideration requirement for variations is the most apt solution.

2. Aim, Scope and Significance of the Thesis

The law of contract is essential to our very concept of exchange; it 'underpins our economy'.³⁵ 'This is because in countries such as Australia most goods and services are created and distributed through markets and markets have at their heart a contract'.³⁶

Contract law provides essential infrastructure for a market economy. In a market, people make voluntary agreements to exchange resources, contributing to increased economic growth and overall prosperity. But if such agreements are not legally binding, people will often not have the confidence to enter into profitable deals, because they will not be sure that the other party will keep its side of the bargain. By allowing people to make their agreements legally binding, contract law increases certainty and predictability about the future.³⁷

³⁵ *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 132 (Kirby P).

³⁶ Philip Clarke and Julie Clarke, *Contract Law: Commentaries, Cases and Perspectives* (Oxford University Press, 2nd ed, 2012) 4.

³⁷ Australian Government, 'Should Contract Law be Reformed?' (Infolet 1, Attorney-General's Department, 2012) 1.

As we will come to discover in later chapters, the doctrine of consideration is firmly embedded in the law of contract.³⁸ Thus, by recommending reform to the doctrine in the renegotiation context, this thesis suggests modifications which have significant implications for our entire system of contract law and, consequently, how parties to our economy operate.

At its core, the thesis takes issue with the common law's stubborn subservience to the outmoded existing legal duty rule and the associated requirement that contractual variations be supported by consideration. It applauds the Court of Appeal's efforts to escape the application of *Stilk v Myrick* in *Williams v Roffey* and enforce the promisor's promise, but condemns the method by which it did so. The most obvious option for the Court was to dispense with the existing legal duty rule but instead it attempted to generate an 'exception'. The resultant practical benefit principle has challenged a number of established principles in the law of contract and been applied inharmoniously across a wide and ever-growing variety of contexts.

A voluminous body of scholarship is devoted to attacking the decision in *Williams v Roffey*. Whilst many scholars discuss the general effect of the practical benefit principle, few devote great attention to critically analysing both how it operates in practice, how it sits within the existing conceptual framework of Anglo-Australian contract law and whether and what changes are desirable.³⁹ The majority of works denounce the existing legal duty rule and argue that the consideration requirement for modifications is unsuited to modern economic conditions and/or should be amended or abolished.⁴⁰ Almost all, however, overlook the fact that, so long as the rule survives, the practical benefit principle continues to spread throughout the common law world and perpetuate the difficulties discussed in Chapters 4 and 5.

³⁸ *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 499 (Windeyer J).

³⁹ See, eg, Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 105-8; J W Carter, *Contract Law in Australia* (Butterworths, 6th ed, 2012) 138-9; N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 211-12.

⁴⁰ See, eg, Paterson, Robertson and Duke, above n 39, 110; Cheng Han Tan, 'Contract Modifications, Consideration and Moral Hazard' (2005) 17 *Singapore Academy of Law Journal* 566; Robert A Hillman, 'Contract Modification Under the Restatement (Second) of Contracts' (1982) 67 *Cornell Law Review* 680; Corneill A Stephens, 'Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary' [2008] 8 *Houston Business and Tax Journal* 355. See further Chapter 6 and the literature there cited.

The Australian Government is in the midst of reviewing the Australian law of contract and recently released a discussion paper in which it stressed the importance of maximising ‘the simplicity, efficiency and utility of market interactions’.⁴¹ Numerous options for reform are being considered, with a primary consideration being to simplify the law by ‘removing outdated or over-technical rules’.⁴² The discussion paper concludes:

Some centuries-old common law rules of contract survive largely intact, attracting the criticism that elements of Australian contract law are tired and inadequate to contemporary circumstances. It is worth considering whether the law could be better suited to the needs of today.⁴³

This thesis argues that the law could indeed be better suited to the needs of today. The Court of Appeal considered that the existing legal duty rule was outmoded in 1989. It is no less futile more than two decades later. The practical benefit principle was an unsatisfactory means of addressing the rule. In light of the difficulties it has created, it is no more ‘suited to the needs of today’ than the rule it sought to mitigate.

In Chapter 6 this thesis explores the variety of means by which unilateral variations of the kind central to the dispute in *Williams v Roffey* can be enforced. It will be argued that these methods are often costly, cumbersome, unavailable, problematic in application or even unbeknownst to the parties. Alternatives will be considered before it is ultimately recommended that the consideration requirement for modifications be abolished and that the normal rules of contract as well as the vitiating doctrines, particularly economic duress, act as safeguards. It will be argued that this is the course the Court of Appeal should have taken in *Williams v Roffey* to provide the flexibility the rule in *Stilk v Myrick* fails to afford in renegotiations. It will be demonstrated that such an approach is essential to parties contracting in today’s economy, which frequently operates upon instantaneous electronic technologies and communication platforms. This sentiment emerges clearly in the Government discussion paper discussed above:

Contract law forms one of the most important elements of any legal framework. It is the bedrock of modern economies and the basis of many everyday interactions. It is therefore of the utmost

⁴¹ Australian Government, ‘Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ (Discussion Paper, Attorney-General’s Department, 2012) 1.

⁴² *Ibid* 3.

⁴³ *Ibid* 1.

importance that Australian contract law maximise the simplicity, efficiency and utility of market interactions for the benefit of all Australians.⁴⁴

The need to allow parties to modify such agreements with as little encumbrance as possible is thus of paramount importance not only to the Australian economy, but to the economies of all nations the world over. This thesis recommends a new approach to contractual variation and encourages the courts and/or the legislatures of Australia and other common law nations to break free from the grip of precedent and do away with *Stilk v Myrick*. Its extensive treatment of the practical benefit principle – one growing in popularity throughout the common law world – makes a significant contribution to this field of the law. It draws attention to the most fundamental conceptual faults in the principle, most of which are overlooked by the courts which continue to apply it today.

This thesis is limited in scope in a number of respects though, paradoxically, these limitations can also be viewed as valuable opportunities. First, the thesis commences with a succinct discussion of the history of the doctrine of consideration to provide a context. Given the breadth of the doctrine and its convoluted past, this discussion was difficult to contain and is reliant on the work of others in this field, drawing heavily from such scholars as Simpson,⁴⁵ Stoljar,⁴⁶ Atiyah,⁴⁷ and Seddon, Bigwood and Ellinghaus.⁴⁸ The need to limit the scope of this discussion did, however provide an opportunity to attempt to synthesise what is a voluminous topic in contract law into a concise and coherent chapter. In similar vein, the portion of Chapter 2 devoted to examining the Court of Appeal's pragmatic approach to resolving the dispute in *Williams v Roffey* was difficult to contain. The use of pragmatism in judicial decision-making is an especially broad issue in itself. The thesis engages with the relevant literature and presents arguments in the restricted context of the practical benefit principle and does not embark upon exhaustive forays into this subject.

Another limitation affecting this thesis is the volume of available literature. Again, however, this can also be seen as a positive. There exists an abundance of scholarly

⁴⁴ Ibid.

⁴⁵ A Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1975).

⁴⁶ S J Stoljar, *A History of Contract at Common Law* (Australian National University Press, 1975).

⁴⁷ P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979); P S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th ed, 1995).

⁴⁸ N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012).

writings and judicial opinions discussing, analysing and critiquing the existing legal duty rule and the requirement of consideration for modifications. The majority of this body of work, however, derives from international jurisdictions, particularly the US which has actively pursued and undertaken large-scale reform to its law of contract. Few Australian scholars have devoted great attention to the practical benefit principle and its place within the Anglo-Australian law of contract and so there is little literature which directly addresses the issue in depth, rather than giving a cursory discussion of the overarching principles and the problems these present.

Given the difficulties the existing legal duty rule continues to present to parties and the courts, and the growing popularity of the versatile but problematic practical benefit principle amongst common law courts both in Australia and across the globe, it is imperative that further research be undertaken in this regard. Australia and indeed many common law countries are fast falling out of step with modern international commercial practice, which appears to be favouring the civil law model of abandoning the consideration requirement for modifications.⁴⁹ Consideration of, and potential harmonisation with, the standards of contemporary commercial practice observed by the international community is crucial to Australia's economic growth. As the Federal Government's contract law reform discussion paper notes:

As well as removing indirect barriers to trade and investment, such an approach could make Australian law more attractive for parties from different countries when choosing a system of law to govern their contract. This could help promote Australia as a regional hub for finance and commercial arbitration bringing significant benefits to the Australian economy.⁵⁰

In light of the difficulties presented by the practical benefit principle, this thesis recommends reform which, it is argued, will not only facilitate more efficient transacting in jurisdictions such as Australia which continue to endorse the existing legal duty rule (and rely upon exceptions to circumvent it), but also bring them into line with what is fast becoming commercial orthodoxy on an international scale. The law should not avoid scrutinising variations altogether. Rather, it should go only so far as necessary to protect

⁴⁹ Paul Finn, 'Internationalisation or Isolation: The Australian Cul De Sac? The Case of Contract Law' in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, 2010) 41, 55-6.

⁵⁰ Australian Government, 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Attorney-General's Department, 2012) 1, 6.

parties without hindering their efforts to contract in a rapidly moving economy. And it certainly should not attempt to get around cumbersome rules by creating other, equally problematic legal principles, as the Court of Appeal did in *Williams v Roffey*.

3. Overview of the Thesis

This thesis utilises a predominantly doctrinal methodology. Such an approach is conducive to effective analysis of the core subject given that the practical benefit principle is specific to the law of contract, which is a traditionally ‘black letter’ field.

The thesis consists of six substantial chapters and a conclusion. Chapter 1 provides an historical overview of the doctrine of consideration and examines its essential elements as crafted in the common law. This discussion is essential for placing the existing legal duty rule and practical benefit principle in context. The chapter then turns to examining the existing legal duty rule expressed most famously in *Stilk v Myrick*. It discusses the various ways in which the rule can manifest itself before focussing specifically on the context of pre-existing contracts between promisor and promisee. It then provides an overview of how the rule has been treated within various civil and common law jurisdictions across the world.

Chapter 2 explores the practical benefit principle, which was generated in response to the existing legal duty rule. The chapter devotes significant attention to the decision in *Williams v Roffey* and the concept of ‘practical benefit’. It critically analyses the practical benefit principle before briefly discussing the pragmatic methodology utilised by the Court of Appeal in creating it.

Chapter 3 is devoted to exploring how *Williams v Roffey* and the practical benefit principle have been treated both domestically and throughout the common law world. Its endorsement and subsequent treatment in Australia are discussed before reactions from international jurisdictions are also considered. It will be demonstrated how the principle has enjoyed generally positive treatment in a number of common law jurisdictions including Australia, England, New Zealand, Canada and Singapore with only occasional instances of judicial disapproval (specifically in Australia and England).

Chapter 4 examines the practical benefit test itself, as expressed by Glidewell LJ in *Williams v Roffey* and revised by Santow J in the Australian case of *Musumeci v Winadell Pty Ltd*,⁵¹ and questions its internal coherence and the manner in which it has been applied by the courts. The various internal inconsistencies and faults within the test will be highlighted, as will the multiple instances where the courts have utilised it in a haphazard manner or even with total disregard to Glidewell LJ's framework.

Chapter 5 discusses the theoretical difficulties inherent in the concept of 'practical' or 'factual' benefits. The principle appears both to conflict with numerous other established legal principles and to offend the bargain theory of consideration. Potentially, it also has limitless scope. The chapter therefore examines the principle's compatibility with the framework of Anglo-Australian contract law.

The purpose of Chapters 4 and 5 is to jointly support the primary contention that the practical benefit principle is fundamentally flawed and fails to address the principal problem confronting parties who seek to make unilateral contract variations: the requirement of consideration for such variations *itself*. This lays the groundwork for Chapter 6, which builds upon these chapters and recommends reform to the Anglo-Australian law of contract. It first argues that the decision in *Williams v Roffey* demonstrated the Court of Appeal's obvious discomfort with the existing legal duty rule and, more broadly, the general rule that contractual modifications be supported by consideration. It then takes the position that the practical benefit principle missed the point in providing a method of finding consideration when it was the requirement for consideration *itself* that should have been the issue in *Williams v Roffey*.

Chapter 6 then turns to discussing the alternative methods of enforcing unilateral contract variations. Given that, at present, Anglo-Australian contract law requires that any variations to a contract be supported by consideration, it is necessary to consider the efficacy of these other expedients so as to gauge the viability of this requirement and also to consider how else *Williams v Roffey* might have been decided.

⁵¹ (1994) 34 NSWLR 723.

Finally, with empirical support, the chapter demonstrates the heightened need for flexibility in the law of contract in the modern economy and suggests reform to the doctrine of renegotiation. Some alternatives are considered before abolition of the consideration requirement for variations is ultimately recommended as the most viable solution. It is further argued that abolishing this requirement, and utilising the normal rules of contract as well as the vitiating doctrines as safeguards, enables the problematic *Williams v Roffey* approach to be rejected whilst still making it possible to secure the sort of results it was intended to achieve. The conclusion summarises the key arguments presented in the thesis.

CHAPTER 1

CONSIDERATION AND THE EXISTING LEGAL DUTY RULE

'People who never do more than they are paid for, never get paid for more than they do'

The doctrine of consideration forms an integral part of the Australian law of contract. So wrote one commentator: 'Consideration is to contract law as Elvis is to rock-and-roll: the King'.² This body of law derives from its English counterpart, which was adopted in Australia upon British settlement from 1788.³ It is from this voluminous doctrine that the existing legal duty rule (to be discussed later in the chapter) and practical benefit principle derive. Whilst a comprehensive discussion of its pedigree is beyond the scope of this work, a brief historical discussion, as well as an understanding of its key rules and theories, is critical to providing a context.

1. *Covenant and Debt*

Whilst the precise origins of the doctrine of consideration cannot be conclusively identified,⁴ its roots can be traced to medieval times. By the 13th Century the 'writ of covenant' had developed as an action utilised by plaintiffs who sought performance of a breached promise made under seal (typically but not exclusively with respect to rights concerning land).⁵ It was generally regarded as an action for unquantified damages and/or specific performance⁶ which was initiated through an application to the local sheriff or directly through the courts.⁷ Where specific sums of money were sought to be recovered, however, the correct writ to use was the corresponding 'writ of debt',⁸ or the subsidiary

¹ American author and philosopher Elbert Hubbard (1856-1915). Quote cited in Daniel Diehl and Mark P Donnelly, *Elbert Hubbard: The Common Sense Visionary: A Business Vision for Our Times* (Spiro Press, 2003) 105.

² J D Gordon, 'A Dialogue About the Doctrine of Consideration' (1990) 75 *Cornell Law Review* 987, 987 (n 2).

³ 'Under the common law principles on the reception of English law it is clear that the general principles of unenacted English law were received by settled colonies': Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 2, 6-7.

⁴ J H Baker, *The Reports of Sir John Spelman* (Selden Society, 1978) vol 2, 286-7:

No aspect of the history of the common law has earned itself a heavier gloss of conflicting explanation than the evolution of the doctrine of consideration. No two writers have taken exactly the same view of the matter, and a century of discussion does not seem to have brought a consensus of opinion much closer.

See also J L Barton, 'The Early History of Consideration' (1969) 85 *Law Quarterly Review* 372; 'The origin of consideration is one of the great controversies in the history of contract law, inspiring nearly as many views as there are writers on the subject': Kevin Teeven, 'Mansfield's Reform of Consideration in Light of the Origins of the Doctrine' (1991) 21 *Memphis State University Law Review* 669, 671.

⁵ A Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1975) 10-11.

⁶ *Ibid* 13-14.

⁷ *Ibid* 9.

⁸ *Ibid* 53, 70.

‘writ of detinue’ in the case of chattels or their value.⁹ To found an action in debt under contract, the arrangement had to adhere to the doctrine of quid pro quo. That is, it had to be shown that ‘the debtor had actually received a material benefit from the creditor; this was the quid in return for which (pro quo) the defendant was saddled in debt’.¹⁰ The added benefit of an action for debt was that it was also available to recover sums of money promised under *informal* arrangements.¹¹

2. *Assumpsit*

Throughout the 14th and 15th Centuries, however, the action of ‘assumpsit’, a form of action on the case, became the primary mechanism for remedying contractual and tortious wrongs. The reason for this is that the writs of covenant and debt were insufficient to remedy the circumstances of each case coming before the courts. The writ of covenant, for example, was not available where the agreement in question was not in deed form (i.e. informal). Similarly, the writ of debt could not be utilised unless a specific sum of money owed under contract was sought. Even an action on assumpsit did not, at the time, apply to cases of pure nonfeasance;¹² that is, where a party merely failed to do something he or she was legally obliged to do.¹³ It was restricted to instances of malfeasance, where a party had done something imperfectly. This was established legal doctrine in England during the 15th Century.¹⁴ By necessity, and in the interests of justice, a contractual remedy had to lie where a party had simply failed to perform its contractual obligations.¹⁵ Finally, in *Pickering v Thoroughgood*,¹⁶ the English judiciary acknowledged this and conclusively extended the applicability of actions in assumpsit to cases of nonfeasance.

⁹ C H S Fifoot, *History and Sources of the Common Law* (Stevens, 1949) 217.

¹⁰ Simpson, above n 5, 193.

¹¹ S J Stoljar, *A History of Contract at Common Law* (Australian National University Press, 1975) 10-11.

¹² Simpson, above n 5, 222.

¹³ *Butterworth’s Concise Australian Legal Dictionary* (3rd ed, 2004) 299.

¹⁴ See, eg, *Watton v Brinth* (1400) Y.B. 2 Hen. IV, f. 3, pl. 9. As Ferson explains, the early courts could not amerce one who merely omitted to perform his simple agreement; there was no form of action to afford such relief. It was necessary, in order to recover on a simple agreement, that the facts of the case be warped into a shape that would fit an available form of action.

Merton Ferson, *The Rational Basis of Contracts and Related Problems in Legal Analysis* (Foundation Press, 1949) 124.

¹⁵ Simpson, above n 5, 199-200, 281.

¹⁶ (1532) *Spelman’s Reports*, vol 1, 4 (reproduced in J H Baker, *The Reports of Sir John Spelman* (Selden Society, 1979). Per Spelman J (at 5):

[I]n some books a difference has been taken between nonfeasance and malfeasance, so that an action of covenant lies upon the one and an action on his case lies upon the other, this is no distinction in reason. For if a carpenter covenants for £100 to make me a house, and does not make it before the day assigned, so that I go

*Slade's Case*¹⁷ took the action on assumpsit even further, recognising it as a single form of action available to remedy the breach of *any* informal agreements, effectively superseding the longstanding writ of debt.¹⁸ Cases based on breach of undertaking were made to fit within the framework of assumpsit by being constructed in terms of 'a tort done by the defendant (promisor) to the plaintiff (promisee)'.¹⁹ Assumpsit had thus evolved into a general action for 'breach of promise' and became 'the primary vehicle for litigation on contractual obligations'.²⁰ The natural consequence of this development was that the scope of promissory liability suddenly became unclear. Whereas alleged breaches of covenant could be resolved by reference to the relevant deed, and a writ of debt could be called upon to recover a certain amount of money due under formal or informal contracts, the action on assumpsit suddenly provided a means to enforce informal promises not involving debts or positive acts of misconduct. That is, it imposed a new liability upon parties in circumstances where the common law would previously have neglected to do so. As Simpson explains:

The extension of promissory liability into areas previously outside the scope of the common law generated a need for a new set of boundary markers. It was natural that in a doctrinal system of law there should be a place for a new body of doctrine, whose function was to define which promises should be actionable, and which should not give rise to legal liability.²¹

It was the modern doctrine of consideration that met this necessity and, in the process, revolutionised the English law of contract. It is significant that the law had taken to recognising that a promise in itself was *good consideration* for another party's undertaking.²² Thus it was not (as it previously was) necessary to show that the other party had actually *performed* their side of the agreement, merely that they had made a

without my lodging, I shall have an action on my case for this nonfeasance just as well as if he had made it badly.

¹⁷ (1602) 4 Co. Rep. 91a; 76 ER 1072.

¹⁸ *Ibid* Co. Rep. 94a-b; ER 1077:

[E]very contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money as such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt...

See also at Co. Rep. 93a; ER 1075: '[A]lthough an action of debt lies upon the contract, yet the bargainer may have an action on the case, or an action of debt at his election'.

¹⁹ Ferson, above n 14, 124.

²⁰ *Holt v Feigenbaum* 52 N.Y. 2d 291, 298 (1981) (Gabielli J).

²¹ A Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1975) 316.

²² See, eg, *Gower v Capper* (1596) Cro. Eliz. 543, 543; 78 ER 790, 790: '[A] promise against a promise is a sufficient ground for an action'.

reciprocal promise which was not honoured.²³ A contract could therefore be founded upon executory promises.²⁴ It remained to determine the basis upon which consideration would be found to render such promises (un)enforceable.

3. Rise and Fall of the 'Moral' Basis of Consideration

Some scholars have suggested that the consideration doctrine in fact derives from the doctrine of *causa promissionis*, a feature of the early Roman and modern civil legal systems.²⁵ This doctrine examined the parties' motives or reasons for making a contract in determining its validity.²⁶ Mason explains: 'Roughly speaking, the cause of a promise is the purpose for which it is made – not the immediate, personal motive of the actual promisor, but an abstract conventional purpose recognized by the law for the type of contract promise intended'.²⁷ If the promise was of sufficient significance, it was said to found a moral duty to fulfil the created expectation; a duty which the law then enforced.²⁸ 'In the civil law, agreement *without more* equals contract, as long as the agreement is a lawful one'.²⁹

The 'moral' basis for enforcing a contractual promise at common law was fervently advocated by Lord Mansfield during the second half of the 18th Century,³⁰ but despite

²³ D W Greig and J L R Davis, *The Law of Contract* (The Law Book Company, 1987) 8.

²⁴ The bargain theory, which we will encounter shortly, subsequently superimposed a requirement that the promises be made as part of a mutual exchange.

²⁵ A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 262.

²⁶ James Gordley, *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001) 10. The doctrine arose as a reconciliation between the canonical law (which assumed that a promise was in itself binding upon the conscience and simultaneously made with God) and the Roman civil law maxim *ex nudo pacto non oritur actio* (no cause of action arises from a bare promise): K O Shatwell, 'The Doctrine of Consideration in the Modern Law' (1954) 1 *Sydney Law Review* 289, 319.

²⁷ Malcolm S Mason, 'The Utility of Consideration – A Comparative View' (1941) 41(5) *Columbia Law Review* 825, 826.

²⁸ Sir Percy H Winfield, *Pollock's Principles of Contract* (Stevens, 13th ed, 1950) 136.

²⁹ J Denson Smith, 'A Refresher Course in *Cause*' (1951) 12 *Louisiana Law Review* 2, 4 (emphasis in original).

³⁰ *Hawkes v Saunders* (1782) 1 Cowp. 289, 290; 98 ER 1091, 1091: 'Where a man is under a moral obligation, which no Court of Law or Equity can enforce [sic], and promises, the honesty and rectitude of the thing is a consideration ... the ties of conscience upon an upright mind are a sufficient consideration'. Justice Buller concurred, saying: 'The true rule is, that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration': Cowp. 289, 294; 98 ER 1091, 1093. It has been suggested that Lord Mansfield 'did more than anyone else' to introduce the moral basis for contractual liability into the common law: Hugh E Willis, 'Rational of the Law of Contracts' (1936) 11 *Indiana Law Journal* 227, 233. Though not mentioned in *Hawkes v Saunders*, there was English authority supporting the moral basis for consideration dating back as far as 1703. In *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107, the defendant promised to safely transport the plaintiff's casks of brandy between

holding sway for some 60 years was unequivocally rejected in *Eastwood v Kenyon*.³¹ In that case it was rightly pointed out by Lord Denman (delivering the judgment for the court) that the moral basis for the enforcement of promises ‘would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise [would create] a moral obligation to perform it’.³² The law demanded more than a mere promise enforceable under conscience. What, then, did the consideration doctrine require of parties seeking to make a legally binding contract? Clarity would come in time.

4. 19th Century Developments

The doctrine of consideration as it is known today took shape in the 19th Century. This tumultuous era is ‘usually regarded as the classical age of English contract law’³³ by virtue of the fact that the framework of modern English contract law, founded on its distinct elements and littered with various rules, was constructed during this time. This development was also influenced by the range of then dominant political and economic philosophies in England, particularly individualism, economic liberalism and *laissez-faire*.³⁴ Freedom of contract was paramount;³⁵ society placed enormous value upon uninhibited enterprise and the legal enforcement of contractual agreements. But there remained the need to clearly identify the criteria by which contracts would be tested.

two cellars. During transport one of the casks was broken and several gallons of brandy lost. The court held that this detriment suffered by the plaintiff, consequential upon the defendant’s promise of safekeeping, was sufficient consideration to support a contract, the breach of which rendered the defendant liable. Justice Gould held that ‘if a man takes upon him expressly to [hold another’s good(s)] safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him’: Ld Raym 909; 92 ER 107. Similarly, Holt CJ held that ‘the owner’s trusting him with the goods is a sufficient consideration to oblige him to a careful management’: Ld Raym 919; 92 ER 113.

³¹ (1840) 11 Ad. & E. 438, 450-1; 113 ER 482, 486-7 (Lord Denman CJ).

³² Ibid Ad. & E. 450; ER 486. See also *Thomas v Thomas* (1842) 2 QB 851, where Patteson J said: ‘Motive is not the same thing with consideration. Consideration means something which is of value in the eye of the law, moving from the plaintiff’ (at 859). See also Oliver W Holmes, *The Common Law* (Little, Brown & Co, 1881) 296.

³³ N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 1269.

³⁴ Ibid 1269, 1277-8; J W Carter, *Carter’s Guide to Australian Contract Law* (LexisNexis Butterworths, 2nd ed, 2011) 22. The famous remarks of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 accurately reflect this attitude of the time:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

³⁵ Samuel Williston, ‘Freedom of Contract’ (1921) 6(4) *Cornell Law Quarterly* 365, 366. The author describes *laissez faire* as ‘a passionate exhortation to allow the free development of the individual, and to permit production and trade to follow their natural channels unimpeded. It was a cry for freedom’. See also Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 6-7.

The enormous body of case law emerging from the courts during this time demonstrated (albeit in disorderly fashion) that a number of essential features needed to be present in order to create a legally enforceable contract. The task of identifying these elements was not made easy by the inconsistency of the English judiciary. When confronted with contractual disputes, it was traditional for English judges to develop legal principles on an ad hoc basis so as to reach resolution on the facts of the particular case.³⁶ This produced a complicated and overwhelming ‘mass of technical rules’ from which the extrapolation of clear and consistent principles was near impossible.³⁷

Despite the weight of the challenge, a number of distinguished legal scholars worked exhaustively, drawing on the influence of the orderly Romanist traditions, to set about organising and giving structure to the law of contract.³⁸ Prominent academics and legal philosophers of the time, such as Sir Frederick Pollock and Sir William Anson, ‘sought to construct a theoretical and systematic framework of legal principle into which specific legal decisions could be fitted’.³⁹ Inspiration was also drawn from Joseph Powell’s influential work *An Essay upon the Law of Contracts and Agreements* of 1790, which sought to identify the rules upon which the decisions of the courts were based, and was widely credited as having achieved this objective.⁴⁰ The majority of texts attempting to comprehensively explain the law of contract were written in the 19th Century,⁴¹ and it is fair to say that the structure and content of contract law that these present – incorporating the central elements of offer, acceptance, consideration and intention – as drawn from the case law, have remained relatively unchanged to the present day.⁴² Similarly, the rules specific to each of these elements are now generally settled. We turn now to those elements the courts came to regard as essential to the establishment of valid consideration.

³⁶ P S Atiyah, *Essays on Contract* (Clarendon Press, 1986) 181-2.

³⁷ *Ibid.*

³⁸ Simpson, ‘Innovation in Nineteenth Century Contract Law’, above n 25, 254-5. See also P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 683: ‘It is to [the academics and legal philosophers of the 19th Century] that we owe much of the power of the concepts of the law of contract; the belief in the objective reality of these concepts – offer, acceptance, consideration, and so forth – if it was not created, was certainly significantly assisted by these writers’.

³⁹ Atiyah, above n 38, 682.

⁴⁰ A W B Simpson, ‘The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature’ (1981) 48 *University of Chicago Law Review* 632, 662.

⁴¹ Atiyah, above n 38, 682-3. See also Greig and Davis, above n 23, 14-15.

⁴² Michael Furmston, *The Law of Contract* (Butterworths, 1999) 159.

5. *The Essential Elements of Consideration*

(a) *Benefit/Detriment*

In *Currie v Misa*⁴³ Lush J expressed what has been judicially described as the ‘classic’⁴⁴ definition of consideration. In his Lordship’s words, ‘[a] valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other’.⁴⁵ Justice Patteson in *Thomas v Thomas* defined consideration in similar terms, stating that it must consist of ‘something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff’.⁴⁶ Since at least the end of the 16th Century this benefit/detriment requirement had been advanced by the courts as critical to the establishment of consideration⁴⁷ and the notion eventually ossified into a prerequisite.

(b) *Bargain*

A corollary requirement to the presence of benefit or detriment, sometimes expressed as a definition in itself, is that the benefit or the detriment be given *in return* for the promise in question: that is, that it was *bargained* for. This condition was expressed in *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd*,⁴⁸ where Lord Dunedin was ‘content to adopt ... the following words as to consideration’: ‘An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable’.⁴⁹ During the 16th and 17th Centuries, prior to

⁴³ (1875) LR 10 Ex 153.

⁴⁴ *Beaton v McDivitt* (1987) 13 NSWLR 162, 181.

⁴⁵ *Currie v Misa* (1875) LR 10 Ex 153, 162.

⁴⁶ (1842) 2 QB 851, 859; 114 ER 330, 333-4. It is questionable whether Patteson J intended to transpose the terms ‘plaintiff’ and ‘defendant’ in this statement, as the established common law rule of the time was that consideration must move from the promisee (i.e. the plaintiff, who benefits from the defendant’s promise of something more or a concession of some variety in return for the plaintiff’s reiterated promise to fulfil an existing legal duty): *Price v Easton* (1833) 4 B. & Ad. 433, 434; 110 ER 518, 519 (Denman CJ); *Laythoarp v Bryant* (1836) 3 Scott 238, 250 (Tindal CJ). Accordingly, consideration must logically subsist in a benefit to the *promisor* (defendant) or a detriment to the *promisee* (plaintiff).

⁴⁷ See, eg, *Stone v Wythipol* (1588) Cro. Eliz. 126, 126; 78 ER 383, 384.

⁴⁸ [1915] AC 847 (‘*Dunlop Pneumatic*’).

⁴⁹ *Ibid* 855. Lord Dunedin was citing the words of Sir Frederick Pollock in his work *Pollock on Contracts* (Stevens & Sons, 8th ed, 1911) at 175.

Lord Mansfield's attempts to enforce the 'moral' basis of consideration in *Hawkes v Saunders*,⁵⁰ the English judges appeared to favour the premise of 'bargain' as founding the element of consideration in contracts.⁵¹ The unequivocal rejection of Lord Mansfield's moral theory in *Eastwood v Kenyon*⁵² seemingly affirmed this view which was later explicitly championed by Lord Dunedin in *Dunlop Pneumatic*, who defined consideration in terms of 'bargain'.⁵³

Bargain was seen as proof of intention to be bound and the requirement that there must be some material inducement to the promisor's undertaking was said to be the best possible test in an uncertain world of the fact that a promise was made seriously and with the intent that it should create a legal liability.⁵⁴

Thus, the English judiciary clearly demanded more than the mere presence of a set of mutual promises; it instead required the additional presence of a 'bargain' having been struck between the parties.

It has been judicially stated that the element of bargain is inherent in Lush J's definition of consideration.⁵⁵ In any event, the bargain theory of consideration has been expressly approved of by the High Court of Australia, as evidenced by its unanimous statement in *Australian Woollen Mills Pty Ltd v Commonwealth*:

In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement. Between the statement or announcement, which is put forward as an offer capable of acceptance by the doing of an act, and the act which is put forward as the executed consideration for the alleged promise, there must subsist, so to speak, the relation of a *quid pro quo*.⁵⁶

⁵⁰ (1782) 1 Cowp. 289; 98 ER 1091. See Part III above.

⁵¹ Fifoot, above n 9, 398-9:

The Elizabethan judges, though the choice was not consciously present to their minds, were impelled by every tradition of the common law to prefer the principle of bargain ... The large commercial interests of the new age sought a general sanction not for charitable gifts but for business enterprise. In such an environment it is not surprising that the judges should have required some material inducement to the defendant's undertaking

⁵² (1840) 11 Ad. & E. 438; 113 ER 482.

⁵³ President Kirby, in *Beaton v McDivitt* (1987) 13 NSWLR 162, remarked that the reception of the bargain theory of consideration reflected 'the consequent final subordination of Roman Law doctrines, founded ultimately in notions of relationships and morality' (at 168).

⁵⁴ K C T Sutton, 'Promise and Consideration' in P D Finn (eds), *Essays on Contract* (Law Book Company, 1987) 35, 36.

⁵⁵ *Beaton v McDivitt* (1987) 13 NSWLR 162, 181 (McHugh JA).

⁵⁶ (1954) 92 CLR 424, 456-7 (per curiam) ('*Australian Woollen Mills*').

And so, in time, consideration ‘came to be seen as something of legal value given in exchange for a promise, which could be seen as the price of the promise’.⁵⁷ Numerous Australian cases following *Australian Woollen Mills* have stressed that the bargain theory remains a critical feature of the consideration doctrine and is founded not on notions of reliance or morality – as it historically was – but on exchange.⁵⁸ This simple exchange represented the ‘bargain’ between the parties. If a party made a promise to another party, who promised something in return, consideration would be found in their mutual undertakings.⁵⁹ But where one party to a pre-existing contract made a promise to give something *more* to, or accept *less* from, the other party, who merely reiterated their promise to complete their existing legal obligation(s), the courts developed the rule that consideration would not be found and the secondary agreement would not have the force of law. This rule, which finds its origins in the late 16th Century, came to be known as the ‘existing legal duty rule’ and would come to form a critical aspect of the doctrine of consideration. This chapter now turns to discussing the rule, which would eventually provide the impetus for the development of the practical benefit principle.

6. *The Existing Legal Duty Rule*

In basic terms, the existing legal duty rule stipulates that the promise to perform, or the actual performance of, an existing legal duty does not suffice as consideration to support a contract. The rule can manifest itself in four types of situation, the first of which occurs

⁵⁷ Paterson, Robertson and Duke, above n 35, 92. See also K C T Sutton, *Consideration Reconsidered* (University of Queensland Press, 1974) 14; Greig and Davis, above n 23, 21. It is interesting to note that earlier cases preceding both *Currie v Misa* (1875) LR 10 Ex 153 and *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847 had alluded to the crucial elements of benefit/detriment and bargain. In *Bunn v Guy* (1803) 4 East 190; 102 ER 803, Lord Ellenborough CJ stated (at East 194; ER 804) that ‘[a] consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself’.

⁵⁸ See, eg, *Coulls v Bagot’s Executor and Trustee Co Ltd* (1967) 119 CLR 460, 478 (Barwick CJ), 498 (Windeyer J); *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353, 373 (Windeyer J); *Beaton v McDivitt* (1987) 13 NSWLR 162, 168 (Kirby P), 181-2 (McHugh JA).

⁵⁹ This would give rise to executory obligations on the part of both parties and constitute a *bilateral* contract. ‘Under [bilateral] contracts ... each party undertakes to the other party to do or to refrain from doing something, and in the event of his failure to perform his undertaking, the law provides the other party with a remedy’: *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 82 (Diplock LJ). This type of contract must be contrasted with *unilateral* contracts, which are created when a party makes an offer which is accepted in return for the performance of a specified act. In such cases ‘the consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer’: *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ). Accordingly, when a unilateral contract is formed the offeree’s obligations are executed, whereas with bilateral contracts both the offeror’s and offeree’s obligations are executory. There is no ‘exchange of promises’ in unilateral contracts, however the requirement of quid pro quo is still present.

in the termination stage of a contract and is better known as the ‘part-payment of debt’ principle. The rule in this context states that a debtor’s promise to pay part of a debt will not amount to good consideration for the creditor’s promise to accept the part-payment in full satisfaction of the debt.⁶⁰ This rule will be discussed in Part VII of this Chapter.

The remaining three types of situation in which the existing legal duty rule can arise are as follows: (1) where a plaintiff is bound by law to perform a duty; (2) where a plaintiff is bound by an existing contract to perform a duty for a third party; and (3) where a plaintiff is bound by an existing contract to perform a duty for the defendant. The first two scenarios will be briefly explored before the third, from which the practical benefit principle derives, is examined in detail.

(a) Duties imposed by law

Where a person is lawfully required to perform a certain duty, the promised performance of that duty cannot constitute good consideration for a promise made by the party to whom the duty is owed. In *Collins v Godefroy*⁶¹ the plaintiff, a lawyer, was subpoenaed to give evidence in the defendant’s trial. The plaintiff demanded from the defendant his regular attendance fee of six guineas, however the defendant did not pay. When the plaintiff sued to recover the alleged debt, it was held that the defendant’s promise to pay was not supported by consideration from the plaintiff. Lord Tenterden CJ said that ‘[i]f it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration’.⁶²

Where, however, the circumstances demonstrate that a person has exceeded their legal duty requirements to a sufficient degree, consideration may be found. In *England v Davidson*⁶³ the defendant offered a reward to anyone who could provide information

⁶⁰ *Pinnel’s Case* (1601) 5 Co. Rep. 117a; 77 ER 237; *Foakes v Beer* (1884) 9 App. Cas. 605. This rule does not apply where the debtor gives something other than money: *Pinnel’s Case* (1601) 5 Co. Rep. 117a, 117a; 77 ER 237, 237. Leonardo da Vinci was once offered a vineyard on the outskirts of Milan, Italy in full satisfaction of outstanding accounts held against the city’s former Duke Ludovico Sforza for commissioned artistic works: Sherwin B Nuland, *Leonardo Da Vinci* (Phoenix, 2000) 40.

⁶¹ (1831) 1 B. & Ad. 950; 109 ER 1040.

⁶² *Ibid* B. & Ad. 956-7; ER 1042.

⁶³ (1840) 11 Ad. & E. 856; 113 ER 640.

which led to the conviction of a particular felon. The plaintiff, a police officer in the region, gave such information. The defendant refused to tender the reward, arguing that the plaintiff had merely performed his legal duty to combat crime in the district. Lord Denman CJ, in a very brief judgment, rejected this plea, holding that services such as voluntarily giving evidence of the kind described went beyond the plaintiff's general duties as a police officer and constituted good consideration for the promised reward.⁶⁴

In the context of public duties, the existing legal duty rule is clearly justified on grounds of policy. It is critical that the law of contract 'does not encourage public officials and those involved in the administration of justice to be influenced by promises of extra rewards for discharging their responsibilities'.⁶⁵ There have, however, been judicial statements to the effect that the existing legal duty rule should not apply to promises to perform duties imposed by law.⁶⁶ Some scholars contend the rule is no longer justifiable in this context given the increasing number of government services which are now paid for by consumers in modern times.⁶⁷ Regardless, the rule remains firm.

(b) Duties imposed by contract proffered to a third party

If A owes a duty to B under an existing contract, A's actual or promised performance of the duty does not amount to consideration in return for something more promised by B.⁶⁸ However, where the existing duty to B is thereafter promised to C, this will amount to good consideration under a contract between A and C. In *Shadwell v Shadwell*⁶⁹ the plaintiff's uncle promised to pay him the sum of £150 per year if he married a particular woman. Though the requirement of marriage was not expressly stated in the promissory letter given to the plaintiff from his uncle, this was the obvious implication to be drawn from its wording. When his nephew married the designated woman, he paid certain of the promised sums but later fell into arrears before passing away. The plaintiff sued his uncle's personal representatives to recover the monies owed. The defendants alleged that

⁶⁴ *Ibid* Ad. & E. 858; 113 ER 641. See also *Glasbrook Bros v Glamorgan County Council* [1925] AC 270.

⁶⁵ Paterson, Robertson and Duke, above n 35, 101. See also Greig and Davis, above n 23, 101.

⁶⁶ See, eg, *Ward v Byham* [1956] 1 WLR 496, 498 (Denning LJ); *Williams v Williams* [1957] 1 WLR 148, 151 (Denning LJ); *Popiw v Popiw* [1959] VR 197, 199 (Hudson J).

⁶⁷ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 165.

⁶⁸ This scenario, and the exceptions which apply, are explored in the next section which deals with contractual modifications in a two-party situation.

⁶⁹ (1860) 9 C.B. (N.S.) 159; 142 ER 62.

the plaintiff had provided no consideration for his uncle's promise, as he was already bound to marry his partner prior to his uncle writing the promissory letter. Chief Justice Erle held, however, that the plaintiff's agreement to wed was a valid consideration for his uncle's promise of annuity, as he had suffered a detriment in that he

may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld.⁷⁰

Moreover, the uncle had received a benefit in that his nephew's marriage could be seen as 'an object of interest to a near relative, and in that sense a benefit to him'.⁷¹ Despite an existing legal duty being proffered by the plaintiff in exchange for his uncle's promise, the arrangement nonetheless accorded with the doctrine of consideration given that the defendant was a third party. Consequently, the third-party exception was born and the principle was later summarised succinctly in *Pao On v Lau Yiu Long* where the English Privy Council said:

Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. In *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd. (The Eurymedon)* [1975] A.C. 154, 168 the rule and the reason for the rule were stated: 'An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration ... the promisee obtains the benefit of a direct obligation This proposition is illustrated and supported by *Scotson v. Pegg* (1861) 6 H. & N. 295 which their Lordships consider to be good law'. Unless, therefore, the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress, the [agreement will be] ... supported by valid consideration.⁷²

(c) Duties imposed by contract between promisor and promisee

We come now to the third and most common scenario in which the existing legal duty rule can have effect: the modification of existing contracts between plaintiff and defendant. The rule has caused the most controversy in this context.⁷³ One of the earliest known instances where it was applied is the case of *Greenleaf v Barker*.⁷⁴ John Barker was bound by an obligation to pay Thomas Greenleaf £5 on November 1. Barker contended that the parties reached an agreement whereby he would pay this amount on

⁷⁰ Ibid C.B. (N.S.) 159, 174; ER 62, 68.

⁷¹ Ibid.

⁷² [1980] AC 614, 632.

⁷³ Mark B Wessman, 'Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration' (1996) 29 *Loyola Los Angeles Law Review* 713, 743.

⁷⁴ (1590) Cro. Eliz. 193; 78 ER 449.

November 3 ‘without suit or trouble’ in return for Greenleaf’s promise to deliver to him a third party’s bond to the value of twenty shillings. Barker later sought to enforce this agreement and succeeded at first instance, prompting Greenleaf to appeal. On a writ of error, the Queen’s Bench held that Barker’s promise lacked consideration, for he had merely reiterated his promise to perform an existing legal duty; namely, pay the money due to Greenleaf by November 1. A similar finding was reached in *Dixon v Adams*⁷⁵ though debate persisted amongst the judiciary as to whether or not a reiterated promise to perform an existing duty might be regarded as good consideration for something more from the promisor.⁷⁶ Clarification was finally achieved following the sailors’ cases of the late 18th and early 19th Centuries.

The starting point is *Harris v Watson*.⁷⁷ In that case the defendant, captain of a ship bound for Portugal, promised extra wages to his crew to navigate the vessel when it fell into danger. He later refused to pay the extra wages and the plaintiff, a member of his crew, sued to recover them. Lord Kenyon held that to support such an action would endanger the British maritime industry. He explained the matter in this way:

It has been long since determined, that when the freight is lost, the wages are also lost. This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.⁷⁸

For Lord Kenyon, public policy negated the enforcement of such contractual arrangements and did not necessitate enquiries into the sufficiency of the consideration tendered. An analysis on this footing would not arise until some years later.⁷⁹ At this juncture it is important to recognise that during this time it was in fact illegal for a sailor to fail to complete a voyage;⁸⁰ this amounted to ‘desertion’ for which the penalty was forfeiture of all due wages.⁸¹ However, an exception was made – and the right to recover

⁷⁵ (1597) Cro. Eliz. 538; 78 ER 785.

⁷⁶ Fifoot, above n 9, 404.

⁷⁷ (1791) Peake 102; 170 ER 94 (*Harris v Watson*).

⁷⁸ Ibid Peake 103; ER 94.

⁷⁹ See the discussion below of *Stilk v Myrick* (1809) 2 Camp. 317; 170 ER 1168.

⁸⁰ Greig and Davis, above n 23, 109. For an annotated summary of the relevant legal provisions under British maritime law of this era, see William D Seymour, *The Merchant Shipping Act, 1854* (W G Benning & Co, 1854).

⁸¹ *Limland v Stephens* (1801) 3 Esp. 269, 270; 170 ER 611, 612 (Lord Kenyon). During the reign of Queen Victoria the *Merchant Seamen Act 1854* was passed which made desertion punishable by ‘imprisonment for any period not exceeding twelve weeks, with or without hard labour’ as well as forfeiture of ‘all or any part

wages preserved – where the commander (and, indirectly, the owner of the vessel) breached their contract with sailors in their employ by, for example failing to provide adequate provisions such as food,⁸² or acting in a cruel or unreasonable manner towards them,⁸³ or where, most importantly, the vessel had become dangerously unseaworthy or lacked sufficient crew.⁸⁴ Hence, there existed a perennial incentive for ship owners and operators to retain their crew in times of great need, as in *Harris v Watson*. Promises of additional wages were the obvious inducement and frequently achieved this end; however the precedent established in *Harris v Watson* subsequently barred plaintiff seamen from recovering any promised additional wages on the basis of public policy.⁸⁵

When in 1809 the seminal case of *Stilk v Myrick*⁸⁶ came before the King’s Bench, Lord Ellenborough took a fundamentally different approach. In that case a pair of sailors deserted a ship travelling from London to the Baltic. The captain attempted to obtain replacements during a stopover in Sweden but was unsuccessful. To guarantee the ship’s return to England, the captain promised the nine remaining crew-members that he would divide the deserters’ wages equally among them if they agreed to remain with the ship and guide it home. They agreed to his terms. When the ship arrived back in England the captain refused to pay the extra sum promised to the crew. The plaintiff, one of the crewmen, sued to recover the money. Lord Ellenborough held that the promise of extra payment was void for want of consideration, saying:

Before [the crew] sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed ... [T]he desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port.⁸⁷

of the clothes and effects [the deserter left] on board, and all or any part of the wages or emoluments which [the deserter had] earned’: s 243(1).

⁸² *The ‘Castilia’* (1822) 1 Hagg. 59; 166 ER 22 (plaintiff sailor not provided with breakfast or dinner by the defendant ship captain during the course of a voyage, prompting desertion but not disentitling him to his wages).

⁸³ *Limland v Stephens* (1801) 3 Esp. 269; 170 ER 611 (plaintiff sailor beaten several times by the defendant ship captain during the course of a voyage prompting desertion but not disentitling him to his wages).

⁸⁴ *Hartley v Ponsonby* (1857) 7 El. & Bl. 872; 119 ER 1471.

⁸⁵ It would seem that *Harris v Watson* was the leading precedent up until the decision in *Stilk v Myrick* (discussed further on) in 1809, and there does not appear to be a reported case applying this decision in the interim. Indeed Glidewell LJ in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 labelled *Harris v Watson* the ‘predecessor’ to *Stilk v Myrick* (at p 14). Earlier the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614, when considering the ‘seaman cases’ in its discussion of the existing legal duty rule, referred only to these two cases (see pp 632-3).

⁸⁶ (1809) 2 Camp. 317; 170 ER 1168 (*‘Stilk v Myrick’*).

⁸⁷ *Ibid* Camp. 319-20; ER 1169.

The clear principle to emerge from this judgment is that a promise to perform a duty one was already contractually bound to perform cannot amount to consideration for a promise of something more from the party to whom the existing obligation is owed.⁸⁸ Counsel for the defendant contended that the agreement ‘was contrary to public policy’ and should not have been enforced on this basis.⁸⁹ This submission was based on Lord Kenyon’s markedly different judgment in *Harris v Watson*.⁹⁰ In *Stilk v Myrick*, however, Lord Ellenborough held that, whilst *Harris v Watson* ‘was rightly decided’, it was not grounded upon principles of public policy as much as on the rules of contract law.⁹¹ The agreement was not void because it would have invited extortionate demands from sailors in similar situations, but because it lacked consideration. His Lordship explained that the defendant’s promise of extra wages may have been enforceable if, for example, the sailors had the option of leaving their positions of employment once in Sweden and forbore from doing so, or if they had assumed greater duties than those they were already contractually bound to fulfil.⁹²

Interestingly, the Espinasse Reports version of the case suggests that *Stilk v Myrick* was also decided on the basis of public policy;⁹³ however, Campbell’s version is widely regarded to be the more accurate and authoritative of the two.⁹⁴ Nonetheless some

⁸⁸ Similar sentiments were expressed around the same time by judges across the Pacific: see, eg, *Bartlett v Wyman* 14 Johns. 260 (1817) where a ship captain’s verbal promise of additional wages to seaman was held to be void for want of consideration. Justice Spencer held (at 262):

To allow the seamen, at an intermediate port, to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract, thus extorted, binding on the master of the ship, would be ... holding out encouragement to a violation of duty, as well as of contract. ... [T]o put the master at the mercy of the crew, takes away all reciprocity.

⁸⁹ *Stilk v Myrick* (1809) 2 Camp. 317, 318; 170 ER 1168, 1169.

⁹⁰ (1791) Peake 102; 170 ER 94.

⁹¹ *Stilk v Myrick* (1809) 2 Camp. 317, 319; 170 ER 1168, 1169. In *The ‘Araminta’* (1854) 1 Sp. Ecc. & Ad. 224; 164 ER 130, however, a case which involved similar facts, it was held that a ship captain’s executed promise of additional wages to his crew (above that which they were already entitled to receive) in return for their continued service on the vessel from which several crew members had deserted was not only void for want of consideration, but illegal in its entirety.

⁹² *Stilk v Myrick* (1809) 2 Camp. 317, 319; 170 ER 1168, 1169.

⁹³ *Stilk v Meyrick* (1809) 6 Esp. 129; 170 ER 851. The Espinasse report of the case spells the defendant’s name as ‘Meyrick’.

⁹⁴ See Peter Luther, ‘Campbell, Espinasse and the Sailors: Text and Context in the Common Law’ (1999) 19 *Legal Studies* 596, particularly pp 528-37; Hugh Collins, *The Law of Contract* (Cambridge University Press, 4th ed, 2003) 344; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (*‘The Atlantic Baron’*) [1979] 1 QB 705, 712 (Mocatta J). In *Redhead v Midland Railway Co* (1866) LR 2 QB 412, Blackburn J even went as far as to say that Espinasse did not have ‘such a character for intelligence and accuracy as to make it at all certain that the facts [were] correctly stated, or that the opinion of the judge was rightly understood’ (at 437). Justice Maule is also said to have remarked that he did not care for Espinasse ‘or any other ass’: A T H Smith, *Glanville Williams: Learning the Law* (Sweet & Maxwell, 13th ed, 2006) 37, citing Sir Chartres Biron, *Without Prejudice* (Faber and Faber, 1936) 88. Regardless, some

commentators maintain that, in spite of appearances, the courts continue to decide existing legal duty cases on the basis of public policy:

In reading the legal-duty cases, it is difficult to avoid the conclusion that many or most of them are covertly decided on grounds of fairness. The judicial technique is simple, even primitive. If the court thinks the new contract was unfairly procured, it simply applies the legal-duty rule. If the court thinks the new contract was fairly procured, it seeks to apply an exception to the rule.⁹⁵

Others have argued that, contrary to Lord Ellenborough's own statement in *Stilk v Myrick* that he was disregarding the 'policy' of the agreement,⁹⁶ his Lordship was indeed conscious of the apparent impropriety surrounding the extraction of the promised pay rise and struck down the agreement accordingly under the veil of the existing legal duty rule.⁹⁷

It is also noteworthy that neither Espinasse's nor Campbell's reported versions of the case are clear as to which parties were privy to the original service contract. It is assumed that the ship captain had the authority to bind the ship's owners to a promise to pay increased wages to the crew through, for example, the doctrine of agency. An intriguing implication of this uncertainty, however, is that it is open to speculate as to different potential outcomes in this case. For example, had the sailors' promise to man the ship been made initially to the ship's *owners*, and the reiterated promise to do so subsequently made to the ship *captain*, consideration may have been found in that the agreement would have fallen under the three-party exception to the existing legal duty rule (see above). That is, the sailors' promise to the captain to fulfil their contractual obligation to man the ship, having already been made to a third party (i.e. the ship owners), would amount to consideration for the captain's promise to pay the sailors increased wages.⁹⁸ Baron Wilde in *Scotson v Pegg*⁹⁹ noted that there was as at 1861, and thus 52 years after *Stilk v Myrick* was decided, 'no authority for the proposition that where there ha[d] been a promise to one person to

commentators maintain that the existing legal duty rule is grounded in public policy notwithstanding that Campbell's accepted report of the case indicates otherwise: see, eg, Furmston, above n 42, 216.

⁹⁵ Melvin A Eisenberg, 'The Principles of Consideration' (1982) 67 *Cornell Law Review* 640, 647.

⁹⁶ *Stilk v Myrick* (1809) 2 Camp. 317, 320; 170 ER 1168, 1169.

⁹⁷ F M B Reynolds and G H Treitel, 'Consideration for the Modification of Contracts' (1965) 7 *Malaya Law Review* 1, 5-6. The authors go on to say it was a 'pity' that Lord Ellenborough obscured the public policy issue by utilising the doctrine of consideration, thereby making it 'hard to discriminate satisfactorily between those promises resulting in factual (but not legal) benefit to the promisor which should, and those which should not, be enforced' (at p 6).

⁹⁸ This is a possibility contemplated by Reynolds and Treitel: *ibid* at p 5.

⁹⁹ (1861) 6 H. & N 295, 300; 158 ER 121, 123.

do a certain thing, it [was] not possible to make a valid promise to another to do the same thing'.¹⁰⁰ Another possibility is that the ship captain was himself the owner, once again bringing the existing legal duty rule into play. Ultimately one can only speculate on such possibilities.

Now if an agreement to do something one was already contractually bound to do is void for want of consideration, it stands to reason that an agreement to do something more is not. The decisive authority on point is *Hartley v Ponsonby*;¹⁰¹ a case factually similar to *Stilk v Myrick*. There a ship docked at Port Philip,¹⁰² Australia en route to Bombay,¹⁰³ India. Whilst in Port Philip, 17 of the 36 crew members were imprisoned for refusing to work. Of the remaining crew only four or five were able seamen. Thus to proceed with the voyage shorthanded was perilous and would impose considerable labour upon such a small crew. The captain, in order to secure the services of his remaining crew, promised each of them an additional sum above their wages. The plaintiff, one such crew member, was given a promissory note to the value of £40.¹⁰⁴ When the crew agreed and safely navigated the ship to India, the captain and owners of the vessel refused to pay the additional sums promised. The plaintiff sued to recover his share and succeeded because, unlike in *Stilk v Myrick*, here he had exceeded his existing legal duty by way of agreeing to man the ship and continue with the journey in circumstances where he was *not obliged* to do so.¹⁰⁵ This constituted good consideration. Justice Coleridge, in the majority, said:

[O]wing to the excessive labour which would be imposed, it was not reasonable to require the mariners to go to sea. If they were not bound to go, they were free to make a new contract: and the master was justified in hiring them on the best terms he could make. It may be that the plaintiff took advantage of his position to make a hard bargain; but there was no duress.¹⁰⁶

¹⁰⁰ His Lordship did, however, 'accede to the proposition that if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual': *Scotson v Pegg* (1861) 6 H. & N 295, 300-1; 158 ER 121, 123.

¹⁰¹ (1857) 7 El. & Bl. 872; 119 ER 1471. See also *Hanson v Royden* (1867) LR 3 CP 47.

¹⁰² Port Phillip is a large bay on Australia's south-eastern coast, covering close to 2000 square kilometres of Victoria and incorporating its capital city Melbourne.

¹⁰³ Now known as 'Mumbai'.

¹⁰⁴ It is unclear on the facts whether each of the crew received the same amount of additional money. Indeed the report of the case indicates that just eight further seamen received a promissory note and that '[c]ontradictory evidence was given as to what passed between the defendant and the seamen at the time of this agreement being made': 7 El. & Bl. 872, 874; 119 ER 1471, 1472.

¹⁰⁵ Gilmore argues that 'the seamen in *Stilk v Myrick* were doing more work on the return voyage than they had agreed to do – their own work plus the work of the two deserters' which should have sufficed as good consideration for the promise of additional wages: Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1974) 24.

¹⁰⁶ *Hartley v Ponsonby* (1857) 7 El. & Bl. 872, 878; 119 ER 1471, 1473.

Interestingly, the Court referred to the promise of additional wages as a ‘new contract’, as opposed to the modification of the original contract.¹⁰⁷ It is questionable whether a new contract had been formed supplanting, or merely modifying, the original. The implications are significant, for if the original contract had been replaced in its entirety, as opposed to being altered, then the existing legal duty rule would have had no effect. The authorities of the time stipulated that the question of whether modification or supplantation had occurred was one of fact to be determined by objectively ascertaining the intentions of the parties.¹⁰⁸ The facts in *Hartley v Ponsonby* clearly indicate that the captain intended merely to alter the original agreement by promising ‘a sum of money *in addition to their wages*’; wages attaching to the *original* contract to navigate the ship from Australia to India.¹⁰⁹

Stilk v Myrick was applied in *Harris v Carter*,¹¹⁰ a factually similar case save for the fact that the captain of the ship owned by the defendants had voluntarily consented to the discharge of some of the crew in port at their destination. As a consequence the remaining crew’s agreement to man the ship for the return journey constituted fresh consideration for the captain’s promise to pay them an increased amount of wages (£6 per month as opposed to the original £3 agreed upon). However, on the evidence, the plaintiff had not been released from his prior contract and was so bound to it. His suit to recover the higher amount of pay failed accordingly. Lord Campbell CJ, the same Campbell who originally reported *Stilk v Myrick* back in 1809, put it thus:

I am of opinion that the nonsuit was most properly entered, and ought not to be disturbed. Had the plaintiff been relieved from the obligation which he had contracted towards the shipowners, he might have entered into a fresh contract, and, under some circumstances, the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him. Had there, for instance, been an entire change of the voyage it might have been so. But here there were no circumstances of that kind. The voyage remained the same voyage for which the men had shipped; there was no consideration for a promise to the plaintiff; and the captain had no authority to bind the owners. The whole foundation for the new contract was the desertion at [the ship’s destination] ...

¹⁰⁷ Ibid El. & Bl. 878; ER 1473 (Lord Campbell CJ, Coleridge and Erle JJ), El. & Bl. 879; ER 1473-4 (Crompton J).

¹⁰⁸ *Stead v Dawber* (1839) 10 Ad. & E. 57, 64-5; 113 ER 22, 25 (Lord Denman CJ). For later applications of this principle see: *Royal Exchange Assurance v Hope* [1928] 1 Ch 179, 191; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340; *Brikom Investments Ltd v Carr* [1979] QB 467; *Tallerman & Co Pty Ltd v Nathan’s Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533.

¹⁰⁹ *Hartley v Ponsonby* (1857) 7 El. & Bl. 872, 872; 119 ER 1471, 1471 (emphasis added).

¹¹⁰ (1854) El. & Bl. 559; 118 ER 1251.

Now nothing which happened [there] could set the plaintiff free, or be any consideration for a fresh promise.¹¹¹

His Lordship therefore applied and approved of the principle in *Stilk v Myrick* but went on to state his reservations of that case's firm rejection of the public policy argument which arose in *Harris v Watson*:

I cannot altogether agree with Lord Ellenborough, in *Stilk v. Myrick*, in discarding the ground of public policy on which Lord Kenyon relied in *Harris v. Watson*; for I think it would be most mischievous to commerce, if it were supposed that captains had power, under such circumstances, to bind their owners by a promise to pay more than was agreed for.¹¹²

It appears, however, that his Lordship was restricting this argument to the doctrine of agency. Moreover, his reasoning is clearly framed within the context of consideration throughout the judgment, removing any doubt as to the strength of the existing legal duty rule in the context of contract modifications.

The principle in *Stilk v Myrick* received further approval in *Frazer v Hatton*.¹¹³ There the defendant ship owners engaged the services of the plaintiff, a seaman, to serve as a steward aboard one of its ships for a fee of £3 per month and for a term not exceeding three years. The ship was to sail from England to Africa and trade in its ports, bays and rivers before returning at the expiry of the term. The articles signed and binding the parties contained a provision that required the crew to 'be transferred to any other ship in the same employ' where necessary. After spending some time on the first ship, the plaintiff was asked by its captain to transfer to another ship owned by the defendants. There he signed new articles raising his wage to £4 per month. When his term was up and the ship returned to England, he claimed his inflated wages for the time spent on the second ship. 'The defendants refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship "in the same employ"'.¹¹⁴ The plaintiff then declined to accept the rate of wages under the original articles and brought a suit seeking the higher rate. Justice Williams held that the plaintiff was bound by the original articles he signed, remunerating him at the rate of £3 per month for his three-year term. Accordingly, any agreements increasing this amount for the same duties

¹¹¹ Ibid El. & Bl. 561-2; ER 1252-3.

¹¹² Ibid El. & Bl. 562; ER 1253.

¹¹³ (1857) 2 C.B. (N.S.) 512; 140 ER 516.

¹¹⁴ Ibid C.B. (N.S.) 512; ER 516.

he was previously bound to perform for the defendants in their employ were void for want of consideration.¹¹⁵ *Stilk v Myrick* was expressly cited as authority for this proposition.

Whilst the existing legal duty rule was originally called upon to resist claims by sailors in actions for wage recovery, it eventually came to have a more general application.¹¹⁶ In *Jackson v Cobbin*,¹¹⁷ one of the earliest examples, it was raised in the context of obligations arising under a contract ancillary to a tenancy agreement. The plaintiff agreed to rent premises from the defendant for a period of three years to use for his business in alcohol sales. By later agreement the defendant promised the plaintiff to perform and fulfil all undertakings contained within the lease, including allowing him to stay for the full term of the lease and operate his business. The plaintiff made a reciprocal promise to honour his obligations under the lease. The defendant later prematurely evicted the plaintiff from the premises, in breach of the tenancy agreement. The plaintiff sued, claiming he provided good consideration for the defendant's promise not to evict by his reciprocal promise to honour the lease conditions.

Parke B held that the plaintiff's promise did not constitute valid consideration to render the defendant's promise enforceable. The plaintiff was previously bound by the terms of the lease to honour its conditions and this obligation could not support a subsequent agreement modifying the terms of the original lease.¹¹⁸ Any cause of action brought by the plaintiff would have to be based on the original claim (i.e. breach of tenancy) and not on the new promise.¹¹⁹ Similarly, in *Bayley v Homan*,¹²⁰ a tenant's promise to repair his landlord's premises whilst in possession did not amount to good consideration for the landlord's subsequent promise to forbear bringing an action against him if the repairs were not completed by a certain date.¹²¹

¹¹⁵ Ibid C.B. (N.S.) 524-5; ER 521. It was also said that the ship captain had no authority to make such an agreement with the plaintiff, as the articles expressly provided that the agreement was between the defendants and each of the crewmen: at 2 C.B. (N.S.) 512 and 524-5; ER 516 and 521.

¹¹⁶ Although the existing legal duty rule expressed in *Stilk v Myrick* remained a feature in sailors' cases throughout the late 19th and into the early 20th Centuries: see, eg, *Turner v Owen* (1862) 3 F & F 176; 176 ER 79; *Liston v Owners of Steamship Carpathian* [1915] 2 KB 42.

¹¹⁷ (1841) 8 M. & W. 790; 151 ER 1259.

¹¹⁸ Ibid M. & W. 797-8; ER 1262.

¹¹⁹ See *Reeves v Hearne* (1836) 1 M. & W. 323; 150 ER 457.

¹²⁰ (1837) 3 Bing. (N.C.) 915; 132 ER 663.

¹²¹ The result would possibly be different in modern times under the rule in *Wigan v Edwards* (1973) 1 ALR 497 (discussed below).

In *Lewis v Edwards*¹²² the plaintiff entered into a business partnership with two other gentlemen in wholesale pharmaceuticals. The partners later declared bankruptcy and title to their estate reverted to the defendant, the official assignee. Notwithstanding the usual undertakings that would normally occur in liquidation proceedings, the plaintiff and defendant entered into a written agreement in which the plaintiff would ‘cover any deficiency’ in the repayment of debts owed by the defunct firm. A separate article within the agreement empowered the defendant to collect any outstanding debts and satisfy the plaintiff’s account with a former creditor. The plaintiff argued that this article implied a requirement on the defendant’s part to transfer any funds to him *directly* in the first instance, and that his promise to cover any deficiencies amounted to good consideration for such an implied undertaking. Parke B held that this was not the case, given that, under the rules of partnership, as a solvent partner, the plaintiff was already bound to cover any deficiencies that might arise. His Lordship said:

[The meaning of the written agreement] certainly is, that Mr. Edwards, when empowered by the plaintiff to collect, should collect the debts, and should pay such debts as he should collect to [the creditor] for the plaintiff’s account: and as [the creditor was] not [a] stake-holder ... and had no trust to perform for any other party than [the plaintiff], it was just the same as if the monies had been agreed to be paid to the plaintiff himself, which, it may be well contended, is equivalent to an undertaking to hold the monies when received on the plaintiff’s account. But admitting this to be so, the question is, whether this agreement is obligatory, and operates as an assignment to the plaintiff alone, for a good consideration, of the funds belonging to the assignees jointly with the plaintiff; and we are of opinion that it does not. There is no consideration moving from the plaintiff, sufficient to make the agreement binding on all parties, and capable of being enforced as a matter of legal obligation. The agreement imposes upon the plaintiff no burthen which he was not before liable to: the assignees and defendant have no benefit which they had not before. The whole instrument is nothing more than a statement of their relative duties and rights, already existing, with some matters of arrangement, which cannot be made the subject of an action.¹²³

Employment contracts outside of the maritime context similarly attracted the application of the existing legal duty rule. The plaintiff in *Swain v West (Butchers) Ltd*¹²⁴ was dismissed from his employment by the defendants on allegations of fraudulent behaviour, namely mislabelling meat products with intent to sell at profit. He brought an action for wrongful dismissal and breach of contract, claiming that the chairman of the defendant company had orally agreed to indemnify him against disciplinary action if he provided evidence against the managing director with respect to the latter’s involvement in these fraudulent business practices. He agreed and made a full statement but was discharged

¹²² (1840) 7 M & W 300; 151 ER 780.

¹²³ *Ibid* M & W 305; ER 782.

¹²⁴ [1936] 1 KB 224.

nonetheless. The pertinent issue, as identified by Finlay J, was whether the plaintiff had provided consideration for the oral contract of indemnity, the breach of which would have rendered his termination unlawful. His Lordship held that there was no consideration here. The plaintiff's supply of information regarding the fraudulent behaviour of the company's staff was incidental to his *existing duties* as an employee, not to the oral agreement:

[The chairman] was entitled to ask the plaintiff about the fraud and the plaintiff was bound to answer all lawful questions put on the matter; and this was a lawful question. There was a request for information and a voluntary supplying of information. All the authorities go to show that there was here no consideration. The employee was carrying out the contract of service and supplied this information in doing so and not under the terms of the alleged verbal agreement.¹²⁵

The existing legal duty rule was also applied to sales and other contracts. An oft-cited example is *Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd*,¹²⁶ where the defendant agreed to sell the plaintiff a quantity of galvanised iron at a fixed price. Later the defendant informed the plaintiff that a price increase was 'inevitable' due to intervention by the French Government. The plaintiff vehemently opposed the price increase but nevertheless increased its letter of credit in favour of the defendant. After claiming the iron and paying the inflated price the plaintiff sued to recover the overpayment, arguing that the agreement to increase the price was not supported by consideration from the defendant, who was merely doing what he was legally bound to do in delivering the iron. The New South Wales Supreme Court held in favour of the plaintiff, agreeing with his submission on the consideration point: 'One person cannot by any promise or performance which does not go beyond the limits of his pre-existing legal duty to another person provide a new consideration for a promise by that other person in his favour'.¹²⁷

*Cook Islands Shipping Co Ltd v Colson Builders Ltd*¹²⁸ was a similar case in which the defendant engaged the plaintiff to ship a quantity of prefabricated steel from New Zealand to Rarotonga (one of the Cook Islands) for one of its construction projects. The

¹²⁵ *Swain v West (Butchers) Ltd* [1936] 1 KB 224, 226.

¹²⁶ (1955) 56 SR (NSW) 323.

¹²⁷ *Ibid* 327 (per curiam). The Court also briefly considered the question of whether the modified agreement was void on the ground of economic duress, however no clear ruling on this point was made. The judgment does suggest however that the secondary agreement, even if it were deemed to replace, rather than modify, the original sale agreement, was voidable insofar as it required the additional payment to be made 'under compulsion' (at pp 327-8).

¹²⁸ [1975] 1 NZLR 422 ('*Cook Islands*').

first of the plaintiff's shipments contained cement and building plant and loading the cargo took far longer than expected. Consequently the plaintiff charged the defendant an additional \$75.00 per hour for holding the ship in the port at New Zealand for the duration of added time. The defendant agreed to the charge, which amounted to \$1612.50 for the additional 21.5 hours required to load the cargo. After a series of further shipments, the plaintiff instigated proceedings to recover the additional holding fee paid. The New Zealand Supreme Court held that the plaintiff's promise to pay the additional money was not supported by consideration from the defendant. Justice Mahon explained it thus:

When the plaintiff demanded payment over and above the scheduled freight for the loading and carriage of the cargo it was thereby requiring from the defendant an affirmative contractual promise for which the consideration was the performance of an obligation which the plaintiff was already contractually bound to perform.¹²⁹

The Court applied *Stilk v Myrick* to the facts at hand, noting that the plaintiff was always bound under the contract between the parties to load and deliver the cargo to the defendant.¹³⁰ Whereas the defendant had provided additional consideration by way of additional funds, the plaintiff had proffered nothing in return. It also relied upon the ratio in the American case *Lingenfelder v Wainwright Brewery Co.*,¹³¹ where the following was said:

[W]hen a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.¹³²

7. The Part-Payment of Debt Principle

The premise underpinning *Stilk v Myrick* is that a 'gratuitous promise, pure and simple, remains unenforceable unless given under seal'.¹³³ If parties wish to modify a contract, consideration must pass between them. The same premise operates through the part-payment of debt principle: a debtor's promise to pay part of a debt will not amount to

¹²⁹ Ibid 434.

¹³⁰ Ibid.

¹³¹ 15 SW 844 (1891).

¹³² Ibid 848; cited in *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422 at 434 (Mahon J).

¹³³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19 (Russell LJ).

good consideration for the creditor's reciprocal promise to discharge the debt.¹³⁴ The logic is that the offer of a lesser sum can never satisfy the greater sum due, such that the law should refuse to enforce such an arrangement. This is widely known as the rule in *Pinnel's Case*¹³⁵ and was applied in *Foakes v Beer*.¹³⁶ In *Foakes* a judgment debtor entered into an agreement with the creditor to pay her the sum due in biannual instalments in return for her promise not to enforce the judgment and claim interest. The debtor successfully paid the total sum due in full, however his former creditor pursued a claim for interest. The creditor was successful at first instance and the debtor appealed. The House of Lords held that the respondent creditor's promise to the appellant to forgo interest on the debt due to her was not supported by consideration, if indeed it was to be construed as such an agreement.¹³⁷

The underlying rationale of the existing legal duty and part-payment of debt rules appears the same: there must be consideration for a contractual modification. It is tempting to regard the part-payment of debt principle simply as an extension of the existing legal duty rule, however it cannot be seen as such.¹³⁸ For a start the part-payment of debt principle from *Pinnel's Case* predates the pre-existing duty rule expressed in *Stilk v Myrick* by more than 200 years. Justice Santow recognised this fact in *Musumeci v Winadell Pty Ltd*, noting there is even evidence of the part-payment rule as far back as 1455.¹³⁹ Having discussed the existing legal duty rule, his Honour went on to say:

¹³⁴ The rule will not apply where: the debtor tenders something other than money or the part-payment is made and accepted before the due date (*Pinnel's Case* (1601) 5 Co. Rep. 117a, 117a-b; 77 ER 237, 237-8); the promise of part-payment is made by a third party (*Hirachand Punamchand v Temple* [1911] 2 KB 330, 337-8 (Vaughan Williams LJ), 339-40 (Fletcher Moulton LJ), 342 (Farwell LJ)); or where multiple creditors unanimously agree to forgo a portion of each of their debts (*Couldery v Bartrum* (1881) 19 Ch D 394). The common law is unclear as to whether different modes of part-payment of a debt (i.e. cheque instead of cash) will escape the confines of the rule and be enforceable: Greig and Davis, above n 23, 113-15.

¹³⁵ (1601) 5 Co. Rep. 117a, 117a; 77 ER 237, 237 (*Pinnel's Case*).

¹³⁶ (1884) 9 App. Cas. 605 (*Foakes*).

¹³⁷ *Ibid* 613 (Earl of Selborne LC), 623-4 (Lord Watson) 628 (Lord Fitzgerald).

¹³⁸ B J Reiter, 'Courts, Consideration and Common Sense' (1977) 27 *University of Toronto Law Journal* 439, 472-3 (n 134). Cf *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 86 (4 April 2003), where Ambrose J regarded the rules in *Foakes* and *Stilk v Myrick* as being the same before noting: 'Strangely *Stilk v Myrick* was not analysed or even referred to in the judgments in *Foakes v Beer* decided some 75 years later': at [34]-[35]. See also *Compagnie Noga D'Importation et D'Exportation SA v Abacha (No 4)* [2003] EWCA Civ 1100 (23 July 2003) [50] (Tuckey LJ); Corneill A Stephens, 'Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary' [2008] 8 *Houston Business and Tax Journal* 355, 358.

¹³⁹ (1994) 34 NSWLR 723, 739.

That notion of illusory consideration is reinforced by the analogous proposition in the context of part payment of debts. This proposition predates any doctrine of consideration and provides that part payment of a debt or the promise thereof, does not afford consideration.¹⁴⁰

The concept of the existing legal duty rule had not fully developed at the time of *Pinnel's Case* and would not surface conclusively until many years later.¹⁴¹ In *Foakes*, only Lord Fitzgerald placed any great emphasis on the fact that a debtor in part-payment cases has relied upon an existing duty as consideration for the creditor's release:

[T]he payment of a part of a debt ... due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation.¹⁴²

In contrast, Lord Chancellor Selborne regarded a creditor's acceptance of part-payment of a debt in full satisfaction as purely gratuitous and hence unenforceable for want of consideration, without any strong emphasis on the debtor's existing duty to pay the debt.¹⁴³ Similarly, Lord Blackburn's judgment appears to have placed greater emphasis on the fact that acceptance of part-payment of a debt is unenforceable as it can never satisfy the whole debt, rather than because the debtor had an existing duty to pay the debt.¹⁴⁴ Thus the early case law negates any discernible synonymy between the existing legal duty and part-payment of debt rules but simultaneously demonstrates the strong ties between the two. Peel claims that the relationship between them can be explained by distinguishing a *promise* to accept part-payment in full satisfaction of a debt from *actual acceptance* of the part-payment:

A promise by the debtor to pay part of the debt provides no consideration for the accord, as it is merely a promise to perform part of an existing duty owed to the creditor. And the actual part payment is no satisfaction under the rule in *Pinnel's case* that 'Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole'.¹⁴⁵

Framed this way an executory promise to accept a lesser sum for a greater debt offends the existing legal duty rule, whereas an executed promise to accept the lesser sum does not amount to consideration for the simple reason it can never discharge the whole

¹⁴⁰ Ibid.

¹⁴¹ See the discussion in Part VI of this chapter.

¹⁴² *Foakes v Beer* (1884) 9 App. Cas. 605, 629.

¹⁴³ Ibid 611-13.

¹⁴⁴ Ibid 614-23.

¹⁴⁵ Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) 130.

amount. The distinction is so fine one cannot be surprised that the rules have been deemed ‘close cousins’¹⁴⁶ by one academic and said to share a similar theoretical basis by several major Anglo-Australian texts.¹⁴⁷ It can probably be said that the two principles are ‘from the same stable’.¹⁴⁸

8. Treatment of the Existing Legal Duty Rule

(a) Common Law Countries

The existing legal duty rule formulated in *Stilk v Myrick* has withstood the test of time and remains good law in a number of common law countries, including England.¹⁴⁹ In *Wigan v Edwards*,¹⁵⁰ the High Court of Australia expressly approved of the rule. In that case, the respondents (the Edwards) entered into a contract to purchase a house constructed by the appellant for \$15,000. The respondents later became concerned about a number of defects in the property including lack of water connection and fencing. The respondents provided the appellant with a list of defects that required attention and stated that he was to rectify them before they would even consider going into the house and finalising the transaction.¹⁵¹ They did not possess the legal right to refuse to complete the transaction; however the fact that they honestly believed they were not required to do so on the basis of the defective state of the house meant that it was a bona fide claim and not ‘vexatious or frivolous’.¹⁵² The appellant signed an agreement stating that he would rectify any minor faults within one week and any major defects¹⁵³ within five years from

¹⁴⁶ Furmston, above n 42, 231.

¹⁴⁷ See, eg, A G Guest, *Anson’s Law of Contract* (Clarendon Press, 26th ed, 1984) 98-9; N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 213-14.

¹⁴⁸ Richard Hooley, ‘Consideration and the Existing Duty’ [1991] *Journal of Business Law* 19, 35.

¹⁴⁹ See, eg, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (‘The Atlantic Baron’)* [1979] 1 QB 705; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd’s Rep 128, 149: ‘[It is] a firmly established rule of law that a promise to perform an enforceable obligation under a pre-existing contract between the same parties is incapable of amounting to sufficient consideration’ (Colman J).

¹⁵⁰ (1973) 1 ALR 497.

¹⁵¹ *Ibid* 510.

¹⁵² *Ibid* 513.

¹⁵³ Several serious defects in the property, including dampness caused by a poorly constructed foundation, were discovered only after the Edwards brought the original action against Wigan:

Defects additional to those mentioned in the list [provided to the appellant by the respondents] subsequently came to light ... It seems that the existence of most of the major defects was not brought to the appellant’s attention until some time after the District Court action (from which this appeal arises) had been commenced by the respondents against the appellant, but certain it is that the appellant had failed to remedy a number of the defects mentioned in the original list before the commencement of the action’ (at p 510 per Mason J).

the date of purchase.¹⁵⁴ He rectified some of the defects prior to settlement but did nothing thereafter. The Edwards sued Wigan for breach of contract and succeeded at first instance. Wigan appealed and lost in the Full Court of the Supreme Court of Queensland before appealing to the High Court.

The appellant argued that the respondents had provided no consideration for his written promise to repair the defects in the property, in that they were merely doing what they were already contractually obliged to do: pay the purchase price and finalise the transaction. Hence the existing legal duty rule applied to invalidate the agreement for want of consideration. As to the status of the rule under Australian contract law, the High Court was clear:

The general rule is that a promise to perform an existing duty is no consideration, at least when the promise is made by a party to a pre-existing contract, when it is made to the promisee under that contract, and it is to do no more than the promisor is bound to do under that contract.¹⁵⁵

To this statement of principle, however, was added a qualification: the rule would have no application where the additional promise was made as part of a bona fide compromise of a dispute. Justice Mason summarised thus:

An important qualification to the general principle is that a promise to do precisely what the promisor is already bound to do is a sufficient consideration, when it is given by way of a bona fide compromise of a disputed claim, the promisor having asserted that he is not bound to perform the obligation under the pre-existing contract or that he has a cause of action under that contract.¹⁵⁶

The Court elaborated that in such cases there is no need to threaten ‘to bring an action or enter a defence’ in order to demonstrate a bona fide compromise; ‘it is enough if there is a claim ... that the contracting party is not bound to perform the contract’ and that this claim is based on an belief honestly held by the party refusing (or threatening to refuse) performance that they were entitled to do so.¹⁵⁷ In this case, the respondents’ claim met these requirements. Hence the existing legal duty rule was firmly endorsed within the law of contract in Australia subject to the recognised exception of bona fide compromise.

¹⁵⁴ *Wigan v Edwards* (1973) 1 ALR 497, 513.

¹⁵⁵ *Ibid* 512 (Mason J).

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* 513.

Other common law jurisdictions have also demonstrated approval of the rule. In Canada the Ontario Court of Appeal endorsed it in *Gilbert Steel Ltd v University Construction Ltd*.¹⁵⁸ Factually the case was similar to *Cook Islands* in that the plaintiff agreed to deliver a quantity of fabricated steel to the defendant at a fixed price (\$153 per tonne for one type of steel and \$159 for the other). The suppliers of the steel subsequently announced a price increase for its product and gave warning that further increases were to come. The plaintiff notified the defendant of this development, the parties expressly agreeing to form a new contract under which the defendant would pay \$156 and \$165 per tonne respectively for each type of steel purchased. The defendant commenced construction work on one of its projects using the steel provided by the plaintiff.

Well before the work was complete the steel supplier's second price increase came into effect. The plaintiff approached the defendant once again, renegotiating the terms of the contract. The defendant agreed once more to pay an increased rate for the steel: \$166 and \$178 per tonne respectively for each type. This was an oral arrangement. The defendant proceeded with its building work, accepting the steel deliveries and being invoiced at the renegotiated prices. When payment was forwarded to the plaintiff by periodic cheque, however, each was for a lesser amount, resulting in a significant balance owed to the plaintiff. The plaintiff sued to recover the balance. The defendant alleged that no consideration had been offered by the plaintiff in return for its promise to pay more.

The Court first swiftly rejected the plaintiff's submission that the oral agreement facilitating the second price increase constituted a rescission *in toto* of the original written contract. The evidence clearly indicated it was directed solely to the issue of price and intended to vary (rather than replace) the written contract.¹⁵⁹ Consideration could therefore not be found in 'a mutual agreement to abandon the earlier written contract and assume the obligations under the new oral one'.¹⁶⁰ The Court then held that the plaintiff was already bound to deliver the steel to the defendant at the original contract price and that there was no *quid pro quo* for the defendant's promise to pay more for the steel under the oral agreement. The rule in *Stilk v Myrick* applied.

¹⁵⁸ (1976) 76 DLR (3d) 606 ('*Gilbert Steel*').

¹⁵⁹ *Ibid* 609-10 (Wilson JA). Rescission and replacement would have eliminated the need to consider issues of consideration as it would have been a new, rather than a renegotiated, contract.

¹⁶⁰ *Ibid* 610 (Wilson JA).

The plaintiff advanced two further arguments in support of its claim that it had tendered valid consideration. The first of these was that the defendant had agreed to the price increase *in return* for the plaintiff's assurances that it would give the defendant 'a good price' on future orders of steel product. The Court dismissed this submission as well, holding that this statement fell short of a solemn commitment and citing the contradictory evidence in this regard.¹⁶¹ The final argument was certainly the most innovative in the plaintiff's attempts to escape the existing legal duty rule. It was said that as the defendant had agreed to pay the increased price to the plaintiff for the steel, so the plaintiff had agreed to increase its amount of credit to the new amount. Despite acknowledging the argument as 'ingenious', the Court held that increased credit was an inherent consequence of the increased price and could not constitute consideration flowing from the promisee.¹⁶²

Mention should be made of more recent Canadian authority which, whilst casting some doubt on the long-term viability of the existing legal duty rule in that jurisdiction, provides no definitive guidance as to its current status. The New Brunswick Court of Appeal in *NAV Canada v Greater Fredericton Airport Authority Inc*¹⁶³ held that 'a post-contractual modification [to an existing contract], unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress'.¹⁶⁴ The court went on, however, to say that it was 'not advocating the abrogation of the rule in *Stilk v Myrick*' but rather indicating that 'the rule should not be regarded as determinative as to whether a gratuitous promise is enforceable'.¹⁶⁵ These statements appear inherently contradictory and represent a radical departure from established Canadian authority in *Gilbert Steel*. Nonetheless the same court reiterated its support for the rejection of the need for consideration in contract modifications in *Harrity and Northeast Yachts 1998 Ltd v Kennedy*.¹⁶⁶ The Supreme Court of British Columbia too endorsed this view but added such an agreement would only be enforced 'if the evidence

¹⁶¹ Ibid.

¹⁶² Ibid. Cf *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705 in which the respondent's agreement to increase the value of its letter of credit in favour of the appellant in return for the appellant's explicit agreement to pay a 10% increase on the remaining instalments due under the contract between the parties (to cover a depreciation in the US dollar) was held to constitute valid consideration: see pp 712-14 per Mocatta J.

¹⁶³ (2008) 290 DLR (4th) 405 ('*NAV Canada*').

¹⁶⁴ Ibid 425.

¹⁶⁵ Ibid 426.

¹⁶⁶ [2009] NBCA 60 (24 September 2009) [27].

established either detrimental reliance by the plaintiff or the gaining of a benefit or advantage by the defendant'.¹⁶⁷

Whilst the Courts of Appeal in both *Gilbert Steel* and *NAV Canada* are on the same judicial hierarchy and thus not bound by each other's decisions,¹⁶⁸ the doctrine of *stare decisis* under Canadian law directs that the decisions of 'courts of co-ordinate authority ... be followed in the absence of strong reason to the contrary'.¹⁶⁹ On this point McRuer CJHC has said:

I think that 'strong reason to the contrary' does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think 'strong reason to the contrary' is to be construed according to the flexibility of the mind of the particular judge.¹⁷⁰

Whether or not the 'policy reasons'¹⁷¹ relied upon by the New Brunswick Court of Appeal in *NAV Canada* justify the court's departure from the approach taken in *Gilbert Steel* is open to debate. More recently the Newfoundland and Labrador Court of Appeal refused to blindly accept the lead of its fellow appellate court in New Brunswick and dismiss the rule in *Stilk v Myrick*, instead stating that the question of whether or not *Gilbert Steel* still represents the law in Canada remains open.¹⁷² It seems likely that *Gilbert Steel*, having long been recognised as good law in Canada and attacked only recently by the dubious reasoning of another appellate court, continues to hold sway.

Singapore's Court of Appeal in *Sea-Land Service Inc v Cheong Fook Chee Vincent*¹⁷³ applied and approved of the rule in *Stilk v Myrick*. There the respondent employee was given one month's notice of termination by his employers (the appellants) and offered a severance package including a sum of 'enhanced severance pay'. When he sought to collect his final salary payment he was informed that a calculation error had occurred and that he was not entitled to the additional enhanced severance pay. He was, however, given a smaller *ex gratia* payment in consolation for the mistake. He reluctantly accepted the

¹⁶⁷ *River Wind Ventures Ltd v British Columbia* [2009] BCSC 589 (28 November 2008) [33] (Meiklem J).

¹⁶⁸ *R v Northern Electric Company Ltd* [1955] OR 431, 444-8 (McRuer CJHC); *R v Groves* (1977) 17 OR (2d) 65, 78 (O'Driscoll J).

¹⁶⁹ *R v Northern Electric Company Ltd* [1955] OR 431, 448 (McRuer CJHC).

¹⁷⁰ *Ibid.*

¹⁷¹ *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405, 423-4.

¹⁷² *Matchim v BGI Atlantic Inc* [2010] NLCA 9 (11 February 2010) [83] (Green CJ).

¹⁷³ [1994] 3 SLR 631.

final payment package before bringing an action claiming the enhanced severance pay. He contended that he had provided consideration for the appellant's promise of enhanced severance pay in staying on in his position for the final month of his tenure. This, it was argued, conferred a 'practical benefit' upon the appellants, circumventing the existing legal duty rule and constituting valid consideration.¹⁷⁴ The Court held that no such benefit existed and that the respondent had relied upon an existing legal duty as *quid pro quo* for the appellants' promise of enhanced severance payment, such that there was no consideration for the promise:

The value of the last month's work by an employee about to be made redundant could hardly be other than minimal, since the management would only retrench workers that were not essential for their operations. Secondly, we agreed with the appellants' counsel that the appellants had not requested the respondent to complete his last month of employment in exchange for their payment of the enhanced benefits. The appellants were merely complying with their contractual obligations and had chosen to provide the respondent with one month's notice before his employment was terminated, instead of terminating his employment there and then and compensating him with a month's wages in lieu of notice. We were therefore of the view that the respondent's last month's work for the appellants would not amount to valid consideration and that it fell within the general rule that prohibits the performance of existing duties from constituting such consideration.¹⁷⁵

Recently the same Court reaffirmed the integral status of the doctrine of consideration within the law of Singapore and stressed the need to maintain the 'status quo',¹⁷⁶ indicating a predilection in favour of maintaining the existing legal duty rule.

It is hard, however, to ignore the increasing number of common law (or hybrid common/civil law) jurisdictions that have abandoned the existing legal duty rule. The rule maintained continued support in New Zealand until recently when that country's Court of Appeal held that *Stilk v Myrick* could 'no longer be taken to control' contract modification cases.¹⁷⁷ In *Conradie v Russouw*¹⁷⁸ the Appellate Division of the Supreme Court of South Africa emphatically rejected the rule, holding that '[a] good cause of

¹⁷⁴ This submission was based on the authority of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. This case will be examined in greater detail in Chapter 2.

¹⁷⁵ *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631, 635 (per curiam).

¹⁷⁶ *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332, 373, 383 (per curiam). This stance is not surprising given that 'English law has been received into Singapore' such that it continues to demonstrate 'acceptance and application of English statutes and case authorities': Walter Woon, 'The Applicability of English Law in Singapore' in Kevin Y L Tan (eds) *The Singapore Legal System* (Singapore University Press, 2nd ed, 1999) 230 at 230. See also the discussion in the judgment at pp 364-5. It should be noted that these statements appear within the coda to the judgment and thus constitute non-binding *obiter dicta*. Nevertheless, they represent 'a significant statement on the doctrine of consideration in Singapore': Wu Zhuang-Hui, 'A Probable Reform of Consideration' (2009) 1 *Singapore Journal of Legal Studies* 272, 275.

¹⁷⁷ *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23, 45 (per curiam).

¹⁷⁸ [1919] SALR (App. Div.) 279.

action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established'.¹⁷⁹ De Villiers AJA felt it essential to resolve the 'nightmare of confusion'¹⁸⁰ stemming from the country's confusing legal system which incorporated elements from both the civil law doctrine of *causa* and the common law doctrine of consideration.¹⁸¹ His Honour even went so far as to say the English law made 'a serious mistake' when converting 'what was merely required as proof of a serious mind ... into an essential of every contract'.¹⁸²

In India the status of the existing legal duty rule is somewhat unclear. Section 10 of the *Indian Contract Act 1872* stipulates that '[a]ll agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void'. Section 63 then states the following:

Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

One commentator contends that this section, in allowing for a promisee to dispense with or accept anything in exchange for the performance of the promise made to them, operatively rejects the existing legal duty rule.¹⁸³ It is questionable whether it has such sweeping effect, though it certainly abrogates the part-payment of debt principle.

The existing legal duty rule has been rendered obsolete in the United States of America in the context of sales contracts through art 2-209 of its *Uniform Commercial Code* (UCC)¹⁸⁴ which reads:

¹⁷⁹ Ibid 279 (headnote), 288 (Solomon ACJ), 297 (C G Maasdorp JA), 320 (De Villiers AJA), 324 (Wessels AAJA and A F S Maasdorp AAJA, not in joint judgment).

¹⁸⁰ Ibid 323.

¹⁸¹ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 556-7.

¹⁸² *Conradie v Rossouw* [1919] SALR (App. Div.) 279, 323.

¹⁸³ Kevin Teeven, *Promises on Prior Obligations at Common Law* (Greenwood Press, 1998) 144, n 6. On this basis, the author also contends that India was the first common law jurisdiction to affirmatively reject the existing legal duty rule through legislation (at p 39).

¹⁸⁴ The UCC was a joint initiative of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). US States are permitted to adopt the UCC text verbatim or with specific changes, however the first Article of the Code requires States to liberally construe and apply the Code so as

§ 2-209 Modification, Rescission and Waiver

- (1) An agreement modifying a contract within this Article needs no consideration to be binding.
- (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
- (3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.
- (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
- (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

In sum, under the UCC, whilst contractual modifications require no consideration, the process of modification itself is regulated by sub-ss (2) to (5).¹⁸⁵ For present purposes the most important observation to be made is that the lack of requirement of consideration for contractual modifications allows a party to rely upon its existing legal duty in exchange for something more from the other party to the contract.¹⁸⁶ Of course art 2-209, part of Article 2 of the UCC, only applies to ‘transactions in goods’ unless otherwise required by the context.¹⁸⁷ Whether or not the contract in question is one for the sale of goods and thereby attracts the provisions of the UCC is a matter of interpretation within the relevant United States jurisdiction.¹⁸⁸

to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) *to make uniform the law among the various jurisdictions.*

§ 1-103(a) (emphasis added).

¹⁸⁵ False allegations of oral modification are guarded against through sub-ss (2) and (3) whilst sub-ss (4) and (5) permit the operation of the doctrine of detrimental reliance where an attempted modification has failed to satisfy the requirements within sub-ss (2) and (3) but has nonetheless constituted a waiver.

¹⁸⁶ Other provisions, such as the UCC requirement for good faith in the performance and enforcement of contracts or duties within its scope (§ 1-304), would temper this highly liberal stipulation.

¹⁸⁷ UCC, § 2-102.

¹⁸⁸ Contracts for the sale of such things as heavy machinery (*K&M Joint Venture v Smith International Inc.* 669 F.2d 1079 (1986)), food (*Larsen v A.C. Carpenter Inc.* 620 F.Supp. 1084 (1985)) and automobiles (*Safeco Insurance Co. v Lapp* 695 P.2d 1310 (1985)) are clearly contracts for the sale of ‘goods’ under the UCC. Difficulties do arise, however, where the alleged ‘goods’ involved are not easily recognised as such: see, eg, *Key v Bagen* 221 S.E.2d 234 (1975) (purchase of a horse deemed to be a sale of goods governed by the UCC); *Vails v Southwestern Bell Telephone Co* 504 F.Supp. 740 (1980) (purchase of advertising space in a phone book deemed to be a sale of non-goods and thus outside the scope of the UCC).

Under art 89 of the US *Restatement (Second) of Contracts* (1981),¹⁸⁹ a promise modifying an executory contract is binding:

- (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
- (b) to the extent provided by statute; or
- (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

There existed no general common law position with respect to the need for consideration in modified contracts within the various United States jurisdictions prior to the introduction of the UCC and *Restatement (Second) of Contracts*, however a large number of the States endorsed the existing legal duty rule.¹⁹⁰ Both the UCC and *Restatement (Second)* have sought to promote uniformity in this regard.¹⁹¹

(b) Civil Law Countries

The civil legal systems do not recognise the common law doctrine of consideration, relying instead upon the doctrine of *causa* as the primary test of enforceability for contracts.¹⁹² Under civil law, the existing legal duty rule is unnecessary because whether a contractual modification is enforceable or not is dependent upon the validity of the underlying *cause* for it. The doctrine has been so modified in the various civil law jurisdictions that a universally accepted definition of this term does not exist.¹⁹³ Essentially, however, the doctrine of *causa* identifies the underlying intention, motive or purpose underpinning the transaction in question and determines on this basis whether or

¹⁸⁹ The *Restatement* is merely a statement of law and has no binding force, however it has frequently been cited with judicial approval and regarded as authoritative by the vast majority of jurisdictions within the United States: see Gregory E Maggs, 'Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law' (1998) 66(3) *George Washington Law Review* 508.

¹⁹⁰ See Richard A Lord, *Williston on Contracts* (Lawyers Cooperative Publishing, 4th ed, 1992) vol 3, 569-90.

¹⁹¹ The General Comment to the UCC, as written by the Commissioners on Uniform State Laws and the American Law Institute, states that '[u]niformity throughout the American jurisdictions is one of the main objectives of [the Uniform Commercial] Code'.

¹⁹² See generally Saúl Litvinoff, 'Still Another Look at Cause' (1987) 48 *Louisiana Law Review* 3.

¹⁹³ Ernest G Lorenzen, 'Causa and Consideration in the Law of Contracts' (1919) 28 *Yale Law Journal* 621, 632.

not it is sufficient at law to render the agreement enforceable.¹⁹⁴ If it is false or absent, the agreement fails for want of cause. Lorenzen provides some examples of the general effect of the doctrine in an array of circumstances:

A contract is deemed *without* cause if the parties did not have a serious intent to enter into a binding legal relationship, for example, if they were merely playing or joking. The transaction would be without cause also if the parties meant to bind themselves legally but the contemplated object of the contract failed. The obligation of the purchaser of a chattel which has perished prior to the making of the contract is regarded as without cause. An obligation is said to have a *false* cause if the parties believed that a certain legal foundation for the promise existed when it did not exist in fact. An agreement on the part of A to pay to B a certain sum of money which he erroneously believed that he owed B would be an agreement based upon a false cause. Not frequently the terms ‘without cause’ and ‘false cause’ are used interchangeably. A contract has an *illegal* cause if the object contemplated is condemned by law.¹⁹⁵

Thus, in civil law jurisdictions, whether or not a contractual modification secured by one party’s reliance on his or her existing legal duty is dependent upon an analysis and construction of the intentions, motivations and purposes of the parties. If a ‘good reason or *causa*’ was found in the adjustment of the parties’ obligations, the civilian courts would enforce them, rather than seek further evidence of a ‘bargain’ having been struck as in common law tradition.¹⁹⁶ These principles are embodied within the various laws of several civil law jurisdictions. For example, art 1108 of the French Civil Code¹⁹⁷ provides:

Four conditions are essential for the validity of an agreement:

The consent of the party who obligates himself;

His capacity to contract;

An object certain which forms the subject-matter of the engagement;

A *licit causa* in the obligation.¹⁹⁸

¹⁹⁴ See, eg, Hein Kötz and Axel Flessner, *European Contract Law: Volume One* (Tony Weir trans, Oxford University Press, 1997) 54-6 [trans of: *Europäisches Vertragsrecht I* (first published 1992)]; James Gordley, *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001) 10; Sir Percy H Winfield, *Pollock’s Principles of Contract* (13th ed, 1950) 136; Abram Glaser, ‘The Doctrine of Consideration and the Civil Law Principle of Cause’ (1941) 46 *Dickinson Law Review* 12.

¹⁹⁵ Lorenzen, above n 193, 633. The author goes on to question whether existing rules of contract law could aptly perform these functions: ‘May not the same results be attained through the ordinary rules governing reality of consent, legality of object, etc.?’ (at p 633). It is arguable that various principles of the common law of contract perform the same functions as the doctrine of *causa* (such as the doctrines of illegality, unconscionability and duress).

¹⁹⁶ Teeven, above n 183, 6-7.

¹⁹⁷ *Code Civil des Français 1804*.

¹⁹⁸ Translation from John H Crabb, *The French Civil Code* (Fred B Rothman & Co., 1995) 218. Article 1131 also reads: ‘An obligation without *causa*, or with a false *causa*, or with an illicit *causa*, cannot have any effect’.

The Civil Codes of Italy,¹⁹⁹ Spain,²⁰⁰ Belgium,²⁰¹ and many others throughout continental Europe contain similar provisions, each emphasising *causa* as the principal indicium of a valid contract based upon a pre-existing obligation and consequently obviating the need for the existing legal duty rule.²⁰²

(c) International Contracts

In 2010, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT)²⁰³ published its third edition of *Principles of International Commercial Contracts*.²⁰⁴ This instrument was endorsed by the United Nations Commission on International Trade Law (UNCITRAL)²⁰⁵ in the same year. Given it is an international instrument it lacks the force of domestic law.²⁰⁶ Nonetheless, one of UNIDROIT's chief purposes is 'to prepare gradually for the adoption by the various States of uniform rules of private law'.²⁰⁷ Moreover, reception of the Principles has been 'extremely favourable', with 'a number of national legislatures' being inspired to modify their domestic contract laws on the basis of the Principles' provisions.²⁰⁸ They are also acting as a frequent point of reference within international trade agreements and domestic courts across the globe.²⁰⁹ Article 3.1.2 of the Principles states:

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

¹⁹⁹ *Il Codice Civil Italiano*, art 1325.

²⁰⁰ *Código Civil Español*, arts 1274-1277.

²⁰¹ *Code Civil*, arts 1108, 1131, 1133.

²⁰² See Lorenzen, above n 193, 622-3; Glaser, above n 194, 16-17.

²⁰³ UNIDROIT was established in 1926 as an auxiliary organ of the League of Nations. It survived the League's dissolution through multilateral agreement (the UNIDROIT Statute) in 1940. Currently UNIDROIT consists of 63 member States drawn from all five continents. Australia has been a member State of UNIDROIT since 20 March 1973.

²⁰⁴ Hereafter cited as 'the Principles'.

²⁰⁵ The official website of UNCITRAL states:

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly [of the United Nations] in 1966 (Resolution 2205(XXI) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.

See < <http://www.uncitral.org/uncitral/en/about/origin.html>>.

²⁰⁶ State parties could, of course, incorporate the UNIDROIT Principles into their domestic law via the legislative process, which would then render it legally enforceable within the jurisdiction.

²⁰⁷ *Statute of UNIDROIT 1940*.

²⁰⁸ Michael Joachim Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' (2007) 2 *Uniform Law Review* 233, 234-5.

²⁰⁹ *Ibid* 235.

The ‘Comment’ to this Article states:

The purpose of this article is to make it clear that the mere agreement of the parties is sufficient for the valid conclusion, modification or termination by agreement of a contract, without any of the further requirements which are to be found in some domestic laws.

The Comment then subdivides into three separate comments, the first of which reads as follows:

In common law systems, ‘consideration’ is traditionally seen as a prerequisite for the validity or enforceability of a contract, as well as for the modification or termination of a contract by the parties. However, in commercial dealings this requirement is of minimal practical importance since in that context obligations are almost always undertaken by both parties. It is for this reason that Art. 29(1) CISG dispenses with the requirement of consideration in relation to the modification and termination by the parties of contracts for the international sale of goods. The fact that this article extends this approach to the conclusion, modification and termination by the parties of international commercial contracts in general can only bring about greater certainty and reduce litigation.

Hence under the Principles there is no need for consideration in modified contracts such that the existing legal duty rule has no effect. Indeed, the Principles clearly dispense with the consideration requirement altogether. The Comment refers to Article 29(1) of the *United Nations Convention on Contracts for the International Sale of Goods 1980*, otherwise known as the ‘Vienna Convention’.²¹⁰ This Article similarly states: ‘A contract may be modified or terminated by the mere agreement of the parties’. Article 29(2) provides a sole qualification here, namely that a written contract ‘which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement’. It further states that ‘a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct’. Thus, it does not preclude the application of the doctrine of promissory estoppel. The UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods* provides commentary as to the meaning and purpose of these provisions. With respect to art 29(1) it states in Comment 5:

²¹⁰ The provisions of the Vienna Convention have the force of law across all Australian jurisdictions: *Sale of Goods (Vienna Convention) Act 1986* (SA), s 4; *Sale of Goods (Vienna Convention) Act 1987* (ACT), s 5; *Sale of Goods (Vienna Convention) Act 1986* (NSW), s 5; *Sale of Goods (Vienna Convention) Act 1987* (NT), s 5; *Sale of Goods (Vienna Convention) Act 1986* (Qld), s 5; *Sale of Goods (Vienna Convention) Act 1987* (Tas), s 5; *Sale of Goods (Vienna Convention) Act 1987* (Vic), s 5; *Sale of Goods (Vienna Convention) Act 1986* (WA), s 5.

The agreement of both parties is all that is required in order to modify or terminate their contract. No form requirements need be met unless the reservation concerning form applies (arts. 11, 12, 96) or the parties have agreed otherwise.

9. Other Means of Enforcing Unilateral Contract Modifications

The existing legal duty rule applies only in the context of unilateral modifications; that is, one-sided modifications where one party promises additional consideration and the other merely promises to perform or maintains their existing contractual obligation(s).²¹¹ *Stilk v Myrick* dictates that such modifications are unenforceable for want of consideration. The practical benefit principle, to be discussed in Chapter 2, provided one alternative means of satisfying the consideration requirement so as to enforce such a modification. There are, however, a number of other doctrines which have significance in the context of contract modifications and may present alternative routes to the enforcement of unilateral contract variations. These doctrines will be discussed in Chapter 6.

10. Conclusion

This chapter commenced by briefly exploring the history of the doctrine of consideration. It was shown how the courts came to regard benefit/detriment and bargain as the doctrine's essential elements. The chapter then turned to exploring the existing legal duty rule, a principle which emerged from the consideration doctrine and became the subject of a stream of litigation embroiling the British maritime industry during the Napoleonic war era. The various ways in which the rule can manifest itself in the context of contract modifications were explored. From situations where the plaintiff is bound by a lawful duty or through a contract with the defendant or a third party, through to part-payment of debt cases, the rule has withstood over 200 years of attack and refinement.

But whilst the rule's status across most common law countries in contemporary times remains intact,²¹² its strength is weakening. Several common law jurisdictions have opted to follow the route of the civil law jurisdictions and either substantially or entirely do away with it. The rule has been abolished by several international instruments as well as

²¹¹ Conversely, 'bilateral modification' refers to a modification which affects both parties' obligations.

²¹² Lord Justice Purchase in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 referred to the rule as 'a pillar stone of the law of contract' (at p 20).

affected by various other doctrines within the framework of Anglo-Australian contract law. Moreover, it is from the ‘pillar stone’ of *Stilk v Myrick* – the origin of the existing legal duty rule – that numerous controversial exceptions and instances of non-application have sprung forth. Chief amongst these is the practical benefit principle arising in a landmark contract law case of the 20th Century.

CHAPTER 2

THE PRACTICAL BENEFIT PRINCIPLE

'They are either rogues or fools who think benefits are merely gifts'

Chapter 1 introduced us to the existing legal duty rule, a mainstay of the law of contract in most common law countries but a principle never accepted within the civil law jurisdictions. Towards the end of that chapter it was demonstrated that the rule has remained firmly entrenched in English law since *Stilk v Myrick*² and the early British sailors' cases. The 1857 decision of *Hartley v Ponsonby*³ confirmed that performing (or promising to perform) an act *above and beyond* one's pre-existing contractual duties will amount to good consideration for a reciprocal promise from the other party to the contract. The question that came before the English Court of Appeal in 1989, however, challenged these propositions and cast a new light upon the existing legal duty rule: if a promisor agrees to give something in addition to what they are contractually obliged to give to the promisee, and the promisee merely promises to perform their pre-existing contractual obligation, will the agreement nevertheless be valid and circumvent the existing legal duty rule where the promisee's reiterated promise is proven to confer a *practical benefit* on the promisor? Enter one of the most controversial cases in the history of Anglo-Australian contract law and the origin of the 'practical benefit' principle.

1. *Williams v Roffey Bros & Nicholls (Contractors) Ltd*⁴

In *Williams v Roffey* the defendants,⁵ building contractors, were engaged by a housing association to refurbish a block of flats in London. Four months later in January 1986, the defendants hired the plaintiff, a carpenter, under a subcontract to carry out the carpentry work in the flats. The agreed price for the plaintiff's work was £20,000. Around two months into this contract the plaintiff began to experience financial difficulty, primarily because the agreed price was too low to allow him to 'operate satisfactorily and at a

¹ Syrian author, playwright and famed writer of Latin maxims Publilius Syrus (circa 1st Century BC). Quote cited in Bergen Evans, *Dictionary of Quotations* (Delacorte Press, 1968) 57.

² (1809) 2 Camp. 317; 170 ER 1168 ('*Stilk v Myrick*').

³ (1857) 7 El. & Bl. 872; 119 ER 1471.

⁴ [1991] 1 QB 1 ('*Williams v Roffey*').

⁵ Mr Lester Williams was the respondent in this action but the order of parties in the case citation was not reversed on appeal. For the purposes of continuity, he is referred to throughout as 'the plaintiff', with the appellants being given the corresponding title of 'the defendants'.

profit' and due to his inadequate supervision of his workmen.⁶ The defendants became concerned that the plaintiff would not be able to complete the required work on time which would trigger the penalty clause contained within their primary contract with the housing association and cause them to incur a significant fee for delay. To avoid this scenario, the defendants made an oral agreement with the plaintiff to pay him an additional £10,300 'at the rate of £575 for each flat in which the carpentry work was completed'.⁷ Nearly two months later, having substantially completed work on eight more flats, the plaintiff had received just one further payment of £1500. He ceased work on the flats and sued the defendant to recover the additional sum promised.

The defendants advanced two arguments at trial. The first was that the additional payment promised to the defendants was only payable upon completion of each flat. The trial judge at first instance held that, on the evidence, this was the agreement made and understood by both parties. Moreover, given that the eight flats worked on after the agreement was made were only *substantially* completed, the plaintiff was not entitled to further payment. These findings were not disturbed on appeal.⁸ The second and more contentious argument was that the plaintiff had not provided consideration to the defendants in return for their promise to pay him the additional sum of money to complete the carpentry work. That is, where the defendants had taken on an additional obligation (to pay the extra money), the plaintiff had provided nothing in return and thus the secondary verbal agreement was void for want of consideration. Not surprisingly, the defendants relied upon the authority of *Stilk v Myrick*⁹ in support of this argument.

Lord Justice Glidewell (with whom Russell and Purchas LJ agreed), referred to two authorities in which the 'practical benefit' of contractual performance on the part of one party had previously been held to constitute valid consideration. The first was *Ward v Byham*,¹⁰ a case involving a de facto couple who bore a child during the five years they were living together. When the relationship terminated, the defendant father promised in writing to pay the plaintiff mother £1 per week in child maintenance provided the

⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 6 (Glidewell LJ). This was the finding of Mr Rupert Jackson QC, Assistant Recorder of the Kingston-upon-Thames County Court, whose judgment was challenged in this appeal.

⁷ *Ibid.*

⁸ *Ibid* 10 (Glidewell LJ), 16-17 (Russell LJ), 20 (Purchas LJ).

⁹ (1809) 2 Camp. 317; 170 ER 1168.

¹⁰ [1956] 1 WLR 496.

daughter was content and adequately cared for. The defendant made such contributions until the plaintiff remarried, at which time he ceased payment. The plaintiff sued the defendant to recover the payments owing. The defendant submitted that his former spouse had provided no consideration for his promise to make payment, as she was legally required to maintain their child in any event by virtue of s 42 of the *National Assistance Act 1948* (UK).¹¹ Despite the apparent force in this argument, the Court of Appeal agreed with the lower court and found in favour of the plaintiff. Lord Justice Denning said:

I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise; and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.¹²

Thus, as the defendant had fulfilled the conditions stipulated by the plaintiff, she had satisfied the terms of the agreement which was in substance a unilateral contract, such that the plaintiff was bound to pay maintenance.¹³

The second authority considered by Glidewell LJ in his leading judgment was *Williams v Williams*.¹⁴ In similar vein to *Ward v Byham*, the plaintiff in this case sought to recover the arrears of promised maintenance payments made by her former husband upon their separation. The defendant pleaded that since *she* left *him* it was her responsibility to maintain herself and that there was no consideration provided in return for his promise. The Court of Appeal held that there was valid consideration provided by the plaintiff, in that her former husband had benefited from the knowledge that: (1) she would not 'pledge his credit' with tradesmen and risk being sued by them and the National Assistance Board; and (2) her desertion may not have been permanent.¹⁵

¹¹ Section 42(1)(a) stated that 'a woman shall be liable to maintain her husband and her children'. Section 42(2) states that 'child' in this context includes *illegitimate* children. No such qualification is given with respect to the corresponding s 42(1)(b) which states that 'a man shall be liable to maintain his wife and his children'. Lord Justice Denning explained the significance of these legislative provisions as follows: 'It is quite clear that by statute the mother of an illegitimate child is bound to maintain it: whereas the father is under no such obligation' (at p 497 of the judgment).

¹² [1956] 1 WLR 496, 498.

¹³ The other members of the Court of Appeal similarly found consideration in the letter written from the de facto husband to the wife pledging to make the maintenance payments if the couple's daughter was well maintained by the wife: Morris LJ (at pp 498-9) and Parker LJ (at p 499).

¹⁴ [1957] 1 WLR 148.

¹⁵ *Ibid* 151 (Denning LJ). Hodson and Morris LJ reached the same conclusion but on different grounds; namely, that the wife's desertion did not destroy her right to be maintained but merely suspended it: at 153-4 (Hodson LJ), 155 (Morris LJ). Lord Justice Hodson (with whom Morris LJ agreed on this point) explained:

The cumulative effect of these decisions, and others referred to in the judgments of the Lord Justices of the Court of Appeal in *Williams v Roffey*,¹⁶ was to encourage the recognition of ‘practical benefit’ of contractual performance as valid consideration. Lord Justice Glidewell famously summarised the law on this subject as follows:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A’s promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B’s promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B’s promise, so that the promise will be legally binding.¹⁷

His Lordship continued:

As I have said, Mr Evans [counsel for the defendants] accepts that in the present case by promising to pay the extra £10,300 his client secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress ... It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants’ promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement.¹⁸

Both Russell and Purchas LJ concurred with Glidewell LJ that in such circumstances, the practical benefit of contractual performance could suffice as valid consideration and render the renegotiated contract legally binding. Lord Justice Russell held that

[a] gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.¹⁹

Similarly, Purchas LJ held that

where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to

In those circumstances, if [the wife] returned or offered to return, her husband's liability to maintain her would revive. So that there was good consideration there to meet that contingency, which was a real contingency and not a fanciful one at that time. It is not affected by the fact that (as we now know, as a matter of history) the parties never have come together again but have been divorced (at 155).

¹⁶ In particular *Woodhouse AC Israel Cocoa Ltd S.A. v Nigerian Produce Marketing Co Ltd* [1972] AC 741; *Pao On v Lau Yiu Long* [1980] AC 614.

¹⁷ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16.

¹⁸ *Ibid* 16.

¹⁹ *Ibid* 19.

support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment.²⁰

Leave to appeal to the House of Lords was granted to the appellant²¹ but never acted on.

2. The Meaning of 'Practical Benefit' in *Williams v Roffey*

The Court of Appeal in *Williams v Roffey*, whilst unanimous in holding that the plaintiff had provided consideration for the defendants' promise of additional payment for his work on the basis that this work conferred a 'practical benefit' on them, failed to conclusively define what this composite term actually meant. Stemming from this uncertainty, it is unclear when a variation achieves the status of a contract under this principle.²²

Lord Justice Russell held that the defendants had received valid consideration from the plaintiff by way of the 'advantages accruing' to them as a consequence of the plaintiff's guaranteed performance.²³ These advantages included avoiding the need to employ other subcontractors to carry out the carpentry work in the flats and replacing the 'haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat'.²⁴ His Lordship did not specifically utilise the term 'practical benefit', noting instead that so long as the promisor obtained 'an *advantage* arising out of the continuing relationship with the promisee' the secondary bargain would be valid.²⁵ The most intriguing aspect of his Lordship's judgment, however, is his test for establishing whether such commercial advantages are present; it requires not so much an analysis of the *exchange* as of the *intentions* of the parties:

[W]hilst consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early 19th Century when *Stilk v Myrick* was decided by Lord Ellenborough CJ. In the late 20th Century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v Myrick* is either necessary or desirable. Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the

²⁰ Ibid 23.

²¹ Brian Coote, 'Consideration and Benefit in Fact and in Law' (1990) 3 *Journal of Contract Law* 23, 24.

²² This issue will be explored in Chapter 5, Part IV.

²³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19.

²⁴ Ibid.

²⁵ Ibid (emphasis added).

intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.²⁶

A formulation of the ‘practical benefit’ test in these terms threatens to blur the boundaries between the separate doctrines of intention (to create legal relations) and consideration. Some commentators have argued that this was an inevitable consequence of the superimposition of the 19th Century doctrine of intention to create legal relations upon the 16th Century doctrine of consideration.²⁷ One appellate court has even suggested that consideration is merely ‘a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself’.²⁸ Nevertheless, regardless of the method elected to identify any ‘practical benefits’ in a given scenario, Russell LJ’s judgment provides no guidance as to what such benefits actually are.

Lord Justice Purchas adopted a similar approach to Russell LJ, saying that as both sides enjoyed a ‘commercial advantage’ as a consequence of entering into the secondary agreement, it was a valid bargain founded upon sufficient consideration.²⁹ His Lordship placed particular emphasis on two such commercial advantages: first, that the defendants were able to secure their commercial position through ensuring the plaintiff’s performance, which in turn presented the reciprocal benefit to the plaintiff of obtaining sufficient finance to complete the contracted work; second, that the plaintiff thereby had no incentive to deliberately breach the contract, which directly benefited the defendants who were facing penalties under the primary contract with the housing association for late completion.³⁰

In addition, the fact that the contract modification required that the plaintiff would complete ‘one flat at a time rather than half completing all the flats’ in order to receive payment was also said to benefit both parties.³¹ This allowed the plaintiff to ‘receive moneys on account’ and concurrently allowed the defendants to ‘direct their other trades to do work in the completed flats which otherwise would have been held up until the

²⁶ Ibid 18.

²⁷ A W B Simpson, ‘Innovation in Nineteenth Century Contract Law’ (1975) 91 *Law Quarterly Review* 247, 263.

²⁸ *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23, 45-6 (Baragwanath J).

²⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 22-3.

³⁰ Ibid.

³¹ Ibid 20.

plaintiff had completed his work'.³² His Lordship did not frame his discussion in the context of the intentions of the parties as Russell LJ did but he too failed to elucidate the concept of 'practical benefit' with any specificity.

Lord Justice Glidewell delivered the leading judgment of the Court of Appeal. His Lordship noted the concession by counsel for the defendants that his client's promise to pay the additional £10,300 to the plaintiff secured benefits for them in the way of guaranteed performance of work from the plaintiff, avoidance of the penalty clause within the primary contract with the housing association, and dispensation of the need to engage other workers to complete the renovations.³³ However, counsel also argued that

though his clients may have derived, or hoped to derive, practical benefits from their agreement to pay the 'bonus', they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his subcontract, i.e., continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement.³⁴

The distinction between factual and legal consideration is conceptually difficult, but Halson explains it thus: 'The factual definition emphasises the *fact* of benefit or detriment; the legal definition, for which *Stilk v Myrick* is often cited, recognises as consideration only those acts which the promisor was not already under a *legal* obligation to perform'.³⁵ In Glidewell LJ's opinion, however, an existing legal duty – consideration that may be factual but can never be strictly 'legal' – tendered in return for something more pledged by the promisor, could still be valid so long as it conferred upon the latter a practical benefit or obviated a disbenefit for them.³⁶ Hence, this principle was encapsulated in the fourth limb of his Honour's six-part test (above). Again, however, the term 'practical benefit' was not defined, leaving open the question of when such a benefit will be deemed to exist in any given scenario. The two authorities referred to in his

³² Ibid.

³³ Ibid 10-11.

³⁴ Ibid 11 (Glidewell LJ). See also at p 3 (F Evans) (during argument).

³⁵ Roger Halson, 'Sailors, Sub-Contractors and Consideration' (1990) 106 *Law Quarterly Review* 183, 183.

³⁶ It is arguable that the modified payment scheme between the parties constituted a *legal* benefit and thereby fell within the conventional meaning of consideration. This would have avoided the need for the Court of Appeal to stretch the boundaries of the doctrine of consideration to incorporate *factual* benefits as it would have fallen outside the scope of the rule in *Stilk v Myrick*. It appears, however, that their Lordships proceeded on the basis that the plaintiff was doing no more than he was already bound to do, and that only the *terms upon which the work was to be completed* were varied, amounting to a mere factual benefit: see, eg, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 11 (Glidewell LJ), 19 (Russell LJ), 23 (Purchas LJ). A finding of legal benefit may also have conflicted with the bargain theory underpinning the doctrine of consideration in that the traditional notion of exchange or *quid pro quo* was clearly absent on the facts. See further Chapter 6, Part IV.

Lordship's judgment, namely *Ward v Byham*³⁷ and *Williams v Williams*,³⁸ also fail to define the term, instead describing the particular circumstances at hand as giving rise to sufficient 'benefits' amounting to sufficient consideration at law.

Chen-Wishart has suggested that the members of the Court of Appeal in *Williams v Roffey* regarded two main classes of advantage conferred upon the defendants as amounting to 'practical benefits': (1) obtaining an increased chance of performance already due to them from the plaintiff, avoiding the need to seek legal redress; and (2) obtaining the chance of acquiring additional benefits beyond those stipulated in the original contract (or of avoiding subsequent disbenefits).³⁹ This categorisation is certainly consistent with the Court of Appeal's decision. It is also attractive as a general rule in that it clarifies when an advantage founded upon a pre-existing duty moving from the promisee to the promisor in return for an additional promise will constitute a practical benefit and thus valid consideration (i.e. if it falls into one of these categories). A benefit falling within the first category would be a demonstrably better chance of completion objectively assessed⁴⁰ whilst the second category would include such benefits as: the avoidance of liability to third parties for contractual breaches; the maintenance of good and valuable business relationships; and the prevention of damage to the promisor's reputation or threats to the financial viability of their business.⁴¹

Coote, however, provides a different formulation of the practical benefit test. For him, it follows from the decision in *Williams v Roffey* that a practical benefit will be present where 'actual performance would provide more benefits to the promisor than would non-performance (or, for that matter, fewer harms than would breach)'.⁴² Conversely, such a benefit would be

³⁷ [1956] 1 WLR 496, 498 (Denning and Morris LJ, delivering separate judgments).

³⁸ [1957] 1 WLR 148, 151 (Denning LJ).

³⁹ Mindy Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 123, 126-32.

⁴⁰ *Ibid* 128.

⁴¹ *Ibid* 130.

⁴² Coote, above n 21, 25.

absent only in cases where the promisor had stood to obtain no advantage from performance of the contract when it was first made, or where the circumstances had so changed since the contract was made that all chance of the promisor's obtaining an advantage from performance had been lost.⁴³

Whereas the promisor would need to choose between accepting the promisee's reiterated undertaking to perform and suing them for repudiation, the promisee would be confronted with a very different choice: perform or deliberately breach the agreement so as to stem further losses. Lord Justice Purchas in *Williams v Roffey* noted that it was 'open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially' but went on to qualify this statement, saying 'the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive'.⁴⁴ The courts are averse to allowing parties to benefit from breaching a contract to which they are privy. The law will not allow parties to defeat their contractual obligations through default.⁴⁵ To quote from Windeyer J in *Coulls v Bagot's Executor & Trustee Co Ltd*:⁴⁶

The primary obligation of a party to a contract is to perform it, to keep his promise. That is what the law requires of him. If he fails to do so, he incurs a liability to pay damages. That however is the ancillary remedy for his violation of the other party's primary right to have him carry out his promise. It is, I think, a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or pay damages. Rather, ... the promisee has 'a legal right to the performance of the contract'.⁴⁷

Nonetheless, if a promisee accepts a benefit or concession from the promisor without providing fresh consideration in return, Coote's formulation stipulates that the purported 'practical benefit' subsists in the promisor's quantification of the value of the promisee's continued performance weighed against the potential disadvantages of accepting this performance.

⁴³ Ibid. Ulyatt offers a concurring view: Craig Ulyatt, 'Should Consideration Be Required for the Variation of Contracts?' (2002) 9(3) *Auckland University Law Review* 883, 891.

⁴⁴ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 23.

⁴⁵ *Sailing Ship 'Blairmore' Co Ltd v Macredie* [1898] AC 593, 607 (Lord Watson).

⁴⁶ (1967) 119 CLR 460, 504.

⁴⁷ Cf Corneill A Stephens, 'Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary' [2008] 8 *Houston Business and Tax Journal* 355 at 364, where the author argues that the promisee's option to breach the contract and risk being sued for damages is their 'right' and one which generally will not be exercised given that they would typically prefer performance to 'a lengthy and costly lawsuit, with the attendant uncertainty, inconvenience and possible collection problems'. See also Oliver W Holmes, 'The Path of Law' (1897) 10(8) *Harvard Law Review* 457 where, in a celebrated article, the author expresses the same view that a party can elect to breach if they so choose and merely incur liability in damages for doing so (at p 462).

Halyk's view is that identifying a practical benefit is a matter of value quantification. In the context of contract modifications, the price paid by the promisor for the benefit received from the promisee must be outweighed by the value of the benefit itself. If it does not, it 'has no positive value to the promisor' and in fact comes at a cost to them.⁴⁸ Therefore, 'only when the marginal price paid for obtaining the practical benefit of actual performance is less than the value of the benefit to the promisor is actual performance of any value to the promisor, and thus a practical benefit to her'.⁴⁹ Halson similarly suggests that the things identified as 'practical benefits' in *Williams v Roffey* can only amount to consideration 'if they represent losses which would not be recoverable as damages in the event of breach'.⁵⁰

Defining practical benefit in fiscal terms, however, threatens to infringe the longstanding principle that the courts will not enquire into the adequacy of consideration.⁵¹ Moreover, Halyk rightly concedes that quantifying the value of a benefit to determine if it is practical in the requisite sense makes it 'difficult to say with absolute certainty when the promisor has in fact obtained a practical benefit'.⁵² If practical benefit were to be measured by reference to the prospective damages recoverable by the aggrieved promisor then the courts would be forced to 'enquire into issues such as remoteness of damages and causation in order to ascertain whether a party received a practical benefit from a renegotiation'.⁵³ The impracticalities of this notion go without saying.

What approach the Lord Justices actually adopted in *Williams v Roffey* in identifying a sufficient 'practical benefit' is distinctly unclear. The foregoing cross-section of academic opinion on the matter in the immediate aftermath of the decision provides ample evidence of this fact. As will be seen, each member of the Court of Appeal took a unique path in coming to the unanimous verdict. There can be no doubt this has inhibited the generation of a comprehensible definition for the term 'practical benefit' and has contributed to the

⁴⁸ Dan Halyk, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*' (1991) 55 *Saskatchewan Law Review* 393, 397.

⁴⁹ *Ibid.*

⁵⁰ Halson, above n 35, 184.

⁵¹ *Westlake v Adams* (1858) 5 C.B. (N.S.) 248, 265; 141 ER 99, 106 (Byles J); *Bolton v Madden* (1873) LR 9 QB 55, 57 (Blackburn J).

⁵² Halyk, above n 48, 397.

⁵³ Karen N Scott, 'From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-Existing Duty Rule in New Zealand' (2005) 11 *Canterbury Law Review* 201, 206. See also Mindy Chen-Wishart, 'The Enforceability of Additional Contractual Promises: A Question of Consideration?' (1991) 14 *New Zealand Universities Law Review* 270, 276.

difficulties other courts have experienced when addressing the principle. It is necessary to establish whether the primary enquiry of the courts should be directed at the *subjective* benefits acquired by the promisor (as alleged by the promisee) or to the *objective* benefits to the promisor arising on the facts, assessed from a neutral perspective.

In Glidewell LJ's view, it was not necessary to address the issue. His Lordship said (at p 16): 'Mr Evans [defence counsel] accepts that in the present case by promising to pay the extra £10,300 [to the plaintiff] his client secured benefits'. These benefits were canvassed at pp 10-11 of his Lordship's judgment and discussed above. Hence conclusive emphasis was placed on the fact that the defendant had *conceded* receipt of benefits, such that it was unnecessary to determine if a practical benefit had in fact been conferred upon the promisor.

Lord Justice Purchas appeared to analyse the facts through an objective lens in determining whether consideration moved from the defendant. His Lordship stressed the need to 'look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid'.⁵⁴ His conclusion was that 'there was clearly a commercial advantage to both sides *from a pragmatic point of view* in reaching the [second] agreement'.⁵⁵ The overall language of his Lordship's judgment in determining the presence of a practical benefit is suggestive of objectivity. No reference is made to the subjective mindsets of the parties, with much emphasis being devoted to the factual matrix and the circumstances of each party being discussed in neutral and disconnected terms.⁵⁶

This approach can be contrasted with that of Russell LJ. His Lordship appeared to use language indicative of a subjective approach, preferring to look to the 'true intention' of the parties to deduce whether a practical benefit existed on the facts.⁵⁷ This differs (or at least can differ) greatly from the *common intention* of the parties which is ascertained

⁵⁴ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 21.

⁵⁵ *Ibid* 22 (emphasis added).

⁵⁶ *Ibid* 22-3.

⁵⁷ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19. Dnes appears to assume that all three members of the Court of Appeal 'regarded the subjective benefit from completing the modified contract as factual consideration': Antony W Dnes, 'The Law and Economics of Contract Modifications: The Case of *Williams v Roffey*' (1995) 15 *International Review of Law and Economics* 225, 225.

objectively and without reference to the subjective or ‘true’ mindsets of the parties.⁵⁸ His Lordship framed his discussion in the context of the benefits perceived by the parties *themselves* as a consequence of the promisee’s promise to perform his existing contractual duties:

There was a desire on Mr Cottrell’s [the defendants’ employee] part to retain the services of the plaintiff so that the work could be completed without the need to employ another subcontractor. There was further a need to replace what had hitherto been a haphazard method of payment by a more formalised scheme....⁵⁹

His Lordship ultimately concluded that these benefits to the defendants could ‘fairly be said to have been in consideration of their undertaking to pay the additional £10,300’.⁶⁰ This may, of course, be mere semantics and simply reflect the manner in which the case was argued by the parties. Nonetheless, it further demonstrates the lack of clarity in the approach of the members of the Court of Appeal to ascertaining the presence of a practical benefit in the proceedings. Whilst the question is clearly one of fact, how to effectively answer it remains uncertain.⁶¹

3. Judicial Method in *Williams v Roffey*

The Court of Appeal in *Williams v Roffey* was clearly concerned to adopt a pragmatic approach in finding consideration to render the renegotiation between the parties enforceable. There existed a commercial advantage to both parties in keeping the contract on foot. However, a purely doctrinal application of precedent would have dictated that the variation be rendered unenforceable. Consider the question before the court (which was succinctly expressed by Russell LJ):

Can the defendants now escape liability on the ground that the plaintiff undertook to do no more than he had originally contracted to do although, quite clearly, the defendants, on 9 April 1986, were prepared to make the [additional] payment and only declined to do so at a later stage [?]⁶²

⁵⁸ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451, 461-2 (per curiam). See also *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 188 (Gleeson CJ, Gummow and Hayne JJ); *Taylor v Johnson* (1983) 151 CLR 422, 429.

⁵⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19.

⁶⁰ *Ibid.*

⁶¹ This issue will be explored further in Chapter 5.

⁶² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 17.

In other words, could a party who had agreed to give more under a pre-existing contract be compelled to make good on their promise where the other party had merely promised to do what they were legally bound to do by virtue of that contract? To this there seemed to be a straightforward answer: no. This was the very principle emerging from *Stilk v Myrick*, and *Williams v Roffey* was a ‘classic’ instance where this rule prima facie appeared to apply.⁶³ Importantly, the Lord Justices in *Williams v Roffey* expressed no doubts as to the correctness of the rule and stressed that it remained an integral feature of the English common law of contract. Gratuitous promises not under seal remained unenforceable in accordance with *Stilk v Myrick*.⁶⁴

Notwithstanding the obvious applicability of the existing legal duty rule, however, the Court of Appeal generated the practical benefit principle so as to detect consideration moving from the promisee and render the variation enforceable. Perhaps this is not surprising; *Williams v Roffey* arose at a time when the traditional formalistic approach, which historically characterised the decision-making dogma of the English courts of the classical age,⁶⁵ was on the decline.⁶⁶ Formalism ‘inculcate[d] an intense respect for *stare decisis*’;⁶⁷ it regarded the law as ‘a series of rules, not informed by any moral discourse, but simply a matrix of rules evolving from a series of cases and statutes’⁶⁸ and resisted

⁶³ Ibid 23 (Purchas LJ) (emphasis added):

The defendants were on risk that as a result of the bargain they had struck the plaintiff would not or indeed possibly could not comply with his existing obligations without further finance. As a result of the agreement [to pay more] the defendants secured their position commercially. There was, however, no obligation added to the contractual duties imposed upon the plaintiff under the original contract. *Prima facie this would appear to be a classic Stilk v Myrick case.*

Similar sentiments emerge in the judgments of both Russell LJ (at 18-19) and Glidewell LJ (at 16).

⁶⁴ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Glidewell LJ), 19 (Russell LJ), 21 (Purchas LJ).

⁶⁵ ‘The nineteenth century is usually regarded as the classical age of English contract law...’: N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 1269.

⁶⁶ Johan Steyn, ‘Does Legal Formalism Hold Sway in England?’ [1996] *Current Legal Problems* 43, 47. A full discussion of the reasons for this decline, which are debated amongst scholars, is beyond the scope of this thesis. For perspectives on this see, eg, Anthony R Blackshield, ‘The Revolt Against Legal Formalism’ (Speech delivered at the 34th Inaugural Lecture Series, La Trobe University, Melbourne, 10 September 1979) 6-7; P S Atiyah, ‘From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law’ (1980) 65 *Iowa Law Review* 1249, 1268-9. As an example, Stevens credits the period of manic political and social development in England during the second half of the 20th Century for having propagated a willingness to challenge the status quo and thereby target the roots of formalism: Robert Stevens, *Law and Politics* (Weidenfeld and Nicolson, 1978).

⁶⁷ Steyn, ‘Does Legal Formalism Hold Sway in England?’, above n 66, 46.

⁶⁸ Geoffrey W G Leane, ‘Testing Some Theories About Law: Can We Find Substantive Justice Within Law’s Rules?’ (1994) 19 *Melbourne University Law Review* 924, 927. See also Frederick Schauer, ‘Formalism’ (1988) 97(4) *Yale Law Journal* 509; Michael Taggart, ‘“Australian Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1, 7 (citations removed):

reference to considerations of ‘the merits of the case, the purpose or point of the rules, or the context of the dispute’.⁶⁹ Applying *Stilk v Myrick* in *Williams v Roffey* would have been consistent with this approach, though of course there were several alternatives open to the Court of Appeal.

Fundamentally the Court had four options:

1. Acknowledge the absence of consideration for the contractual variation and apply *Stilk v Myrick* so as to render it unenforceable;
2. Find fresh consideration (based on established notions of that concept) for the contractual variation;
3. Abolish the consideration requirement for contractual modifications entirely; or
4. Invent a principle which effectively recognises consideration in performance or reaffirmation of a pre-existing duty.

As discussed above, Option 1 might have seemed the most obvious outcome. It might have been possible for the Court to endorse Option 2; that is, decide the case on the basis that the promisee *did* provide consideration in the traditional sense for the additional £10,300 paid by the promisor and that *Stilk v Myrick* simply did not apply. Had this been found there would have been no need to invent the practical benefit principle. As will be discussed in Chapter 5, bar two exceptions, all ‘benefits’ that were said to have been conferred upon the promisor were those to which they were already entitled or would have received had the promisee fulfilled his original contractual obligation. The two exceptions were the modified payment scheme⁷⁰ and the subsequent ability for the

Formalism is a catch-all term: a “shorthand for a number of different ideas” including a highly technical approach to problems; the employment of formal, conceptual and logical analysis, often related to literalism and sometimes originalism; a belief that law is an inductive science of principles drawn from the cases, rather than the application of broad, overarching principles to particular disputes; a downplaying of the role of principle, policy, values and justice in adjudication; and in extreme forms a denial of judicial law-making.

⁶⁹ David W Oughton and Martin Davis, *Sourcebook on Contract Law* (Cavendish, 2nd ed, 2000) 5. See also Peter Drahos and Stephen Parker, ‘Critical Contract Law in Australia’ (1990) 3 *Journal of Contract Law* 30, 33; Jude Wallace and John Fiocco, ‘Recent Criticisms of Formalism in Legal Theory and Legal Education’ (1980) 7 *Adelaide Law Review* 309; Peter Goodrich, ‘The Rise of Legal Formalism; Or the Defences of Legal Faith’ (1983) 3 *Legal Studies* 248, 249; Richard A Posner, ‘What Has Pragmatism to Offer Law?’ (1990) 63 *Southern California Law Review* 1653, 1663.

⁷⁰ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19 (Russell LJ).

promisor to efficiently ‘direct their other trades to do work in the completed flats which otherwise would have been held up until the plaintiff had completed his work’.⁷¹ Mindful of the traditional definition of consideration expressed in *Currie v Misa*,⁷² these examples in themselves would presumably have sufficed as consideration to render the promise enforceable without the need to entirely redefine the boundaries of the doctrine. The fact that the benefits were not the subject of the renegotiated ‘bargain’ between the parties would once again be an issue although, as will be discussed in Part III of Chapter 5, this clearly did not perturb the Court of Appeal in *Williams v Roffey*.

Conversely the Court may have found a corresponding detriment being imposed upon the promisee in reiterating his promise to complete his pre-existing contractual duty. Some commentators have suggested that the imposition of additional, or alteration of previous, contractual obligations and the assumption of additional liability in contract and possibly other areas such as tort and criminal law could themselves have amounted to a detriment to resolve the consideration issue.⁷³ Others propose that the promisee’s subsequent inability to undertake some other activity, commercial or otherwise, might have done the same.⁷⁴ It is submitted that these arguments are tenuous at best. Liability already subsisted in the promisee by virtue of his pre-existing contractual obligation and the primary alteration made to this, namely the stipulation that a certain amount (£575) be paid upon completion of each flat, was slight at the most and did not fundamentally alter the obligation itself which was, fundamentally, to pay the full amount upon fulfilment of the work. These aspects of the agreement could hardly have been regarded as detrimental to the promisee.

Endorsing Option 3 would have meant the Court of Appeal overturning a time-honoured precedent and radically modifying the doctrine of consideration as understood in English law. This would have been a radical development which flagrantly disregarded the *stare decisis* principle. And so the Court endorsed Option 4. It did not find consideration in the traditional sense moving from the promisee in return for the promisor’s undertaking to

⁷¹ Ibid 20 (Purchas LJ).

⁷² (1875) LR 10 Ex 153, 162 (Lush J). See further Chapter 1, Part V.

⁷³ Norma J Hird and Ann Blair, ‘Minding Your Own Business – *Williams v Roffey* Re-visited: Consideration Re-considered’ [1996] *Journal of Business Law* 254, 259; Brian Coote, ‘Consideration and the Variation of Contracts’ [2003] *New Zealand Law Review* 361, 362-3.

⁷⁴ John Land, ‘The Enforceability of Contractual Variations: *Moyes & Groves Ltd v Radiation New Zealand Ltd*’ (1985) 15 *Victoria University of Wellington Law Review* 287, 293.

pay more for the same. Rather, when confronted with the rule in *Stilk v Myrick*, which threatened to strike down the renegotiation, it ‘channelled its impulse for enforcement toward an inappropriate expression – the invention of practical benefit to justify enforcement within the bargain model’.⁷⁵ This in itself has given rise to a plethora of issues both with respect to the inconsistent application and internal coherence of the practical benefit test⁷⁶ and the conceptual difficulties in the principle itself.⁷⁷

It is argued that the Court’s actions were indicative of an attempt to strike a balance between adherence to doctrine and application of precedent, and a more pragmatic development of principle calculated to avoid any consequential injustice. We turn first to the Court of Appeal’s self-professed desire to honour and apply the *stare decisis* doctrine. Lord Justice Russell was quick to dispel any implicit ‘reservation[s] as to the correctness of the law long ago enunciated in *Stilk v Myrick*’,⁷⁸ whilst Glidewell LJ vehemently defended his position that the practical benefit principle did *not* abrogate this time-honoured precedent.⁷⁹ The greatest example of this purportedly ‘formalistic’ attitude, however, emerges from Purchas LJ’s judgment. His Lordship noted that the ‘point of difficulty’ which arose in *Williams v Roffey* was the submission by counsel for the appellant that the principle established in both *Harris v Watson* and *Stilk v Myrick* did not apply.⁸⁰ This argument was based on the fact that both cases were tried at *nisi prius* level and were ostensibly, therefore, not binding upon the Court of Appeal. Lord Justice Purchas rejected this ‘bold’ submission and concurrently emphasised the Court’s subservience to the *stare decisis* doctrine, as well as his own respect for the judges in those cases:

I feel I must say at once that, for my part, I would not be prepared to overrule two cases of such veneration involving judgments of judges of such distinction except on the strongest possible grounds since they form a pillar stone of the law of contract which has been observed over the years and is still recognised in principle in recent authority.⁸¹

⁷⁵ Mindy Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor’s New Clothes’ in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 123, 149.

⁷⁶ See Chapter 4.

⁷⁷ See Chapter 5.

⁷⁸ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19.

⁷⁹ *Ibid* 16.

⁸⁰ *Ibid* 20.

⁸¹ *Ibid*.

Perhaps conclusively, all three members of the Court of Appeal reaffirmed the underlying moral of *Stilk v Myrick* in their judgments; namely, that gratuitous promises not under seal are unenforceable.⁸² And yet, despite the express⁸³ and implied⁸⁴ concessions from the Court that *Stilk v Myrick* was applicable to the facts in *Williams v Roffey*; despite the fact the secondary promise given by the defendants to the plaintiff was plainly one for which they received nothing in return; despite the Court's repeated assurances that the existing legal duty rule remained good law, consideration was nonetheless 'found' to render the promise enforceable.

It is submitted that the decision in *Williams v Roffey* was at least in part driven by an underlying concern held by the members of the Court of Appeal as to the *fairness* of the outcome for the parties, more specifically the plaintiff promisee. Had *Stilk v Myrick* applied – which, it is argued, should have been expected if the Court saw no consideration subsisting in the modified payment scheme or the promisor's ability to more efficiently direct their tradesmen (as discussed above) – then the promisee would have been disentitled to the additional £10,300 promised to him in circumstances where he was already operating at a loss by performing his contractual obligations for the defendants. Numerous scholars agree that the judgments of the three Lords Justice reek of a covert desire to achieve a 'just' outcome in the face of a doctrine which threatened to deliver the opposite.⁸⁵ Upon closer inspection, the point hardly seems debatable.

Consider the leading judgment of Glidewell LJ. His Lordship conceded that the rule in *Stilk v Myrick* was outmoded and was not surprised that it had endured much refinement and limitation over the succeeding 180 years since its genesis in the Napoleonic war era.⁸⁶ In light of the fact the doctrines of fraud and duress had developed considerably since 1809, there was no reason in modern times to deny the enforceability of a unilateral

⁸² Ibid 16 (Glidewell LJ), 19 (Russell LJ), 21 (Purchas LJ).

⁸³ Ibid 23 (Purchas LJ).

⁸⁴ Ibid 16 (Glidewell LJ), 18-19 (Russell LJ).

⁸⁵ See, eg, Dan Halyk, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*' (1991) 55 *Saskatchewan Law Review* 393, 405; Mindy Chen-Wishart, 'The Enforceability of Additional Contractual Promises: A Question of Consideration?' (1991) 14 *New Zealand Universities Law Review* 270, 279; Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, 437-8; J W Carter, Andrew Phang and Jill Poole, 'Reactions to *Williams v Roffey*' (1995) 8 *Journal of Contract Law* 248, 248; John Gava and Peter Kincaid, 'Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia' (1996) 10 *Journal of Contract Law* 141, 145.

⁸⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16.

promise whereby the promisor derived a ‘practical benefit’ or obviated a disbenefit from the promisee’s actual or promised performance of their existing legal duty. If illegitimate tactics had been used to extract the promise, it would be struck down.

Lord Justice Purchas similarly noted that times had changed dramatically since *Stilk v Myrick* was decided and that modern renegotiation cases turned more upon the defence of duress rather than the lack of consideration.⁸⁷ His Lordship made the interesting observation that the courts were ‘more ready in the presence of this defence being available in the commercial context to *look for* mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid’.⁸⁸ Lord Justice Russell likewise suggested that the courts in contemporary times should be more ready to *find* consideration so as to reflect the intention of the parties where they are of equal bargaining power and where the finding of consideration reflects this intention.⁸⁹

Thus, all three members of the Court of Appeal recognised that the application of *Stilk v Myrick* to the facts would have resulted in a palpable injustice to the plaintiff in circumstances where he had relied upon a promise of additional funds from the defendants given without duress and so as to allow them to enjoy the fruits of the contract. Perhaps the strongest indication of the Court’s concern for the prejudice this would have caused is found in the words of Russell LJ. To the question his Lordship posed of whether the defendants should be permitted to escape liability to pay the additional money by virtue of the existing legal duty rule he replied: ‘It would certainly be *unconscionable if this were to be their legal entitlement*’.⁹⁰ The Court therefore went to considerable lengths to generate a principle which would detect consideration in a pre-existing duty without violating established doctrine so as to attain the desired result.

Williams v Roffey thus exhibits all the hallmarks of pragmatic judicial decision-making. At first the Court of Appeal stresses that the result stems from the identification of *consideration* moving from the promisee and rendering the promisor’s secondary promise enforceable, not from the *policy* of holding parties to their promises where it seems fair to

⁸⁷ Ibid 21.

⁸⁸ Ibid (emphasis added).

⁸⁹ Ibid 18.

⁹⁰ Ibid 17 (emphasis added).

do so.⁹¹ This gives it the air of a purely doctrinal decision. However the relevant ‘consideration’ is grounded in a pre-existing duty and circumvents the rule in *Stilk v Myrick* only by virtue of the dubious ‘practical benefit’ test, a creature of Glidewell LJ’s reasoning and one supported by the concurring judgments of Russell and Purchas LJ. The ideals of ‘fairness’ and ‘justice’ clearly informed this process and yet were masked under the cloak of formalist logic.

Earlier in the chapter it was mentioned that formalism was in decline around the time *Williams v Roffey* was decided. Adherence to this classical brand of doctrinal, black-letter reasoning persisted well into last quarter or so of the 20th Century, at which point it came under extensive attack from jurists on both sides of the Atlantic.⁹² It was during this period Reiter published a seminal article in which he suggested that most courts were indeed coming into the habit of deciding cases in this manner:

[M]any judgments are written as if the orthodox [consideration] doctrine had been consulted and had guided decision. However, the leeway within the doctrine and the availability of many techniques which permit escape from the doctrine suggest that even in these cases the *decisions* are being made for other reasons and are then justified in orthodox language.⁹³

He even went as far as to suggest that very often asking whether there was consideration for a party’s secondary promise and asking whether there were sufficiently strong reasons to enforce the promise would tender the same result, and that consideration would not be found (and enforcement denied) only where it would be ‘undesirable’ to lend the law’s assistance to the party requesting it.⁹⁴ In his view, judges, particularly in matters of contract law, strained to make it appear as though the law had been consulted and applied in a strictly formalistic way to reach an outcome which such an approach would likely not have facilitated:

Often decisions are written as if the judges had gone to the orthodox doctrine and it had mechanically dictated the answer to the enforcement-or-not question. It is made to appear that the

⁹¹ It is tempting to draw comparisons here between the approaches of Lords Ellenborough and Kenyon in *Stilk v Myrick* and *Harris v Watson* respectively (described in Chapter 1), where we saw doctrine being used in lieu of policy and still achieving the same end.

⁹² Brian Coote, ‘The Essence of Contract: Part 1’ (1988) 1 *Journal of Contract Law* 91, 92. With respect to the causal factors, see above n 66.

⁹³ B J Reiter, ‘Courts, Consideration and Common Sense’ (1977) 27 *University of Toronto Law Journal* 439, 444 (n 23) (emphasis in original).

⁹⁴ *Ibid* 443-5. ‘[I]n the vast majority of cases, orthodox doctrine and the independent policy considerations which encourage non-enforcement travel parallel paths: there is only “no consideration” where, quite apart from problems of lack of consideration, there are good reasons not to enforce the promise’: *ibid* at p 445.

judges had little say or discretion; that they had not exercised ‘judgment and tact’ in deciding whether or not good reasons for non-enforcement were present.⁹⁵

There is certainly scope to argue that this was the Court of Appeal’s method in *Williams v Roffey*. Of course the suggestion that judges impose their own idiosyncratic values and opinions when deciding matters that come before them is hardly new.⁹⁶ In contract law, irrespective of what the parties intended, or what they have written, said or done, the legal consequences flowing from the bargain between them is ultimately a determination for the court.⁹⁷ Thus, in the process of giving effect to the manifest intentions of the parties, the opportunity exists for judges to skew their interpretations of the facts and the relevant law so as to ‘put into effect their own ideas on what parties should or must have intended to provide as regards the regulation of their affairs’.⁹⁸ Whilst this cannot be said to happen *all* the time, there can be little doubt that where the breadth of the language utilised in the contract and the applicable common law decisions permits, some judges will attempt to ‘police’ the agreement by reference to such ideals as fairness and justice in order to attain a desirable result.⁹⁹

The distinguished American judge Richard Posner explains in his provocative book *How Judges Think* that the pragmatism movement has in modern times infiltrated the traditionally formalistic process of following and applying common law decisions in accordance with the *stare decisis* doctrine. ‘Often “following” precedent’, his Honour argues, ‘really means making a policy-based choice among competing precedents or a policy-influenced interpretation of a precedent’s scope’.¹⁰⁰ He proceeds to explain how this scope for choice has provided fertile ground for the growing trend of judges to decide cases along pragmatic lines with purported recourse to the doctrine of precedent:

⁹⁵ Ibid 445. See also P S Atiyah, *Essays on Contract* (Clarendon Press, 1986) 97: ‘[A] precedent is often treated as an additional reason for deciding in a certain way, rather than as a different kind of reason which shuts out of consideration all other reasons’.

⁹⁶ ‘The judge ... can only strive to minimize the emotional, the idiosyncratic elements in his intellectual processes, but cannot eliminate them altogether’: Alexander B Smith and Abraham S Blumberg, ‘The Problem of Objectivity in Judicial Decision-Making’ (1967) 46(1) *Social Forces* 96, 96; ‘Bias and prejudice are human failings which sometimes find shelter beneath the judge’s gown’: Walter B Kennedy, ‘Pragmatism as a Philosophy of Law’ (1925) 9(2) *Marquette Law Review* 63, 71. See also Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1929) 113. The issue is very much alive in modern times: see, eg, Catherine Mitchell, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ [2012] *Current Legal Problems* 1, 22.

⁹⁷ G H L Fridman, ‘Freedom of Contract’ (1967) 2 *Ottawa Law Review* 1, 7.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 45.

Because judges are reluctant to overrule decisions – their preference is for ‘distinguishing’ them to death rather than explicitly overruling them, in order to preserve the appearance of the law’s continuity and stability – the landscape of case law is littered with inconsistent precedents among which current judges can pick and choose, resurrecting if need be a precedent that had died but had not been given a decent burial.¹⁰¹

These passages are instructive when the decision in *Williams v Roffey* is revisited. Lord Justice Glidewell cited two earlier precedents in *Ward v Byham*¹⁰² and *Williams v Williams*¹⁰³ – both decisions of Denning LJ – in order to provide a legal foundation for the recognition of *factual* benefits as good consideration. *Ward v Byham* had only been applied in one subsequent case prior to *Williams v Roffey* – though the method in which it was ‘applied’ was somewhat dubious, with the presiding judge conceding that he found consideration on a number of alternative bases.¹⁰⁴ It was also rejected 16 years later by a New Zealand court¹⁰⁵ and given only cursory attention four years after this in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*.¹⁰⁶ Similarly *Williams v Williams* received only perfunctory, sometimes derogatory, mention in three subsequent cases prior to *Williams v Roffey*.¹⁰⁷ Moreover, as Hobhouse J stated in *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC* (*‘The Alev’*), the dicta of Lord Denning in these decisions ‘related to non-contractual duties or duties owed to another’ and did not support the view that an agreement to simply perform a pre-existing contractual duty already owed to the promisor amounted to good consideration.¹⁰⁸

Notwithstanding the controversy surrounding these two precedents, however, Glidewell LJ eagerly constructed the practical benefit principle upon them. Consideration was then found in the factual benefits conferred upon the defendants through the plaintiff’s reiterated promise to fulfil his contractual obligation. This circumvented *Stilk v Myrick* and avoided the application of the existing legal duty rule.

The critical observation to be made here is that the line of reasoning proffered by the members of the Court of Appeal in *Williams v Roffey*, and the eventual outcome itself,

¹⁰¹ Ibid.

¹⁰² [1956] 1 WLR 496.

¹⁰³ [1957] 1 WLR 148.

¹⁰⁴ *Popiw v Popiw* [1959] VR 197, 199 (Hudson J).

¹⁰⁵ *Cook Islands Shipping Co Ltd v Colson Builders Pty Ltd* [1975] 1 NZLR 422, 435 (Mahon J).

¹⁰⁶ [1979] 1 QB 705, 713 (Mocatta J).

¹⁰⁷ *O’Loughlin v O’Loughlin* [1958] VR 649, 655-7 (Dean J); *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705, 713 (Mocatta J); *Pao On v Lau Yiu Long* [1980] AC 614, 633 (per curiam).

¹⁰⁸ [1989] 1 Lloyd’s Rep 139, 147.

suggest a concerted effort by the Court to attain a ‘just’ and commercially acceptable result without offending doctrine and instead giving the impression of having honoured it. It was important that the Court maintained an air of continuity, for even if an opinion

is creative or imaginative and expresses a minority viewpoint, it must seek to maintain some sort of continuity with the existing body of law if it is to be received as credible. It must ‘stretch it without snapping it’. The judge may hold that the rule or principle claimed to be the existing law is incomplete or wrong, but he or she must nevertheless place it in context and demonstrate that the continuity of the law or legal process remains intact.¹⁰⁹

The Court of Appeal in *Williams v Roffey* ‘bent over backwards’ to see that the plaintiff received the additional sum promised to him in circumstances where the underpricing which endangered his ability to perform was entirely within his control,¹¹⁰ an act symptomatic of the emerging inclination of courts to force the consideration doctrine to ‘yield to practical justice and the needs of modern commerce’.¹¹¹ It signalled that, when deciding whether or not to enforce the promise, the courts ‘may be guided less by technical questions of consideration than by questions of fairness, reasonableness and commercial utility’.¹¹² The large body of English and international case law applying *Williams v Roffey* to be discussed in Chapter 3 adds credence to this argument.

In *Harrity and Northeast Yachts 1998 Ltd v Kennedy*,¹¹³ the New Brunswick Court of Appeal observed that the doctrine of consideration in modern times was being manipulated by judges so as to ensure those contractual variations which were favourable were enforced and those that were not were rendered unenforceable:

[A]ccording to the ‘hunt and peck’ theory of consideration, judges will rummage through trial and appeal records to find the necessary consideration if that is what is needed to achieve a just result. If they believe that enforcement would lead to an unjust result, the same judges will declare there is an absence of meaningful consideration and, therefore, the promise is gratuitous and unenforceable.¹¹⁴

Reynolds and Treitel had similarly suggested years earlier that a court ‘will tend to stress the factual benefit or detriment when it thinks that the agreement should be upheld, and

¹⁰⁹ E W Thomas, *The Judicial Process* (Cambridge University Press, 2005) 247.

¹¹⁰ John Adams and Roger Brownsword, ‘Contract, Consideration and the Critical Path’ (1990) 53 *Modern Law Review* 536, 541.

¹¹¹ Steyn, ‘Does Legal Formalism Hold Sway in England?’, above n 66, 437.

¹¹² Adams and Brownsword, above n 110, 537.

¹¹³ [2009] NBCA 60 (24 September 2009).

¹¹⁴ *Ibid* [28].

the lack of legal benefit or detriment when it thinks that it should not'.¹¹⁵ This certainly echoes Reiter's view (discussed above) that 'orthodox doctrine and the independent policy considerations which encourage non-enforcement travel parallel paths'.¹¹⁶ One commentator goes so far as to suggest that a strict application of the consideration doctrine almost always protects the party who has acted in 'bad faith'.¹¹⁷ It certainly seemed likely to protect the defendants in *Williams v Roffey* until the Court of Appeal daringly devised a new means of finding consideration. It also threatened to render unenforceable the renegotiations in the subsequent cases to be explored in Chapter 3. There is firm grounding, therefore, for the suggestion that the Court of Appeal in *Williams v Roffey* resorted to pragmatic, ad hoc reasoning in order to overcome the difficulties presented by the consideration doctrine and to come to the aid of the aggrieved promisee who had, at least from a moral perspective, earned the right to the additional sum promised to him.

4. Was the decision in *Williams v Roffey* 'correct'?

It is strongly arguable, from an ethical perspective and on the particular facts of the case, that the correct decision was reached in *Williams v Roffey*.¹¹⁸ A contractor under financial strain and in danger of being unable to complete was promised more money than stipulated in the contract by the builder to guarantee performance. The contractor performed, the builder reneged. Popular sentiment favours the enforcement of fairly-made mutual promises, as Cohen explains:¹¹⁹

¹¹⁵ F M B Reynolds and G H Treitel, 'Consideration for the Modification of Contracts' (1965) 7 *Malaya Law Review* 1, 14.

¹¹⁶ Reiter, above n 93, 445.

¹¹⁷ Malcolm S Mason, 'The Utility of Consideration – A Comparative View' (1941) 41(5) *Columbia Law Review* 825, 845.

¹¹⁸ Conversely, it might be argued that the same result would not always be the most 'correct' in similar cases i.e. where a subcontractor has demonstrated an unwillingness or inability to perform and requires additional payment from the principal contractor to ensure they can complete their side of the bargain. A study published just seven years prior to *Williams v Roffey* found that this particular type of situation was rare within the English building and construction industry and did not reflect overall commercial reality in that jurisdiction: Richard Lewis, 'Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' (1982) 9(2) *Journal of Law and Society* 153, 162-4. The result in *Williams v Roffey* might well be objectively perceived as 'correct' on the particular facts of that case, however it cannot be said that it will always be so every time a unilateral variation benefiting an imperilled subcontractor is enforced.

¹¹⁹ Morris R Cohen, 'The Basis of Contract' (1933) 46(4) *Harvard Law Review* 553, 580-1. See also p 571: Common law is commonly supposed to enforce promises. Why should promises be enforced? The simplest answer is that of the intuitionists, namely, that promises are sacred *per se*, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this. This may also be said to be the common man's theory.

It is generally considered unfair that after A has given something of value or rendered B some service, B should fail to render anything in return. Even if what A did was by way of gift, B owes him gratitude and should express it in some appropriate way. And if, in addition, B has promised to pay A for the value or services received, the moral sense of the community condemns B's failure to do so as even more unfair. The demand for justice behind the law is but an elaboration of such feelings of what is fair and unfair.

It also made good commercial sense to enforce this agreement, with both parties enjoying commercial advantages as a consequence of the renegotiation. The existing law, however, stipulated that the defendants' promise to the plaintiff was unenforceable as no fresh consideration moved from the plaintiff in return for the promise. *Stilk v Myrick* firmly favoured the defendants' case. Ingenuity on the part of the English Court of Appeal was what allowed the plaintiff to get around the existing legal duty rule when all seemed lost. By detecting consideration through the practical benefit principle the Court effectively constructed a mutual exchange between the parties and achieved the goal of enforcement. As will be seen in Chapters 5 and 6, however, this initiative came at a cost. The practical benefit principle has given rise to a plethora of issues both with respect to the inconsistent application and internal coherence of the test and the conceptual difficulties stemming from the very notion of factual benefit.

In a theme that will be elaborated upon in Chapter 6, it is submitted that *Williams v Roffey* was rightly decided but for the wrong reasons. Enforcement of the unilateral variation in that case was objectively the fairest and most appropriate outcome. The defendants should have been bound to their promise to the plaintiff. However, pretending to circumvent doctrine through the invention of a tenuous 'exception' was an incorrect means of attaining this result. The Court of Appeal was clearly inconvenienced by the existing legal duty rule and felt it should not have applied. The most sensible solution, therefore, would have been to remove the consideration requirement for contract modifications altogether and rely upon appropriate safeguards including the duress doctrine. The practical benefit principle was simply an improvised means of finding consideration where there was none, so as to enforce the renegotiation within the traditional bargain mould. This simultaneously created the façade of having dutifully acknowledged the significance of the existing legal duty rule in the circumstances and

Willis similarly notes that there exists a 'social interest' in being able to rely upon the promises of others: Hugh E Willis, 'Rationale of the Law of Contracts' (1936) 11 *Indiana Law Journal* 227, 230.

determining that consideration subsisted in the plaintiff's reiterated promise to render this rule inapplicable.

5. Conclusion

This chapter examined the decision in *Williams v Roffey*, discussing its facts and findings and exploring the nebulous concept of 'practical benefit' generated by the Court of Appeal. The meaning of 'practical benefit' was considered with the tentative conclusion being that the term lacked clear definition. Finally, the overtly pragmatic approach endorsed by the Court of Appeal in rendering the renegotiation between the parties enforceable was discussed before an opinion as to the correctness of the decision was given. It was argued that the decision was characteristic of a more policy-driven judicial methodology whereby the Court strove to give effect to a contractual variation it felt deserved enforcement in circumstances where a routine application of precedent would have resulted in the agreement being struck down. It was further argued, in anticipation of a theme to be elaborated upon in subsequent chapters, that the Court of Appeal took the wrong road in achieving the eventual outcome. Whilst the result was 'correct', the means by which the Court reached this result was not.

It becomes important now to analyse the case law which has addressed the practical benefit principle enunciated in *Williams v Roffey* to shed further light on the meaning of this term and how such benefits are found to exist in contractual modification cases. In so doing, the first Australian case to endorse the principle will be examined, along with other decisions from across the common law world.

CHAPTER 3

AUSTRALIAN AND INTERNATIONAL TREATMENT OF PRACTICAL BENEFIT

'An idea that is not dangerous is unworthy of being called an idea at all.'

The previous chapter discussed the practical benefit principle generated by the Court of Appeal in *Williams v Roffey*. The facts of the case and the Court's reasoning were examined before the chapter attempted to extrapolate the meaning of the term 'practical benefit' from the case and a cross-section of the literature analysing the decision. Finally the judicial method endorsed in *Williams v Roffey* was considered, with the argument being that the decision exemplified the hallmarks of pragmatic decision-making so as to escape what would have been an unjust outcome under a routine application of precedent. This chapter now turns to discussing the first Australian decision to endorse and apply the practical benefit principle before considering the large body of case law both domestically and internationally which has addressed the concept.

1. Australian Endorsement: *Musumeci v Winadell Pty Ltd*²

In *Musumeci* the defendant leased to the plaintiffs certain premises within its shopping centre located in New South Wales, Australia. The tenancy agreement was entered into on 14 December 1990 and the plaintiffs subsequently established a fruit and vegetable business within the premises. Some time later, having discovered that the lessor intended to lease four premises within the shopping centre to a rival fruit and vegetable company (Duffy Bros), the plaintiffs requested their solicitors to write to the lessor's legal representatives addressing their concerns regarding this arrangement. The plaintiffs feared that the new proprietors, whose store would be approximately six times larger than their own and in a location much closer to the shopping centre entrance, would significantly affect their business revenue and goodwill. They sought to renegotiate the terms of the lease to include: (1) a reduction of rent by 1/3 commencing from the date Duffy Bros opened for trade; (2) a supplantation of a new lease for five years with an option to renew; and (3) an agreed framework for the determination of rent. On 21 April 1992 the defendants responded to this letter, agreeing to reduce the rent but saying that they were 'not in the position to grant a new Lease'. The proposed rent calculation framework was not mentioned.

¹ Irish author and poet Oscar Wilde (1854-1900). Quote cited in Matthew Beaumont, 'Reinterpreting Oscar Wilde's Concept of Utopia: "The Soul of Man Under Socialism"' (2004) 15(1) *Utopian Studies* 13, 19.

² (1994) 34 NSWLR 723 ('*Musumeci*').

After further disagreements regarding the terms of the lease,³ the defendant abandoned the agreement to reduce rent and instead claimed the full amount from the plaintiffs. When they failed to pay by the imposed deadline of 14 January 1994, the defendant ‘entered the premises, changed the locks and immediately arranged for demolition works to be commenced demolishing walls between the adjoining ... store and shop 19 leased to the plaintiffs’.⁴ The plaintiffs sued, claiming damages for breaches of contract and the covenant for quiet enjoyment, arguing that the defendant’s promise to accept a rent reduction was binding and that they were therefore not compelled to pay the full amount of rent claimed. The defendant argued that no consideration had been tendered by the Musumecis in return for the promised rent concession such that it was revocable at will.⁵

The plaintiffs contended that the purported variation to the lease was supported by consideration and therefore binding on the lessor. They founded this argument upon two bases. First, they argued that ‘the lessor agreed to the rent reduction ... in consideration of [them] agreeing to abandon their claim for alleged destruction of their goodwill in leasing a substantially larger area to a major competing fruit market business’.⁶ Recall that such an agreement to forbear legal action will, subject to certain conditions being met, amount to valid consideration.⁷ This argument was swiftly rejected, as the correspondence between the parties indicated that the plaintiffs accepted the rent reduction from the defendant *without* actually abandoning their threats of legal action.⁸ Secondly, the plaintiffs argued that their continued tenancy in the defendant’s premises conferred a practical benefit on the latter such that, under the rule in *Williams v Roffey*, they had tendered valid consideration in return for the defendant’s promise of reduced rent. This submission, however, relied upon *Williams v Roffey* being accepted into the Australian common law.

³ The Musumecis (plaintiffs) contended that the rent concession applied not only to the rent payable but also to the applicable outgoings. Winadell (defendant) argued that this was not the case and that the concession was limited strictly to the actual rent payable: *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 731.

⁴ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 734 (Santow J). On 18 January 1994, two days after the demolition work commenced, the plaintiffs obtained an injunction preventing any further destruction of their shop, ordering the restoration of any damage caused and entitling them to continue trading, until such time as the matter was resolved by the courts.

⁵ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 730.

⁶ *Ibid* 736.

⁷ See Chapter 1, Part VIII where *Wigan v Edwards* (1973) 1 ALR 497 is discussed. See also the principles and other authorities cited by Santow J in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 737.

⁸ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 737-8.

In deciding whether *Williams v Roffey* should be followed in Australia, Santow J first explored the principal reasons opposing the enforcement of contracts to perform existing obligations generally. In his Honour's opinion, these were:⁹

1. the potential – even incentive – for extortionate behaviour on the part of opportunistic parties to a contract seeking to secure additional benefits from the other party by threatening breach;
2. the conceptual difficulty in recognising the actual or promised performance of an existing duty as consideration for an additional promise from the other party. Practically the promisee suffers no legal detriment in performing what was already due from them in the same way the promisor does not receive a legal benefit from receiving that already due to them; and
3. the effective abolition of the existing legal duty rule brought about by recognising a 'hoped-for end result' as consideration, which will almost invariably be found in every case involving a modification of terms.

His Honour went on to say that the chief difficulty in *Williams v Roffey* and subsequent cases was reconciling a finding of consideration based upon the actual or promised performance of a pre-existing contractual duty with the rule in *Stilk v Myrick*, where a 'wholly gratuitous promise' was concerned.¹⁰ This paradox raised an important question: 'What then is a sufficient practical benefit to B, so as to take the situation beyond a wholly gratuitous promise by B?'¹¹ The answer, in Santow J's opinion, was to be found in a passage from Treitel:

The view that the new promises in such cases should not be enforced seems to be based on two related lines of reasoning. The first rests on the need to protect the promisor from extortion, in the shape of the promisee's refusal to perform unless he is promised extra pay. But this argument is much reduced in importance now that such a refusal may constitute duress. ... The second reason ... was that the promisee suffered no legal detriment in performing what was already due from him, nor did the promisor receive any legal benefit in receiving what was already due to him. But this reasoning takes no account of the fact that the promisee may in fact suffer a detriment: for example, the wages that a seaman could earn elsewhere may exceed those that he would earn under the original contract together with the damages that he would have to pay for breaking it. Conversely, the promisor may in fact benefit from the actual performance of what was legally due to him: in *Stilk v Myrick* the master got his ship home and this may well have been worth more to him than any damages that he could have recovered from the crew.¹²

⁹ Ibid 741-5.

¹⁰ Ibid 745.

¹¹ Ibid.

¹² G H Treitel, *The Law of Contract* (Sweet & Maxwell, 8th ed, 1991) 89.

Hence, provided that the promisee's performance and the consequential benefits obtained (or disbenefits averted) are 'capable of being viewed' by the promisor as worth more than any likely remedy against the promisee, with due regard to the fiscal value of the new promise, these will represent valid consideration moving from the promisee in return for the new promise.¹³ Moreover, and in the alternative, if the promisee suffers a detriment or obviates a benefit in promising to perform the contract in return for the additional promise from the other party, and this is 'capable of being viewed' by the promisee as less valuable than non-performance in the absence of the additional promise, with due regard to the promisor's likely remedy against them, then this too will represent valid consideration for the additional promise.¹⁴ In other words, any potential remedy against the beneficiary of the additional promise must be seen to have less worth to the promisor than actual performance by the beneficiary.

In Santow J's opinion these principles should also extend to circumstances where the promisor had agreed to accept less, rather than pay more, for the promisee's performance.¹⁵ In addition, his Honour felt that it was logical to expand part (v) of Glidewell LJ's test to exclude promises extracted through 'unfair pressure' i.e. those 'induced by undue influence or unconscionable conduct, at the least'.¹⁶ These propositions would later be encapsulated in his Honour's modified test for establishing the presence of a 'practical benefit' in relevant cases, extracted below.

Justice Santow noted two then recent cases¹⁷ which had applied the practical benefit principle established in *Williams v Roffey* before concluding that, 'subject to the earlier re-casting of the five elements of Glidewell LJ, *Williams v Roffey* should be followed [in Australia] in allowing a practical benefit or detriment to suffice as consideration'.¹⁸ For convenience, his Honour proceeded to set out the modified test, indicating changes with italics:

¹³ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 745, 747.

¹⁴ *Ibid.*

¹⁵ *Ibid* 747.

¹⁶ *Ibid* 743-4.

¹⁷ *Lee v GEC Plessey Telecommunications* [1993] IRLR 383; *Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993). These cases are discussed in Parts II and III of this chapter.

¹⁸ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 746-7.

- (i) If A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B, and
- (ii) At some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or be able to, complete his side of the bargain, and
- (iii) B thereupon promises A an additional payment *or other concession (such as reducing A's original obligation)* in return for A's promise to perform this contractual obligation at the time, and
- (iv)
 - (a) As a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit provided that *A's performance, having regard to what has been so obtained, is capable of being viewed by B as worth more to B than any likely remedy against A (allowing for any defences or cross-claims), taking into account the cost to B of any such payment or concession to obtain greater assurance of A's performance, or*
 - (b) *as a result of giving his promise, A suffers a detriment (or obviates a benefit) provided that A is thereby foregoing the opportunity of not performing the original contract, in circumstances where such non-performance, taking into account B's likely remedy against A (and allowing for any defences or cross-claims) is capable of being viewed by A as worth more to A than performing that contract, in the absence of B's promised payment or concession to A.*
- (v) B's promise is not given as a result of economic duress or fraud *or undue influence or unconscionable conduct* on the part of A *nor is it induced as a result of unfair pressure on the part of A, having regard to the circumstances, then,*
- (vi) The benefit to B *or the detriment to A* is capable of being consideration for B's promise, so that the promise will be legally binding.¹⁹

Having accepted the *Williams v Roffey* principle as good law and recast the elements of the test for establishing whether a 'practical benefit' is present, Santow J proceeded to apply the relevant principles to the facts. The plaintiffs contended that the defendant lessor gained a practical benefit for its promised rent concession by way of their 'enhanced capacity' for them to remain in occupation of the premises they leased from the defendant and 'carry out their future reduced lease obligations, notwithstanding substantial newly introduced competition from the other tenant'.²⁰ Justice Santow accepted this submission holding that, in spite of the fact there was no legal inhibition preventing the defendant from introducing new competition in the same industry to its

¹⁹ Ibid 747.

²⁰ Ibid.

shopping centre,²¹ the practical benefit of having the plaintiffs remain in possession of the defendant's premises and continue to pay rent amounted to good consideration for the defendant's promise to reduce the amount of rent due per instalment. His Honour said that 'in a shopping centre it is well-known that vacant shops are not in the interests of the landlord whilst a reputation for fairness is',²² before stating his reasons in greater detail:

I find that the particular practical benefit here, was that the lessor had greater assurance of the lessees staying in occupation and maintaining viability and capacity to perform by reason of their reduction in their rent, notwithstanding the introduction of a major, much larger competing tenant. The practical detriment to the lessees lay in risking their capacity to survive against a much stronger competitor, by staying in occupancy under their lease, rather than walking away at the cost of damages, if the lessees' defences ... were unsuccessful. From the lessee's actions, it is evident that without the rent concession, the latter course was viewed as more likely to be in the lessees' interests than staying in occupation.²³

All elements of the modified test being satisfied, the plaintiffs succeeded in their action against the defendant lessor. It was open to Santow J, however, to find another practical benefit flowing from the arrangement between the parties to the promisor, namely the 'immediate receipt of payment and the saving of time, effort and expense',²⁴ all of which would certainly have been incurred had a contractual modification of the kind which occurred not been enforced. In analogous part-payment of debt cases this factor alone can be seen to constitute sufficient consideration for an additional promise to accept less from the promisee in full satisfaction.²⁵ As Lord Blackburn said in *Foakes*:

[A]ll men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.²⁶

²¹ Ibid 748. See also p 727 where it is said that the plaintiffs' lease did 'not contain any restriction on the lessor to allow a similar business to operate in the Shopping Centre and [that] no representation to that effect was ever made'.

²² Ibid 748.

²³ Ibid 748-9.

²⁴ *Robichaud v Caisse Populaire de Pokemouche Ltée* (1990) 69 DLR (4th) 589, 595 (Angers JA).

²⁵ Ibid 595-6 (Angers JA).

²⁶ (1884) 9 App. Cas. 605, 622. Interestingly Blackburn J was dissenting on this point, however his Lordship withheld his reasons and assented to the proposed judgment in light of the contrary views of the majority: at pp 622-3.

As will be discussed in Part III of this chapter, however, the notion of reconciling the practical benefit principle with the part-payment of debt rule has been considered and dismissed by the English courts.²⁷

2. Further Domestic Treatment of the 'Practical Benefit' Principle

Whilst *Musumeci* represents the first Australian authority to expressly adopt the practical benefit principle, it was neither the first, nor the last, to consider it. There had been at least one early instance where factual benefits were seemingly recognised as amounting to legal consideration though, as we will see shortly, the concept failed to take root until 1994 when the issue confronted the New South Wales Supreme Court. In *Larkin v Girvan*²⁸ the plaintiff landowner contracted the defendant builder to construct a home for her. Under the contract any disputes between the parties were to be referred to arbitration prior to either party commencing legal action. During construction the plaintiff alleged that the house had not been built in accordance with the plans and specifications and informed the defendant that she wished to take the matter to arbitration. The defendant promised that if she forbore from doing so he would remedy any defects within six months. The plaintiff agreed to his terms.

After six months had passed the plaintiff alleged that the defendant breached this agreement and sued him. The defendant contended that the plaintiff had provided no consideration for his promise to remedy all defects within six months and that, in any event, it formed part of his existing legal obligation to construct the house for the plaintiff. Chief Justice Jordan, with whom Davidson and Halse Rogers JJ agreed, held that the arrangement between the parties

could be regarded as constituting an agreement in which the consideration moving from the defendant was an agreement on his part no longer to dispute the validity of the plaintiff's complaints – no longer to make it necessary for her to establish them before the appropriate tribunal – but to admit that it was necessary for him to do what she had been asking in order to comply with the plans and specifications, and to undertake to do it within a period of six months, and by which the consideration moving from the plaintiff was an agreement not to cause an arbitration to be had.²⁹

²⁷ *Re Selectmove* [1995] 1 WLR 474.

²⁸ (1940) 40 SR (NSW) 365.

²⁹ *Ibid* 369.

His Honour's judgment is somewhat ambiguous in that it earlier suggests that the arrangement between the parties could constitute a bona fide compromise of a disputed claim³⁰ and therefore a legally enforceable agreement to which the existing legal duty rule does not apply.³¹ He then offers the 'factual benefit' analysis extracted above before proceeding to opine that, given the plaintiff paid the balance of the contract price three days after the compromise arrangement was made,

it might also be inferred that it was an implied term of the agreement that the agreement not to go to arbitration involved a promise by the plaintiff to make this payment in consideration of the defendant abandoning his previous attitude and agreeing to satisfy her requirements.³²

His Honour concluded, rather unhelpfully, that the agreement was enforceable on any number of bases depending 'on the view taken of the alleged conversation [between] the parties when it is considered in the light of all the surrounding circumstances'.³³ Hence, there were indications here of factual benefits receiving recognition as forms of legal consideration.

The more specific concept of 'practical benefit' was initially addressed in the unreported Victorian case of *Ajax Cooke Pty Ltd v Nugent*.³⁴ There an agreement was reached between the defendant company and several unions regarding the terms of a redundancy package for its employees. The agreement was to remain in force for one year commencing 4 September 1990. The defendant placed notices in its workplace informing employees of the package and detailing the benefits retrenched employees would receive after being made redundant. The plaintiff employee had previously resigned from his union and was not a member of any of the signatory unions when the agreement came into effect.

Nonetheless, he continued in his employ with the defendant and, when the notice was posted up by his employer, he read it and, without any discussion on the point, he simply considered the redundancy package to be part of the terms and conditions of his employment.³⁵

³⁰ Which had previously been held to amount to valid consideration to support a one-side contract modification: see, eg, *Cook v Wright* (1861) 1 B. & S. 559; *Miles v New Zealand Alford Estate Co* (1864) 32 Ch. D. 266; *McDermott v Black* (1940) 63 CLR 161. This rule was later expressly approved by the High Court of Australia in *Wigan v Edwards* (1973) 1 ALR 497: see further Chapter 1, Part VIII.

³¹ *Larkin v Girvan* (1940) 40 SR (NSW) 365, 368.

³² *Ibid* 369.

³³ *Ibid* 370.

³⁴ (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993) ('*Ajax*').

³⁵ *Ibid* 1.

Three months later the plaintiff was promoted before being made redundant in July 1991, during which the redundancy package remained in effect. He received ‘redundancy’ payments for both annual leave and long service leave but claimed he had not been paid all entitlements due to him under the redundancy package.³⁶ He sued to recover the balance allegedly owed and was successful at first instance, the Court holding that the terms of the redundancy package were incorporated into his terms of employment, as per the principle in *Carlill v Carbolic Smoke Ball Co.*³⁷ On appeal to the Victorian Supreme Court, the defendant contended that, even if the package became part of the plaintiff’s contract of employment, he had provided no consideration in doing no more than he was already bound to do as its employee and without giving any notice of resignation. This argument was rejected:

The plaintiff was not bound to continue in his employment: even if the employee was bound by his existing contract not to quit his employment without giving due notice, he was not bound to continue in employment until retrenchment. By doing so in the belief that the package applied to him, he both accepted the offer made of further benefits upon retrenchment, and he gave consideration at the same time.³⁸

On the consideration point, the following was also said:

The judgments in [*Williams v Roffey*] indicate a willingness to spell out consideration where the conduct of the parties is seen to have been to their mutual advantage, in a practical sense. That approach might have served the plaintiff here, for it was at least open to the magistrate to have found mutual advantage to both the plaintiff and defendant in the redundancy package. The benefit to the plaintiff is obvious. As for the defendant, was it not open to infer that, in posting notice of the redundancy package, and thereby announcing the benefits to be paid during the relevant period, the defendant acted to secure some benefit or advantage to itself, whether by inducing its employees to refrain from further industrial disputation or by encouraging them to continue in their present employment?³⁹

Hence whilst the point was not even raised by the plaintiff, Phillips J expressed strong approval of the practical benefit principle and applied *Williams v Roffey* on the facts. Acting Justice Burchett did the same in the New South Wales Supreme Court case of *Figjam Pty Ltd v Pedrini*.⁴⁰ In contrast, less than five months after *Ajax* and four months

³⁶ Ibid 2.

³⁷ [1893] 1 QB 256 (*Carlill*). There it was generally stated that a notice offering reward to whoever fulfils the conditions stipulated on the notice will be contractually entitled to the reward upon doing so: see pp 262 (Lindley LJ), 268 (Bowen LJ). In *Ajax* it was said that the redundancy package notice contained an offer akin to that in *Carlill* and that in continuing in his employment with the defendant, the plaintiff thereby entitled himself to the benefits of the redundancy package.

³⁸ (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993) 10.

³⁹ Ibid 10-11.

⁴⁰ (2007) Aust Contract Reports ¶90-259, 89,981 (*Figjam*).

prior to the landmark decision in *Musumeci*, the New South Wales Commercial Tribunal in *Bing Lee Finance Pty Ltd v Various Respondents*⁴¹ emphatically rejected the practical benefit principle. The case concerned, amongst other issues, a purported agreement between the applicant and its debtors ‘to allow them to defer instalments or pay reduced instalments’ on monies owed to the applicant.⁴² The applicant argued that there was no such agreement and that, even if there was, the debtors had provided no consideration, for they were doing no more than they were legally bound to do in repaying the debts. The Tribunal agreed with this submission, holding that the decision in *Williams v Roffey* was ‘inconsistent’ with *Wigan v Edwards*⁴³ and various other Australian authorities applying the existing legal duty rule, and that in any event it was bound to follow *Wigan v Edwards* being a High Court authority on point.⁴⁴ This view was rejected by Santow J who expressly approved of the practical benefit principle in *Musumeci*.

Several other cases in the domestic setting have since endorsed the concept of ‘practical benefit’. It was firmly approved and applied by the Queensland Supreme Court in *Mitchell v Pacific Dawn Pty Ltd*.⁴⁵ There the defendant contracted the plaintiff to construct a multi-storey commercial/residential building. When the building was at practical completion stage, the parties arranged a meeting to discuss finances and arrange payments. The defendant contended that the plaintiff agreed in this meeting to accept a significantly lower amount of finance in full settlement. The plaintiff claimed no such agreement was reached and claimed the full amount. The Supreme Court found on the documented evidence that this was in fact the agreement made, and so the plaintiff contended in the alternative that the defendant had provided no consideration for his concession.

The defendant argued that they had provided consideration by way of forbearance from pursuing a *bona fide* claim against the plaintiff ‘for delay in handing over to the defendant a building constructed in accord with the contract between them at the stage of practical completion’.⁴⁶ The Court first accepted the practical benefit principle as expressed in

⁴¹ (1994) ASC ¶56-267.

⁴² *Ibid* 58,788.

⁴³ (1973) 1 ALR 497 (‘*Wigan v Edwards*’).

⁴⁴ (1994) ASC ¶56-267, 58,789-91.

⁴⁵ [2003] QSC 86 (4 April 2003) (‘*Pacific Dawn*’).

⁴⁶ *Ibid* [16] (Ambrose J).

Musumeci as ‘a correct statement of the law at this stage of its development’.⁴⁷ It then found that the defendant had provided consideration for the plaintiff’s concession not in their forbearance from pursuing a *bona fide* claim as it pleaded, but in their ‘reduction of the retention fund to 2.5% [from the previous rates of 8% and 4%] of the plaintiff’s certified entitlements under the contract’.⁴⁸ The Court went on to find, however, that the modification was procured by economic duress and unconscionable behaviour on the part of the defendant in contravention of the fifth element of the *Musumeci* test, such that it was unenforceable.⁴⁹

The practical benefit principle also enjoyed unequivocal endorsement in the New South Wales Court of Appeal decision of *Tinyow v Lee*.⁵⁰ In that case the parties were shareholders in a company experiencing significant financial difficulty. The respondents wanted to ‘exit and escape liability under their respective guarantees to the company’s bank’ and so, at the request of the appellant, pledged to each pay \$70,000 towards the company debt.⁵¹ In return, the appellant agreed to acquire their shares without payment, accept their resignations as directors of the company and ‘give releases’ to each of them. The arrangement was in aid of ‘propping up’ the company. The respondents did not receive formal releases from the bank; however the appellant consented to the releases and personally paid out the company’s debts and the bank. He then sought payment from the respondents, but they refused.

At first instance the respondents successfully argued that their promises were unenforceable for want of consideration such that they were not required to pay. The reasons for this were that: (1) the respondents were able to resign as directors of the company at any time; (2) the company was possibly insolvent and laden with debt, such that the shares held very little and possibly no value; and (3) the appellant, as a minority shareholder, was not authorised to release the respondents from the company liabilities and bank guarantees.⁵² On appeal, the court agreed with this finding on points (1) and (2). As to (3), however, the court disagreed. Whilst it was true that the appellant could not himself give a release from the bank of the respondents’ guarantees, he discharged the

⁴⁷ Ibid [37] (Ambrose J).

⁴⁸ Ibid [74]-[77] (Ambrose J).

⁴⁹ Ibid [64]-[71], [78] (Ambrose J).

⁵⁰ [2006] NSWCA 80 (13 April 2006) (*‘Tinyow’*).

⁵¹ Ibid [2] (Santow JA).

⁵² Ibid [35]-[36].

indebtedness guaranteed.⁵³ The Court went on to find that ‘the substantive effect’ of the appellant’s payments ‘was to give an effective release to each of the respondents’ free from any debt that would otherwise have burdened the company in which they were shareholders.⁵⁴ This was not only a *legal* benefit, but a *factual* benefit. According to Santow JA, now a member of the Court of Appeal:

[T]he consideration given by [the appellant] sufficiently accorded with that bargained for. I am satisfied that the respondents were given the substantive effect of a release and consider that suffices for consideration But even if it were otherwise, there was sufficient consideration in the practical benefit enjoyed by the respondents from the appellant’s actions in re-paying the company debt and thus relieving them, or in the detriment suffered by the appellant in doing so. I consider that consideration in that broader sense does suffice; see, for example, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 and *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723....⁵⁵

The following year *Silver v Dome Resources NL*⁵⁶ came before the New South Wales Supreme Court. Like *Ajax*, the case centred on the consideration provided by a plaintiff employee in return for promised benefits from the defendant employer. The plaintiff was an experienced and highly-valued employee of the defendant, acting as a company director for several years. When he requested to stand down from his position as managing director, the defendant requested him to stay on as a non-executive director. The plaintiff agreed to do so only if his entitlements under a retirement deed between the parties were paid upon him retiring from that post. The defendant agreed to these terms but refused to pay the retirement benefit upon the plaintiff standing down, arguing he had provided no consideration for the agreement. The Court found for the plaintiff on the basis that his continued employment with the defendant, in circumstances where he was eligible to leave but persuaded to stay, constituted a practical benefit and thus valuable consideration for the promised retirement benefits. According to Hamilton J:

The evidence in this case indicates that Dome was prepared (twice) to promise the payment of a benefit running into hundreds of thousands of dollars to Mr Silver in order to retain his services, without seeking to make a stipulation as to the time during which he should continue to render those services if he were to be entitled to the promised benefit. On the evidence, it is easy to see why Dome should have taken this view. I have indicated that, in general terms, I accept Mr Silver’s evidence as to the part he played in the establishment, commissioning and running of [one of Dome’s major mining projects]. It is entirely reasonable that it would be desired to retain so long as was possible, or certainly for a further period, Mr Silver’s services and experience in this regard. In my view, Dome, at the relevant times, considered the practical benefit to be obtained by

⁵³ Ibid [60].

⁵⁴ Ibid [59].

⁵⁵ Ibid [61] (Santow JA, with whom Handley and Ipp JJA agreed).

⁵⁶ (2007) 62 ACSR 539 (*‘Silver’*).

retaining Mr Silver's services in these circumstances to be valuable. In my view, therefore, Mr Silver's undertaking not to leave immediately, but to continue providing the services, albeit for an undefined period, did provide valuable consideration for Dome's promises made in the retirement deed⁵⁷

The practical benefit principle was also endorsed in *Vella v Ayshan*,⁵⁸ yet another decision of a New South Wales appellate court. It has also been cited with apparent approval by the Federal Court of Australia⁵⁹ and in other instances at State level.⁶⁰ Most recently judges in the Supreme Court of Victoria,⁶¹ the Federal Court of Australia⁶² and the New South Wales Supreme Court⁶³ and Court of Appeal⁶⁴ appear to have regarded the practical benefit principle as an established feature of the Australian law of contract. These authorities clearly demonstrate the growing acceptance of the practical benefit principle by the Australian judiciary at various levels below the High Court. Whilst we must wait for an authoritative statement from the High Court on the issue, at least two judges of that court have tentatively indicated their acceptance of the concept of practical benefit as valid consideration. This occurred in the case of *DPP (Vic) v Le*.⁶⁵

Le concerned an order made under the *Confiscation Act 1997 (Vic)* ('the Act'), legislation allowing for 'the forfeiture of the proceeds of certain offences' and the seizure of 'property of persons convicted of certain offences'.⁶⁶ The Act sought to deprive persons of the proceeds of crime and of property involved in the commission of crime, deter criminal behaviour and disrupt criminal activity.⁶⁷ In 1997 the defendant, Mr Le, purchased an apartment in Sunshine, Victoria. The following year his wife moved from Vietnam to live with him. In June 2003 the defendant was charged and convicted for

⁵⁷ Ibid 572. This finding was not disturbed on appeal: *Dome Resources NL v Silver* (2008) 72 NSWLR 693, 710-11 (per curiam).

⁵⁸ [2008] NSWSC 84 (15 February 2008) [18] (White J) ('*Vella*').

⁵⁹ *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FCA 1306 (8 November 2002), [241] (Lindgren J); *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 (12 March 2003) [594] (Allsop J).

⁶⁰ *Amerinaus Financial Resource Corporation Pty Ltd v Residence Company Pty Ltd* (Unreported, Supreme Court of Victoria, Byrne J, 4 July 1997) 7.

⁶¹ *MP Investments Nominees Ptd Ltd v Bank of Western Australia* [2012] VSC 43 (6 March 2012), [107]-[115] (Judd J); *Wolfe v Permanent Custodians Ltd* [2012] VSC 275 (11 October 2012) [113] (Zammit AsJ).

⁶² *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012) [144]-[147] (Flick J).

⁶³ *W & K Holdings (NSW) Pty Ltd v Mayo* [2013] NSWSC 1063 (9 August 2013) [164]-[166] (Sackar J).

⁶⁴ *Schwartz v Hadid* [2013] NSWCA 89 (3 May 2013) [117]-[119] (Meagher JA). Cf the comments of Macfarlan JA, where his Honour felt the present was 'not an appropriate case in which to discuss the validity or extent' of the practical benefit principle (at [60]). Basten JA did not pass comment on the practical benefit principle.

⁶⁵ (2007) 232 CLR 562 ('*Le*').

⁶⁶ *Confiscation Act 1997 (Vic)*, s 1.

⁶⁷ *Confiscation Act 1997 (Vic)*, s 3A.

trafficking and possessing heroin and sentenced to a term of imprisonment. The Act allowed the DPP to make a restraining order in respect of ‘tainted property’, namely property that ‘was used, or was intended by the defendant to be used in, or in connection with, the commission of the offence’.⁶⁸ The Act further provided that anyone who claimed an interest in property the subject of a restraining order could make an application for an exclusion order within 60 days which, if successful, excluded the property subject to the applicant’s interest from the operation of s 35 (the provision facilitating forfeiture of the property). One condition for the grant of an exclusion order was that applicant ‘acquired the interest from the accused, directly or indirectly ... for sufficient consideration’.⁶⁹

In August 2003 the defendant conveyed his apartment into the joint names of himself and his wife, the consideration for the transfer being expressed as ‘natural love and affection’. His wife subsequently applied for and was granted an exclusion order. The DPP unsuccessfully opposed the order, contending that ‘natural love and affection’ did not suffice as consideration for the purposes of the Act, such that it could not be excluded. On appeal, a High Court majority held that the consideration was sufficient.⁷⁰ The Court acknowledged that the meaning of ‘sufficient consideration’ in the context of property law (i.e. conveyances) was different to its meaning under the law of contract.⁷¹ Nonetheless, in giving examples of things that suffice as consideration in simple contracts, Gummow and Hayne JJ in their dissenting judgment said the following:

When used elsewhere in the general law, the term ‘sufficient consideration’ imports a notion of tangible benefit or advantage conferred by the promisor upon the promisee, as in the case of a forbearance to sue, a bona fide compromise of a disputed claim, or the conferral of some other form of practical benefit.⁷²

The authority cited for the last proposition, namely ‘the conferral of some other form of practical benefit’, was *Musumeci*. This reference (albeit inconspicuous), together with the weight of the foregoing case law, supports the view that the practical benefit principle has been received into Australian contract law or, at the very least, is close to being so. To

⁶⁸ *Confiscation Act 1997* (Vic), s 3.

⁶⁹ *Confiscation Act 1997* (Vic), s 52(1)(a)(v).

⁷⁰ *DPP v Le* (2007) 232 CLR 562, 566-7 (Gleeson CJ), 595 (Kirby and Crennan JJ). Gummow and Hayne JJ dissenting at p 578.

⁷¹ *Ibid* 566-7 (Gleeson CJ), 576-7 (Gummow and Hayne JJ), 590 (Crennan and Kirby JJ).

⁷² *Ibid* 566-7 (footnotes omitted).

this should be added mention of the High Court's statement in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁷³ regarding the persuasive value of a decision of an intermediate court of appeal vis-à-vis other such courts. Given that there is a single common law of Australia, the High Court opined, intermediate appellate courts should not depart from other such courts' rulings on the common law unless convinced they are plainly wrong.⁷⁴ On this basis it could be said that *Musumeci* (which has subsequently been approved by other courts of similar or higher rank on the judicial hierarchy, particularly *Tinyow*) and, therefore, the principle in *Williams v Roffey* (as qualified), form a part of the common law of Australia until the High Court indicates otherwise. Of course in conclusively addressing the issue of the status of the practical benefit principle in Australia the High Court may also consider international opinion on the principle which, unfortunately, is far less harmonious.

3. International Reactions to Williams v Roffey

Apart from Australia, the common law jurisdictions of Canada, New Zealand and Singapore have addressed *Williams v Roffey* and hence the practical benefit principle. England, too, has revisited its own precedent on numerous occasions.

(a) England

Some eight months after *Williams v Roffey*, the case of *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)*⁷⁵ came before the English High Court.⁷⁶ There the plaintiff purchasers brought proceedings against the defendant shipbuilders, alleging they had agreed to modify the existing contract between the parties so as to entitle the plaintiffs to 'most favoured customer' treatment. At the time the shipping industry was experiencing a slump and many clients of the defendants had sought similar price reductions and other concessions. One such client ('X'), whose payment terms were nearly identical to the plaintiff's, managed to substantially renegotiate their contract resulting in reduced financial obligations. The plaintiffs sought

⁷³ (2007) 230 CLR 89.

⁷⁴ Ibid 151-2 (per curiam).

⁷⁵ [1990] 2 Lloyd's Rep 526 ('*Anangel*').

⁷⁶ Commercial Court, Queen's Bench Division.

to receive 'equivalent treatment to that accorded to any other customer of the defendants'⁷⁷ and thus claimed similar terms to those afforded to X.

The defendants contended that there was no such agreement to modify the contract in this way and that, even if there was, the plaintiffs had provided no consideration for it. The plaintiffs were already contractually bound to take delivery on the specified date. Moreover, they argued that *Williams v Roffey* should be narrowly construed given the Court of Appeal there had failed to overrule *Stilk v Myrick* and that, in any event, it was distinguishable in this case in that it was them and not the plaintiffs (i.e. the promisees) providing the services. Justice Hirst rejected these arguments and found for the plaintiffs on the consideration point:

I do not think such a very narrow and artificial distinction can properly be drawn, and consider that the ratio of *Williams*' case is that, whoever provides the services, where there is a practical conferment of benefit or a practical avoidance of disbenefit for the promisee, there is good consideration, and it is no answer to say that the promisor was already bound; where, on the other hand, there is a wholly gratuitous promise *Stilk*'s case still remains good law.⁷⁸

On the facts there was 'a very substantial practical avoidance of disbenefit to the defendants, which constituted good consideration'.⁷⁹ The plaintiffs were long-term customers of the defendants (approximately 20 years) and were described by the defendants as their 'core' patrons who, in taking delivery on the stipulated date, encouraged 'their other reluctant customers to follow suit'.⁸⁰ A similar finding was made in *Simon Container Machinery Ltd v Emba Machinery AB*⁸¹ where, again, the benefit of ensuring that the promisee did not withdraw from the contract altogether where the promisor agreed to a one-sided modification was held to provide sufficient consideration for the promise.⁸²

These decisions, together with *Ajax*, should also be read in conjunction with *Lee v GEC Plessey Telecommunications*,⁸³ yet another case concerning the purported consideration provided to an employer by an employee who was made redundant. The plaintiff was

⁷⁷ *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526, 529.

⁷⁸ *Ibid* 545.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* 544.

⁸¹ [1998] 2 Lloyd's Rep 429 ('*Simon Container*').

⁸² *Ibid* 434-5 (Raymond Jack J).

⁸³ [1993] IRLR 383 ('*Plessey*').

employed with the defendant company who, following negotiations with an industry union, devised a redundancy package which was incorporated into the individual contracts of each employee from 1985. In 1990 the defendant sought to withdraw the enhanced redundancy terms and substitute them with a less favourable package. The plaintiff was made redundant after the date of effect of the new redundancy package and sued to claim the difference between this and the original and more generous redundancy package of 1985. The defendant claimed the plaintiff had provided no consideration for the enhanced severance payments by merely continuing in his employment, which he was already contractually bound to do. The English High Court rejected this submission, holding that the plaintiff had provided consideration by way of conferring the benefit of his continued services upon the defendant and avoiding any possible dispute as to the terms of his employment:

In my judgment the arguments advanced by the plaintiffs are correct. Where, in the context of pay negotiations, increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim and the continuation of the same employee in the same employment. The situation is similar with an increase in the severance payments made to those who lose their employment due to redundancy, for a redundancy payment is part of the remuneration package. The employee continues to work for the employer, thereby abandoning any argument that the increase should have been even greater and removing a potential area of dispute between employer and employee. The employer has both secured a benefit and avoided a detriment (see *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1).⁸⁴

The cumulative effect of *Ajax*, *Anangel*, *Simon Container* and *Plessey*, as well as aiding the significant reconceptualisation of practical benefit,⁸⁵ has been to render the rule in *Stilk v Myrick* nugatory, at least in the context of modifications made to employment contracts.⁸⁶ On this body of authority, and disregarding the doctrines of economic duress and promissory estoppel which are far more developed today than during the Napoleonic age of war in which *Stilk v Myrick* was decided, that case would almost certainly be

⁸⁴ Ibid 389 (Connell J).

⁸⁵ See further Chapter 5.

⁸⁶ Cf *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631 where the Singapore Court of Appeal held that an employee's continued service in his last month of employment when he had been given the month's notice of his pending redundancy was held not to constitute a practical benefit: 'The value of the last month's work by an employee about to be made redundant could hardly be other than minimal, since the management would only retrench workers that were not essential for their operations' (at 635). It may well be that *Stilk v Myrick* still has application in the employment context where the *value* of the services provided by the employee are deemed to fall below the requisite level of practicality. Such an arbitrary value-based assessment, if adopted as an appropriate measure, is sure to foster judicial inconsistency. *Sea-Land Service Inc v Cheong Fook Chee Vincent* is discussed in greater detail later in this chapter. See also *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012), discussed in Chapter 4, Part I.

decided differently in modern times. If an employee in accepting a promise of something more from their employer provides consideration in the way of the benefit of their continued services and the obviation of avenues for industrial dispute or further negotiation of terms, then the seamen on Myrick's ship would today have claimed their promised additional wages with relative ease.

In *Re Selectmove*⁸⁷ the English Court of Appeal was confronted with a part-payment of debt scenario but refused to apply the practical benefit principle, holding instead that it was irreconcilable with the rule in *Foakes*. There a company under financial strain made an offer to the Inland Revenue to pay its significant tax arrears in instalments. An employee of the Revenue said he would require supervisor approval before accepting this offer and that he would contact the company if it was not acceptable. The company, having heard nothing, assumed its proposal was approved and commenced payments in accordance with its terms, which were accepted. The Revenue later made claim for the full amount of arrears. The court first held that even if the Revenue's silence could amount to acceptance of the company's offer, its employee had no authority to accept the offer on the Revenue's behalf and the company had no basis to believe he did.⁸⁸ Second, assuming the offer was validly accepted and the part-payment agreement rendered enforceable, the company had provided no consideration for the Revenue's promise to accept the part-payments.⁸⁹

The company claimed that *Williams v Roffey* was applicable, as the Revenue 'stood to derive practical benefits' from the part-payment agreement, for 'it was likely to recover more from not enforcing its debt against the company, which was known to be in financial difficulties, than from putting the company into liquidation'.⁹⁰ Accordingly, it had provided valid consideration for the Revenue's promise to accept its payments through the instalment scheme. The Court of Appeal rejected this argument. Lord Justice Peter Gibson, with whom the other members of the Court agreed,⁹¹ noted that if the practical benefit principle was 'to be extended to an obligation to make payment, it would

⁸⁷ [1995] 1 WLR 474 ('*Re Selectmove*').

⁸⁸ *Ibid* 478-9 (Peter Gibson LJ).

⁸⁹ This was a part-payment of debt scenario because, even if the full amount of arrears was gradually paid off in instalments, this amount continually accrued interest hence increasing the overall amount due.

⁹⁰ *Re Selectmove* [1995] 1 WLR 474, 480 (Peter Gibson LJ).

⁹¹ *Ibid* 482.

in effect leave the principle in *Foakes v Beer* without any application'.⁹² His Lordship found the principles to be irreconcilable:

When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing ... [I]t is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of [*Williams v Roffey*] to any circumstances governed by the principle of *Foakes v Beer*. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.⁹³

In *Davis v Giladi*⁹⁴ the reasoning in *Williams v Roffey* was endorsed to give effect to an agreement between the parties to share profits from the sale of land. Mitting QC, sitting as Deputy Judge of the High Court, felt the facts fell 'squarely within the principle' summarised by Russell LJ in *Williams v Roffey*:

[a] gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.⁹⁵

More importantly, his Lordship proceeded to cast a new light on the practical benefit principle. It is implicit from the language of the judgment that the fact the agreement was made freely and so as to facilitate a more efficient and valuable transaction for both parties provided further justification for the application of the exception in *Williams v Roffey*:

[The agreement] was made between two experienced businessmen negotiating at arms length and on equal terms. It was freely entered into by the defendant. The claimant was entitled as against the defendant to ensure precise agreement on the terms on which the profit accruing to the defendant would be split and to obtain proof of those terms.

Whilst the judge was conscious of the potential presence of duress, as pleaded by the defendant, it was ultimately held not to arise on the facts. The agreement was said to have arisen 'out of the opportunity ... for both parties to make a substantial profit for themselves, if [the potential purchaser's] revised offer was to be accepted'. Hence detecting the presence of a practical benefit attracted the additional considerations of

⁹² Ibid 481.

⁹³ Ibid.

⁹⁴ [2000] WL 976085 (unreported, High Court, Queen's Bench Division).

⁹⁵ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 19.

private autonomy and free enterprise. One academic has suggested that this is a natural consequence of the courts' desire to enforce promises made in a commercial setting, thereby keeping modified contracts on foot and allowing the socio-economic benefits to be realised.⁹⁶ Indeed some courts have praised the practical benefit principle for its 'flexible approach to consideration in [the] commercial context'.⁹⁷

The concept of practical benefit was applied, if not stretched, in *Gribbon v Lutton*⁹⁸ where the plaintiff vendor's attendance at a meeting between the parties was said to constitute valid consideration in return for a prospective purchaser's promise that his deposit would be non-refundable if he failed to conclude the sale for any reason other than the plaintiff's default. By attending the meeting and giving the prospective purchaser 'further opportunity to enter into the contract' the plaintiff was said to have provided consideration.⁹⁹ The practical benefit principle received further endorsement in *Compagnie Noga D'Importation et D'Exportation SA v Abacha (No 4)*.¹⁰⁰ There Tuckey LJ, with whom the other members of the Court of Appeal agreed, was content to emphasise the correctness of the principle but ultimately found it was inapplicable on the facts, for the new agreement was said to have rescinded and replaced, rather than modified, the original contract.¹⁰¹

Most recently the English High Court approved of the practical benefit principle in two separate cases. In *Parties Named in Schedule A v Dresdner Kleinwort Ltd* Simon J stated:¹⁰²

Stilk v Myrick (1809) 2 Camp 317 is the foundation of a long-established rule that the performance of a pre-existing contractual obligation is not sufficient consideration ... however where a promisee has in fact conferred a benefit (factual or practical) on the promisor by performing the original contract, then the requirement of consideration is satisfied and there is no reason not to enforce the promise, if the other requirements for its enforceability are met.

⁹⁶ Cheng Han Tan, 'Contract Modifications, Consideration and Moral Hazard' (2005) 17 *Singapore Academy of Law Journal* 566, 586.

⁹⁷ *European Consulting Unternehmensberatung Aktiengesellschaft v Refco Overseas Ltd* (Unreported, Queens Bench (Comm), Mance J, 12 April 1995) cited in Rembert Meyer-Rochow, 'The Requirement of Consideration' (1997) 71 *Australian Law Journal* 532, 542.

⁹⁸ [2002] QB 902.

⁹⁹ *Ibid* 925-6 (Pill LJ).

¹⁰⁰ [2003] EWCA Civ 1100 (23 July 2003).

¹⁰¹ *Ibid* [43]-[61].

¹⁰² [2010] EWHC 1249 (28 May 2010) [56].

His Lordship cited *Williams v Roffey* as one of two common law authorities for this proposition. The other was *Horwood v Land of Leather Ltd*,¹⁰³ another High Court decision from two months earlier. There a question arose as to whether the defendant's supplier had provided consideration for the defendant's forfeiture of their right to make claims for indemnity with respect to third party claims brought against them. Justice Teare found consideration upon 'conventional grounds', namely the promise to pay the \$900,000 indemnity sum via a structured credit arrangement over six months as opposed to within a 'reasonable time'.¹⁰⁴ His Lordship then went on to say that he would have found consideration in any event subsisting in the practical benefit to the defendant of having a structured credit arrangement in place for payment of the indemnity sum rather than the speculative scheme that existed beforehand.¹⁰⁵

The case law hitherto examined has demonstrated continuing support for the practical benefit principle in England in the years following *Williams v Roffey*. However, whilst positive for the most part, judicial attitudes towards this exception to the existing legal duty rule have been far from unanimous. It will be recalled, for example, that the English Court of Appeal in *Re Selectmove* acknowledged the 'force of the argument' submitted by counsel for Selectmove Ltd that *Williams v Roffey* should apply to part-payment of debt cases.¹⁰⁶ The decision was neither criticised nor overruled but rather *distinguished*, signifying implicit approval of the practical benefit principle. The court ultimately refused to extend its application to part-payment of debt cases, citing the resultant nullification of the rule in *Foakes*.¹⁰⁷ The Court's view was that a creditor who agreed to allow a debtor to pay their debt by instalments would undoubtedly 'always see a practical benefit to himself in so doing'.¹⁰⁸ In *Adam Opel GmbH v Mitras Automotive (UK) Ltd*, Donaldson DJ expressed strong doubt as to the 'logical coherence' of the practical benefit principle but nonetheless conceded he was 'bound to apply the decision accordingly' given it was a Court of Appeal authority.¹⁰⁹

¹⁰³ [2010] EWHC 546 (18 March 2010).

¹⁰⁴ *Ibid* [40].

¹⁰⁵ *Ibid* [41].

¹⁰⁶ *Re Selectmove* [1995] 1 WLR 474, 481 (Peter Gibson LJ, Stuart-Smith and Balcombe LJJ concurring).

¹⁰⁷ *Ibid* 480-1.

¹⁰⁸ *Ibid* 481.

¹⁰⁹ [2007] EWHC 3205 (18 December 2007) [42].

English courts have also witnessed outright dissent and condemnation of *Williams v Roffey* and the practical benefit principle. In *South Caribbean Trading Ltd v Trafigura Beheer BV*¹¹⁰ the plaintiff contracted with the defendant to sell them several thousand barrels of fuel oil at a fixed price. Delays in the blending process meant that the plaintiff would not be able to complete by the stipulated date and so it sought a time extension from the defendant, which was granted. It also sought an extension in the applicable letter of credit which was also granted, however the defendant contended that this was conditional upon the plaintiff agreeing to change the purchase price to the current market rate (which was markedly higher than the agreed fixed price). Disputes as to the financial arrangements arose such that the plaintiff withheld delivery of the oil and threatened to sell it elsewhere if the defendant did not comply and take delivery at the initial fixed price by the imposed deadline. The defendant refused to give notice of its intention by the deadline and the plaintiff terminated and sued for damages.

The English High Court first dismissed the defendant's contention that the extension of the letter of credit was conditional on any price variation. The evidence did not establish this. It then considered the defendant's second submission: that even if an extension were agreed to, the plaintiff had provided no consideration for it as they were already contractually bound to make delivery. Justice Colman agreed insofar as saying that '[h]ad it been necessary to base the question of consideration exclusively on the promise to release the cargo, I should have held that this alone was insufficient to supply consideration'.¹¹¹ However, his Lordship went on to say:

The decision of the Court of Appeal in *Williams v. Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 appears to have introduced some amelioration to the rigidity of this rule in cases where there has been refusal to perform not amounting to economic duress by the party who might otherwise be in breach of any existing contract and where the other party will derive a practical benefit from such performance.¹¹²

He then denounced the decision in *Williams v Roffey*:

But for the fact that Williams v. Roffey Bros Ltd, supra, was a decision of the Court of Appeal, I would not have followed it. That decision is inconsistent with the long-standing rule that consideration, being the price of the promise sued upon, must move from the promisee. The judgment of Glidewell LJ was substantially based on Pao On v. Lau Yin Long [1980] AC 614 in

¹¹⁰ [2005] 1 Lloyd's Rep 128.

¹¹¹ Ibid 149.

¹¹² Ibid.

which the Judicial Committee of the Privy Council had held a promise by A to B to perform a contractual obligation owed by A to X could be sufficient consideration as against B. At page 15 Glidewell LJ regarded Lord Scarman's reasoning in relation to such tripartite relationship as applicable in principle to a bipartite relationship. But in the former case by the additional promise to B, consideration has moved from A because he has made himself liable to an additional party, whereas in the latter case he has not undertaken anything that he was not already obliged to do for the benefit of the same party. Glidewell LJ substituted for the established rule as to consideration moving from the promisee a completely different principle - that the promisor must by his promise have conferred a benefit on the other party. Purchas LJ at pages 22-23 clearly saw the nonsequitur but was 'comforted' by observations from Lord Hailsham LC in *Woodhouse AC Israel Cocoa Ltd v. Nigerian Product Marketing Co Ltd* [1972] AC 741 at pages 757-758. Investigation of the correspondence referred to in those observations shows that the latter are not authority for the proposition advanced 'with some hesitation' by Purchas LJ.¹¹³

Notwithstanding his personal views, Colman J was bound to take the decision in *Williams v Roffey* into account. His Lordship appeared to suggest that the plaintiff had conferred a practical benefit upon the defendant in ensuring that they received the fuel oil by the revised delivery date at a fixed price unaffected by negative market movement and thus potentially impervious to loss.¹¹⁴ He went on to say:

However, seeing that *Williams v. Roffey Bros.* has not yet been held by the House of Lords to have been wrongly decided, and approaching the validity of consideration on the basis of mutuality of benefit, I would hold that [the plaintiff's] threat of non-compliance with its delivery obligation under [the contract] precluded its reliance on the benefit that its performance by effecting delivery would confer on [the defendant]. This threat was analogous to economic duress as contemplated in *Williams v. Roffey Bros.*, supra because it was not based on any argument that [the plaintiff] was discharged from its delivery obligation.¹¹⁵

Thus, whilst the plaintiff may have conferred a practical benefit in performing its existing legal duty in return for the defendant's additional promise, the promise was extracted through economic duress in violation of the fifth limb of the practical benefit test. In any event Colman J held that the variation could in fact be seen as a new agreement for fresh consideration:

There can, in my judgment, be no doubt that the assent of [the defendant] to the extension of the letter of credit ... was an effective variation of [the contract] to that effect. That is because it was a new agreement supported by mutual promises - on the part of [the defendant] to accept delivery of product at a date different from 31 March at a fixed price and on the part of [the plaintiff] that, the blending operation having been much delayed, would successfully be completed by the new delivery date. Given that [the plaintiff] had encountered apparently insuperable problems in the [preparation of the fuel oil], and that it was impossible to come anywhere near completion of blending under [the] contract ... by 31 March, their promise to achieve effective blending by an extended date thus provided [the defendant] with an enforceable right to obtain delivery of finished and effectively dehydrated product on a future agreed date. The fixed price, although below market price on 14 March, might exceed market price by 30 June. In these unusual circumstances,

¹¹³ Ibid 149-50 (emphasis added).

¹¹⁴ Ibid 149.

¹¹⁵ Ibid 150.

particularly the uncertainties inherent in the blending operation and the uncertainty of the movement of the market price, it could be said that sufficient consideration to support the variation moved from the promisee [(the plaintiff)].¹¹⁶

(b) New Zealand

The New Zealand High Court followed *Williams v Roffey* in *Newmans Tours Ltd v Ranier Investments Ltd*,¹¹⁷ where the plaintiff agreed to purchase the defendant group of companies. The parties made an ancillary oral agreement whereby the defendant would pay US\$100,000 from the purchase price to one Ronald Fenwick, manager of one of the companies and one ‘regarded as essential to the continued successful operation’ of the defendant’s business.¹¹⁸ The defendant later refused to make the payment and the plaintiff sued to enforce this agreement. The defendant argued that the plaintiff was already bound to proceed with the sale under the written sale agreement, so they had provided no consideration for the promised payment.

Citing *Williams v Roffey*, Fisher J held that given the final sale agreement was still in the construction stage at the time the oral promise was made, and the plaintiff proceeded to perform its existing contractual obligations under the incomplete sale agreement, they had provided ‘fresh consideration’ for the defendant’s promise to pay Mr Fenwick.¹¹⁹ It can be inferred that one of the notable ‘practical benefits’ here was the efficient completion of the takeover which simultaneously removed the defendant’s debts previously owed to the plaintiff in circumstances where the deal could have fallen through and allowed the debts to fester.

Williams v Roffey was also applied in *Machirus Properties Ltd v Power Sports World (1987) Ltd*¹²⁰ where the appellant landlord was said to have derived a practical benefit from the respondent tenant’s promise to pay rent arrears on a revised schedule with interest and after the relevant property lease had expired. Maintenance of the relationship between the parties was said to be essential to the appellant and in any event this was not

¹¹⁶ Ibid 149.

¹¹⁷ [1992] 2 NZLR 68.

¹¹⁸ Ibid.

¹¹⁹ Ibid 80.

¹²⁰ [2000] ANZ ConvR 435.

simply an agreement to pay an existing debt in instalments.¹²¹ Consequently, the New Zealand High Court felt that *Re Selectmove* was of no application. Rather, the arrangement was a practical benefit to the appellant as ‘it was spared the task of trying to find new tenants, of mitigating any loss, and it retained the prospect of a renewed lease by Power Sports’ after its expiry.¹²² ‘The compromise was in relation to more than a simple obligation to pay a debt (rent arrears plus interest) as in *In re Selectmove* and *Foakes v Beer*’ and whilst it involved the continuation of the respondent’s existing legal obligation to remain in occupation of the premises, this was nevertheless of practical benefit to the appellant.¹²³ The Court stressed that *Re Selectmove* and *Williams v Roffey* were not inconsistent¹²⁴ demonstrating an even stronger degree of acceptance of the practical benefit principle. It is also noteworthy that the English Privy Council in *Attorney-General for England and Wales v R*, hearing an appeal from the New Zealand Court of Appeal, was content to utilise the concept of practical benefit in finding consideration.¹²⁵

(c) Canada

In what appears to be the first instance of practical benefit being addressed by a Canadian court, the Ontario Superior Court of Justice in *Chahal v Khalsa Community School*¹²⁶ appeared to support the principle in *Williams v Roffey*, albeit in obiter dictum. Eight years later the New Brunswick Court of Appeal in *NAV Canada v Greater Fredericton Airport Authority Inc*¹²⁷ endorsed the practical benefit principle, and the following year the Supreme Court of British Columbia in *River Wind Ventures Ltd v British Columbia*¹²⁸ indicated express approval of the reasoning in that decision and its effect in softening the rigid doctrine of consideration in the context of contractual renegotiation. Both courts went on, however, to ‘build upon the English Court of Appeal’s decision’ in *Williams v Roffey*¹²⁹ and modify the Canadian law of contract by dispensing of the need for

¹²¹ Ibid 437-8.

¹²² Ibid 438.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ [2004] 2 NZLR 577, 586 (Lord Hoffmann). Judgment was handed down in March 2003, seven months before New Zealand’s abolition of appeals to the Privy Council in favour of the newly-established Supreme Court of New Zealand.

¹²⁶ (2000) 2 C.C.E.L. (3d) 120, [76]-[78] (Mandel J).

¹²⁷ (2008) 290 DLR (4th) 405, 422-6.

¹²⁸ [2009] BCSC 589 (30 April 2009) [32].

¹²⁹ *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405, 423.

consideration in contractual modifications provided they were not procured by duress.¹³⁰ The court in *River Wind* also added the requirement of ‘either detrimental reliance by the plaintiff or the gaining of a benefit or advantage by the defendant’ as a prerequisite to enforceability,¹³¹ though this can only have persuasive value being a lower court decision.

Assessing the current status of *Williams v Roffey* in Canada is thus difficult given that neither of the courts in these later cases actually rejected the authority. On the contrary, the decision received praise for avoiding the ‘rigid application of the rule in *Stilk v Myrick*’¹³² before this rule was ultimately done away with in the context of contractual modifications (subject to the qualifications expressed in those cases).¹³³ It is most apt to observe that *Williams v Roffey* has prompted a diverse array of judicial opinions on the issue of contractual modifications and will likely continue to do so.

(d) Singapore

In *Sea-Land Service Inc v Cheong Fook Chee Vincent*¹³⁴ the Singapore Court of Appeal applied *Williams v Roffey* to the facts but deemed the promisee (employee) had not conferred a practical benefit to the promisor (his employer) in performing his existing legal duties for them, such that he had provided no consideration for the promisor’s additional promise of enhanced severance pay. The benefits of the work performed by an employee awaiting redundancy were said to be minimal at best. Chief Justice Yong Pung How, delivering the joint judgment, stated:

The value of the last month’s work by an employee about to be made redundant could hardly be other than minimal, since the management would only retrench workers that were not essential for their operations. Secondly, we agreed with the appellants’ counsel that the appellants had not requested the respondent to complete his last month of employment in exchange for their payment of the enhanced benefits. The appellants were merely complying with their contractual obligations and had chosen to provide the respondent with one month’s notice before his employment was terminated, instead of terminating his employment there and then and compensating him with a month’s wages in lieu of notice. We were therefore of the view that the respondent’s last month’s work for the appellants would not amount to valid consideration and that it fell within the general rule that prohibits the performance of existing duties from constituting such consideration.¹³⁵

¹³⁰ Ibid 423-4; *River Wind Ventures Ltd v British Columbia* [2009] BCSC 589 (30 April 2009) [30]-[32].

¹³¹ *River Wind Ventures Ltd v British Columbia* [2009] BCSC 589 (30 April 2009) [33].

¹³² *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405, 423; *River Wind Ventures Ltd v British Columbia* [2009] BCSC 589 (30 April 2009) [30].

¹³³ See the relevant discussion on this point in Chapter 1, Part VIII.

¹³⁴ [1994] 3 SLR 631, 634-5.

¹³⁵ Ibid 635.

The same court recently reaffirmed the practical benefit principle's place in the law of Singapore¹³⁶ and there had been previous and seemingly favourable mentions of the principle by the Singapore High Court in obiter¹³⁷ and ratio.¹³⁸ Here too there appears strong support for *Williams v Roffey*.

4. Conclusion

This chapter has examined a large cross-section of the many domestic and international authorities addressing the practical benefit principle. It was demonstrated that, for the most part, the notion has been warmly received but that judicial opinions as to its scope have differed. It was further demonstrated that extracting a precise definition of 'practical benefit' from the extensive body of case law surveyed is an impossible assignment. The next chapter analyses practical benefit more deeply, putting the common law test expressed by Glidewell LJ in *Williams v Roffey* under the microscope and considering whether it is internally coherent and consistently applied by the courts; a matter critical to determining the efficacy of the practical benefit principle and informing the discussion of legal reform to come in Chapter 6.

¹³⁶ *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332, 365.

¹³⁷ *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594, 634; *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853, 866.

¹³⁸ *Teo Seng Kee Bob v Arianecorp Ltd* [2008] 3 SLR 1114, 1135-6 (Lai Siu Chiu J): 'The modern approach [to consideration] ... is encapsulated in the judgment of Glidewell LJ in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ...'.

CHAPTER 4

JUDICIAL APPLICATION AND INTERNAL COHERENCE OF THE PRACTICAL BENEFIT PRINCIPLE

Having examined the domestic and international case law addressing the concept of practical benefit in the previous chapter, this chapter turns to critically analysing the practical benefit test itself. The practical benefit test compiled by Glidewell LJ in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*² was said to represent ‘the present state of the law’ at that time.³ His Lordship engaged in a lengthy discussion of the relevant authorities and expressly stated that its elements were inspired by the majority view in *Ward v Byham*⁴ and the unanimous views in both *Williams v Williams*⁵ and *Pao On v Lau Yiu Long*.⁶ The synthesis of various principles was ordered as follows:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A’s promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B’s promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B’s promise, so that the promise will be legally binding.⁷

Elements (i) to (iv) appear to be the product of *Ward v Byham* and *Williams v Williams* whilst element (v) plainly incorporated the newly-developed doctrine of economic duress expressed in *Pao On* as a safeguard against the potential exploitation of promisors. Whilst Glidewell LJ’s efforts to present the practical benefit principle in an orderly and workable structure are commendable, the question arises whether it is, on face value, internally coherent. This chapter will address the issue, highlighting a number of internal inconsistencies and faults within the test as well as multiple instances where the courts have utilised it in a haphazard manner or even with total disregard to Glidewell LJ’s framework.

¹ Sir Karl Popper (1902-1994). Quote cited in John J Sosik, Surinder S Kahai and Michael J Piovoso, ‘Silver Bullet or Voodoo Statistics? A Primer for Using the Partial Least Squares Data Analytic Technique in Group and Organization Research’ (2009) 34(1) *Group and Organization Management* 5, 7.

² [1991] 1 QB 1 (*Williams v Roffey*’).

³ *Ibid* 15.

⁴ [1956] 1 WLR 496 (*Ward v Byham*’).

⁵ [1957] 1 WLR 148 (*Williams v Williams*’).

⁶ [1980] AC 614 (*Pao On*’).

⁷ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16.

1. *The Neglect of Element (ii)*

Justice Santow in *Musumeci v Winadell Pty Ltd*⁸ declined to amend Glidewell LJ's second element in the practical benefit test and so it reads the same in both versions: '(ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain...'. This limb quite clearly requires that the promisor must have possessed reason to doubt that the promisee would or would be able to complete his or her obligations under the contract at some point prior to full completion, in order for the promisor's promise of something more (or agreement to accept less in the case of concessions) to be enforceable. In *Williams v Roffey* the evidence clearly established that the defendants held genuine concern that the plaintiff would not complete the carpentry work on time.⁹ The authorities applying the practical benefit principle, however, are not so clear in their regard to element (ii), with some spurning it altogether.

In *Musumeci*, for example, the evidence as to the defendant's belief in the plaintiffs' ability to perform their contractual obligations was somewhat obscure. The defendant reduced the plaintiffs' rent liability in response to their concerns as to the potential negative effects on their business revenue and goodwill through the introduction of a larger competitor in the same industry within the same shopping centre. There was no immediate suggestion that the defendant felt the plaintiffs would be unwilling or unable to perform, though this was an obvious risk and by implication must have played a role in prompting the defendant's agreement to lower the rent payable. As Santow J said:

Applying [*Williams v Roffey*] to the present circumstances, the practical benefit that the lessor gained from the concession of lower future rental, *was argued to be the enhanced capacity of the plaintiffs to stay in occupation, able to carry out their future reduced lease obligations, notwithstanding substantial newly introduced competition from the other tenant. What this practical benefit consists of therefore is enhanced capacity for the lessor to maintain a full shopping centre with another competing tenant, when the original tenant is no longer at so great a risk of defaulting and more likely to stay.*¹⁰

In some cases, consideration of element (ii) has been altogether neglected. The promisor's belief as to the likelihood of the promisee being able to complete their obligations was

⁸ (1994) 34 NSWLR 723 ('*Musumeci*').

⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 6 (Glidewell LJ).

¹⁰ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747-8 (emphasis added).

overlooked in *Anangel*,¹¹ *Plessey*,¹² *Pacific Dawn*,¹³ *Vella*¹⁴ *Figjam*¹⁵ and *Ajax*,¹⁶ all cases applying, or addressing the potential application of, the practical benefit principle. Rather than being worked through in the methodical and systematic way envisaged by Glidewell LJ's six-point test, the practical benefit principle is typically applied haphazardly and with overemphasis upon the fourth element (i.e. identification of a benefit conferred or disbenefit obviated). In part, much weight of judicial analysis can be expected to be devoted to the fourth and fifth elements of the test, given that the preceding three elements essentially turn on the facts and determine if it is necessary to consider whether a practical benefit subsists, whilst the sixth and final element merely stipulates the ultimate consequence. Nonetheless, it is submitted that, if the practical benefit test is going to be utilised by the courts, orderly consideration of each of the six elements of the test is the preferred approach and one which safeguards against misuse of the principle.

A recent decision from the Federal Court of Australia best exemplifies the correct approach. In *Cohen v iSoft Group Pty Ltd*¹⁷ the plaintiff, a software developer, sued the defendant, his former employer, seeking a number of allegedly due and unpaid entitlements including remuneration, redundancy payments and annual and long service leave. One particular claim made by the plaintiff concerned a promised pay rise that was not honoured by the defendant during his employment. Whilst the claim ultimately failed on other grounds, the defendant also resisted it on the basis that the plaintiff provided no consideration for the promised pay rise. Conversely, the plaintiff argued that he provided consideration in 'continuing to provide services and in not seeking to terminate his

¹¹ *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526 (promise of better terms made simply to appease the promisee, a long-term customer, and to encourage other clients to maintain their custom).

¹² *Lee v GEC Plessey Telecommunications* [1993] IRLR 383 (company redundancy package unilaterally brought into effect, practical benefit principle applied without reference to promisee's willingness or ability to perform).

¹³ *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 86 (4 April 2003) (builder's promised concessions in asking price for construction of a residential building made so as to expedite finalisation and settlement rather than because of doubts as to the other party's capacity to pay).

¹⁴ *Vella v Ayshan* [2008] NSWSC 84 (15 February 2008) (clauses in a property sale contract amended to make procedures more efficient for the benefit of both parties and not for reason of doubt as to the vendor builder's willingness or ability to complete construction).

¹⁵ *Figjam Pty Ltd v Pedrini* (2007) Aust Contract Reports ¶90-259 (restraint of trade clause arbitrarily introduced into an employment contract by an employer to protect its own interests, potential application of practical benefit principle discussed without reference to employee's willingness or ability to perform).

¹⁶ *Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993) (company redundancy package unilaterally brought into effect, potential application of practical benefit principle discussed without reference to promisee's willingness or ability to perform).

¹⁷ [2012] FCA 1071 (28 September 2012).

contract of employment’ on ‘the belief that he would receive a pay increase’.¹⁸ Justice Flick noted that consideration had previously been held to subsist in an employee continuing in their employment¹⁹ and cited *Ajax Cooke Pty Ltd v Nugent*²⁰ as authority for this proposition. He then proceeded to consider whether the plaintiff had in fact provided consideration for the promised pay rise.

His Honour cited the practical benefit test as expressed by Santow J in *Musumeci* before considering whether each of its elements was satisfied. To this end he held that the plaintiff’s claim would ultimately have failed for want of consideration given that the second and third elements of the test were not satisfied:

In the present proceeding ... there was no suggestion that [the plaintiff] would resign in the event that his remuneration was not increased. There was no case sought to be advanced, for example, that [the plaintiff] continued his employment against a background of threatened industrial action or contractual uncertainty. Nor was any suggestion put that the promised increase in remuneration was made to improve the chances of securing [the plaintiff’s] services. It was never contended that [the plaintiff] was even giving any thought to seeking employment elsewhere. Indeed, there was no evidence of anything other than consideration being given to increasing his salary.²¹

Thus, for Flick J, there was no evidence that the plaintiff (promisee) would or would be able to complete his side of the bargain²² (element (ii)) nor that the defendant (promisor) made the promise of a pay rise so as to secure the plaintiff’s services²³ (element (iii)). His Honour felt it was subsequently ‘prudent to not attempt any further analysis of the [defendant’s] submission that the pay rise was not supported by consideration’.²⁴ The question of whether the plaintiff provided consideration on the basis of the practical benefit principle thus went unanswered. More importantly for the present argument, however, it is submitted that Flick J’s concerted effort to address each of the individual elements of the practical benefit test typifies the appropriate approach for courts to take when applying the principle.²⁵

¹⁸ *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012) [142].

¹⁹ *Ibid* [143].

²⁰ (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993). See further Chapter 3, Part II.

²¹ *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012) [146].

²² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15; *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

²³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16; *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

²⁴ *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012) [147].

²⁵ In *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631 the Singapore Court of Appeal also appeared to demonstrate consideration of elements (iii) and (iv) of the practical benefit test, stressing that the appellants in that case ‘had not requested the respondent to complete his last month of employment

2. *The Inconsistency of Element (ii)*

In requiring the promisor to have possessed reason to doubt that the promisee ‘*will, or will be able to*, complete [their] side of the bargain’,²⁶ the accepted formulation of the practical benefit test is afflicted by an internal inconsistency. This stems from the curious distinction between *willingness* and *ability*, evidenced by the inclusion of both terms in the language of element (ii). Belief as to whether the promisee *will* complete imports enquiries into whether they have demonstrated a disinclination to perform their contractual obligations. This strikes as odd given that a refusal of this kind, calculated to extract additional advantages from the promisor, may attract the operation of the *fifth* limb of the practical benefit test; this stipulates that promises of additional consideration which are procured through economic duress, fraud, undue influence, unconscionable conduct or unfair pressure from the promisee are unenforceable.²⁷

Of course the leading authorities stipulate that the wrong of duress is comprised of two elements: ‘(1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted’.²⁸ The first element requires a determination whether the victim’s will was so overborne that it was impaired or inhibited when the contract was entered into²⁹ whereas the second element considers the nature of the pressure applied and ‘the demand which the pressure is applied to support’.³⁰ Together these elements set a high threshold for determining whether a promisee’s threat of non-performance amounts to economic duress for the purposes of element (v). It might be argued, therefore, that this in fact attracts a different enquiry from that mandated by the second element of the practical benefit test, as mere refusal to perform without more is unlikely to suffice.

in exchange for their payment of the enhanced benefits’ (at p 635). Accordingly, the respondent’s continued performance of his employment contract did not correlate with the benefits promised to him by the appellants and therefore failed to satisfy the practical benefit test expressed in *Williams v Roffey*. See further Chapter 3, Part III.

²⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15 (Glidewell CJ) (emphasis added).

²⁷ *Ibid* 16 (Glidewell CJ); *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747 (Santow J).

²⁸ *Universe Tankships Inc. of Monrovia v International Transport Workers Federation* [1983] AC 366, 400-401 (Lord Scarman); *Pao On v Lau Yin Long* [1980] AC 614.

²⁹ *Universe Tankships Inc. of Monrovia v International Transport Workers Federation* [1983] AC 366, 400 (Lord Scarman). The telling sign will often be the victim submitting through the realisation ‘that there is no practical choice open to [them]’, as opposed to any question of a ‘lack of will to submit’. See also the comments of McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-6: ‘A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action’

³⁰ *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366, 401 (Lord Scarman).

On any reading it seems strange for Glidewell LJ to have appeared to distinguish between intentional refusal, and unintentional inability, to perform given that the former situation will be addressed by element (v). Why the repetition? Twyford is of the view that this inconsistency restricts the practical benefit principle to situations where ‘new circumstances render performance by the promisee of his or her original obligation different or more problematic’³¹ or, in other words, relates to their ability – as opposed to their willingness – to perform. This interpretation can be doubted for two reasons. First, the case law does not support this view. In *Williams v Roffey* the plaintiff was unable to complete his contractual obligations due to his inadequate supervision of his workers and the fact the agreed price for his work was too low.³² There was no suggestion the plaintiff was unwilling to perform, only evidence he ran the risk of significant financial detriment if he did. In contrast, the promisor in *Anangel* accepted that there was a risk the promisee would not fulfil their contractual obligations but this was due to suspected *unwillingness* founded upon dissatisfaction with terms and not with *inability* to perform per se.³³ The same goes for *Simon Container*.³⁴ At the other extreme the promisee in *Silver*³⁵ was explicit in demonstrating unwillingness to continue ‘devoting significant time and effort as a consultant to [the defendant promisor] unless remuneration arrangements were improved’, though strangely the issue of economic duress was not addressed by the court. In both cases of unwillingness and inability, the practical benefit principle was held to apply.

Secondly, Twyford’s argument appears inconsequential. It matters not if the promisor’s promise was motivated by a belief that the promisee was either unable or unwilling to complete as the renegotiation will not be enforced through the practical benefit principle if any of the vitiating factors listed in element (v) are present. In other words, whether the promisee intends to complete or is unable to do so because of external factors is irrelevant; the crucial aspect of element (ii) is whether the promisor believed the promisee ultimately would not complete for whatever reason, with element (v) guarding against extortion.

³¹ John Wilson Twyford, *The Doctrine of Consideration* (SJD Thesis, University of Technology (Sydney), 2002) 115.

³² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 6 (Glidewell LJ).

³³ *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd’s Rep 526, 545 (Hirst J).

³⁴ *Simon Container Machinery Ltd v Emba Machinery AB* [1998] 2 Lloyd’s Rep 429, 434-5.

³⁵ *Silver v Dome Resources NL* (2007) 62 ACSR 539, 544 (Hamilton J).

3. *How a peppercorn Undoes Element (iii)*

The third limb of Glidewell LJ's practical benefit test stipulates that an 'additional payment'³⁶ or 'other concession'³⁷ must be promised in return for the promisee's performance of their existing duty (emphasis added). A difficulty therefore arises where the promisor's offer of something other than money does not count as either an additional payment or a concession, such as the famous peppercorn. In *NAV Canada v Greater Fredericton Airport Authority Inc*³⁸ the promisor undertook to purchase navigational equipment in return for the promisee's installation of the equipment.³⁹ Whilst the provision of funds to facilitate the purchase counted as an 'additional payment', doubt would have arisen had the navigational equipment *itself* been tendered as consideration. This would count neither as money nor as a concession of any kind. Theoretically, then, the practical benefit principle could not have applied.

The Court ultimately declined to apply the practical benefit principle (abolishing the requirement of consideration for modifications and utilising economic duress as a safeguard) and so how this issue would have been addressed remains unknown. It could certainly be argued that an item which is neither money nor a concession is fundamentally an additional payment i.e. money's worth. It ultimately benefits the promisee and might in fact be worth more to them than an additional payment or some other form of concession envisaged by the practical benefit test. This is especially so if the promisee makes clear what item they need to purchase with the money and the promisor goes ahead and acquires the item as in *NAV Canada*. Nonetheless a strict reading of the practical benefit test, formulated in *Williams v Roffey* and *Musumeci*, indicates that only money or concessions will count in return for the promisee's promise to perform their contractual obligations. It seems absurd to suggest that the principle intended to get caught upon technicalities when it was itself formulated to escape one.⁴⁰

³⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16; *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

³⁷ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

³⁸ (2008) 290 DLR (4th) 405, 422-6 ('*NAV Canada*').

³⁹ Note that the court ultimately modified the law to the extent that consideration for contractual modifications was deemed unnecessary so long as they were not procured under duress: (2008) 290 DLR (4th) 405, 423-4.

⁴⁰ Namely the existing legal duty rule.

4. *The Effect of Elements (iii) and (iv) on Bargain Theory*

In a theme to be developed further in the next chapter, Glidewell LJ was clearly unperturbed by the fact the practical benefit principle turned its back on bargain theory. The recognition of subsequent (i.e. post-contractual) factual benefits as good consideration infringes the bedrock principle of English law that a contract can only be founded upon *bargained for* consideration. Carter, Phang and Poole suggest that the practical benefit test perpetuates this offence against the traditional consideration doctrine in the way that it is structured.⁴¹ They explain thus: fundamental to the notion of consideration is that the benefit conferred upon B be obtained in response to A's repeat promise. Yet in the practical benefit test the consideration for the requisite exchange of promises is located in element (iv) whereas the exchange itself is stated in element (iii):

... (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit ...

So B's consideration (the promise of something more) comes before A's (the benefits received by virtue of A's reiterated promise). This offends the proposition that the consideration proffered by each party be the price for which the other is bought.⁴² There was, strictly speaking, no quid pro quo. The test wrongfully assumes, therefore, that there was.

Carter, Phang and Poole argue that the subsequent factual benefits conferred upon B by A's promise could only be regarded as good consideration had they formed part of an exchange in the traditional sense: 'A must be able to show that the benefit received by B was conferred in response to a request by B that the benefit be conferred'.⁴³ If, for example, the defendants in *Williams v Roffey* had promised the additional £10,300 and the plaintiff had promised to confer the 'practical benefits' alleged to have moved to the defendants *in return* for this promise, this would presumably have sufficed.

⁴¹ J W Carter, Andrew Phang and Jill Poole, 'Reactions to *Williams v Roffey*' (1995) 8 *Journal of Contract Law* 248, 253-4. Carter reiterates this point in the most recent edition of his work *Carter's Guide to Australian Contract Law* (LexisNexis Butterworths, 2nd ed, 2011) at 66-7.

⁴² *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, 855 (Lord Dunedin).

⁴³ J W Carter, Andrew Phang and Jill Poole, 'Reactions to *Williams v Roffey*' (1995) 8 *Journal of Contract Law* 248, 254.

5. *The Defect in Element (v)*

In the fifth limb of Glidewell LJ's original formulation of the practical benefit test, a promisor's promise given as a result of 'economic duress or fraud on the part of' the promisee is treated as unenforceable.⁴⁴ The issue here is that if either form of illegitimate behaviour is applied to procure the promisor's promise then, providing valid consideration has been tendered and a contract formed (which will occur if elements (i) to (iv) are established), the promisor will have the *option* of rescinding the contract and making a restitutionary claim in respect of the benefits conferred.⁴⁵ The varied contract is not automatically rendered void ab initio⁴⁶ yet element (v) of the practical benefit test appears to assume that it is.⁴⁷ Justice Santow extended this limb in *Musumeci* to incorporate undue influence, unconscionable conduct and unfair pressure.⁴⁸ Again, the presence of such behaviour generally renders a contract *voidable*, not *void*.⁴⁹ This has significant ramifications for the doctrine of affirmation. Would it not be open to the promisee to argue that the promisor had impliedly affirmed the contract in carrying through with the contract on the modified terms, notwithstanding the promisee had applied a form of pressure identified in element (v)?⁵⁰ There would certainly be scope for such an argument.

6. *Conclusion*

From a strictly doctrinal perspective the practical benefit principle is highly problematic. The test enunciated by Glidewell LJ in *Williams v Roffey* appears internally incoherent as

⁴⁴ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16.

⁴⁵ The contract must be rescinded before the benefits conferred under duress can be recovered: *Dimskal Shipping Co SA v International Transport Workers Federation ('The Evia Luck')* [1992] 2 AC 152, 165 (Lord Goff).

⁴⁶ It is an established principle that duress renders a contract *voidable* not *void*: *Pao On v Lau Yin Long* [1980] AC 614, 634. The same generally holds for agreements induced by fraud: see Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 613; N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 543.

⁴⁷ It is curious that Glidewell LJ in *Williams v Roffey* cited authorities which seem to acknowledge the effect of economic duress as rendering contracts *voidable* not *void* (see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 13-15) but then proceeded to formulate a test which appears, on its face, to be inconsistent with this established principle.

⁴⁸ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

⁴⁹ See, eg, Paterson, Robertson and Duke, above n 46, 707, 721, 753; Seddon, Bigwood and Ellinghaus, above n 46, 774, 804-5.

⁵⁰ Remembering of course that affirmation can occur by conduct: *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634.

demonstrated by its numerous inconsistencies. Moreover, many courts have applied the test unsystematically or with complete disregard to its orderly framework. Being a principle of the common law, the task falls to the appellate courts to refine the test and resolve these discrepancies to ensure coherence within the doctrine of consideration. Justice Santow's efforts⁵¹ to do so, though ultimately attracting further uncertainties, are to be commended. Of equal importance is that judges remember that the practical benefit test incorporates six elements, to each of which regard must be had. The principle's application is contingent upon *all* of these elements being satisfied, not just the fourth which inquires as to the presence of a factual benefit on the facts. Chapter 5 will build upon the analysis commenced in this chapter and focus instead on the *conceptual* difficulties that application of the practical benefit principle creates.

⁵¹ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

CHAPTER 5

THE CONCEPTUAL DILEMMAS WITH PRACTICAL BENEFIT

‘The finest words in the world are only vain sounds, if you cannot comprehend them’⁵²

Before *Williams v Roffey Bros & Nicholls (Contractors) Ltd*⁵³ was decided, the established common law position was that only a *legal* benefit would suffice to render a contract enforceable. There had been early attempts by Denning LJ to introduce the concept of ‘factual benefit’ into the common law of England,⁵⁴ but the notion never took root. In *Williams v Roffey* the Court of Appeal – particularly Glidewell LJ – inspired its resurrection and gave it firm footing in the law of contract. With this, however, came a number of uncertainties stemming from the difficulty in conceptualising ‘factual’ benefits. The common law appears to hold that, putting aside the application of waiver or estoppel, the principles governing the *formation* of a contract also apply to *modification*.⁵⁵ That being so, considerable doubt surrounds the scope of the practical benefit principle and its compatibility with the framework of Anglo-Australian contract law. This chapter builds on the previous one which considered the inconsistent application and internal (in)coherency of the practical benefit test, examining the *conceptual* difficulties with this principle before concluding that it is, from a theoretical perspective, problematic and ultimately unsuited to the task of satisfactorily dealing with cases such as *Williams v Roffey*.

1. *The Conflict with the Existing Legal Duty Rule*

The Court of Appeal in *Williams v Roffey* stressed on numerous occasions that the practical benefit principle did not abrogate the rule in *Stilk v Myrick* and that the latter

⁵² Anatole France (1844-1924). Quote cited in Alexander Gilmore, ‘Catching Words: Exploiting Film Discourse in the Foreign Language Classroom’ in Freda Mishan and Angela Chambers (eds) *Perspectives on Language Learning Materials Development* (Peter Lang, 2010) 111, 111.

⁵³ [1991] 1 QB 1 (‘*Williams v Roffey*’).

⁵⁴ See, eg, *Ward v Byham* [1956] 1 WLR 496; *Williams v Williams* [1957] 1 WLR 148. These cases are discussed in Chapter 2, Part I.

⁵⁵ *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533-4 (Gleeson CJ, Gaudron, McHugh and Hayne JJ); *GEC Marconi Systems Pty Ltd v BHP Information Technology* (2003) 128 FCR 1, 63 (Finn J); *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 (Gummow, Hayne and Kiefel JJ). The question of whether or not a purported variation has the effect of rescinding and replacing the original contract is a question of the intentions of the parties: *Morris v Baron and Company* [1918] AC 1; *British and Benningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48; *Royal Exchange Assurance v Hope* [1928] 1 Ch 179; *Tallerman & Co Pty Ltd v Nathan’s Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340, 347 -8 (per curiam); *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533-4 (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

retained its status as good law. Lord Justice Glidewell was adamant that practical benefit left the existing legal duty rule ‘unscathed’ and merely ‘refined’ and ‘limited its application’ citing the case of the promisor who derives no benefit from their additional promise.⁵⁶ Lord Justice Russell similarly dispelled any implicit ‘reservation[s] as to the correctness of the law long ago enunciated in *Stilk v Myrick*’ before endorsing the practical benefit test.⁵⁷ Lord Justice Purchas also regarded the existing legal duty rule as ‘a pillar stone of the law of contract’ incapable of overrule in the absence of ‘the strongest possible grounds’⁵⁸ before finding consideration in the factual benefits conferred upon the defendants.⁵⁹ Gratuitous promises not under seal, it was emphasised, remained unenforceable in accordance with *Stilk v Myrick*.⁶⁰

Notwithstanding the assurances provided by the members of the Court of Appeal, there is significant doubt as to whether the practical benefit principle does not contradict *Stilk v Myrick*. For a start, the ‘practical benefits’ said to move to the promisor in modification cases flow directly from performance of the *original legal obligation* binding the promisee. Fulfilment of this obligation and, by extension, the benefits stemming from it, are already the promisor’s right.⁶¹ As *Stilk v Myrick* makes clear, it is this original promise that suffices as consideration to support a bilateral contract, *not* the reiterated promise or the benefits that flow from its performance. Coote explains:

The reason why that should be so is that consideration is required for the formation of a contract. Performance, *ex hypothesi*, comes too late to qualify. Since executory bilateral contracts are formed by an exchange of promises with intention to contract, consideration for them must lie not in performance or its consequences but in some aspect of the exchange of promises.⁶²

Deputy High Court Judge Donaldson in *Adam Opel GmbH v Mitras Automotive (UK) Ltd*⁶³ expressed similar reservations as to the Court of Appeal’s claim in *Williams v Roffey* that the existing legal duty rule was compatible with the practical benefit principle:

⁵⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16.

⁵⁷ *Ibid* 19.

⁵⁸ *Ibid* 20.

⁵⁹ *Ibid* 22-3.

⁶⁰ *Ibid* 16 (Glidewell LJ), 19 (Russell LJ), 21 (Purchas LJ).

⁶¹ Brian Coote, ‘Consideration and Benefit in Fact and in Law’ (1990) 3 *Journal of Contract Law* 23, 28.

⁶² *Ibid* 26.

⁶³ [2007] EWHC 3205 (18 December 2007).

Though all three judges claimed to accept the rule in *Stilk v Myrick* [sic], it is wholly unclear how the decision in *Williams v Roffey* can be reconciled with it. On analysis, the benefit or advantage lay in an act or promise wholly coincident with the plaintiff's existing contractual obligation.

For this very reason, as noted by Mason J in *Wigan v Edwards*, the new promise must be illusory as it is indistinguishable from the old.⁶⁴ Accordingly, practical benefit drives a coach and horses through the rule in *Stilk v Myrick* in allowing a reiterated promise to support a contract modification. The only established exception, where performance amounts to the consideration for the promise, is in the case of unilateral contracts, such as reward cases.⁶⁵ Such contracts are inherently anomalous by virtue of the fact that the promisor can never be sure if a promisee has performed the stipulated act and accordingly formed a contract with them (up and until the point the promisee makes known this fact).⁶⁶

It is arguable, however, that the practical benefit principle introduces an even greater level of uncertainty into the law of contract. Unlike the performance of a clearly specified act – a prerequisite for unilateral contracts – the conferral of a factual benefit can only be established by the courts to satisfy the practical benefit test. That is, whilst the courts cannot perform an act for a promisee, they can detect factual benefits in performance and retrospectively validate the purported agreement between the parties.

Moreover, as will be seen later, the ease with which one can identify factual benefits in virtually any renegotiation case can be seen as indirectly abrogating the existing legal duty rule. In *Stilk v Myrick* itself it is surely arguable that the ship captain received a factual benefit from his sailors' promise to stay aboard and perform their duties by way of being able to navigate his ship home safely.⁶⁷ Little wonder that Lord Justice Purchas suggested in *Williams v Roffey* that *Stilk v Myrick* might well have been decided differently if tried today.⁶⁸

⁶⁴ (1973) 1 ALR 497, 512.

⁶⁵ See, eg, *Carlill v Carbolic Smoke Ball Co.* (1893) 1 QB 256. Whether the variation in *Williams v Roffey* could have been regarded as a unilateral contract and decided on this basis will be considered later in this chapter.

⁶⁶ See, eg, *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.

⁶⁷ Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1974) 24; Sir Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Press, 2002) 21; Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) 98; John Gooley and Peter Radan, *Principles of Australian Contract Law* (LexisNexis Butterworths, 2006) 69.

⁶⁸ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 21.

2. *Benefits Already Due*

We have just seen that the practical benefit principle appears to conflict with the existing legal duty rule despite constant assurances from the English Court of Appeal that it does not. Another intriguing aspect of the practical benefit principle is that it allows consideration to be found in ‘benefits already due’. This phrase is intended to incorporate not only those benefits which the promisor was already due to receive under the contract, but also those which they would have received in any event had the promisee fulfilled their contractual obligation.

As to the first class of benefits already due it is certainly arguable that several of the ‘benefits’ found to have been conferred upon the promisor in *Williams v Roffey* were those that were already owing to them under the contract. Prime examples include timely completion of the carpentry work in the block of flats⁶⁹ and the avoidance of the need to employ other subcontractors to carry out this work.⁷⁰ It is absurd to suggest that a party who engages another to perform work is not entitled both to have the work completed by an agreed date and to rely upon the other’s performance of their agreed obligations.

As to the second class of benefits already due it is again obvious from the decision in *Williams v Roffey* that many of the benefits enjoyed by the promisor would have been received in any event had the promisee fulfilled their contractual obligation. If the promisee had performed the work as promised, the promisor’s commercial position would have been secured⁷¹ and they would not have had to find substitute workers⁷² nor be concerned about being penalised under the head contract for delay.⁷³ It seems that the modified payment scheme and the subsequent ability for the promisor to efficiently ‘direct their other trades to do work in the completed flats’ was the only ‘benefit’ that the promisor was not previously entitled to nor due to receive.⁷⁴ The issue, therefore, is that

⁶⁹ Ibid 10-11 (Glidewell LJ).

⁷⁰ Ibid 10-11 (Glidewell LJ), 19 (Russell LJ).

⁷¹ Ibid 10-11 (Glidewell LJ), 22-3 (Purchas LJ).

⁷² Ibid 10-11 (Glidewell LJ), 19 (Russell LJ).

⁷³ Ibid 10-11 (Glidewell LJ).

⁷⁴ Ibid 19 (Russell LJ), 20 (Purchas LJ).

the promisor already possessed the contractual right to receive any practical benefits flowing from the promisee's performance of their original contractual duties.⁷⁵

A confirmatory promise, i.e. one to fulfil an executory promise previously given, is purely tautological as it imposes no new obligations upon the promisee nor confers any new benefits upon the promisor other than those which they would inevitably have enjoyed had the promisee kept their word.⁷⁶ It seems highly dubious to regard such benefits as consideration for an attempted modification when they were merely consequential upon the original promise being honoured. As Mason J stated in *Wigan v Edwards*, in such circumstances 'the new promise, indistinguishable from the old, is an illusory consideration'.⁷⁷ This is not to suggest that freely given promises conferring benefits should be altogether unenforceable; it merely acknowledges the inaptness of the doctrine of consideration in facilitating this type of enforcement.⁷⁸

3. Benefits Not Bargained For

Quite apart from the difficulties just discussed, if benefits are to be recognised as good consideration through the practical benefit principle then it would seem essential at the very least that they form part of a bargained-for exchange. Once again, however, the Court of Appeal in *Williams v Roffey* felt this was not necessary.

In Chapter 1, the development of the doctrine of consideration in the law of contract was explored. What emerged was that its most fundamental function is to distinguish a merely gratuitous promise from a legally enforceable one. In making this determination it seeks out the presence of a bargain between the parties and concurrently imposes legal obligations upon them to fulfil their part of the exchange.⁷⁹ Over some time this requirement came to be a settled feature of both English and Australian contract law.⁸⁰ Prima facie, the established common law position prior to *Williams v Roffey* was that the

⁷⁵ Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 106.

⁷⁶ Coote, above n 10, 27.

⁷⁷ (1973) 1 ALR 497, 512. See also Coote, above n 10, 26-7 (the author asserts that consideration cannot plausibly be found in the *performance*, as opposed to the *promise* to perform, a contractual obligation).

⁷⁸ Norma J Hird and Ann Blair, 'Minding Your Own Business – *Williams v Roffey* Re-visited: Consideration Re-considered' [1996] *Journal of Business Law* 254, 256-7.

⁷⁹ *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, 855.

⁸⁰ See Chapter 1, Part V.

consideration moving between the parties to support the renegotiation must have been bargained for. In *Williams v Roffey*, however, this position was turned on its head. The Court of Appeal detected ‘practical benefits’ in things that had not specifically been the subject of a bargain between the parties. These included:

- the avoidance of the need to employ other subcontractors to carry out the carpentry work in the flats;⁸¹
- the replacement of the ‘haphazard method of payment [in place] by a more formalised scheme involving the payment of a specified sum on the completion of each flat’⁸² and the subsequent ability for the promisor to efficiently ‘direct their other trades to do work in the completed flats’;⁸³
- the safeguarded security of the promisor’s commercial position through ensured performance on the part of the promisee;⁸⁴ and
- the removal of the incentive to the promisee to deliberately breach the contract which would have exposed the promisor to a delay penalty under the primary contract with the housing association⁸⁵ (and avoidance of the penalty clause generally).⁸⁶

Whilst it is true that these benefits ultimately aided the promisor, this overshadows the significant fact that the promisor never actually agreed to pay the promisee more money in return for them. That is, the promisor’s motivation to provide additional consideration did not, strictly speaking, correlate with the benefits identified by the Court of Appeal. This discrepancy is raised by Carter, Phang and Poole,⁸⁷ who assert that the order of the practical benefit test – in positioning B’s consideration (the promise of something more) before A’s (the benefits received by virtue of A’s reiterated promise) – offends the longstanding common law principle that the consideration proffered by each party be the price for which the other is bought.⁸⁸

⁸¹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 10-11 (Glidewell LJ), 19 (Russell LJ).

⁸² *Ibid.*

⁸³ *Ibid* 20 (Purchas LJ).

⁸⁴ *Ibid* 10-11 (Glidewell LJ), 22-3 (Purchas LJ).

⁸⁵ *Ibid* 22-3 (Purchas LJ).

⁸⁶ *Ibid* 10-11 (Glidewell LJ).

⁸⁷ J W Carter, Andrew Phang and Jill Poole, ‘Reactions to *Williams v Roffey*’ (1995) 8 *Journal of Contract Law* 248, 253-4. See Chapter 4, Part IV.

⁸⁸ *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, 855 (Lord Dunedin).

This point clearly troubled Santow J in *Musumeci v Winadell Pty Ltd*,⁸⁹ his Honour acknowledging that Glidewell LJ in *Williams v Roffey* ‘departed from this traditional approach, when allowing consequential practical benefits to suffice that were never explicitly the subject of the parties’ promised bargain’.⁹⁰ Later in his judgment Santow J, immediately before recasting the six elements of Glidewell LJ’s practical benefit test and recognising that they would be ‘further refined in light of experience’, strained to make sense of this discrepancy:

One particular issue is the extent to which a benefit or detriment, said to be ‘practical’, as distinct from expressly bargained for, must nonetheless be consistent with, and not extraneous to, the bargaining process, as at least its intended result if not necessarily its moving force.⁹¹

It would seem that the practical benefit principle reconceptualises bargain theory in regarding the *product* of a contractual relationship as a ‘bargain’ without thought as to the presence or absence of an *exchange*. If the courts are encouraged to ‘find’, ‘detect’ or ‘look for’ consideration, as they are within the parameters of the practical benefit test,⁹² then this undermines the consideration doctrine’s established role as one of the gauges of contractual enforceability. If upon an agreement between the parties valid consideration does not subsist on one side, it is not for the courts to seek it out so as to give force to the parties’ accord.

Of course not all types of contract adhere comfortably to the bargain theory. Unilateral contracts, for example, entail the fundamental requirement of quid pro quo yet do not involve an exchange of mutual promises.⁹³ Nonetheless, the consideration that moves from the promisee (i.e. the party that performs the ‘act’ stipulated by the promisor) is referable to the promisor’s promise.⁹⁴ The same cannot be said of bilateral variations enforced through the practical benefit principle. In such cases there is no discernible connection between the promisor’s promise of additional consideration and the subsequent factual benefits moving from the promisee that are alleged to support this

⁸⁹ (1994) 34 NSWLR 723 (*Musumeci*).

⁹⁰ *Ibid* 740.

⁹¹ *Ibid* 747.

⁹² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Glidewell LJ), 18 (Russell LJ), 21 (Purchas LJ).

⁹³ See the discussion in Parts III(a) and (b) below.

⁹⁴ See the discussion in *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456-7 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

promise. *Williams v Roffey* can therefore be seen as an anomalous exception to the bargain requirement.

(a) Finding a Bargained-For Exchange

Could the Court of Appeal in *Williams v Roffey* have decided the case differently and found a bargained-for exchange through alternative analyses? Can this fault within the practical benefit principle be cured if an agreement between parties to modify their existing contract is seen in a different light? When one re-examines the circumstances at play in modification cases, the answer to these questions must be ‘not quite, but nearly’ and ‘no’ respectively.

Let us start by re-examining the exchange between the parties in *Williams v Roffey*. Initially the defendants subcontracted with the plaintiff to perform the carpentry work on the flats they were refurbishing for a third party. In return for the plaintiff’s services, the defendants would pay him £20,000. This is a straightforward bilateral agreement. Later the plaintiff, citing financial strain, sought additional remuneration and intimated the work might not be completed without it. Hardship is just one of the myriad of reasons discussed in the Introduction to this thesis that may impel parties to renegotiate their agreements. Such variables occur all the time and, more often than not, ‘tend to operate unevenly between the parties, and result in a loss to one party, rather than a loss to both’.⁹⁵ Consequently, the need for change seldom affects both parties simultaneously such that most modifications are required to assist only *one* of the parties. This was the situation in *Williams v Roffey* and the scenario which often typifies modification cases. The question to be considered here is: might it be possible to regard such one-sided agreements not as unilateral modifications of a bilateral contract, but as unilateral *contracts* in and of themselves?

First we must distinguish a unilateral contract from a bilateral contract. A bilateral contract is created by the exchange of promises and gives rise to executory obligations on the part of both parties.⁹⁶ In contrast, a unilateral contract is created when a party makes

⁹⁵ John Carter, ‘The Renegotiation of Contracts’ (1998) 13(3) *Journal of Contract Law* 185, 186.

⁹⁶ ‘Under [bilateral] contracts ... each party undertakes to the other party to do or to refrain from doing something, and in the event of his failure to perform his undertaking, the law provides the other party with a

an offer which is accepted in return for the performance of a specified act.⁹⁷ In such cases ‘the consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer’.⁹⁸ Accordingly, when a unilateral contract is formed the offeree’s consideration is executed, whereas with bilateral contracts the consideration of both the offeror and offeree is executory. Seddon, Bigwood and Ellinghaus explain that unilateral contracts ‘serve a useful role in catering for reward cases and the like in which the offeree is at no stage bound to perform’.⁹⁹ But it will be demonstrated that a unilateral contract analysis might also have served to resolve the ‘bargain’ issue in *Williams v Roffey* and the practical benefit principle.

It was established earlier in this chapter that the Court of Appeal in *Williams v Roffey* saw the renegotiation as a bilateral agreement. What it could have done was regard the renegotiation as a unilateral contract in and of itself. Had it done so the promisee’s consideration – and the requisite bargain – would have been found in his performance of the act stipulated by the offeror (i.e. the promisor), namely completion of the building work. The additional £10,300 could therefore be regarded as the ‘reward’ for the promisee’s completion. On this analysis we can identify an exchange between the parties which was seemingly lacking in *Williams v Roffey* – but we run into the same problems as with the bilateral contract analysis in that it cannot be said that the benefits flowing from having the stipulated act completed (i.e. avoiding having to find substitute workers and the delay penalty clause in the head contract) were part of the *bargain*. Strictly speaking, the only thing apparently bargained for was the performance of the stipulated act, not the beneficial consequences of doing so.

Coote rightly suggests that regarding the modification in *Williams v Roffey* as a unilateral agreement more closely establishes the link between benefit in fact and benefit in law and therefore adds credence to the notion that actual performance or its results can amount to

remedy’: *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74, 82 (Diplock LJ).

⁹⁷ *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

⁹⁸ *Ibid.*

⁹⁹ N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 121.

fresh consideration.¹⁰⁰ But whilst the unilateral contract analysis might more easily establish an *exchange* of consideration, it still leaves us wanting a *bargain*.

(b) Further Issues with the Unilateral Contract Analysis

A unilateral contract analysis of the modification in *Williams v Roffey* and similar cases attracts a number of concomitant issues. For a start, unilateral contracts by their very nature do not bind the offeree. Only when the stipulated act which constitutes acceptance of the offer is performed will the offeree have accepted the offer and formed a contract,¹⁰¹ an issue which gives rise to its own problems.¹⁰² Yet in modification cases purporting to apply the practical benefit principle the promisee in jeopardy will always be bound by virtue of their existing duty under the original contract to perform the specified ‘act’.

Complicating matters further is the accepted common law principle that a unilateral offer may be revoked, short of the offeree establishing an estoppel or the existence of an implied promise from the offeror not to revoke the offer.¹⁰³ Difficulty therefore arises in modification cases where the offeree will almost always have embarked upon performance of the stipulated act of acceptance. If we frame the variation in *Williams v Roffey* as a unilateral contract, the promisee continued working towards completion of the building work he was contracted to do on the promisor’s assurance that additional money would be paid, and made considerable strides in this regard.¹⁰⁴

¹⁰⁰ Coote, above n 10, 27-8.

¹⁰¹ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, 262 (Lindley LJ), 268 (Bowen LJ); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

¹⁰² Determining whether the requisite ‘act’ of acceptance of the offer has been completed is a process which often presents difficulty in unilateral contracts. In most unilateral contracts the act is specified i.e. A promises to pay whoever finds her lost dog \$100. B finds A’s dog. An enforceable contract arises between the parties at this point because B’s consideration for A’s promise subsists in B’s act of finding the dog. But does B’s obligation extend to returning the dog to A? Must B have physical possession of the dog or merely sight it and inform A of its whereabouts? Similarly in *Williams v Roffey* at what point could it be said that the ‘act’ in return for the ‘reward’ on offer (the additional money) was accomplished – when the promisee substantially completed a further eight flats as he did, when the building work was complete, or only upon the conferral of one or more practical benefits to the promisor consequential to this completion?

¹⁰³ *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998) 81 FCR 475, 506 (per curiam) (*‘Mobil Oil’*).

¹⁰⁴ The plaintiff had substantially completed the carpentry work in nine of the flats prior to the defendants agreeing to pay him additional consideration to allay his financial hardship. After this agreement was made a further eight flats were substantially completed: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 6-7 (Glidewell LJ).

It would doubtless seem unconscionable for the defendants to be entitled to revoke their offer of additional money in these circumstances. However it was stressed in *Mobil Oil Australia Ltd v Wellcome International Pty Ltd*¹⁰⁵ that there exists no universal principle that an offeror is barred from revoking their offer where the offeree has commenced performance of the requisite act. This is because the ‘respective positions of offeror and offeree vary greatly from the case of one unilateral contract to another’ and the injustice of such a revocation will depend upon a number of factors including: whether the offeror knew the offeree had commenced performance; whether the offeree benefits or suffers detriment from their performance; whether the parties intended the offeror to have the option of revocation; and whether the offeror appreciates that incomplete performance of the act of acceptance is at their own risk.¹⁰⁶ A promisee such as the carpenter in *Williams v Roffey* would have a good case for raising an estoppel in circumstances where the promisor sought to revoke their offer of additional consideration,¹⁰⁷ but this nonetheless emphasises the difficulties that a unilateral contract analysis would have in such cases.

Finally, there is the issue that an offeree must be conscious of the ‘reward’ at stake and acted upon this knowledge in order to form a unilateral contract. In *Crown v Clarke*¹⁰⁸ the Western Australian Police offered a public reward of £1,000 for anyone that could provide information leading to the arrest and conviction of the person(s) who murdered two police officers. The respondent, who was himself charged with murder in connection with the case, issued a statement to police which led to the arrest and conviction of two men for the homicides. The respondent, in turn, was exonerated and released before attempting to claim the reward. In evidence, however, he revealed that he made his statement to police not in reliance upon or in return for the reward, but exclusively in order to clear himself of the murder charge against him. The award was only contemplated after this time and, accordingly, WA Police refused to pay him the £1,000.

The High Court held that a unilateral contract will only be formed where the act required for acceptance is performed on the faith of the offer and that, accordingly, the respondent was not entitled to the reward. In Isaacs ACJ’s words:

¹⁰⁵ (1998) 81 FCR 475, 502, 506 (per curiam).

¹⁰⁶ Ibid 501-2.

¹⁰⁷ A point made by Russell LJ in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 17. As to the potential application of the doctrine of estoppel in this context see Chapter 6, Part III.

¹⁰⁸ (1927) 40 CLR 227.

Clarke never accepted or intended to accept the offer in the proclamation, and, unless the mere giving of the information without such intention amounted in law to an acceptance of the offer or to performance of the condition, there was neither 'acceptance' nor 'performance', and therefore there was no contract.¹⁰⁹

Had the respondent not made known that he hadn't acted in reliance on the offer it might have been presumed that he had,¹¹⁰ but with clear evidence that there had been no agreement, no contract was formed.

The requirement of knowledge of the 'reward' at stake thus has added implications for modification cases such as *Williams v Roffey* if they are looked at through the lens of a unilateral contract analysis. In *Williams v Roffey* the factual benefits said to have been conferred upon the promisor (and flowing from the promisee's performance of the act stipulated) were not contemplated by the promisee when he agreed to fulfil his existing contractual obligation. Through the practical benefit principle the courts find the 'benefits' which amount to consideration and complete the parties' bargain. These benefits are *not* conferred on the faith of the offer of additional consideration from the promisor.

4. When Does a Variation Become a Contract Under the Practical Benefit Principle?

The question of when a variation achieves the status of a contract under the practical benefit principle remains unclear. This uncertainty manifests in the lack of discernible meaning for the term 'practical benefit'. It is questionable whether the consideration in a practical benefit scenario lies in the promise or in the conferred factual benefit itself. On the one hand it might be said that the consideration here can only be in the promisee's reiterated promise to perform their existing legal obligation. As mentioned in Chapter 1,¹¹¹ the common law has for centuries recognised that a promise in itself amounts to good consideration for another promise. It follows, as Carter explains, 'that a contract will generally become binding prior to any performance being rendered. This shows that consideration cannot be equated with the actual receipt of performance: the promise itself is the relevant benefit'.¹¹² On the other hand, Glidewell LJ in *Williams v Roffey* referred

¹⁰⁹ Ibid 232.

¹¹⁰ Ibid 241 (Higgins J).

¹¹¹ See Part II.

¹¹² J W Carter, *Carter's Guide to Australian Contract Law* (LexisNexis Butterworths, 2nd ed, 2011) 22.

to ‘*the benefit to B*’ as the ‘consideration for B’s promise’ so that the variation ‘will be legally binding’.¹¹³ Accordingly, whether a renegotiation becomes effectual when the promisee reciprocates with a reiterated promise to fulfil their existing legal duty, or when they actually confer the relevant practical benefit (or obviate the disbenefit), is open to question.

As discussed in the previous chapter, the courts tend to emphasise the fourth element of the practical benefit test; namely, the identification of a factual benefit conferred or disbenefit obviated. The practical benefit test stipulates that consideration can subsist in a promisee’s (A’s) reiterated promise to fulfil an existing legal duty provided that, ‘*as a result of giving [this] promise, B [the promisor] obtains in practice a benefit, or obviates a disbenefit*’.¹¹⁴ The italicised portion of the test suggests that the relevant factual benefits must materialise in consequence of the promise and that, until this occurs, the renegotiation is not enforceable under this principle. This lends further support to the view that the consideration lies in the conferred factual benefit itself, as opposed to the reiterated promise from which the benefits derive. As the cases discussed in Chapter 3 demonstrate, the courts often identify the relevant consideration as subsisting in the factual benefits themselves as opposed to the promise giving rise to those benefits.

Two other issues stem from this uncertainty as to when a variation becomes a contract under the principle in *Williams v Roffey*. First, what is the position where the variation is repudiated by the promisor before it has been acted upon? Second, is the practical benefit principle limited to situations where the contract has been partially performed or might it apply if the secondary promise is made whilst the contract remains wholly executory?

As to the first issue, this ultimately turns on the answer to the principal question of when a variation becomes a contract under the practical benefit principle. If the variation takes legal effect when the promisor’s secondary promise is made then there can be no repudiation by the promisor as the relevant ‘performance’ (i.e. the making of the promise) would already have occurred. If the promisor thereafter refused to pay the additional consideration promised, this would amount to a simple breach of contract. If the promisor’s promise were instead binding upon receipt of the relevant factual benefits

¹¹³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16 (emphasis added).

¹¹⁴ *Ibid* (emphasis added).

from the promisee (giving rise to a reciprocal obligation to pay the additional consideration promised), and the promisor subsequently reneged on their promise to make the additional payment, this would amount to a repudiation. If the promisor was yet to receive the relevant factual benefits then, in theory, the promise of additional consideration would be merely gratuitous, legally unenforceable and therefore revocable.¹¹⁵

As to the second issue, the Court of Appeal in *Williams v Roffey* was clearly of the view that the practical benefit principle was limited to situations where the contract has been partially performed. The practical benefit test expressed by Glidewell LJ anticipates that A has previously contracted to do work for, or to supply goods or services to, B, and that A has commenced performance when B makes their additional promise:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) *at some stage before A has completely performed his obligations under the contract* B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time...¹¹⁶

In theory, however, there is no logical reason why the principle could not apply if B's secondary promise was made whilst the contract was wholly executory i.e. before A had recommenced performance of their existing legal obligation. Applying this scenario to the facts of *Williams v Roffey*, it is fair to ask why the defendants' promise of an additional £10,300 could not have been regarded as binding under the practical benefit principle if it had been made *before* the plaintiff had even commenced the refurbishment work. Why should it matter if the requisite doubt in the mind of the promisor as to the promisee's willingness or ability to perform (element (ii)) and prompting their secondary promise arose *prior* to the promisee commencing work? The defendants might, for example, have discovered that the plaintiff had dangerously underquoted himself before the job was started and felt the need to pledge additional money to safeguard performance. Despite this somewhat irrational restriction, the practical benefit test clearly stipulates that B's promise must have come *after* A had commenced work.

¹¹⁵ Other doctrines such as promissory estoppel may nevertheless operate to render this promise enforceable: see further Chapter 6, Part III.

¹¹⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16 (emphasis added).

5. *Movement from the Promisee*

In *Williams v Roffey*, counsel for the defendants questioned during argument¹¹⁷ whether the benefits said to amount to valid consideration ‘moved from the promisee’ as required.¹¹⁸ In plain terms, the general rule requires that the consideration stipulated by the promisor must be provided by the promisee. For example, if A promises to deliver goods to B providing B pays C \$50, and B reciprocally promises to pay C the \$50 in return for the goods from A, the payment is good consideration for A’s promise as it has moved from B. This rule ensures there is proof of the plaintiff participating in the bargain upon which he or she now seeks to initiate a cause of action.¹¹⁹ The consideration need not, however, move to the promisor.¹²⁰ In the given example, it does not matter that the \$50 from B did not pass to A, for the common law requires *either* a benefit to the promisor *or* a detriment to the promisee. Here, there is no obvious benefit to A, however there is an obvious detriment to B (a requirement to pay C). A’s motives for bargaining in this way are irrelevant. All that matters is that the arrangement adheres to the common law requirements for good consideration.

Returning, then, to *Williams v Roffey*, counsel for the defendants argued that even assuming those ‘benefits’ said to have been conferred upon the defendants by virtue of the plaintiff’s reiterated promise amounted to sufficient consideration, they did not move from the promisee. Bargain theory dictates that consideration subsists in the thing given in exchange for a promise, not in the benefits flowing from such a promise. The Court of Appeal dealt with this argument swiftly. Lord Justice Glidewell quoted *Chitty on Contracts*¹²¹ in saying:

The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment.¹²²

¹¹⁷ Ibid 4 (Franklin Evans) (during argument).

¹¹⁸ *Price v Easton* (1833) 4 B. & Ad. 433, 434; 110 ER 518, 519 (Denman CJ).

¹¹⁹ Seddon, Bigwood and Ellinghaus, above n 48, 174-5.

¹²⁰ *Pico Holdings Inc v Wave Vistas Pty Ltd* (2005) 214 ALR 392, 407 (per curiam).

¹²¹ Joseph D Chitty, *Chitty on Contracts* (Sweet & Maxwell, 26th ed, 1989) 126.

¹²² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16.

The view that consideration moving from a promisee must inevitably constitute a detriment to them¹²³ was thus flatly rejected. In similar terms Purchas LJ held that ‘[i]f both parties benefit from an agreement it is not necessary that each also suffers a detriment’.¹²⁴ The point received no attention from Russell LJ. One possible solution justifying the Court of Appeal’s finding on this point is to regard the promisee as having suffered a detriment in consequence of their promise to fulfil their existing legal duty. It could be said such detriment subsisted in the promisee continuing with the contract and foregoing the option of breach or seeking other (potentially more profitable) employment.¹²⁵

Williams v Roffey was thus highly significant in that it downplayed the traditional understanding of the established rule that the consideration under a contract must move from the promisee.¹²⁶ The rationale for this rule was that it provided proof of the plaintiff’s share in the bargain upon which they now sought to bring an action.¹²⁷ Nonetheless the Court of Appeal was content to recognise benefit to the promisor as a viable alternative to detriment to the promisee in satisfaction of the consideration requirement. Even where the consideration hadn’t moved from the promisee, provided it ultimately vested in the promisor as a consequence of the promisee’s actions, this would suffice. Thus in *Williams v Roffey*, though the promisee’s consideration did not ‘move’ from him, his repeated promise to fulfil his existing legal obligation to complete the carpentry work resulted in the conferral of numerous factual benefits to the promisor. Provided the promisor received a benefit, it was seen as unnecessary for the promisee to have incurred a detriment.

¹²³ A view strongly advocated by K O Shatwell, ‘The Doctrine of Consideration in the Modern Law’ (1954) 1 *Sydney Law Review* 289, 305.

¹²⁴ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 23.

¹²⁵ Karen N Scott, ‘From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-Existing Duty Rule in New Zealand’ (2005) 11 *Canterbury Law Review* 201, 207; John Land, ‘The Enforceability of Contractual Variations: *Moyes & Groves Ltd v Radiation New Zealand Ltd*’ (1985) 15 *Victoria University of Wellington Law Review* 287, 293.

¹²⁶ *Price v Easton* (1833) 4 B. & Ad. 433, 434; 110 ER 518, 519 (Denman CJ). See further Chapter 1, Part V.

¹²⁷ Seddon, Bigwood and Ellinghaus, above n 48, 175.

6. Does Practical Benefit Have Limits?

In the 20 years after *Williams v Roffey*, and following the lead of the Court of Appeal in that case, a number of courts have seized upon the opportunity to apply the practical benefit principle to enforce contract modifications and in so doing have demonstrated considerable ingenuity. Practical benefit has been detected in a colourful array of things, including:

- the avoidance of potential industrial disputation;¹²⁸
- the assurance that a contract is validly made;¹²⁹
- the retention of the services of a valued employee;¹³⁰
- the relief from liability under a bank guarantee;¹³¹
- the preservation of good relations with valued customers;¹³²
- the guarantee that the other contractual party would not withdraw from the agreement;¹³³
- the reduction of a retention fund in a construction contract;¹³⁴
- the attainment of an advantage out of the continuing relationship between the parties to the contract;¹³⁵
- the attendance at a meeting to give a prospective purchaser further opportunity of purchasing land;¹³⁶
- the assurance of the efficient completion of a transaction;¹³⁷ and
- the dissolution of a contract between hostile and feuding parties.¹³⁸

¹²⁸ *Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993); *Lee v GEC Plessey Telecommunications* [1993] IRLR 383.

¹²⁹ *Figjam Pty Ltd v Pedrini* (2007) Aust Contract Reports ¶90-259.

¹³⁰ *Silver v Dome Resources NL* (2007) 62 ACSR 539.

¹³¹ *Tinyow v Lee* [2006] NSWCA 80 (13 April 2006).

¹³² *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526.

¹³³ *Simon Container Machinery Ltd v Emba Machinery AB* [1998] 2 Lloyd's Rep 429; *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526; *Vella v Ayshan* [2008] NSWSC 84 (15 February 2008).

¹³⁴ *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 86 (4 April 2003). Note however that the practical benefit principle was deemed inapplicable because the modification was procured by economic duress and unconscionable behaviour on the part of the defendant in contravention of the test's fifth element: [2003] QSC 86, [64]-[71], [78] (Ambrose J).

¹³⁵ *Davis v Giladi* [2000] WL 976085 (unreported, High Court, Queen's Bench Division).

¹³⁶ *Gribbon v Lutton* [2002] QB 902.

¹³⁷ *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68.

¹³⁸ *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332.

The sheer diversity of this selection is testament to the practical benefit principle's versatility and speaks of its appeal to judges seeking to enforce a contract modification in the alleged absence of consideration. There is no doubt it stretches the relatively narrow boundaries of the doctrine of consideration and provides scope for the courts to decide modification cases according to their 'inherent merits' as opposed to strictly within the parameters of the law.¹³⁹ Such an approach avoids the excessive technicalities which at present stand between enforcement and non-enforcement of fair and necessary contract modifications, albeit at the price of certainty.¹⁴⁰

Nonetheless, it must be conceded that the 'practical benefits' described above are wide-ranging and in some cases outwardly trivial, even unpersuasive. This alone is not good reason to condemn practical benefit, for the common law is no stranger to finding consideration in the most unlikely of things. Aside from the traditional example of the humble peppercorn,¹⁴¹ consideration has also been detected in empty chocolate wrappers,¹⁴² a promise not to smoke, drink, swear or play cards or billiards for money

¹³⁹ Philip Clarke, Julie Clarke and Ming Zhou, *Contract Law: Commentaries, Cases and Perspectives* (Oxford University Press, 2008) 127; M H Ogilvie, 'Of What Practical Benefit is Practical Benefit to Consideration?' (2011) 62 *University of New Brunswick Law Journal* 131, 134: '[The practical benefit principle] seems to relax the consideration requirement so that technical consideration requirements may be overtaken by issues of equity, fairness, reasonableness or commercial efficacy'. Cf D W Greig and J L R Davis, *The Law of Contract* (The Law Book Company, 1987) 108.

¹⁴⁰ Carter, Phang and Poole, above n 36, 264.

¹⁴¹ Lord Somervell in *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87, 114 stated: 'A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn'. In modern times this rule has come to be known as 'the peppercorn principle' and emphasises that consideration need only be of sufficient legal value, it need not be adequate (see also *Haigh v Brooks* (1839) 10 Ad. & E. 309, 320; 113 ER 119, 123 (Lord Denman CJ); *Thomas v Thomas* (1842) 2 QB 851, 859 (Patteson J); *Westlake v Adams* (1858) 5 C.B. (N.S.) 248, 265; 141 ER 99, 106 (Byles J): 'It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration'). Interestingly, whilst *Chappell* is attributed by most legal text-writers as the origin of the 'peppercorn principle', it appears to have far earlier origins. In Bermuda, on the Wednesday closest to St George's Day (April 23) every year, the Masonic Lodge of St George's pays its annual rent of a single peppercorn to the island's Governor for the use of the Old State House which formerly housed Bermuda's parliament. The tradition has continued every year since 1815 and has developed into an elaborate ceremony attended by hundreds and involving national dignitaries and the military. The peppercorn is presented upon a velvet cushion atop a silver platter. See Owain Johnston-Barnes, 'Hundreds Attend Annual Peppercorn Ceremony', *The Royal Gazette* (online), 28 April 2011 < <http://www.royalgazette.com/article/20110428/NEWS/704289973>>. Similarly, the Sevenoaks Vine Cricket Club of England pays the Sevenoaks Town Council an annual rent of two peppercorns for the use of the Vine Cricket Ground and its pavilion. If requested, the Council must then give one cricket ball to the current Baron Sackville: Sevenoaks Life, *History of Sevenoaks* < <http://www.sevenoaks-life.co.uk/content/view/166/89/>>.

¹⁴² *Chappell & Co Ltd v Nestlé & Co Ltd* [1960] AC 87 (consideration for the right to use a copyrighted song in marketing scheme found in the provision of empty chocolate wrappers).

until the age of 21,¹⁴³ a promise not to live in a certain area and not to visit or annoy a particular person¹⁴⁴ and all manner of unusual things.¹⁴⁵

But what this diversity does demonstrate is the ease with which sufficient factual benefits can be identified in any particular case involving a unilateral modification. They will almost always be found with little effort or scrutiny which not only casts significant doubt over the contemporary significance of the existing legal duty rule,¹⁴⁶ but also ‘lowers the bar’ with respect to satisfying the consideration requirement for a contractual variation. Halyk highlights this point with an interesting hypothetical:

If the promisee argues that the promisor has received a subjective, intangible benefit as a result of actual performance, would this be sufficient consideration to make a promise binding? For example, if, as a result of the promisee’s completion of his contractual obligations, the promisor was once again able to sleep at night, would this benefit flowing from actual performance be sufficient to make the contract modification promise enforceable? There is nothing in the [*Williams v Roffey*] judgment to prevent such an argument.¹⁴⁷

The same point was made more recently by the Singapore Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*:¹⁴⁸

[T]he combined effect of *Williams v Roffey* ... (to the effect that a *factual*, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate ... is that ... it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties.

¹⁴³ *Hamer v Sidway* 124 NY 538 (1891) (consideration for payment of \$5,000 found in promisee’s agreement not to smoke, drink, swear or play cards or billiards for money until age 21).

¹⁴⁴ *Jamieson v Renwick* (1891) 17 VLR 124 (promisee’s promise not to live in a certain area and not to visit or annoy the promisor held to be good consideration for the promisor’s promise of an annual payment of £25).

¹⁴⁵ See, eg, *Hunter v Sparling* 87 Cal. App. 2d 711 (1948) (consideration for a bonus payment found in employee’s forbearance from accepting alternative employment offers); *Schoy v Cole* 9 Ohio N.P. (N.S.) 199 (1909) (consideration for an employer’s promise of additional compensation at year’s end found in employee’s promise to put in his ‘utmost efforts’ and ‘render extraordinary services’); *Dunton v Dunton* (1892) 18 VLR 114 (consideration for ex-husband’s payment of £6 per month found in his former wife’s promise not to commit any act that would subject either of them to ‘hate, contempt or ridicule’ and to conduct herself with sobriety and dignity); *Head v Kelk* (1963) 63 SR (NSW) 340 (debtor’s promise to repay loan ‘when he was financially able to do so’ upheld as valid despite clear uncertainty as to when this would occur).

¹⁴⁶ J W Carter, *Contract Law in Australia* (Butterworths, 6th ed, 2012) 139; Paterson, Robertson and Duke, above n 24, 106; Dan Halyk, ‘Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*’ (1991) 55 *Saskatchewan Law Review* 393, 398.

¹⁴⁷ Halyk, above n 95, 398.

¹⁴⁸ [2007] 1 SLR 853, 866. See also *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205 (18 December 2007) [41] (DJ Donaldson): ‘*Williams v Roffey* would seem to permit *any* variation of a contract, even if the benefits and burdens of the variation move solely in one direction’ (emphasis added).

A prime example from *Williams v Roffey* itself perhaps best exemplifies this fact. The Court of Appeal found practical benefit in the avoidance of the need for the promisor to employ other subcontractors to carry out the carpentry work in the flats.¹⁴⁹ Ogilvie explains how this aspect of the practical benefit principle renders it potentially boundless: ‘If merely avoiding having to find an alternative contractor constitutes practical benefit then that is characteristic of all attempts to modify contracts and would result in enforcement of all such attempts except where there is economic duress or fraud’.¹⁵⁰ Indeed, it is for this very reason that the English Court of Appeal in *Re Selectmove*¹⁵¹ refused to extend the operation of practical benefit to part-payment of debt situations. In Peter Gibson LJ’s words: ‘When a creditor and a debtor who are at arm’s length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing’.¹⁵²

Hence, in light of the loose language contained within the practical benefit principle, Halyk argues, there is no ‘logical limitation’ upon which benefits will qualify.¹⁵³ This clearly threatens to blur the boundary delineating gratuitous promises and promises supported by sufficient consideration. Any ‘motive or desire’, says Chen-Wishart, ‘is capable of being turned into practical benefit’ such that it will be impossible to hold the line against enforcing *all* modifying promises.¹⁵⁴ The ramifications here are significant, for this starts to equate motive with consideration, a notion firmly established within the civil law but one fervently rejected by the common law,¹⁵⁵ despite the persistent efforts of Lord Mansfield in the 18th Century.¹⁵⁶ In Ulyatt’s view this would be ‘tantamount to abolishing consideration altogether’.¹⁵⁷

¹⁴⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 10-11 (Glidewell LJ), 19 (Russell LJ).

¹⁵⁰ Ogilvie, above n 88, 134.

¹⁵¹ [1995] 1 WLR 474.

¹⁵² *Ibid* 481.

¹⁵³ Halyk, above n 95, 398.

¹⁵⁴ Mindy Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor’s New Clothes’ in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 123, 139.

¹⁵⁵ *Eastwood v Kenyon* (1840) 11 Ad. & E. 438, 450-1; 113 ER 482, 486-7 (Lord Denman CJ). See further Chapter 1.

¹⁵⁶ *Hawkes v Saunders* (1782) 1 Cowp. 289, 290; 98 ER 1091, 1091.

¹⁵⁷ Craig Ulyatt, ‘Should Consideration Be Required for the Variation of Contracts?’ (2002) 9(3) *Auckland University Law Review* 883, 910. See also Dena Valente, ‘Enforcing Promises: Consideration and Intention in the Law of Contract’ (LLB (Hon) Thesis, The University of Otago, 2010) 23: ‘When judges allow a “practical benefit” to the promisor to suffice as consideration, they essentially deny that the promise really requires consideration to be enforceable’.

Professor Smith, writing the sixth edition of Atiyah's *An Introduction to the Law of Contract*, provides a contrary view. He argues that practical benefit will *not* be found in cases where a promisor's undertaking to provide additional consideration 'is made from altruistic or sympathetic motives, or where the parties agree to vary a contract out of a concern for their reputation'.¹⁵⁸ He continues:

Here the party performing the undertaking obtains a practical benefit as a consequence, but this benefit will not have been obtained in *exchange* for the undertaking and so the consideration requirement is not strictly satisfied. The reputational benefit is merely a consequence of the arrangement.¹⁵⁹

As discussed earlier, however, Glidewell LJ in *Williams v Roffey* clearly did not see the absence of an orthodox bargained-for exchange as fatal to the classification of subsequent factual benefits as good consideration. Moreover, as we have seen, the practical benefit doctrine now being applied imposes a low threshold for consideration such that motives driven by benevolence or reputational concerns (outside of purely gratuitous gifts which require a seal)¹⁶⁰ may well suffice.

The apparent ease with which factual benefits can be established in a modification setting has other significant ramifications. If such little effort is required to detect sufficient benefits in a given factual scenario then the practical benefit test must surely favour the promisee at trial; they could almost always argue, as a matter of logic, that the promisor must have received sufficient advantages from the agreed modification, otherwise they would not have agreed to it. The promisor would be hard-pressed to argue otherwise. Zhuang-Hui explains:

As what constitutes a factual or practical benefit is unclear, why would the promisee to perform an existing duty not *always* provide a factual or practical benefit? After all, if that party did not find the performance worth benefiting from, he or she would presumably not have agreed to the variation of the contract.¹⁶¹

This argument appears to overlook the fact that parties will often agree to such variations merely for the sake of *convenience* i.e. to avoid the burden of obtaining substitute

¹⁵⁸ Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (Clarendon Press, 6th ed, 2005) 117.

¹⁵⁹ *Ibid* (emphasis in original).

¹⁶⁰ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Glidewell LJ), 19 (Russell LJ), 21 (Purchas LJ).

¹⁶¹ Wu Zhuang-Hui, 'A Probable Reform of Consideration' [2009] *Singapore Journal of Legal Studies* 272, 279-80. See also Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 164.

performance and commencing litigation against the promisee for breach of contract.¹⁶² It will not always follow that because consent was given the promisor anticipated factual or practical benefits. Moreover, as will be seen further on, some courts have managed to prove that such benefits will not *always* be present in a given factual scenario.

It has even been suggested by some courts that a *chance* may be capable of amounting to a practical benefit. In *Anangel*,¹⁶³ a case applying *Williams v Roffey*,¹⁶⁴ practical benefit was found in the plaintiffs taking delivery of the vessel constructed for them by the defendants on a particular date, even though they were already contractually bound to do so. The requisite benefit was said to exist both in the defendant's retention of the plaintiff's valued patronage and in the *chance* that the plaintiff's agreement to take delivery on the specified date would 'encourage [the defendant's] other reluctant customers to follow suit'.¹⁶⁴

There is no doubt that a chance has value in the eyes of the law in the context of lost opportunities to obtain benefits under a contract,¹⁶⁵ but it is questionable whether such a chance could *in itself* amount to consideration to support a unilateral modification through the practical benefit doctrine. Unlike the benefit of assured performance, the chance of benefit is not even guaranteed. Legal recognition of the chance of benefit as consideration would therefore go one step further towards destroying 'the traditional boundaries of contractual liability'.¹⁶⁶ Chen-Wishart rightly asks:

[I]f practical benefit includes the chance, as opposed to the assurance, of obtaining a specified benefit, how small must the chance be before it ceases to count as consideration? If any hope of benefit by the promisor, however speculative, vague or tangential, is to count, consideration amounts to little more than a requirement of motive for a promise.¹⁶⁷

In *Anangel* the defendant's 'chance' of receiving a benefit was coupled with the added tangible benefit of retaining the plaintiff's patronage. Whilst it is significant that the chance was recognised as constituting a practical benefit, this flowed directly from the

¹⁶² Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27(3) *The Yale Law Journal* 362, 380-1; Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 26-7.

¹⁶³ *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526 ('*Anangel*'). This case is discussed in Chapter 3.

¹⁶⁴ *Ibid* 544 (Hirst J).

¹⁶⁵ See, eg, *Chaplin v Hicks* [1911] 2 KB 786; *Howe v Teefy* (1927) 27 SR (NSW) 301.

¹⁶⁶ Chen-Wishart, above n 103, 130.

¹⁶⁷ *Ibid* 131. See also Scott, above n 73, 205 (author offers a concurring view).

defendant's retention of the plaintiff as a valued customer. Therefore the question of whether such a chance could alone amount to a factual benefit and thus consideration to support a one-sided modification remains unanswered. There is no doubt, however, that if it were recognised as being capable of doing so then the scope of the practical benefit test is, as Chen-Wishart submits, potentially boundless.

Perhaps this is all unsurprising. After all, the Court of Appeal in *Williams v Roffey* did nothing to elaborate upon the meaning of 'practical benefit' when generating the principle¹⁶⁸ and subsequent courts have similarly struggled to define the term. This all inevitably leads to the following question to be addressed next: does 'practical benefit' have limits?

7. Finding Limits

As we have seen, in the aftermath of *Williams v Roffey*, a number of authors predicted that the practical benefit principle would have no discernible limits. This argument was grounded in the semantic ambiguity surrounding the term 'benefit' and the fact the Court of Appeal in that case encouraged the 'detection' of such benefits in order to attract the operation of the practical benefit principle.¹⁶⁹ In every unilateral variation, the doomsayers cried, you would be able to find factual benefits and therefore consideration to enforce the agreement. In at least one instance, however, practical benefit has been pleaded, recognised judicially as good law and *rejected*.

In *Sea-Land Service Inc v Cheong Fook Chee Vincent*¹⁷⁰ the plaintiff employee was made redundant by his employers, the defendants.¹⁷¹ A month's notice was provided. A provision in the defendants' handbook of employee rules and benefits stipulated that the plaintiff was entitled to a severance payment of half a month's pay for each year of his service to them, totalling \$23,900. He was informed in writing that he would receive this amount as well as an additional 'enhanced severance pay' of \$14,340. When the plaintiff

¹⁶⁸ See Chapter 2, Part II.

¹⁶⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Gidewell LJ), 18 (Russell LJ), 21 (Purchas LJ).

¹⁷⁰ [1994] 3 SLR 631 ('*Sea-Land*'). This case was referred to in Chapter 3, Part III.

¹⁷¹ The plaintiff was the respondent in this action but for the sake of simplicity and continuity will be referred to as the 'plaintiff'. The appellants will accordingly be referred to as the 'defendants'.

collected his final salary instalment, however, he received another letter from the defendants informing him that his total severance payment entitlements had been miscalculated and that he was not entitled to the 'enhanced severance payment'. In place of the enhanced severance pay the plaintiff was promised an ex gratia payment of \$4,780, equivalent to two months' pay. He accepted the payment under protest and initiated proceedings to recover the enhanced severance payment.

The defendants argued that the plaintiff had provided no consideration for their initial promise to disburse the enhanced severance pay, such that it was unenforceable being purely gratuitous. The plaintiff argued he had conferred upon the defendants several factual or practical benefits which amounted to valid consideration and was successful at first instance, the Singapore High Court holding that he had accepted the terms of the redundancy package in the expectation of receiving the enhanced severance benefits.¹⁷² The defendants appealed to the Singapore Court of Appeal. The Court noted that any consideration provided by the plaintiff (respondent) 'could only have arisen in three possible forms':

first, by the respondent performing his existing contractual duties under the employment contract when he continued to work for the appellants after he received the termination notice; secondly, by the respondent forbearing to sue the appellants for breach of the employment contract as the termination of the respondent's employment was allegedly not in accordance with the employment contract; and, thirdly, by the respondent accepting the termination of his employment in the expectation of receiving the enhanced benefits.¹⁷³

The defendants argued that they did not request the plaintiff to complete his last month of employment after being notified of his redundancy in return for their promise to pay the enhanced severance pay.¹⁷⁴ The plaintiff argued he had conferred multiple factual or practical benefits upon his employers by fulfilling his existing duties in the last month of his employment, in that this allowed them to: '(a) restructure and reorganize their corporate affairs; (b) streamline their organization; and (c) provide an organized and structured redundancy program'.¹⁷⁵ He also claimed his overall assistance in the retrenchment exercise was also a factual benefit to the defendants. The Court of Appeal

¹⁷² *Cheong Fook Chee v Sea-Land Service Inc* [1994] 2 SLR 340.

¹⁷³ *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631, 633.

¹⁷⁴ *Ibid* 635.

¹⁷⁵ *Ibid*.

found in favour of the defendants and rejected the plaintiff's arguments based upon practical benefit. Of great significance is the manner in which the Court did so:

In our view, there was no merit in this submission of the respondent. The value of the last month's work by an employee about to be made redundant could hardly be other than minimal, since the management would only retrench workers that were not essential for their operations. Secondly, we agreed with the appellants' counsel that the appellants had not requested the respondent to complete his last month of employment in exchange for their payment of the enhanced benefits. The appellants were merely complying with their contractual obligations and had chosen to provide the respondent with one month's notice before his employment was terminated, instead of terminating his employment there and then and compensating him with a month's wages in lieu of notice. We were therefore of the view that the respondent's last month's work for the appellants would not amount to valid consideration and that it fell within the general rule that prohibits the performance of existing duties from constituting such consideration.¹⁷⁶

From this judgment some important observations can be made. First, there is no doubt the Singapore Court of Appeal in this case 'ostensibly applied (or at least recognised)'¹⁷⁷ the principle in *Williams v Roffey*. It was not simply addressing it because it featured in the plaintiff's pleadings, but rather evaluating if it had any application to the facts at hand. Secondly, the Court of Appeal unequivocally demonstrated that, contrary to Halyk's view, the practical benefit principle *is* capable of restraint and that not even the most loosely-worded description of purported 'benefits' will always suffice to support a pleading of consideration. Thirdly, the Court determined that the plaintiff had conferred no factual benefit upon the defendants on the basis of a sweeping and stereotypical supposition: that the value of *any* employee's service in their last month before termination must be so minimal that it can never rise to the level of practicality envisaged in *Williams v Roffey*. This seems a highly unfair generalisation given that such value will surely vary upon the facts of each individual case. Hence, whilst the scope of practical benefit might not be infinite, the process of determining how and where to draw the line is drawn is left to the idiosyncrasies and discretion of the presiding judge(s).

8. The Need for 'Practicality' – Must the Benefit(s) be Adequate?

The search for factual benefit might be seen to necessitate an enquiry into the adequacy of consideration which has traditionally been off-limits to the common law.¹⁷⁸ This flows

¹⁷⁶ Ibid.

¹⁷⁷ *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332, 365 (per curiam).

¹⁷⁸ Seddon, Bigwood and Ellinghaus, above n 48, 212; Chen-Wishart, above n 103, 126-7. See *Haigh v Brooks* (1839) 10 Ad. & E. 309, 320; 113 ER 119, 123 (Lord Denman CJ); *Westlake v Adams* (1858) 5 C.B.

from the qualification in *Williams v Roffey* that the benefit(s) identified be ‘practical’,¹⁷⁹ The use of such an adjective implies not only that sufficient benefits be identified on the facts, but that they meet a threshold of adequacy. The Macquarie and Oxford English Dictionaries¹⁸⁰ define ‘practical’ in the following terms:

Prac-ti-cal (*adj.*) inclined towards or fitted for actual work or useful activities;¹⁸¹ [h]aving, or implying, value or consequence in relation to action; available or applicable in practice; capable of being turned to account; practically useful.¹⁸²

Where, as in *Williams v Roffey*, the practical benefits said to have been conferred upon the promisor have not been bargained for, the courts are presumably required to quantify the adequacy of the benefits with reference to such definitions. If no such limitation applied then the mere presence of a factual benefit, which as we have seen can be easily identified in any given factual scenario,¹⁸³ would suffice to render a modification for which only one party has provided additional consideration enforceable. This would dramatically lower the threshold for establishing consideration and consequently almost always operate in favour of the promisee. If the mere advantage enjoyed by the promisor of having the promisee complete their side of the original agreement (and any flow-on advantages) amount to a ‘practical benefit’ then ‘there exists in the law an irreconcilable contradiction between [*Stilk v Myrick*] and [*Williams v Roffey*] so that if both rules are to stand, practical benefit must mean something more, but what more is the question’.¹⁸⁴

In *Musumeci*, Santow J sought to identify what is ‘a sufficient practical benefit to [the promisor], so as to take the situation beyond a wholly gratuitous promise by [the promisor]’,¹⁸⁵ and answer this very question. The answer, in his Honour’s view, was

inherent in the situation posed by *Williams v Roffey* itself (and indeed in *Stilk’s* case itself, despite the decision). There the subcontractor A’s performance was worth more to B (the principal

(N.S.) 248, 265; 141 ER 99, 106 (Byles J): ‘It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration’.

¹⁷⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 11 (Glidewell LJ).

¹⁸⁰ These versions are the most popular amongst the courts in Australia, who have the unqualified power at common law to consult whichever dictionaries they please for assistance in defining particular terms: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 6th ed, 2006) 93-4.

¹⁸¹ *Macquarie Dictionary* (5th ed, 2009) 1305.

¹⁸² *Oxford English Dictionary* (2nd ed, 1989) vol 12, 270.

¹⁸³ See Part VI, above.

¹⁸⁴ Ogilvie, above n 88, 139-40.

¹⁸⁵ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 745.

contractor) than likely damages, even taking into account the cost of any concession to obtain greater assurance of that performance.¹⁸⁶

He went on to recast element (iv) of the practical benefit test posited by Glidewell LJ in *Williams v Roffey* and introduce a value-based assessment – if the promisor promises something more or some concession in return for the promisee’s assured performance, then provided no vitiating factors (i.e. economic duress) are present, there will be consideration so long as:

- (a) As a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit provided that A’s performance, having regard to what has been so obtained, is capable of being viewed by B as worth more to B than any likely remedy against A (allowing for any defences or cross-claims), taking into account the cost to B of any such payment or concession to obtain greater assurance of A’s performance, or
- (b) as a result of giving his promise, A suffers a detriment (or obviates a benefit) provided that A is thereby foregoing the opportunity of not performing the original contract, in circumstances where such non-performance, taking into account B’s likely remedy against A (and allowing for any defences or cross-claims) is capable of being viewed by A as worth more to A than performing that contract, in the absence of B’s promised payment or concession to A.¹⁸⁷

Hence, under this revised test, the presence of a factual benefit (or avoidance of a disbenefit) will not suffice in itself; for a ‘practical benefit’ to be established either the promisee’s performance be ‘capable of being viewed’ by the promisor as worth more than any claim made against the promisee, or the promisee’s performance be worth more to them than foregoing the opportunity to avoid performance and accepting the consequences of breach.

These qualifications can be seen as offsetting in part the scope for judicial discretion in discerning the presence of factual benefits (or absence of disbenefits) and simultaneously providing a more detailed basis upon which the courts can evaluate whether a practical benefit really subsists on the facts. Conversely, they also present a significant problem, for what the *Musumeci* version of the practical benefit test effectively asks of the courts is to second-guess the promisor’s judgment and determine whether or not they should have received more.¹⁸⁸ The unattractiveness of this proposition, certainly from the perspective of the contractual parties, goes without saying. It not only offends the longstanding

¹⁸⁶ Ibid.

¹⁸⁷ Ibid 747 (original emphasis removed).

¹⁸⁸ Mindy Chen-Wishart, ‘The Enforceability of Additional Contractual Promises: A Question of Consideration?’ (1991) 14 *New Zealand Universities Law Review* 270, 271.

common law position that consideration need only be sufficient not adequate¹⁸⁹ but from a policy viewpoint also robs the parties of their autonomy to stipulate the price for their agreement. The enquiry into the presence of practical benefits goes beyond ensuring ‘something’ of value has been exchanged and asks whether these were of *adequate* worth. If the adequacy of the purported benefits in a modification scenario is going to be assessed than the common law position that consideration need only be sufficient must be re-evaluated.

The *Musumeci* test has not been addressed by another court since its inception and even its predecessor in *Williams v Roffey* has not been consistently applied by subsequent courts. We are thus left wondering whether a factual benefit must meet some threshold of adequacy before it will become a ‘practical benefit’.

9. The Remedial Value of Practical Benefit

In *Williams v Roffey* the promisee was awarded £3,500. This figure was arrived at as follows: £4,600 (sum due for substantially completing eight further flats after the second agreement was made at the rate of £575 per flat) minus a nominal deduction for defective and incomplete work, plus a reasonable proportion of the £2,300 outstanding from the original contract sum, minus £1,500 already received.¹⁹⁰ This provides an intriguing insight into the value of the ‘practical benefit’ conferred upon the promisor from the promisee’s perspective. It clearly extends only to the promisee’s *reliance* interest.

But what about the value of the practical benefit from the *promisor’s* perspective? If the promisee (i.e. the beneficiary of the promise of additional consideration from the promisor) fulfils their existing legal obligation accordingly and promises to confer certain factual benefits upon the promisor as a consequence, and the sought after practical benefits fail to materialise, this must – assuming this is a bilateral contract to vary – be treated as a breach of contract. The question then becomes: to what quantum of damages is the promisor entitled? This is a critical issue because it will be necessary for the courts

¹⁸⁹ See, eg, *Haigh v Brooks* (1839) 10 Ad. & E. 309, 320; 113 ER 119, 123 (Lord Denman CJ); *Thomas v Thomas* (1842) 2 QB 851, 859 (Patteson J); *Westlake v Adams* (1858) 5 C.B. (N.S.) 248, 265; 141 ER 99, 106 (Byles J): ‘It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration’. See also above n 90.

¹⁹⁰ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 7 (Glidewell LJ).

to assess the value of the benefits which had purportedly been purchased by the promisor through the renegotiated agreement. But this can only be done by enquiring into the subjective mindset of the promisor in making the promise, appraising the value of what they sought to derive in agreeing to pay more for the same. This would be a controversial and highly difficult exercise and one fraught with difficulty. Of course the fact that damages are difficult to assess does not relieve the court of its responsibility to quantify the value of what has been lost.¹⁹¹ So again the question must be asked: what amount of damages is the promisor entitled to?

On one view, if no express promise to confer practical benefits is made by the promisee, the answer must be none: the promisor has received the *chance* bargained for.¹⁹² There is no promise to confer those benefits and so there is no breach of contract as varied. Along another line of reasoning, if a promised factual benefit *itself* (as opposed to the chance of its receipt) were regarded as the consideration and it never came to fruition, then the loss must be calculated and made good. The fundamental principle governing the award of damages was expressed in *Robinson v Harman*.¹⁹³ In Parke B's well-known words: 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'.¹⁹⁴ How could this principle accommodate lost 'practical benefits'? As we have seen these benefits vary widely from case to case and often subsist in unusual and even intangible things. Moreover, the value of such a benefit is only as great as the promisor perceives it to be.¹⁹⁵ That being so the law cannot feasibly measure 'the difference between the position that would have been created by full performance of the contract and the position that has actually been created by its breach',¹⁹⁶ which is essential to the calculation of a suitable remedy. Thus, without any kind of formula for

¹⁹¹ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 88 (Mason CJ and Dawson J); *Fink v Fink* (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ); *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625, 641 (Gibbs J).

¹⁹² Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes', above n 103, 133.

¹⁹³ (1848) 1 Ex 850; 154 ER 363.

¹⁹⁴ *Ibid* Ex 850, 855; ER 363, 365. Approved in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J), 98 (Brennan J), 117 (Deane J), 134 (Toohey J), 148 (Gaudron J), 161 (McHugh J).

¹⁹⁵ '[H]uman beings value some things or states of affairs more highly than others. That is a fact of the world, but it is not an evaluative fact. It is not a matter of one thing's being better than another. It is simply a matter of human beings' regarding one thing as better than another': Barry Stroud, 'The Study of Human Nature and the Subjectivity of Value' in Grethe B Peterson (ed), *The Tanner Lectures on Human Values* (University of Utah Press, Vol 10, 1989) 211, 215.

¹⁹⁶ Seddon, Bigwood and Ellinghaus, above n 48, 1126.

determining the value of a practical benefit, it is nearly impossible to establish with any real certainty what position the promisor would have been in but for the promisee's breach.

It could be said that contracts are characterised to enforce expectations and that expectation should therefore be used as the measure of damages when quantifying the promisor's lost practical benefits. But this would produce a patent injustice in that the additional larger payment promised (but unpaid) in the renegotiation would be taken into account as a cost avoided and accordingly be subtracted from their damages.¹⁹⁷ The unfairness of this analysis goes without saying. But the alternatives are few and no more attractive. If the courts are instead forced to place a value upon the 'practical benefits' in a given case then they face a difficult task. Calculating the worth of such things as amicable relations with valued customers,¹⁹⁸ the avoidance of potential industrial disputation¹⁹⁹ or the dissolution of a contract between hostile and feuding parties²⁰⁰ would be a highly arbitrary, subjective and unpredictable process. The only feasible option might be for the courts to reward a sum of nominal damages in recognition of the promisee's breach and the consequential loss of practical benefits on the part of the promisor.²⁰¹ Whether this becomes the favoured approach remains to be seen.

10. Extending Practical Benefit to Contractual Formation?

For all its uncertainties, there have even been suggestions that the practical benefit principle could extend beyond the renegotiation setting and into the realm of contractual formation. The theory is that a 'practical benefit' might be the consideration relied upon from the outset to form a contract. Chen-Wishart, for example, suggests that this possibility stems directly from *Williams v Roffey*'s dilution of the consideration doctrine:

¹⁹⁷ Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes', above n 103, 134-5.

¹⁹⁸ *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526.

¹⁹⁹ *Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993); *Lee v GEC Plessey Telecommunications* [1993] IRLR 383.

²⁰⁰ *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332.

²⁰¹ *Owners of Steamship 'Mediana' v Owners, Master and Crew of Lightship 'Comet'* [1900] AC 113, 116 (Earl of Halsbury LC).

[The decision's] effect could logically extend beyond contract modification to *contract formation* and include the *chance* of making a contract or some other un-promised benefit, or the chance of avoiding some nuisance or other harm threatened by the promisee.²⁰²

In *Attorney-General for England and Wales v R*²⁰³ Tipping J appeared to lend support to the notion that *Williams v Roffey* could apply to the formation of a contract. There were even indications in *Tinyow v Lee*²⁰⁴ that the New South Wales Court of Appeal was open to the idea of applying the practical benefit principle outside the variation context. Recall from Chapter 3 that the court there cited the trial judge's finding that the appellant had originally provided no consideration in return for the respondents' promises to each pay a sum of money to him. The court nonetheless found consideration subsisting in the appellant's payments of the company's indebtedness including the sums owing under the bank guarantees.

Whilst it is questionable whether consideration in the orthodox sense was present as the court believed it was, a further anomaly arises from the court's alternative view that, even if it were not present, 'there was sufficient consideration in the practical benefit enjoyed by the respondents from the appellant's actions in re-paying the company debt thus relieving them, or in the detriment suffered by the appellant in so doing'.²⁰⁵ The significance of this finding is that if consideration in the orthodox sense were not present in the first place then that would mean the court would have regarded the practical benefit of the appellant's actions as sufficient consideration to support the *original agreement* between he and the respondents for their payments. This would take the rule in *Williams v Roffey* beyond the variation context and into the realm of contract formation.

In any event there are two reasons why such an extension is not possible. First, the practical benefit test as originally formulated by Glidewell LJ in *Williams v Roffey* clearly stipulates that the principle only has application in cases of *renegotiation*. The third limb – 'B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time...' – envisages the promise of additional consideration from one party in return for the other party's promise to perform their *pre-existing* contractual obligation(s). Whilst a factual benefit might conceivably be capable of

²⁰² Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 2nd ed, 2008) 151.

²⁰³ [2002] 2 NZLR 91, 109.

²⁰⁴ [2006] NSWCA 80 (13 April 2006) ('*Tinyow*'). See Chapter 3, Part II.

²⁰⁵ *Ibid* [61] (Santow JA).

amounting to consideration in the contractual formation stage, the test originally formulated in *Williams v Roffey* does not currently permit such an extension.

The second reason why practical benefit cannot extend to contractual formation is that it would radically redefine the consideration doctrine and, more broadly, the Anglo-Australian law of contract. Chen-Wishart explains: ‘Such an extension would make it impossible to hold the line against enforcing all promises. *Any* motive or desire of the promisor would be capable of constituting practical benefit for the purchase of contractual rights’.²⁰⁶ The practical benefit test retrospectively seeks out benefits moving to the promisor and therefore involves, at least to some extent, a subjective assessment of their motives or desires in making the second promise. This brings the common law perilously close to embracing the civil law doctrine of *causa promissionis*.²⁰⁷ Such a development would turn our existing understanding of the doctrine of consideration on its head.

11. The ‘Moral Hazard’ Problem

The recognition of ‘practical benefits’ as lawful consideration gives rise to what have been widely labelled ‘moral hazard’ problems.²⁰⁸ Moral hazard situations arise where a promisee acts with less care and prudence in the performance of their contractual obligations and invests fewer resources towards risk prevention thereby increasing their exposure to potentially adverse variables, such as bankruptcy. They do so ‘knowing that any mistakes may be remedied by the practical necessity of the other party having to make the best of a poor situation’, thus insulating them from loss and allowing them to extract a better deal for themselves through the practical benefit doctrine.²⁰⁹ The practical benefit principle also attracts a second moral hazard problem: it inadvertently encourages the practice of ‘underpricing’, whereby a promisee deliberately quotes a low fee for the performance of services to secure a contract before subsequently requesting renegotiation on the basis completion might not otherwise be achieved. ‘Apart from making nonsense

²⁰⁶ Chen-Wishart, *Contract Law*, above n 151, 151-2.

²⁰⁷ See Chapter 1, Part III.

²⁰⁸ See, eg, Varouj A Aivazian, Michael J Trebilcock and Michael Penny, ‘The Law of Contract Modifications: The Uncertain Quest for a Benchmark of Enforceability’ (1984) 22 *Osgoode Hall Law Journal* 173, 194; Richard Hooley, ‘Consideration and the Existing Duty’ [1991] *Journal of Business Law* 19, 27; Cheng Han Tan, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17 *Singapore Academy of Law Journal* 566, 583.

²⁰⁹ Han Tan, above n 157, 583.

of the entire tendering process’, Halyk argues, ‘such activity would result in a suboptimal allocation of resources within society. The most efficient contractor, that being the contractor who could in fact complete the project at the lowest cost, may well be denied the opportunity to do so’.²¹⁰

Lord Justice Glidewell was clearly mindful of the potential for such extortionate behaviour in the sphere of contractual modifications, particularly where the change is unilateral and benefits only one party who merely promises to perform their existing legal duty in return for something more. The notion of economic duress was recognised as being a ‘relatively recent development’²¹¹ however, for all its uncertainties, it was seen as capable of policing renegotiations reliant upon the practical benefit principle for enforcement. For this reason, his Lordship heeded the Privy Council’s call from the earlier decade²¹² and introduced the doctrine as a means of protecting against extortion in these settings. It thus featured as the fifth element in his five-point test: if B’s promise to impart additional consideration on A was given in return for A’s promise to perform an existing duty, it was enforceable provided B’s promise was ‘not given as a result of economic duress or fraud on the part of A’.²¹³ This initiative was praised by some academics who feared that promisees could otherwise enforce agreements that had been extracted under duress through establishing a factual benefit and relying upon the practical benefit principle for enforcement.²¹⁴

12. Conclusion

The notion of factual benefit brought to the fore by the Court of Appeal in *Williams v Roffey* invites a number of concomitant problems. It not only clashes head-on with the existing legal duty rule but allows consideration to be detected in benefits already due, benefits not bargained for and even the mere *chance* of receiving a benefit in order to

²¹⁰ Dan Halyk, ‘Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*’ (1991) 55 *Saskatchewan Law Review* 393, 404.

²¹¹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 13.

²¹² *Pao On v Lau Yin Long* [1980] AC 614, 634 (per curiam).

²¹³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16 (Glidewell LJ).

²¹⁴ Roger Brownsword, ‘The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract’ in Brownsword, Howells and Wilhelmsson (eds) *Welfarism in Contract Law* (1994) 21, 42-3. Other academics have suggested that an inference of duress only arises where there is a ‘gross disparity’ between the benefits exchanged: Timothy J Muris, ‘Opportunistic Behaviour and the Law of Contracts’ (1981) 65 *Minnesota Law Review* 521, 550.

render a one-sided contractual modification enforceable. Conceptually, the principle renders seemingly illusory consideration legally sufficient and greatly waters down the requirement that consideration move from the promisee. Practical benefit is therefore an incredibly versatile device available to the courts but one which must be limited in scope to avoid eroding the divide between gratuitous and enforceable promises and offending the fundamental tenets of Anglo-Australian contract law. Gauging the sufficiency of a practical benefit has also proven a difficult exercise, and the methods of the various common law courts to do so are markedly inharmonious. Moreover, how the courts are to establish the value of practical benefits which do not materialise remains to be seen. In the meantime, the practical benefit principle will remain at their disposal, and the numerous conceptual dilemmas it presents to the doctrine of consideration will live on.

CHAPTER 6

PRACTICAL BENEFIT MISSING THE POINT? A SUGGESTION FOR REFORM

Chapters 2 to 3 introduced us to the practical benefit principle established in *Williams v Roffey* and explored in great detail its reception and development throughout the common law world. Chapters 4 and 5 demonstrated the functional and conceptual difficulties inherent in, or consequential to, the principle itself. This chapter now consolidates the central theme of this thesis; namely, that the motivations of the Court of Appeal in *Williams v Roffey* were laudable but that the practical benefit principle was the incorrect solution to the problem in that case and an inappropriate means of enforcing similar unilateral variations in analogous cases. In sum, *Williams v Roffey* was rightly decided but for the wrong reasons.

The discussion in this chapter is organised as follows. Parts I and II revisit the decision in *Williams v Roffey* and argue that the 'real' issue in that case was not so much the existing legal duty rule but more the general requirement of consideration for modifications. It will be demonstrated how the law has historically prioritised the desire to protect parties from extortion above their right to contract autonomously and that the existing legal duty rule was a product of this conflict. Part III explores the variety of means by which unilateral variations of the kind central to the dispute in *Williams v Roffey* can be enforced. It considers how such methods might have achieved the same result in that case without the need for the invention of the highly problematic practical benefit test.

Finally, Part IV argues that the other methods of giving effect to unilateral variations discussed in Part III are often costly, cumbersome, unavailable, problematic in application or even unbeknownst to the parties. As such, sole reliance upon these expedients to enforce unilateral contract variations is unfeasible. Part V then considers a number of alternatives before it is ultimately recommended that the consideration requirement for modifications be abolished and that the normal rules of contract as well as the vitiating doctrines, particularly economic duress, act as safeguards. This suggestion for reform is intended to reemphasise the overarching theme of this thesis: that the practical benefit principle was a poor solution to the problem in *Williams v Roffey*, as demonstrated by the

²¹⁵ Theodore Roosevelt (1858-1919), 26th President of the United States of America from 14 September 1901 to 4 March 1909. Quote cited in Joslyn T Pine, *Wit and Wisdom of the American Presidents* (Courier Dover Publications, 2000) 39.

principle's inharmonious treatment throughout the common law world, and that the consideration requirement for contract modifications is what the Court of Appeal should have focussed its efforts on addressing.

1. Identifying the 'Real' Issue in *Williams v Roffey*

There can be little doubt the Court of Appeal took issue with the existing legal duty rule expressed in *Stilk v Myrick*.²¹⁶ Lord Justice Glidewell acknowledged that it had, as with many legal principles, been outgrown by the contemporary needs of society. His Lordship stated: 'It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day'.²¹⁷ The rule denied the plaintiff in *Williams v Roffey* an additional monetary payment from the defendants. In his Lordship view, given that the defendants' promise of additional consideration was made in the absence of fraud or duress from the plaintiff, and that the plaintiff's reciprocal promise to fulfil their existing legal obligations conferred factual benefits on the promisor, the promise warranted enforcement.²¹⁸

Lord Justice Russell, despite being largely preoccupied with the potential that an argument based on promissory estoppel might have had on the facts,²¹⁹ expressed similar sentiments when his Lordship noted that 'the policy of the law in its search to do justice between the parties has developed considerably since the early 19th Century when *Stilk v Myrick* was decided'.²²⁰ Consideration, it was said, was still a 'fundamental requirement', but the 'rigid approach to the concept ... found in *Stilk v Myrick*' was both unnecessary and undesirable.²²¹ This statement is interesting when it is recalled that in *Stilk v Myrick* Lord Ellenborough's 'approach' was to demand *consideration* for 'the ulterior pay promised to the mariners who remained with the ship'.²²² Seeing as the plaintiff had

²¹⁶ (1809) 2 Camp. 317; 170 ER 1168 ('*Stilk v Myrick*').

²¹⁷ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16.

²¹⁸ See Chapter 2, Part I.

²¹⁹ His Lordship lamented that the issue was not raised at trial and discussed it at length: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 17-18.

²²⁰ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 18.

²²¹ *Ibid.*

²²² *Stilk v Myrick* (1809) 2 Camp. 317, 319; 170 ER 1168, 1169.

provided no additional *legal* consideration for the ship captain's promise outside of his existing contractual obligation, the promise was unenforceable.

From Russell LJ's perspective in *Williams v Roffey*, Lord Ellenborough's was not the correct approach for the courts of today to adopt. Rather, his Lordship believed judges should be 'more ready to find' the existence of consideration 'so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect [sic] the true intention of the parties'.²²³ The fact that the promisee had tendered nothing new in return for the promisor's promise, and thereby attracted the operation of the existing legal duty rule, was inconsequential when measured against the desires of the parties and the fact that the promisor benefited from the arrangement: '[W]here, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration'.²²⁴

Finally, Purchas LJ also joined the chorus of attacks on the existing legal duty rule in commenting that *Stilk v Myrick* involved very special circumstances, 'namely the extraordinary conditions existing at the turn of the 18th Century under which seamen had to serve their contracts of employment on the high seas'.²²⁵ His Lordship noted that the doctrine of duress was underdeveloped at the time and that the conditions of naval service had improved dramatically in modern times. Given the presence of a more established duress doctrine,²²⁶ public policy no longer supported the law's zealous protection of shipmasters from dissident crewmen. In his Lordship's view the Court of Appeal should be more willing to undertake a *search* for consideration in order to circumvent the existing legal duty rule and enforce the secondary agreement, using the duress doctrine as gatekeeper.²²⁷ The modern cases on contractual variation, it was noted, tended to 'depend

²²³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 18.

²²⁴ *Ibid* 19.

²²⁵ *Ibid* 21.

²²⁶ The Court of Appeal stated on numerous occasions that the duress doctrine was far more advanced than when *Stilk v Myrick* was decided: *ibid* 13-14 (Glidewell LJ), 21 (Purchas LJ). Lord Justice Russell did not comment on this point apart from to say that duress was not present on the facts (at p 17).

²²⁷ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 21. His Lordship suggested the courts should 'detect' and 'look for' consideration where the modification is worthy of enforcement.

more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement'.²²⁸

From these three judgments we can elucidate a common view: if parties to a contract intentionally attempt to modify their agreement, whereby only one of the parties gives more in return for the same, then provided the party giving more receives a practical benefit (or avoids a disbenefit) from the beneficiary's reiterated promise of performance, *Stilk v Myrick* will not apply. This view is particularly significant when one recalls the Court of Appeal's emphasis on the sanctity of the consideration requirement for modifications in *Williams v Roffey*.²²⁹ If consideration for the variation were lacking in *Williams v Roffey* (as appeared to be the case) then, presumably, the plaintiff's claim should have been rejected by virtue of the existing legal duty rule. Yet the Court of Appeal went out of its way to warp the established rules of the consideration doctrine and find consideration in factual benefits that were either already due to the promisor or not bargained for between the parties. In doing so it escaped the application of *Stilk v Myrick*, where ostensibly the principle adopted in that case should have settled the matter at the outset.

It is argued that, at a broader level of abstraction, the Court of Appeal's decision in *Williams v Roffey* was symptomatic of its dissatisfaction with the general requirement of consideration for contractual modifications, the inconvenience of which presents most strongly in the case of unilateral modifications caught by the existing legal duty rule. This is certainly the view of Tan, who laments that the Court of Appeal was not bold enough to excise the requirement of consideration for modifications from the law of contract, despite implying a desire to do so.²³⁰ It could be said that the Court's attacks largely focussed upon the rule in *Stilk v Myrick* as distinct from the general consideration requirement, but upon closer analysis the distinction is untenable.

²²⁸ Ibid. His Lordship went on to quote the obiter of Lord Hailsham LC in *Woodhouse AC Israel Cocoa Ltd v. Nigerian Product Marketing Co Ltd* [1972] AC 741 at 757-8 where the sanctity of the autonomy of private individuals to conduct their business affairs was emphasised: 'Business men know their own business best, even when they appear to grant an indulgence'.

²²⁹ This is implicit throughout Glidewell LJ's judgment and is expressed by both Russell and Purchas LJ at [1991] 1 QB 1, 18 and 21 respectively.

²³⁰ Cheng Han Tan, 'Contract Modifications, Consideration and Moral Hazard' (2005) 17 *Singapore Academy of Law Journal* 566, 585.

In the first place, cases in which the absence or failure of consideration to support a contractual modification is pleaded will habitually involve the existing legal duty rule by virtue of the pre-existing contractual relationship between the parties. The argument from A will be that B provided no consideration for A's promise of something more. If no additional consideration moving from B subsists then the case is one of existing duty, as B will then have defaulted to relying upon what they had originally promised, i.e. an existing obligation:

If one party to an executory bilateral contract alters his performance with the full consent and agreement of both parties and the other party does nothing different than was originally required of him by the contract, the party altering his performance can allege that his second promise (i.e., his altered performance) is without consideration and therefore unenforceable. *The effect of the modification is thus destroyed.* The basis for such an allegation is that the second party does nothing different; rather, he is merely performing what was required of him by the original contract. Traditional doctrine dictates that the performance of a pre-existing duty cannot, for this reason, be consideration for a promise. Thus, the pre-existing duty rule and modification of contract are inextricably intertwined and analysis of one must include the other.²³¹

Accordingly, whilst *Stilk v Myrick* might often bear the brunt of any denigration in modification cases involving an existing legal duty, this is merely testament to the fact that such cases represent the most common instance where the cumbersome consideration requirement manifests itself and causes difficulties. As Paul Finn writes:

There is no requirement of consideration [in civil legal systems] as generally obtains in common law systems. But as is well recognised in common law systems, the impediment posed by the consideration requirement becomes most apparent in practice in relation to modification (or variation) of a contract and especially of long-term or complex contracts – hence the attempts to manufacture consideration or else the resort to such expedients as reliance upon the doctrines of estoppel, election or waiver where contracting parties have apparently departed from the strict terms of their contract.²³²

Secondly, *Stilk v Myrick's* premise that it is necessary to give something more in return for something more from the other party merely reflects the fundamental notion of quid pro quo: a valid contract must be based upon an exchange of consideration. Fundamentally, therefore, the issue in unilateral modification cases such as *Williams v Roffey* is not strictly the existing legal duty rule (as we are often led to believe), but the

²³¹ Burton F Brody, 'Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation' (1975) 52(2) *Denver Law Journal* 433, 435 (emphasis in original).

²³² Paul Finn, 'Internationalisation or Isolation: The Australian Cul De Sac? The Case of Contract Law' in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, 2010) 41, 55.

principle underpinning it: that consideration is necessary to modify a contract, just as it is to form one. Olson explains:

The justification for the general rule requiring new consideration for contract modification lies in policy motives opposed to economic duress. The underlying judicial fear is that parties to a contract may repudiate their contractual obligations in order to 'hold-up' the other party and obtain a higher price for the performance which they are already obliged to render. The result of this fear is the requirement that each party to the modification perform or promise to perform something beyond what he already owes.²³³

Thus, the existing legal duty rule and the requirement of consideration for modifications 'are actually only views of the same situation from different perspectives'.²³⁴ Now if the rule that consideration is required to create or change a contract, and the concomitant rule that an existing legal duty will not suffice for this purpose, create so many problems, why then does the common law place such a premium upon them? Why does it stubbornly uphold these rules and find novel ways around them (such as the practical benefit principle) rather than addressing them directly? The answer, at least to some extent, lies in the sailors' cases of the late 18th and early 19th Centuries.

2. Why Require Consideration for Contract Modifications?

(a) Efficiency Considerations

Aivazian, Trebilcock and Penny note that within the law of contract modifications, there are two competing 'efficiency considerations'.²³⁵ On the one hand there is the need to protect parties from extortion (the 'security' consideration). If the law permitted parties to modify their contracts without consideration there would be a very real risk that one might, having accumulated greater bargaining power through the course of the relationship, exploit their advantage and hold the other party to ransom. The traditional example of the builder holding up performance without additional pay is often cited as a

²³³ Theodore B Olson, 'Contract Modification and the Consideration Requirement' (1963) 51(5) *California Law Review* 1001, 1004.

²³⁴ Brody, above n 17, 435.

²³⁵ Varouj A Aivazian, Michael J Trebilcock and Michael Penny, 'The Law of Contract Modifications: The Uncertain Quest for a Benchmark of Enforceability' (1984) 22 *Osgoode Hall Law Journal* 173. This analysis has been widely agreed with: see, eg, Robert A Hillman, 'Contract Modification in Iowa – *Recker v Gustafson* and the Resurrection of the Preexisting Duty Doctrine' (1980) 65 *Iowa Law Review* 343, 343-4; Corneill A Stephens, 'Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary' [2008] 8 *Houston Business and Tax Journal* 355, 359.

case in point.²³⁶ In effect, the existing legal duty rule appears to presume that duress is likely at play in unilateral renegotiations though of course the absence of consideration ‘does not necessarily, or even normally, point towards a promise being perjured, careless or unintended’.²³⁷ Aivazian, Trebilcock and Penny regard this suspicion of wrongdoing as beneficial:

If this explains most modification situations, then it might be argued that the law should attempt to discourage extortionary, coercive, opportunistic or monopolistic behaviour by refusing to enforce most modifications, perhaps by means of a presumption of invalidity. The traditional legal doctrine might be close to what is socially optimal.²³⁸

On the other hand, there is the need for the law to ‘respect the parties’ assessment of what course of action best advances their joint welfare’ and presumptively enforce such modifications (the ‘autonomy’ consideration).²³⁹ This view is justified on the basis that parties know their own interests best and, particularly in the commercial context in which the majority of litigated modification cases arise, it can be assumed that they would not have agreed to the change unless they too benefited from it.²⁴⁰ Protecting contractual parties from unscrupulous manipulation without going too far therefore exemplifies the challenge of contract modification law. Regrettably, the law has overcompensated in its attempts to strike this balance.

(b) Security Trumping Autonomy

As a contractual relationship matures, circumstances will often vest one of the parties with greater bargaining power.²⁴¹ The example cited above of the contractor refusing to complete building works without additional payment is the traditional example. The promisor is at the mercy of the promisee and must hastily decide to succumb and pay

²³⁶ See, eg, *Chicago College of Osteopathic Medicine v George A Fuller Co* 776 F (2d) 198 (1985) (contractor agreed to pay more than contractually obliged only after subcontractor refused to remove stockpiled material on a building site, creating a safety hazard).

²³⁷ Mindy Chen-Wishart, ‘A Bird in the Hand: Consideration and Contract Modifications’ in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010) 108.

²³⁸ Aivazian, Trebilcock and Penny, above n 21, 174.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.* See also the comments of Lord Hailsham LC in *Woodhouse AC Israel Cocoa Ltd v. Nigerian Product Marketing Co Ltd* [1972] AC 741 at 757-8.

²⁴¹ *United States v Stump Home Specialties Manufacturing Inc.* 905 F (2d) 1117, 1121 (7th Circ, 1990) (Posner J): ‘Since one of the main purposes of contracts and contract law is to facilitate long-term commitments there is often an interval in the life of a contract during which one party is at the mercy of the other’.

more or take their chances of finding substitute performance and suing the promisee in breach. This danger of economic ransom was particularly pertinent to sailors (or more so their masters) aboard vessels on the high seas during the Napoleonic war era (circa 1790-1820). The perilous conditions and exhaustive nature of naval service, and the considerable length of sailing contracts, frequently drove sailors into depressive and even violent states often worsened by indulgence in alcohol or other stimulants.²⁴² This in turn led to disobedience which, given the sailors alone were charged with the responsibility of guiding the ship safely to her destination, could be used as a tool of ransom against the shipmaster in order to secure higher wages or other benefits.²⁴³

Such malevolence could have catastrophic consequences on the high seas for, as Grime explains, '[i]n the old days, before instantaneous communication, the isolation of ships was complete. Proper order, discipline and control was absolutely necessary, in the interests not only of success but also of safety.'²⁴⁴ Shipmasters were vested with some common law disciplinary powers, but these were ultimately futile if their entire crew held them to ransom. With maritime trade being one of Britain's key industries it was imperative, as Lord Kenyon stated in *Harris v Watson*,²⁴⁵ that the law discouraged or at best prohibited such behaviour.²⁴⁶ If it did not, ruthless sailors 'would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make'.²⁴⁷ Such a sentiment emerges clearly from the preamble to the *Merchant Seamen Act 1729*:²⁴⁸

²⁴² *Robinett v The Ship 'Exeter'* (1799) 2 C. Rob. 261, 264-5; 165 ER 309, 310-11 (Sir W Scott).

²⁴³ Unsurprisingly, then, it became common for seamen aboard ships ready for departure or only a short distance into their journey to refuse 'to proceed with them without coming to new agreements for increasing their wages': Preamble to the *Merchant Seamen Act 1729* 2 Geo. II, c. 36. Reproduced in Sir William D Evans, *Collection of Statutes Connected with the General Administration of the Law* (W H Bond, 1836) vol 2, 77.

²⁴⁴ Robert Grime, *Shipping Law* (Sweet & Maxwell, 2nd ed, 1991) 99.

²⁴⁵ (1791) Peake 102, 103; 170 ER 94, 94.

²⁴⁶ See also B J Reiter, 'Courts, Consideration and Common Sense' (1977) 27 *University of Toronto Law Journal* 439, 461 (n83):

At a time when maritime trade was critical to the country and sailors were regarded as performing public duties much as are the firemen or police officers of today, it was understandable that the law should not want to tempt undedicated seamen, whatever might be the merits of the particular sailors in [*Harris v Watson*] or [*Stilk v Myrick*]. (There may also have been a fear of allowing overly generous captains to bind the shipowners back in England).

²⁴⁷ *Ibid.*

²⁴⁸ 2 Geo. II, c. 36. Reproduced in Sir William D Evans, *Collection of Statutes Connected with the General Administration of the Law* (W H Bond, 1836) vol 2, 77.

[T]he welfare and riches of this Kingdom greatly depend on the trade and navigation thereof, the same being of great use and benefit and tending very much to enrich the subjects thereof, upon which great number of the artificers and manufacturers livelihoods wholly depend.

As the ethos of individualism which historically characterised English law commenced its decline during the 19th Century, a number of measures came to be introduced by the common law courts to regulate contractual arrangements and police contractual opportunism across the maritime and other industries. Judges readily implied terms into contracts to give them business efficacy or absolved parties for breach where performance was rendered impossible.²⁴⁹ This was not, as Bowen LJ explained in *The Moorcock*²⁵⁰ so as to

impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

The courts were becoming more concerned with the overall ‘fairness’ of contractual arrangements, mindful of the fact that overemphasis upon the individualist notion of freedom of contract exposed weaker parties to the danger of extortion in the bargaining process. When *Stilk v Myrick* came before the King’s Bench, the existing legal duty rule was utilised to act as a ‘surrogate for an imperfectly developed law of duress’²⁵¹ and become the shield against extortion in unilateral modification cases.²⁵² The rule emphasised the notion that contract modifications require consideration from *both* parties,

²⁴⁹ Sir David H Parry, *The Sanctity of Contracts in English Law* (Sweet & Maxwell, 1959) 39-51.

²⁵⁰ (1889) 14 P.D. 64, 68.

²⁵¹ Sir Gunther Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Press, 2002) 14. See also Rembert Meyer-Rochow, ‘The Requirement of Consideration’ (1997) 71 *Australian Law Journal* 532, 542-3; Mark B Wessman, ‘Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration’ (1996) 29 *Loyola of Los Angeles Law Review* 713, 745; Richard Nathan, ‘Grappling with the Pre-Existing Duty Rule: A Proposal for a Statutory Amendment’ (1986) 23 *American Business Law Journal* 509, 512; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 13-14 (Glidewell LJ), 21 (Purchas LJ). See also John Land, ‘The Enforceability of Contractual Variations: *Moyes & Groves Ltd v Radiation New Zealand Ltd*’ (1985) 15 *Victoria University of Wellington Law Review* 287, 293: ‘The true justification for the pre-existing duty rule seems to be the protection of the party to whom the duty is owed from extortion’.

²⁵² ‘[The existing legal duty rule] gives no comfort to a party who by merely threatening a breach of contract seeks to secure an additional contractual benefit from the other party on the footing that the first party’s new promise of performance will provide consideration for that benefit’: *Wigan v Edwards* (1973) 1 ALR 497, 512 (Mason J). See also *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 741 (Santow J); *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 13-14 (Glidewell LJ), 21 (Purchas LJ). *United States of America v Stump Home Specialties Manufacturing Inc* 905 F (2d) 1117, 1121 (1990) (Posner J); Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 160-61; N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 205; Meyer-Rochow, above n 37, 542-3; Wessman, ‘Retraining the Gatekeeper’, above n 37, 745; Nathan, above n 37, 512.

providing a ‘simple and uniform test’ of enforceability²⁵³ and thus distinguishing bona fide renegotiations from blackmail or, in Corbin’s famous words, separating ‘the sheep from the goats’.²⁵⁴

This judicial emphasis upon the security consideration also promoted certainty in common law decision-making. The requirement that contractual variations be supported by consideration, and the concomitant rule that an existing legal duty would not suffice, simultaneously provided a simple answer to the question of enforceability: if fresh consideration was exchanged, the variation was valid; if not, it was invalid. This question did not involve any qualitative assessment, as would be necessary if the determinative factor for the validity of a contractual modification was not simply whether there was fresh consideration exchanged, but rather whether the modification was procured by illegitimate pressure. These requirements therefore ensured the parties knew where they stood.

Hence whilst contracts remained an integrally important aspect of the British economy, the ‘security’ consideration took precedence over the need to let parties contract freely. This shift in emphasis recognised that if contractual parties were able to obtain additional benefits through the making of unreasonable demands of one another, the very essence of contract law would be frustrated; namely, the facilitation of bargains formulated on the *freely-given* promises of parties.²⁵⁵ To enforce promises given reluctantly under threat of non-performance from the promisee ‘would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts, that they may profit by their own wrong’.²⁵⁶ Owing to the times, the existing legal duty rule adopted in *Stilk v Myrick* was ultimately based upon a suspicion of duress in unilateral renegotiations.

²⁵³ K O Shatwell, ‘The Doctrine of Consideration in the Modern Law’ (1954) 1 *Sydney Law Review* 289, 329.

²⁵⁴ Arthur L Corbin, ‘Does a Pre-Existing Duty Defeat Consideration? – Recent Noteworthy Decisions’ (1918) 27 *Yale Law Journal* 362, 373. This phrase has Biblical origins: *Matthew* 25: 31-46.

²⁵⁵ Stephen A Smith, *Atiyah’s Introduction to the Law of Contract* (Clarendon Press, 6th ed, 2005) 3-5 (emphasis added):

The underlying idea is that where two parties *freely agree on a contract* involving, say, a simple exchange of money for goods, the seller does so because he thinks he will be better off with the money than with the goods, and the buyer does so because she prefers the goods to the money. Both parties thus emerge from the exchange “better off” in one sense than they were before, and since society’s wealth is made up of the total wealth of its members, even a simple exchange of this kind can improve social wealth. In short, contract law (and the officials needed to enforce the law) is a justified use of the state’s resources because it helps everyone to become better off.

²⁵⁶ *Lingenfelder v Wainwright Brewing Co* 130 Mo. 578, 593 (1890) (Gantt PJ).

3. Alternative Methods of Enforcing Unilateral Contract Variations

And so, come 1989 when *Williams v Roffey* was decided, the existing legal duty rule was firmly entrenched in the English law of contract. The rule persists today. Any variation to a contract must be supported by consideration from either party unless incorporated in a deed.²⁵⁷ Accordingly, it is necessary to consider alternative methods of either satisfying this consideration requirement or circumventing it so as to evaluate the efficacy of such methods when assessing the viability of the requirement and to consider how else *Williams v Roffey* might have been decided.

(a) The Seal

In *Pinnel's Case* it was stated: '[I]f a man acknowledges himself to be satisfied by deed, it is a good bar, without anything received'.²⁵⁸ Similarly in *Williams v Roffey* the Court of Appeal stressed on numerous occasions that gratuitous promises were perpetually unenforceable in accordance with the rule in *Stilk v Myrick* unless given under seal.²⁵⁹ Hence, if an agreement is set out in a deed, consideration is not necessary at all. The parties in *Williams v Roffey* could have simply incorporated the variation to the contract into a deed and avoided the consideration issue altogether.

(b) Fresh Consideration

If an agreement to do something one was already contractually bound to do is void for want of consideration, it stands to reason that an agreement to do something more is not. By offering fresh, legally sufficient consideration in return for the promisor's additional consideration, a unilateral variation will become an enforceable bilateral variation. This principle was expressed in *Hartley v Ponsonby*,²⁶⁰ a case discussed in Chapter 1.²⁶¹ It will be recalled that this case was factually similar to *Stilk v Myrick* save that the crewmen that remained with the ship in *Hartley* were no longer contractually obliged to man the ship

²⁵⁷ See further below.

²⁵⁸ (1601) 5 Co. Rep. 117a, 117b; 77 ER 237, 238.

²⁵⁹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Gidewell LJ), 19 (Russell LJ), 21 (Purchas LJ). 'Historically deeds were referred to as documents under seal or specialties': John Gooley and Peter Radan, *Principles of Australian Contract Law* (LexisNexis Butterworths, 2006) 60.

²⁶⁰ (1857) 7 El. & Bl. 872; 119 ER 1471 ('*Hartley*'). See also *Hanson v Royden* (1867) LR 3 CP 47.

²⁶¹ See Part VI.

and continue with the journey because of the high desertion rate (17 from 36) and the excessive labour this imposed upon them.²⁶²

Promisees needn't, however, trouble themselves with finding something of worth, for even *nominal* consideration will normally be enough. Consideration must be sufficient but need not be adequate.²⁶³ In *Williams v Roffey*, had the plaintiff offered anything of 'some value in the eye of the law'²⁶⁴ in return for the defendants' promise of an additional £10,300 – something more than what he was already contractually bound to provide to the defendants – this would have sufficed to render the existing legal duty rule inapplicable. The Court of Appeal would then not have been enticed to create the practical benefit principle to retrospectively detect consideration in things that were not the subject of a bargain between the parties. It is arguable that, from a strictly legal perspective, this would have been the simplest solution.

(c) Compromise of Disputed Claim or Forbearance to Sue

In *Wigan v Edwards*²⁶⁵ the Australian High Court expressly approved the existing legal duty rule,²⁶⁶ before recognising a significant exception:

An important qualification to the general principle [i.e. the existing legal duty rule] is that a promise to do precisely what the promisor is already bound to do is a sufficient consideration, when it is given by way of a bona fide compromise of a disputed claim, the promisor having asserted that he is not bound to perform the obligation under the pre-existing contract or that he has a cause of action under that contract.²⁶⁷

Accordingly, provided the beneficiary of the additional promise reciprocally agrees to waive their purported legal entitlement to refuse performance or pursue a cause of action on the contract, this will amount to valid consideration. There is no need to threaten 'to

²⁶² See the comments of Coleridge J: 7 El. & Bl. 872, 878; 119 ER 1471, 1473.

²⁶³ *Haigh v Brooks* (1839) 10 Ad. & E. 309, 320; 113 ER 119, 123 (Lord Denman CJ); *Westlake v Adams* (1858) 5 C.B. (N.S.) 248, 265; 141 ER 99, 106 (Byles J): 'It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration'; *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87, 114 (Lord Somervell). See further Chapter 5, Part VI (n 90).

²⁶⁴ *Thomas v Thomas* (1842) 2 QB 851, 859 (Patteson J). In *Couldery v Bartrum* (1881) 19 Ch. D. 394, Jessell MR remarked (at 400) that a promise by one party may be supported by the other party's reciprocal provision of 'canary-birds', 'tomtits' or insignificant 'rubbish of that kind'. Wessman is correct, therefore, in likening consideration to Tabasco sauce, in that 'a little of it goes a long way': Wessman, 'Retraining the Gatekeeper', above n 37, 789.

²⁶⁵ (1973) 1 ALR 497. See further Chapter 1, Part VIII where this case is discussed in greater depth.

²⁶⁶ *Ibid* 512 (Mason J).

²⁶⁷ *Ibid*.

bring an action or enter a defence' in order to demonstrate a bona fide compromise; 'it is enough if there is a claim ... that the contracting party is not bound to perform the contract' and that this claim is based on a belief honestly held by the party refusing (or threatening to refuse) performance that they were entitled to do so.²⁶⁸ If the plaintiff in *Williams v Roffey* could have established that he held such a belief, the variation to his contract with the defendants might hypothetically have fallen within the scope of this exception. The difficulty, however, lies in the fact that the defendants' promise of additional money was made in response to concerns as to the plaintiff's inability to fulfil his contractual obligations. Performance was not held up on the basis that the plaintiff felt he was not bound to perform or had a valid cause of action.

(d) Mutual Rescission/Replacement

Another technique judges might use to circumvent the existing legal duty rule is to find that the original contract had been mutually rescinded and replaced with a new contract on the modified terms, rather than merely varied.

The consideration for the contract of rescission is satisfied by the parties giving up their rights to take action for the other's failure to perform. The consideration requirement for the new contract is satisfied by the exchanged promises to complete the outstanding obligations, albeit on amended terms.²⁶⁹

The question of whether rescission and replacement or mere modification was intended is a question of the intention of the parties.²⁷⁰ Often this will 'turn upon the place, or the time, or the form, of the [renegotiated] contract'.²⁷¹ In *Concut Pty Ltd v Worrell*,²⁷² for example, an employee, W, commenced employment with the appellant company under an oral agreement. In 1986 the parties executed a formal written employment contract. In 1988 W was terminated without notice. The appellant defended its decision, arguing W

²⁶⁸ Ibid 513.

²⁶⁹ John Wilson Twyford, 'Additional Payments Under Construction Contracts' (2007) 25 *Construction Management and Economics* 739, 744.

²⁷⁰ *Morris v Baron and Company* [1918] AC 1; *British and Benningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48; *Royal Exchange Assurance v Hope* [1928] 1 Ch 179; *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340, 347 -8 (per curiam); *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533-4 (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

²⁷¹ *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533 (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

²⁷² (2000) 176 ALR 693.

had breached his employment conditions by alleged misconduct which occurred prior to the formal employment contract being signed in 1986. The High Court held that the text of the written contract and the surrounding circumstances²⁷³ suggested the parties did not intend for it to terminate and replace the original oral agreement and thus entirely eradicate the appellant's right to dismiss W for his earlier indiscretion.²⁷⁴ Amongst other things, the formal written agreement preserved W's accrued leave entitlements²⁷⁵ and utilised the same language as before in his role description²⁷⁶ and it could hardly be said that it was intended to deprive the appellant of its rights under the original oral contract.²⁷⁷

It is plainly obvious that the parties in *Williams v Roffey* intended to vary, rather than replace, their contract. The language and conduct of each were unmistakably indicative of modification rather than rescission and substitution.

(e) Promissory Estoppel

It is not uncommon for parties to make additional promises to one another during the life of a contract. These are often given on a whim and with little to no regard for the formalities of contract law.²⁷⁸ As in *Williams v Roffey*, these promises are sometimes not honoured by the promisor to the promisee's detriment. In such scenarios the doctrine of promissory estoppel may avail the promisee. The purpose of estoppel 'is to prevent an unjust departure by one person from an assumption adopted by another on the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment'.²⁷⁹ The core elements of estoppel²⁸⁰ are established within the common

²⁷³ Ibid 699 (Gleeson CJ, Gaudron and Gummow JJ).

²⁷⁴ Ibid 709 (Kirby J).

²⁷⁵ Ibid 699 (Gleeson CJ, Gaudron and Gummow JJ).

²⁷⁶ Ibid 708 (Kirby J).

²⁷⁷ Ibid 708-9 (Kirby J).

²⁷⁸ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55, 60-1.

²⁷⁹ *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J).

²⁸⁰ Sourced from the judgment of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428-9 ('*Waltons Stores*'). This is said to be the 'most commonly cited passage for the requisite elements of estoppel': Seddon and Ellinghaus, above n 38, 63. A number of additional 'sub-requirements' also apply i.e. the relying party's reliance must be reasonable and the representor's departure from the assumption they created must be unconscionable: see Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 181-94 for an excellent summary of the principles.

law: (1) the relying party has adopted an assumption; (2) this assumption was induced by the representor's conduct; and (3) the relying party will suffer detriment in reliance on the assumption.

Where a unilateral contract variation is purportedly unenforceable by virtue of the existing legal duty rule, the doctrine of promissory estoppel may provide an alternative method of enforcement. In *Je Maintiendrai Pty Ltd v Quaglia*²⁸¹ the defendant lessees negotiated with the plaintiff lessor to reduce the monthly rent payable for the shop premises subject of the lease. The plaintiff agreed to accept a reduced amount of rent for no consideration and for an indefinite period of time. The defendants paid the reduced rental for approximately 18 months before the plaintiff sued to recover the arrears of the full rent. The defendants successfully raised promissory estoppel to enforce the lessor's promise to accept a reduced rent and prevent him from claiming the full amount. Chief Justice King stated the relevant principle:

In my opinion, a person who promises or states his intention to another not to enforce or insist upon his legal rights is not estopped from resiling from that position and reverting to the strict legal position, unless his doing so would result in some detriment and therefore some injustice to that other.²⁸²

Having accepted that the defendants had adopted the assumption that the lower rent would be accepted by the plaintiff on the basis of the plaintiff's promise,²⁸³ it stood to be proven that the defendants would suffer detriment if the plaintiff were allowed to renege on his promise. His Honour accepted the trial judge's finding that such a detriment was present:

The respondents conducted a small business. There was some evidence of their financial position and the learned trial Judge heard it given. He was in a better position than is this Court to judge whether the accumulation of arrears of this magnitude would be a detriment to the respondents, and to assess whether any significance was to be attached to the respondents' failure to say so expressly. I think that we should accept the conclusion which he reached.²⁸⁴

Justice White also found detriment in the defendants' election to continue with the lease and assume the attendant liabilities as lessees as well as the fact they had organised their

²⁸¹ (1980) 26 SASR 101.

²⁸² Ibid 106.

²⁸³ 'In the present case there was an intimation that the rent legally due under the lease was reduced. This clearly amounts to a promise not to enforce the legal right to the difference between the reduced amount and the amount legally due': Ibid (King CJ).

²⁸⁴ *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, 107.

finances on the basis they would be liable only for the reduced amount of rent.²⁸⁵ Justice Cox dissented, simply holding there was no requisite ‘detriment’ on the facts.²⁸⁶ What is questionable is whether, as White J asserted in part,²⁸⁷ the defendants had suffered detriment by losing the opportunity to assign or even breach and abandon their lease agreement. The defendants were bound to fulfil their obligations as lessees, as are all promisees who tender nothing in return for an additional promise from the other party in modification settings. They have no legal right to elect to either perform their promise or pay damages; rather, the promisor has the legal right to performance of the contract’.²⁸⁸ It is nonsensical to claim that a party has suffered detriment through performing their contractual obligations.²⁸⁹

A more recent example of promissory estoppel being utilised to enforce a unilateral contract variation where the traditional rules of contract cannot is *Collier v P & M J Wright (Holdings) Ltd.*²⁹⁰ The appellant, with two other property development partners, took out a loan from the respondent company. A repayment schedule was set up whereby each debtor would pay an equal share of the £600 monthly instalment. The partnership ended in 2000 and the other partners became bankrupt within the next four years. In 2006 the respondent served a statutory demand on the appellant for the balance of the debt plus interest. The appellant sought to set aside the demand, arguing that he had reached an agreement in 2000 with a representative from the respondent company stipulating that he would be severally liable for one third of the debt and continue paying his share and that the respondent would pursue the other partners for the balance. He continued paying his instalments and eventually paid off his one-third share of the debt. The respondent later

²⁸⁵ Ibid 115-16.

²⁸⁶ Ibid 120-1 (Cox J):

The bare monetary obligation could not constitute a detriment in the relevant sense. Something additional to that was needed. However, what the respondent said in evidence hardly amounted to any more than the assertions that the new rent was too high and that he found it harder to pay a higher rent than a lower one.

That is readily understandable, but it has little to do with the equitable defence. Evidence, direct or indirect, about the respondent's position at the time the appellant made its demand for the arrears, compared with his position when the oral agreement was made, is practically non-existent.

²⁸⁷ Ibid 115-16.

²⁸⁸ *Colls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 504 (Windeyer J); Cf Corneill A Stephens, ‘Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary’ [2008] 8 *Houston Business and Tax Journal* 355, 364. See further Chapter 2, Part II.

²⁸⁹ Cf Land, above n 37, 293: ‘It is ... wrong to say that the promisee incurs no detriment in performing the duty he already owes. Performance either in itself or because it precludes the undertaking of some other activity may be more onerous than paying damages’. See also Norma J Hird and Ann Blair, ‘Minding Your Own Business – *Williams v Roffey* Re-visited: Consideration Re-considered’ [1996] *Journal of Business Law* 254 at 259, where the authors argue that the assumption of additional liability in contract and possibly even tort and criminal law also amounts to a ‘detriment’ to the promisee.

²⁹⁰ [2008] 1 WLR 643.

sought to hold the appellant liable for the remaining two-thirds of the debt, successfully arguing at first instance that there was a genuine triable issue on the facts and that, even if the 2000 agreement had been made as alleged, it was unenforceable for want of consideration.

The Court of Appeal agreed that there was a genuine triable issue on the evidence and the respondent's statutory demand was consequently set aside. The triable issue stemmed from the effect of the alleged 2000 agreement, which the Court then considered. The agreement, being merely an agreement to accept part-payment of a debt from a joint debtor in full satisfaction of the total amount owing, was said to be unenforceable as it contravened the rule in *Pinnel's Case*²⁹¹ and lacked the consideration necessary for it to be binding.²⁹² The Court then considered the appellant's submission that the respondent's alleged agreement to accept the lesser sum was enforceable through promissory estoppel. It was held that this gave rise to a triable issue.²⁹³ The respondent creditor voluntarily agreed to accept the appellant's share of the total debt and discharge him of joint liability for the balance in return for the appellant's continued repayments. This was an accord, the respondent's departure from which would have been inequitable. Lady Justice Arden explained:

The facts of this case demonstrate that, if (1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt. For him to resile will of itself be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguishing the creditor's right to the balance of the debt.²⁹⁴

The respondent's statutory demand was therefore set aside and the appeal allowed.

In *Williams v Roffey* the Court of Appeal considered whether there was in the circumstances 'an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra [money] was not binding'.²⁹⁵ At p 13 of the judgment, Glidewell LJ said the following:

²⁹¹ (1601) 5 Co. Rep. 117a, 117a; 77 ER 237, 237. See Chapter 1, Part VI.

²⁹² *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643, 654-5 (Arden LJ), 659 (Longmore LJ), 660 (Mummery LJ).

²⁹³ *Ibid* 658-9 (Arden LJ), 660 (Longmore LJ), 660 (Mummery LJ).

²⁹⁴ *Ibid* 659.

²⁹⁵ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 17 (Russell LJ).

It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under an existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise.

This suggestion was ultimately rejected for two reasons. First, as pointed out by his Lordship, estoppel was not raised in argument in the trial case nor with any clarity or conviction in the appeal.²⁹⁶ Lord Justice Russell noted that he ‘would have welcomed the development of [this line of] argument, if it could have been properly raised’ during the trial,²⁹⁷ whilst Purchas LJ did not address the estoppel issue at all. The second reason for rejecting the argument on the basis of promissory estoppel was that the application of the doctrine to contract modification situations was said to have been ‘underdeveloped’.²⁹⁸ In support of this proposition Glidewell LJ cited *Syros Shipping Co SA v Elaghill Trading Co*,²⁹⁹ a case involving a sea-freight contract. The claimants, owners of a shipping vessel, chartered it to a company to transport tractors from Sweden to Yemen. The consignees pre-paid the freight and a bill of lading binding the charterers and the owners was issued. During the voyage the charterers fell into insolvency and defaulted in payment of hire charges to the owners. The designated port at Yemen was congested so the owners ordered other cargo on the vessel to be discharged at other ports first. They negotiated with the consignees, including the respondents, who agreed to pay an additional US \$31,000 above the freight already paid for discharge of their cargo before later refusing to pay.

The matter went to arbitration, the arbitrator finding that the agreement lacked consideration but that the consignee was estopped from departing from its promise to pay this sum. The High Court found in favour of the respondents. Justice Lloyd disagreed with the arbitrator’s conclusion that, if there was no enforceable agreement, promissory estoppel operated in favour of the claimants.³⁰⁰ The owners were merely ‘suing on the naked promise to pay the \$31,000’ and were ‘using equitable estoppel as a sword and not as a shield’ which they could not do.³⁰¹ The application of promissory estoppel in the

²⁹⁶ Ibid 13.

²⁹⁷ Ibid 17.

²⁹⁸ Ibid 13 (Glidewell LJ).

²⁹⁹ [1980] 2 Lloyd’s Rep 390 (‘*Syros*’).

³⁰⁰ Ibid 392-3.

³⁰¹ Ibid 392.

circumstances could not ‘be used to create a new cause of action’.³⁰² It seems, therefore, that what Glidewell LJ was alluding to when he claimed that ‘the application of the doctrine of promissory estoppel to facts such as those of the present case ha[d] not yet been fully developed’ was that, commensurate with leading English authority of the time (i.e. *Central London Property Trust Ltd v High Trees House Ltd*,³⁰³ *Combe v Combe*³⁰⁴), promissory estoppel could not be used as a sword, only as a shield. A brief discussion of this authority is essential to comprehending Glidewell LJ’s position.

In *High Trees* Denning J revived the principle of promissory estoppel and expressed it in very broad terms. Under his Lordship’s formulation, the doctrine operated where a party made a promise intended to affect the legal relations between the parties which was subsequently acted upon by the other party.³⁰⁵ The party making the representation could be prevented from acting inconsistently with their promise but it could not provide a cause of action to the other party for damages for breach of the promise.³⁰⁶ In *Combe*, a case involving a husband’s dishonoured promise to pay his ex-wife £100 per annum in maintenance, Denning LJ re-examined the notion of estoppel and expressed the relevant principle in this way:

[W]here one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word. Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action.

In the wake of these decisions the position under English law was that promissory estoppel could only arise where the parties were in a pre-existing legal relationship and that it functioned only as a defence to an attempted enforcement of a right a representor had previously promised not to enforce (i.e. as a ‘shield’ and not a ‘sword’).³⁰⁷ Returning to *Syros*, Justice Lloyd ordered that the award be remitted rather than set aside, his

³⁰² Ibid.

³⁰³ *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 (‘*High Trees*’).

³⁰⁴ *Combe v Combe* [1951] 2 KB 215 (‘*Combe*’).

³⁰⁵ *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130, 134-5.

³⁰⁶ Ibid.

³⁰⁷ Ibid 220, 224. See also *Sloan v Union Oil Company of Canada Ltd* [1955] 4 DLR 664, 678 (Wilson J): ‘Where a sword is required there must be consideration’.

Lordship reiterating the point established by the English authorities that estoppel could not give rise to enforceable rights.

It is submitted that a similar *Syros* scenario today would under the weight of Australian authority, particularly *Waltons Stores (Interstate) Ltd v Maher*,³⁰⁸ be resolved in favour of the owners. In that case *Waltons Stores* were estopped from denying that they were bound to proceed with entry into a lease agreement with the Mahers. Mason CJ and Wilson J accepted that the doctrine of promissory estoppel could be used to support a cause of action in contract,³⁰⁹ as did Brennan J.³¹⁰ The fact that *Waltons*' unconscionable conduct induced the Mahers' assumption that a binding lease agreement had or would come into being, upon which they relied to their detriment, gave rise to an equity in the plaintiffs 'satisfied by treating *Waltons* as if it had executed and delivered the original deed'.³¹¹ In other words, estoppel operated to regard *Waltons* as having signed and exchanged the lease agreement.

Waltons Stores readily demonstrates that where a party makes a gratuitous promise modifying a contract and later reneges to the other party's detriment, this may (assuming the other elements of the doctrine are satisfied) give rise to an equity enforceable through an action in estoppel. The possibility was not disregarded in *Williams v Roffey*, with Glidewell LJ acknowledging the prospect of a promisee utilising promissory estoppel as a sword and not a shield.³¹² However the uncertainties surfacing in *Syros*, together with the fact the point 'was not argued in the court below' and 'merely adumbrated' before the Court of Appeal led his Lordship to conclude that 'no reliance [could] ... be placed on this concept', notwithstanding how 'interesting' it was.³¹³

Chen-Wishart has suggested that the Court of Appeal in *Williams v Roffey* 'channelled its impulse for enforcement toward an inappropriate expression – the invention of practical

³⁰⁸ (1988) 164 CLR 387 ('*Waltons Stores*').

³⁰⁹ *Ibid* 404, 407-8.

³¹⁰ *Ibid* 425-6.

³¹¹ *Ibid* 432-3.

³¹² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 13. There seems little likelihood of such a development occurring in England any time soon: see *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2002] 1 All ER (Comm) 737.

³¹³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 13.

benefit to justify enforcement within the bargain model'.³¹⁴ She feels the use of promissory estoppel 'would have provided greater flexibility and accuracy in targeting the relevant concerns in contract modifications' without compromising the function of the doctrine of consideration.³¹⁵ Indeed Russell LJ in *Williams v Roffey* demonstrated obvious concern for the unconscionability that would follow from non-enforcement of the promisor's promise:

Can the defendants now escape liability on the ground that the plaintiff undertook to do no more than he had originally contracted to do although, quite clearly, the defendants, on 9 April 1986, were prepared to make the payment and only declined to do so at a later stage. *It would certainly be unconscionable if this were to be their legal entitlement.*³¹⁶

His Lordship appeared less inclined to enforce the promise on the basis it formed part of a 'bargain' as much as because it would have been unjust not to do so. In choosing promissory estoppel as a means of enforcing an equity borne out of a broken promise in a renegotiation setting, the courts will arguably remove a promisor's legal 'right' or 'entitlement' to 'simply ignore [their] promise on the basis of lack of consideration', holding equity to its function of mitigating the austerity of the common law.³¹⁷ Nonetheless, the practical benefit principle was and remains framed within the context of consideration and presumably, therefore, will continue to operate alongside promissory estoppel in the sphere of contract modifications. In sum, if factual benefit cannot be found in a party's actual or promised performance of their existing contractual obligations to the promisor, the equity (if any) raised through the latter's promise may nonetheless be enforced via promissory estoppel.

³¹⁴ Mindy Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 123, 149.

³¹⁵ *Ibid*; Cf Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 31. Hird and Blair agree the case could have been resolved on promissory estoppel grounds and argue it was primarily the English judiciary's general hesitance to apply the doctrine in the unfamiliar context of contract modifications that prevented the Court of Appeal from doing so: Hird and Blair, above n 75, 262-3.

³¹⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 17 (emphasis added).

³¹⁷ Dan Halyk, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*' (1991) 55 *Saskatchewan Law Review* 393, 412-13.

(f) Waiver

The term ‘waiver’ has various meanings within the law and ‘is commonly used loosely to encompass doctrines as diverse as election, estoppel and contract variation’.³¹⁸ Generally speaking it is said to apply to circumstances where a party has voluntarily or intentionally abandoned or relinquished a ‘known right, claim or privilege’, though it is debatable whether it is a doctrine in and of itself.³¹⁹

The authorities make clear that contingent conditions in a contract can be ‘waived’ by the party in whose favour they operate, thereby dispensing with the right to insist upon the other party’s performance of the condition.³²⁰ Whilst this has the effect of modifying how the contract is performed, it does not actually modify the terms of the contract itself. In this regard the capabilities of waiver remain patently unclear. Some US authorities have previously suggested that waiver can operate to circumvent the consideration requirement in unilateral modification scenarios. That is, where one party promises more in return for actual or promised performance of the other party’s existing legal duty, it may be said that the promisor has ‘waived’ the promisee’s requirement to perform on the initial terms and may instead rely upon the secondary promise.

This occurred in *Watkins & Son v Carrig*.³²¹ The plaintiff was contracted by the defendant to excavate a cellar in the defendant’s house. During works the plaintiff encountered unanticipated solid rock underlying the surface and notified the defendant

³¹⁸ *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 (Finn and Sundberg JJ); *Commonwealth v Verwayen* (1990) 170 CLR 394, 406-7 (Mason CJ), 431 (Deane J), 451-3 (Dawson J), 491 (McHugh J); *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 (Gummow, Hayne and Kiefel JJ).

³¹⁹ *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 (Finn and Sundberg JJ); *Banning v Wright* [1972] 1 WLR 972, 979 (Lord Hailsham LC). Justice Toohey in *Commonwealth v Verwayen* (1990) 170 CLR 394 clarified the need for ‘intention’ in this context: ‘That is not to say that there must be an intention to bring about the consequences of waiver; rather, the conduct from which waiver may be inferred, must be deliberate’ (at 473). As to the question of whether waiver exists as an independent doctrine, Ewart has remarked:

[Aside from contexts where it has specialised meaning, all] else that is usually spoken of as ‘waiver’ is, in the judgment of the author, referable to one or other of the well-defined and well-understood departments of the law, Election, Estoppel, Contract, Release. ‘Waiver’ is, in itself not a department. No one has been able to give it satisfactory definition, or to assign to it explanatory principles. The word is used indefinitely as a cover for vague, uncertain thought. And although, on occasion, it may have helped some judges to do right under an appearance of legal principle, yet, upon the whole ... its presence in our system of jurisprudence has been disastrous not only to clarity of conception, but to the general administration of justice.

John S Ewart, *Waiver Distributed* (Harvard University Press, 1917) 5

³²⁰ *Gange v Sullivan* (1966) 116 CLR 418; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

³²¹ 91 N.H. 459 (1941) (*Watkins*).

that the costs of excavation would be much higher as a consequence. The defendant orally agreed to pay the plaintiff nine times more than was originally agreed to complete the work. The defendant later refused to pay the renegotiated price and the plaintiff sued to recover. The Supreme Court of New Hampshire held that the defendant had ‘waived’ the plaintiff’s obligation to perform the labour at the initial, insufficient price and introduced a new price as a binding modification:

The defendant intentionally and voluntarily yielded to a demand for a special price for excavating rock. In doing this he yielded his contract right to the price it provided. ... The promise of a special price ... necessarily imported a release or waiver of any right by the contract to hold the plaintiff to the lower price the contract stipulated.³²²

The position under Australian contract law, however, has long been that, when used to describe the process of contractual variation, a ‘waiver’ requires the presence of sufficient consideration.³²³ As the High Court stated in *Mulcahy v Hoyne*, a contractual right can only be waived by a release or by accord and satisfaction, emphasising the ‘elementary’ rule of contract that a promise made without consideration must be made under seal in order to be binding.³²⁴ Of course where ‘an agreement to vary is supported by consideration it will generally take effect as a contractually binding variation agreement, and it may matter little whether the case is categorised as one of variation or of waiver’.³²⁵

And yet, as Gummow, Hayne and Kiefel JJ stated in *Agricultural and Rural Finance v Gardiner*,³²⁶ there have been instances where, as in *Watkins*, the term ‘waiver’ ‘has been used to describe some modification of the terms of a contract without the formalities, or consideration, necessary for an effective contractual variation’. Their Honours in *Gardiner* referred to the decision in *Bacon v Purcell*.³²⁷ There the plaintiff agreed to sell 2,200 cattle of differing varieties to the defendant in two lots. 26 April 1912 was the agreed delivery date. Before this date the plaintiff and the defendant’s agent agreed that

³²² Ibid 464-5.

³²³ The position is the same under English contract law: see, eg, *Brikom Investments Ltd v Carr* [1979] QB 467.

³²⁴ (1925) 36 CLR 41, 58-9 (Starke J). See also *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 234 (Starke J); *Watson v Healy Lands Ltd* [1965] NZLR 511, 513 (Woodhouse J):

[W]here the modified version of the original contract involves such changes in the contractual obligations of the parties that its structure is clearly affected, then the change goes beyond any question of waiver and must be regarded as a ‘variation’ requiring consideration or a deed.

³²⁵ Michael Furmston, *The Law of Contract* (Butterworths, 1999) 243.

³²⁶ (2008) 238 CLR 570, 587 (‘*Gardiner*’).

³²⁷ (1916) 22 CLR 307.

the first lot of cattle should be delayed until the second lot was delivered.³²⁸ The second lot was delivered on 28 April.³²⁹ The defendant then refused to accept delivery of the first lot on the following day. The plaintiff sued for breach of contract. The Privy Council (exercising its appellate jurisdiction from the High Court of Australia) held that the defendant purchaser had, through his agent, waived the date for delivery. Accordingly, the original contractual terms had been legally varied. An alternative rationalisation for this result is that the ‘waiver’ in this case related merely to the ‘mode and manner’ of the performance of a contractual obligation not requiring consideration³³⁰ though, as the High Court noted in *Gardiner*, the decision was somewhat nebulous.

The variation in *Williams v Roffey* was significant; it increased the overall contract price for the plaintiff’s work by £10,300. It did not merely affect the ‘mode and manner’ of the promisee’s performance. Consideration was required to render it enforceable. Even assuming waiver has its own province in Anglo-Australian contract law, it is hard to determine how such a doctrine would have operated in the circumstances at play in *Williams v Roffey*. By indicating that they would not require the plaintiff to perform his refurbishment work at the originally contracted price when he stipulated he could not do so, the defendants theoretically ‘waived’ their entitlement to later insist upon performance according to the contract’s terms. This could be construed either as an election to abandon their right to insist upon the promisee’s performance at the original rate of remuneration (and their corresponding entitlement to sue him for repudiation or breach of contract) or a promise intended to induce the promisee to act and potentially attracting the operation of the doctrine of estoppel.³³¹ Instead it was treated as a contract variation, the promisee’s consideration for which subsisted in his pre-existing duty by virtue of the practical benefit principle. Seeing as waiver is more often than not expressed in terms of variation, election

³²⁸ The agent’s words were: ‘What does it matter about the date? I suppose you have got the cattle there, and I will take them anyhow’: *ibid* 312.

³²⁹ The Court held that ‘delivery on 26th April mean[t] no more than that the vendor should be ready to begin delivery on that date and to complete it with all reasonable despatch, having regard to the numbers of the cattle involved, the place where, and the conditions under which, the delivery was to take place’: *Bacon v Purcell* (1916) 22 CLR 307, 309. Hence there was no issue as to breach of this time stipulation.

³³⁰ See *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 233-4 (Starke J), 243-4 (Williams J).

³³¹ As the Queensland Court of Appeal recently explained:

If one party to the contract chooses to act in a manner inconsistent with the exercise of a contractual right, then that will usually amount to an election to abandon that right. Alternatively, if one party communicates to another party to the contract that it will not be exercising one of its contractual rights, and the other party orders its affairs accordingly, then an estoppel may arise.

Kostopoulos v GE Commercial Finance Australia Pty Ltd [2005] QCA 311 (26 August 2005) [36]-[37] (Keane JA, McMurdo P and Dutney J concurring). See also J W Carter, *Contract Law in Australia* (Butterworths, 6th ed, 2012) 171-4.

or estoppel,³³² an analysis of the decision in *Williams v Roffey* in terms of waiver would have been superfluous.

Reiter has suggested that courts have utilised waiver predominantly as a means of ‘enforcing modifying promises where no good reason for non-enforcement appears’.³³³ Indeed, Kirby J in *Gardiner* stated that waiver could only operate where the facts show that ‘it would be manifestly unfair for the party which had earlier waived its legal rights later to adopt an inconsistent position and seek to enforce them’.³³⁴ Nevertheless, the beneficiary of a unilateral variation would be more prudent in utilising more established and less-controversial doctrines such as promissory estoppel to attempt to enforce the additional promise made to them.³³⁵

4. The Modern Need for Flexibility

There are clearly numerous ways of satisfying, or circumventing, the requirement of consideration for variations. The requirement has persisted and manifests itself most clearly in the existing legal duty context. As discussed in Part II of this chapter, the classical law was concerned with the potential for duress in unilateral contract variations and therefore insisted that consideration move from the beneficiary of such variations. The underlying problem with this approach, however, was that it failed to realise that ‘long-term business interests could lead rational self-interested parties to agree informally to disadvantageous adjustments’ to their contracts.³³⁶ Just because a party has made what appears to be a purely gratuitous promise for which they obtain no immediately discernible benefit, it does not necessarily follow that they were joking, confused, drunk, mad or held to ransom when doing so.³³⁷ As explained in the Introduction to this thesis, the change might have been driven by market movements, labour shortages, supply issues or natural disasters which affect original financial forecasts. It might have been to allay

³³² *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 (Finn and Sundberg JJ); *Commonwealth v Verwayen* (1990) 170 CLR 394, 406-7 (Mason CJ), 431 (Deane J), 451-3 (Dawson J), 491 (McHugh J); *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 (Gummow, Hayne and Kiefel JJ).

³³³ Reiter, above n 32, 486.

³³⁴ *Agricultural and Rural Finance v Gardiner* (2008) 238 CLR 570, 620.

³³⁵ Christopher Bevan, ‘Waiver of Contractual Rights: A Non Sequitur’ (2009) 83 *Australian Law Journal* 817, 838.

³³⁶ Hugh Collins, *The Law of Contract* (Cambridge University Press, 4th ed, 2003) 346.

³³⁷ Mark B Wessman, ‘Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration’ (1993) 48 *University of Miami Law Review* 45, 114-15.

one party's financial difficulties or to accommodate unforeseen expenses. It may even have been a simple act of generosity on the part of the promisor calculated to promote their business or enhance their goodwill in the community. Collins explains:

Commercial contractors expect a degree of 'give and take' during performance. They will offer indulgences, refrain from pedantic insistence upon strict contractual rights, and seek genuine accommodations in cases of difficulty. They do so in order to co-operate, so that the contract is performed, and to preserve goodwill in long-term informal commercial relations.³³⁸

The classical law, preoccupied by its desire to protect parties from illegitimate behaviour in renegotiations, ignored this fact. Its insistence that contract modifications comply with the rules governing contract formation thus catered exclusively to short-term economic interests. The modern realm of contract law extends far beyond straightforward dealings between shipmaster and crew on the high seas and encompasses a number of more complex arrangements. It provides far greater protections against economic duress now than during the Napoleonic era in which the existing legal duty rule finds its genesis, though these protections are given little scope to operate.³³⁹

The diverse array of circumstances in which consideration has been detected – even manufactured – by the courts in modern times³⁴⁰ to escape the application of the existing legal duty rule clearly demonstrates the need for greater flexibility in the contractual renegotiation process. This thesis now explores the key bases upon which the case for abolition of the consideration requirement for modifications and the existing legal duty rule can be made.

(a) Sociological Basis

In 1881 American teacher, author and political leader Booker T Washington coordinated the establishment of Tuskegee University in Alabama, USA. During construction it is said that he neglected the option to lay footpaths around the campus buildings in a traditional

³³⁸ Hugh Collins, *The Law of Contract* (Cambridge University Press, 4th ed, 2003) 346.

³³⁹ Mindy Chen-Wishart, 'The Enforceability of Additional Contractual Promises: A Question of Consideration?' (1991) 14 *New Zealand Universities Law Review* 270, 272-3:

[A]s a solution to the problem of unfair pressure, the pre-existing duty rule is drastic, to say the least. It throws out *everything*, including cases involving no unfair pressure and where valid reasons may exist for the modification. Such questions are not even addressed, they are legally irrelevant to the application of the rule. Today when more appropriate legal concepts to deal with the problem have developed, they have no place to operate.

³⁴⁰ See the case law discussed in Chapter 3. See also Chapter 5, Part VI.

geometric pattern and opted instead to allow the students to establish their own pathways according to their own choice of routes. Once a series of ‘naturally selected’ courses were established Washington had concrete sidewalks built over the top of them.³⁴¹ The move was one of genius and ensured the university’s layout accorded with the desires of the student body. This anecdote serves to highlight an integral aspect of human behaviour: we instinctively seek out the fastest and most efficient means of obtaining what we want in the course of our lives. In the contractual context, the classical law’s emphasis on guarding against extortionate bargaining grossly outweighs its scope for parties to modify their agreements and therefore runs counter to this efficiency ideal.

Countless empirical studies across various industries,³⁴² notably Macaulay’s pioneering analysis in 1963,³⁴³ demonstrate that people typically do not structure and administer their agreements according to the law of contract and seldom resort to its processes when disputes arise. Instead, such relationships operate primarily upon informal norms and customs. It is an expectation in every such relationship that there be some measure of flexibility to adjust the terms of the agreement in order to ensure its success and to encourage additional dealings in the future.³⁴⁴ Scope for ‘honest misunderstandings or good faith differences of opinion’ is deemed an intrinsic feature of the contractual relationship³⁴⁵ and wherever possible lawyers are not invited to resolve disagreements.³⁴⁶

In Collins’ comprehensive work *Regulating Contracts*, the author examines the rationality of contractual behaviour and notes with reference to a variety of studies how parties to an agreement frequently prioritise the preservation of a healthy business relationship over the deal itself and their strict legal entitlements upon the other party’s

³⁴¹ J D Gordon, ‘A Dialogue About the Doctrine of Consideration’ (1990) 75 *Cornell Law Review* 987, 994.

³⁴² See, eg, Lisa Bernstein, ‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21(1) *Journal of Legal Studies* 115; James J White, ‘Contract Law in Modern Commercial Transactions, An Artefact of Twentieth Century Business Life?’ (1982) 22 *Washburn Law Journal* 1; Thomas M Palay, ‘Comparative Institutional Economics: The Governance of Rail Freight Contracting’ (1984) 13 *Journal of Legal Studies* 265.

³⁴³ Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28(1) *American Sociological Review* 55.

³⁴⁴ Robert A Hillman, ‘The Crisis in Modern Contract Theory’ (1988) 67 *Texas Law Review* 103, 128: ‘Parties who are comfortable with their contracting partner, familiar with the subject matter of the deal, and eager to do additional business in the future believe that flexibility and compromise, not resort to the “letter of the law”, ensure the success of a business relation’.

³⁴⁵ Macaulay, above n 129, 62.

³⁴⁶ Stewart Macaulay, ‘Contract Law and Contract Research (Part II)’ (1968) 20(4) *Journal of Legal Education* 460, 461-2.

default.³⁴⁷ Even where one party is under no obligation to comply with the other's request to modify the agreement, they will often do so without objection or demand to adjust the contract price or other conditions. Rather than 'go for the jugular' when trouble arises or is projected, the data reveals 'a greater willingness to adapt and respond to unanticipated changes' than the existing legal duty rule and consideration requirement permit.³⁴⁸ The picture that emerges is that regard to the law of contract is more commonly paid only where parties seek to utilise it for their own purposes and not so as to 'organize their contracting activities to give effect to the rules and ethos underlying' it.³⁴⁹ It is a tool which parties merely expect to assist them towards efficient completion of their transactions.

It seems patently illogical for the law to allow people to contract on whatever terms they choose, but then prohibit them from altering their contracts according to their needs.³⁵⁰ As Knapp rightly asks, 'if two persons, legally competent, can bind themselves to a contract and set its terms, why cannot the same two persons modify that contract by another equally binding agreement?'³⁵¹ The presumption and expectation held by the reasonable layperson is that they *can*.³⁵² They expect the law to evolve and adapt to the modern needs of business so as to facilitate renegotiations with maximum efficiency rather than hamper them with rigid and outmoded rules of centuries past.

The requirement of consideration to effect contract modifications is a cumbersome impediment which runs contrary to these expectations of contracting parties. It seems illogical for a mere promise to suffice as consideration for another promise in the formation stage of a contract³⁵³ but not in the variation stage where one of the promises is merely repeated.³⁵⁴ More broadly the consideration requirement for variations represents

³⁴⁷ Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 127-48.

³⁴⁸ Roger Halson, 'The Modification of Contractual Obligations' (1991) 44 *Current Legal Problems* 111, 113.

³⁴⁹ John Gava, 'Can Contract Law Be Justified on Economic Grounds?' (2006) 25 *University of Queensland Law Journal* 253, 264.

³⁵⁰ Robert A Hillman, 'Contract Modification Under the Restatement (Second) of Contracts' (1982) 67 *Cornell Law Review* 680, 681. See also the comments of Crane J in *Schwartzreich v Bauman-Basch Inc* 231 NY 196 (1921) at p 203.

³⁵¹ Charles L Knapp, 'Reliance in the Revised *Restatement*: The Proliferation of Promissory Estoppel' (1981) 81 *Columbia Law Review* 52, 72. See also Han Tan, above n 16, 579-80.

³⁵² Stephens, above n 21, 362.

³⁵³ See Chapter 1, Part II.

³⁵⁴ '[T]here was never any reason why a promise to do what one is already bound to do should not be consideration for another promise, since mutual promises are consideration for each other': Editorial

‘a denial of freedom of contract and the policy that the intention of the parties will be upheld, wherever possible’.³⁵⁵ Only if the common law has due regard to the ‘reasonable practices and understandings ... of business and commerce’ in formulating its rules will it effectively perform its function.³⁵⁶ With the development of increasingly complex methods of doing business and our exponentially growing reliance upon technology, contracts have increased in intricacy and lifespan and their vulnerability to changes in economic, social or other conditions has consequently been amplified.³⁵⁷ Businesspeople of today recognise this and would expect the law to do the same. In the majority of circumstances, duress will not be at play where one party grants a gratuity to the other. Yet the rule in *Stilk v Myrick* and, more broadly, the requirement for consideration to validate contractual alterations, unjustly presuppose that it must have been. On the body of empirical evidence available, these common law rules therefore offend the expectations of the people they purport to serve in modern times and call for change.³⁵⁸

(b) Practical Basis

It could rightly be argued, as was demonstrated in Part III of this chapter, that there are numerous ways of satisfying the consideration requirement to effect a unilateral contract modification and avoid the application of *Stilk v Myrick*. A promisee could give fresh, perhaps nominal, consideration which would suffice given that consideration need only be sufficient not adequate. They could also incorporate the modification into a deed or argue that their reiterated promise conferred a practical benefit upon the promisor, or constituted a compromise of a disputed claim. They might even argue that the reiterated promise constituted a second agreement in substitution for the first, amounted to a waiver or gave rise to an action in estoppel.

Committee of the Modern Law Review, ‘The Law Revision Committee’s Sixth Interim Report’ (1937) 1(2) *Modern Law Review* 97, 104.

³⁵⁵ Olson, above n 19, 1004-5.

³⁵⁶ *Watkins & Son v Carrig* 91 N.H. 459, 462 (1941) (per curiam).

³⁵⁷ Brody, above n 17, 434-5. See also Kevin M Teeven, ‘Development of Reform of the Preexisting Duty Rule and its Persistent Survival’ (1996) 47(2) *Alabama Law Review* 387 at 419-20.

³⁵⁸ Cf Gava, above n 135, 265:

It is one thing to argue about the appropriate nature of the rules which the state uses to achieve justice in contract disputes. It is another to ditch that role of dispensing justice, and adopt another which is to serve the needs of commerce. One is law, as commonly understood, the other is management or instrumentalism or whatever. One operates from within our constitutional structure; the other subverts it.

See further the discussion in Part V of this chapter.

Given the number of expedients capable of circumventing the existing legal duty rule and, more broadly, satisfying the requirement of consideration for unilateral contractual modifications, it might be said that these rules present no real inconvenience for contracting parties.³⁵⁹ It is argued this view is incorrect on a number of grounds. For a start, the available expedients are often cumbersome and unpredictable. A party could give nominal consideration, but this is a trifling ritual which makes a mockery of the legal system and is often a veil for coercion.³⁶⁰ ‘Practical benefits’ can almost always be identified on any set of facts,³⁶¹ producing a seemingly irreconcilable conflict between *Williams v Roffey* and the existing legal duty rule expressed in *Stilk v Myrick*.³⁶² Parties will never be able to be sure whether they have an enforceable agreement or not, particularly if the courts are equipped to ‘find’, ‘detect’ or ‘look for’ consideration *post-contract*, as they are within the parameters of the practical benefit test.³⁶³

The compromise/forbearance exception is problematic in that it requires the court to consider whether the promisee honestly held a belief that they were not bound to perform or that they had a valid cause of action on the contract.³⁶⁴ With little ingenuity the cunning promisee could easily construct the facade of genuine belief in almost any factual circumstance. Similarly the mutual rescission/replacement device also involves objectively deducing the intentions of the parties, which might not actually align with their subjective intentions.³⁶⁵ In either case, consideration can be artificially found to subsist so as to render the contract variation enforceable. The function of the doctrine of waiver in the context of contract modification remains patently unclear, and promissory

³⁵⁹ This is certainly the view of Stephen A Smith writing *Atiyah's Introduction to the Law of Contract* (Clarendon Press, 6th ed, 2005). See pp 113-17.

³⁶⁰ Token consideration can be ingeniously disguised as an act of kindness when it is actually to give force to an extortionate demand: Stephens, above n 21, 363-4 (author provides an apt example); Craig Ulyatt, ‘Should Consideration Be Required for the Variation of Contracts?’ (2002) 9(3) *Auckland University Law Review* 883, 890; Wessman, ‘Retraining the Gatekeeper’, above n 37, 746. See also *United States of America v Stump Home Specialties Manufacturing Inc* 905 F (2d) 1117 at 1122 (1990) (Posner J):

Slight consideration, therefore, will suffice to make a contract or a contract modification enforceable. And slight consideration is consistent with coercion. To surrender one's contractual rights in exchange for a peppercorn is not functionally different from surrendering them for nothing.

³⁶¹ See Chapter 5, Part VI.

³⁶² See Chapter 5, Part I. Recall that Purchas LJ felt that *Stilk v Myrick* might well have been decided differently if tried today: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 21.

³⁶³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 16 (Gidewell LJ), 18 (Russell LJ), 21 (Purchas LJ).

³⁶⁴ *Wigan v Edwards* (1973) 1 ALR 497, 512-13 (Mason J).

³⁶⁵ Brody, above n 17, 473: ‘Frequently there is not even the slightest hint that the parties feel themselves totally relieved from their contractual obligations. At no point do the parties believe that either of them may abandon the contract with impunity’.

estoppel, being an equitable doctrine, is available only at the court's discretion and may not even apply if its various elements are not satisfied. Like the practical benefit principle, waiver and estoppel are judicial devices the effects of which can only be determined by the courts post-contract. And whilst deeds retain importance, particularly for property transactions and settlements of disputes, they are nonetheless an antiquated remnant of centuries past and a cumbersome formality for anyone not using a lawyer to document their contractual arrangements.

Secondly, parties may not even be aware of these methods at their disposal. The sociological studies referred to above demonstrate that in the majority of cases contracting parties are oblivious to how the law of contract operates and rarely resort to its processes to settle disputes. Consequently, 'the enforceability of sensible contractual variations will often depend on whether the party benefiting was legally advised'.³⁶⁶ If parties don't know the options available to them, and don't have competent legal counsel to advise them of such, then those options make the renegotiation process no more flexible. Moreover, these methods, even if known to the parties, often come at some cost. Utilising a deed, proffering new consideration (nominal or otherwise) or rescinding and replacing a contract all involve expense – sometimes considerable – and, of course, effort. The 'practical benefit', 'compromise/forbearance', estoppel and waiver options cannot be facilitated by the parties as such; these are judicial devices which will come to a party's aid if the facts support their case and may therefore cost at least the price of litigation.

Thirdly, it might not always be practical or even possible to use these options. Rescission and replacement, for example, might be hindered by statutory requirements and taxation implications.³⁶⁷ The use of a deed or nominal consideration might not assist a party seeking equitable relief.³⁶⁸ Contractual clauses providing a mechanism for change are becoming more commonplace, but cases such as *Commonwealth v Crothall Hospital Services (Aust) Ltd*³⁶⁹ demonstrate that these are far from perfect. There is, after all, 'a

³⁶⁶ Land, above n 37, 292.

³⁶⁷ J W Carter, Andrew Phang and Jill Poole, 'Reactions to *Williams v Roffey*' (1995) 8 *Journal of Contract Law* 248, 251.

³⁶⁸ *Ibid.*

³⁶⁹ (1981) 36 ALR 567. Crothall was engaged by the Commonwealth Government to clean buildings occupied by the Department of Defence in Canberra for the sum of \$158,492 per annum. The contract contemplated variations in the contract price due to variations in wages paid and areas cleaned. The parties enjoyed a seven-year working relationship during which Crothall, at certain times, claimed increased fees for its services. The Commonwealth paid these sums but later terminated the agreement and sought to claim

limit to human foresight³⁷⁰ and parties may even neglect these clauses despite them attempting to cover the field of potential contingencies. In sum, reliance upon any of the various available expedients to satisfy the requirement of consideration for unilateral contract variations can be seen as merely delaying the development of a more appropriate test of legal enforceability.³⁷¹

5. A Suggestion for Reform

There can be little doubt that the existing legal duty rule is in contemporary times an unsatisfactory tool for gauging the enforceability of post-contractual modifications. It is both underinclusive, in failing to capture extorted modifications concealed through the use of nominal consideration; and overinclusive, in striking down one-sided modifications that ‘do not offend the tenets of the economic duress doctrine’.³⁷² It defies sociological evidence that businesspeople expect some measure of ‘give and take’ in their dealings and assume the law will be consistent with this expectation. As discussed in Part II, the rule in *Stilk v Myrick* was clearly borne out of concern for the protection of the British maritime industry and founded upon a suspicion that duress was at play where a unilateral variation was agreed to. Accordingly, the rule ‘frustrate[s] the intentions of the parties in cases of genuine adjustments of obligations’.³⁷³

The Court of Appeal in *Williams v Roffey* sought to alleviate the rigidity of the existing legal duty rule but, in retaining the rule as the test of enforceability for contractual modifications, arguably failed. The practical benefit principle might in theory have made it easier for the beneficiary of a unilateral variation to establish consideration in return for the additional benefits pledged by the promisor. But, as demonstrated in the preceding

what it contended were ‘overpayments’ miscalculated under the variation clause. The Commonwealth’s claim was dismissed, the Federal Court holding that, notwithstanding how they were calculated, the inflated invoices submitted by Crothall constituted an offer to vary the contract which was accepted by the Commonwealth’s payment of these invoices (at 580-1 per Ellicott J, Blackburn and Deane JJ concurring).

³⁷⁰ Han Tan, above n 16, 579. It is perhaps unsurprising, then, that such renegotiation clauses are seldom used by Western organisations: Jeswald W Salacuse, ‘Renegotiating Existing Agreements: How to Deal with “Life Struggling Against Form”’ (2001) 17(4) *Negotiation Journal* 311, 317.

³⁷¹ Ulyatt, above n 146, 899; Robert A Hillman, ‘Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress’ (1979) 64 *Iowa Law Review* 849, 853: ‘The creation of fictions to avoid an unpalatable doctrine often hampers the development of the law’.

³⁷² *NAV Canada v Greater Fredericton Airport Authority Inc.* (2008) 290 DLR (4th) 405, 424 (Robertson JA); Wessman, ‘Retraining the Gatekeeper’, above n 37, 746; Hillman, ‘Contract Modification under the Restatement (Second) of Contracts’, above n 136, 685.

³⁷³ Collins, *The Law of Contract*, above n 122, 344.

two chapters, this has merely substituted ‘one set of problems for another’.³⁷⁴ The *Stilk v Myrick* test enquires whether the promisee has given or agreed to do something more in return for the variation. This misses the point altogether. The crucial and more accurate enquiry should be whether the promisor’s promise to give something more was *unfairly obtained*.³⁷⁵ As Purchas LJ conceded in *Williams v Roffey*, ‘[t]he modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement’.³⁷⁶

There might well be a plethora of exceptions to the existing legal duty rule and methods of satisfying the consideration requirement for unilateral contract modifications, but as we have seen these are inconvenient, costly and sometimes unavailable or even unknown to the parties. Moreover, one must necessarily ask *why* there exist so many expedients. If the rule mandating consideration to change an agreement is so important, why are contractual parties and the courts constantly dodging or finding novel ways of satisfying it?³⁷⁷ ‘There comes a time’, as Cartwright says, ‘when the exceptions to a rule become so well developed that one must begin to reconsider the validity of the rule itself’.³⁷⁸

The conditions of our modern economy, operating in a fast-paced and technological society, demand that parties be permitted to modify their agreements with as little encumbrance as possible.³⁷⁹ The consideration requirement for variations is little more than a stubborn obstacle impeding such vital exchanges, and reliance upon the various methods of satisfying it to give effect to unilateral modifications can be seen as

³⁷⁴ John Adams and Roger Brownsword, ‘Contract, Consideration and the Critical Path’ (1990) 53 *Modern Law Review* 536, 542.

³⁷⁵ Steven Fennell and Simon Ball, ‘Welfarism and the Renegotiation of Contracts’ in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds) *Welfarism in Contract Law* (Dartmouth Publishing, 1994) 212, 216; Aivazian, Trebilcock and Penny, above n 21, 179.

³⁷⁶ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 21.

³⁷⁷ The Supreme Court of British Columbia recently blamed the outmoded consideration doctrine and the rule in *Stilk v Myrick* for forcing courts to undertake ‘the embarrassing task of offering unconvincing reasons why a contractual variation should be enforced’: *River Wind Ventures Ltd v British Columbia* [2009] BCSC 589 (28 November 2008) [32].

³⁷⁸ John Cartwright, ‘The English Law of Contract: Time for Review?’ (2009) 2 *European Review of Private Law* 155, 175. Hillman goes so far as to suggest that frustrating rules such as the requirement of consideration for a modification might even discourage parties from entering into contractual relationships: Hillman, ‘Contract Modification under the Restatement (Second) of Contracts’, above n 136, 681.

³⁷⁹ Australian Government, ‘Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ (Discussion Paper, Attorney-General’s Department, 2012) 1, 1:

Contract law forms one of the most important elements of any legal framework. It is the bedrock of modern economies and the basis of many everyday interactions. It is therefore of the utmost importance that Australian contract law maximise the simplicity, efficiency and utility of market interactions for the benefit of all Australians.

obstructing the development of a more appropriate test of legal enforceability.³⁸⁰ The law should focus more on facilitating exchange than over-regulating and even inhibiting it.³⁸¹

A recent report from the Australian Government aimed at reforming and improving the Australian law of contract unequivocally agreed with this point:

Australian contract law could be simplified by removing outdated or over-technical rules thereby reducing the cost burden of the law on users. The more technical or complicated the rule, the greater the cost required for compliance and the greater the parties' reliance on legal advice. Rules which are out of step with current commercial practice and expectations undermine predictability because they can later emerge to surprise parties who have acted on the basis of common sense assumptions.³⁸²

What is necessary, therefore, is a 'flexible product' which meets the needs of contractual parties; 'a product which will allow renegotiation in the light of changed circumstances but also one that will protect them from extortion',³⁸³ a product more certain than the anomalous practical benefit principle.

(a) Weighing the alternatives

One alternative to the consideration requirement for variations is merely to require that all contract variations be in writing in order to be enforceable. Though speaking in the context of the part-payment of debt principle,³⁸⁴ Lord Chancellor Selborne in *Foakes v Beer* was highly supportive of this notion, stating that such agreements in writing though not under seal should attract the force of law.³⁸⁵ This was also one of the suggestions put forward by the English Law Revision Committee in its Sixth Interim Report of 1937.³⁸⁶ There is some force in the idea. As two commentators have stated:

No one doubts that formal mechanisms have their place within the legal system. But formal accounts of the consideration doctrine have failed to justify the use of consideration specifically. If the ultimate goal is to determine which promises the parties intended to be binding, why not simply require parties who desire enforcement to declare so in writing?³⁸⁷

³⁸⁰ Ulyatt, above n 146, 899.

³⁸¹ Han Tan, above n 16, 579.

³⁸² Australian Government, 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Attorney-General's Department, 2012) 1, 3.

³⁸³ Hooley, above n 101, 34. Cf Gava, above n 135, 265.

³⁸⁴ See Chapter 1, Part VII.

³⁸⁵ (1884) 9 App. Cas. 605, 613.

³⁸⁶ Law Revision Committee, Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration* (1937) cmd. 5449.

³⁸⁷ David Gamage and Allon Kedem, 'Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations' (2006) 73 *University of Chicago Law Review* 1299, 1301.

A form requirement has its benefits; it provides, for example, an additional measure of protection for parties by encouraging prudence in dealings and reflection prior to signature. It demands more than a promise and requires a ritualistic manifestation of mutual agreement which the law recognises as enforceable. In this way it fulfils what Fuller famously described as the evidentiary, cautionary and channelling functions of legal formalities.³⁸⁸ But it would seem that requiring variations to be in writing is merely substituting one inconvenience (a consideration requirement) with another (a form requirement). It seems anomalous to place such a premium on form.³⁸⁹ Moreover, there is always the risk of inadvertent non-compliance with formalities such as writing which renders renegotiations unenforceable and paradoxically defeats the intentions of the parties.

Another alternative to requiring consideration for contract variations is to deem that consideration is present in renegotiations. Again, this approach was suggested by the English Law Revision Committee in 1937³⁹⁰ and has drawn support from some commentators.³⁹¹ This is arguably a less contentious alternative in that it does not abdicate the role of the doctrine of consideration as the gauge of enforceability in contract modification as it is in contract formation. It is argued, however, that assuming the presence of consideration in renegotiations is an equally inapposite alternative. Deeming something is present when it might well not be seems superfluous and superficial. It is surely more sensible not to require its presence at all; the crucial enquiry should be whether or not the agreement was rendered unenforceable by virtue of the behaviour of the parties in renegotiating their contract.

³⁸⁸ Lon L Fuller, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799. The author states that legal formalities, like the doctrine of consideration itself, perform three basic functions. First, they are *evidentiary* in that they serve as evidence of the existence and content of a contractual agreement. Unless there is evidence of a promise from one party inducing the other party to proffer something in return, a 'cause-and-effect linkage', the arrangement is legally unenforceable. Secondly, they have a *cautionary* role in that they deter parties from acting maliciously in their contractual dealings. They do so by requiring the relevant exchange to take the form of a bargain and thereby ensures deliberation between the parties and guards against foolish promises being made. Thirdly, they act as 'a simple and external test of enforceability'. They are a means of signifying that the parties intend to be legally bound and indicate that enforceable obligations have arisen as a consequence of ritualistic deliberation. This is the *channelling* function.

³⁸⁹ John Carter, 'The Renegotiation of Contracts' (1998) 13(3) *Journal of Contract Law* 185, 191.

³⁹⁰ Law Revision Committee, Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration* (1937) cmd. 5449.

³⁹¹ Editorial Committee of the Modern Law Review, 'The Law Revision Committee's Sixth Interim Report' (1937) 1(2) *Modern Law Review* 97, 104.

It will be argued that abolition of the consideration requirement for variations is the most appropriate means of addressing the issue that confronted the Court of Appeal in *Williams v Roffey* and which continues to confront parties who make unilateral variations to their agreements.

(b) The Need for Caution

In recommending reform of the consideration doctrine in the context of renegotiations, regard must be had both to the goals the practical benefit principle was seeking to accomplish and to the issues surrounding abolition of what is, at present, the primary gauge of enforceability for contractual modifications (i.e., the consideration requirement). In terms of the practical benefit principle's purpose, the Court of Appeal in *Williams v Roffey* was clearly attempting to add flexibility to the rigid doctrine of renegotiation.³⁹² It devised a principle which could detect consideration in a reiterated promise to perform, or actual performance of, an existing legal duty. Whilst sound in theory, the principle has, as we have seen in the preceding two chapters, actually given rise to a number of (actual or potential) functional and theoretical difficulties.

As to the issues surrounding abolition of the consideration requirement for variations, there are a number to be considered. First, common law courts are hesitant to instigate such wholesale changes to the common law, for various reasons.³⁹³ They are not always best-positioned to assess the deficiencies of the existing law, much less the problems their alterations may cause. Nor may they be fully appreciative of the economic and policy issues underlying the process they are asked to undertake. Moreover, large-scale changes to the law often involve 'devising subsidiary rules and procedures relevant to their implementation',³⁹⁴ a task better accomplished through consultation between lawyers and the courts than left to the sole discretion of the judiciary. Finally, it is an established common law principle that primary responsibility for legal reform rests with the elected legislature.

³⁹² 'In short, the English Court of Appeal was prepared to "relax" the tenets of the consideration doctrine in order to render enforceable a gratuitous promise to pay more': *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405, 423.

³⁹³ The following reasons were provided by McLachlin J in *Watkins v Olafson* [1989] 2 SCR 750, 760-1.

³⁹⁴ *Watkins v Olafson* [1989] 2 SCR 750, 760 (McLachlin J).

Perhaps the most telling of these reasons is the first: that the courts will be unable to predict the effect(s) such sweeping reforms have upon other doctrines within the law of contract and the common law generally.³⁹⁵ The Australian courts have recognised that ‘rejection or discounting of the authority of precedent not only disturbs the law established by a particular precedent but infuses some uncertainty into the general body of the common law’ and that the ongoing tension between legal development and legal certainty ‘has to be resolved from case to case by a prudence derived from experience and governed by judicial methods of reasoning’.³⁹⁶ Hence reform of the kind to be suggested must be carefully planned so as to avoid any undesirable consequences spreading throughout the common law framework like ripples in a pond.

Secondly, even if the renegotiation doctrine were overhauled so as to make it more flexible and commensurate with the desires of contracting parties, this may not be a good thing. It might be said that consciously shaping and reshaping the law to suit business needs undermines the common law’s role as the state’s mechanism for resolving contractual disputes.³⁹⁷ It is not for the courts to turn their back on the established rules and principles of the common law merely because they do not sit as comfortably in modern times as they once did.³⁹⁸ An overly flexible renegotiation doctrine can be seen as undermining the formal and binding nature of contracts generally. Moreover, it might also be open to abuse by parties resolute on obtaining a variation to their agreement.³⁹⁹ A non-relational system characterised by greater formality may in fact be the better option by reason of the fact it ‘*resists* commercial reality’.⁴⁰⁰

It is submitted, however, that it is this same hesitancy that saw the judicial concern for security against extortion in renegotiations overtake that of party autonomy within the

³⁹⁵ ‘[J]ettisoning the doctrine of consideration from the common-law system of contracts might create enormous and unpredictable strains elsewhere in the system’: Wessman, ‘Retraining the Gatekeeper’, above n 37, 840.

³⁹⁶ *Dietrich v The Queen* (1992) 177 CLR 292, 320-1 (Brennan J).

³⁹⁷ Gava, above n 135, 265.

³⁹⁸ *SGIC v Trigwell* (1979) 26 ALR 67, 70 (Barwick CJ).

³⁹⁹ Hillman, ‘Contract Modification in Iowa’, above n 21, 344:

Although contracting parties should have flexibility to adapt to change, they also must be assured that if they do not desire to modify their agreements, they cannot be required to do so. Stability in contractual arrangements is necessary to enable parties to plan their affairs in reliance on their contracts.

⁴⁰⁰ Hillman, ‘The Crisis in Modern Contract Theory’, above n 130, 127 (emphasis in original). See also Christine Jolls, ‘Contracts as Bilateral Commitments: A New Perspective on Contract Modification’ (1997) 26 *Journal of Legal Studies* 203, where the author argues that forcing parties to commit to an original contract, even where they wish to modify it at a later stage, may actually improve their overall welfare and that the law of contract should instead focus upon facilitating bilateral commitment between them.

English law of contract from the early 19th Century. It is the same fear of making the renegotiation doctrine too accessible and open to manipulation that drove the King's Bench in *Stilk v Myrick* to impose the requirement of consideration as a prerequisite to a valid modification. Parties who have bargained for additional benefits without the use of illegitimate pressure are constantly being forced to comply with petty formalities or litigate in order to enforce the modification. This seems both the illogical product of an outmoded rule and a misuse of state resources. As argued earlier in the chapter, the case for a more flexible doctrine of renegotiation is stronger now than it ever has been. The arguments in favour of reform outweigh those against, and with this in mind the chapter now turns to suggesting one means of reform.

(c) Developing a Strategy for Reform

This chapter has stressed the inappropriateness of the consideration requirement – expressed through the rule in *Stilk v Myrick* – as the gauge of enforceability for post-contractual modifications. It is little more than a ‘straitjacket’ barring the enforcement of all unilateral variations even where these were fairly negotiated⁴⁰¹ and is the first component of the renegotiation doctrine that must go. Of course, as Reiter remarks, simply sweeping it away ‘does not do away with the need to identify promisees who have exacted advantages through the use of unfair pressure’.⁴⁰² The question, then, is what safeguard(s) to introduce to perform this role?

It is useful at this juncture to examine the *Uniform Commercial Code* (UCC) model utilised in almost all US jurisdictions. As we saw in Chapter 1, art 2-209(1) of the Code stipulates that ‘[a]n agreement modifying a contract within [Article 2] needs no consideration to be binding’. The Code was an attempt to ‘make the law correspond more closely to business practices’⁴⁰³ and so it came as no surprise to see the drafters eliminate the consideration requirement for modifications to sales contracts. Official Comment 1 thus states:

This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

⁴⁰¹ Nathan, above n 37, 516.

⁴⁰² Reiter, above n 32, 495.

⁴⁰³ Gordon, above n 127, 997.

The ‘technicalities’ mentioned include, first and foremost, the existing legal duty rule and the closely related consideration requirement.⁴⁰⁴ The UCC through art 2-209(1) therefore sought to make the renegotiation doctrine more pliable and cognisant of the needs of contracting parties.⁴⁰⁵ It was a widely welcomed move. In order to guard against extortionate exploitation of this provision, the UCC drafters introduced through a second Official Comment a ‘good faith’ requirement:

Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding. However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith. The test of ‘good faith’ between merchants or as against merchants includes ‘observance of reasonable commercial standards of fair dealing in the trade’ (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.⁴⁰⁶

The Comment alludes to the meaning of ‘good faith’ under the UCC as defined in art 2-103,⁴⁰⁷ yet strangely omits mention of art 1-203, which at the time stipulated that ‘[e]very contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement’.⁴⁰⁸ These good faith provisions became the new safeguards against impropriety in contractual renegotiation in the absence of the consideration requirement. The Sixth Circuit Court of Appeal in *Roth Steel Products v Sharon Steel Corp*⁴⁰⁹ explained their operation thus:

⁴⁰⁴ James J White and Robert S Summers, *Handbook of the Law Under the Uniform Commercial Code* (West Publishing Co, 1972) 37-8; Thomas M Quinn, *Quinn’s Uniform Commercial Code Commentary and Law Digest* (Warren, Gorham & Lamont, 2nd ed, 1991) vol 1, 2-143, 2-148; Beth A Eisler, ‘Modification of Sales Contracts Under the Uniform Commercial Code: Section 2-209 Reconsidered’ (1990) 57 *Tennessee Law Review* 401, 404; Hillman, ‘Policing Contract Modifications under the UCC’ above n 157, 849; Nathan, above n 37, 527-8; John E Murray Jnr., ‘The Modification Mystery: Section 2-209 of the Uniform Commercial Code’ (1987) 32(1) *Villanova Law Review* 1, 3-4; John E Murray Jnr., ‘The Revision of Article 2: Romancing the Prism’ (1994) 35(4) *William and Mary Law Review* 1447; Steven L Emanuel, *Contracts* (Aspen Publishers, 8th ed, 2006) 133.

⁴⁰⁵ Hillman, ‘Policing Contract Modifications under the UCC’, above n 157, 849; Nathan, above n 37, 527.

⁴⁰⁶ See also art 2-302 which empowers the court to limit or refuse enforcement of all or part of a contract it deems to be ‘unconscionable’.

⁴⁰⁷ “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade’. See also art 1-201(b)(20): “‘Good faith”, except as otherwise provided in Article 5 [letters of credit], means honesty in fact and the observance of reasonable commercial standards or fair dealing’.

⁴⁰⁸ Article 1-203 is the defunct predecessor of the current art 1-304 which is to the same effect.

⁴⁰⁹ 705 F.2d 134, 145-6 (6th Circ., 1983) (citations omitted).

The ability of a party to modify a contract which is subject to Article Two of the Uniform Commercial Code is broader than common law, primarily because the modification needs no consideration to be binding. A party's ability to modify an agreement is limited only by Article Two's general obligation of good faith. In determining whether a particular modification was obtained in good faith, a court must make two distinct inquiries: whether the party's conduct is consistent with 'reasonable commercial standards of fair dealing in the trade', and whether the parties were in fact motivated to seek modification by an honest desire to compensate for commercial exigencies. The first inquiry is relatively straightforward; the party asserting the modification must demonstrate that his decision to seek modification was the result of a factor, such as increased costs, which would cause an ordinary merchant to seek a modification of the contract. The second inquiry, regarding the subjective honesty of the parties, is less clearly defined. Essentially, this inquiry requires the party asserting the modification to demonstrate that he was, in fact, motivated by a legitimate commercial reason and that such a reason is not offered merely as a pretext. Moreover, the trier of fact must determine whether the means used to obtain the modification are an impermissible [sic] attempt to obtain a modification by extortion or overreaching.

And so the process of determining whether a modification was made in good faith is relatively straightforward, but how effectively have the courts performed this role? Not so well it would seem. Whilst some commentators have argued that art 2-209(1) has not troubled the courts which have sought to apply it,⁴¹⁰ the case law suggests otherwise. There have been numerous instances where courts have either ignored the good faith requirement qualifying art 2-209 of the UCC or allowed seemingly unfair modifications to be enforced.⁴¹¹ In *Pirrone v Monarch Wine Co of Georgia*,⁴¹² for example, the defendant buyer refused to take delivery of one of several batches of peach brandy it had purchased from the plaintiff vendor unless the latter agreed to a variation in the overall quantity ordered.⁴¹³ The defendant had mistakenly over-ordered and paid well above the market price for peach brandy which had dropped to two-thirds below the contract price in the interim. After protracted deliberations and the negotiation of a termination agreement, the defendant finally agreed to take delivery of the brandy a year later than planned.

The plaintiff sued and was awarded damages for the defendant's breach and delay. However its claim for lost profits was rejected on the basis that the parties objectively demonstrated that the termination agreement was to govern their rights and liabilities and that this agreement – enforceable by virtue of UCC art 2-209(1) – contemplated the initial delivery only and 'wiped out' the subsequent deliveries. Strangely, despite the strong

⁴¹⁰ See, eg, Richard A Lord, *Williston on Contracts* (Lawyers Cooperative Publishing, 4th ed, 1992) vol 3, 612-14; Murray Jr., 'The Modification Mystery', above n 181; Eisler, above n 181.

⁴¹¹ See, eg, Quinn, above n 190, 2-148-2-150, 2-152; Hillman, 'Policing Contract Modifications under the UCC', above n 157.

⁴¹² 497 F.2d 25 (5th Circ., 1974).

⁴¹³ The defendant refused to initiate a US Government permit to authorise the shipment of the brandy.

suggestion of bad faith or duress on the part of the defendant, the United States Court of Appeals (5th Circuit) did not even consider whether the termination agreement, which significantly affected the plaintiff's entitlements and decreased the defendant's liabilities, was made in good faith as required by the UCC.

In other situations the courts have purported to address the good faith issue but allowed enforcement of a modification which arguably should have been struck down. Take the case of *Ruble Forest Products Inc v Lancer Mobile Homes of Oregon Inc*,⁴¹⁴ where the defendant buyer refused to pay for 11 truckloads of lumber purchased from the plaintiff vendor unless the vendor agreed to a subsequent price reduction. The defendant alleged that the lumber was defective. The vendor was under pressure from its bank and so acceded to the defendant's request for a price adjustment, forwarding a \$2,500 credit. The vendor later sued to recover the credit but was ultimately unsuccessful. The Supreme Court of Oregon held that the variation constituted a bona fide compromise of dispute and was therefore valid, despite expressing reservations as to the legitimacy of the defendant's conduct in extracting the variation.⁴¹⁵

Countless other common law examples abound, demonstrating how the good faith requirement under UCC art 2-209 has been disregarded or misinterpreted and failed to provide a workable mechanism to thwart extorted modifications.⁴¹⁶ This is not surprising given the inherent vagueness of the term 'good faith' and the failure of the courts to elucidate a definition which is uniformly considered and applied in modification cases. Summers contends that it has no meaning whatsoever and is merely an exclusionary term which seeks to exclude 'a wide range of heterogeneous forms of bad faith'.⁴¹⁷ Like their American counterparts, the English and Australian courts have also grappled with the doctrine of good faith and laboured to determine its definition, content and scope.⁴¹⁸

⁴¹⁴ 524 P.2d 1204 (1974).

⁴¹⁵ *Ruble Forest Products Inc v Lancer Mobile Homes of Oregon Inc* 524 P.2d 1204, 1207 (1974).

⁴¹⁶ See Hillman, 'Policing Contract Modifications under the UCC', above n 157, 862-76.

⁴¹⁷ Robert S Summers, "'Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195, 201. Similar views have been expressed by Australian judges; see, eg, *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17 (31 January 2002), [68] (Barrett J): 'In many ways the implied obligation of good faith is best regarded as an obligation to eschew bad faith'.

⁴¹⁸ See the discussion in Seddon, Bigwood and Ellinghaus, above n 38, 464-79. See also Australian Government, 'Long-Term Contracts and Good Faith' (Infolet 8, Attorney-General's Department, 2012) 2.

It is submitted that a more effective model for determining the validity of a post-contractual modification would depend not upon whether it was founded upon an exchange of consideration or made in good faith, but whether it was the product of *economic duress*. This view has much judicial⁴¹⁹ and academic support.⁴²⁰ Even in the US, the economic duress doctrine is regarded as far more established than its good faith counterpart and has more discernible parameters, making it the more ‘sensible’ guard against extortion.⁴²¹ As Donaldson DJ said in *Adam Opel GmbH v Mitras Automotive (UK) Ltd*: ‘The law of consideration is no longer to be used to protect a participant in ... a [one-sided] variation. That role has passed to the law of economic duress, which provides a more refined control mechanism, and renders the contract voidable rather than void’.⁴²² Unlike the rule in *Stilk v Myrick* and the broader consideration requirement the duress doctrine ‘does not threaten the enforceability of fair bargains’.⁴²³ It strikes down extortionate agreements irrespective of whether fresh consideration was tendered or not,⁴²⁴ and is thus impervious to the cunning use of nominal consideration. Finally, and perhaps most importantly, it ‘asks the right questions’⁴²⁵ by enquiring whether the promise was freely made, *not* whether something was given in return for it. *This* should be the critical issue.⁴²⁶

But if the question of whether the promise was freely given is the critical issue, the enforceability of a modification lacking consideration must also be contingent upon the

⁴¹⁹ See, eg, *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205 (18 December 2007) [42]; *United States of America v Stump Home Specialties Manufacturing Inc* 905 F (2d) 1117, 1122 (1990) (Posner J); *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 744 (Santow J); *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23, 45-6.

⁴²⁰ See, eg, Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd ed, 2012) 20; Aivazian, Trebilcock and Penny, above n 21, 179; Edwin W Patterson, ‘An Apology for Consideration’ (1958) 58 *Columbia Law Review* 929, 937; Meyer-Rochow, above n 37, 548-9.

⁴²¹ *United States v Stump Home Specialties Manufacturing Inc*. 905 F (2d) 1117, 1122 (7th Circ, 1990) (Posner J). This is not to suggest that the doctrine of economic duress is flawless. As discussed in Chapter 4, Part II, it too has its shortcomings. Chief amongst these is the difficulty in distinguishing legitimate and illegitimate pressure. See also Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor’s New Clothes’, above n 103, 144-5, where the author contends that the economic duress doctrine is ‘too coarsely calibrated to adequately distinguish between meritorious and unmeritorious variations’. It is submitted, however, that especially in Australia the doctrine of economic duress is more settled than its good faith counterpart and would give rise to fewer problems in application than the latter doctrine. On balance, it is the more appropriate option.

⁴²² [2007] EWHC 3205 (18 December 2007) [42].

⁴²³ Land, above n 37, 299-300.

⁴²⁴ See, eg, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705.

⁴²⁵ Aivazian, Trebilcock and Penny, above n 21, 179.

⁴²⁶ ‘The real issue ... is whether the promisor entered into the modification voluntarily or whether the promisor was coerced into making the new promise’: Hillman, ‘Policing Contract Modifications under the UCC’, above n 157, 854. See also the comments of the Supreme Court of Rhode Island in *Angel v Murray* 322 A (2d) 630 (1974) at p 635.

absence of *other* forms of illegitimate pressure. The Privy Council recognised this in *Pao On v Lau Yiu Long* when it stated that parties ‘who have negotiated at arm’s length’ should be held to their bargains ‘unless it can be shown that their consent was vitiated by *fraud, mistake or duress*’.⁴²⁷ It is arguable, however, that even this extension does not go far enough; it does not, as will be seen shortly, take into account other forms of illegitimate behaviour which might procure a contractual variation.

The New Zealand Court of Appeal in *Antons Trawling Co Ltd v Smith* opted for a principle rendering all modifications enforceable ‘in the absence of policy reasons to the contrary’.⁴²⁸ Whilst this approach provides ample scope for consideration of vitiating factors outside of duress, it is not favoured for two key reasons: (1) it offends the longstanding approach of the Anglo-Australian law of contract which, as we saw in Chapter 1, prioritises doctrine over policy in determining the enforceability of a post-contractual modification;⁴²⁹ and (2) in using loose language such as ‘policy reasons’ it arguably becomes as illusory as the ‘good faith’ doctrine. Coote suggests that a formula such as that posited in *Antons* could, if applied flexibly, ‘be used to discourage behaviour which, although short of fraud and duress, took unfair advantage of the other party, or was seriously contrary to good faith, or which otherwise was an abuse of a dominant bargaining position’.⁴³⁰ Whilst this is true, it is submitted that such behaviours should be classified according to the more established doctrines of contract law,⁴³¹ rather than under the vague umbrella term ‘policy reasons’.

Swan takes a slightly different tack and suggests that any agreement to vary an existing contract should be presumed valid unless there exist ‘good reasons for refusing enforcement’.⁴³² At first this sounds no more convincing than the *Antons* ‘policy reasons’ approach, though the author elaborates that such ‘good reasons’ include ‘evidence of

⁴²⁷ [1980] AC 614, 634 (emphasis added) (*Pao On*).

⁴²⁸ [2003] 2 NZLR 23, 45-6 (Baragwanath J) (*Antons*). Some commentators have offered similar views in advocating reform to the consideration doctrine. Meyer-Rochow, for example, argues that contractual modifications should be enforceable ‘unless one party’s consent to such an agreement has been given in such circumstances that it *would not be fair* to give effect to the new agreement’: Meyer-Rochow, above n 37, 548 (emphasis added). It is argued that ‘lack of fairness’ and ‘public policy’ go hand in hand.

⁴²⁹ See Chapter 1, Part VI where the conflict between *Harris v Watson* (1791) Peake 102; 170 ER 94 and *Silk v Myrick* (1809) 2 Camp. 317; 170 ER 1168 is discussed and shows how the ‘policy’ approach in the former case was rejected in favour of the ‘consideration’ approach in the latter.

⁴³⁰ Brian Coote, ‘Variations Sans Consideration’ (2011) 27 *Journal of Contract Law* 185, 190.

⁴³¹ Such as economic duress, fraud, undue influence, unconscionability etc.

⁴³² John Swan, ‘Consideration and the Reasons for Enforcing Contracts’ in Barry J Reiter and John Swan (eds), *Studies in Contract Law* (Butterworths, 1980) 23, 40.

economic duress or unconscionable conduct that is sufficiently offensive to overcome the pressure to hold businessmen to their bargains'.⁴³³ Nonetheless his argument suffers from the same deficiency as Coote's,⁴³⁴ in that it opts for a broad, all-encompassing term to catch all forms of behaviour which might be regarded as 'illegitimate' in the renegotiation process.

Swan is correct, however, in recognising (as the Privy Council did in *Pao On*) that economic duress is not the only form of unlawful pressure that can unfairly procure a contractual variation. A promisor may, for example, be swayed simply by virtue of the relationship they share with the promisee and the undue influence this party exerts upon them, as in *Farmers' Co-Op Executors & Trustees v Perks*.⁴³⁵ A promisee may exploit a 'special disability' afflicting the promisor (as defined by the common law) such as illiteracy, youth, lack of understanding or some infirmity of body or mind.⁴³⁶ Or they may simply make a fraudulent representation to the promisor to induce their agreement to modify the contract.⁴³⁷ Renegotiations are as vulnerable to these behaviours as they are to economic duress. Accordingly, any recommendation for reform of the consideration requirement for variations must also take account of these other forms of pressure or influence.

Reference must also be made to the possible effects of the *Australian Consumer Law* ('ACL') contained in sch 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA'). This comprehensive piece of legislation rebranded the *Trade Practices Act 1974* (Cth) ('TPA') and consolidated numerous other Acts and consumer protection regimes that previously operated across the Australian jurisdictions to provide a single national

⁴³³ Ibid.

⁴³⁴ Coote, above n 216.

⁴³⁵ (1989) 52 SASR 399 (wife's transfer of interest in farming property to her husband prior to her death rendered invalid on evidence the defendant had exerted considerable influence over the deceased whilst she was alive through use of violence and exploitation of their isolated existence).

⁴³⁶ *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J). In this case the respondent, whilst intoxicated, agreed to sell his grazing property at a gross undervalue to the appellant, who sought specific performance of the contract when the respondent later refused to sanction the transfer. The High Court refused the order and set aside the contract on the basis of unconscionable dealing.

⁴³⁷ *Derry v Peek* (1889) 14 App. Cas. 337. Per Lord Herschell at pp 374-5:

[F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.

consumer law.⁴³⁸ The new ACL, which applies uniformly across all States and Territories,⁴³⁹ contains several provisions which might have effect where a party has applied particular forms of pressure to procure a contract variation. For example, s 21 of the ACL prohibits unconscionable conduct in connection with goods or services:

A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person (other than a listed public company); or (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company); engage in conduct that is, in all the circumstances, unconscionable.

Section 21(4)(a) makes clear that this provision is not limited by the unwritten law relating to unconscionable conduct. Moreover, pursuant to s 22(1), without limiting the matters to which the court may have regard in determining if a person (the supplier) has contravened s 21 in connection with the supply or possible supply of goods or services to another person (the customer), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the customer; and
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- ...
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services;
- ...
- (j) if there is a contract between the supplier and the customer for the supply of the goods and services: (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and (ii) the terms and conditions of the contract; and (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract;

⁴³⁸ This followed recommendations contained within the Productivity Commission's *Review of Australia's Consumer Policy Framework* (Report No. 45, 30 April 2008). It was submitted that Australia's existing consumer policy framework was inefficient, inconsistent and incapable of adaptation to rapidly changing consumer markets. It was also said to be costly to administer and provide inadequate redress mechanisms for consumers. The chief recommendation of the Productivity Commission, therefore, was to introduce 'a single generic consumer law applying across Australia, based on the consumer provisions in the Trade Practices Act (TPA), modified to address gaps in its coverage and scope' (Volume 1 at p 2).

⁴³⁹ *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 7; *Fair Trading Act 1987* (NSW), s 32; *Consumer Affairs and Fair Trading Act 1990* (NT), s 27; *Fair Trading Act 1989* (Qld), s 16; *Fair Trading Act 1987* (SA), s 14; *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 6; *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 8; *Fair Trading Act 2010* (WA), s 19.

- (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
- (l) the extent to which the supplier and the customer acted in good faith.

A promisee threatening not to perform their contractual obligations unless the promisor provides additional consideration could conceivably amount to exploitation of the promisor's weaker bargaining position (s 22(1)(a)), forced compliance with unreasonable conditions (s 22(1)(b)), or unfair pressure or tactics (s 22(1)(d)) and might, therefore, involve a breach of the ACL. Such conduct might also be found to amount to a breach of the ACL where it is shown to be unfair, illegitimate or beyond the scope of the contract (ss 21(2)(j) and (k)) or contrary to good faith (s 21(2)(l)). Cases decided under the former s 51AB of the TPA suggest that the question of whether conduct is 'unconscionable' in the context of this provision necessarily imports a pejorative moral judgment and typically requires the alleged perpetrator to have acted in a clearly unfair or unreasonable manner.⁴⁴⁰

Section 50 of the ACL (formerly s 60 of the TPA) specifically prohibits a person from using 'physical force, or undue harassment or coercion, in connection with ... the supply or possible supply of goods or services'⁴⁴¹ as well as 'the payment for goods or services'.⁴⁴² There is authority which suggests that coercion in this context connotes actual or threatened force or compulsion which negates one's choice or freedom to act.⁴⁴³ A promisee refusing to perform their pre-existing contractual duties without additional consideration moving from the promisor is certainly capable of falling into this category.

The cited examples demonstrate that the statutory consumer law regime may also play a role in situations involving unilateral contract variations. Any reform proposals affecting the doctrine of consideration and the process of contracting generally must therefore also consider the potential application of the Australian Consumer Law.

⁴⁴⁰ *Australian Competition and Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1, 23 (Spender J).

⁴⁴¹ ACL, s 50(1)(a).

⁴⁴² ACL, s 50(1)(b).

⁴⁴³ *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472, 485-6 (Hill J). See also Ray Steinwall, *Annotated Competition and Consumer Legislation* (LexisNexis Butterworths, 2013) 1442-3.

(d) Future Directions

Dispensing with *Stilk v Myrick* and the broader requirement of consideration for contractual modifications, and utilising the normal rules of contract as well as the vitiating doctrines – as opposed to the problematic ‘good faith’ requirement utilised in the US through the UCC – as safeguards, enables the *Williams v Roffey* approach to be rejected whilst still making it possible to secure the sort of results it was intended to achieve.⁴⁴⁴ It is argued that this strikes the balance between the efficiency considerations of security and autonomy with which the law of renegotiation is chiefly concerned. Moreover, it does so without introducing the considerable uncertainty that arose from the practical benefit principle.

Such an approach reemphasises the overarching theme of this thesis: that the practical benefit principle was an unsatisfactory solution to the problem in *Williams v Roffey*, as demonstrated by the principle’s inharmonious treatment throughout the common law world, and that the consideration requirement for contract modifications is what the Court of Appeal should have focussed its efforts on addressing.

If reform along the lines suggested is to occur, however, it is unclear which institution is best placed to set the wheels in motion. Some contend the courts are best-equipped to do so,⁴⁴⁵ whilst another school of thought claims it is strictly a job for the legislature.⁴⁴⁶ Others take a middle ground and say either approach is fine so long as change occurs.⁴⁴⁷ This view, it is argued, is more attractive. Regardless, dispensing with the consideration requirement for variations and relying upon existing principles to guard against extortion would make the renegotiation process simpler and more flexible for contractual parties seeking efficient modifications of their contracts. The benefits of this are threefold: (1) parties will know where they stand from the outset when contemplating and giving effect to contract modifications; (2) flowing from the first benefit, this will be likely to discourage or dispense with the need for litigation and ease the burden on our backlogged

⁴⁴⁴ Brian Coote, ‘Consideration and the Variation of Contracts’ [2003] *New Zealand Law Review* 361, 379.

⁴⁴⁵ See, eg, Reiter, above n 32, 510.

⁴⁴⁶ See, eg, Meyer-Rochow, above n 37, 548; F M B Reynolds and G H Treitel, ‘Consideration for the Modification of Contracts’ (1965) 7 *Malaya Law Review* 1, 21.

⁴⁴⁷ Patterson, above n 206, 963.

judiciary; (3) parties will be able to quickly and easily amend their agreements to combat changes in circumstances without overzealous scrutiny from the law.

If parties have agreed, in the absence of duress or other illegitimate behaviour, to vary their contract, there is simply no good reason to deny the enforceability of the modification. The consideration requirement loses all relevance in such situations. The principle in *Williams v Roffey* was intended to provide an alternative means of detecting consideration in a pre-existing duty and thereby enforcing a fairly-made unilateral variation. In so doing the Court of Appeal introduced incoherence and uncertainty to the law of contract. The task now falls to the legislature or the courts to undo the damage caused to the doctrine of renegotiation and attain clarity. As Burrows writes:

The law would be rendered more intelligible and clear if the need for consideration were abolished and gratuitous promises that have been accepted or relied on were held to be binding (subject to the operation of normal contractual rules relating to, for example, the intention to create legal relations, duress, and illegality).⁴⁴⁸

⁴⁴⁸ Andrew Burrows, *Understanding the Law of Obligations* (Oxford University Press, 1998) 197.

CONCLUSION

*Stilk v Myrick*¹ was one of many sailors' cases to emerge from the Napoleonic war era (circa 1790-1820). The maritime trade was of enormous importance to the British economy during this period and the perilous conditions on the high seas provided fertile ground for extortionate behaviour between seamen and their masters seeking advantageous modifications to their agreements. With no developed concept of economic duress, the doctrine of consideration was installed as the principal test of enforceability in contractual renegotiations. Unilateral variations to agreements were unenforceable, held Lord Ellenborough in *Stilk v Myrick*, because they lacked consideration.² Only if *both* parties exchanged something of sufficient legal value could it be objectively determined that coercion played no part in the bargain and the variation would have effect. This became known as the 'existing legal duty rule'.

Times have changed dramatically, however, since *Stilk v Myrick* was decided. This thesis highlights the many legitimate reasons why parties might agree to give more or accept less in return for what they were already contractually entitled to receive; reasons to which the existing legal duty rule pays no heed.³ Such agreements are often made out of necessity in response to changes in circumstances. Market movements, labour shortages, supply issues or natural disasters, for example, might affect original financial forecasts and prompt one of the parties to request more money than originally agreed to guarantee their ability to perform their obligations. A party may simply submit to such requests out of guilt or as a selfless act of generosity calculated to enhance their goodwill in the community and maintain amicable relations with the other party. A unilateral variation may even reflect an error in the drafting stage of the contract as to scope of work required or some other aspect of the agreement.

The existing legal duty rule was borne out of concern for the protection of the British maritime industry and founded upon a suspicion that duress was at play where a unilateral variation was made. Of course, as discussed, it is plainly wrong to suggest that all unilateral modifications are invariably procured under duress. Moreover, parties do not always exhaustively or effectively allocate risks when drafting their agreements or utilise price adjustment mechanisms or renegotiation clauses. It is also conceivable that one

¹ (1809) Camp. 317; 170 ER 1168 ('*Stilk v Myrick*').

² See Chapter 1.

³ See Introduction.

party's promise to perform their existing legal obligations may be worth more to the other party than their right to sue for breach of contract, in that it dispenses with the need to obtain substitute performance and avoids the hassle of litigation. To use a trite expression in contract law, a bird in the hand really is, in some circumstances, worth more than two in the bush.⁴ Thus, many honestly made one-sided variations are inappropriately rendered unenforceable by virtue of the existing legal duty rule without further enquiry. This thesis argues, and demonstrates with reference to the relevant case law and literature, that this rule is outmoded and completely unsuited to modern economic conditions. The general requirement of consideration, it was argued, is superfluous in the context of renegotiations.

It was further argued that the Court of Appeal's effort to avoid the application of *Stilk v Myrick* in *Williams v Roffey*, whilst laudable, was erroneous. Rather than overturning this antiquated precedent and doing away with the general requirement of consideration for variations, the Court sought to preserve both and generate a principle capable of detecting consideration moving from the promisee in circumstances where, objectively, there was none. The resultant practical benefit principle has proved to be anomalous, conflicting with a number of established principles within the common law of contract law and being applied haphazardly by judiciaries the world over.

This principle, it was submitted, was the incorrect solution to the problem in *Williams v Roffey* and represents an inappropriate means of enforcing similar unilateral variations in analogous cases. It might well achieve the desired result in cases such as *Williams v Roffey*, but it does so at the expense of maintaining certainty and cohesion within the law. The existing legal duty rule and general requirement of consideration for variations are what were clearly in issue in *Williams v Roffey*. The Court of Appeal should have been more focussed on reforming these rules, rather than generating others to get around them; all it did – as clearly demonstrated in Chapters 4 and 5 – was substitute one set of problems with another. The practical benefit principle was as troublesome as the rule it sought to rectify. It has produced a growing body of inharmonious case law which continues to perpetuate the difficulties discussed in Chapters 4 and 5.

⁴ See James Barr Ames, 'Two Theories of Consideration II. Bilateral Contracts' (1899) 13(1) *Harvard Law Review* 28, 40; Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? – Recent Noteworthy Decisions' (1918) 27 *Yale Law Journal* 362, 380; Henry Winthrop Ballantine, 'Is the Doctrine of Consideration Senseless and Illogical?' (1913) 11(6) *Michigan Law Review* 423, 427.

It was further argued that reliance could not be placed solely upon the other existing methods of enforcing unilateral contract variations. It was shown that these are often costly, cumbersome, unavailable, problematic in application or even unbeknownst to the parties. Alternatives were considered before it was ultimately argued that abolition of the consideration requirement for variations, and reliance upon the normal rules of contract as well as the vitiating doctrines (such as economic duress) to act as safeguards, was the more appropriate solution.

In recommending reform to the doctrine of consideration, this thesis comes at an apt time. The Australian Government is currently undertaking an extensive review of the Australian law of contract in response to concerns that our system is falling behind others around the globe, including those of our major trading partners.⁵ In the wake of the global financial crisis, it is imperative that all strategies to improve our system of contract law be considered so as to encourage parties to contract with one another and thereby strengthen the national economy.⁶ A Government report aimed at generating discussion tailored to this very issue stated thus:

Some centuries-old common law rules of contract survive largely intact, attracting the criticism that elements of Australian contract law are tired and inadequate to contemporary circumstances. It is worth considering whether the law could be better suited to the needs of today.⁷

One of the primary contentions of this thesis, as supported by the voluminous body of relevant literature, is that the law could indeed be better suited to the needs of today. The Court of Appeal's solution to an antiquated rule in *Williams v Roffey*, it is argued, was unsatisfactory. This thesis broadly recommends reform to the doctrine of renegotiation but stops short of suggesting specific models for such reform which proved to be beyond the scope of the discussion. The Government expressly stipulated its desire to 'maximise the simplicity, efficiency and utility of market interactions'⁸ and simplify the law of contract by 'removing outdated or over-technical rules'.⁹ This thesis is simply responding to these calls for change by suggesting the removal of the requirement of consideration

⁵ Australian Government, 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Attorney-General's Department, 2012) i.

⁶ Ibid.

⁷ Ibid 1.

⁸ Ibid.

⁹ Ibid 3.

for variations and, therefore, the existing legal duty rule and practical benefit principle. This suggestion was justified by extensive reference to the problems introduced by the Court of Appeal's decision in *Williams v Roffey*.

Of course this thesis is as much a suggestion for reform as it is an invitation for continued research into this highly important issue concerning the Anglo-Australian law of contract. The Australian Government is considering harmonisation in the form of internationalisation of our contract law so as to remove indirect barriers to trade and investment as well as entice parties from countries the world over to contract here and thereby 'promote Australia as a regional hub for finance and commercial arbitration'.¹⁰ Internationalisation, certainly with respect to the consideration requirement for modifications, would further 'reduce costs associated with contracting across international legal systems' and strengthen ties with our major trading partners such as China whose contract law currently stands in stark contrast to ours.¹¹ Further comparative analyses of other jurisdictions which do not require consideration for contractual variations could be undertaken to provide an even greater understanding of how effectively such legal systems work.¹²

This thesis adds to the existing literature on the practical benefit principle but represents a novel contribution by virtue of the comprehensiveness of its analysis of the principle and its exhaustive effort to trace its development across the common law world. Extensive examination of the principle, and of the large number of cases which have sought to apply it, has provided a strong indication that the practical benefit principle is inherently uncertain and unstable and that the requirement that variations be supported by consideration is similarly undesirable.

It has been argued from the outset that the case was rightly decided but for the wrong reasons. In light of the principle's conceptual problems and its growth in the common

¹⁰ Australian Government, 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Attorney-General's Department, 2012) 1, 6.

¹¹ Australian Government, 'Should Contract Law be Internationalised?' (Infolet 6, Attorney-General's Department, 2012) 2.

¹² *Ibid* 1:

Comparisons between Australian contract law and other contract law systems around the world may help build a better understanding of the nature of Australian contract law. These comparisons may also allow Australian lawmakers to assess why particular approaches are adopted overseas and whether they could be desirable in Australia.

law, and in the face of the Australian Federal Government's live discussions for reform including internationalisation, more focussed reflection upon the merits of the practical benefit principle, the existing legal duty rule and the general requirement of consideration for variations, is critical. This thesis provides a source of reference in this regard.

The title of this thesis ultimately sums up everything it stood to address: *old rules* which continue to thwart the expectations of parties in a modern economy; the *practical benefit* principle which was designed to help introduce greater flexibility into the doctrine of renegotiation but served only to attract its own horde of difficulties; and *a new approach to contractual variation* – one which, it has been persistently argued, promises to provide one means of curing the difficulties currently presented by the existing legal duty rule and the requirement of consideration for variations.

BIBLIOGRAPHY

Cases

- Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205 (18 December 2007).
- Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570.
- Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993).
- Alaska Packers Association v Domenico* 117 F. 99 (9th Circ, 1902).
- Amerinaus Financial Resource Corporation Pty Ltd v Residence Company Pty Ltd* (Unreported, Supreme Court of Victoria, Byrne J, 4 July 1997).
- Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526.
- Angel v Murray* 322 A (2d) 630 (1974).
- Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23.
- Attorney-General for England and Wales v R* [2002] 2 NZLR 91.
- Attorney-General for England and Wales v R* [2004] 2 NZLR 577.
- Australian Competition and Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1.
- Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472.
- Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.
- Bacon v Purcell* (1916) 22 CLR 307.
- Baird Textile Holdings Ltd v Marks & Spencer Plc* [2002] 1 All ER (Comm) 737.
- Banning v Wright* [1972] 1 WLR 972.
- Bartlett v Wyman* 14 Johns. 260 (1817).
- Bayley v Homan* (1837) 3 Bing. (N.C.) 915; 132 ER 663.
- Beaton v McDivitt* (1987) 13 NSWLR 162.
- Bing Lee Finance Pty Ltd v Various Respondents* (1994) ASC ¶56-267.
- Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130.
- Bishop v Busse* 69 Ill. 403 (1873).
- Blomley v Ryan* (1956) 99 CLR 362.
- Bolton v Madden* (1873) LR 9 QB 55.
- Brikom Investments Ltd v Carr* [1979] QB 467.
- British and Benningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48.
- Bunn v Guy* (1803) 4 East 190; 102 ER 803.
- Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
- Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327.
- Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130.
- Chahal v Khalsa Community School* (2000) 2 C.C.E.L. (3d) 120.
- Chaplin v Hicks* [1911] 2 KB 786.
- Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.
- Cheong Fook Chee v Sea-Land Service Inc* [1994] 2 SLR 340.
- Chicago College of Osteopathic Medicine v George A Fuller Co* 776 F (2d) 198 (1985).
- Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594.
- Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107.
- Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012).
- Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643.
- Collins v Godefroy* (1831) 1 B. & Ad. 950; 109 ER 1040.
- Combe v Combe* [1951] 2 KB 215.

Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520.

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64.

Commonwealth v Crothall Hospital Services (Aust) Ltd (1981) 36 ALR 567.

Commonwealth v Verwayen (1990) 170 CLR 394.

Compagnie Noga D'Importation et D'Exportation SA v Abacha (No 4) [2003] EWCA Civ 1100 (23 July 2003).

Concut Pty Ltd v Worrell (2000) 176 ALR 693.

Conradie v Rossouw [1919] SALR (App. Div.) 279.

Cook v Wright (1861) 1 B. & S. 559.

Cook Islands Shipping Co Ltd v Colson Builders Ltd [1975] 1 NZLR 422.

Couldery v Bartrum (1881) 19 Ch D 394.

Coulls v Bagot's Executor and Trustee Co Ltd (1967) 119 CLR 460.

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40.

Crown v Clarke (1927) 40 CLR 227.

Currie v Misa (1875) LR 10 Ex 153.

Davis v Giladi [2000] WL 976085 (unreported, High Court, Queen's Bench Division).

Derry v Peek (1889) 14 App. Cas. 337.

Dietrich v The Queen (1992) 177 CLR 292.

Dimskal Shipping Co SA v International Transport Workers Federation ('The Evia Luck') [1992] 2 AC 152.

Dixon v Adams (1597) Cro. Eliz. 538; 78 ER 785.

Dome Resources NL v Silver (2008) 72 NSWLR 693.

DPP v Le (2007) 232 CLR 562.

Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915] AC 847.

Dunton v Dunton (1892) 18 VLR 114.

Eastwood v Kenyon (1840) 11 Ad. & E. 438; 113 ER 482.

European Consulting Unternehmensberatung Aktiengesellschaft v Refco Overseas Ltd (Unreported, Queens Bench (Comm), Mance J, 12 April 1995).

Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 (12 March 2003).

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89.

Farmers' Co-Op Executors & Trustees v Perks (1989) 52 SASR 399.

Figjam Pty Ltd v Pedrini (2007) Aust Contract Reports ¶90-259, 89,981.

Fink v Fink (1946) 74 CLR 127.

Foakes v Beer (1884) 9 App. Cas. 605.

Francis v South Sydney District Rugby League Football Club Ltd [2002] FCA 1306 (8 November 2002).

Frazer v Hatton (1857) 2 C.B. (N.S.) 512; 140 ER 516.

Gange v Sullivan (1966) 116 CLR 418.

Gay Choon Ing v Loh Sze Ti Terence Peter [2009] 2 SLR 332.

GEC Marconi Systems Pty Ltd v BHP Information Technology (2003) 128 FCR 1.

Gilbert Steel Ltd v University Construction Ltd (1976) 76 DLR (3d) 606.

Glasbrook Bros v Glamorgan County Council [1925] AC 270.

Goebel v Linn 47 Mich. 489 (1882).

Gower v Capper (1596) Cro. Eliz. 543; 78 ER 790.

Greenleaf v Barker (1590) Cro. Eliz. 193; 78 ER 449.

Gribbon v Lutton [2002] QB 902.

Haigh v Brooks (1839) 10 Ad. & E. 309; 113 ER 119.

Hamer v Sidway 124 NY 538 (1891).

Hanson v Royden (1867) LR 3 CP 47.

Harris v Carter (1854) El. & Bl. 559; 118 ER 1251.
Harris v Watson (1791) Peake 102; 170 ER 94.
Harrity and Northeast Yachts 1998 Ltd v Kennedy [2009] NBCA 60 (24 September 2009).
Hartley v Ponsonby (1857) 7 El. & Bl. 872; 119 ER 1471.
Hawkes v Saunders (1782) 1 Cowp. 289; 98 ER 1091.
Head v Kelk (1963) 63 SR (NSW) 340.
Hirachand Punamchand v Temple [1911] 2 KB 330.
Holt v Feigenbaum 52 N.Y. 2d 291 (1981).
Horwood v Land of Leather Ltd [2010] EWHC 546 (18 March 2010).
Howe v Teefy (1927) 27 SR (NSW) 301.
Hunter v Sparling 87 Cal. App. 2d 711 (1948).
Jackson v Cobbin (1841) 8 M. & W. 790; 151 ER 1259.
Jamieson v Renwick (1891) 17 VLR 124.
Je Maintiendrai Pty Ltd v Quaglia (1980) 26 SASR 101.
K&M Joint Venture v Smith International Inc. 669 F.2d 1079 (1986).
Key v Bagen 221 S.E.2d 234 (1975).
Kostopoulos v GE Commercial Finance Australia Pty Ltd [2005] QCA 311 (26 August 2005).
Larkin v Girvan (1940) 40 SR (NSW) 365.
Larsen v A.C. Carpenter Inc. 620 F.Supp. 1084 (1985).
Laythoarp v Bryant (1836) 3 Scott 238.
Lee v GEC Plessey Telecommunications [1993] IRLR 383.
Lewis v Edwards (1840) 7 M & W 300; 151 ER 780.
Limland v Stephens (1801) 3 Esp. 269; 170 ER 611.
Lingenfelder v Wainwright Brewery Co. 15 SW 844 (1891).
Liston v Owners of Steamship Carpathian [1915] 2 KB 42.
Machirus Properties Ltd v Power Sports World (1987) Ltd [2000] ANZ ConvR 435.
Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181.
Matchim v BGI Atlantic Inc [2010] NLCA 9 (11 February 2010).
McDermott v Black (1940) 63 CLR 161.
Miles v New Zealand Alford Estate Co (1864) 32 Ch. D. 266.
Mitchell v Pacific Dawn Pty Ltd [2003] QSC 86 (4 April 2003).
Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998) 81 FCR 475.
Morley v Boothby (1825) 3 Bing 107; 130 ER 455.
Morris v Baron and Company [1918] AC 1.
MP Investments Nominees Ptd Ltd v Bank of Western Australia [2012] VSC 43 (6 March 2012).
Mulcahy v Hoyne (1925) 36 CLR 41.
Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723.
NAV Canada v Greater Fredericton Airport Authority Inc (2008) 290 DLR (4th) 405.
Newmans Tours Ltd v Ranier Investments Ltd [1992] 2 NZLR 68.
North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd ('The Atlantic Baron') [1979] 1 QB 705.
O'Loughlin v O'Loughlin [1958] VR 649.
Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWSC 17 (31 January 2002).
Owners of Steamship 'Mediana' v Owners, Master and Crew of Lightship 'Comet' [1900] AC 113.
Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd (2006) 149 FCR 395.

Pacific Carriers Limited v BNP Paribas (2004) 218 CLR 451.
Pao On v Lau Yiu Long [1980] AC 614.
Parties Named in Schedule A v Dresdner Kleinwort Ltd [2010] EWHC 1249 (28 May 2010).
Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd (1981) 145 CLR 625.
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537.
Phillips v Ellinson Bros Pty Ltd (1941) 65 CLR 221.
Pickering v Thoroughgood (1532) *Spelman's Reports*, vol 1.
Pico Holdings Inc v Wave Vistas Pty Ltd (2005) 214 ALR 392.
Pinnel's Case (1601) 5 Co. Rep. 117a; 77 ER 237.
Pirrone v Monarch Wine Co of Georgia 497 F.2d 25 (5th Circ., 1974).
Placer Development Ltd v Commonwealth (1969) 121 CLR 353.
Popiw v Popiw [1959] VR 197.
Pratt v Barker (1829) 1 Sim 1; 57 ER 479.
Price v Easton (1833) 4 B. & Ad. 433; 110 ER 518.
Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462.
R v Groves (1977) 17 OR (2d) 65.
R v Morton (1873) LR 2 CCR 22.
R v Northern Electric Company Ltd [1955] OR 431.
Re Selectmove [1995] 1 WLR 474.
Redhead v Midland Railway Co (1866) LR 2 QB 412.
Reeves v Hearne (1836) 1 M. & W. 323; 150 ER 457.
River Wind Ventures Ltd v British Columbia [2009] BCSC 589 (28 November 2008).
Robichaud v Caisse Populaire de Pokemouche Ltée (1990) 69 DLR (4th) 589.
Robinett v The Ship 'Exeter' (1799) 2 C. Rob. 261; 165 ER 309.
Robinson v Harman (1848) 1 Ex 850; 154 ER 363.
Roth Steel Products v Sharon Steel Corp 705 F.2d 134 (6th Circ., 1983).
Royal Exchange Assurance v Hope [1928] 1 Ch 179.
Ruble Forest Products Inc v Lancer Mobile Homes of Oregon Inc 524 P.2d 1204 (1974).
Safeco Insurance Co. v Lapp 695 P.2d 1310 (1985).
Sailing Ship 'Blairmore' Co Ltd v Macredie [1898] AC 593.
Sargent v ASL Developments Ltd (1974) 131 CLR 634.
Schwartz v Hadid [2013] NSWCA 89 (3 May 2013).
Schwartzreich v Bauman-Basch Inc 231 NY 196 (1921).
Scohy v Cole 9 Ohio N.P. (N.S.) 199 (1909).
Scotson v Pegg (1861) 6 H. & N 295; 158 ER 121.
Sea-Land Service Inc v Cheong Fook Chee Vincent [1994] 3 SLR 631.
SGIC v Trigwell (1979) 26 ALR 67.
Shadwell v Shadwell (1860) 9 C.B. (N.S.) 159; 142 ER 62.
Silver v Dome Resources NL (2007) 62 ACSR 539.
Simon Container Machinery Ltd v Emba Machinery AB [1998] 2 Lloyd's Rep 429.
Slade's Case (1602) 4 Co. Rep. 91a; 76 ER 1072.
Sloan v Union Oil Company of Canada Ltd [1955] 4 DLR 664.
South Caribbean Trading Ltd v Trafigura Beheer BV [2005] 1 Lloyd's Rep 128.
Stead v Dawber (1839) 10 Ad. & E. 57; 113 ER 22.
Stilk v Myrick (1809) 6 Esp. 129; 170 ER 851.
Stilk v Myrick (1809) 2 Camp. 317; 170 ER 1168.
Stone v Wythipol (1588) Cro. Eliz. 126; 78 ER 383.
Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd (1955) 56 SR (NSW) 323.

Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] 1 SLR 853.
Swain v West (Butchers) Ltd [1936] 1 KB 224.
Syros Shipping Co SA v Elaghill Trading Co [1980] 2 Lloyd's Rep 390.
Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957) 98 CLR 93.
Taylor v Johnson (1983) 151 CLR 422.
Teo Seng Kee Bob v Arianecorp Ltd [2008] 3 SLR 1114.
The 'Araminta' (1854) 1 Sp. Ecc. & Ad. 224; 164 ER 130.
The 'Castilia' (1822) 1 Hagg. 59; 166 ER 22.
The Moorcock (1889) 14 P.D. 64.
Thomas v Thomas (1842) 2 QB 851.
Thompson v Palmer (1933) 49 CLR 507.
Tinyow v Lee [2006] NSWCA 80 (13 April 2006).
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165.
Turner v Owen (1862) 3 F & F 176; 176 ER 79.
United Dominions Corporation (Jamaica) Ltd v Shoucair [1969] 1 AC 340.
United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 WLR 74.
United States v Cook 257 US 523 (1922).
United States v Stump Home Specialties Manufacturing Inc. 905 F (2d) 1117 (7th Circ, 1990).
Universe Tankships Inc. of Monrovia v International Transport Workers Federation [1983] AC 366.
Vails v Southwestern Bell Telephone Co 504 F.Supp. 740 (1980).
Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC ('The Alev') [1989] 1 Lloyd's Rep 139.
Vella v Ayshan [2008] NSWSC 84 (15 February 2008).
W & K Holdings (NSW) Pty Ltd v Mayo [2013] NSWSC 1063 (9 August 2013).
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.
Ward v Byham [1956] 1 WLR 496.
Watkins v Olafson [1989] 2 SCR 750.
Watkins & Son v Carrig 91 N.H. 459 (1941).
Watson v Healy Lands Ltd [1965] NZLR 511.
Watton v Brinth (1400) Y.B. 2 Hen. IV, f. 3, pl. 9.
Westlake v Adams (1858) 5 C.B. (N.S.) 248; 141 ER 99.
Wigan v Edwards (1973) 1 ALR 497.
Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1.
Williams v Williams [1957] 1 WLR 148.
Wolfe v Permanent Custodians Ltd [2012] VSC 275 (11 October 2012).
Woodhouse AC Israel Cocoa Ltd S.A. v Nigerian Produce Marketing Co Ltd [1972] AC 741.

Legislation

Australian Consumer Law and Fair Trading Act 2012 (Vic).
Australian Consumer Law (Tasmania) Act 2010 (Tas).
Code Civil des Français 1804.
Código Civil Español.
Il Codice Civil Italiano.
Competition and Consumer Act 2010 (Cth).
Confiscation Act 1997 (Vic).

Consumer Affairs and Fair Trading Act 1990 (NT).
Fair Trading (Australian Consumer Law) Act 1992 (ACT).
Fair Trading Act 1987 (NSW).
Fair Trading Act 1989 (Qld).
Fair Trading Act 1987 (SA).
Fair Trading Act 2010 (WA).
Merchant Seamen Act 1729 2 Geo. II, c. 36.
Merchant Seamen Act 1854 (UK).
National Assistance Act 1948 (UK).
Sale of Goods (Vienna Convention) Act 1987 (ACT).
Sale of Goods (Vienna Convention) Act 1986 (NSW).
Sale of Goods (Vienna Convention) Act 1987 (NT).
Sale of Goods (Vienna Convention) Act 1986 (Qld).
Sale of Goods (Vienna Convention) Act 1986 (SA).
Sale of Goods (Vienna Convention) Act 1987 (Tas).
Sale of Goods (Vienna Convention) Act 1987 (Vic).
Sale of Goods (Vienna Convention) Act 1986 (WA).
Statute of UNIDROIT 1940.

Articles/Books/Reports

Adams, John, and Brownsword, Roger, 'Contract, Consideration and the Critical Path' (1990) 53 *Modern Law Review* 536.
 Aivazian, Varouj A, Trebilcock, Michael J and Penny, Michael, 'The Law of Contract Modifications: The Uncertain Quest for a Benchmark of Enforceability' (1984) 22 *Osgoode Hall Law Journal* 173.
 Ames, James Barr, 'Two Theories of Consideration II. Bilateral Contracts' (1899) 13(1) *Harvard Law Review* 28.
 Atiyah, P S, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979).
 Atiyah, P S, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) 65 *Iowa Law Review* 1249.
 Atiyah, P S, *Essays on Contract* (Clarendon Press, 1986) 181-2.
 Atiyah, P S, *An Introduction to the Law of Contract* (Clarendon Press, 5th ed, 1995).
 Baker, J H, *The Reports of Sir John Spelman* (Selden Society, 1978) vol 2.
 Ballantine, Henry Winthrop, 'Is the Doctrine of Consideration Senseless and Illogical?' (1913) 11(6) *Michigan Law Review* 423.
 Bant, Elise and Harding, Matthew (eds) *Exploring Private Law* (Cambridge University Press, 2010).
 Barton, J L, 'The Early History of Consideration' (1969) 85 *Law Quarterly Review* 372.
 Beatson, Jack, and Friedmann, Daniel (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, 1995).
 Beaumont, Matthew, 'Reinterpreting Oscar Wilde's Concept of Utopia: "The Soul of Man Under Socialism"' (2004) 15(1) *Utopian Studies* 13.
 Bernstein, Lisa, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *Journal of Legal Studies* 115.
 Bevan, Christopher, 'Waiver of Contractual Rights: A Non Sequitur' (2009) 83 *Australian Law Journal* 817.
 Biron, Sir Chartres, *Without Prejudice* (Faber and Faber, 1936).
 Bonell, Michael Joachim, 'Towards a Legislative Codification of the UNIDROIT Principles?' (2007) 2 *Uniform Law Review* 233.

- Brody, Burton F, 'Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation' (1975) 52(2) *Denver Law Journal* 433.
- Brownsword, Roger, 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds) *Welfarism in Contract Law* (Dartmouth Publishing, 1994) 21.
- Brownsword, Roger, Howells, Geraint and Wilhelmsson, Thomas (eds) *Welfarism in Contract Law* (Dartmouth Publishing, 1994).
- Burrows, Andrew, *Understanding the Law of Obligations* (Oxford University Press, 1998).
- Burrows, Andrew and Peel, Edwin (eds), *Contract Formation and Parties* (Oxford University Press, 2010).
- Cardozo, Benjamin N, *The Nature of the Judicial Process* (Yale University Press, 1929).
- Carter, John, 'The Renegotiation of Contracts' (1998) 13(3) *Journal of Contract Law* 185.
- Carter, John, *Carter's Guide to Australian Contract Law* (LexisNexis Butterworths, 2nd ed, 2011).
- Carter, J W, *Contract Law in Australia* (Butterworths, 6th ed, 2012).
- Carter, J W, Phang, Andrew and Poole, Jill, 'Reactions to *Williams v Roffey*' (1995) 8 *Journal of Contract Law* 248.
- Cartwright, John, 'The English Law of Contract: Time for Review?' (2009) 2 *European Review of Private Law* 155.
- Castles, Alex C, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 2.
- Charny, David, 'Nonlegal Sanctions in Commercial Relationships' (1990) 104(2) *Harvard Law Review* 373.
- Chen-Wishart, Mindy, 'The Enforceability of Additional Contractual Promises: A Question of Consideration?' (1991) 14 *New Zealand Universities Law Review* 270.
- Chen-Wishart, Mindy, 'Consideration: Practical Benefit and the Emperor's New Clothes' in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 123.
- Chen-Wishart, Mindy, *Contract Law* (Oxford University Press, 2nd ed, 2008).
- Chen-Wishart, Mindy, 'A Bird in the Hand: Consideration and Contract Modifications' in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010).
- Chitty, Joseph D, *Chitty on Contracts* (Sweet & Maxwell, 26th ed, 1989).
- Clarke, Philip, and Clarke, Julie, *Contract Law: Commentaries, Cases and Perspectives* (Oxford University Press, 2nd ed, 2012).
- Cohen, Morris R, 'The Basis of Contract' (1933) 46(4) *Harvard Law Review* 553.
- Collins, Hugh, *Regulating Contracts* (Oxford University Press, 1999).
- Collins, Hugh, *The Law of Contract* (Cambridge University Press, 4th ed, 2003).
- Coote, Brian, 'The Essence of Contract: Part 1' (1988) 1 *Journal of Contract Law* 91.
- Coote, Brian, 'Consideration and Benefit in Fact and in Law' (1990) 3 *Journal of Contract Law* 23.
- Coote, Brian, 'Consideration and the Variation of Contracts' [2003] *New Zealand Law Review* 361.
- Coote, Brian, 'Variations Sans Consideration' (2011) 27 *Journal of Contract Law* 185.
- Corbin, Arthur L, 'Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27(3) *Yale Law Journal* 362.
- Crabb, John H, *The French Civil Code* (Fred B Rothman & Co., 1995).

- Denson Smith, J, 'A Refresher Course in *Cause*' (1951) 12 *Louisiana Law Review* 2.
- Diehl, Daniel and Donnelly, Mark P, *Elbert Hubbard: The Common Sense Visionary: A Business Vision for Our Times* (Spiro Press, 2003).
- Dnes, Antony W, 'The Law and Economics of Contract Modifications: The Case of *Williams v Roffey*' (1995) 15 *International Review of Law and Economics* 225.
- Drahos, Peter and Parker, Stephen, 'Critical Contract Law in Australia' (1990) 3 *Journal of Contract Law* 30.
- Editorial Committee of the Modern Law Review, 'The Law Revision Committee's Sixth Interim Report' (1937) 1(2) *Modern Law Review* 97.
- Eisenberg, Melvin A, 'The Principles of Consideration' (1982) 67(4) *Cornell Law Review* 640.
- Eisler, Beth A, 'Modification of Sales Contracts Under the Uniform Commercial Code: Section 2-209 Reconsidered' (1990) 57 *Tennessee Law Review* 401.
- Emanuel, Steven L, *Contracts* (Aspen Publishers, 8th ed, 2006).
- Evans, Sir William D, *Collection of Statutes Connected with the General Administration of the Law* (W H Bond, 1836) vol 2.
- Evans, Bergen, *Dictionary of Quotations* (Delacorte Press, 1968).
- Ewart, John S, *Waiver Distributed* (Harvard University Press, 1917).
- Fennell, Steven and Ball, Simon, 'Welfarism and the Renegotiation of Contracts' in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds) *Welfarism in Contract Law* (Dartmouth Publishing, 1994) 212.
- Ferson, Merton, *The Rational Basis of Contracts and Related Problems in Legal Analysis* (Foundation Press, 1949).
- Fifoot, C H S, *History and Sources of the Common Law* (Stevens, 1949).
- Finn, P D (eds), *Essays on Contract* (Law Book Company, 1987).
- Finn, Paul, 'Internationalization or Isolation: The Australian *cul de sac*? The Case of Contract Law' in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, 2010) 41.
- Fridman, G H L, 'Freedom of Contract' (1967) 2 *Ottawa Law Review* 1.
- Fuller, Lon L, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799.
- Furmston, Michael, *The Law of Contract* (Butterworths, 1999).
- Gamage, David and Kedem, Allon, 'Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations' (2006) 73 *University of Chicago Law Review* 1299.
- Gava, John, 'Can Contract Law Be Justified on Economic Grounds?' (2006) 25 *University of Queensland Law Journal* 253.
- Gava, John and Kincaid, Peter, 'Contract and Conventionalism: Professional Attitudes to Changes in Contract Law in Australia' (1996) 10 *Journal of Contract Law* 141.
- Gilmore, Alexander, 'Catching Words: Exploiting Film Discourse in the Foreign Language Classroom' in Freda Mishan and Angela Chambers (eds) *Perspectives on Language Learning Materials Development* (Peter Lang, 2010) 111.
- Gilmore, Grant, *The Death of Contract* (Ohio State University Press, 1974).
- Glaser, Abram, 'The Doctrine of Consideration and the Civil Law Principle of Cause' (1941) 46 *Dickinson Law Review* 12.
- Goodrich, Peter, 'The Rise of Legal Formalism; Or the Defences of Legal Faith' (1983) 3 *Legal Studies* 248.
- Gooley, John and Radan, Peter, *Principles of Australian Contract Law* (LexisNexis Butterworths, 2006).
- Gordon, J D, 'A Dialogue About the Doctrine of Consideration' (1990) 75 *Cornell Law Review* 987.

- Gordley, James, *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001).
- Gordon, J D, 'A Dialogue About the Doctrine of Consideration' (1990) 75 *Cornell Law Review* 987.
- Greig, D W and Davis, J L R, *The Law of Contract* (The Law Book Company, 1987).
- Grime, Robert, *Shipping Law* (Sweet & Maxwell, 2nd ed, 1991).
- Guest, A G, *Anson's Law of Contract* (Clarendon Press, 26th ed, 1984).
- Halsan, Roger, 'Sailors, Sub-Contractors and Consideration' (1990) 106 *Law Quarterly Review* 183.
- Halsan, Roger, 'The Modification of Contractual Obligations' (1991) 44 *Current Legal Problems* 111.
- Halsan, Roger, *Contract Law* (Longman, 2001).
- Halyk, Dan, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*' (1991) 55 *Saskatchewan Law Review* 393.
- Han Tan, Cheng, 'Contract Modifications, Consideration and Moral Hazard' (2005) 17 *Singapore Academy of Law Journal* 566.
- Hillman, Robert A, 'Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress' (1979) 64 *Iowa Law Review* 849.
- Hillman, Robert A, 'Contract Modification in Iowa – *Recker v Gustafson* and the Resurrection of the Preexisting Duty Doctrine' (1980) 65 *Iowa Law Review* 343.
- Hillman, Robert A, 'Contract Modification Under the Restatement (Second) of Contracts' (1982) 67 *Cornell Law Review* 680.
- Hillman, Robert A, 'The Crisis in Modern Contract Theory' (1988) 67 *Texas Law Review* 103.
- Hird, Norma J and Blair, Ann, 'Minding Your Own Business – *Williams v Roffey* Revisited: Consideration Re-considered' [1996] *Journal of Business Law* 254.
- Holmes, Oliver W, *The Common Law* (Little, Brown & Co, 1881).
- Holmes, Oliver W, 'The Path of Law' (1897) 10(8) *Harvard Law Review* 457.
- Hooley, Richard, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19.
- Jolls, Christine, 'Contracts as Bilateral Commitments: A New Perspective on Contract Modification' (1997) 26 *Journal of Legal Studies* 203.
- Kennedy, Walter B, 'Pragmatism as a Philosophy of Law' (1925) 9(2) *Marquette Law Review* 63.
- Knapp, Charles L, 'Reliance in the Revised *Restatement*: The Proliferation of Promissory Estoppel' (1981) 81 *Columbia Law Review* 52.
- Kötz, Hein and Flessner, Axel, *European Contract Law: Volume One* (Tony Weir trans, Oxford University Press, 1997) [trans of: *Europäisches Vertragsrecht I* (first published 1992)].
- Land, John, 'The Enforceability of Contractual Variations: *Moyes & Groves Ltd v Radiation New Zealand Ltd*' (1985) 15 *Victoria University of Wellington Law Review* 287.
- Leane, Geoffrey W G, 'Testing Some Theories About Law: Can We Find Substantive Justice Within Law's Rules?' (1994) 19 *Melbourne University Law Review* 924.
- Lewis, Richard, 'Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' (1982) 9(2) *Journal of Law and Society* 153.
- Litvinoff, Saúl, 'Still Another Look at Cause' (1987) 48 *Louisiana Law Review* 3.

- Lord, Richard A, *Williston on Contracts* (Lawyers Cooperative Publishing, 4th ed, 1992) vol 3.
- Lorenzen, Ernest G, 'Causa and Consideration in the Law of Contracts' (1919) 28 *Yale Law Journal* 621.
- Lucke, H K, 'Non-Contractual Arrangements for the Modification of Performance: Forbearance, Waiver and Equitable Estoppel' (1991) 21 *University of Western Australia Law Review* 149.
- Luther, Peter, 'Campbell, Espinasse and the Sailors: Text and Context in the Common Law' (1999) 19 *Legal Studies* 596.
- Macaulay, Stewart, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.
- Macaulay, Stewart, 'Contract Law and Contract Research (Part II)' (1968) 20(4) *Journal of Legal Education* 460.
- Maggs, Gregory E, 'Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law' (1998) 66(3) *George Washington Law Review* 508.
- Mason, Malcolm S, 'The Utility of Consideration – A Comparative View' (1941) 41(5) *Columbia Law Review* 825.
- Meyer-Rochow, Rembert, 'The Requirement of Consideration' (1997) 71 *Australian Law Journal* 532.
- Mishan, Freda and Chambers, Angela (eds) *Perspectives on Language Learning Materials Development* (Peter Lang, 2010).
- Mitchell, Catherine, 'Obligations in Commercial Contracts: A Matter of Law or Interpretation?' [2012] *Current Legal Problems* 1.
- Muris, Timothy J, 'Opportunistic Behaviour and the Law of Contracts' (1981) 65 *Minnesota Law Review* 521, 550.
- Murray, John E Jnr., 'The Modification Mystery: Section 2-209 of the Uniform Commercial Code' (1987) 32(1) *Villanova Law Review* 1.
- Murray, John E Jnr., 'The Revision of Article 2: Romancing the Prism' (1994) 35(4) *William and Mary Law Review* 1447.
- Nathan, Richard, 'Grappling with the Pre-Existing Duty Rule: A Proposal for a Statutory Amendment' (1986) 23 *American Business Law Journal* 509.
- Nuland, Sherwin B, *Leonardo Da Vinci* (Phoenix, 2000).
- Ogilvie, M H, 'Of What Practical Benefit is Practical Benefit to Consideration?' (2011) 62 *University of New Brunswick Law Journal* 131.
- Olson, Theodore B, 'Contract Modification and the Consideration Requirement' (1963) 51(5) *California Law Review* 1001.
- Oughton, David W and Davis, Martin, *Sourcebook on Contract Law* (Cavendish, 2nd ed, 2000).
- Palay, Thomas M, 'Comparative Institutional Economics: The Governance of Rail Freight Contracting' (1984) 13 *Journal of Legal Studies* 265.
- Parry, Sir David H, *The Sanctity of Contracts in English Law* (Sweet & Maxwell, 1959).
- Paterson, Jeannie, Robertson, Andrew and Duke, Arlen, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012).
- Pearce, D C and Geddes, R S, *Statutory Interpretation in Australia* (Butterworths, 6th ed, 2006).
- Peel, Edwin, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011).
- Peterson, Grethe B (ed), *The Tanner Lectures on Human Values* (University of Utah Press, Vol 10, 1989).
- Pine, Joslyn T, *Wit and Wisdom of the American Presidents* (Courier Dover Publications, 2000).

- Pollock, Sir Frederick, *Pollock on Contracts* (Stevens & Sons, 8th ed, 1911).
- Posner, Richard A, 'What Has Pragmatism to Offer Law?' (1990) 63 *Southern California Law Review* 1653.
- Posner, Richard A, *How Judges Think* (Harvard University Press, 2008).
- Quinn, Thomas M, *Quinn's Uniform Commercial Code Commentary and Law Digest* (Warren, Gorham & Lamont, 2nd ed, 1991) vol 1.
- Reiter, B J, 'Courts, Consideration and Common Sense' (1977) 27 *University of Toronto Law Journal* 439.
- Reiter, Barry J and Swan, John (eds), *Studies in Contract Law* (Butterworths, 1980).
- Reynolds, F M B and Treitel, G H, 'Consideration for the Modification of Contracts' (1965) 7 *Malaya Law Review* 1.
- Salacuse, Jeswald W, 'Renegotiating Existing Agreements: How to Deal with "Life Struggling Against Form"' (2001) 17(4) *Negotiation Journal* 311.
- Schauer, Frederick, 'Formalism' (1988) 97(4) *Yale Law Journal* 509.
- Scott, Karen N, 'From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-Existing Duty Rule in New Zealand' (2005) 11 *Canterbury Law Review* 201.
- Seddon, N, Bigwood, R and Ellinghaus, M, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012).
- Seymour, William D, *The Merchant Shipping Act, 1854* (W G Benning & Co, 1854).
- Shatwell, K O, 'The Doctrine of Consideration in the Modern Law' (1954) 1 *Sydney Law Review* 289.
- Simpson, A, *A History of the Common Law of Contract* (Clarendon Press, 1975).
- Simpson, A W B, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247.
- Simpson, A W B, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *The University of Chicago Law Review* 632.
- Smith, A T H, *Glanville Williams: Learning the Law* (Sweet & Maxwell, 13th ed, 2006).
- Smith, Alexander B and Blumberg, Abraham S, 'The Problem of Objectivity in Judicial Decision-Making' (1967) 46(1) *Social Forces* 96.
- Smith, Stephen A, *Atiyah's Introduction to the Law of Contract* (Clarendon Press, 6th ed, 2005).
- Sosik, John J, Kahai, Surinder S and Piovosio, Michael J, 'Silver Bullet or Voodoo Statistics? A Primer for Using the Partial Least Squares Data Analytic Technique in Group and Organization Research' (2009) 34(1) *Group and Organization Management* 5.
- Steinwall, Ray, *Annotated Competition and Consumer Legislation* (LexisNexis Butterworths, 2013).
- Stephens, Corneill A, 'Abandoning the Existing Legal Duty Rule: Eliminating the Unnecessary' [2008] 9 *Houston Business and Tax Journal* 355.
- Stevens, Robert, *Law and Politics* (Weidenfeld and Nicolson, 1978).
- Steyn, Johan, 'Does Legal Formalism Hold Sway in England?' [1996] *Current Legal Problems* 43.
- Steyn, Johan, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433.
- Stoljar, S J, *A History of Contract at Common Law* (Australian National University Press, 1975).
- Stroud, Barry, 'The Study of Human Nature and the Subjectivity of Value' in Grethe B Peterson (ed), *The Tanner Lectures on Human Values* (University of Utah Press, Vol 10, 1989) 211.

- Summers, Robert S, “‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code’ (1968) 54(2) *Virginia Law Review* 195.
- Sutton, K C T, *Consideration Reconsidered* (University of Queensland Press, 1974).
- Sutton, K C T, ‘Promise and Consideration’ in P D Finn (eds), *Essays on Contract* (Law Book Company, 1987) 35.
- Swan, John, ‘Consideration and the Reasons for Enforcing Contracts’ in Barry J Reiter and John Swan (eds), *Studies in Contract Law* (Butterworths, 1980) 23.
- Taggart, Michael, “‘Australian Exceptionalism’ in Judicial Review’ (2008) 36 *Federal Law Review* 1.
- Tan, Kevin Y L (eds) *The Singapore Legal System* (Singapore University Press, 2nd ed, 1999).
- Teeven, Kevin, ‘Mansfield’s Reform of Consideration in Light of the Origins of the Doctrine’ (1991) 21 *Memphis State University Law Review* 669.
- Teeven, Kevin M, ‘Development of Reform of the Preexisting Duty Rule and its Persistent Survival’ (1996) 47(2) *Alabama Law Review* 387.
- Teeven, Kevin, *Promises on Prior Obligations at Common Law* (Greenwood Press, 1998).
- Thomas, E W, *The Judicial Process* (Cambridge University Press, 2005).
- Treitel, G H, *The Law of Contract* (Sweet & Maxwell, 8th ed, 1991).
- Treitel, Sir Gunther, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Press, 2002).
- Twyford, John Wilson, ‘Additional Payments Under Construction Contracts’ (2007) 25 *Construction Management and Economics* 739.
- Ulyatt, Craig, ‘Should Consideration Be Required for the Variation of Contracts?’ (2002) 9(3) *Auckland University Law Review* 883.
- Wallace, Jude and Fiocco, John, ‘Recent Criticisms of Formalism in Legal Theory and Legal Education’ (1980) 7 *Adelaide Law Review* 309.
- Wessman, Mark B, ‘Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration’ (1993) 48 *University of Miami Law Review* 45.
- Wessman, Mark B, ‘Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration’ (1996) 29 *Loyola Los Angeles Law Review* 713.
- White, James J, ‘Contract Law in Modern Commercial Transactions, An Artefact of Twentieth Century Business Life?’ (1982) 22 *Washburn Law Journal* 1.
- White, James J and Summers, Robert S, *Handbook of the Law Under the Uniform Commercial Code* (West Publishing Co, 1972).
- Wilken, Sean and Ghaly, Karim, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd ed, 2012).
- Willis, Hugh E, ‘Rationale of the Law of Contracts’ (1936) 11 *Indiana Law Journal* 227.
- Williston, Samuel, ‘Freedom of Contract’ (1921) 6(4) *Cornell Law Quarterly* 365.
- Willmott, Lindy, Christensen, Sharon, Butler, Des and Dixon, Bill, *Contract Law* (Oxford University Press, 4th ed, 2013).
- Winfield, Sir Percy H, *Pollock’s Principles of Contract* (Stevens, 13th ed, 1950).
- Woon, Walter, ‘The Applicability of English Law in Singapore’ in Kevin Y L Tan (eds) *The Singapore Legal System* (Singapore University Press, 2nd ed, 1999) 230.
- Zhuang-Hui, Wu, ‘A Probable Reform of Consideration’ (2009) 1 *Singapore Journal of Legal Studies* 272.
- Zimmermann, Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996).

Treaties

United Nations Convention on Contracts for the International Sale of Goods 1980.

Other Instruments

Restatement (Second) of Contracts 1981 (US).

Government Reports/Documents

Australian Government, 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Attorney-General's Department, 2012).

Australian Government, 'Long-Term Contracts and Good Faith' (Infolet 8, Attorney-General's Department, 2012).

Australian Government, 'Should Contract Law be Internationalised?' (Infolet 6, Attorney-General's Department, 2012).

Australian Government, 'Should Contract Law be Reformed?' (Infolet 1, Attorney-General's Department, 2012).

Australian Productivity Commission, *Review of Australia's Consumer Policy Framework* (Report No. 45, 30 April 2008).

Law Revision Committee, Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration* (1937) cmd. 5449.

Speeches

Blackshield, Anthony R, 'The Revolt Against Legal Formalism' (Speech delivered at the 34th Inaugural Lecture Series, La Trobe University, Melbourne, 10 September 1979).

Dictionaries

Butterworth's Concise Australian Legal Dictionary (3rd ed, 2004) 299.

Macquarie Dictionary (5th ed, 2009).

Oxford English Dictionary (2nd ed, 1989) vol 12.

Theses

Twyford, John Wilson, *The Doctrine of Consideration* (SJD Thesis, University of Technology (Sydney), 2002).

Valente, Dena, 'Enforcing Promises: Consideration and Intention in the Law of Contract' (LLB (Hon) Thesis, The University of Otago, 2010).

Digital Newspapers

'Olympic Opening Ceremony Stars Earn Token £1', *The Guardian* (online), 30 July 2012 <<http://www.guardian.co.uk/sport/2012/jul/30/olympic-opening-ceremony-stars-pound>>.

Johnston-Barnes, Owain, 'Hundreds Attend Annual Peppercorn Ceremony', *The Royal Gazette* (online), 28 April 2011 <<http://www.royalgazette.com/article/20110428/NEWS/704289973>>.

Websites

< <http://www.uncitral.org/uncitral/en/about/origin.html>>.

Other Internet Materials

Sevenoaks Life, *History of Sevenoaks* < <http://www.sevenoaks-life.co.uk/content/view/166/89/>>.