

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---



Contract Law Concentrate: Law Revision and Study Guide (6th edn)

Adam Shaw-Mellors and James Devenney

p. 47

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel 

James Devenney, Head of School and Professor of Transnational Commercial Law, School of Law, Reading University, UK, Visiting Full Professor, University College Dublin, Ireland & Visiting Professor Dalian Maritime University, China. and Adam Shaw-Mellors, Senior Lecturer in Commercial Law, Law School, Aston University, UK

<https://doi.org/10.1093/he/9780198904618.003.0003>

**Published in print:** 05 August 2024

**Published online:** August 2024

#### Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter examines the question of whether the promises contained in the agreement are enforceable so that there is a legally binding contract in place (formation). It considers the parties' intention to be legally bound and the need to establish that the promises are part of a bargain. The same bargain requirement applies to alteration promises, although the treatment of alteration promises is not as strict. It is possible for freely made alteration promises to be enforceable when not 'paid for' with another promise or action, e.g. by means of the doctrine of promissory estoppel.

**Keywords:** enforceability, promises, formation, consideration, deed, alteration, intention to create legal relations, factual practical benefit, promissory estoppel

#### Key facts

---

- Only enforceable promises in an agreement can be relied upon before the courts.
- To be enforceable, a formation promise (promise made as part of an agreement where there is no existing agreement between these parties covering this subject matter) requires (i) an intention to be legally bound by the promise (known as intention to create legal relations) and (ii) either the promise to be expressed in the

### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

---

form of a deed (indicating that any promise is taken seriously), or the party seeking to enforce the promise of the other to show they have given something in exchange for that promise (i.e. it is a bargain, as opposed to a gratuitous promise or gift).

- Intention to be legally bound is judged objectively through the use of two presumptions. These may be rebutted by clear evidence to the contrary. Domestic or social agreements are presumed not to be intended to have legally enforceable consequences. To rebut this presumption there needs to be reliance, certainty of terms, and evidence of the seriousness of the promise. In contrast, parties to commercial agreements are presumed to intend to be legally bound unless there are clear words indicating the absence of a promise or that the parties have agreed to be bound in honour only.

- Consideration means an act or a promise given in exchange for the promise (i.e. the price for which the other's promise was bought). Consideration need not be adequate but must be sufficient. This means the courts will not examine whether what has been given in exchange is of equivalent value; but some acts or promises are not recognized by the law as being valid consideration, e.g. past consideration and the performance of an existing legal duty.

p. 48

- In order to enforce an alteration promise, a party must also show that **it has provided consideration for, or purchased, that promise**. Performing an existing contractual obligation was not recognized as sufficient consideration since there was no new exchange. But where there is an alteration promise, if the promisor receives a factual benefit from making the alteration promise, that promise might be treated as supported by consideration and enforceable.

- In the context of alteration promises, the Court of Appeal (CA) has suggested that the promisor's receipt of a factual or practical benefit can amount to consideration to support a promise to pay more money (*Williams v Roffey Bros*) and a promise to accept less money (*MWB Business Exchange Centres Ltd v Rock Advertising Ltd*), although this area of law is without clarity of principle.

- Where an alteration promise is not supported by consideration, that promise might have *some binding effect* (although not the same binding effect as where consideration is present) through the doctrine of **promissory estoppel**. Promissory estoppel prevents a promisor from going back on a promise where to do so would be inequitable because the promisee has relied on that promise and the promise was freely given (again the doctrine of duress might be relevant).

- There are some difficulties with the scope of promissory estoppel in English law.

### 3.1 Introduction

---

Even if the parties have reached agreement, several issues might arise that mean the agreement is not enforceable as a binding contract. This chapter brings these issues together under the collective term 'enforceability issues'. The chapter examines the question of whether the promises contained in the agreement are enforceable so that there is a legally binding contract in place (formation) and the position with the enforceability of promises which vary or alter the terms of an existing contract (alterations).

The chapter therefore considers the parties' intention to be legally bound (formation) and the need to establish that the promises are part of a bargain (as opposed to gratuitous promises, which need to be contained in a special legal document—a deed). The same bargain requirement applies to alteration promises,

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

although in practice the treatment of alteration promises is not as strict, and it is possible for freely made alteration promises to be enforceable when not strictly bargained for (i.e. paid for with another promise or action). Promises obtained as a result of threats or extortion are not freely made and are voidable for duress. Duress is discussed in Chapter 10.

#### Think like an examiner

Contract Law courses vary in the way the content of this topic is taught and assessed and you should refer to the guidance given on your course. It might be, for example, that some of these enforceability issues are treated as discrete topics. The legal issues do, of course, remain the same.

p. 49

↩ A problem question might include a number of components relevant to consideration and might also include issues relating to whether a promise was freely given because of the presence of a 'vitiating factor' (such as duress—see Chapter 10) and the context in which any promises were made (and the relevant presumption as to intention to be legally bound). Most issues concerning consideration will arise in the context of alteration promises (to pay more and to accept less) and the defence of promissory estoppel. Typical issues relevant to formation promises include past consideration issues and whether the performance of existing duties can constitute formation consideration.

The breadth and complexities of the issues mean they can be assessed as either a problem question or an essay question. Popular areas of focus in essay questions are the scope and controversies surrounding *Williams v Roffey Bros* and *MWB v Rock* in the context of factual benefits. Another important area for discussion relates to the broader requirement of consideration and whether a more preferable approach is the Australian approach of recognizing greater flexibility for the doctrine of estoppel—or even whether reliance ought to be the sole criterion for the enforceability of promises (see 'Key debates').

## 3.2 Is the agreement promise enforceable? Is it legally binding?

---

#### Practical example

Alex has made an offer to Becky to sell his bicycle to her for £150. Becky has accepted by promising to pay £150 for it.

If Alex delivers the bicycle but Becky refuses to pay, can Alex enforce the promise of payment? Is Becky bound to pay that price?

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### 3.2.1 The terminology for enforceability questions

We are seeking to establish *whether a promise made by the promisor* (Becky in this example) *can be enforced against her by the promisee* (Alex). Has the promisee (Alex) supplied consideration to support the promise made by the promisor (Becky)? If so, we can refer to the promisor's promise as being 'supported by consideration', and at this stage we can start talking about a 'contract' between the parties as opposed to merely 'agreement'.

In addition, an act or a promise which the law would recognize as a sufficient consideration is referred to as 'good consideration'.

The promise might nevertheless be unenforceable if it is voidable and the contract has been set aside for duress (promise obtained as a result of illegitimate pressure or threats). This is discussed in Chapter 10.

p. 50 Although a promise freely given might not be supported by consideration, in the context of some alteration promises the promisee might be able to *prevent the promisor from going back on that promise* where this would be inequitable (or unfair), even though no fresh ↵ consideration is supplied. This is the doctrine of promissory estoppel and usually operates to delay enforcement of the promise (the estoppel therefore has a 'suspensory' effect), rather than denying enforceability forever (referred to as 'extinguishing liability', which would be the case where the alteration promise was supported by consideration).

#### 3.2.2 Structure for answering all problem questions on enforceability issues

- Identify the promise or promises that are to be tested for enforceability.
- Consider whether there is any real issue in relation to intention to create legal relations by identifying the type of agreement and its context; e.g. if there is a straightforward commercial agreement with no attempt to avoid legal liability attaching to the promises, it would be superfluous to discuss the question since there is no doubt that intention to be legally bound will be presumed.
- Consider whether the promisor's promise was freely given or whether it was extracted by illegitimate pressure or threats from the promisee.
- Was the promise contained in a deed? Bear in mind that it is unlikely that any examiner would set something this straightforward and you need only state 'since this promise is not contained in a deed it can be enforceable only if it is shown to be supported by consideration'.
- Assess whether there is any consideration supplied by the promisee to support the promise made by the promisor. Can this constitute a good (valid) consideration?
- If not, in the context of an alteration promise, assess whether promissory estoppel can operate as a defence to an attempt to go back on that alteration promise. If so, assess the extent of operation of the estoppel, as compared to full enforceability of the promise, and the practical consequences of this for the parties.

### 3.2.3 The key distinction: Formation and alteration promises

Broadly, a promise will be one of two types:

- **A promise on the formation of a contract (a formation promise).** This is where there is no existing contract in place between these parties covering this subject matter, e.g. the promises relating to the bicycle in the Alex and Becky example. Consideration is vital to establish such a contract in English law and requirements are strict.
- **A promise which alters a term of an existing contract between the parties (an alteration promise).** Consideration is also a requirement to enforce such a promise, but the approach to identifying consideration is not as strict and, even if consideration is not present, the promisor may feel bound in practical terms by the alteration promise because of being prevented from going back on it.

p. 51

↩ It is helpful to make this distinction before proceeding in order to consider whether a promise is supported by consideration. We must, however, first consider the earlier steps in the structure to apply when answering problem questions.

### 3.3 Step 1: Identify the promise that one party is seeking to enforce against the other

---

You might be fortunate and the instruction might be explicit, asking you to advise whether a promise can be enforced. It is perhaps more likely that you will be asked simply to 'advise' one of the parties. If so, look at what has gone wrong. Who has not done what they 'promised' to do? Or who has made a promise and is now seeking to avoid being bound by it? The question might tell you that the party allegedly in breach is denying any obligation to pay a sum of money they promised to pay or is trying to recover a sum of money they had earlier promised to forgo. Can they be held to the promise?

#### Practical example

Alex has made an offer to Becky to sell his bicycle to her for £150. Becky has accepted by promising to pay £150 for it. Alex delivers the bicycle but Becky refuses to pay. Advise Alex.

It is Becky's payment obligation that Alex wishes to enforce. Alex therefore needs to establish that the promise is legally binding and enforceable against Becky.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Don't fall into the trap

There are follow-up issues, namely whether the promise has in fact been broken—and the remedies available to the promisee if it has. Therefore, where there are no real issues associated with enforceability since the parties accept that they are bound, the question may be about breach and remedies rather than enforceability. Familiarity with the enforceability issues in this chapter will enable you to identify questions where enforceability is the issue.

## 3.4 Step 2: Did the promisor intend to be legally bound by the promise?

---

### Is there an intention to create legal relations?

p. 52 This might not be a controversial question on the facts, and rarely will more than a paragraph of an answer be devoted to it. With commercial agreements, intention to be legally bound is presumed once a promise has been made. It is only likely to be rebutted where clear words to the opposite effect are used, e.g. honour clauses whereby the parties agree to exclude the courts and rely only on each other's honour (*Rose & Frank Co. v JR Crompton & Bros Ltd* (1925) ↵ and *Jones v Vernon's Pools Ltd* (1938)), or where there is extreme uncertainty of terms so that there is no clear contract (*Baird Textiles Holdings Ltd v Marks & Spencer plc* (2001): lack of certainty as to terms of alleged 'implied' contract confirmed the absence of intention to create legal relations, despite the existence of a commercial relationship). The legal effect of the parties' language and whether there was an intention to create legal relations are assessed objectively (*Mansion Place Ltd v Fox Industrial Services Ltd* (2021): the fact that one of the parties characterized the agreement as a 'gentleman's agreement' was merely a reference to the fact that it was not in writing and did not mean that there was no intention to create legal relations).

In the context of commercial agreements it may be necessary to distinguish an advertising gimmick (having no legal consequences) from a promise intended to be legally binding (e.g. *Carlill v Carbolic Smoke Ball Co.* (1893): commercial agreement and not a mere advertising gimmick because the company had deposited £1,000 with its bank to show its sincerity).

The key question is: would the promise be understood by the reasonable person as constituting a binding offer? See *Bowerman v ABTA Ltd* (1996): if ABTA wished to avoid the reasonable conclusion that its scheme of protection was intended to be legally binding it could have made this clear by the use of express words, but it had failed to do so.

It is more likely that your examiner will slip in a promise made by a relative to the promisee to see whether you spot this as relevant to intention to be legally bound (*a domestic or social agreement*) and can address whether the usual presumption of no intention to be legally bound in that context (*Balfour v Balfour* (1919)) can be rebutted on the particular facts.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

To rebut the presumption in the case of promises by relatives, it seems that there must be evidence of certainty of the terms of the parties' agreement coupled with reliance. Compare, for example, the finding of an intention to create legal relations in *Parker v Clark* (1960) (agreement between relatives with detailed terms and strong reliance on the promises) with the finding of no such intention in *Jones v Padavatton* (1969) (mother and daughter's agreement for funding to study for the Bar exams evidenced reliance but lacked certainty of terms, and there were problems with the duration of the promise).

If the parties to the promise are each other's spouse, it is likely that the presumption will only be rebutted if (i) the promises in the agreement are made when the parties have decided to separate (*Merritt v Merritt* (1970), compare *Balfour v Balfour*) and (ii) the promise is sufficiently certain in its terms (*Gould v Gould* (1970): for 'as long as I can manage it' is not sufficiently certain). ↵

p. 53

#### Revision tip

You should be aware of the reasons why promises made in the domestic context are not generally legally enforceable. Why do we not want such promises being litigated before the courts? In *Balfour v Balfour* (CA) a husband's promise to his wife while living together (although they later separated) was not intended to be legally binding. Atkin LJ explained the policy reason for the unenforceability of promises in the domestic or social context as the avoidance of the opening of the floodgates and nature of such agreements as informal.

#### Don't fall into the trap

**The nature of the agreement is more significant than the identities of its parties.** You should not think that all agreements between relatives would be characterized as domestic or social. If the nature of the agreement is commercial, e.g. concerning a family business, then the fact the parties are brothers would not bring this agreement within the presumption of no intention to be legally bound. The presumption would be that which is applicable to a commercial agreement (*Snelling v John G Snelling Ltd* (1973)). There is also a link between establishing an intention to create legal relations and the need for the agreement to be sufficiently certain (Chapter 2), i.e. an absence of certainty indicates that there was no intention to create legal relations (*Blue v Ashley* (2017), *Pretoria Energy Co. (Chittering) Ltd v Blankney Estates Ltd* (2023)).

## 3.5 Step 3: Was the promise contained in a deed?

---

In a problem question, it is unlikely that the promise will be contained in a deed because, if it was, it would mean that the examiner would not be asking you to demonstrate the existence of consideration to support such a promise.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Definition

A deed is a legally binding document which is expressed as a deed, is validly executed as a deed (i.e. it is signed in the presence of witnesses who attest to the signature), and is delivered as a deed (s. 1(2) and (3) Law of Property (Miscellaneous Provisions) Act 1989).

## 3.6 Step 4: Was any consideration supplied by the promisee to support the promise made by the promisor?

---

### 3.6.1 Identifying consideration

Was the promise broken a *formation* promise, or was it an *alteration* promise?

### 3.6.2 Formation promises

Consideration is whatever is asked for and given in exchange for the promise (Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd* (1915): the price for which the other's promise is bought).

- In the case of a bilateral contract, each party's promise is the consideration to support the promise given by the other. Therefore, parties to a bilateral contract are bound on the exchange of promises although neither has yet undertaken any performance of those promises.

p. 54

#### Practical example

Axel Ltd promises to deliver a consignment of light bulbs to Brandon Ltd by 1 October. Brandon Ltd promises to pay for them on delivery. Axel Ltd is late in delivering the light bulbs. Brandon Ltd wishes to sue for damages for breach of the delivery promise.

Brandon Ltd is seeking to enforce Axel Ltd's delivery promise, and hence Brandon Ltd must establish that it gave consideration in exchange for this promise by Axel Ltd.

Brandon Ltd's consideration is its own promise to pay for the goods on delivery.

- In the case of a unilateral contract, consideration is the performance of the act which was requested in order to earn the reward in the promise. The promise is not capable of being enforced until the act is completed.



### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Consideration need not be adequate

Consideration need not match the value of the promise sought to be enforced.

##### *Chappell & Co. Ltd v Nestlé Co. Ltd (1960)*

Trivial acts (three chocolate wrappers) as part payment for the supply of a record were regarded as part of the consideration because they had been requested. The fact that the wrappers were of trivial economic value and were thrown away was irrelevant as consideration need not be adequate.

#### Practical example

Alex has made an offer to Becky to sell his bicycle to her for £150.

Becky has accepted by promising to pay £150 for it. It is irrelevant to the enforceability of the promise to sell if the bicycle is in fact worth only £100.

#### Consideration must be sufficient

The consideration merely needs to be requested by the other party and be something the law will recognize as consideration.

The following will *not* be a sufficient (good) consideration:

- Sentimental motives (*Thomas v Thomas (1842)*: testator's desire could not be consideration).
- Anything that is not capable of expression in economic terms, e.g. promising to refrain from doing something that you have no right to do anyway (*White v Bluett (1853)*).
- Past consideration (although subject to the previous request device).
- Performance of a duty imposed by law.
- Performance of an existing contractual duty owed to the other party (compare performance of an existing contractual duty owed to a third party, which is good consideration).

p. 55 ↩ If there is already an existing contractual duty owed by the promisor to the promisee, any additional promise will involve an alteration of an existing contract.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Past consideration is not a good consideration

Any act carried out *before* a promise is given is not given in exchange for the promise and therefore cannot be consideration to support that promise (*Re McArdle (1951)*: improvements carried out before the promise to pay for them were not consideration).

#### Revision tip

This is linked to the agreement principle of accepting in response to the offer. Typical problem scenarios tend to involve a unilateral context of a promise of reward. The distinction is that past consideration involves an act followed by a promise whereas a unilateral contract requires a promise followed by the requested act.

There is a device—the ‘previous request’ device—which allows the past consideration rule to be sidestepped.

#### Practical example: previous request device

- (i) Junaid requests that Kate performs a particular act, such as finding customers for a product.
- (ii) This request carries with it an implied promise to pay for these services.
- (iii) Kate finds the customers (performs the requested act).
- (iv) There is a later promise which fixes the amount of Kate’s reward.

There is now a promise (the implied promise at stage 2) that predates the performance of the act and in exchange for which the promise is performed. The later express promise merely fixes the amount of the payment already impliedly promised by Junaid (*Pao On v Lau Yiu Long (1980)* and *Re Casey’s Patents (1892)*).

The crucial question therefore is whether there is an appropriate context for the request to give rise to the implied promise to pay for the services, e.g. this would be unlikely if I am drowning in a lake and ask you to rescue me (domestic or social context) but quite likely in the context of professional services (commercial context) as in the Junaid and Kate example. ↩

p. 56

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Performance of a duty imposed by law is not a good consideration

##### Practical example

James promises Kelly that he will do something which he is already bound by the general law to do. This promise or performance cannot be a good consideration because James is promising to do no more than he is already legally bound to do (*Collins v Godefroy* (1831): promise of payment for giving evidence in court when the promisee had been subpoenaed to attend and give that evidence and was thereby under a legal duty to do so).

#### Going beyond that duty imposed by law will be consideration

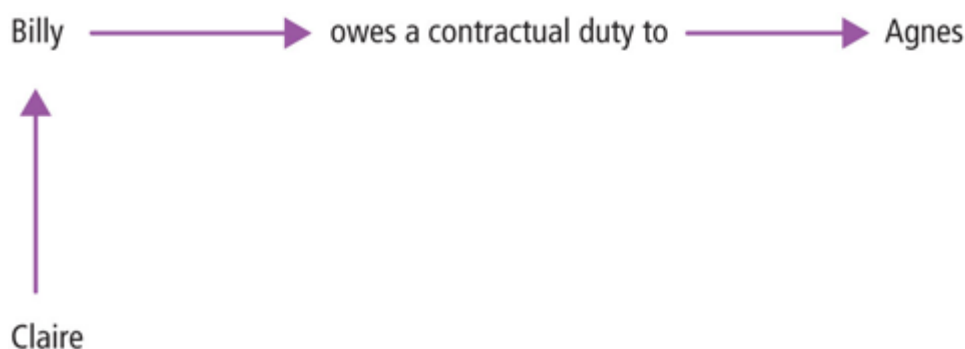
Going beyond the duty is seen as incurring additional detriment and/or giving additional benefit and therefore supplying fresh consideration. See *Glasbrook Bros v Glamorgan CC* (1925) (police services over and above services required by law could amount to consideration to support a promise of specific payment for those services) and *Ward v Byham* (1956) (majority of the CA considered that although the mother of an illegitimate child owed a statutory duty to maintain her child, this mother had provided consideration for a payment of support by promising that the child would be 'well looked after and happy').

Note that in *Ward v Byham* and *Williams v Williams* (1957) Lord Denning had considered that unless it would be contrary to public policy to enforce such a promise, consideration *should be* provided by performing a legal duty as this was a factual benefit to the promisor.

You should compare performance of a legal duty with performance of an existing contractual duty owed to a third party.

#### Performance of an existing contractual duty owed to a third party

Performance of an existing contractual duty owed to a third party is a good consideration (see the illustration in Figure 3.1). ↵



**Figure 3.1** Performance of an existing contractual duty owed to a third party

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Practical example

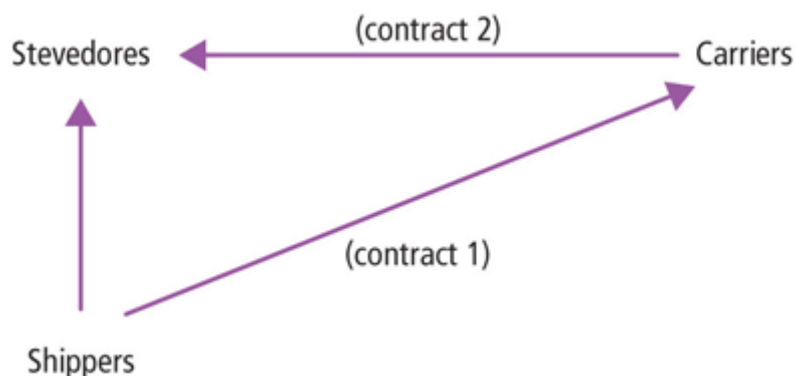
Billy owes a contractual duty to Agnes.

Claire promises Billy that Claire will pay a sum of money to Billy if Billy does what he is already bound to do under his contract with Agnes.

Billy can use the promise or performance owed to Agnes as consideration to support Claire's promise. (In relation to this promise given by Claire to Billy, Agnes is a third party.)

#### *New Zealand Shipping Co. Ltd v AM Satterthwaite & Co. Ltd, The Eurymedon (1975) (PC)*

- The first contract was made between the shippers and the carriers for carriage of machinery. This contract contained a Himalaya clause (exemption from liability for servants, agents, and independent contractors).
- The carriers then made the second contract with the stevedores whereby the carriers employed the stevedores to unload goods at the port of destination.
- The Privy Council recognized a third contract between the shippers and the stevedores, based on the shippers' unilateral promise of exemption made to the stevedores. **The stevedores could enforce this promise of exemption because they had provided consideration by unloading the goods.** This was the performance of an existing contractual duty owed to a third party to this contract, namely to the carrier under the second contract. (See Figure 3.2.)



**Figure 3.2** *The Eurymedon*

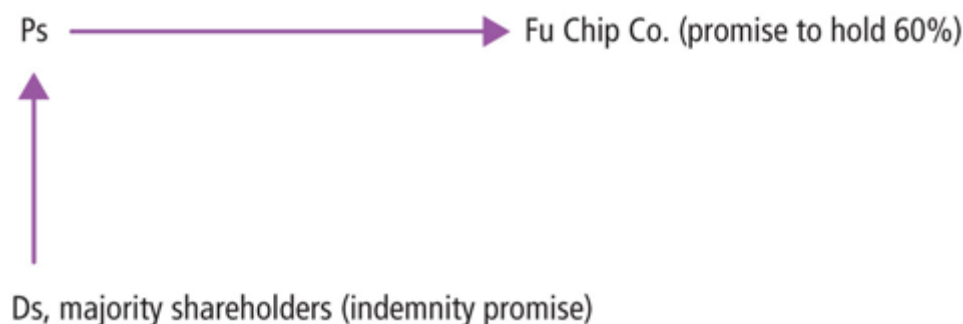
### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

#### ***Pao On v Lau Yiu Long (1980) (PC)***

**FACTS:** The plaintiffs acquired shares in the Fu Chip Co. The defendants were majority shareholders who were concerned about a fall in the value of their holding if the plaintiffs decided to sell these shares. The plaintiffs were persuaded to make a promise to the Fu Chip Co. that they would not sell 60% of their shares for one year. They made this promise at the request of the defendants and on the basis that they would be protected if the share price fell and they were unable to sell this 60% in that period. The defendants later made a promise to indemnify the plaintiffs against such a loss. Was this promise enforceable by the plaintiffs?

**HELD:** The plaintiffs had provided consideration for the indemnity promise by promising the Fu Chip Co. that they would retain the shares. This amounted to promising to perform an existing duty owed to a third party to the indemnity contract, namely to the Fu Chip Co. (See Figure 3.3.)



**Figure 3.3** *Pao On v Lau Yiu Long*

p. 58

#### **Revision tip**

This type of consideration is difficult to draft into a problem question, but it might be there. Look out for a contract between the promisee and someone other than the person whose promise they are seeking to enforce.

### **3.6.3 Alteration promises**

#### **Practical example**

- Peter promises Sidra he will do something he is already bound by a contract with Sidra to do (promises to pay or do more).

### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

---

- Peter promises Sidra he will accept a smaller sum than Sidra owes in full payment of her debt (promises to accept less, which impliedly involves promising not to sue for the balance on the debt).

Can Sidra enforce these alteration promises?

The key difficulty Sidra faces is that such alteration promises, not contained in a deed, must be supported by consideration; and performance of an existing duty owed to the promisor (Peter) is not a good consideration because Sidra has supplied no additional legal benefit to Peter and has incurred no additional detriment. Sidra, as promisee, will have done no more than she was already legally bound to do.

#### Key point

There must be some independent consideration to support alteration promises: *Stilk v Myrick* (1809) (promises to pay more) and *Foakes v Beer* (1884) (promises to accept less).

The approach to enforceability of alteration promises has long been more pragmatic than in the case of formation promises; evidenced e.g. by the development of the doctrine of promissory estoppel to give limited enforceability to alteration promises that had been acted upon even though no independent consideration could be found. The decision of the CA in *Williams v Roffey Bros* made it much easier to establish the consideration necessary to support certain alteration promises.

The legal treatment of alteration promises and the distinction between alteration promises to pay more and alteration promises to accept less has lacked coherence. As a result, examiners often emphasize this distinction, and problem questions involving the enforceability of alteration promises often involve both types of promise in different factual situations. The Peter and Sidra example earlier is a good (simple) illustration.

p. 59

#### **Scenario 1: Alteration promises to pay more than the promisor is contractually obliged to pay**

There is a strong link with the possibility of duress (see Chapter 10) in this scenario. If the promise was obtained as a result of duress it will be voidable and the presence or absence of consideration will be irrelevant in practice, although an examiner would expect you to assess whether there is consideration.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### Practical example

There is an existing contract whereby Ampere Ltd (A Ltd) is employed as the electrical services subcontractor by Builder Ltd (B Ltd), the main building contractor. B Ltd has itself been engaged by Creative plc (C plc), the landowner and developer. A Ltd has agreed to perform the work for a fixed price and to a fixed deadline. This fixed deadline is designed to ensure B Ltd is able to meet the handover date, and if B Ltd is late it will become liable to pay a 'penalty' according to the terms of its contract with C plc. B Ltd discovers that A Ltd is struggling to meet the deadline and voluntarily offers (so no duress) to pay an extra £7,000 to A Ltd to ensure that the original deadline is met. A Ltd promises to meet the deadline and does so; but B Ltd refuses to pay the extra money, claiming A Ltd has not supplied any consideration to support the promise to pay more.

#### Is B Ltd's promise supported by consideration?

A Ltd does have a potential problem here since simply promising to meet the deadline involves A Ltd promising no more than it was already bound to do under the terms of its contract with B Ltd. There is no additional benefit or detriment.

#### *Stilk v Myrick (1809)*

**FACTS:** On a voyage where two of the sailors deserted, the ship's captain had promised the remaining crew extra wages to sail the ship to the home port. The contract terms required this to happen anyway in the event of such minor desertions.

**HELD:** This promise of extra wages was unenforceable because (i) the sailors had done no more than they were contractually bound to do in any event, and/or (ii) the promise was obtained as a result of extortion so that policy dictated that it should not be enforceable.

As explained below, however, A Ltd does have two possible arguments.

#### (i) Argue that it went beyond the scope of the contract terms

If A Ltd (as promisee) can demonstrate additional performance beyond the scope of the terms of the contractual duty, this will constitute fresh consideration to support the promise to pay more.

The first task therefore is to examine the scope of the contract terms to see whether the promisee has exceeded the existing contractual duty (compare *Stilk v Myrick* and *Hartley v Ponsonby (1857)*).

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

p. 60

- ↪ If in the example A Ltd had agreed to improve the quality of the electrical specification for some fittings as part of the alteration promise to pay more, A Ltd would have agreed to suffer an additional detriment and to provide B Ltd with an additional benefit. (It would be irrelevant that the improved fittings cost significantly less than the £7,000 extra being promised since consideration need not be adequate.)

Since there is no evidence of A Ltd agreeing to do anything extra in exchange for the £7,000, A Ltd will need to focus on the second argument.

**(ii) Argue that there is consideration for the promise to pay more in the form of factual (or practical) benefit arising to B Ltd from making the promise to pay more (*Williams v Roffey Bros & Nicholls (Contractors) Ltd*)**

#### ***Williams v Roffey Bros (1991) (CA)***

**FACTS:** A promise was given by the main contractor to pay more money to the subcontractor in order to get the subcontract work completed by the original deadline in the contract with the building owner and thereby avoid payment of a penalty.

**HELD:** The promise was enforceable as supported by consideration since there were factual benefits to the promisor in making such a promise.

The decision is based on the argument that since the doctrine of duress (see Chapter 10) exists to prevent the enforcement of alteration promises extracted under threats, there is no longer a need for such a strict approach to consideration in the alteration context as was evidenced in *Stilk v Myrick* (although that decision was not overruled in *Roffey*).

The factual benefit is the consideration.

#### **Don't fall into the trap**

With *Roffey* consideration, be careful not to state that factual benefits are provided by the promisee. They are not. The factual benefit arises from the making of the promise and not from anything done by the promisee (i.e. it is about benefit rather than detriment—and clearly does not move from the promisee: see Colman J in *South Caribbean Trading v Trafalgar Beheer BV (2004)*). This is controversial (and you can comment on this for extra marks). You should ensure you can state and explain the consideration element accurately, as this will otherwise indicate confusion and a lack of precision.

The most fundamental error is to state that *Roffey* removes the need to show consideration in the case of alteration promises to pay more. The CA's decision indicates quite the opposite.



### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

Thus, the next question is to ask whether, in making the promise to pay more, the promisor (B Ltd in our example) derives any factual benefit. If so, the promise will be enforceable as it will be supported by consideration.

#### p. 61 What constitutes a factual benefit?

In *Williams v Roffey* the factual benefits were identified as:

- the fact the promisor intended to avoid having to make payment for late performance under a penalty clause in its contract with the building owner; and
- the fact the promisor was seeking to avoid the difficulty of finding another subcontractor to complete the work.

#### Revision tip

The practical example is based on *Roffey*, as, it seems, are many problem question scenarios. They are not difficult to spot, i.e. often a construction contract and evidence of difficulties in meeting a contractual deadline with consequences for the promisor. Given the importance of *Roffey*, it is advisable to be familiar with the facts; the fact the promise was found to be supported by consideration (and hence the need to establish consideration to support alteration promises), and the nature of *Roffey* consideration (students often get this last part wrong, which can undermine the effectiveness of the law stated correctly elsewhere).

If, as seems to be the case, factual benefits are judged subjectively by the promisor, consideration ought not to be difficult to establish, as the promisor would not agree to pay more unless they subjectively considered this to be of benefit. It is only if factual benefit is to be viewed objectively that any difficulty is likely to arise in establishing the existence of a binding promise to pay more.

It follows that consideration means something more than the price for which the promise of the other was bought in this context of alteration promises to pay more.

#### Scenario 2: Alteration promises to accept less than the promisee is legally bound to pay (or perform) under an existing contract

#### Practical example

##### Simple debt

Axel Ltd (debtor) owes its supplier Berry Ltd (creditor) £1,000 due on Friday 1 October.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

On 1 October Berry agrees to accept £750 in full payment and promises not to sue for the £250 balance because Axel is having cash flow problems.

Is Berry's promise enforceable or can Berry go back on its promise and sue Axel for the balance of £250?

As with all promises not in deeds, to be enforceable, any promise to alter the terms of a debt contract must be supported by consideration. Since promising to perform an existing duty (paying the debt) is not a good consideration because there is no additional benefit or detriment in law; promising to perform only part of that duty cannot be consideration (*Pinnel's Case* (1602) and *Foakes v Beer*). ↵

p. 62

#### ***Foakes v Beer* (1884) (HL)**

**FACTS:** Existing judgment debt was to be paid by instalments and the creditor therefore promised not to take any enforcement proceedings in relation to the debt. The instalments did not, however, cover the interest on the judgment debt and the creditor sought to go back on this promise and recover that sum.

**HELD:** The creditor could do this because the debtor had not provided any consideration for the promise not to sue on the debt. Part payment of an existing debt was no more than the debtor was already contractually bound to pay.

#### **Does *Williams v Roffey* affect this position? Can a factual benefit to the promisor constitute the consideration?**

The traditional view had been that *Roffey* did not apply to alteration promises to accept less (and only applied to alteration promises to pay more). This was because, in *Foakes v Beer*, Lord Blackburn, in what was effectively a dissenting speech, had appeared to recognize there might well be factual benefits obtained by a creditor in accepting a part payment—but the suggestion that this could amount to good consideration had been rejected by the majority. *Obiter* comments in *Re Selectmove Ltd* (1995) (CA) appeared to accept that the binding precedent of *Foakes* precluded the application of the 'factual benefit as consideration' argument with alteration promises to accept less.

The net effect was a somewhat artificial difference in approach between alteration promises to *pay more* (a factual benefit could be consideration) and alteration promises to *accept less* (a factual benefit could not be consideration).

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (2016) the CA took steps to address this distinction. Much of the analysis by the CA in *MWB* is difficult to reconcile with authority. Regrettably, an appeal to the Supreme Court (SC) failed to provide much-needed clarity. It is convenient to consider the approach of the CA first and then that of the SC.

#### ***MWB Business Exchange Centres Ltd v Rock Advertising Ltd (2016)***

**FACTS:** Rock occupied office premises managed by MWB under a licence agreement. When Rock fell behind with its licence payments, the parties came to an oral arrangement whereby Rock would initially pay less than it was otherwise contractually required to pay. The question was whether this promise to accept less was supported by consideration.

**HELD:** The CA (2016) accepted that part payment of a debt was not *itself* consideration (on the authority of *Foakes*) but took the view that, where a creditor obtained an *additional* benefit, this additional benefit could amount to a factual benefit and good consideration. On the facts, the additional (factual) benefit was found in MWB's retaining Rock as occupant and thus avoiding the consequences of empty and 'unproductive' property. Accordingly, MWB's promise to accept less than it was entitled to was supported by consideration and enforceable.

p. 63 The CA reconciled its conclusion with *Foakes* and *Selectmove* on the basis that the *only* benefit in *Foakes* and *Selectmove* was the mere receipt of the part payment, which could not *itself* be a factual benefit (being no more than the debtor's existing performance obligation). Thus, in the Axel–Berry example, it would not be enough for Axel to claim that payment of some of the debt is preferable to securing none at all to Berry (*Foakes v Beer*). If, however, Berry's decision to accept part payment was because Axel was about to launch a new product and this would create fresh supply opportunities for Berry, acceptance of part payment means Berry's commercial relationship with Axel can continue (when it otherwise might not have done should Berry have taken action to recover the balance)—and this points to an *additional* factual benefit (and good consideration) in relation to the promise to accept less.

The CA's analysis in *MWB* is controversial because it goes against the traditional view that *Foakes* denied the enforceability of alteration promises to accept less, even if a factual benefit could be identified.

The CA's decision in *MWB* was reversed by the SC (2018) but on a different ground, namely that the purported alteration was not binding because a clause in the contract precluded an oral alteration (modification) of the contract. As such, the SC considered it unnecessary to tackle the consideration issue. Lord Sumption recognized that there were 'arguable points of distinction' between *Roffey* and *Foakes* but conceded that the arguments were 'somewhat forced'. This casts doubt on the CA's analysis in *MWB*, but the SC did not overturn the CA on the consideration point. Lord Sumption also suggested *Foakes* was probably ripe for re-examination, but such re-examination should be left for a future case.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

After the SC's judgment in *MWB, Kerr J in Simantob v Shavleyan (t/a Yacob's Gallery) (2018)* considered himself bound by *Selectmove* and concluded, consistent with *Foakes*, that a factual benefit could not amount to consideration in the part payment of a debt context.

#### Other recognized forms of consideration to support Berry's promise

There are other recognized ways (apart from via factual benefits) to provide the necessary independent consideration, so that Berry would be bound by its promise and unable to sue for the £250 balance of the debt:

- Paying a smaller sum *in advance* at the creditor's (Berry's) request (additional benefit/detriment; this is in fact the *ratio* in *Pinnel's Case*).

#### Practical example

If Berry had asked Axel to pay £750 in full satisfaction on 15 September when the full debt was repayable on 1 October then Axel would provide consideration for Berry's promise to forgo the balance.

- Payment of a smaller sum *at a different place* at the creditor's (Berry's) request (additional benefit/detriment).

If Berry has asked Axel to pay £750 in full satisfaction on 1 October but in Birmingham when the full debt was repayable in London on that date, this would be a detriment to Axel; and because Berry requested it, it would be a benefit to Berry.

p. 64

- Payment in kind (a chattel) which is *accepted by Berry (the creditor)* (no enquiry into adequacy of the consideration; it is consideration because the creditor accepts it).

If Berry agrees to accept Axel's company van (worth £750) in full satisfaction of the £1,000 debt.

Berry would also be bound (but not on the basis of consideration):

- where its promise is part of a composition agreement with Axel's other creditors, e.g. each agrees to take 75p in the £; or
- where the part payment of £750 is made by Vankeet Ltd (a third party) since this prevents Berry from suing Axel for the balance (*Hirachand Punamchand v Temple (1911)*).

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

This seems to be because it would be a fraud on the third party to accept the *smaller sum in full satisfaction* and then promptly sue the debtor for the balance. Examiners like to slip in a part payment by a third party, e.g. by a parent or other relative.

## 3.7 Step 5: Promissory estoppel

---

Is it possible to enforce an alteration promise even where there is no consideration to support it?

p. 65 There may be limited enforceability using the equitable doctrine of promissory estoppel. ↩

### Don't fall into the trap

**Failing to address the consideration question and rushing into promissory estoppel:** if the alteration promise to accept less is not supported by consideration, or not otherwise enforceable, we then need to consider whether it is possible for an alteration promise to be enforceable despite the absence of consideration. Always try to establish the existence of consideration first, since its existence will mean the promise is fully and completely enforceable. The temptation may be to rush into promissory estoppel, particularly if the question involves a landlord agreeing to accept less rent than the tenant owes, but this presents a lower form of enforceability in English law and provides the promisee with limited protection.

**Some issues of scope and practicality:** if the promise is made on the formation of a new contract, it must be supported by consideration (unless contained in a deed). **We are only concerned here with alteration promises to existing contracts.**

### Definition

**Promissory estoppel** is an equitable doctrine designed to prevent the promisor going back on its promise where this would be inequitable (unfair) because the promisee has relied on it.

Where the parties have an existing legal relationship (*Umrish Ltd v Gill (2020)*) and party A promises party B that a right which party A has under the contract will not be fully enforced, intending party B to rely on that promise, and party B does rely on the promise, the promisor (party A) cannot go back on that promise where it would be inequitable to do so.

To this extent promissory estoppel gives limited enforceability to (alteration) promises.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### ***Central London Property Trust Ltd v High Trees House Ltd (High Trees House) (1947) (Denning J)***

**FACTS:** The landlords of a block of flats promised to reduce the rent charged to tenants during the bombing in the Second World War when the tenants were unable to sublet. The reduced rent was paid until September 1945 when the landlords claimed to receive the full rent.

**HELD:** Despite the fact that the tenants had provided no consideration to support the promise to accept less rent, the landlord could not go back on that promise, because of the tenants' reliance on it, until it was no longer inequitable to do so. *Obiter:* the landlord was unable to recover the balance on the rental payments while this estoppel operated.

#### **Defence only**

In English law promissory estoppel operates purely as a defence by the promisee to an action by the promisor where the promisor seeks to go back on this promise, e.g. Berry attempts to go back on its promise to Axel to accept the £750 as discharging the debt and not claim the £250 balance.

In English law, promissory estoppel cannot be used as means by which to create fresh rights (*Combe v Combe* (1951)). This is sometimes expressed in terms that the doctrine is a 'shield not a sword'.

#### ***Combe v Combe (1951) (CA)***

Husband's promise to pay ex-wife was not supported by consideration, and promissory estoppel could not apply on the facts because (i) this was a formation issue rather than an alteration to an existing contract and (ii) in any event, promissory estoppel operates as a defence where a promisor goes back on a promise not to sue. It could not be used to create fresh rights for the ex-wife.

#### **Revision tip**

Examiners may well formulate questions involving consideration, alteration promises, and promissory estoppel around the factual scenarios in *Roffey*, *MWB*, and *High Trees*. You are advised to be familiar with these facts and decisions.

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

#### When will the promissory estoppel doctrine operate?

This depends on identifying the conditions for its operation:

- (i) **There must be a clear promise that *existing* legal rights will not be fully enforced.** The context is alteration promises since the doctrine applies to promises which forgo or amend existing legal rights.
- (ii) **The promise must be intended to be binding and to be acted upon and it must in fact be acted upon.** The essential element is reliance, but it need not be detrimental reliance. *WJ Alan & Co. Ltd v El Nasr Export and Import Co. (1972)*: need to have been led to act differently.
- p. 66 (iii) **It must be inequitable to allow the promisor to go back on the promise.** This is easier to establish where there has been detrimental reliance: *The Post Chaser (1982)*.

*D & C Builders Ltd v Rees (1966)*: it will not be inequitable to go back on a promise where that promise was not freely given (i.e. if it was extracted by duress—see Chapter 10).

#### *D & C Builders Ltd v Rees (1966) (CA)*

**FACTS:** The defendant owed plaintiff builders £482. The defendant was taken to know that the plaintiff was in financial difficulties when the defendant offered £300 in full settlement. The plaintiff accepted the smaller sum and then sought to recover the balance.

**HELD:** There was no consideration to support the plaintiff's promise to accept the smaller sum. Lord Denning considered that promissory estoppel could not operate on these facts since it was not inequitable for the plaintiff to go back on a promise that was not freely given.

#### What is the effect of promissory estoppel? Does it have the same effect as the presence of consideration?

The next question to consider is the scope of the estoppel and its duration. **Promissory estoppel suspends legal rights. Unlike consideration, it does not generally extinguish them.** Where a promise to accept less is supported by consideration, the entire debt will be discharged; whereas promissory estoppel merely suspends the legal right to full payment while the estoppel conditions operate (or until the estoppel comes to an end), i.e. when it is no longer inequitable to go back on the promise.

#### Practical example

It follows that, if there is not any consideration, Berry could go back on its promise to accept the £750 in full satisfaction if, two days later, it learnt that Axel had just received a significant sum of money.



### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

---

The result of *obiter* comments in **High Trees**, however, is that periodic payments (as part of a continuing obligation to pay, e.g. rental) which were made while an estoppel operated will be extinguished so that it is not possible to sue for the balance on the individual rent payments. Once the promissory estoppel ends, however, the general right to full payment will revive, i.e. for the future the full rent will be payable each month or quarter.

#### How is the promissory estoppel brought to an end? Reasonable notice given and notice period has expired

This issue is complicated by the facts of **High Trees** since the estoppel in that case was considered to turn on the bombing in the Second World War and so came to an end automatically when the conditions under which the estoppel operated ceased to exist. The HL in **Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd (1955)**, however, revived the strict legal rights only after the promisor had given reasonable notice of an intention to do so and that notice had elapsed.

p. 67     ↵ It seems safest to demonstrate the giving of reasonable notice as a means of showing fairness and that it is no longer inequitable to go back to the strict contractual rights rather than assuming that the estoppel conditions have come to an end. In any event, court action would probably be required to enforce the strict legal position so that it would be necessary to initiate proceedings. This is exactly what happened in **High Trees**.

## Key debates

---

### 1. Consideration requirement and alteration promises

---

Should it be necessary to establish consideration to support alteration promises? Compare the different approaches to avoid it and their legal credentials, e.g. the pragmatism behind **Roffey** and promissory estoppel:

- **Ma Hongjin v SCP Holdings Pte Ltd (2020)** (Court of Appeal of Singapore reaffirmed the need for consideration in the alteration context).
- Chen-Wishart, 'Consideration, Practical Benefit and the Emperor's New Clothes' in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995).
- Chen-Wishart, 'A Bird in the Hand: Consideration and Contract Modification' in Burrows and Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010).

There is also the difficulty presented by the absence of coherent principle surrounding the factual benefit concept in the alteration context:

- Shaw-Mellors, 'Contractual Variations and Promises to Accept Less: Pragmatism in the Court of Appeal' (2016) 8 JBL 696.



### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

---

- Shaw-Mellors and Poole, 'Recession, Changed Circumstances, and Renegotiations: The Inadequacy of Principle in English Law' (2018) 2 JBL 101.

Should consideration be replaced by 'reliance' in this context? Reliance-focused remedial approaches include:

- Atiyah's arguments on reliance (debate between *Atiyah and Treitel*).
- Atiyah, 'Consideration in Contracts: A Fundamental Restatement' in *Essays in Contract Law* (Oxford University Press, 1990).
- Treitel, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 Australian LJ 439.
- **§ 90 of the American Restatement of Contract (2d):**

A promise which the promisor should *reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance* is binding if injustice can be avoided only by enforcement of the promise. *The remedy granted for breach may be limited as justice requires.*

p. 68

- ↪ Although this is based on reliance, the remedy may not equate to full enforcement of the promise:
- ***Antons Trawling Co. Ltd v Smith* (2003)** (Court of Appeal of New Zealand): alteration promise had been acted upon (reliance) and was enforceable on that basis.

## 2. The limitations and future of promissory estoppel in English law—and the link to perceived deficiencies with *Roffey*

---

### Limitations of promissory estoppel in English law:

- It operates only in the context of alteration promises (this is not as controversial as the other two limitations).
- **It operates only as a defence and does not create fresh rights** (in contrast to promises made under the distinct doctrine of *proprietary estoppel*).
- The exact meaning of its suspensory effect is unclear.

### ***Waltons Stores (Interstate) Ltd v Maher* (1988) (High Court of Australia)**

#### **The Australian approach: avoiding unconscionability.**

**FACTS:** The plaintiff sought **specific performance** of a lease on the basis that it had been encouraged by the defendant to believe the lease would be executed and so had acted to its detriment in demolishing an existing structure on the land.

### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

**HELD:** It was unconscionable to have adopted a course of action encouraging this detrimental conduct and therefore the defendant was estopped from denying that it was bound.

This estoppel therefore operated although there was no pre-existing contractual relationship between the parties, and it also operated as a cause of action enabling the plaintiff to enforce the promise, thereby creating fresh rights for the plaintiff.

This principle has far greater flexibility than the English doctrine of promissory estoppel since:

- It uses a general category of estoppel.
- It enables the courts to take ‘sufficient action’ to prevent the detriment resulting from the unconscionable conduct. (Compare with consideration, the existence of which allows for full and direct enforcement of a promise.)
- It was applied in **Walton Stores** to enable direct enforcement of a promise rather than as a defence but also to create liability where there was no existing relationship between the parties (i.e. formation issue).

The **Walton Stores** approach—general category of estoppel and no limitation that estoppel cannot create new rights for the promisee—was attempted (unsuccessfully) before the CA in **Baird Textiles v Marks & Spencer**.

Arguments based on extending estoppel appear to be favoured due to the questions which arise when **Roffey** is subjected to scrutiny. While that decision might be greeted favourably as a pragmatic solution to the enforceability of alteration promises, it can be criticized as ‘invented consideration’ (i.e. the consideration does not move from the promisee, and it is not easily reconciled with **Stilk v Myrick**).

p. 70

## Key cases

Case	Facts	Principle
<b>Pao On v Lau Yiu Long (PC)</b>	When Ps acquired shares in a company its majority shareholders wanted to protect themselves against a fall in value of shareholding if shares all sold at once. At request of Ds and on basis of some form of protection being provided by Ds, Ps promised the company that they would not sell 60% of their shares for one year. Ds later made a promise to indemnify Ps against a loss in not being able to sell. Ps wanted to enforce this promise. Held: it was not a promise extracted as a result of duress, and Ps had provided consideration for it through their promise to the company (promising to perform an existing duty owed to a third party—the company). Consideration was not past consideration since the promise had been made following	This is an important case discussing: <ul style="list-style-type: none"><li>• previous request device as a means of avoiding past consideration;</li><li>• consideration in the form of promising to perform an existing contractual duty owed to a third party;</li><li>• ingredients for a claim in duress.</li></ul>

### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

Case	Facts	Principle
	a request by Ds which carried with it a promise of protection. The later promise of indemnity merely fixed the method of protection.	
<b><i>Stilk v Myrick</i></b>	On a voyage where two of the sailors deserted, the ship's captain had promised the remaining crew extra wages to sail the ship to the home port. But the contract terms required the sailors to sail the ship anyway if there were such minor desertions. The promise was unenforceable since (i) the sailors had done no more than they were contractually bound to do in any event, and/or (ii) the promise was obtained as a result of extortion so that policy dictated that it should not be enforceable.	Alteration promise to pay more: need to show consideration to support that promise and the general rule is that the consideration cannot be performing a contractual duty already owed to the same promisor.
<b><i>Williams v Roffey Bros (CA)</i></b>	Promise by main contractor to pay more money to the subcontractor in order to get the subcontract work completed by the original deadline in the contract with the building owner and thereby avoid payment of a penalty. The promise was enforceable as supported by consideration since there were factual benefits to the promisor in making such a promise.	Alteration promise to pay more—avoiding the <b><i>Stilk v Myrick</i></b> restriction where the promisor's promise gives rise to factual benefits to the promisor (and so provides consideration to enforce the promise). This consideration is not provided by anything done by the promisee.
<b><i>Foakes v Beer (HL)</i></b>	Existing judgment debt was to be paid by instalments and creditor therefore promised not to take any enforcement proceedings in relation to the debt. The instalments did not cover the interest on the judgment debt, however, and the creditor went back on this promise to recover that sum. The creditor could do this because the debtor had not provided any consideration for the promise not to sue on the debt. Part payment of an existing debt was no more than the debtor was already contractually bound to pay.	Alteration promise to accept less than the debt owed: needs to be supported by consideration, and this consideration is not provided by performance of existing contract, i.e. by making a part payment of the existing debt. More is required, e.g. payment earlier at creditor's request.
<b><i>MWB Business Exchange Centres Ltd v Rock Advertising Ltd (CA), (SC)</i></b>	Licence agreement by which Rock occupied property managed by MWB. Rock fell behind on payments and MWB promised to accept a smaller sum from Rock (the agreement being that Rock would later pay the balance).	CA held MWB's promise to accept less was supported by consideration (applying <b><i>Roffey</i></b> factual benefit principle). Although payment of a smaller sum could not itself be consideration ( <b><i>Foakes</i></b> ), MWB received the additional benefit of retaining Rock as occupier of the property, thus avoiding having an empty and unproductive property. This amounted to a separate factual benefit beyond the mere receipt of

### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

Case	Facts	Principle
		payment, which was good consideration to support the promise to accept less.  The SC reversed the decision on a different ground. The CA's analysis and application of <b>Roffey</b> was not subjected to scrutiny but was not overturned.
<b>Central London Property Trust Ltd v High Trees House Ltd</b>	Landlords of block of flats promised to reduce the rent charged to tenants during the bombing in the Second World War when the tenants were unable to sublet. The reduced rent was paid until September 1945 when the landlords claimed to receive the full rent. Despite the fact that the tenants had provided no consideration to support the promise to accept less rent, the landlord could not go back on that promise because of the tenants' reliance on it until it was no longer inequitable to do so. <i>Obiter</i> : the landlord was unable to recover the balance on the rental payments while this estoppel operated.	Promissory estoppel as a defence to prevent a promisor from going back on his promise to forgo legal rights (accept less than it is owed) where the debtor has acted on that promise, and it would be unfair to do so.
<b>D &amp; C Builders Ltd v Rees (CA)</b>	D owed P builders £482 and was taken to know that P was in financial difficulties when D offered £300 in full settlement. P accepted the smaller sum and then sought to recover the balance. CA held that there was no consideration to support P's promise. Lord Denning considered that promissory estoppel could not operate on these facts since it was not inequitable for P to go back on a promise that was not freely given.	It is not unfair to go back on a promise to forgo legal rights and accept less than is owed where that promise was obtained by duress. Duress will prevent the promissory estoppel defence from operating as the promise must be freely given.

p. 71

## Exam questions

### Problem question

In February, Zoe agreed to lease a fitness studio and beauty salon from Harcourt Investments for £5,000 per month. The lease was to run for three years, commencing in May.

In March, Zoe's aunt, Audrey, sent a letter to Zoe promising to give Zoe £15,000 to help her new business venture. On the strength of this promise, Zoe ordered £10,000 of new fitness equipment from Jaymark Fitness. On 1 April, when Zoe received an invoice from Jaymark, she asked Audrey for the promised £15,000, but Audrey told her she could no

### 3. Enforceability issues

#### Intention to be bound, consideration, and promissory estoppel

---

longer afford this sum and would give her £6,000 instead. Zoe informed Jaymark that she could not pay the £10,000 owed but could manage £6,000. Jaymark agreed, reluctantly, to accept the £6,000 in full and final satisfaction of the debt.

The studio and salon were due to open for business on 1 July and Zoe engaged a firm of builders, Longshots, to carry out some internal renovation work for which planning permission had been granted. On 3 June, it became apparent that Longshots would not complete by its contractual deadline of 25 June, so Zoe offered a £1,000 'bonus' to get the work completed by that date.

In early June, Harcourt Investments learnt that Zoe was experiencing financial difficulties and offered to reduce her rent on the studio and salon to £4,000 per month 'to help out at the start'.

Zoe's business opened on time on 1 July and is proving to be a great success. In August, Harcourt told Zoe to start paying £5,000 per month in rent again from that month onwards and also demanded the balance for June and July.

Advise Zoe.

**Head to the Outline Answers** <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-3-outline-answers-to-essay-questions?options=showName> **section of the online resources for help with this question.**

### Essay question

---

The law governing the principles of consideration in the context of alterations to existing contracts is without clarity of principle and in urgent need of reform.

To what extent do you agree?

### Online Resources

---

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-3-outline-answers-to-essay-questions?options=showName>
- Interactive key cases <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-3-interactive-key-cases?options=showName>
- Multiple-choice questions <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-3-multiple-choice-questions?options=showName>

You can also find an interactive glossary <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-interactive-glossary?options=showName> on our online resources.

Additionally, to help you focus your revision, there is also a diagnostic test <https://iws.oup.support.com/ebook/>

### 3. Enforceability issues

Intention to be bound, consideration, and promissory estoppel

---

[access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName](https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName)> available. For general advice on your revision and exam technique, you can listen to our podcast <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-audio-podcast?options=showName>>, or alternatively, you can access the transcript here <https://iws.oup.support.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-podcast-transcript?options=showName>>.

© James Devenney & Adam Shaw-Mellors 2024

#### Related Books

View the Essential Cases in contract law

#### Related Links

Test yourself: Multiple choice questions with instant feedback <https://learninglink.oup.com/access/content/poole-devenney-shaw-mellors-concentrate5e-student-resources/poole-devenney-shaw-mellors-concentrate5e-diagnostic-test>>

#### Find This Title

In the OUP print catalogue <https://global.oup.com/academic/product/9780198904618>>