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5. Consideration and Promissory Estoppel

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Abstract

The doctrine of consideration is one feature of English contract law that readily distinguishes it from the law of contract in civilian jurisdictions. Its essence is that a promisee cannot enforce a promise unless he has given or promised to give something in exchange for the promise, or unless the promisor has obtained (or been promised) something in return. In other words, there must have been a bargain between the parties. This chapter analyses the current scope of the doctrine of consideration, particularly the rule that consideration must be sufficient but need not be adequate; the pre-existing duty rule and the question whether a promise to pay, or part payment of a debt, is good consideration for the discharge of the entire debt; and the rule that past consideration is not good consideration. It also examines the role of promissory estoppel in contract cases. An estoppel gives (at least limited) effect to a promise that would otherwise be unenforceable (it may be used as a shield but not a sword), thus the effect of an estoppel may be to supplement, or even supplant, the doctrine of consideration. The chapter concludes with a brief discussion of the future of the doctrine of consideration and, in particular, draws on the critique of consideration developed by Professor Atiyah.

Keywords: English contract law, doctrine of consideration, existing duties as consideration, past consideration, promissory estoppel, estoppel as a shield not a sword

Central Issues

1. The doctrine of consideration is a feature of English contract law that is not to be found in civilian legal systems. It is now a very technical doctrine and it has been the subject of considerable criticism.
2. The essence of the doctrine of consideration is that a promisee cannot enforce a promise unless he has given or promised to give something in exchange for the promise or unless the promisor has obtained or been promised something in return. In other words, there must have been a bargain between the parties.
3. The doctrine of consideration can be explained in outline in the form of three rules: (i) consideration must be sufficient but need not be adequate, (ii) consideration must not be past, and (iii) consideration must move from the promisee.
4. There is an important conflict at the heart of the rules that make up the doctrine of consideration and that relates to the test to be applied when seeking to identify the existence of a benefit obtained or a detriment suffered by the contracting parties. The Court of Appeal in *Williams* v. *Roffey Bros* looked for the existence of a practical benefit, whereas the House of Lords in *Foakes* v. *Beer* applied a much stricter test that focused on whether the promisee had, as a matter of law, received a benefit. The relationship between these two cases is a major part of this chapter.
5. A promise which is not supported by consideration may nevertheless be given legal effect as a result of the operation of an 'estoppel'. 'Estoppel' is not a word that is used in everyday language and it is a concept that is difficult to explain, largely because it appears to defy classification. In essence, the effect of an estoppel may be to prevent a party from going back on his promise when the person to whom the promise has been made has acted on it to his detriment. However, the scope of estoppel is limited by a number of rules, the most important of which is that estoppel cannot create a cause of action. The scope of these rules, the criticisms made of them, and the justifications offered in support of them are considered in this chapter.
6. Finally, the chapter concludes with a brief discussion of the future of the doctrine of consideration and, in particular, it draws on the critique of consideration developed by Professor Atiyah.

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5.1 Introduction

One feature of English contract law that readily distinguishes it from the law of contract in civilian jurisdictions is the doctrine of consideration. As we shall see, the scope of the doctrine is the subject of some debate. The orthodox view is that consideration is about reciprocity or bargains. In order to be entitled to enforce a promise, a promisee must have given something in return for the promise. The fundamental

distinction is therefore between a bargain and a promise to make a gift. The former is enforceable, while the latter is not unless it is made in a deed (on deeds see further Chapter 6). This conception of consideration has been challenged by a number of writers, in particular by Professor Atiyah. We shall return to these criticisms at the end of the chapter after we have examined the current scope of the doctrine of consideration. But it is necessary first of all to outline the principal criticisms that have been levelled against the doctrine because they ought to be borne in mind when reading the cases that seek to determine its scope.

Five principal criticisms can be levelled against the doctrine of consideration. The first is that it is too narrow in its scope and so fails to give effect to promises that ought to have legal effect. Thus Professor Dawson has argued (*Gifts and Promises* (Yale University Press, 1980), pp. 3–4) that:

> even the most embittered critics of bargain consideration do not really object to the enforcement of bargains. The objection has been to its transformation into a formula of denial, a formula that would deny legal effect to most promises for which there is nothing given or received in exchange.

Secondly, the doctrine has become extremely technical, a point evidenced by the fact that the account of the doctrine contained in the current edition of Treitel's classic textbook on the law of contract exceeds 100 pages. Thirdly, it has been argued that the doctrine is divorced from commercial reality. It is much harder to evaluate the merits of this claim because the doctrine is rarely in issue in modern commercial practice. The reason for this is that it is a relatively simple matter for a lawyer to ensure that consideration is provided. The law does not, in general, inquire into the adequacy of the consideration that has been supplied (see further 5.2.1). As long as some consideration has been provided the requirements of the doctrine are satisfied. Thus one can find transactions, reported in the media, of major businesses being sold for £1. In such cases the company that is acquired is usually debt-ridden, and the reason for the payment of £1 is simply to ensure that consideration has been supplied for the promise to sell the company. Where there is doubt about the presence or absence of consideration, lawyers might make use of a deed and so avoid the problem, because a promise contained in a deed is enforceable whether or not consideration has been supplied (see further 6.3.1). In this respect the doctrine of consideration is not of major significance in modern commercial transactions. On the other hand, there are some commercial transactions which are difficult to explain in terms that are consistent with the requirements of the doctrine of consideration (an example being, perhaps, the letter of credit, on which see 5.4). Fourthly, it is extremely difficult to reconcile the doctrine of consideration with any of the modern theoretical models of contract law (see SA Smith, *Contract Theory* (Oxford University Press, 2004), pp. 215–233). For example, if contract law is based upon the promise principle or upon the will of the parties, why insist upon the presence of consideration in order to render the promise enforceable? Fifthly, it has been argued that the doctrine of consideration is over-broad and that the work that is currently done by the
p. 149 doctrine ↵ could be done more effectively by more specific doctrines such as duress, unconscionability, estoppel, and intention to create legal relations which can target with greater precision the reason for the law's refusal to give effect to the promise that has been made. But it would not be true to say that the doctrine of consideration is devoid of support. Thus it has been stated (M Chen-Wishart, 'Reciprocity and Enforceability' in M Chen-Wishart, L Ho, and P Kapai, *Reciprocity in Contract* (University of Hong Kong, 2010) p. 10) that:

> the consideration doctrine is not an embarrassment to the common law. It recognises and expresses our deep instinct for reciprocity; an instinct which enhances co-operation and division of labour, while preserving social equilibrium. It represents the terms of engagement between equals who are deserving of respect. By requiring the reciprocation to be explicit, the consideration doctrine keeps the state away from the private domain where external coercion would distort the practice of gift-giving and so destroy much which is valuable about it.

At this point it is not necessary to reach a final conclusion on the relative strengths and weaknesses of these arguments. It suffices to note that consideration is a doctrine that is under some pressure. While consideration may be said to be a distinctive feature of English contract law, it is probably true to say that it is a feature that many English contract lawyers could live without. Thus Lord Goff stated in *White* v. *Jones* [1995] 2 AC 207, 262 that 'our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration'. But, while the doctrine may 'not be very popular nowadays … [it] still exists as part of our law' (*Johnson* v. *Gore Wood & Co (A Firm)* [2001] 1 All ER 481, 507 per Lord Goff) and, as such, it must be applied by the courts.

The principal part of this chapter is devoted to an analysis of the current scope of the doctrine of consideration. This analysis will be followed by a discussion of the role of estoppel, in particular the role of promissory estoppel, in contract cases. The reason for including estoppel at this stage is that the effect of an estoppel is to give (at least limited) effect to a promise that would otherwise be unenforceable. Thus the effect of an estoppel may be to supplement, or even supplant, the doctrine of consideration. It is therefore necessary to consider the scope of estoppel alongside the doctrine of consideration before embarking upon a critical evaluation of the role of the doctrine of consideration in English contract law.

5.2 Consideration: Its Scope

Conventional accounts of the doctrine of consideration start with the classic definition of the doctrine adopted by Lush J in *Currie* v. *Misa* (1875) LR 10 Ex 153, 162. He stated:

> A valuable consideration, in the sense of the law, may consist either 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.

This definition has been amplified in the following terms (Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 3-004):

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> The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment ↵ to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. These statements relate to the consideration *for the promise of each party* looked at separately. For example, the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price. It is quite irrelevant that the seller has made a good bargain and so gets a benefit from the performance of the contract. What the law is concerned with is the consideration *for a promise*—not the consideration *for a contract*.

Two points should be noted about this definition, as amplified by Treitel. The first is that the requirement of consideration can be satisfied by the presence of benefit *or* detriment. The law does not generally insist that both elements be present (although frequently they are). The second point concerns the use of the phrase 'in the sense of the law' in the judgment of Lush J. This suggests that it is for the law to decide whether or not consideration has been supplied. This has in fact proved to be an issue of some controversy in the cases. While it is no doubt true to say that, in the final analysis, it is for the courts to decide whether or not consideration has been provided, the courts on a number of occasions have given considerable weight to the preferences of the parties to the contract when deciding whether or not something of value has been given or promised (see further 5.2.1).

The rules that make up the doctrine of consideration can be set out in the form of three principal rules. The first is that consideration must be sufficient but need not be adequate. This rule can be further broken down into a number of sub-rules and has proved to be particularly problematic in the case where the consideration is alleged to take the form of a promise to perform or the performance of a pre-existing duty. The second rule is that past consideration is not good consideration, and the third is that consideration must move from the promisee. Each rule requires further analysis, but most attention will be given to the first rule.

5.2.1 Consideration Must be Sufficient

The rule that consideration must be sufficient but that it need not be adequate requires that *something* of value must be given in return for a promise but that something need not be an adequate return. In other words, the doctrine of consideration requires the existence of a bargain but it does not demand that the bargain be a good one. The parties, and not the doctrine of consideration, are in general the arbiters of what constitutes a good or a bad bargain. However, it does not follow from the fact that the doctrine of consideration is not interested in the fairness of the bargain that the law of contract is similarly disinterested. A number of contractual rules and doctrines, such as duress and undue influence, are concerned with the fairness of the bargain that has been concluded by the parties (these rules are discussed in Chapters 18–20).

What does it mean to say that consideration must be 'sufficient'? Who decides whether or not the consideration is 'sufficient'? Is it the parties or is it the court? In answering these questions it is useful to distinguish the case where the alleged consideration takes the form of a promise to pay money for a service or a product from the case where the promise takes the form of a promise to provide some non-monetary benefit.

p. 151 ↵ Where the promise is one to pay money for a service or a product (here used to encompass both goods and land) the law does not generally encounter any difficulty. The example has already been given (see 5.1) of a contract for the sale of a business. In such a case a promise to pay £1 for the business does constitute the provision of sufficient consideration. Such consideration is often described as 'nominal consideration'. The label 'nominal' should not be taken to imply that the law regards such transactions with suspicion. As Professor Atiyah has observed ('Consideration: A Restatement' in *Essays on Contract* (Oxford University Press, 1986), p. 194), a 'promise for nominal consideration is just about the clearest possible indication that the promisor intended his promise seriously and intended to give the promisee a legally enforceable right'. The reason for this is that the parties will generally have been advised by lawyers to make £1 payable precisely in order to render the agreement legally enforceable. Of course, if the promise to sell the business for such a small amount of money has been extracted by pressure that amounts in law to duress (on which see 5.2.2.3.2.3) then the promise may not be enforceable but, in the absence of such a vitiating factor, the promise is enforceable. A distinction is sometimes drawn between 'nominal consideration' and consideration which is 'inadequate' but, for most purposes, the distinction does not matter.[1]

The issue is more difficult where the alleged consideration takes a form other than a promise to pay a sum of money. Here we encounter the question whether it is for the courts or the parties to determine what constitutes sufficient consideration. Take an extreme example. Suppose that A promises to pay B £5,000 if B promises in return to stand on one leg for 90 seconds. Does B provide consideration by promising to stand on one leg for 90 seconds? The courts have generally adopted a liberal approach to the identification of consideration and cases can be found in which trifling or apparently insignificant acts have been held to constitute consideration, as can be seen from the following case.

Chappell & Co Ltd v. The Nestlé Co Ltd
[1960] AC 87, House of Lords

The plaintiffs were the owners of the copyright in a musical work entitled 'Rockin' Shoes'. The defendants offered to supply gramophone records which included Rockin' Shoes to anyone sending in a postal order for 1s 6d together with three wrappers from bars of Nestlé milk chocolate. The plaintiffs alleged that the manufacture and sale of this record amounted to an infringement of their copyright in the song. The defendants relied by way of defence on section 8 of the Copyright Act 1956 which, in essence, permitted the making of records of a musical work that the manufacturer intended to sell by retail provided that he gave the owner of the copyright prior notice and paid a royalty of 6¼ per cent of the 'ordinary retail selling price' of the record. The defendants notified the plaintiffs that the ordinary retail selling price of the records would not be greater than 1s 6d. The plaintiffs submitted that this notice did not satisfy the requirements of section 8 because it did not take into account the three wrappers from the chocolate bars. They accordingly sought an injunction
p. 152 to restrain the defendants from infringing their copyright. The defendants denied that the wrappers ↵ were part of the consideration and they pointed to the fact that the wrappers, when received, were worthless and were in fact thrown away. The House of Lords held by a bare majority (Viscount Simonds and Lord Keith of Avonholm dissenting) that the sending of the wrappers was not simply a condition which had to be fulfilled before a copy of the record could be obtained: it was part of the consideration for the sale of the record. The defendants had therefore not complied with the requirements of section 8 and the plaintiffs were entitled to an injunction restraining the defendants from infringing their copyright.

Viscount Simonds

[dissenting]

In my opinion, my Lords, the wrappers are not part of the selling price. They are admittedly themselves valueless and are thrown away and it was for that reason, no doubt, that Upjohn J [the trial judge] was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than that someone, by no means necessarily the purchaser of the record, has in the past bought not from Nestlés but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure speculation. The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the manufacturers.

I conclude, therefore, that the objection fails, whether it is contended that (in the words of Upjohn J) the sale 'bears no resemblance at all to the transaction to which the section … is pointing' or that the three wrappers form part of the selling price and are incapable of valuation. Nor is there any need to take what, with respect, I think is a somewhat artificial view of a simple transaction. What can be

easier than for a manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that? It may be assumed that the manufacturer's motive is his own advantage. It is possible that he achieves his object. But that does not mean that the sale is not a retail sale to which the section applies or that the ordinary retail selling price is not the price at which the record is ordinarily sold, in this case 1s. 6d.

Lord Reid

To determine the nature of the contract one must find the intention of the parties as shown by what they said and did. The Nestlé Co's intention can hardly be in doubt. They were not setting out to trade in gramophone records. They were using these records to increase their sales of chocolate. Their offer was addressed to everyone. It might be accepted by a person who was already a regular buyer of their chocolate; but, much more important to them, it might be accepted by people who might become regular buyers of their chocolate if they could be induced to try it and found they liked it. The inducement was something calculated to look like a bargain, a record at a very cheap price. It is in evidence that the ordinary price for a dance record is 6s. 6d. It is true that the ordinary record gives much longer playing time than the Nestlé records and it may have other advantages. But the reader of the Nestlé offer was not in a position to know that.

It seems to me clear that the main intention of the offer was to induce people interested in this kind of music to buy (or perhaps get others to buy) chocolate which otherwise would not have been bought. It is, of course, true that some wrappers might come from the chocolate which had already
p. 153 been bought or from chocolate which would have been bought without ↵ the offer, but that does not seem to me to alter the case. Where there is a large number of transactions—the notice mentions 30,000 records—I do not think we should simply consider an isolated case where it would be impossible to say whether there had been a direct benefit from the acquisition of the wrappers or not. The requirement that wrappers should be sent was of great importance to the Nestlé Co; there would have been no point in their simply offering records for 1s. 6d. each. It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (a) does something of value to the supplier and (b) pays money: the consideration is both (a) and (b). There may have been cases where the acquisition of the wrappers conferred no direct benefit on the Nestlé Co, but there must have been many cases where it did. I do not see why the possibility that in some cases the acquisition of the wrappers did not directly benefit the Nestlé Co should require us to exclude from consideration the cases where it did; and even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement. …

I am of opinion that the … notice that the ordinary retail selling price was 1s. 6d. was invalid, that there was no ordinary retail selling price in this case and that the respondents' operations were not within the ambit of section 8. They were therefore infringements of the appellants' copyright and in my judgment this appeal should be allowed.

> ### Lord Somervell of Harrow
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> The question … is whether the three wrappers were part of the consideration or, as Jenkins LJ held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store. I think they are part of the consideration. They are so described in the offer. 'They,' the wrappers, 'will help you to get smash hit recordings.' They are so described in the record itself—'all you have to do to get such new record is to send three wrappers from Nestlé's 6d. milk chocolate bars, together with postal order for 1s. 6d.' This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestlés. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. 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. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration.
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> ***Lord Tucker*** delivered a speech in which he concluded that the defendants had not complied with the requirements of section 8 so that the plaintiffs were entitled to an injunction in the term sought. ***Lord Keith of Avonholm*** dissented.

Commentary

The issue that divided the majority and the minority was whether the supply of the chocolate bar wrappers was a condition that had to be satisfied in order to obtain the record but was not part of the consideration or whether it was part of the consideration itself. The distinction is not always an easy one to draw. As Lord Wedderburn has remarked ([1959] *CLJ* 160, 161), it is 'notoriously difficult to set out satisfactory theoretical distinctions between bare promises of gifts subject to contingent conditions, and offers proper, e.g. in regard
p. 154 to statements such as: "if you go to London on Monday, I will give you £10".' On the facts of ↵ *Chappell* the majority construction was that the supply of chocolate bar wrappers was part of the consideration (although it should be noted that both sides expressed themselves in strong terms: Viscount Simonds stated that the majority construction was 'quite artificial' while Lord Reid stated that the minority construction was 'quite unrealistic').

The litigation in *Chappell* was not between a purchaser of a chocolate bar and the supplier of the records. So the House of Lords was not actually asked to enforce a contract under which one party promised to sell goods to another in return for payment by chocolate bar wrappers. Nevertheless, the question whether or not the chocolate bar wrappers were part of the consideration for the supply of the record was integral to the decision of their Lordships. It would therefore appear to follow from their decision that a contract to sell a record in return for chocolate bar wrappers is a contract that is supported by consideration. But does it follow from *Chappell* that a promise to supply chocolate bar wrappers will always constitute consideration for a promise given in return? Take the case of a promise to sell a work of art, valued at £2 million, in return for three chocolate bar wrappers. Is the promise to sell the work of art supported by consideration? *Chappell* does not necessarily support such a conclusion. The reason for this is that Nestlé had good commercial reasons for asking for the supply of chocolate bar wrappers. It was an integral part of their marketing strategy in that their purpose was to encourage people to buy their products. In the case of the sale of the work of art there

appears to be no objectively good reason for asking for the supply of chocolate bar wrappers; it could be attributable simply to the subjective whim of the vendor. On the other hand it can be argued that it is for the parties to decide what is to constitute good consideration. If a party chooses to ask for a performance which others would regard as bizarre, that is arguably no concern of the law.

Nevertheless it would appear that the courts do reserve to themselves the right to decide that a particular act alleged to amount to consideration does not in fact do so. In *Thomas* v. *Thomas* (1842) 2 QB 851, 859 Patteson J stated that 'consideration means something which is of some value in the eye of the law'. This statement is not altogether easy to reconcile with the statement of Lord Somervell in *Chappell* that 'a contracting party can stipulate for what consideration he chooses'. It would appear that the starting point, at least in commercial cases, is that it is for the parties to decide what is or is not of value, but that the court nevertheless retains the right to conclude that the alleged consideration does not in law have any value and so does not amount to consideration. But the courts should be slow to conclude that something which the parties believe to be of value is not in fact of value. Lord Wedderburn, commenting on *Chappell* ([1959] *CLJ* 160, 162), summed the matter up as follows:

> [I]f the offer requires a certain act from the offeree, it is not open to the courts to speculate about whether it has any 'real value' in the mind of the offeror. Such an inquiry would approach perilously near to an investigation of motive. Provided that it is not wholly illusory, the act becomes part of the consideration because it is asked for by the offeree.

Of course it may not always be easy to decide whether or not an alleged consideration is 'wholly illusory' but in most cases it will be tolerably clear.

5.2.1.1 A benevolent approach in commercial cases

In commercial cases the courts have tended to adopt a benevolent approach. This can be seen from a number
p. 155 of cases. The first is *Bainbridge* v. *Firmstone* (1838) 8 A & E 743. ↵ The defendant asked for permission to weigh two of the plaintiff's boilers and he promised to return them to the plaintiff in the same condition as they were in when he took possession of them. The plaintiff gave his permission. The defendant took the boilers to pieces but failed to put them together again. When sued by the plaintiff the defendant responded that no consideration had been provided for his promise to restore the boilers. The court held otherwise. Lord Denman CJ stated (at p. 744):

> It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

Patteson J stated (at p. 744):

> The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

The finding that consideration took the form of giving up possession of the boilers seems more secure than the finding that the defendant obtained some (unidentified) benefit by being given permission to weigh the plaintiff's boilers.

5.2.1.2 Settling a claim that is doubtful or bad in law

A party who agrees in return for payment to give up a claim that is good in law clearly provides consideration for the promise of payment. The claim in such a case is an asset of value and so, in promising to give it up, value or consideration is provided. Consideration is also provided in the case where the claim given up is a doubtful one because, in promising to give up a claim which may have substantial value, the promisor is clearly providing value. But can it be said that a claimant has provided consideration where the claim that has been abandoned is one that is inevitably doomed to failure? Cases can be found in which the courts have concluded that a promise to give up a worthless claim can amount to the provision of consideration provided that the party who gives up the claim is acting in good faith and does not know of the invalidity of his claim. That this is so can be demonstrated by reference to the following two cases, namely *Cook* v. *Wright* (1861) 1 B & S 559 and *Wade* v. *Simeon* (1846) 2 CB 548.

In *Cook* v. *Wright* notice was given to the defendant occupier of a house calling upon him to pay his share of the cost of works done in an adjoining street. The defendant objected that he was not liable to make a contribution to the cost of the works on the ground that he was not the owner of the house. He later promised to pay a reduced contribution in three instalments (by way of three promissory notes) after being threatened with legal action if he did not pay. He paid the first instalment but then refused to make any further payment. The plaintiffs, the Commissioners responsible for carrying out the works, brought an action to recover the outstanding balance. At the trial of the action it transpired that the defendant was not in fact personally liable to make a contribution to the cost of the work. The court summed up the issue before it in the following terms (at p. 568):

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> [I]t appeared on the evidence that [the defendant] believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay; and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

The Court of Common Pleas concluded that the defendant was not entitled to resist the demand for payment and, for this purpose, it did not matter that the plaintiffs had not in fact commenced suit at the time at which the compromise was reached. Blackburn J stated that the 'real consideration' depends on 'the reality of the claim made and the bona fides of the compromise'. On the facts, the plaintiffs had suffered a detriment in that the compromise had induced them not to take proceedings against the actual owner of the house.

On the other hand, in *Wade* v. *Simeon* the plaintiff brought an action against the defendant to recover £1,300 and £700. The defendant promised to pay the sum claimed provided that the plaintiff did not pursue his claim. The plaintiff did not pursue his claim but the defendant refused to honour his promise. The plaintiff sued to recover the promised sum. His action failed. The vital finding of the court was that the plaintiff knew that he had no claim against the defendant at the time at which he issued proceedings. It was held that there was no consideration to support the defendant's promise. Tindal CJ stated (at pp. 564–565):

> [T]he plaintiff admits that he had no cause of action against the defendant in the action … and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost contra bonos mores, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must shew a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action: and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails.

Why does the law attribute such importance to the knowledge of the claimant? Should the presence or absence of consideration turn upon the state of mind of the claimant? One might expect the law to conclude either that a promise to give up a worthless claim is not good consideration (on the basis that nothing of value is given in promising to give up a worthless claim) or that it is good consideration (on the basis that the defendant is freed from the nuisance of having to defend the claim). Instead the law has adopted an uneasy compromise that rests on the knowledge of the claimant. The reason for this is probably to be found in the fact that the compromise of litigation is generally perceived to be in the public interest (hence the general rule that giving up a claim is good consideration) but, at the same time, the courts do not wish to encourage parties to threaten to resort to the courts in pursuit of a claim that is known to be invalid (hence the emphasis on the knowledge of the claimant).

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5.2.1.3 Changing one's behaviour

A final situation worth noting is one in which the claimant agrees to change his or her behaviour or lifestyle as a result of the promise made by the defendant. One such case is *White* v. *Bluett* (1853) 23 LJ Ex 36 (discussed in more detail at 7.2.4), in which a son was held not to have provided consideration for his father's promise to release him from liability under a promissory note on condition that he stopped his practice of complaining to his father about his father's intentions in relation to the distribution of his estate. But it may be that *White*

would not be decided the same way today (at least on the consideration point). An indication of greater judicial willingness to find consideration in a domestic context is provided by the New York case of *Hamer* v. *Sidway* 124 NY 538 (1891), the facts of which are set out in the judgment of the court which was given by Parker J.

> **Parker J**
>
> The question which provoked the most discussion by counsel on this appeal and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that 'on the 20th day of March, 1869, William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed,' and that he 'in all things fully performed his part of said agreement.'
>
> The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. …
>
> [He set out a number of judicial and textbook definitions of the doctrine of consideration, including a statement by Pollock that 'consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first' and continued]
>
> Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense.

p. 158 ↵ It is necessary to take some care with *Hamer* because it is not an English case and there is no guarantee that an English court will follow it. Nevertheless, it is widely cited in English textbooks and it is reasonable to conclude that it is likely that an English court would follow it. It is also consistent with the approach that we have noted in commercial cases such as *Chappell* and *Bainbridge* (earlier in this section). But in what sense did

the uncle obtain a benefit as a result of the promise made by his nephew and did the nephew suffer a detriment in promising to give up activities which his uncle believed to be harmful to him? Has English law now reached the position that the performance of a requested act is consideration for a promise of payment, no matter how absurd the act that is carried out? Consider the following two extracts:

PS Atiyah, 'Consideration: A Restatement' In *Essays On Contract*
(Oxford University Press, 1986), p. 195

> [After setting out the facts of *Hamer* v. *Sidway* he continues]
>
> > [T]he nephew plainly incurs no detriment in fact by forbearing from smoking (indeed, quite the reverse) and it is hard to see that the uncle derives any benefit from the forbearance. Yet such a promise has been held enforceable in America, and it is generally thought that it would be enforceable in England. It may, of course, be argued that in such a case there is some indirect benefit to the uncle. No doubt he has his reasons for wishing the nephew not to smoke or he would not have made the promise; and no doubt he will be gratified if in fact the nephew forbears for the stated period. But here again, this seems to be a matter of motive rather than benefit. If this were a benefit in the sense in which the word is used in the orthodox doctrine, it would seem that many gratuitous promises would become enforceable simply because the promisor derives a sense of satisfaction from his generosity or from the recognition of it by the promisee or the public. Professor Treitel objects that the plaintiff in this case gave up a right; but in a unilateral contract the plaintiff gives up no right except by his behaviour. He just acts in reliance on the promise, and the reward cases suggest that the promise does not have to be a necessary condition for the 'action in reliance'. A promise of a reward to the winner of a race is generally believed to be legally enforceable even if the winner would still have run just as effectively absent the promise. It is hard to see that there is anything here which can sensibly be called a 'detriment'. The truth appears to be once again that a promise of this kind may be enforced because, if the promisee is induced to act on it, it may appear to the courts to be just to enforce it. Although a detrimental change of position is the usual reason for thinking it would be just to enforce the promise, the absence of detriment does not by itself seem fatal.

JC Smith, 'The Law Of Contract—Alive Or Dead?'
(1979) 13 *The Law Teacher* 73, 77

> The language of benefit and detriment is, and I believe long has been, out of date. So is the idea that consideration must be an economic benefit of some kind. All that is necessary is that the defendant should, expressly or impliedly, ask for something in return for his promise, an act or a promise by the offeree. If he gets what he has asked for, then the promise is given for consideration unless there is some vitiating factor. Though lip service has been paid to the notions of benefit and detriment, they
> p. 159 have no substantial meaning, in the light of the ↵ principle that the court will not inquire into the adequacy of the consideration. If I make a promise to you in return for your supplying me with three, quite useless, chocolate wrappers, which I will instantly throw away, there is a perfectly good contract provided that the promise was seriously intended. I have got what I asked for and that is a sufficient 'benefit'. You have parted with something that you might have kept and that is a sufficient 'detriment'. But the wrappers are of no value to me, and you are perhaps glad to be rid of them. As for economic value, the judges have recognised, for over a century, the validity of the contract to pay £100 if the promisee will walk to York … and no one has ever demonstrated what economic value there is in walking to York. Similarly, with promises of reward for not smoking. …

5.2.2 The Pre-Existing Duty Rule

Assume that A is promised a sum of money by B if he, A, promises to perform an act that he is already obliged to perform. Does A provide consideration for B's promise of payment? It is not easy to provide an answer to this question because the law is in a state of flux. The answer depends in part on the nature of A's pre-existing obligation. The cases can be divided into three categories, namely (i) performance of a contractual duty owed to a third party, (ii) performance of a contractual duty owed to the promisor, and (iii) performance of a duty imposed by law. If the pre-existing obligation is a contractual duty owed to a third party, then A will have provided consideration for B's promise. If, on the other hand, A's obligation is a contractual duty owed to B, the answer is less clear. The old case of *Stilk* v. *Myrick* (1829) 6 Esp 129, 2 Camp 317 suggests that A does not provide consideration by promising to perform a contractual duty owed to B, but the modern case of *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 suggests that A may provide consideration in such a case. The relationship between these two cases is the central issue in this section. Finally, if A's obligation is one that is imposed on him by the law (as opposed to the terms of his contract), then the general rule is that A does not provide consideration for B's promise of payment (although the status of the general rule is uncertain as a result of the decision of the Court of Appeal in *Ward* v. *Byham* [1956] 1 WLR 496 and the possible impact of the decision in *Williams* v. *Roffey Bros*). Thus the traditional account of the law distinguishes between the case where the pre-existing duty is a contractual duty owed to a third party (which clearly constitutes consideration) and the case where the pre-existing duty is either a contractual duty owed to the promisor or a duty imposed by law (where the general rule, subject to *Williams* v. *Roffey Bros*, is that there is no consideration).

A number of important questions have to be answered in this context. The first is whether or not there is any justification for continuing to differentiate between these three different categories. Why, for instance, does the law recognize the existence of consideration where the promise is a promise to perform a pre-existing

contractual duty owed to a third party when it has been so reluctant to recognize the existence of consideration where the promise is one to perform a pre-existing contractual duty owed to the promisor or a pre-existing duty that is imposed by law? The second question relates to the role of duress in these cases. As we shall see (5.2.2.3.2.3), it is possible that the general refusal of the law to recognize the existence of consideration was attributable to a desire to protect the promisor (B) from duress by the party promising to perform his pre-existing duty (A). If duress, or the fear of duress, is indeed the concern that underlies these
p. 160 cases then, it is argued, that concern ↵ should be reflected through the development of rules that target behaviour that constitutes duress. Thirdly, there is an issue relating to the conception of benefit and detriment that the law employs. If the conception is of 'legal benefit' and 'legal detriment' then it is more difficult to find the existence of consideration in these cases because A does not suffer a 'legal' detriment in promising to perform a duty that he is already obliged to perform, and B does not receive a 'legal benefit' if all that he receives is a performance to which he is already entitled. On the other hand, the picture changes somewhat if we adopt a conception of 'practical' or 'factual' benefit and 'practical' detriment. A party who performs a pre-existing obligation may incur a practical detriment in doing so and a party who receives a performance to which he is already entitled may receive a practical benefit in consequence. One of the most important features of *Williams* v. *Roffey Bros* is the emphasis that it places on 'practical' benefit and detriment. The final issue is whether the law should distinguish between the requirements necessary for the creation of a contract and the requirements necessary for the modification of an existing contract. The traditional view has been that the law does not distinguish between formation and modification; the doctrine of consideration applies in both contexts. But it has been argued that the law should differentiate between contract formation and the modification of a contract and that the doctrine of consideration, if it is to apply to modifications at all, should apply in a much less stringent form.

5.2.2.1 Performance of a Contractual Duty Owed to a Third Party

Performance of a pre-existing contractual duty owed to a third party does constitute consideration for a promise given by another party. This proposition is supported by a number of cases. An old case is *Shadwell* v. *Shadwell* (1860) 9 CB (NS) 159. An uncle wrote to his nephew in the following terms:

> My dear Lancey,
>
> I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require.
>
> Your ever affectionate uncle,
>
> Charles Shadwell

The nephew alleged that his uncle failed to honour his promise in full during his lifetime and brought a claim for the arrears. One of the points taken by way of defence was that there was no consideration to support this agreement. By a majority, it was held that the promise was enforceable (Byles J dissented on the ground that the letter was 'no more than a letter of kindness, creating no legal obligation'). The consideration which the

plaintiff claimed that he had supplied was the performance of his contractual obligation to marry Ellen Nicholl (at that time a promise to marry did have legal effect). In finding that the promise to pay was supported by consideration Erle CJ stated (at pp. 173–174):

> Now, do these facts shew that the promise was in consideration either of a loss to be sustained by the plaintiff or a benefit to be derived from the plaintiff to the uncle, at his, the uncle's request? My answer is in the affirmative.
>
> p. 161 ↵ First, do these facts shew a loss sustained by the plaintiff at his uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and, in that sense the reverse of a loss: yet, as between the plaintiff and the party promising to supply an income to support the marriage, it may well also be a loss. The plaintiff 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; and, if the promise was made in order to induce the parties to marry, the promise so made would be in legal effect a request to marry.
>
> Secondly, do these facts shew a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood and the interest in the settlement of his nephew which the uncle declares. The marriage primarily affects the parties thereto; but in a secondary degree it may be an object of interest to a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request. If the promise of the annuity was intended as an inducement to the marriage, and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage, this is the consideration averred in the declaration; and it appears to be expressed in the letter, construed with the surrounding circumstances.

A more modern example of the performance of a pre-existing contractual duty owed to a third party being held to constitute consideration is provided by the decision of the Privy Council in *The Eurymedon* [1975] AC 154. There the Privy Council held that a shipper of goods had made a promise to the defendant stevedores, who unloaded its goods from a ship, that it would not sue them for any damage that was done to the goods while they were being unloaded from the ship. One of the issues before the Privy Council was whether or not the stevedores had provided consideration for the shipper's promise not to sue them. It was held that the performance of their contractual duty to unload the goods (which contractual duty was owed to a third party, the carrier), was good consideration for the shipper's offer not to sue them for any damage done.

More difficult is the case where the consideration takes the form of a promise to perform, as opposed to performance of, a contractual duty owed to a third party. Initially, in *Jones* v. *Waite* (1839) 5 Bing NC 341 the courts took the view that a promise to perform a contractual duty owed to a third party was not good consideration, but in *Pao On* v. *Lau Yiu Long* [1980] AC 614 (see further 5.2.3) the Privy Council held that such a promise does amount to the provision of consideration. Lord Scarman, delivering the judgment of the Privy Council, stated (at p. 632):

> 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. *AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 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.'

p. 162 ↵ It is therefore clear that both performance of, and a promise to perform, a pre-existing contractual duty owed to a third party constitute good consideration for a promise given in return.

5.2.2.2 Performance of a Duty Imposed by Law

When we turn to the case of a duty imposed by law we find a different picture. The traditional rule is that performance of a duty imposed by law, or the promise to perform such a duty, does not, in law, amount to the provision of consideration. In *Collins* v. *Godefroy* (1831) 1 B & Ad 950 an attorney was subpoenaed to give evidence as a witness. He brought a claim for payment, alleging that he had been promised a guinea a day for his attendance. His claim failed. Lord Tenterden CJ stated (at pp. 956–957) that:

> if 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. We think that such a duty is imposed by law; and on consideration of the Statute of Elizabeth, and of the cases which have been decided on this subject, we are all of opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain cases, of allowing, as costs between party and party, so much per day for the attendance of professional men; but that practice cannot alter the law. What the effect of our decision may be, is not for our consideration. We think, on principle, that an action does not lie for a compensation to a witness for loss of time in attendance under a subpoena.

But the rule that performance of a duty imposed by law does not constitute consideration was challenged by Lord Denning in the following two cases:

Ward v. Byham
[1956] 1 WLR 496, Court of Appeal

The plaintiff and the defendant were, respectively, mother and father to a child. After they had lived together as partners for several years, and the plaintiff had given birth to an illegitimate child, the defendant turned the plaintiff out of the family home. Initially, the defendant put the child into the care of a neighbour for which he paid £1 per week. When the plaintiff found a new home for herself, she agreed with the defendant that she would care for the child and that he would pay her £1 per week. Subsequently, the plaintiff remarried and the defendant ceased payment. The plaintiff brought an action against the defendant on the basis of his undertaking to pay her £1 per week. The defendant denied that he was liable to make the promised payments on the ground that his promise to pay her was not supported by consideration. The Court of Appeal held that the plaintiff had provided consideration for the defendant's promise with the result that the defendant was liable to make the promised payment.

Denning LJ

[set out the facts of the case and continued]

p. 163 I approach the case, therefore, on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration ↵ to support the promise. 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.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week ... I would dismiss the appeal.

Morris LJ

It seems to me ... that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that Carol [the child] will be well looked after and happy, and also that you must agree that Carol is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. Upon those terms, which in fact became operative, the father agreed to pay £1 a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding.

> **Parker LJ**
>
> I have come to the same conclusion. I think that the letter of July 27, 1954, clearly expresses good consideration for the bargain, and for myself I am content to adopt the very careful judgment of the learned county court judge.

Shortly after the decision in *Ward* the Court of Appeal was given another opportunity to consider whether or not the performance of a duty imposed by law can constitute consideration and, once again, Lord Denning (but not the other judges) took the opportunity to lodge an assault on the rule that such performance generally does not constitute consideration:

Williams v. Williams
[1957] 1 WLR 148, Court of Appeal

[The facts of the case are set out in the judgment of Denning LJ.]

Denning LJ

In the present case a wife claims sums due to her under a maintenance agreement. No evidence was called in the court below because the facts are agreed. The parties were married on Apr. 25, 1945. They have no children. On Jan. 24, 1952, the wife deserted the husband. On Mar. 26, 1952, they signed the agreement now sued on, which has three clauses:

> '(1) The husband will pay to the wife for her support and maintenance a weekly sum of £1 10s. to be paid every four weeks during the joint lives of the parties so long as the wife shall p. 164 ↵ lead a chaste life the first payment hereunder to be made on Apr. 15, 1952. (2) The wife will out of the said weekly sum or otherwise support and maintain herself and will indemnify the husband against all debts to be incurred by her and will not in any way at any time hereafter pledge the husband's credit. (3) The wife shall not so long as the husband shall punctually make the payments hereby agreed to be made commence or prosecute against the husband any matrimonial proceedings other than proceedings for dissolution of marriage but upon the failure of the husband to make the said weekly payments as and when the same become due the wife shall be at full liberty on her election to pursue all and every remedy in this regard either by enforcement of the provisions hereof or as if this agreement had not been made.'

So far as we know, the parties have remained apart ever since. On June 1, 1955, the husband petitioned for divorce, on the ground of his wife's desertion, and on Oct. 12, 1955, a decree nisi was made against her. On Dec. 2, 1955, the decree was made absolute. In this action the wife claims maintenance at the rate of £1 10s. a week under the agreement for a period from October, 1954, to October, 1955. The sum claimed is £30 5s. 9d., which is the appropriate sum after deduction of tax. The husband disputes the claim, on the ground that there was no consideration for his promise. Clause 2, he says, is worthless and cl. 3 is unenforceable.

Let me first deal with cl. 3. It is settled law that a wife, despite such a clause as cl. 3, can make application to the magistrates or to the High Court for maintenance. If this wife had made such an application, the husband could have set up the fact of desertion as an answer to the claim, but he could not have set up cl. 3 as a bar to the proceedings. The clause is void, and as such is no consideration to support the agreement. ... Now let me deal with cl. 2. The husband relies on the fact that his wife deserted him. If there had been a separation by consent, he agrees that the agreement would have been enforceable. In that case the husband would still be under a duty to maintain, and the sum of 30s. a week would be assumed to be a quantification of a reasonable sum for her maintenance having regard to her own earning capacity. The ascertainment of a specific sum in place of an unascertained sum has always been held to be good consideration. So long as

> circumstances remained unchanged, it would be treated by the courts as binding on her and she could not recover more from him. … In the present case the husband says that, as the wife deserted him, he was under no obligation to maintain her and she was not entitled to pledge his credit in any way. Clause 2 therefore gives him nothing and is valueless to him. … Now I agree that, in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest. Suppose that this agreement had never been made, and the wife had made no promise to maintain herself and did not do so. She might then have sought and received public assistance or have pledged her husband's credit with tradesmen; in which case the National Assistance Board might have summoned him before the magistrates, or the tradesmen might have sued him in the county court. It is true that he would have an answer to those claims because she was in desertion, but nevertheless he would be put to all the trouble, worry and expense of defending himself against them. By paying her 30s. a week and taking this promise from her that she will maintain herself and will not pledge his credit, he has an added safeguard to protect himself from all this worry, trouble and expense. That is a benefit to him which is good consideration for his promise to pay maintenance. That was the view which appealed to the county court judge, and I must say that it appeals to me also.
>
> There is another ground on which good consideration can be found. Although the wife was in
> p. 165 desertion, nevertheless it must be remembered that desertion is never irrevocable. It was ↵ open to her to come back at any time. Her right to maintenance was not lost by the desertion. It was only suspended. If she made a genuine offer to return which he rejected, she would have been entitled to maintenance from him. She could apply to the magistrates or the High Court for an order in her favour. If she did so, however, whilst this agreement was in force, the 30s. would be regarded as prima facie the correct figure. It is a benefit to the husband for it to be so regarded, and that is sufficient consideration to support his promise.
>
> I construe this agreement as a promise by the husband to pay his wife 30s. a week in consideration of her promise to maintain herself during the time she is living separate from him, whether due to her own fault or not. The wife cannot throw over the agreement and seek more maintenance from him unless new circumstances arise making it reasonable to allow her to depart from it. The husband cannot throw it over unless they resume married life together (in which case it will by inference be rescinded) or they are divorced (in which case it is a post-nuptial settlement and can be varied accordingly), or perhaps other circumstances arise not envisaged at the time of the agreement. Nothing of that kind has, however, occurred here. The husband must honour his promise. I would dismiss the appeal accordingly.
>
> ***Hodson*** and ***Morris LJJ*** delivered concurring judgments but they found for the plaintiff on the basis that clause 2 of the agreement provided consideration for the defendant's promise to maintain her on the basis that her right to maintenance was not forfeited but only in suspension and would be resurrected in the event of her making an offer to return to the defendant.

Commentary

In both *Ward* and *Williams* Lord Denning launched a direct attack on the pre-existing duty rule. The other judges were more circumspect and the cases can be explained on the ground that the plaintiff in both cases had done more than her existing legal duty. In *Ward* the plaintiff did more than her legal duty in promising to keep the child happy, while in *Williams* the plaintiff's right to maintenance had not been lost but was only in abeyance and so she was not simply promising to perform her legal duty when she promised to maintain herself in return for payment by her husband. *Ward* is the more problematic of the two decisions. The proposition that the plaintiff provided consideration by promising to keep the child happy sits rather uneasily with the proposition that a promise to provide love and affection does not in general constitute consideration (see *Bret* v. *JS* (1600) Cr Eliz 755). While it is clear that a promise to do more than one is legally obliged to do does amount to consideration, it can be difficult to tell whether or not the claimant has promised to do more than he was in fact legally obliged to do. This problem is not confined to cases such as *Ward*. It is of more general application. That this is so can be demonstrated by reference to the decision of the House of Lords in *Glasbrook Brothers Ltd* v. *Glamorgan County Council* [1925] AC 270 where their Lordships divided 3–2 on the question whether the police force had done more than their legal duty in providing protection to the owners of a colliery.

In *Glasbrook*, a colliery manager, Mr James, applied for police protection for the colliery in the immediate aftermath of the settlement of the national coal strike. While the national strike had been settled, the local situation remained extremely volatile and the men responsible for keeping the mine working had decided to cease work because of fears for their own safety. Mr James informed the police superintendent that it was necessary to have the police billeted in the colliery. The police superintendent was of the view that this was unnecessary; he thought he could protect the colliery without installing a police garrison. The police
p. 166 superintendent ↵ eventually agreed to garrison seventy policemen at the colliery after Mr James signed a requisition in which he promised to pay for the agreed level of service. After the dispute had come to an end Glamorgan County Council presented the colliery owners with a bill for some £2,200 which the colliery owners refused to pay. The colliery owners submitted that there was no consideration for their promise to pay for the police protection they had been given. The majority concluded that consideration had been given on the ground that the police had done more than their legal duty. Thus Viscount Cave LC stated (at p. 281):

> The question for the Court was whether on July 9, 1921, the police authorities, acting reasonably and in good faith, considered a police garrison at the colliery necessary for the protection of life and property from violence, or, in other words, whether the decision of the chief constable in refusing special protection unless paid for was such a decision as a man in his position and with his duties could reasonably take. If in the judgment of the police authorities, formed reasonably and in good faith, the garrison was necessary for the protection of life and property, then they were not entitled to make a charge for it, for that would be to exact a payment for the performance of a duty which they clearly owed to the appellants and their servants; but if they thought the garrison a superfluity and only acceded to Mr James' request with a view to meeting his wishes, then in my opinion they were entitled to treat the garrison duty as special duty and to charge for it.

He concluded on the facts (at p. 282) that the garrison 'formed an additional and not a substituted or alternative means of protection' with the result that the colliery owners were liable to pay for the services provided. Lord Carson and Lord Blanesburgh dissented. Lord Carson expressed his dissent in the following terms (at pp. 297–298):

> I cannot, on the facts of this case, myself see that the demands of the colliery owners were for anything in the nature of a luxury. The circumstances speak for themselves, and we must in the calmer atmosphere of this House be quite sure we realize the facts as existing at the time. The safety men had left the colliery under compulsion, owing, as they said themselves, to want of police protection, and it is not to my mind any justification for not protecting them that, to use the words of Superintendent Smith, they were very nervous or unduly nervous. When the protection in the form in which it was asked for had been granted they returned to work, and I cannot help thinking that it was in this way a great disaster was avoided. My Lords, I find great difficulty in trying to define 'special services' in a case where there is actually being carried on an open invasion of the rights of subjects and when riot and violence threaten the destruction of property of such individuals and the right to work of other individuals, and indeed it would, I think, render the law difficult to carry out under similar circumstances if those demanding protection were to be told at any moment in the course of such attacks that the limit of protection had been reached unless they were rich enough to buy further protection by agreeing to pay a sum which in this case amounted to some £3000 to the police authorities.

Given these difficulties that can arise in terms of deciding whether or not the claimant has done more than his legal duty, should the law not take the additional step advocated by Lord Denning and recognize that performance of a legal duty does constitute consideration and that the transaction is enforceable provided that there is nothing in it contrary to the public interest?

This raises the question of the rationale that lies behind the rule that performance of a legal duty cannot in
p. 167 general amount to consideration. Why, for example, can the police not ↵ generally charge for the public services that they render? Lord Shaw of Dunfermline considered this issue in *Glasbrook* in the following terms (at p. 290):

> I clearly am of opinion that no charge can be exacted from a private citizen for the performance of a public duty. Furthermore, I would also add that, on the assumption that a payment is made to induce or secure that the public authority will perform such a duty, moneys paid under such a bargain are recoverable by the private citizen on the double ground, first, that it is against public policy that the performance of public duty shall be a matter of private purchase, and second, that a promise or agreement to pay, accepted from a citizen in times of nervous alarm or anxiety, fails in legality on the ground of duress, and sums paid under it must be restored.

It is important to note the two distinct grounds advanced by Lord Shaw. The second objection is narrower than the first. The second objection is based on duress: absent duress, or, possibly, the fear of duress, a promise to perform an existing legal duty does amount to consideration. The first ground is wider in that it is based on the public duty, which the police owe to the general public (see also *Michael* v. *Chief Constable of South*

Wales Police [2015] UKSC 2, [2015] AC 1732, [30]–[33]) and which takes account of a broader range of factors than simply the presence or absence of duress. Take the case where a member of the public freely agrees to pay a policeman for services which the policeman was obliged by law to perform. Should the promise to pay the policeman be enforceable? On the basis of Lord Shaw's first ground it should not, but on the second it seems that it may be enforceable. Does the example of a promise to pay a member of the police force for the performance of a legal duty not suggest that there is good sense behind the general rule that performance of a legal duty is not good consideration and that the public policy objection is more deeply rooted than the fear of duress? On the other hand, does this public policy objection apply with the same force on the facts of either *Ward* or *Williams*? Were the parties in either case seeking to turn the performance of a 'public duty' into a 'matter of private purchase'? While there is obviously a public interest in ensuring that children are cared for and looked after, does this public policy require that the law should refuse to give effect to private bargains between parents in relation to their obligations in respect of the care of their children?

Notwithstanding the views expressed by Lord Denning the formal position in English law remains that performance of a legal duty does not amount to consideration. But the rule is likely to come under pressure as a result of developments that have taken place in our next group of cases.

5.2.2.3 Performance of a Contractual Duty Owed to the Promisor

The question whether or not performance of a pre-existing contractual duty owed to the promisor is good consideration for an additional promise of payment made by the promisor has proved to be a vexed one in English law. Take the following example. A enters into a contract with B under which B agrees to build a house for A at a price of £100,000. B finds that he cannot perform the contract for the agreed sum and informs A that he will not be able to complete the works unless he is paid an additional £10,000. A promises to pay the additional sum but, after the works are completed, refuses to honour his promise. Can B recover the additional £10,000 from A? The traditional answer is that he cannot on the ground that he has not provided any consideration for B's promise to pay him £10,000. He has simply performed his existing contractual duty,
p. 168 owed to A, to build the house and performance ↵ of an existing contractual duty owed to the promisor (here A) is not good consideration. Authority for such a proposition is to be found in *Stilk* v. *Myrick* (1809) 2 Camp. 317, 6 Esp 129 (5.2.2.3.1) and *Foakes* v. *Beer* (1884) 9 App Cas 605 (5.2.2.4), albeit that the latter case is concerned with a promise to pay part of an existing debt. This view has, however, been challenged by the decision of the Court of Appeal in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (5.2.2.3.2) where, on facts which resemble our hypothetical example, the court held that performance of an existing contractual duty did amount to consideration for a promise of additional payment by the party in the position of A. The basis for this conclusion was that A received a practical benefit as a result of the performance by B of his existing contractual duty and, in the absence of duress, there were no public policy objections to giving effect to A's promise to pay B more money for the performance of B's existing contractual obligations.

In terms of authority the central issue at stake in the cases is the relationship between *Williams* v. *Roffey Bros* (and now the decision of the Court of Appeal in *MWB Business Exchange Centres Ltd* v. *Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604, on which see 5.2.2.4.2), on the one hand, and *Stilk* v. *Myrick* and *Foakes* v. *Beer* on the other hand. The relationship between *Williams* and *Foakes* is particularly difficult, given that the latter is a decision of the House of Lords which was not in fact mentioned by the Court of Appeal in their

judgments in *Williams*. In terms of principle there are two important points at stake. The first relates to the conception of benefit or detriment to which the court ought to have regard. If the court looks for a benefit or detriment as a matter of law, it will struggle to find such benefit or detriment in these cases because it is difficult to say that A has been benefited as a matter of law when all that he has received is a performance to which he was already entitled, and it is also hard to say that B has suffered a legal detriment in performing a duty that he was already legally obliged to perform as a result of his contract with A. On the other hand, if attention is focused on the existence of a 'practical' or 'factual' benefit or detriment then it can be argued that A has received a 'practical' benefit in obtaining performance which he might not otherwise have obtained, and B can be said to have suffered a 'practical' or 'factual' detriment in continuing with performance when he might have simply refused to go on with his contractual obligations. The second issue relates to the role of duress. Is the reason for refusing to give effect to A's promise to pay more to B, the fact that B either has, or may have, extracted the promise of additional payment by subjecting A to duress? If duress is the rationale behind the cases then we should give effect to re-negotiations of a contract provided that they are freely entered into. But if duress is not the rationale behind the rule then the courts should refuse to give effect to A's promise to pay B an additional £10,000 even in the case where A freely agreed to pay B the additional sum.

5.2.2.3.1 *The early case law:* Stilk v. Myrick

The leading case, at least in historical terms, is *Stilk* v. *Myrick*. Unfortunately, the case was reported twice and the two reports differ in significant respects. The facts of *Stilk* were as follows:

The plaintiff seaman agreed to sail to the Baltic and back at a rate of pay of £5 per month. When the vessel arrived in Cronstadt two of the seamen deserted. The master of the vessel failed in his attempt to find two sailors to replace the deserters and so he entered into an agreement with the rest of the crew, which included the plaintiff, under which he agreed that if the crew worked the ship back to London he would divide the wages of the two deserters between them in equal shares. The crew worked the ship back to London but the
p. 169 master did ↵ not pay the plaintiff his share of the deserters' wages. The plaintiff brought an action against the master to recover the wages which he believed were due to him. His claim failed.

The reasons for the failure of the plaintiff's claim are stated differently in the two reports. The first report was prepared by Espinasse ((1809) 6 Esp 129) and is in the following terms:

> **Lord Ellenborough** ruled, That the plaintiff could not recover upon this part of his demand. His Lordship said, That he recognised the principle of the case of *Harris* v. *Watson* as founded on just and proper policy. When the defendant entered on board the ship, he stipulated to do all the work his situation called upon him to do. Here the voyage was to the Baltick and back, not to Cronstadt only; if the voyage had then terminated, the sailors might have made what terms they pleased. If any part of the crew had died, would not the remainder have been forced to work the ship home? If that accident would have left them liable to do the whole work without any extraordinary remuneration, why should not desertion or casualty equally demand it?
>
> Verdict for the monthly wages only.

The second report was prepared by Campbell ((1809) 2 Camp 318) and it states:

> **Lord Ellenborough**
>
> I think *Harris* v. *Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they 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. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the 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. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 per month.

Commentary

At the time at which *Stilk* was decided there was no centralized system of law reporting and the quality of the reporting was variable. The two reporters of *Stilk* were Espinasse and Campbell. It is fair to say that Espinasse was not highly regarded as a law reporter. His standing, or lack of it, was summed up by Isaacs J when he said that he did not care for 'Espinasse or any other ass'! On the other hand, Espinasse was junior counsel in *Stilk* and so one might have expected him to note down accurately what Lord Ellenborough actually said. But Espinasse's hearing was apparently suspect so we may not be able to rely on his ability to record what was said accurately. Campbell, on the other hand, is an altogether more powerful figure. He rose to become Lord
p. 170 Chancellor and his reputation as a ↵ law reporter is much higher, although it might be said that his position as Lord Chancellor insulated him from some of the criticisms that might otherwise have been levelled against the quality of his reporting.

However, it is possible to exaggerate the significance of the differences between the two reports. Indeed, Peter Luther notes ('Campbell, Espinasse and the Sailors: Text and Context in the Common Law' (1999) 19 *Legal Studies* 526) that there are substantial similarities between the two reports of the case. Thus he states (at p. 538):

> Bearing in mind that both texts must be treated with caution, it is interesting to compare the two methodically. The surprise is not how different, but how *similar* they are. The best way to do this is to take each sentence of Espinasse's report, as the less full version, and to find its equivalent in Campbell. To the sentence which refers to *Harris* v. *Watson* there is, it appears, no equivalent in Campbell; this is the crux of the case, and to this we will return. But, except for this sentence, there is nothing in Espinasse that does not have its parallel in Campbell. Espinasse's following sentence, beginning 'When the defendant … ' makes the same point as the sentence in Campbell which begins 'Before they sailed from London … '. The next sentence, 'Here the voyage was to the Baltick … ', corresponds to the first part of Campbell's 'If they had been at liberty to quit the vessel at Cronstadt … ', though Campbell continues with a point omitted by Espinasse, concerning what might have happened had the master 'capriciously discharged the two men who were wanting'. This is, of course, not the only point made by Campbell but ignored by Espinasse—the latter's omission of any reference to consideration is another point that must be considered in more detail … Espinasse's two closing questions, beginning 'If any part of the crew had died … ' and 'If that accident would have left them liable … ' are the equivalent of Campbell's single sentence beginning 'But the desertion of the crew … '. Leaving aside for the moment the problem references to *Harris* v. *Watson*, each report makes sense as it stands, but Espinasse has produced a report which supports a 'public policy' analysis, and Campbell a report which culminates in an application of the doctrine of consideration, *by using identical reasoning*. A literary critic would be struck by the consonance between the two reports, not the difference. Perhaps it is in the nature of lawyers—or at least those used to an adversarial system—to assume that if two texts are not identical, they must be diametrically opposed; that one must be wrong, one right.
>
> What about the references to *Harris* v. *Watson*? Surely at this point there is a direct conflict between the two reports? It is suggested—tentatively—that it may be possible to reconcile even these two sentences. This can only be speculation, but it is surely as valid to suggest an answer to the question 'what did the judge mean?' when we have two accounts (or, at least, impressions) of what he said, than it is to ask and answer the question 'what really happened in Cronstadt?', which is what judges and commentators have done when they suppose *Stilk* v. *Myrick* to have been a case of coercion. Could Espinasse's statement that Ellenborough 'recognised the principle of the case of *Harris* v. *Watson* as founded on just and proper policy' be no more than his equivalent of Campbell's 'I think *Harris* v. *Watson* was rightly decided'? Or, to put it another way and to paraphrase the combined text of both reporters, could Ellenborough have been suggesting that Lord Kenyon's decision in the earlier case was indeed based on *a* just and proper policy, but not on *the* policy which is stated in the report of *Harris* v. *Watson*? Such a construction would have the advantage of making perfect sense of Espinasse's report, in which the apparent approval of *Harris* v. *Watson* otherwise looks rather odd, since there is no subsequent reference to any of the reasoning used in the case. Espinasse, on such an analysis, makes Ellenborough give an *alternative* policy-based reason why he approves of the decision in *Harris* v. *Watson*.

p. 171 ↵ Notwithstanding the similarities noted by Luther, *Stilk* has been analysed in two different ways by commentators, and these two different analyses reflect the two reports of the case. The first analysis is based on duress (and hence on Espinasse's report) and the second on consideration (based on Campbell's report).

The difference between the two analyses is important because the latter refuses to give effect to the promise of additional payment even in the case where no duress has been exercised.

The claim that *Stilk* can be explained on the ground of duress is somewhat problematic. The difficulties are both doctrinal and factual. The doctrinal difficulty relates to the status of the doctrine of duress in 1809. The doctrine of duress, at least that part of it concerned with the application of economic, as opposed to physical, coercion was in a very undeveloped state in 1809 and indeed there are doubts as to its very existence at that point in time (it is common to attribute the recognition of the doctrine of economic duress in English law to Kerr J in 1976 in *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293). For present purposes, it suffices to concentrate on the factual difficulty. It is important to note that the context in which the master made his promise of additional pay was not one in which the sailors had refused mid-voyage to continue with the journey unless they were promised extra pay. The vessel was in port at the time at which the promise was made and so there may not have been any pressure on the master at all. In other words, we need to know more about the facts of the case before we can be in a position to decide whether or not this was a case of duress. There is evidence that duress, or the fear of potential duress, may have been a factor that influenced Lord Ellenborough. Some support for the proposition that duress does have a role to play in understanding these cases can be gleaned from the case of *Harris* v. *Watson* (1791) 1 Peake 102 (although note Peter Luther's comments on *Harris* extracted earlier). The plaintiff was a seaman on board the vessel *The Alexander*. The defendant was the master of the vessel and he promised to pay the plaintiff five guineas over and above his common wages if the plaintiff would perform some extra work in navigating the ship. The promise was made at a time when the ship was in danger and it was made in order to induce the seamen to exert themselves. Lord Kenyon held that the plaintiff was not entitled to recover the promised five guineas. He stated (at p. 103):

> If this action was to be supported, it would materially affect the navigation of this kingdom. 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.

The alternative analysis of *Stilk*, based on Campbell's report, was that it was a case in which there was no consideration for the promise of extra pay. Why was there no consideration on the facts of the case? The plaintiff in all probability had to work harder as a result of the desertion of the two crew members and it could be argued that the master obtained a benefit as a result of the work done by the sailors. Lord Ellenborough addressed the detriment side of the equation but he did not comment on the benefit issue. In rejecting the submission that the plaintiff had provided consideration as a result of the work he had done on the voyage home, Lord Ellenborough did not focus on the question whether, as a matter of fact, the plaintiff had worked harder. Instead he examined the legal obligations of the plaintiff and concluded that he had not, as a matter of law, done more than he was legally required to do. He had accepted a contractual obligation to work the vessel
p. 172 to the Baltic and back and that ↵ was what he had done. The absence of any discussion of whether or not the master obtained a benefit as a result of the work done by the sailors is a matter of some significance, given

the emphasis placed by modern courts upon the question of whether or not the party in the position of the master obtained a 'practical benefit' as a result of the performance of the pre-existing duty (see further 5.2.2.3.2.1).

We have seen in the context of cases concerned with the performance of a duty imposed by law (5.2.2.2) that the courts have recognized that a party who does more than his legal duty does provide consideration. The same principle has been applied in the present context. Thus in *Hanson* v. *Royden* (1867) LR 3 CP 47 the plaintiff did more than he was obliged to do in that he was promoted and so performed additional tasks in return for the promise of extra pay. Similarly, in *Hartley* v. *Ponsonby* (1857) 7 E & B 872 the sailors did more than they were contractually bound to do in that the ship was so under-manned as a result of desertions that they would have been entitled to refuse to continue with the voyage. Thus in continuing the voyage when they might lawfully have refused to do so they provided consideration for the promise of extra pay.

The question whether *Stilk* is properly analysed as a duress case or as a case in which no consideration was provided for the defendant's promise of additional pay resurfaced in the case of *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, which is now regarded as the leading modern authority on the point.

5.2.2.3.2 *Modern developments:* Williams v. Roffey Bros

Williams v. Roffey Bros & Nicholls (Contractors) Ltd
[1991] 1 QB 1, Court of Appeal

> The defendant building contractors entered into a contract with the plaintiff carpenter under which the plaintiff agreed to carry out the carpentry work on the refurbishment of twenty-seven flats. The contract price for the carpentry work was agreed at £20,000. After he had completed part of the work, and been paid £16,200 by the defendants, the plaintiff ran into financial difficulties. The trial judge found that there were two principal causes of his difficulties. The first was that the contract price was too low to enable him to operate satisfactorily and make a profit. The second was that he failed to supervise his workmen adequately. The defendants wished to ensure that the plaintiff completed the work on time because a failure to do so would result in them incurring liability under a 'penalty clause' to the employer. The defendants called a meeting with the plaintiff and they promised to pay him a further sum of £10,300 to be paid at the rate of £575 for each flat in which the carpentry work was completed. The plaintiff continued with the work and was paid a further £1,500. The plaintiff then walked off the site. The defendants employed other contractors to finish off the work, albeit that they incurred liability under the 'penalty clause' as a result of their completion of the works one week late. The plaintiff brought a claim against the defendants for damages of £10,847.07. The Assistant Recorder found that before he ceased work the plaintiff had substantially completed the work on eight flats after the defendants had made their promise of additional payment. He accordingly awarded the plaintiff damages of £4,600 (consisting of 8 × £575) 'less some small deduction for defective and incomplete items' and held that the plaintiff was entitled to a reasonable proportion of the £2,200 outstanding from the original contract price.
>
> p. 173 ↵ The defendants appealed to the Court of Appeal on two principal grounds. The first was that they submitted that there was no consideration for their promise to pay an additional £575 per completed flat. The second was that the money was only payable upon completion of each flat and that, since the work had not been completed on any flat, no payment was due. The Court of Appeal dismissed the appeal and held that the plaintiff was entitled to be paid because he had substantially completed the work on eight of the flats and had provided consideration for the defendants' promise of additional payment.
>
> ### Glidewell LJ
>
> [set out the facts, decided that substantial completion of the eight flats entitled the plaintiff to payment and continued]
>
> *Was there consideration for the defendants' promise made on 9 April 1986 to pay an additional price at the rate of £575 per completed flat?*
>
> The judge made the following findings of fact which are relevant on this issue. (i) The subcontract price agreed was too low to enable the plaintiff to operate satisfactorily and at a profit. Mr Cottrell, the defendants' surveyor, agreed that this was so. (ii) Mr Roffey (managing director of the

defendants) was persuaded by Mr Cottrell that the defendants should pay a bonus to the plaintiff. The figure agreed at the meeting on 9 April 1986 was £10,300.

The judge quoted and accepted the evidence of Mr Cottrell to the effect that a main contractor who agrees too low a price with a subcontractor is acting contrary to his own interests. He will never get the job finished without paying more money. The judge therefore concluded:

> 'In my view where the original subcontract price is too low, and the parties subsequently agree that additional moneys shall be paid to the subcontractor, this agreement is in the interests of both parties. This is what happened in the present case, and in my opinion the agreement of 9 April 1986 does not fail for lack of consideration.'

In his address to us, Mr Evans [counsel for the defendants] outlined the benefits to his clients, the defendants, which arose from their agreement to pay the additional £10,300 as: (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the subcontract; (ii) avoiding the penalty for delay; and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work.

However, Mr Evans submits 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. Mr Evans relies on the principle of law which, traditionally, is based on the decision in *Stilk* v. *Myrick* (1809) 2 Camp 317. ...

[He set out the facts of the case and the judgment as reported by Campbell and continued]

In *North Ocean Shipping Co Ltd* v. *Hyundai Construction Co Ltd* [1979] QB 705, Mocatta J regarded the general principle of the decision in *Stilk* v. *Myrick*, 2 Camp 317 as still being good law. He referred to two earlier decisions of this court, dealing with wholly different subjects, in which Denning LJ sought to escape from the confines of the rule, but was not accompanied in his attempt by the other members of the court. ...

[He considered *Ward* v. *Byham* [1956] 1 WLR 496, see 5.2.2.2 and, after setting out passages from the judgments of Denning LJ and Morris LJ, stated]

p. 174 ↵ As I read the judgment of Morris LJ, he and Parker LJ held that, although in maintaining the child the plaintiff was doing no more than she was obliged to do, nevertheless her promise that the child would be well looked after and happy was a practical benefit to the father which amounted to consideration for his promise.

[He then considered *Williams* v. *Williams* [1957] 1 WLR 148, see 5.2.2.2 and continued]

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. However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed. … Moreover, this point was not argued in the court below, nor was it more than adumbrated before us. Interesting though it is, no reliance can in my view be placed on this concept in the present case.

There is, however, another legal concept of relatively recent development which is relevant, namely, that of economic duress. Clearly if a subcontractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the subcontractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since before *Stilk* v. *Myrick*, 2 Camp 317, and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration.

This possible application of the concept of economic duress was referred to by Lord Scarman, delivering the judgment of the Judicial Committee of the Privy Council in *Pao On* v. *Lau Yiu Long* [1980] AC 614. Lord Scarman … referred to *Stilk* v. *Myrick*, 2 Camp 317, and its predecessor *Harris* v. *Watson* (1791) Peake 102, and to *Williams* v. *Williams* [1957] 1 WLR 148, before turning to the development of this branch of the law in the United States of America. He then said, at pp. 634–635:

> 'Their Lordships' knowledge of this developing branch of American law is necessarily limited. In their judgment it would be carrying audacity to the point of foolhardiness for them to attempt to extract from the American case-law a principle to provide an answer to the question now under consideration. That question, their Lordships repeat, is whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position. Their Lordships' conclusion is that where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal. Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine
> p. 175 in each case whether there had ↵ been, short of duress, an unfair use of a strong bargaining position. It would create anomaly because, if public policy invalidates the consideration, the effect is to make the contract void. But unless the facts are such as to support a plea of "non est factum", which is not suggested in this case, duress does no more than confer upon the victim the opportunity, if taken in time, to avoid the contract. It would be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable. …'

It is true that *Pao On* is a case of a tripartite relationship that is, a promise by A to perform a pre-existing contractual obligation owed to B, in return for a promise of payment by C. But Lord Scarman's words, at pp. 634–635, seem to me to be of general application, equally applicable to a promise made by one of the original two parties to a contract.

Accordingly, following the view of the majority in *Ward* v. *Byham* [1956] 1 WLR 496 and of the whole court in *Williams* v. *Williams* [1957] 1 WLR 148 and that of the Privy Council in *Pao On* [1980] AC 614 the present state of the law on this subject can be expressed in the following proposition: (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.

As I have said, Mr Evans 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. If it be objected that the propositions above contravene the principle in *Stilk* v. *Myrick*, 2 Camp 317, I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed e.g. where B secures no benefit by his promise. 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. 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. …

For these reasons I would dismiss this appeal.

Russell LJ

I find [the] primary argument relating to consideration much more difficult. It is worth rehearsing some of the facts. …

[He set out an extract from the defendants' pleading and continued]

There is no hint in that pleading that the defendants were subjected to any duress to make the agreement or that their promise to pay the extra £10,300 lacked consideration. As the judge found, the plaintiff must have continued work in the belief that he would be paid £575 as he finished each of the 18 uncompleted flats (although the arithmetic is not precisely accurate). For their part the defendants recorded the new terms in their ledger. Can the defendants now escape liability on the
p. 176 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.

The submissions advanced on both sides before this court ranged over a wide field. They went far beyond the pleadings, and indeed it is worth noticing that the absence of consideration was never pleaded, although argued before the assistant recorder, Mr Rupert Jackson QC. Speaking for myself—and I notice it is touched upon in the judgment of Glidewell LJ—I would have welcomed the development of argument, if it could have been properly raised in this court, on the basis that there was here an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding … whilst 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*, 2 Camp 317 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 intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.

What was the true intention of the parties when they arrived at the agreement pleaded by the defendants ...? The plaintiff had got into financial difficulties. The defendants, through their employee Mr Cottrell, recognised the price that had been agreed originally with the plaintiff was less than what Mr Cottrell himself regarded as a reasonable price. There was a desire on Mr Cottrell's 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 involving the payment of a specified sum on the completion of each flat. These were all advantages accruing to the defendants which can fairly be said to have been in consideration of their undertaking to pay the additional £10,300. True it was that the plaintiff did not undertake to do any work additional to that which he had originally undertaken to do but the terms upon which he was to carry out the work were varied and, in my judgment, that variation was supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates.

For my part I wish to make it plain that I do not base my judgment upon any reservation as to the correctness of the law long ago enunciated in *Stilk* v. *Myrick*. 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. As I read the judgment of the assistant recorder this was his true ratio upon that part of the case wherein the absence of consideration was raised in argument. For the reasons that I have endeavoured to outline, I think that the assistant recorder came to a correct conclusion and I too would dismiss this appeal.

Purchas LJ

[set out the facts and continued]

p. 177 The point of some difficulty which arises on this appeal is whether the judge was correct in his conclusion that the agreement reached on 9 April did not fail for lack of consideration ↵ because the principle established by the old cases of *Stilk* v. *Myrick*, 2 Camp 317 approving *Harris* v. *Watson*, Peake 102 did not apply. Mr Makey, who appeared for the plaintiff, was bold enough to submit that *Harris* v. *Watson*, albeit a decision of Lord Kenyon, was a case tried at the Guildhall at nisi prius in the Court of King's Bench and that *Stilk* v. *Myrick* was a decision also at nisi prius albeit a judgment of no less a judge than Lord Ellenborough CJ and that, therefore, this court was bound by neither authority. 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: see the reference to *Stilk* v. *Myrick* to be found in *North Ocean Shipping Co Ltd* v. *Hyundai Construction Co Ltd* [1979] QB 705, 712 per Mocatta J. With respect, I agree with his view of the two judgments by Denning LJ in *Ward* v. *Byham* [1956] 1 WLR 496

> and *Williams* v. *Williams* [1957] 1 WLR 148 in concluding that these judgments do not provide a sound basis for avoiding the rule in *Stilk* v. *Myrick*, 2 Camp 317. Although this rule has been the subject of some criticism it is still clearly recognised in current textbooks of authority: see *Chitty on Contracts*, 28th ed. (1989) and Cheshire, Fifoot and Furmston's *Law of Contract*, 11th ed. (1986). By the same token I find myself unable to accept the attractive invitation … to follow the decision of the Supreme Court of New Hampshire in *Watkins and Sons Inc* v. *Carrig* (1941) 21 A. 2d 591.
>
> In my judgment, therefore, the rule in *Stilk* v. *Myrick*, 2 Camp 317 remains valid as a matter of principle, namely that a contract not under seal must be supported by consideration. Thus, where the agreement upon which reliance is placed provides that an extra payment is to be made for work to be done by the payee which he is already obliged to perform then unless some other consideration is detected to support the agreement to pay the extra sum that agreement will not be enforceable. The two cases, *Harris* v. *Watson*, Peake 102 and *Stilk* v. *Myrick*, 2 Camp 317 involved circumstances of a very special nature, 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. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews. Thus, the decision that the promise to pay extra wages even in the circumstances established in those cases, was not supported by consideration is readily understandable. Of course, conditions today on the high seas have changed dramatically and it is at least questionable … whether these cases might not well have been decided differently if they were tried today. The modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement. In the present case the question of duress does not arise. The initiative in coming to the agreement of 9 April came from Mr Cottrell and not from the plaintiff. It would not, therefore, lie in the defendants' mouth to assert a defence of duress. Nevertheless, the court is 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. …
>
> In the light of those authorities the question now must be addressed: Was there evidence upon which the judge was entitled to find that there was sufficient consideration to support the agreement of 9 April … what consideration has moved from the plaintiff to support the promise to pay the extra £10,300 added to the lump sum provision? In the particular circumstances which I have outlined above, there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April. 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
> p. 178 without further finance. As a result ↵ of the agreement 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. It was, however, open to the plaintiff to be in deliberate breach of the contract in order to 'cut his losses' commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation … I consider that the modern approach to the question of

> consideration would be 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 support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment. In my judgment, on the facts as found by the judge, he was entitled to reach the conclusion that consideration existed and in those circumstances I would not disturb that finding. … For these reasons and for the reasons which have already been given by Glidewell LJ I would dismiss this appeal.

Commentary

Williams v. *Roffey Bros* is a leading modern case on the doctrine of consideration. It has attracted a huge amount of academic commentary but its impact on the world of practice seems relatively small; the case has not been cited extensively. But this may simply reflect the point that has already been made, namely the limited practical significance of the doctrine of consideration. Eight points fall to be made in relation to the scope of the case.

5.2.2.3.2.1 Identifying the practical benefit

The first relates to the basis for the finding that the plaintiff provided consideration for the defendants' promise to pay an extra £10,300. All three judges emphasized the fact that the defendants obtained a 'practical benefit' as a result of the plaintiff's promise to perform his existing contractual duty. What was this 'practical benefit'? Various explanations were offered by the judges in *Williams*. Check back through the judgments and try to identify as many as you can. At one end of the spectrum is the observation of Purchas LJ that the plaintiff could be said to have provided consideration in that he did not break his contract with the defendants. This is a controversial statement in that it gives little or no emphasis to the fact that the defendants had purchased the right to the plaintiff's performance under the original contract. While they may have obtained a practical benefit in the sense that the plaintiff continued with performance when he might not otherwise have done so, they were already entitled to that performance as a matter of law so that, in the eyes of the law, it can be said that they did not obtain a benefit as a result of the performance by the plaintiff of his existing contractual duty. At the other end of the spectrum is the point made by Russell LJ that a 'haphazard method of payment' was replaced by a more formalized payment system which gave the defendants greater control over the order of the plaintiff's performance. The latter does seem to amount to the
p. 179 provision of consideration ↵ and so the case was probably correctly decided on its own facts. It is the wider dicta which suggest that the plaintiff provided consideration merely by continuing with the work and not breaching his contract that are problematic.

But it may be that these wider dicta will not be followed. Thus in *WRN Ltd* v. *Ayris* [2008] EWHC 1080 (QB), [2008] All ER (D) 276 (May), [46] Judge Seymour stated that it was 'well-established' that a promise to perform an existing contract 'will not, in law, constitute consideration'. Slightly more equivocal is the decision of the Court of Appeal in *Attrill* v. *Dresdner Kleinwort Ltd* [2011] EWCA Civ 229, [2011] IRLR 613, where an employer undertook to establish a guaranteed minimum bonus pool for certain employees. The employer subsequently maintained that the promise was unsupported by consideration. The Court of Appeal concluded (at [35]) that 'the continued work of the employee is, at least arguably, adequate consideration for the establishment of the guaranteed minimum bonus pool'. Two aspects of this decision should be noted. First, it was not necessary for

the Court of Appeal to reach a final view on the matter; hence it was sufficient to conclude that it was 'arguable' that the employees had provided consideration. Secondly, the scheme was part of a retention package, so that the benefit to the employer was not simply that the employees would continue to perform their existing contractual obligations, but that they would not exercise their right to terminate their employment in order to seek better terms elsewhere at a time when the employer had particular need of their services (as indicated by Elias LJ at a subsequent stage of the litigation in *Attrill* v. *Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 All ER 607, [95]). On the other hand, Leggatt J in *Blue* v. *Ashley* [2017] EWHC 1928 (Comm), [59], stated that the decision in *Williams* had 'effectively' rendered the rule that performance of, or a promise to perform, an existing contractual duty could not constitute consideration 'obsolete by accepting that performance or a promise to perform an existing duty can satisfy the requirement of consideration by providing a practical benefit to the other party, which it will invariably do'.

5.2.2.3.2.2 *The relationship between* Williams *and* Stilk *v.* Myrick

The second point concerns the relationship between *Williams* and *Stilk* v. *Myrick*. All three judges discuss *Stilk* but they do not overrule it. Thus the six propositions set out by Glidewell LJ (5.2.2.3.2) are said to 'refine' and 'limit' the application of the principle laid down in *Stilk* but they do not 'contravene' it. Rather oddly, all three judges cite Campbell's report of *Stilk* but their interpretation of the case is much closer to Espinasse's version of it. This suggests that the difference between *Stilk* and *Williams* lies in the absence of duress, or the potential for duress, in the latter case. But there is another possible explanation for the difference between the two cases. The emphasis on 'practical benefit' in *Williams* finds no counterpart in *Stilk*. What would have been the outcome in *Stilk* if Lord Ellenborough had asked himself the question whether the master of the ship had obtained a practical benefit as a result of the performance by the plaintiff of his contractual obligation to work the ship back home? We shall never know the answer to this question but it is important to bear in mind that, post *Williams* v. *Roffey Bros*, there are two possible analyses of *Stilk*. The first is that the plaintiff did provide consideration for the master's promise of additional pay but that the agreement was set aside on the ground of duress (or on the ground that it was contrary to public policy). The second explanation is that the plaintiff did not in fact provide any consideration in promising to carry out his existing contractual obligation. Which
p. 180 interpretation of *Stilk* did the judges in *Williams* adopt? The answer is not clear. ↵ But in *Anangel Atlas Compania Naviera SA* v. *Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526 Hirst J appeared to adopt the latter interpretation. Thus he said (at p. 545) 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.

5.2.2.3.2.3 Duress

The third point relates to the role of duress. The point can be put more widely. Thus in *Antons Trawling Co Ltd* v. *Smith* [2003] 2 NZLR 23 Baragwanath J referred more broadly to the principle that parties should be bound by their agreement to vary their contract in the absence of 'policy reasons to the contrary'. These 'policy factors' are nowhere identified in the judgment of Baragwanath J but they are presumably doctrines that are related to duress, such as undue influence (on which see Chapter 19) and, in so far as they are recognized as

vitiating factors, unconscionability and inequality of bargaining power (on which see Chapter 20). But the essential point to grasp is the argument that the real fear in contract modification cases is that one party will exploit the vulnerability of the other in order to extract a promise of more pay. On this view there is a fundamental distinction to be drawn between a modification that is freely negotiated (which should be enforceable) and a modification extracted as a result of the application of illegitimate pressure (which should not be enforceable). If the concern of the law is to ensure that contract modifications are freely negotiated, then duress rather than consideration should be the regulator of contract modifications or re-negotiations. This point was made by Posner CJ in *United States* v. *Stump Homes Specialties Manufacturing Inc* 905 F 2d 1117 (1990) in the following passage from his judgment (at pp. 1121–1122):

> The requirement of consideration has … a distinct function in the modification setting—although one it does not perform well—and that is to prevent coercive modifications. Since one of the main purposes of contracts and of 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. A may have ordered a machine from B that A wants to place in operation on a given date, specified in their contract; and in expectation of B's complying with the contract, A may have made commitments to his customers that it would be costly to renege on. As the date of scheduled delivery approaches, B may be tempted to demand that A agree to renegotiate the contract price, knowing that A will incur heavy expenses if B fails to deliver on time. A can always refuse to renegotiate, relying instead on his right to sue B for breach of contract if B fails to make delivery by the agreed date. But legal remedies are costly and uncertain, thereby opening the way to duress. Considerations of commercial reputation will deter taking advantage of an opportunity to exert duress on a contract partner in many cases, but not in all.
>
> [He cited a number of examples of duress in the contract-modification setting and continued]
>
> The rule that modifications are unenforceable unless supported by consideration strengthens A's
> p. 181 position by reducing B's incentive to seek a modification. But it strengthens ↵ it feebly. … The law does not require that consideration be adequate—that it be commensurate with what the party accepting it is giving up. 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.
>
> The sensible course would be to enforce contract modifications (at least if written) regardless of consideration and rely on the defense of duress to prevent abuse. … All coercive modifications would then be unenforceable, and there would be no need to worry about consideration, an inadequate safeguard against duress.

A similar judicial sentiment has been expressed on this side of the Atlantic (see, for example, Leggatt J in *Blue* v. *Ashley* [2017] EWHC 1928 (Comm), [59]). Thus in *The Alev* [1989] 1 Lloyd's Rep 138, 147 Hobhouse J stated that:

> now that there is a properly developed doctrine of the avoidance of contracts on the grounds of economic duress, there is no warrant for the Court to fail to recognise the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.

The adoption of a duress-based analysis does have significant implications for the doctrine of consideration because it usually carries with it the proposition either that the court should be readier to find the existence of consideration (the view taken by Hobhouse J) or that the court should take the bolder step, suggested by Posner CJ, of abolishing the requirement that contract modifications be supported by consideration. Should English law take the latter step? *Williams* itself does not take it. It retains the consideration requirement, albeit that it makes it much easier for the court to find the existence of consideration in the context of a re-negotiation of a contract. The answer to the question whether or not English law should abolish the consideration requirement in relation to contract modifications depends in large part upon whether consideration is seen as a once-for-all requirement in English law; that is to say it should apply only at the moment of formation of the contract and not subsequently. But is there a difference between a promise to make a gift of £1,000 and a promise to pay an extra £1,000 for something to which one is already contractually entitled? The latter could be said to be a form of gift that should be treated in exactly the same way as all other promises to make a gift. On the other hand, as Posner CJ points out, the parties in a modification case have already made a contract 'so that the danger of mistaking casual promissory language for an intention to be legally bound is slight'. Yet there are difficulties with the view that consideration should no longer apply to contract modifications (these difficulties were examined by the Singapore Court of Appeal in *Ma Hongjin* v. *SCP Holdings Pte Ltd* [2020] SGCA 106, [2021] 1 SLR 304, [54]–[95] where the court rejected the submission that 'the requirement for consideration should be dispensed with for contractual variations'). Perhaps the most pressing difficulty relates to the current state of the doctrine of duress (on which see further Chapter 18). The doctrine does not, as yet, exhibit a great deal of stability and, as *Stilk* v. *Myrick* demonstrates (see 5.2.2.3.1), it can be a difficult task to ascertain whether or not duress has been applied on the facts of a particular case. The doctrine of duress may not be ready for an exalted role as the principal regulator of contract modifications.

p. 182 #### 5.2.2.3.2.4 One contract or two?

The fourth point relates to the reference by Purchas LJ (see 5.2.2.3.2) to the American case of *Watkins and Sons Inc* v. *Carrig* (1941) 21 A 2d 591. In that case the court held that there had not been a variation of the initial contract but a consensual abandonment of that contract which was then replaced by a second contract on new terms. In this way the court was able to find that the abandonment of the contract and the entry into a new contract was supported by consideration. *Watkins* has been applied by the Court of Appeal in *Compagnie Noga d'Importation et d'Exportation SA* v. *Abacha (No 2)* [2003] EWCA Civ 1100, [2003] 2 All ER (Comm) 915. Tuckey LJ stated (at [57]–[60]):

> The essential difference between rescission and variation for present purposes is that a contract comes to an end when it is rescinded but continues if it is varied. If the rescinded agreement is replaced by a new agreement containing the same obligations, it is not the old agreement which compels the performance of those obligations but the new agreement. It follows that the principle in *Stilk* v. *Myrick* has no application to this situation because it is premised on the continuation of the obligations in the old agreement. Mr Flint [counsel for the defendant] accepted this analysis in a case where there was an interval between the rescission and replacement, but I do not see that there can be any difference in principle between the two situations. … It is not necessary in my judgment to create a scintilla temporis [a moment in time] for there to be a rescission and replacement. It can be achieved concurrently by the same document in the way it was done in this case.

Thus, had the court in *Stilk* decided that the original contract had been abandoned and replaced by a new contract, it would have found that the sailors were entitled to the additional pay because, in such a case, the agreement to abandon the original contract would have been supported by consideration and, equally, the new contract entered into between the parties would have been supported by consideration. The distinction between a rescission of the original contract (and its replacement with a new contract) and the variation of that contract may be difficult to draw on the evidence but it is an important one in terms of the legal consequences which flow from it.

5.2.2.3.2.5 Estoppel

The fifth point relates to the role of estoppel. All three judges in *Williams* make reference to estoppel cases and Russell LJ stated that he would have welcomed the development of an argument to the effect that the defendants were estopped from taking the position that their promise to pay an extra £10,300 was not binding. Estoppel will be discussed in greater detail later in the chapter (see 5.3). Here it suffices to note that it was not in fact necessary for the plaintiff to place reliance upon estoppel because he succeeded with his primary submission that he had provided consideration for the defendants' promise of additional payment. A claimant who can establish the existence of consideration does not need to invoke an estoppel. Indeed, the wider the scope of the doctrine of consideration, the less need there is in practice to have resort to estoppel. Conversely, the narrower the scope of the doctrine of consideration, the greater the potential role for estoppel.

5.2.2.3.2.6 Analogies with other pre-existing duty cases

The sixth point relates to the willingness of the judges in *Williams* to draw on case-law concerned with the
p. 183 performance of a duty imposed by law and the performance of a contractual ↵ duty owed to a third party. In relation to a duty imposed by law, it is interesting to note Glidewell LJ's analysis of *Ward* v. *Byham* [1956] 1 WLR 496 (5.2.2.2). He analysed *Ward* as a case in which the consideration was to be found in the fact that the father obtained a 'practical benefit' as a result of the mother's promise that the child would be well looked after and happy. The effect of the 'practical benefit' analysis is to shift attention away from the mother and the question whether or not she had simply performed her existing legal duty. Instead it focuses attention on the father and suggests that the question which the court should ask itself is whether or not the promise to perform, or the performance of, a pre-existing legal duty confers a 'practical benefit' upon the other party. But this analysis may go too far. Suppose that in *Glasbrook Brothers Ltd* v. *Glamorgan County Council* [1925] AC 270 (5.2.2.2) the House of Lords had concluded that the police had done no more than their legal duty in providing

a garrison for the colliery owners. Would they nevertheless have been entitled to charge the colliery owners for the service they had provided on the basis that the colliery owners had obtained a 'practical benefit' as a result of the performance of their legal duty? The adoption of a 'practical benefit' test in the context of the legal duty cases could largely undermine the general rule that performance of, or a promise to perform, a legal duty does not constitute consideration for a promise given in return.

Of greater interest perhaps is the fact that Glidewell LJ drew considerable support for his analysis from *Pao On* v. *Lau Yiu Long* [1980] AC 614, a case concerned with a promise to perform a contractual duty owed to a third party. This reliance on *Pao On* has, however, been criticized. In *South Caribbean Trading Ltd* v. *Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128, Colman J stated (at [108]):

> But for the fact that *Williams* v. *Roffey Bros.* 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 Lord Justice Glidewell was substantially based on *Pao On* v. *Lau Yiu Long* [1980] AC 614 in 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 p. 15 Lord Justice Glidewell 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. Lord Justice Glidewell 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. Lord Justice Purchas at pp. 22–23 clearly saw the *non sequitur* 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 pp. 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 Lord Justice Purchas.

In essence Colman J believes that a distinction must be drawn between two-party and three-party cases and that Glidewell LJ erred in *Williams* in so far as he attempted to transplant the principles applicable in a three-party case into a two-party case. The answer to this criticism may be that the promisee in *Williams* (the sub-contractor) did provide consideration for the promise of additional payment in that he continued with performance of the contract when he might not otherwise have done so. In this sense, consideration did move
p. 184 from the ↵ promisee in *Williams.* However, it would appear that the consideration for which Colman J was looking was consideration in a legal and not a practical form. Thus the consideration which he identified in the three-party case was the assumption of an additional legal liability by A towards B. He then noted that no such additional legal liability was present in the two-party case and so concluded that *Williams* was inconsistent with the rule that consideration must move from the promisee. The difficulty with this reasoning is that it overlooks the fact that the essence of *Williams* is to shift the focus of attention from the existence or otherwise of a legal benefit or detriment towards an approach which focuses attention on the

existence or otherwise of a *practical* benefit or detriment. This ultimately takes us back to the distinction between legal and practical benefits and suggests that Colman J is firmly entrenched in the legal benefit/detriment school and that this in large part explains his criticisms of *Williams.*

5.2.2.3.2.7 The measure of recovery

The seventh point relates to the measure of the plaintiff's recovery. As Professor Treitel has pointed out (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 19), 'the reason for the exact amount of the recovery cannot be deduced from the figures given in the report'. The plaintiff claimed damages of £10,847 but was awarded only £3,500. Damages were calculated by reference to the work done by the plaintiff at the date of the termination of the contract: he was not awarded anything for the loss of profit on the flats he would have finished had the defendants performed their obligations in accordance with the contract. However, it may be possible to explain this result. Professor Chen-Wishart has argued ('A Bird in the Hand: Consideration and Contract Modifications' in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010), pp. 89, 96) that *Williams* can best be explained as a case in which the original bilateral contract between the parties was supplemented by 'a collateral unilateral contract to pay more … if actual performance is rendered'. On this view the defendant was not purchasing the right to performance (as it had already purchased that right) but was bargaining for actual performance. This explanation rests on the proposition that 'contract law should concede that obtaining actual performance will often be more valuable than simply having the right to sue for non-performance'. Applied to the facts of *Williams*, it produces the result that the defendant promised to pay 'an extra £575, if and when [the plaintiff] finishes each of the 18 remaining flats on time' so that the plaintiff was only entitled to payment in respect of the flats that had been finished on time. The conclusion that the defendant made '18 separate unilateral offers' does not fit with the reasoning of the Court of Appeal in *Williams* and it would probably require some explanation before it was understood by the parties to the litigation, but it does provide an explanation for the case which is consistent with legal principle and which avoids the conclusion that the plaintiff provided consideration simply by promising to do something he had already promised to do (and it also finds support from the judgment of Arden LJ in *MWB Business Exchange Centres Ltd* v. *Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604, [89]–[90], on which see further 5.2.2.4.2).

5.2.2.3.2.8 *The relationship between* Williams *and* Foakes *v.* Beer

The final point relates to the relationship between *Williams* and the decision of the House of Lords in *Foakes* v. *Beer* (1884) 9 App Cas 605. The relationship between these two cases is the subject matter of the next section.

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5.2.2.4 Part Payment of a Debt

The final aspect of the pre-existing duty rule is the general rule that payment of part of a debt is not good consideration for a promise to discharge the entire debt. The leading case on this general rule is:

Foakes v. Beer
(1884) 9 App Cas 605, House of Lords

In August 1875 the respondent, Mrs Beer, obtained a judgment against the appellant, Dr Foakes, for the sum of £2,090 19s. Mrs Beer was entitled to interest on the judgment debt at 4 per cent, arising immediately on the entering of the judgment, until the judgment debt was fully paid. Dr Foakes asked Mrs Beer for more time to pay the debt and so in December 1876 the parties entered into an agreement. The agreement was drawn up by Dr Foakes' solicitor and it recited that:

> 'Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of £2090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2090 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on the 1st day of July and the 1st day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2090 19s. shall have been fully paid and satisfied, the first of such payments to be made on the 1st day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment.'

In 1882 Mrs Beer sought to recover interest on the judgment debt (Dr Foakes having paid to Mrs Beer the sum of £2,090 19s by instalments). Dr Foakes denied that he was liable to pay interest and relied for this purpose on the terms of the agreement. At trial Dr Foakes was successful but the Court of Appeal allowed Mrs Beer's appeal and held that the agreement was no bar to her claim. Two points were in issue before the House of Lords. The first was whether, as a matter of construction, Mrs Beer had agreed to forego her claim to interest on the judgment debt and the second was whether, if she had, that agreement was supported by consideration. The four judges in the House of Lords divided on the question of construction but were unanimous (subject to the doubts of Lord Blackburn) that the agreement was not supported by consideration and that Mrs Beer was entitled to recover interest on the judgment debt.

Earl of Selborne LC

[considered the meaning of the agreement and concluded that Mrs Beer had relinquished her claim to interest on the judgment debt and continued]

p. 186 ↵ But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of

> accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise de futuro was only that of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would 'take no proceedings whatever on the judgment'. No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. …
>
> The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's Case* 5 Rep. 117a in 1602, and repeated in his note to Littleton, sect. 344 (2), but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, inter se, by several creditors. … The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.
>
> The doctrine, as stated in *Pinnel's Case*, is 'that payment of a lesser sum on the day' (it would of course be the same after the day), 'in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum'. As stated in Coke Littleton, 212 (b), it is, 'where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater'; adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.
>
> The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration

is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole
p. 187 debt, on payment of any sum which the ↵ creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities … which were relied upon by the appellant at your Lordships' Bar … have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called 'any benefit, or even any legal possibility of benefit', in Mr Smith's notes to *Cumber* v. *Wane* 1 Sm L C 8th ed. 366, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed, with costs, and I so move your Lordships.

Lord Blackburn

[considered the meaning of the agreement and concluded that Mrs Beer had relinquished her claim to interest on the judgment debt and continued]

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2090 19s., subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

[He considered Coke, Littleton 212 b and *Pinnel's Case*, both of which are set out in the speech of the Earl of Selborne above and continued]

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in

> satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.
>
> There is a second point stated to have been resolved, viz.: 'That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum'. This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake. …
>
> p. 188 ↵ [He considered the authorities and continued]
>
> What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all 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. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.
>
> I assent to the judgment proposed, though it is not that which I had originally thought proper.
>
> ***Lord Watson*** and ***Lord Fitzgerald*** delivered concurring judgments in which they held that, as a matter of construction, Mrs Beer had not promised to forego her claim to recover interest (although Lord Watson added that he assumed that he was wrong on this point) but that, in any event, Mrs Beer was entitled to recover interest because there was no consideration to support any promise to forego interest.

Commentary

Before dealing with the consideration aspect of *Foakes*, it is worth exploring the question of construction because it may shed light on the reasons that led their Lordships to conclude that Mrs Beer was entitled to interest on the judgment debt on the particular facts of the case. Professor Treitel (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), pp. 24–26) neatly sets out the issue as follows:

> [T]he question was whether the agreement meant that, if Dr Foakes paid instalments amounting to the principal sum, then Mrs Beer would not claim interest. There is nothing in the reports to indicate that Dr Foakes' liability to pay interest was discussed in the negotiations leading up to the 1876 agreement, and Lord Selborne doubted whether this issue was 'really present to the mind of' Mrs Beer. Nevertheless he held that the operative part of the agreement was 'clear'—it said '£2090 19s' and not '£2019 19s plus interest'—and, that being so, the case was governed by the well-established rule that 'clear' words in the operative part of an agreement could not be controlled by recitals—i.e. here by the recital that Dr Foakes was asking for time. On the issue of construction, Lord Blackburn agreed with Lord Selborne; Lords Fitzgerald and Watson did not agree, but Lord Watson was prepared to assume that he was wrong on the construction point. There being no record of any speech from a fifth Law Lord, we have a majority of sorts in favour of Dr Foakes on the construction issue. But on the issue of legal effect of the agreement the decision went in favour of Mrs Beer. She was not bound by her promise to forego interest: Dr Foakes had provided no consideration for that promise by paying the principal sum since he was already bound to make that payment before the promise was made.
>
> The actual decision in *Foakes* v. *Beer* does not seem to be unjust. What seems to have happened was that Dr Foakes' solicitor dug a technical trap for Mrs Beer and the House of Lords arranged an equally
> p. 189 technical rescue. The technical trap was the rule that recitals ↵ cannot control 'clear' words in the operative provisions of a contract. The technicality invoked to rescue her was the rule in *Pinnel's* case (as later interpreted) under which payment by Dr Foakes of part of what was due (the principal) could not constitute consideration for Mrs Beer's promise to forego the rest (the interest). I call this a technical rescue because probably she did benefit in fact from the 1876 agreement. Lord Blackburn stressed this aspect of the case and was critical of the rule in *Pinnel's* case. But, being a good judge as well as a great lawyer, he did not dissent: he must have seen that the outcome proposed by the other members of the House was not unjust. Conversely, the reasoning of those others is, with respect, less than wholly convincing. They were not prepared to overturn the 'rule in *Pinnel's* case' because it 'has been accepted as part of the law of England for 280 years'. Sometimes, that would be a strong argument. If a long-established rule is one on which people rely, there is a case for saying that it should not be overturned by judicial decision since such a reversal operates retrospectively and so defeats legitimate expectations, at least in the particular case. But is 'the rule in *Pinnel's* case' really of this kind? Do people rely on this rule, or if they do, should the law encourage them to do so? I doubt whether the antiquity of the rule was an adequate justification for continuing to apply it in the circumstances of *Foakes* v. *Beer*. If there had been evidence of Mrs Beer's intention to exploit the rule as a weapon in the negotiations with Dr Foakes, I should have had little, if any sympathy with her. The fact that does engage my sympathy on her side is that, although she was probably not coerced, she does appear to have been tricked into making a promise which, on its true construction, had an effect not intended by her. The requirement of consideration was a useful tool for protecting her against trickery.

In this passage Professor Treitel provides a defence of the result on the facts of *Foakes* but raises a question-mark against the general rule for which the case stands as authority, namely that payment of part of a debt is not good consideration for a promise to discharge the entire debt. The general rule has been attacked on a

number of different grounds.

The first is that a payment of part of a debt can be, and generally is, of benefit to the creditor. This is the point made by Lord Blackburn in the penultimate paragraph extracted from his judgment (earlier in this section). The second is that the general rule is easy to evade. The simplest way to do so is for the debtor to provide fresh consideration for the promise to accept part payment in full settlement of the debt. For example, the debtor can agree to make payment a day early or make payment at a different place from that agreed in the contract. Why does the law refuse to give effect to a promise to treat payment of £95,000 as good consideration for the discharge of a debt of £100,000 but at the same time give effect to a promise to pay £20,000 in discharge of a debt of £100,000 where the debtor agrees to make payment at a place other than that agreed in the contract? The law should not encourage such artificial behaviour: it should look to the substance of the transaction and not its form. Provided that the creditor intends to be bound by his promise to accept part payment as full satisfaction of the debt, should the law not give effect to the new agreement? Thirdly, it can be argued that the rule in *Foakes* v. *Beer* is out of step with modern developments in the doctrine of consideration, particularly the decision of the Court of Appeal in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (5.2.2.3.2).

Given these criticisms, why has the general rule survived for as long as it has? There appear to be two answers to this question. The first is that the rule has played a useful role in protecting creditors from unscrupulous debtors and the second is the operation of the doctrine of precedent. We shall consider these alternatives in turn.

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5.2.2.4.1 Protection of the creditor

The protective function of the rule established in *Foakes* v. *Beer* can be seen on the facts of the case itself. But a clearer illustration of the need to protect creditors from unscrupulous debtors is provided by the decision of the Court of Appeal in *D & C Builders* v. *Rees* [1966] 2 QB 617. The plaintiffs, a small building company, carried out building work for the defendant. The defendant paid £250 on account and a balance of £482 13s. 1d. remained outstanding. The plaintiffs made several requests for payment but received no reply. By this time the plaintiff company was in 'desperate financial straits'. The defendant's wife offered to pay them £300 in settlement of the whole claim. The plaintiffs stated that they would accept £300 straight away and give the defendant a year to find the balance. The defendant's wife refused to agree to this, stating, 'we will never have enough money to pay the balance. £300 is better than nothing.' The plaintiffs stated that they had no choice but to accept. The defendant's wife gave the plaintiffs a cheque for £300 and insisted that they give her a receipt which included the words 'in completion of the account'. The plaintiffs then brought an action for the balance. The Court of Appeal held that the purported settlement did not bar the plaintiffs from recovering the balance of the debt.

In reaching the conclusion that the settlement was not binding on the plaintiffs Danckwerts and Winn LJJ simply applied *Foakes* v. *Beer*. Lord Denning, however, took a different approach. While he did not seek to challenge the authority of *Foakes* v. *Beer* at common law (he could not do so as a matter of authority), he resorted to equity in an attempt to confine, if not undermine, *Foakes*. Thus he was careful to say that the reason why the plaintiffs were entitled to sue for the balance of the price was that the defendant had behaved inequitably. In his words:

> The creditor is only barred from his legal rights when it would be *inequitable* for him to insist upon them. Where there has been a true *accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them.

This division of opinion in many ways reflects the debate that has taken place over the true analysis of *Stilk* v. *Myrick* (on which see 5.2.2.3.1). The majority judgments adopt traditional reasoning, based on the absence of consideration for the promise to discharge the entire debt, while the minority opinion of Lord Denning attempts to distinguish an agreement that has been freely concluded from one that has been extracted as a result of the application of illegitimate pressure.

This protective role of *Foakes* may suggest a limit to the rule, namely that it should only apply where its effect is to protect the creditor against an unscrupulous debtor. On this basis, a creditor who voluntarily enters into an agreement under which he agrees to accept part payment of a debt in discharge of the entire debt should be bound by that agreement. The House of Lords in *Foakes* did not, however, adopt this position. On the contrary, it held that there is no consideration to support such an agreement, whether the creditor enters into it freely or under pressure from the debtor. But the willingness of a creditor to enter into the agreement may be of considerable importance in relation to the possible application of the doctrine of estoppel. In other words, a creditor who voluntarily agrees to accept part payment in discharge of the entire debt may be estopped from
p. 191 going back ↵ upon his promise if the debtor makes that part payment. Support for this proposition can be derived from the decision of the Court of Appeal in *Collier* v. *P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643. The applicant was one of three partners who, between them, owed £46,000 to the defendant. The liability of the partners was joint (that is to say there was one liability for £46,000, so that one partner could be called upon to pay the entire debt and he would then have a claim to recover a share of that debt from his fellow partners by way of a claim for contribution). The applicant alleged that he had made an oral agreement with the defendant under which it was agreed that his liability should be limited to one third of the judgment debt and that the defendant would recover the rest of the debt from the other two partners. The applicant, over a period of five years, paid £15,600 to the defendant. The defendant then claimed that he was entitled to recover the balance of the judgment debt from the applicant, who relied on the oral agreement he had reached with the defendant. The defendant submitted that he was not bound by the alleged agreement, relying upon *Foakes* v. *Beer*. The Court of Appeal held that the applicant had established an arguable case that promissory estoppel might afford him a defence to the claim of the defendant.

Two reasoned judgments were given. The first, given by Arden LJ, drew heavily upon the judgment of Lord Denning in *D & C Builders.* She deduced from the authorities the following proposition (at [42]):

> [I]f (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.

On this basis a debtor who pays (as distinct from one who merely promises to pay) the promised part of the debt may now be able to rely upon promissory estoppel in order to defeat a claim brought by the creditor to recover the balance of the debt. This is an important conclusion in relation to the sphere of application of *Foakes*. On the facts of *Foakes* the debtor had paid the promised part of the debt and so, on the reasoning of Arden LJ, ought to have been able to rely on promissory estoppel as a defence to the creditor's claim.

The second judgment, given by Longmore LJ, was more circumspect. While he accepted that the applicant had established an arguable case of estoppel, he registered three concerns (at [45]–[48]) about the scope of the principle set out by Arden LJ. First, he stated that the agreement to give up the claim for the balance of the debt must be clearly established on the evidence. The courts will not lightly infer that a creditor has promised to give up his right to recover the balance of the debt. Secondly, the debtor must establish that the creditor has agreed to give up his right on a permanent basis and that he has not simply agreed to suspend his right to payment for a period of time. Thirdly, it must be inequitable for the creditor to go back on his promise to accept part payment in discharge of the entire debt. On this basis he concluded that, if the approach advocated by Arden LJ is to be adopted, 'it is perhaps all the more important that agreements which are said to forgo a creditor's rights on a permanent basis should not be too benevolently construed'.

It remains to be seen what impact *Collier* will have on *Foakes.* But it has the potential significantly to limit the
p. 192 rule in *Foakes*. On the basis of *Collier*, a creditor who voluntarily ↵ agrees to accept payment of part of a debt in discharge of the entire debt and who receives that part payment from the debtor, may find that his right to claim the balance of the debt has been extinguished by operation of the doctrine of estoppel.

5.2.2.4.2 The role of precedent

The second reason for the survival of *Foakes* v. *Beer* is that it is a decision of the House of Lords and so can now only be overruled by the Supreme Court. But the doctrine of precedent does not prevent a court from distinguishing *Foakes,* and here the vital issue is the extent to which it is possible to distinguish *Foakes* by invoking the principle laid down by the Court of Appeal in *Williams* v. *Roffey Bros*. There are two cases of significance here. The first is the decision of the Court of Appeal in *In re Selectmove* [1995] 1 WLR 474, where an orthodox approach was taken and *Foakes* v. *Beer* was applied. The second case is the more recent decision of the Court of Appeal in *MWB Business Exchange Centres Ltd* v. *Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604, where the Court of Appeal distinguished *Foakes* and applied *Williams* v. *Roffey Bros* in order to find the existence of consideration to support an agreement to vary the payment obligation under a licence to occupy property. We shall consider each case in turn.

In Re Selectmove
[1995] 1 WLR 474, Court of Appeal

In July 1991 Selectmove Ltd owed substantial amounts of income tax (PAYE) and national insurance contributions (NIC) to the Inland Revenue. Mr Ffookes, the managing director of the company, met with Mr Polland, a collector of taxes. At that meeting Mr Ffookes claimed that he put a proposal to Mr Polland to the effect that Selectmove Ltd would pay future tax and national insurance liabilities as they fell due and would pay off the arrears at a rate of £1,000 per month. Mr Ffookes further claimed that Mr Polland stated that he would have to seek approval from his superiors to such a proposal and that he would revert to Mr Ffookes if the proposal was unacceptable. Mr Polland did not get back in touch with Mr Ffookes. In October 1991 the Revenue wrote to the company demanding payment of arrears of £24,650 and threatened a winding-up petition if payment was not made. The Revenue served a statutory demand for payment and presented a winding-up petition in September 1992. On behalf of the company it was submitted that the petition should be dismissed. The judge rejected the submission and compulsorily wound up the company. The company appealed to the Court of Appeal. One of the grounds on which they appealed was that an agreement had been reached with the Revenue in July 1991 and that agreement was supported by consideration. The Court of Appeal held that no such agreement had been reached but that, in any event, there was no consideration to support the alleged agreement.

Peter Gibson LJ

There are two elements to the consideration which the company claims was provided by it to the revenue. One is the promise to pay off its existing liability by instalments from 1 February 1992. The other is the promise to pay future PAYE and NIC as they fell due. Mr Nugee [counsel for Selectmove] suggested that implicit in the latter was the promise to continue trading. But that cannot be spelt out of Mr Ffookes' evidence as to what he agreed with Mr Polland. Accordingly, the second element is no more than a promise to pay ↵ that which it was bound to pay under the fiscal legislation at the date at which it was bound to make such payment. If the first element is not good consideration, I do not see why the second element should be either.

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The judge held that the case fell within the principle of *Foakes* v. *Beer* (1884) 9 App Cas 605. … Although their Lordships were unanimous in the result, that case is notable for the powerful speech of Lord Blackburn, who made plain his disagreement with the course the law had taken in and since *Pinnel's Case* (1602) 5 Co Rep 117a and which the House of Lords in *Foakes* v. *Beer* 9 App. Cas. 605, decided should not be reversed. Lord Blackburn expressed his conviction, at p. 622, that

> 'all 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.'

Yet it is clear that the House of Lords decided that a practical benefit of that nature is not good consideration in law.

Foakes v. *Beer* has been followed and applied in numerous cases subsequently, of which I shall mention two. In *Vanbergen* v. *St Edmunds Properties Ltd* [1933] 2 KB 223, 231 Lord Hanworth MR said

> 'It is a well established principle that a promise to pay a sum which the debtor is already bound by law to pay to the promisee does not afford any consideration to support the contract.'

More recently in *D & C Builders Ltd* v. *Rees* [1966] 2 QB 617 this court also applied *Foakes* v. *Beer*, Danckwerts LJ saying, at p. 626, that the case

> 'settled definitely the rule of law that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction.'

Mr Nugee, however, submitted that an additional benefit to the Crown was conferred by the agreement in that the Crown stood to derive practical benefits therefrom: 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. He pointed to the fact that the company did in fact pay its further PAYE and NIC liabilities and £7,000 of its arrears. He relied on the decision of this court in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 for the proposition that a promise to perform an existing obligation can amount to good consideration provided that there are practical benefits to the promisee.

[He considered the case, noting in particular the six-point summary to be found in the judgment of Glidewell LJ and continued]

Mr Nugee submitted that, although Glidewell LJ in terms confined his remarks to a case where B is to do the work for or supply goods or services to A, the same principle must apply where B's obligation is to pay A, and he referred to an article by Adams and Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 *MLR* 536, 539–540 which suggests that *Foakes* v. *Beer* might need reconsideration. I see the force of the argument, but the difficulty that I feel with it is that, if the principle of *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes* v. *Beer* without any application. 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. In the absence of authority there would be much to be said

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for the enforceability of such a contract. But that was a matter expressly considered in *Foakes* v. *Beer* yet held not to constitute good consideration in law. *Foakes* v. *Beer* was not even referred to in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of the *Williams* case to any circumstances governed by the principle of *Foakes* v. *Beer* 9 App Cas 605. 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.

> In my judgment, the judge was right to hold that if there was an agreement between the company and the revenue it was unenforceable for want of consideration.
>
> ***Stuart-Smith*** and ***Balcombe LJJ*** agreed with the judgment of Peter Gibson LJ.

Commentary

The Court of Appeal here concluded that *Foakes* v. *Beer* remains good law and that it has not been undermined by *Williams* v. *Roffey Bros*. That said, *Foakes* received a distinctly lukewarm reception. Had the matter not been governed by authority it seems clear that Peter Gibson LJ would have reached a contrary conclusion to that reached by the House of Lords in *Foakes*. But he does make one very significant point in relation to the extension of the 'practical benefit' test to a promise to pay part of a debt, and that is that its effect will be to leave the principle in *Foakes* 'without any application'. The reason for this is that payment of money will always constitute a 'practical benefit' to the creditor. Thus, in his view, the consequence of extending *Williams* v. *Roffey Bros* to the case of part payment of a debt would not be to limit or confine *Foakes* but to undermine it.

What is the view of the relationship between *Williams* v. *Roffey Bros* and *Foakes* that emerges from *Williams* and *Selectmove*? Here we encounter the problem that the Court of Appeal in *Williams* did not consider *Foakes* and so did not attempt to explain the relationship between the two cases. Peter Gibson LJ in *Selectmove* did not doubt the correctness of *Williams* (see *Forde* v. *Birmingham City Council* [2009] EWHC 12 (QB), [2009] 1 WLR 2732, [89]), and so it remains binding up to and including the level of the Court of Appeal. Is there a relevant difference between *Williams* and *Foakes*? The short answer is that *Williams* is about a promise to pay more, whereas *Foakes* is about a promise to accept less (or, to use the language of Professor Treitel (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002)), *Williams* is a case of an 'increasing pact' while *Foakes* is a 'decreasing pact'). Thus there is a clear distinction on the facts between the two cases, but is there a distinction in principle? Peter Gibson LJ does not answer this particular question. His analysis of the relationship between the two cases is conducted in terms of authority rather than principle. This is understandable given that he was bound by the two decisions, but it leaves the question of principle unanswered. His suggestion that the relationship between the two cases should be considered by the Law Commission and then by Parliament is unlikely to bear fruit. The issue is not of sufficient practical significance to attract the time and the resources of the Law Commission. It is therefore likely that it will be left to the courts themselves to work out the relationship between the two cases. The most authoritative modern consideration of the relationship between the two lines of authority is to be found in the following case:

p. 195 ***MWB Business Exchange Centres Ltd v. Rock Advertising Ltd***
[2016] EWCA Civ 553, [2017] QB 604, Court of Appeal

The defendant, Rock Advertising Ltd, occupied premises in central London which were managed by the claimant, MWB Business Exchange Centres Ltd. In November 2011 the defendant agreed to take additional space and to pay to the claimant a licence fee of £3,500 per month for the first three months, and that thereafter the monthly sum would increase to £4,433.34 (both sums exclusive of VAT). The business did not develop as the defendant had anticipated and it found itself unable to pay the new licence fee. By late February 2012 it had accumulated arrears of some £12,000. On 30 March 2012 the claimant exercised its right under the licence agreement to lock the defendant out of the premises and subsequently it purported to terminate the licence agreement between the parties.

The defendant challenged the entitlement of the claimant to act in this manner. For this purpose it relied upon an oral agreement alleged to have been made between the claimant's credit-controller and the defendant's managing director on 27 February 2012, under which it was agreed to 're-schedule the licence fee payments due under the agreement over the period from February to October 2012' on the basis that the defendant would pay less in the early months but more towards the end of the year so that the arrears would be paid off by the end of the calendar year. The claimant denied that such an oral agreement had been entered into between the parties but, in any event, it submitted that any such agreement was not legally enforceable because it lacked consideration to support it. At first instance Judge Moloney held that the agreement to pay in accordance with the revised schedule was supported by consideration because there was a 'possible commercial benefit' to the claimant in retaining an existing tenant, even if it was a questionable payer, in the hope of perhaps recovering some of the arrears. The Court of Appeal also held that the agreement was supported by consideration.

Kitchin LJ

Consideration

37. Mr Darton [counsel for the claimant, MWB] contended that the judge fell into error in his approach to consideration and in support of that submission relied primarily upon the decision of the House of Lords in *Foakes* v. *Beer* (1884) 9 App Cas 605 and the decision of this court in *In re Selectmove Ltd* [1995] 1 WLR 474.

    [He considered the two cases and continued]

46. Founding himself on these authorities, Mr Darton submitted that it is clear that the judge was wrong to find that Rock's payment of the £3,500 and its agreement to comply with the other terms of the revised payment schedule amounted to good consideration. The benefits conferred on MWB were, said Mr Darton, just the kind of practical benefits which Lord Blackburn in *Foakes* v. *Beer* and this court in *In re Selectmove* recognised might flow from an agreement for the payment of a debt by instalments to accommodate the debtor, yet in both

cases they were held not to amount to good consideration. Further, he continued, if the rule in *Williams* v. *Roffey* is to be extended to the circumstances governed by *Foakes* v. *Beer*, it must be by (what is now) the Supreme Court or by Parliament.

47. I have to say that I was initially much attracted by these submissions. However, upon reflection, I have come to the conclusion that they fail to take proper account of the full extent of the factual findings of the judge. He was clearly of the view that the oral variation agreement would have a number of beneficial consequences for MWB. First, MWB would recover some of the arrears immediately and would have some hope of recovering them all in due course. But secondly and importantly, Rock would remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB.

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48. There has been no suggestion that MWB was at any material time operating under any kind of duress. Rather, acting by Miss Evans [a credit controller employed by MWB], it had for some time been trying to find a way to accommodate Rock's financial difficulties. There was, so it seems to me, a commercial advantage to both MWB and Rock in reaching an agreement if that could be achieved. MWB would receive an immediate payment of £3,500, it would be likely to recover more from Rock than it would by enforcing the terms of the original agreement and it would also retain Rock as a licensee. Rock would remain in occupation of the property, continue its business without interruption and have an opportunity to overcome its cash flow difficulties. Accordingly this is not a case in which the only benefits conferred on MWB by the oral variation agreement were benefits of a kind contemplated by Lord Blackburn in *Foakes* v. *Beer* and by this court in *In re Selectmove*. MWB derived a practical benefit which went beyond the advantage of receiving a prompt payment of a part of the arrears and a promise that it would be paid the balance of the arrears and any deferred licence fees over the course of the forthcoming months. This is therefore a case where, as in *Williams* v. *Roffey*, Rock's immediate payment of £3,500 and its agreement to perform its obligations under the revised payment schedule conferred a practical benefit on MWB which amounted to good consideration, so rendering the oral variation agreement enforceable.

49. I conclude that the judge was right to find that the payment by Rock of the £3,500 and its promise to make further payments in accordance with the revised payment schedule conferred upon MWB a benefit which constituted sufficient consideration to support the oral variation agreement. In my judgment the oral variation agreement thereupon became binding upon MWB and it would remain binding for so long as Rock continued to make payments in accordance with the revised payment schedule. I would add that I agree with the judgment of Lady Justice Arden on this issue at [69] to [87] below. I prefer to express no view as to whether the oral variation agreement can properly be characterised as a collateral unilateral contract, however, for this is a point upon which we heard no submissions.

McCombe LJ

67. I am most grateful to Kitchin and Arden LJJ for their judgments both of which I have read in draft. I agree that the appeal should be allowed for the reasons given by Kitchin LJ and those given by Arden LJ in paragraphs 69 to 87 of her judgment. I would prefer not to base my own decision upon the issue of 'collateral unilateral contract' with which Arden LJ deals in paragraphs 88 to 90 of her judgment.

Arden LJ

Consideration: practical benefit to MWB of variation agreement was good consideration in law

Summary of my conclusion

69. MWB contends that the doctrine of consideration is a feature to hold that the variation agreement was supported by consideration and that for this reason it was not bound by its promise to accept deferred payments in that agreement.

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70. In agreement with Lord Justice Kitchin, I consider that this contention is unsound. In summary, the practical benefit which the judge found that MWB derived from the variation agreement constituted good consideration: see *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd*. Neither the Rule in *Pinnel's* case nor *Foakes* v. *Beer* nor *Re Selectmove* prevents that conclusion. Furthermore, the variation agreement may be a contract between the parties which is properly analysed as a collateral unilateral contract.

71. On consideration, there are three steps in my reasoning:

    i) the judge's findings,

    ii) practical benefit as good consideration in law and

    iii) *Pinnel's* case, which does not apply as there is good consideration.

Judge's findings

72. The material findings are in paragraphs 14 and 20 of the concise judgment of the judge.

    [She considered the findings of the judge and continued]

75. In the space of his short judgment, the judge gave significant emphasis to consideration, and it seems therefore unlikely that he did not have in mind that MWB obtained some benefit over and above that simply derived from accommodating the debtor. The benefit to the licensor was thus that it would not be at risk that the unit previously occupied by Rock would stand empty for some time at loss to itself, and that it (the licensor) would have an improved prospect of obtaining payment of the licence fee arrears. There was therefore an identifiable,

practical benefit to the creditor over and above the mere acceptance of the reality that the defaulting debtor was not in a position to pay more than the variation agreement stipulated. The judge clearly considered that the parties had reached an accord on this.

Practical benefit can be good consideration in law

77. The law requires that the promisee (here Rock) must provide consideration to make a promise by the promisor enforceable in law. So Rock had to show that it gave consideration for MWB's agreement to accept the terms of the variation agreement.

78. In my judgment, this requirement is satisfied where the promisee shows that his renewed promise to perform an existing obligation results in the promisor receiving a benefit which he requested or at least indicated he wanted from the renegotiation. That is what happened in *Roffey*. ...

79. There are other illustrations of this form of consideration in the case law, including *Ward* v. *Byham* [1956] 1 WLR 496. Reference may also be made to the observations of the Privy Council in *Pao On* v. *Lau Yiu Long* [1980] AC 614 at 631 to 632. Glidewell LJ discussed both these cases in *Roffey*. The development of this form of consideration is comparatively modern, but it is confirmed in *Roffey.* The principle that a benefit can in law be consideration for a promise must logically apply whatever the nature of the contract. It must also apply whether the promisee has at the same time agreed to render the same performance as he originally promised or to render a lesser performance, and whether the promisor has renewed his original promise or, as in *Roffey*, agreed to pay more.

80. Professor G.H. Treitel at paragraph 4–070 of *Chitty on Contracts*, vol 1, 32nd edition sums up the modern state of the law in relation to consideration for agreements to perform obligations already due under the original contract in the following words, with which I respectfully agree:

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> ↵ 'Where [the debtor's conduct did not constitute economic duress], and the promisee has in fact conferred a benefit on the promisor by performing the original contract, then the requirement of consideration is satisfied and there seems to be no good reason for refusing to enforce the new promise.'

81. On different facts, reliance on consideration in the form of securing a benefit to the promisor which the promisor wants, rather than the more conventional form of consideration consisting of a detriment to the promisee, might result in the enforcement of a contract that had been made ill-advisedly or under improper pressure. However this concern should not be overstated since in the latter situation at least a remedy now exists for economic duress which may protect the disadvantaged creditor. I am also not concerned that in this case the judge describes the practical benefit as 'just enough' to constitute adequate consideration since on general principle the court is not required to ask whether MWB made a good bargain in this situation: the important point is that the practical benefit was an additional item.

Pinnel's case does not have to be considered where there is good consideration

82. The argument for MWB amounts to this: the variation agreement was a promise to pay a smaller amount than originally agreed in that the time value of money has the effect that an agreement to defer payment of a due debt is in effect an agreement to pay a smaller sum. MWB invokes the well-known rule in *Pinnel's* case for the proposition that in those circumstances there is no good consideration in law: see *Foakes* v. *Beer*. ...

83. Furthermore in *re Selectmove*, this Court drew a distinction between obligations to perform work and obligations to pay money and it held that the practical benefit to the creditor of (my words) 'a bird in the hand rather than two in the bush' did not mean that a contract to pay a lesser sum than originally agreed was enforceable. ...

84. In my judgment, *Selectmove* is distinguishable from the present case and decides only that the benefit which a creditor obtains from a promise to pay an existing debt by instalments is not good consideration in law. In that case, there was no finding by the trial judge that there was any extra benefit to the Inland Revenue in having an instalment agreement with the taxpayer. The question of practical benefit only arose in this Court in *Selectmove* because counsel for the taxpayer argued that there was consideration because the instalment agreement was beneficial to the Inland Revenue in the sense that it had a promise to make payments in discharge of the existing debt in accordance with an agreed schedule, which would obviate the need for it to take steps to enforce payment of the amount owed to it. It was that argument that Peter Gibson LJ rejected. Peter Gibson LJ could not reject the general principle that, where there was other consideration, which the law recognised was sufficient to support a contract, that was good consideration for a promise. There can be no coherent distinction between agreements to pay debts and agreements to do work in this context. The strength of that general principle may well explain why in *Roffey* this Court did not refer to *Foakes* v. *Beer*.

85. My conclusion that *Selectmove* can be distinguished in this case is not inconsistent with *Foakes* v. *Beer*, where the only suggested consideration was the debtor's promise to pay part of his existing debt. Nor is it inconsistent with the dictum of Lord Coke LC in *Pinnel's* case itself. After stating that 'payment of a lesser sum ... in satisfaction of a greater, cannot be any satisfaction for the whole,' Lord Coke had added a rider that 'the gift of a horse, hawk or robe, etc in satisfaction is good for it shall be intended that a horse, hawk, or robe, etc might be more beneficial to the plaintiff than the money.' The House of Lords in *Foakes* v. *Beer* approved both the statement of general rule and the rider. As the law of consideration now stands, the gift of the horse, hawk or robe is no different in principle from the conferral of a benefit or advantage. ... In accepting that a practical benefit can be good consideration for part payment of a debt, all I am doing is replacing the words 'the gift of a horse, hawk or robe' with a more modern equivalent in line with the responsibility which Glidewell LJ in *Roffey* (at 16) described as refining and limiting the common law but leaving the principle (the actual Rule in *Pinnel's* case) unscathed.

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86. The judge held that MWB did not enter into the variation agreement simply to accommodate Rock. I accept that in the light of *Selectmove* it may be difficult for any benefit solely of that kind to constitute a practical benefit for the purposes of the law of consideration. On the judge's findings it did so in its own interests in order to, as I put it above, avoid a void and that this was a practical benefit to MWB. In those circumstances there was in my judgment on the judge's findings a binding contract in law.

87. As I explained in *Collier* v. *Wright*, the Rule in *Pinnel's* case is controversial and the Sixth Interim Report of the Law Revision Committee in 1937 under the chairmanship of Lord Wright MR made recommendations for its reform, which Parliament has not accepted or implemented. If my Lords agree that I have correctly stated the law, the necessary result of this is that there will be cases in the future, of which this is one, where agreements to pay a lesser sum than was due under a previous contract will be held to be enforceable because there has been shown to have been consideration in the form of a practical benefit to the creditor which he sought and which is an identifiable benefit over and above the mere fact of accommodating the debtor and not having to enforce payment of the debt. This may well strike a satisfactory balance between on the one hand enforcing promises and enabling debtors to rely on their creditors' promises and on the other hand of protecting creditors from debtors who seek unfairly to gain an advantage from their creditors.

88. That leads to the question whether MWB was bound to accept the deferred payments provided for in the variation agreement as soon as Rock paid the sum of £3,500 and even if it made no further payment. That would not have been a sensible commercial agreement. Accordingly it is unlikely that the parties made an agreement in those terms. (The case was argued on the basis that the payment of £3,500 had to be made before the agreement became binding: it was not argued that the variation agreement became binding merely on the exchange of promises and so I do not need to deal with that still less sensible result). Lord Justice Kitchin has addressed this problem by holding that the variation agreement contained a term that the rescheduling arrangement would be binding on MWB only so long as Rock performed its side of the bargain (paragraph 49 above). I agree that that is one interpretation and analysis which addresses the problem. But there is another possible interpretation and analysis which would lead to the same result that Rock would have to perform the whole of its side of the bargain. That would be the case if the variation agreement took effect as a collateral unilateral contract (binding on MWB once the sum of £3,500 was paid), and accordingly that is the question which I next consider.

Was the variation agreement a collateral unilateral contract?

89. Rock was not bound to continue as licensee of its unit for more than the contractual term, which was shorter than the period over which its arrears were rescheduled. The variation agreement, conferring as it did on MWB the advantage of 'avoiding a void' meant that Rock had to be the occupier. Rock did continue to occupy its unit until the licence was terminated. To reconcile the parties' legal positions, my provisional view (in the absence of argument) is that Rock's acceptance of MWB's promise gave rise to a 'collateral unilateral contract,'

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meaning that, collaterally to the licence, for so long as Rock was entitled to and did occupy the unit and paid the licence fee as renegotiated, MWB would be bound on payment of the initial £3,500 to accept the deferral of the arrears in accordance with the variation agreement. This seems to me to be the legal effect of what the parties agreed, which was confirmed by Rock's immediate payment of £3,500 to MWB. Although the effect of the variation agreement if it was supported by consideration was not the subject of submissions, it was not suggested by either party that Rock could take the benefit of the variation agreement without performing its side of the bargain, or that MWB could withdraw from the variation agreement so long as Rock was complying with it.

90. I gratefully adopt the concept of 'collateral unilateral contract' in this context from a helpful article: M Chen-Wishart, *Reforming Consideration—No Greener Pastures* in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Sydney, Thomson, 2016) (Publication pending). Since writing this judgment I have also seen *A Bird in the Hand: Consideration and Contract Modifications* (Andrew S Burrows and Edwin Peel (eds) *Contract Formation and Parties* (OUP, 2010) pages 89–113) by the same author, which also discusses this point.

Commentary

The Court of Appeal held that Judge Moloney had been entitled to conclude that the revised agreement was supported by consideration and that it would remain binding so long as Rock continued to make payments in accordance with the revised payment schedule. A number of points can be made about this conclusion.

The first is that a narrow reading of the case might lead to the conclusion that the Court of Appeal did no more than decline to interfere with the finding of Judge Moloney that the practical benefits obtained by MWB from the revised agreement were sufficient to amount in law to the provision of consideration (see [47] and [75]). But this is to adopt an unduly narrow reading of the judgments. This is the first ground given by Arden LJ in support of her conclusion, but it is not the only one. The other grounds are of much wider potential significance.

The second point is that *Foakes* v. *Beer*, while still formally good law, would appear now to be confined to the case where the creditor obtains no benefit other than the promise to pay part of the debt (see [85]) or obtains no more than prompt payment of a part of the debt and a promise that the balance of the arrears will be paid ([48]). The important 'practical' benefit obtained by MWB on the facts of the present case was that Rock would remain a licensee and continue to occupy the property so that the property would not be left standing empty for some time at further loss to MWB. On this basis it would appear that the practical benefit obtained as a result of the preservation of the underlying relationship out of which the obligation to pay the debt has arisen can constitute sufficient consideration to support a promise to pay a part of the debt. But in the case where there is no relationship other than a strict debtor/creditor relationship it would appear that the creditor might still be able to argue, as was the case in *Foakes*, that the mere promise to pay, or even the payment of, part of the debt will not constitute consideration for the discharge of the entire debt.

Thirdly, it should be noted that Arden LJ (at [79]) drew on cases concerned with a duty imposed by law (*Ward* v. *Byham*, see 5.2.2.2) and a duty imposed by contract with a third party (*Pao On* v. *Lau Yiu Long*, see 5.2.2.1) in support of her analysis. More questionable perhaps is her citation from *Chitty on Contracts* because that passage is directed only to duties imposed by a contract with a promisor and it does not expressly extend to
p. 201 the ↵ *Foakes* v. *Beer* fact pattern (although the point is made later in that edition of *Chitty* at para 4-119, when discussing *Foakes*, that 'the law would be more consistent as well as more satisfactory in its practical operation' if it adopted the factual or practical benefit analysis in cases of part payment of a debt: for the equivalent passage see para 6-096 of the current, 35th edition of *Chitty*).

Fourthly, it would appear that the consideration provided by Rock did not take the form of a simple promise to pay the rent in accordance with the revised payment schedule but that it was necessary for Rock actually to make the payments it had promised to make. This emerges clearly from the adoption by Arden LJ of the 'collateral unilateral contract' analysis ([89]–[90]) developed by Professor Chen-Wishart (on which see 5.2.2.3.2.7). According to this analysis MWB was bound to accept the revised payment schedule only for so long as Rock adhered to it. While Kitchen and McCombe LJJ declined to adopt the 'collateral unilateral contract' analysis (see [49] and [67]), given that it had not been the subject of submissions by counsel, the analysis of Kitchin LJ would appear to reach a similar conclusion to that of Arden LJ, in that he stated (at [49]) that the agreement 'would remain binding for so long as Rock continued to make payments in accordance with the revised payment schedule'. On this basis it is not the promise to pay part of the debt that amounts to the provision of consideration by the debtor, but the performance of that promise by making payment provided that, in doing so, a sufficient practical benefit is conferred upon the creditor.

Fifthly, the statement by Arden LJ (at [84]) that there 'can be no coherent distinction between agreements to pay debts and agreements to do work in this context' clearly suggests that it may no longer be possible to regard *Foakes* and *Williams* as inhabiting different worlds, with the former dealing with a promise to accept less and the latter a promise to pay more. The irrelevance of the distinction is also evident from Arden LJ's statement (at [79]) that the 'principle that a benefit can in law be consideration for a promise must logically apply whatever the nature of the contract'. The point is an important one because, once it is accepted that the practical benefit analysis can apply to the *Foakes* v. *Beer* fact pattern, there is, as Peter Gibson LJ accepted in *Selectmove*, very little left of the rule that a promise to pay, or payment of, part of a debt is not good consideration for discharge of the entire debt.

Sixthly, it is worth noting that Rock submitted that MWB was estopped from resiling from the agreement to accept payment in accordance with the revised schedule. Given its conclusion that the revised agreement was contractually binding, it was not technically necessary for the Court of Appeal to consider whether Rock was entitled to invoke the assistance of estoppel but the court nevertheless proceeded to consider the issue. On the facts it would have held that MWB was not estopped from seeking to reimpose its legal rights under the original agreement. It had notified Rock of its change of mind two days after the oral variation had been agreed, and in these circumstances the Court of Appeal would have held that MWB had given Rock reasonable notice that it must in future pay the licence fee in accordance with the original agreement and Rock would not have been able to maintain that it had suffered prejudice by relying on the original agreement. On this basis Rock would not have been able to invoke the assistance of estoppel, but the point did not in the end matter because the variation was held to be binding as it was supported by consideration.

The Supreme Court was given the opportunity to review these issues when it heard MWB's appeal from the decision of the Court of Appeal ([2018] UKSC 24, [2019] AC 119) but it declined to do so, largely because it allowed the appeal on another ground which rendered it unnecessary to decide whether or not consideration had been supplied on the facts of the case. This refusal to take on the issue has been the cause of considerable
p. 202 disappointment to ↵ many academic commentators. Lord Sumption dealt with the submissions on the existence or otherwise of consideration in a single paragraph in the following terms:

> [18] That [ie, the conclusion that the appeal was to be decided on another ground] makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes* v. *Beer* (1884) 9 App Cas 605: see in particular p 622 per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in *In re Selectmove Ltd* [1995] 1 WLR 474, and declined to follow *Williams* v. *Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes* v. *Beer*. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.

Three points are worth noting here. First, Lord Sumption stated that the issue was a 'difficult' one, given that it involved not only a reconsideration of *Foakes* v. *Beer* but also of *Williams* v. *Roffey Bros.* Secondly, the panel which had been convened for the hearing was a panel of five judges when an enlarged panel would have been preferable, given that one outcome might have been the decision to overrule *Foakes* v. *Beer*, a decision of the House of Lords which has been a leading, if controversial, authority for some 135 years. There is, of course, no guarantee that an enlarged panel will necessarily produce a better outcome, but one can see the point that great care is needed before overruling a decision of long-standing authority, and in such a case an enlarged panel might reflect the importance of the issue to be decided. Thirdly, any consideration of the issue by the Supreme Court would technically have been *obiter* and this was believed to be an unsatisfactory way of proceeding. These points clearly have substance but they have the unfortunate consequence that we may have to wait a very long time before the Supreme Court is given an opportunity to convene an enlarged panel in an appropriate future case. There is a certain irony here. In *Foakes* Lord Selbourne expressed a reluctance to reverse 'a doctrine which has been accepted as part of the law of England for 280 years'. We can now add a further 140 years to that period. It would therefore appear that the rule that part payment of a debt is not good consideration for the discharge of the entire debt has survived not because it is believed to be correct in principle but simply by virtue of its longevity which has insulated it from serious judicial scrutiny. The fact that the rule that part payment of a debt is not good consideration for the discharge of the entire debt can only be effectively reviewed by the Supreme Court significantly lessens the likelihood of such a review taking place

in the near future (given the low probability that a case on the point will make it all the way up the Supreme
p. 203 Court) and lower courts, in the absence of authority to be able effectively ↵ to resolve the difficulties, are likely simply to note the inconsistencies said to exist in the case law and leave it to higher courts to resolve them when a suitable opportunity presents itself (see, for example, *Integral Petroleum SA* v. *Bank GBP International SA* [2022] EWHC 659 (Comm), [126]–[127]).

But, were an appropriate case to come before the Supreme Court, how should it be decided? It is difficult to say, but the predominant academic view is that it is *Foakes* v. *Beer* that should give way and that the courts in future should apply a test based on the presence or absence of practical benefit or detriment (subject to defences such as economic duress). Not all are convinced of the wisdom of such a step (see, for example, J O'Sullivan, 'In Defence of *Foakes* v. *Beer*' [1996] *CLJ* 219). The concerns surrounding the application of the practical benefit test to the part payment of a debt are that the test is too easy to satisfy and that the defences, such as duress, may not provide sufficient protection for the creditor. Professor Treitel expresses some doubts about the reversal of *Foakes* v. *Beer* in the following terms (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), pp. 45–46):

> Would anything be lost if such a reversal took place? The rule no doubt has a protective function in cases such as *D & C Builders Ltd* v. *Rees*, though in that kind of situation the same function could perhaps in many cases be performed by the concept of economic duress. But that concept may not go far enough. There was, I repeat, nothing wrong with the outcome in *Foakes* v. *Beer*; and I do not see how the case could be brought within even the expanding concept of duress; nor is it obvious what other legal machinery could be used to achieve the same end. Rectification has been suggested as a possibility but this would work only if *both* parties had no intention that the interest should be given up or if Dr Foakes *knew* that Mrs Beer had no such intention or if he was guilty of fraud or other unconscionable conduct in procuring the agreement. But there was no evidence of any such circumstances so that the problem cannot be solved in this way. There is much to be said against *Foakes* v. *Beer* but also something in its favour. How the balance will one day, perhaps in the twenty-first century, be struck continues to be a matter of speculation.

5.2.3 Past Consideration

The general rule is that past consideration is not good consideration. The rule is linked to the bargain theory of consideration. Take the following example. X washes Y's car. Y later promises to pay X £15 for washing his car but then changes his mind and refuses to pay. Can X sue Y for the promised sum? The answer to this question ultimately depends upon the evidence. If it is the case that there was an unexpressed bargain between X and Y according to which X agreed to wash Y's car in return for payment then the promise will be enforceable (see later in this section). On the other hand, if X washed Y's car and Y then separately promised to pay X £15 then X will not be entitled to sue Y for payment because the consideration that he provided for Y's promise of payment, namely washing the car, was in the past. It may be difficult to distinguish these two cases on the facts. But the difference between them is essentially an evidential one relating to the nature of the obligations assumed by the parties. The essence of the distinction is between a bargain, on the one hand, and a gift which is followed by a promise to make a gift, on the other. The former is enforceable while the

p. 204 latter is not. The general rule that past consideration ↵ is not good consideration was established in two cases in the nineteenth century, namely *Eastwood* v. *Kenyon* (1840) 11 Ad & E 438 and *Roscorla* v. *Thomas* (1842) 3 QB 234. Both cases have been the subject of criticism.

Eastwood v. Kenyon
(1840) 11 Ad & E 438, Queen's Bench

John Sutcliffe died and left his entire estate to his daughter, Sarah. The plaintiff was Sutcliffe's executor and he acted as Sarah's agent and guardian until she came of full age. Sutcliffe's estate proved to be insufficient to cover the cost of maintaining and educating Sarah and maintaining and improving some cottages that had been left to Sarah. The plaintiff therefore borrowed £140 from Mr Blackburn in order to meet these costs. This money was spent for the benefit of Sarah and, after she came of full age, she promised to repay the £140 which the plaintiff had borrowed and, indeed, she paid the interest to Blackburn for one year. The plaintiff then gave up the control and management of the estate to Sarah's agent. Sarah later married the defendant and he in turn promised that he would discharge the plaintiff's liability to Blackburn. He failed to honour his promise but it was held that he incurred no liability in failing to do so because his promise to pay the debt which the plaintiff had incurred was unenforceable.

Lord Denman CJ

[delivering the judgment of the court]

It was … argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall* v. *Adney* (3 B & P 249), and the conclusion there arrived at seems to be correct in general, 'that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision'. …

The eminent counsel who argued for the plaintiff in *Lee* v. *Muggeridge* (5 Taunt 36), spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall* v. *Adney* (3 B & P 249), shews the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield* v. *Shee* (2 B & Ad 811). Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits

would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

p. 205 ↵ Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson* v. *Hewson* (7 T R 348), shews that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a ratihabitio[2] the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shewn, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of non assumpsit.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh v. *Brathwait* (Hob 105), is selected by Mr Smith (1 Smith's Leading Cases, 67), as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart CJ lays it down that 'a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference'. ...

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

Commentary

The language in which the judgment is expressed is not always easy to follow but this is frequently so with reports that date from this period. *Eastwood* is an important decision for a number of reasons. The first relates to the conclusion that the consideration was 'past and executed' long before the express promise to pay was made. The plaintiff performed services that were of value to Sarah and the defendant did promise to pay for them but there was never a bargain between them to the effect that, if the plaintiff performed these services, the defendant would pay for them. Rather, there was one event, the loan taken out by the plaintiff for the benefit of Sarah, followed by a second event, the promise by the defendant to reimburse the plaintiff, but no sufficient connection between the two to constitute a bargain to this effect. The plaintiff had conferred a gift on Sarah, and her husband, in gratitude or as a matter of moral obligation (on which see later), had promised to repay the money borrowed, but the latter promise was unenforceable in law.

Secondly, Lord Denman recognizes that the rule that past consideration is no consideration is the subject of exceptions. He recognizes an exception, based on *Lampleigh* v. *Brathwait* (1615) Hob 105 (discussed later in this section), where the earlier act was performed at the request of the promisor. This exception was not applicable
p. 206 on the facts of *Eastwood* because ↵ the defendant had not asked the plaintiff to borrow the money. Lord Denman also refers to the possibility of ratification, albeit he rejects it on the facts. A party who ratifies an obligation which, prior to ratification, was not (or no longer) binding on him may incur a liability in respect of that obligation as a result of the ratification. The law in this area is, however, rather uneven. A debtor who promises to pay a debt after it has become statute-barred does not thereby become liable to repay the debt (Limitation Act 1980, section 29(7)). His ratification is ineffective to revive the debt (unless his promise to pay the debt is supported by fresh consideration). But the position is otherwise in the case of a child who ratifies a contract that was not binding on him during his childhood. Children have limited contractual capacity and so many contracts do not bind them during their childhood. But if a child, on reaching adulthood, ratifies the contract he will generally become liable on it (*Williams* v. *Moor* (1843) 11 M & W 256). In this way ratification can serve to give legal effect to an obligation that was previously unenforceable. Thirdly, *Eastwood* is of great significance because of its rejection of the proposition, associated with Lord Mansfield, that a promise to perform a pre-existing 'moral obligation' could constitute good consideration. In this respect *Eastwood* is something of a watershed. It provided the court with an opportunity to abandon the doctrine of consideration but instead Lord Denman used it to affirm the existence of the doctrine. The impact of *Eastwood* has been described by Professor Atiyah (*The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979), pp. 491–493) in the following terms:

> There is no doubt that this is one of the most puzzling of all nineteenth-century decisions on contract law. Why did the Court go out of its way to overrule decisions representing the law of some seventy years' standing, when the result seemed so unjust? Further, if … the whole trend of contract law had been to stress the importance of the promissory basis, is it not passing strange that the Court should have invoked the doctrine of consideration (which elsewhere had been reduced by this time to a bare technicality) to defeat a clear and express promise? Moreover, the idea that this was a conservative decision, a return to the old, true, pre-Mansfield law, does not square with what we know of Denman. For though Denman may not have had any great reputation as a lawyer, he was by no means a conservative figure. He had spent many years as a fairly radical Whig in Parliament, was a close associate of Brougham's, and even while on the Bench, took an active part in many law reform proposals.
>
> I suggest that three factors may have been responsible for the decision. First, there was the growing strength of positivism which stressed the line between law and morality far more than had ever been the case in Mansfield's time. Positivism owed its origins to Bentham's *Fragment on Government*, but was given much greater elaboration and force in Austin's *Province of Jurisprudence Determined*, first published in 1832. Austin, it must be remembered was a member of the Benthamite circle, on the outer fringes of which had been Denman himself before he became Chief Justice. Denman may have been acquainted with Austin, and, more likely, with his work. It does not seem unduly speculative to suggest that the Court was unhappy at the idea of having openly to convert moral obligations into legal ones.
>
> The second factor is less obvious, and more dubious, but I suggest that there is a sense in which the decision was part of the process of downgrading quasi-contractual duties, liabilities not based on consent, which was such a pronounced feature of the times. The fact that in the case itself there was an express promise is no doubt paradoxical, but the point is that the original benefit received by Sarah was not at that time the subject of any promise to pay, either by Sarah or by her husband. If there had been any quasi-contractual duty on Sarah to reimburse the plaintiff for his expenditure, then there is no doubt that she at least would have been subsequently liable on her promise. The Court stressed the rule that where a benefit is rendered in circumstances which create a legal liability
>
> p. 207 to pay without any promise, then ↵ a subsequent promise is itself binding and the past consideration is treated as good. In a sense, therefore, the importance of the decision may lie not so much in the denial of liability on the express promise, but in the denial of any pre-existing quasi-contractual duty. … Now we have seen how, around 1840, the Courts were cutting down on such [quasi-contractual] liabilities. A man was not to be held liable for some benefit conferred upon his wife or his child, unless authorized by him. And in *Eastwood* v. *Kenyon* the Court appears to be insisting that the authority must be contemporaneous with the conferring of the benefit. Benefits are not to be thrust upon people behind their backs, and then promises afterwards extracted from them.
>
> The third possible factor which may have contributed to the decision in *Eastwood* v. *Kenyon* was the disappearance of the idea that the binding nature of a promise rested upon some pre-existing obligation. This is shown by the fact that Lord Denman rejects the argument that a moral obligation

> can amount to a consideration by arguing that all promises anyhow give rise to moral obligations, and the doctrine, literally applied, would eliminate the need for consideration altogether.

Roscorla v. Thomas
(1842) 3 QB 234, Queen's Bench

> The plaintiff bought a horse from the defendant for £30. The defendant gave to the plaintiff an oral warranty that the horse was sound and free from vice. The plaintiff brought an action against the defendant, alleging a breach of this oral warranty. It was held that the oral warranty was unenforceable for want of consideration. The consideration which supported the contract for the sale of the horse was insufficient to support the subsequent oral warranty.
>
> ### Lord Denman CJ
>
> It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.
>
> But the promise in the present case must be taken to be, as in fact it was, express and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.
>
> The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note (a) to *Wennall* v. *Adney* (3 Bos & Pul 249), and in the case of *Eastwood* v. *Kenyon* (11 A & E 438). They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

Commentary

This is another decision of Lord Denman, decided shortly after *Eastwood*. At the time it was decided there was no implied obligation of quality in horse sales (see P Mitchell, 'The Development of Quality Obligations in Sale of Goods' (2001) 117 *LQR* 645, esp. pp. 645–650). Therefore, the only basis upon which the plaintiff could bring a claim against the defendant was on the basis of the express oral warranty given by the defendant. But the consideration provided by the plaintiff in entering into the contract of sale was insufficient to support the oral

warranty because that consideration was held to be 'past and executed'. There is, however, one problem with the case and that relates to the time at which the oral warranty was given. It would appear from this report that the warranty was given after the conclusion of the contract of sale but it has been pointed out (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 6-029 fn 143) that, according to another report of the case ((1842) 11 LJQB 214, 215), the oral warranty was given at the time of the sale. If this was the case it makes the conclusion that the consideration was past much more difficult to defend (although Professor Treitel states that the result in the case can nevertheless be justified on the ground that the oral warranty was, at the time, void for want of written evidence).

The outcome in *Roscorla* might be thought to be an unsatisfactory one. The court could, perhaps, have taken the view that the oral warranty was part and parcel of one overall transaction. Such a view has been taken in other cases (see, for example, *Thornton* v. *Jenyns* (1840) 1 M & G 166, 188–189). Thus a guarantee given after the conclusion of a contract for the sale of goods is not necessarily unenforceable on the ground that the consideration alleged to support it (entry into the contract of sale) is past. A court is more likely to conclude that there is but one transaction and that entry into the contract of sale is good consideration for the guarantee.

Finally, in relation to *Roscorla* it should be noted that Lord Denman, once again, refers to the ratification cases as an exception to the general rule, albeit that they were not applicable on the facts of the case.

Eastwood and *Roscorla* between them established the general rule that past consideration is not good consideration. When deciding whether or not consideration is past the courts have regard to what has actually happened. They do not rely exclusively on the terms of the contract between the parties. Thus in *Re McArdle* [1951] Ch 669 the document stated that payment would be to Mrs McArdle 'IN CONSIDERATION of your carrying out certain alterations and improvements' to some property. The evidence established that all the work had in fact been done prior to the execution of the deed and that this fact was 'well-known to everybody who signed it'. The Court of Appeal held that Mrs McArdle could not show that she had provided consideration for the promise of payment because the 'consideration was wholly past'.

As has been noted, the rule that past consideration is not good consideration is not absolute. There are exceptions. In the first place the court may be able to conclude on the evidence that the consideration was not in fact past because the later promise was part and parcel of one overall transaction (*Classic Maritime Inc* v. *Lion Diversified Holdings Berhad* [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep 59, [43]–[46]). Secondly, section 27(1)(b) of the Bills of Exchange Act 1882 provides that an 'antecedent debt or liability' constitutes valuable consideration for a bill of exchange and the effect of this subsection is, potentially, to render past consideration good consideration (although in most cases involving bills of exchange the consideration is not in fact past). The principal exception consists of a line of cases that originated with the old case of *Lampleigh* v. *Brathwait* (1615) Hob 105 and was restated in ↵ modern form by the Privy Council in *Pao On* v. *Lau Yiu Long* [1980] AC 614. The facts of this case are rather complex but factual complexity is the hallmark of many modern commercial transactions. It is therefore important to work through the facts of the case with some care.

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Pao On v. Lau Yiu Long
[1980] AC 614, Privy Council

The plaintiffs were the owners of all the shares of a company called Shing On, while the defendants were the majority shareholders in Fu Chip, a company which 'went public' on 9 February 1973. The principal asset owned by Shing On was a building which the defendants wished to acquire. At the same time, the plaintiffs wished to realize the value of the property by selling the shares in Shing On. So the parties agreed that the plaintiffs would sell the shares in Shing On to Fu Chip, the price payable to be met by the allotment to the plaintiffs of 4.2 million ordinary shares of $1 each in Fu Chip. It was agreed that the market value of each Fu Chip share was to be deemed to be $2.50, and the plaintiffs also agreed that they would not, before the end of April 1974, sell or transfer 2.5 million of the shares so transferred. This restriction was imposed in order to prevent a depression in the value of Fu Chip shares caused by heavy selling of the shares. The difficulty which this restriction posed for the plaintiffs was that their inability to sell the shares exposed them to the risk of any drop in their value. In order to reduce this exposure, the parties entered into a subsidiary agreement under which the defendants agreed, on or before the end of April 1974, to buy back the shares at $2.50 per share. However, this agreement operated to the advantage of the defendants because they could require the plaintiffs to sell them the shares for $2.50 even if the market value of the shares had risen beyond $2.50. When the plaintiffs discovered this, they informed the defendants that they would not perform the main agreement unless the subsidiary agreement was cancelled and replaced by a guarantee which only came into operation in the event of the price of the shares falling below $2.50. The defendants were anxious to complete the transaction so that public confidence in the newly formed company was not undermined, and so they agreed to the terms proposed by the plaintiffs and the guarantee was duly executed on 4 May 1973. The price of Fu Chip shares subsequently slumped on the market and the plaintiffs sought to enforce the guarantee against the defendants. The defendants maintained that the guarantee was unenforceable because it was not supported by consideration and had been procured by duress. The Privy Council rejected the defendants' argument and held that the guarantee was supported by consideration and that there had been no operative duress because the defendants could not show that their will had been coerced such as to vitiate their consent. In this extract we are only concerned with the first question which was asked of the Privy Council, namely whether or not the guarantee was supported by consideration.

Lord Scarman

[giving the judgment of the Board]

The first question

The first question is whether upon its true construction the written guarantee of May 4, 1973, states a consideration sufficient in law to support the defendants' promise of indemnity against a fall in value of the Fu Chip shares. The instrument is, so far as relevant, in these terms:

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↵ ‘Re: Tsuen Wan Shing On Estate Co Ltd

In consideration of your having at our request agreed to sell all of your shares of and in the above mentioned company whose registered office is situate at 274 Sha Tsui Road Ground Floor, Tsuen Wan New Territories in the colony of Hong Kong for the consideration of $10,500,000: by the allotment of 4,200,000 ordinary shares of $1.00 each in Fu Chip Investment Co Ltd whose registered office is situate at no. 33 Wing Lok Street Victoria in the said colony of Hong Kong and that the market value for the said ordinary shares of the said Fu Chip Investment Co Ltd shall be deemed as $2.50 for each of $1.00 share under an agreement for sale and purchase made between the parties thereto and dated February 27, 1973, we Lau Yiu Long (...) of no. 152 Tin Hau Temple Road, Flat C1, Summit Court, 14th floor in the colony of Hong Kong merchant and Benjamin Lau Kam Ching (...) of no. 31 Ming Yuen Street West, basement in the said colony of Hong Kong merchant the directors of the said Fu Chip Investment Co Ltd hereby agree and guarantee the closing market value for 2,520,000 shares (being 60 per cent. of the said 4,200,000 ordinary shares) of the said Fu Chip Investment Co Ltd shall be at $2.50 per share and that the total value of 2,520,000 shares shall be of the sum of HK$6,300,000 on the following marketing date immediately after April 30, 1974, and we further agree to indemnify and keep you indemnified against any damages, losses and other expenses which you may incur or sustain in the event of the closing market price for the shares of Fu Chip Investment Co Ltd according to the Far East Exchange Ltd, shall fall short of the sum of $2.50 during the said following marketing date immediately after April 30, 1974, provided always that if we were called upon to indemnify you for the discrepancy between the market value and the said total value of HK$6,300,000 we shall have the option of buying from you the said 2,520,000 shares of Fu Chip Investment Co Ltd at the price of HK$6,300,000. ...’

...

Mr Neill, counsel for the plaintiffs, ... contends that the consideration stated in the agreement is not in reality a past one. It is to be noted that the consideration was not on May 4, 1973, a matter of history only. The instrument by its reference to the main agreement with Fu Chip incorporates as part of the stated consideration the plaintiffs’ three promises to Fu Chip: to complete the sale of Shing On, to accept shares as the price for the sale, and not to sell 60 per cent. of the shares so accepted before April 30, 1974. Thus, on May 4, 1973, the performance of the main agreement still lay in the future. Performance of these promises was of great importance to the defendants, and it is undeniable that, as the instrument declares, the promises were made to Fu Chip at the request of the defendants. It is equally clear that the instrument also includes a promise by the plaintiffs to the defendants to fulfil their earlier promises given to Fu Chip.

The Board agrees ... that the consideration expressly stated in the written guarantee is sufficient in law to support the defendants’ promise of indemnity. An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisors’ request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit: and

payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance. All three features are present in this case. The promise given to Fu Chip under the main agreement not to sell the shares for a year was at the first defendant's request. The parties understood at the time of the main agreement that the restriction on selling must be compensated for by the benefit of a guarantee against a drop in price: and such a guarantee would be legally
p. 211 enforceable. ↵ The agreed cancellation of the subsidiary agreement left, as the parties knew, the plaintiffs unprotected in a respect in which at the time of the main agreement all were agreed they should be protected.

Mr Neill's submission is based on *Lampleigh* v. *Brathwait* (1615) Hobart 105. In that case the judges said, at p. 106:

> 'First ... a meer voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.'

The modern statement of the law is in the judgment of Bowen LJ in *In re Casey's Patents* [1892] 1 Ch 104, 115–116; Bowen LJ said:

> 'Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share.'

Conferring a benefit is, of course, an equivalent to payment. ...

Mr. Leggatt, for the defendants, does not dispute the existence of the rule but challenges its application to the facts of this case. He submits that it is not a necessary inference or implication from the terms of the written guarantee that any benefit or protection was to be given to the plaintiffs for their acceptance of the restriction on selling their shares. Their Lordships agree that the mere existence or recital of a prior request is not sufficient in itself to convert what is prima facie past consideration into sufficient consideration in law to support a promise: as they have indicated, it is only the first of three necessary preconditions. As for the second of those preconditions, whether the act done at the request of the promisor raises an implication of promised remuneration or other return is simply one of the construction of the words of the contract in the circumstances of its making. Once it is recognised, as the Board considers it inevitably must be, that the expressed consideration includes a reference to the plaintiffs' promise not to sell the shares before April 30, 1974

> —a promise to be performed in the future, though given in the past—it is not possible to treat the defendants' promise of indemnity as independent of the plaintiffs' antecedent promise, given at the first defendant's request, not to sell. The promise of indemnity was given because at the time of the main agreement the parties intended that the first defendant should confer upon the plaintiffs the benefit of his protection against a fall in price. When the subsidiary agreement was cancelled, all were well aware that the plaintiffs were still to have the benefit of his protection as consideration for the restriction on selling. It matters not whether the indemnity thus given be regarded as the best evidence of the benefit intended to be conferred in return for the promise not to sell, or as the positive bargain which fixes the benefit on the faith of which the promise was given—though where, as here, the subject is a written contract, the better analysis is probably that of the 'positive bargain'. Their Lordships, therefore, accept the submission that the contract itself states a valid consideration for the promise of indemnity.

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Commentary

In this extract Lord Scarman identifies the three elements that must be satisfied by a claimant who wishes to invoke this exception to the past consideration rule. The claimant must show: (i) that he performed the original act at the request of the defendant, (ii) that it was clearly understood or implied between the parties when the act was requested that the claimant would be paid for doing the act, and (iii) the defendant's promise of payment must have been one which, had it been made prior to or at the time at which the claimant performed the act in question, it would have been enforceable. All three conditions were satisfied on the facts of this case.

Pao On is an important case for a number of other reasons and, indeed, we have already encountered the case on two occasions. First, the case illustrates the rule that a promise to perform, or the performance of, a pre-existing contractual obligation owed to a third party can be valid consideration (see 5.2.2.1). Thus Lord Scarman stated that 'the consideration for the promise of indemnity, while it included the cancellation of the subsidiary agreement, was primarily the promise given by [the plaintiffs] to [the defendants], to perform their contract with Fu Chip, which included the undertaking not to sell 60% of the shares allotted to them before 30 April 1974'. Fu Chip was a third party for the purposes of this rule notwithstanding the fact that the defendants were the major shareholders in Fu Chip (a company being in law a separate entity from its shareholders). Secondly, the case is notable for its rejection of the plaintiffs' submission that the consideration supplied by the defendants was illegal as being against public policy. The reasons given by Lord Scarman for rejecting this submission are set out in the judgment of Glidewell LJ in *Williams* v. *Roffey Bros* (5.2.2.3.2). Thirdly (and a point that we have not yet encountered), the case is notable for its recognition of the fact that 'there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of the will, which vitiates consent'. However, on the facts of the case it was found that the plaintiffs could not establish that they had entered into the guarantee under duress.

5.2.4 Consideration Must Move from the Promisee

Finally, consideration must move from the promisee and not from a third party; that is to say the promisee rather than a third party must provide the consideration. The rule does not require that the consideration move to the promisor. It suffices that it moves from the promisee. Thus the rule is satisfied in the case where the promisee agrees to confer a benefit on a third party at the request of the promisor (see *Bolton* v. *Madden* (1873) LR 9 QB 55). This is the rule at common law but it must now be read in the light of the Contracts (Rights of Third Parties) Act 1999 which confers on third parties a limited right to enforce a term in a contract between two (or more) other parties provided that certain conditions have been satisfied (on which see Chapter 25). A third party who is given a right to enforce a term of the contract by the Act does not have to provide consideration in order to be able to enforce his right. The fact that the Act confers a right of action is sufficient to displace the requirement that he provide consideration.

5.2.5 Establishing the Necessary Link

What link or connection must there be between the act alleged to constitute the consideration and the promise made by the other party? The link is generally provided by the terms of the promise itself. A simple
p. 213 example will illustrate the point. Suppose that A promises to ↵ pay £5 to B if he will take him to the train station. In such a case B's act of taking A to the station is the consideration for A's promise of payment. But suppose that A promises to pay B £5 but makes no mention of a lift to the station. B nevertheless provides A with a lift to the station. In such a case can B claim that he has provided consideration in giving A a lift to the station? Prima facie the answer is no. In order to constitute consideration the act must have been performed at the request, express or implied, of the promisor. Thus B would have to show that A, in making the promise of payment, expressly or impliedly requested B to give him a lift to the station: it would not be enough for B to show that it was reasonably foreseeable that he would give A a lift to the station as a result of the promise of payment. This point is an important one because it bears directly on the scope of the doctrine of consideration. A court that is willing to imply a request by A that B act in a particular way will generally find the existence of consideration and so will not have any need to resort to estoppel. But a finding that there is no sufficient link between the promise of A and the act of B will generally result in a finding that no consideration has been supplied, and the court may then be asked to find the existence of an estoppel in order to give effect to A's promise. The following case illustrates these points:

Combe v. Combe
[1951] 2 KB 215, Court of Appeal

The plaintiff (the wife) and the defendant (the husband) were married in 1915 and separated in 1939. On 1 February 1943 a decree nisi of divorce was pronounced on the plaintiff's application. Later that month the defendant's solicitor wrote to the plaintiff's solicitor and stated that the defendant had agreed to allow the plaintiff £100 per annum free of tax. On 11 August 1943 the decree was made absolute. The defendant failed to make any of the promised payments. The plaintiff pressed for payment but made no application to the Divorce Court for maintenance. The plaintiff's annual income was between £700 and £800 per year, while the defendant's annual income was in the region of £650. In July 1950 the plaintiff brought an action against the defendant in which she claimed arrears of £675. Byrne J held that the plaintiff was not entitled to recover the first three instalments of £25 (on the ground that the limitation period had expired and the claim in respect of them was time-barred) but he held that the plaintiff was entitled to recover the remaining £600 from the defendant. He held that, while the plaintiff had not provided any consideration for the defendant's promise of payment, she was entitled to succeed in her claim on the ground that it fell within the scope of the principle laid down by Denning J in *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] KB 130 [see 5.3.2] and *Robertson* v. *Minister of Pensions* [1949] 1 KB 227. The defendant appealed to the Court of Appeal. The Court of Appeal affirmed the decision of Byrne J in so far as he held that the plaintiff had not provided any consideration for the defendant's promise but allowed the appeal on the ground that the *High Trees* principle could not be used so as to confer a cause of action on the plaintiff.

Denning LJ

[after stating the facts continued]

Much as I am inclined to favour the principle stated in the *High Trees* case [1947] KB 130, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from
p. 214 ↵ insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes* v. *Metropolitan Railway* (1877) 2 App Cas 439, 448, the case in the House of Lords in which the principle was first stated, and in *Birmingham, etc., Land Company* v. *London and North-Western Railway Co* (1888) 40 Ch D 268, 286, the case in the Court of Appeal where the principle was enlarged. It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights. Thus, a creditor is not allowed to enforce a debt which he has deliberately agreed to waive, if the debtor has carried on business or in some other way changed his position in reliance on the waiver. … On other occasions it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. Thus a government department, which had accepted a disease as due to war service, were not allowed afterwards to say it was not, seeing that the soldier, in reliance on the assurance, had

> abstained from getting further evidence about it: *Robertson* v. *Minister of Pensions* [1949] 1 KB 227. … In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself: he was sued for some other cause, for example, a pension or a breach of contract, and the promise, assurance or assertion only played a supplementary role—an important role, no doubt, but still a supplementary role. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself.
>
> The principle, as I understand it, is that, where 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. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled Byrne J, in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case: was there sufficient consideration to support the promise?
>
> If it were suggested that, in return for the husband's promise, the wife expressly or impliedly promised to forbear from applying to the court for maintenance—that is, a promise in return for a promise—there would clearly be no consideration, because the wife's promise was not binding on her and was therefore worth nothing. Notwithstanding her promise, she could always apply to the Divorce Court for maintenance—maybe only with leave—and no agreement by her could take away that right. …
>
> There was, however, clearly no promise by the wife, express or implied, to forbear from applying to the court. All that happened was that she did in fact forbear—that is, she did an act in return for a promise. Is that sufficient consideration? Unilateral promises of this kind have long been enforced, so
> p. 215 long as the act or forbearance is done on the faith of the promise ↵ and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises ex post facto. … If the findings of Byrne J were accepted, they would be sufficient to bring this principle into play. His finding that the husband's promise was intended to be binding, intended to be acted upon, and was, in fact, acted on—although expressed to be a finding on the *High Trees* principle—is equivalent to a finding that there was consideration within this long settled rule, because it comes to the same thing expressed in different words. … But my difficulty is to accept the finding of Byrne J, that the promise was 'intended to be acted upon'. I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for

maintenance, or, in other words, any request by the husband, express or implied, that the wife should so forbear. He left her to apply if she wished to do so. She did not do so, and I am not surprised, because it is very unlikely that the Divorce Court would have then made any order in her favour, seeing that she had a bigger income than her husband. Her forbearance was not intended by him, nor was it done at his request. It was therefore no consideration.

It may be that the wife has suffered some detriment because, after forbearing to apply to the court for seven years, she might not now be given leave to apply. … The court is, however, nowadays much more ready to give leave than it used to be …, and I should have thought that, if she fell on hard times, she would still obtain leave. Assuming, however, that she has suffered some detriment by her forbearance, nevertheless, as the forbearance was not at the husband's request, it is no consideration. … The doctrine of consideration is sometimes said to work injustice, but I see none in this case. … I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years and then come down on him for the whole £600.

The truth is that in these maintenance cases the real remedy of the wife is, not by action in the King's Bench Division, but by application in the Divorce Court. I have always understood that no agreement for maintenance, which is made in the course of divorce proceedings prior to decree absolute, is valid unless it is sanctioned by the court. … I know that such agreements are often made, but their only valid purpose is to serve as a basis for a consent application to the court. The reason why such agreements are invalid, unless approved, is because they are so apt to be collusive. Some wives are tempted to stipulate for extortionate maintenance as the price of giving the husband his freedom. It is to remove this temptation that the sanction of the court is required. It would be a great pity if this salutary requirement could be evaded by taking action in the King's Bench Division. The Divorce Court can order the husband to pay whatever maintenance is just. Moreover, if justice so requires, it can make the order retrospective to decree absolute. That is the proper remedy of the wife here, and I do not think she has a right to any other.

Asquith LJ

The judge has decided that, while the husband's promise was unsupported by any valid consideration, yet the principle in *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] KB 130 entitles the wife to succeed. It is unnecessary to express any view as to the correctness of that decision, though I certainly must not be taken to be questioning it; and I would remark, in passing, that it seems to me a complete misconception to suppose that it struck at the roots of the doctrine of consideration. But assuming, without deciding, that it is good law, I do not think, however, that it helps the plaintiff at all. What that case decides is that when a promise is given which (1.) is intended to create legal relations, (2.) is intended to be acted upon by the promisee, and (3.) is in fact so acted upon, ↵ the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning, J, expressly stated the contrary. Neither in the *High Trees* case nor in *Minister of Pensions* v. *Robertson* [1949] 1 KB 227 (another decision of my Lord which is relied upon by the plaintiff) was an action brought by the promisee on the promise. In the first of

p. 216

> those two cases the plaintiff was in effect the promisor or a person standing in the shoes of the promisor, while in the second the claim, though brought by the promisee, was brought upon a cause of action which was not the promise, but was an alleged statutory right. …
>
> Finally, I do not think an actual forbearance, as opposed to an agreement to forbear to approach the court, is a good consideration unless it proceeds from a request, express or implied, on the part of the promisor. If not moved by such a request, the forbearance is not in respect of the promise.
>
> ***Birkett LJ*** delivered a concurring judgment.

Commentary

There are two central aspects to this decision. The first relates to the finding that the plaintiff did not provide any consideration for the defendant's promise of payment and the second relates to the scope of the principle laid down in *High Trees* (see 5.3.2). We shall explore the second issue in greater detail when we examine *High Trees* in the section on estoppel. Here our focus is confined to the first issue.

Why did the Court of Appeal not conclude that the plaintiff had provided consideration for the defendant's promise? Could the court not have found that the defendant impliedly requested the plaintiff to refrain from applying for maintenance? Professor Goodhart (1951) 67 *LQR* 456, 458 made the following comments in relation to the facts of *Combe*:

> To suggest that this might be an offer of a generous gift on the part of a guilty but repentant husband would be to place a considerable burden on one's credulity. It cannot be believed that the husband was promising to pay the wife £100 per year even though she should make an application to the court for maintenance. In *Alliance Bank* v. *Broom* (1864) 2 Dr & Sim 289 the court said that 'although there was no promise on the part of the plaintiff to abstain for any certain time from suing for the debt, the effect was that the plaintiff did, in fact, give, and the defendant receive, the benefit of some degree of forbearance'. It is not unreasonable to suggest that in the present case the husband was offering to pay £100 per year in return for the wife's forbearance.

While it may not be unreasonable to suggest that the husband was offering to pay £100 per year in return for the wife's forbearance, this was not the construction adopted by the Court of Appeal on the facts. It has to be remembered that *Combe* is, essentially, a family law case and it was heavily influenced by the procedure then applicable to divorce proceedings. Thus, writing extrajudicially, Lord Denning stated ('Recent Developments in the Doctrine of Consideration' (1952) 15 *MLR* 1, 2) that the defendant's statement that he would pay £100 per annum to his wife:

> did not mean that she should forbear from applying for maintenance. It is well known that agreements of that kind are made as a preliminary to an application for maintenance. They form the basis for a consent order to be approved by the court. The agreement, therefore, so far from being an implied request to forbear from applying to the court, was almost an invitation to her to apply to the court. Her forbearance was therefore no consideration.

An alternative explanation for the court's refusal to imply a request has been provided by Professor Atiyah in the following terms ('Consideration: A Restatement' in Atiyah, *Essays on Contract* (Oxford University Press, 1986), pp. 179, 231). He argues that the court could have implied a request 'without doing the least violence to the facts' but that it did not do so because the justice of the case did not require it. The justice of the case did not support the plaintiff for two reasons. The first was that her income was greater than her husband's and the second was that she was attempting to recover a lump sum of £600 from the defendant and not seeking to enforce his promise to pay £100 per annum.

However, Professor Goodhart's citation of *Alliance Bank* v. *Broom* demonstrates that cases can be found in which the courts have been prepared to imply a request. In *Alliance Bank* the defendant, who was heavily indebted to the plaintiff bank, promised to provide the bank with security to cover his indebtedness. He failed to provide the promised security and, when sued by the bank, submitted that his promise to provide security was not supported by consideration. It was held that the bank had in fact provided consideration in that it had refrained from taking proceedings against the defendant in relation to his indebtedness. This forbearance was held to be at the implied request of the defendant. The willingness of a court to imply a request will very much depend upon the facts and circumstances of the individual case. The bank in *Alliance Bank* was, in all probability, much more likely to institute proceedings than the wife in *Combe* and, this being the case, the court doubtless found it easier to imply that the defendant had requested the bank not to sue him on the debt provided that he gave the bank security. The readier the court is to find the existence of such a request, the wider will be the doctrine of consideration and, in consequence, the less need there will be to invoke estoppel.

5.3 Estoppel: Its Scope

We have encountered estoppel at various points in this chapter (in the judgments in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (see 5.2.2.3.2) and *Combe* v. *Combe* [1951] 2 KB 215 (see 5.2.5)) but have not as yet sought to define it or to ascertain its scope. Estoppels come in different shapes and sizes. Our concern in this chapter is not to survey the whole range of estoppels but rather to examine the role which estoppel plays, or can play, in giving legal effect to a promise that is unsupported by consideration. Take *Combe* v. *Combe* as an example. The wife's claim that she had provided consideration for her husband's promise to pay her £100 per year failed. But she had a second string to her bow. She argued that her husband was estopped, or prevented, from going back upon his promise to pay her £100 per year. As it happened, her estoppel claim failed but the case nevertheless illustrates the way in which estoppel is invoked by litigants who are unable to establish that the promise upon which they base their claim, or defence, is supported by consideration. Two
p. 218 cases feature prominently in the development of the doctrine of estoppel. These cases are *Hughes* v.
↵ *Metropolitan Railway Company* (1877) 2 App Cas 439 and *Central London Property Trust Ltd* v. *High Trees*

House Ltd [1947] 1 KB 130, both of which are cited in *Combe*. Given their significance in the development of the law we shall examine them in more detail after first giving a brief definition of the meaning of the word estoppel.

5.3.1 Estoppel: A Brief Definition

Estoppel is not a word that is used in everyday conversation. What does it mean? A dictionary definition states that it means an obstruction and the example given is of an obstruction of a waterway. In legal terms an estoppel has been described as an impediment or bar to a right of action arising from a man's own act as, for example, where a man is forbidden by law to speak against his own deed. A fuller definition of estoppel has been provided in the following terms:

E Cooke, *The Modern Law Of Estoppel* (Oxford University Press, 2000), pp. 1–2

> Estoppel is a mechanism for enforcing consistency; when I have said or done something that leads you to believe in a particular state of affairs, I may be obliged to stand by what I have said or done, even though I am not contractually bound to do so.
>
> It is perhaps easiest to begin with examples. If your bank pays money into your account by mistake, it may be estopped from telling you later that it is not yours and demanding repayment—but only if it has assured you that the money is yours, and you have relied on that by spending the money. The parties to a commercial deal might agree: 'we'll treat clause 2 as meaning such-and-such'; if they go ahead with the deal on that basis, they have to abide by that agreement if the construction of the document is disputed later. A landlord might reassure his tenant: 'I will not insist that you pay for the roof repairs, even though your lease obliges you to do so'; he may then be estopped from going back on that promise and demanding payment. The idea running through these examples is of making the person concerned work on the basis that what he has said is true, even if it is not.
>
> Estoppel has been described as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'. It is not easy to frame a definition of estoppel, in the sense of a neat formula that will tell us whether or not a given set of facts is an instance of estoppel. Lord Denning's description of the doctrine is both informative and brief:
>
> > 'Estoppel … is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.'

A number of features should be noted about this passage. The first is that, as a definition, it is lacking in precision. It makes use of broad standards such as 'justice' and 'equity'. Its emphasis on flexibility echoes a recurrent theme in legal writing, both judicial and academic, on estoppel. Not everyone approves of this flexibility. Professor Birks launched an attack on it in the following terms ('Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 21–22):

p. 219 ↵

> 'Estoppel' is by origin a common law word. But ever since, in imitation of American law, the *High Trees* case set equity on the path of supplementing the doctrine of consideration by extending the common law notion of estoppel, 'equitable estoppel' has been more prominent in the books than its common law original. The law is at its worst when it refuses to name things in a straightforward way. It is impossible to understand or place something that is obscurely named. For example, the reason why the tort in *Rylands* v. *Fletcher* is so puzzling is that it is called just that, *Rylands* v. *Fletcher*. … 'Estoppel' is much the same. Out in the shops and restaurants of the city, the word is never heard. Generations of law students have somehow let their teachers escape without making them say how exactly the word works and what exactly it denotes. From the taxonomist's point of view, the consequence is that this entity is difficult to place. A huge case-law has developed, and all the time we have never, in a sense, known what we were talking about.
>
> The word 'stop' in the middle gives a clue. The French original means 'bung' or 'stopper'. It was when it came to bottling wines that estoppels had their natural home. The law makes liberal use of the metaphor of binding and being bound. It is in 'obligation' and in 'liable', more obviously in 'bond'. 'Estoppel' is another version of the same metaphor. As a wine bottle is corked, so one is restricted or shut up. In short, one is bound. … we see that estoppel names something obliquely, telling us that something binds. The thing or things we need to classify is named by a consequence, the consequence being that, at least for some purposes, one is bound. In most estoppels the thing in question is an undertaking, and in equitable estoppel, it is an undertaking as to the future or, in short, a promise. Demystifying the word does not take us very far, but, subject to more refined argument, it does allow the taxonomist committed to a classification of causative events to see what event he has to classify.

Secondly, three different types of estoppel are referred to in the passage from Cooke. The bank payment illustration is an example of estoppel by representation, the contract interpretation hypothetical is an example of estoppel by convention and the illustration involving the landlord is an example of equitable or promissory estoppel. As we shall see, one of the most contested issues in this area of law is whether or not these different estoppels can be unified into one coherent doctrine. The third point is that the definition does not identify the cause of action that is at the root of an estoppel claim. It tells us that estoppel is a 'mechanism for enforcing consistency' and the reference to the fact that the party is 'not contractually bound' to stand by what he said or did suggests that it is not part of the law of contract. But if it is not part of the law of contract, how do we classify the claim? Is it part of the law of wrongs, the law of unjust enrichment, or is it some type of claim that cannot be classified as a matter of law? We shall return to these and other questions after examining two of the leading estoppel cases.

5.3.2 Two Leading Cases

The most commonly cited case in the development of estoppel in the twentieth century is the decision of Denning J, as he then was, in *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] 1 KB 130. In his judgment Denning J purported to find the foundation for his approach in the judgment of the House of Lords

in *Hughes* v. *Metropolitan Railway Company* (1877) 2 App Cas 439. *Hughes* was decided some 70 years before
p. 220 *High Trees* but it ↵ had fallen into obscurity prior to its 'rescue' in *High Trees* (see *WJ Alan & Co Ltd* v. *El Nasr Export & Import Co* [1972] 2 QB 189, 212). Given its influence in the development of the law, it is important to start with *Hughes* before turning to *High Trees*.

Hughes v. Metropolitan Railway Company
(1877) 2 App Cas 439, House of Lords

> The defendant company (the respondents) was the lessee of property owned by the plaintiff (the appellant). On 22 October 1874 the plaintiff, acting pursuant to its entitlement under the lease, served notice upon the defendants to repair the property within six months. The lease was forfeitable by the plaintiff if the defendants failed to comply with the notice. The defendants replied that the repairs would be carried out but also suggested that the plaintiff might wish to buy the defendants' interest in the property and they therefore proposed to defer carrying out the repairs until they heard from the plaintiff in relation to their offer to dispose of their interest in the property. In November 1874 the plaintiff entered into negotiations with the defendants for the surrender of the lease but made no response to the defendants' statement that they intended to defer carrying out the repairs. The negotiations between the parties broke down on 31 December 1874. There were no further communications between the parties until 19 April 1875, when the defendants wrote to the plaintiff and stated that, in the light of the breakdown in negotiations, 'the company would take in hand the repairs'. The notice issued by the plaintiff expired on 22 April 1875, and on 28 April the plaintiff served a writ of ejectment on the defendants. The defendants completed the repairs in June 1875. The House of Lords held that the defendants were entitled to be relieved against the forfeiture of the lease. The plaintiff's notice to repair the property was in suspension for the duration of the negotiations between the parties and did not revive until 31 December 1874. The repairs were carried out by the defendants within six months of that date and they were entitled to relief against forfeiture.

Lord Cairns LC

> It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the Appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the Respondents as the period during which the repairs must be executed.

> ***Lords O'Hagan***, ***Selborne***, ***Blackburn***, and ***Gordon*** delivered concurring judgments.

p. 221 ***Central London Property Trust Ltd v. High Trees House Ltd***
[1947] 1 KB 130, King's Bench Division

In 1937 the plaintiff company granted a 99-year lease over a block of flats in London to the defendant company, a subsidiary of the plaintiff, at an annual rent of £2,500. Many people left London on the outbreak of the Second World War and, as a consequence, the defendant was unable to let all the flats. Discussions took place between the directors of the two companies and they resulted in an agreement, made in January 1940, by which the plaintiff agreed to reduce the rent 'as from the commencement of the lease to £1,250 per annum'. In March 1941 a receiver was appointed to the plaintiff company. The defendant paid the reduced rent from 1941 until the beginning of 1945 by which time the flats were fully occupied. In September 1945 the receiver of the plaintiff company wrote to the defendant and informed it that £2,500 was the agreed annual rent and he claimed arrears of £7,916. The receiver then instituted 'friendly proceedings' to test the legal position as between the two companies. The plaintiff claimed £625, being the difference between £2,500 and £1,250 for the last two quarters of 1945. The defendant denied that it was liable to pay the sums claimed. Denning J held that the plaintiff was entitled to recover £625.

Denning J

[stated the facts and continued]

If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l*. a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in *Berry* v. *Berry* [1929] 2 KB 316. That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden* v. *Money* (1854) 5 HLC 185, a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden* v. *Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. … As I have said they are not cases of estoppel in the strict sense. They are really promises—promises

intended to be binding, intended to be acted on, and in fact acted on. *Jorden* v. *Money* (1854) 5 HLC 185 can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to
p. 222 be bound. In each case the court held the promise to be binding on the party making ↵ it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes* v. *Metropolitan Ry Co* (1877) 2 App Cas 439, 448, *Birmingham and District Land Co* v. *London & North Western Ry Co* (1888) 40 Ch D 268, 286 and *Salisbury (Marquess)* v. *Gilmore* [1942] 2 KB 38, 51, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes* v. *Beer* (1884) 9 App Cas 605. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, paras. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250l. a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope

> of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.
>
> I therefore give judgment for the plaintiff company for the amount claimed.

Commentary

Professor Treitel has stated (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 29) that 'the *High Trees* case is surely one of the most prominent of the landmarks in twentieth
p. 223 century contract law'. He notes that its exalted status is, in many ↵ ways, remarkable given that it was apparently argued and decided in one day. The judgment of Denning J was therefore, in all probability, an unreserved judgment. As Professor Treitel has remarked, 'if there was any time for reflection, it could at most have been the luncheon recess'. The facts of the case are rather unusual in that the litigation was conducted between members of the same corporate group and it is not altogether clear why the claim was brought in the first place. The claim may not in fact have been a 'friendly' one but a keenly fought contest between the defendant and the creditors of the plaintiff company.

High Trees is a notable decision for a number of reasons. First it would appear from the first paragraph of the judgment that *High Trees* might not be an estoppel case at all. In this part of his judgment Denning J is attempting to get round the decision of the House of Lords in *Jorden* v. *Money* (1854) 5 HLC 185 in which it was held that an estoppel must relate to a statement of fact and that it could not apply to a case where, in the words of Lord Cranworth LC (at pp. 214–215), 'the representation is not a representation of fact, but a statement of something which the party intends or does not intend to do'. The statement in issue in *High Trees* was clearly a statement of intent, or a promise, and so was vulnerable to the argument that effect could not be given to it consistently with *Jorden* v. *Money*. Denning J attempts to deal with this difficulty in the second paragraph of his judgment where he draws on cases in equity, including *Hughes* v. *Metropolitan Railway*, which he states are 'not cases of estoppel in the strict sense'. Rather, he states that they are cases of 'promises intended to be binding, intended to be acted on, and in fact acted on' and he then distinguishes *Jorden* on the rather dubious ground that the promisor there did not intend to be legally bound by the promise made.

Secondly, it is important to note that the reasoning of Denning J in this second paragraph brings him into an apparent conflict with *Foakes* v. *Beer* in that he recognizes that the 'logical consequence' of the principle that he articulates is that 'a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration'. He then adds the rather curious sentence that this aspect 'was not considered in *Foakes* v. *Beer*'. Professor Treitel points out (*Some Landmarks of Twentieth Century Contract Law* (2002), p. 32) that this sentence is only to be found in the official report of the case; it is not to be found in the other four reports of the case. It is therefore possible that it was inserted as an afterthought by Denning J when the draft judgment was submitted by the editor of the Law Reports for his approval. But what is to be made of his suggestion that the House of Lords in *Foakes* did not consider this aspect of the case? Professor Treitel responds to this suggestion in the following way (*Some Landmarks of Twentieth Century Contract Law* (2002), p. 32):

> It is hard to suppose that the House of Lords in *Foakes* v. *Beer* can have been unaware of *Hughes* v. *Metropolitan Railway* which had been decided only seven years previously, particularly as two members of the House of Lords who had decided the *Hughes* case [Lords Selborne and Blackburn] also heard the appeal in *Foakes* v. *Beer*. The most plausible explanation of the fact that 'That aspect was not considered in *Foakes* v. *Beer*' seems to be that it was not thought to be relevant since *Foakes* v. *Beer* was concerned with the argument that legal rights had been *permanently* extinguished while the *Hughes* principle was concerned with their temporary suspension.

It can be argued that the principles that underpin *Hughes* and *Foakes* are very different in nature. Professor Brownsword (*Smith and Thomas: A Casebook on Contract* (14th edn, Sweet & Maxwell, 2021), para 11-004) sets out the principle that was applied in *Hughes* in the following terms:

p. 224 ↵

> If A tells B (by words or conduct) that B need not perform a contractual (or other) obligation owed by B to A and B takes A at his word and does not perform that obligation, A cannot treat that non-performance as a breach of contract entitling him to damages or to terminate the contract. It would be entirely wrong that A should be allowed to treat as a legal wrong that to which he has consented.

On the other hand, he formulates the principle in *Foakes* as follows:

> If A tells B that B need not perform a contractual (or other) obligation owed by B to A, A can change his mind and require B to perform that obligation in so far as it is still possible to do so. A is not alleging that B has broken his contract—he is simply saying 'Now you must perform—and if you fail to do so, that will be a breach of contract'.

The third point to note is that the result of the case was that the plaintiff was entitled to demand the full rent of £2,500 from the time at which the flats became fully let in early 1945. In this sense the effect of the estoppel (albeit that it may not have been an estoppel in the strict sense) was not to deprive the plaintiff of its right to demand the full rent. Rather the right was in suspension for the wartime period when the flats were only partially let. But it is important to note that there is a sense in which the estoppel had extinctive effect. Denning J was careful to state that 'the reduction in rent applied throughout the years down to the end of 1944' and it would therefore seem to follow that, had the plaintiff demanded that the defendants pay the rent in full for the duration of the war years, the claim would have failed. As a result of its promise the plaintiff's right to demand the full rent from 1940 to 1945 was not in suspension. It was lost.

5.3.3 The Ingredients of Promissory Estoppel

Notwithstanding the statement of Denning J that *High Trees* is not a case of estoppel in the 'strict sense', it has subsequently been regarded as a landmark case in the development of what has come to be known as 'equitable' or 'promissory' estoppel. The transition to the language of promissory estoppel can be seen in the following passage from the judgment of Lord Hodson in *Ajayi* v. *R T Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, 1330:

> The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights, an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (i) that the other party has altered his position, (ii) that the promisor can resile from his promise on giving reasonable notice, which need not be formal notice, giving the promisee a reasonable opportunity of resuming his position, (iii) the promise only becomes final and irrevocable if the promisee cannot resume his position.

As a definition of the scope of estoppel this statement cannot be said to be exhaustive. It does not identify all the ingredients of promissory estoppel. In particular, it does not include the requirement that the promise must be 'clear and unequivocal' nor does it provide any clear definition of the remedy available (other than the broad reference to an 'equity'). A fuller account of the elements of promissory estoppel can be provided as follows:

p. 225

5.3.3.1 Clear and Unequivocal Promise

The promise that gives rise to the estoppel must be a clear and unequivocal promise. The promise must have been one that was intended to affect the legal relations between the parties and that clearly demonstrated that the promisor was giving up his strict legal rights (or some of them) against the promisee. In *Woodhouse AC Israel Cocoa SA* v. *Nigerian Produce Marketing Co Ltd* [1972] AC 741, 757 Lord Hailsham of St Marylebone LC stated:

> Counsel for the appellants was asked whether he knew of any case in which an ambiguous statement had ever formed the basis of a purely promissory estoppel. … He candidly replied that he did not. I do not find this surprising, since it would really be an astonishing thing if, in the case of a genuine misunderstanding as to the meaning of an offer, the offeree could obtain by means of the doctrine of promissory estoppel something that he must fail to obtain under the conventional law of contract.

Notwithstanding its absence from Lord Hodson's description in *Ajayi*, this element is a necessary one for the protection of promisors. Promisors should not be required to insist upon their legal rights in order to protect them, and the law does not demand that they do so. Rather the law provides that they will only lose their contractual rights when they clearly and unequivocally promise that they will give them up (either in whole or in part).

5.3.3.2 The Promisee Has Altered His Position

The promisor must have altered his position in reliance upon the promise that has been made. In many cases the promisee will alter his position to his detriment. This was the case in *Hughes* v. *Metropolitan Railway* (5.3.2) where, as a result of the negotiations with the landlord, the tenants lost the time they otherwise would have had to carry out the repairs. But detrimental reliance is not apparent in all cases. For example, there was no obvious detriment to the tenants in *High Trees* (5.3.2) because they were only being asked to pay the rent that they had contracted to pay. Thus it would appear from *High Trees* that the promisee need not have acted to his

detriment provided that he has altered his position to the extent that it would be inequitable to allow the promisor to go back on the promise made. In *Société Italo-Belge pour le Commerce et l'Industrie* v. *Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1982] 1 All ER 19, 26–27 Robert Goff J stated:

> I approach the matter as follows. The fundamental principle is that stated by Lord Cairns [in *Hughes* v. *Metropolitan Railway*], viz. that the representor will not be allowed to enforce his rights 'where it would be inequitable having regard to the dealings which have thus taken place between the parties'. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] 1 KB 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist upon his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and
> p. 226 a court might well think it right to conclude that only after reasonable notice ↵ could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the Court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice. But it does not follow that in every case in which the representee has acted, or failed to act, in reliance on the representation, it will be inequitable for the representor to enforce his rights for the nature of the action, or inaction may be insufficient to give rise to the equity, in which event a necessary requirement stated by Lord Cairns LC for the application of the doctrine would not have been fulfilled.

5.3.3.3 Inequitable for the Promisor to Go Back on His Promise

The requirement that it must be inequitable for the promisor to go back on his promise overlaps to some extent with the requirement that the promisee must have altered his position, as can be seen from the extract from the judgment of Robert Goff J in *The Post Chaser*. The significance of the requirement that it must be inequitable for the promisor to go back on his promise can be seen in *D & C Builders* v. *Rees* (5.2.2.4.1) where the Court of Appeal concluded that it was not inequitable for the creditor to go back on his promise to accept part payment in discharge of the entire debt.

5.3.3.4 Suspension

The effect of an estoppel is generally suspensory (see *Tool Metal Manufacturing Co Ltd* v. *Tungsten Electric Co Ltd* [1955] 1 WLR 761). Thus in *Hughes* v. *Metropolitan Railway* (5.3.2) the landlord did not lose his right to require that the repairs be carried out within six months. It was simply the case that this right was in suspense during the currency of the negotiations between the landlord and the tenants. On the breakdown of the negotiations the landlord could have revived his right by giving notice to the tenants requiring them to effect the repairs within a six-month period. The suspensory nature of estoppel is underlined by Lord Hodson in his second 'qualification' in *Ajayi* (quoted earlier). On the other hand, Lord Hodson's third qualification

clearly suggests that an estoppel can, in certain circumstances, be 'final and irrevocable'. When can an estoppel have extinctive effect? Some guidance can be obtained on this point from *High Trees* (5.3.2), where Denning J held that the plaintiff landlord could revive its right to demand the full rent for the future but that it could not go back and demand the unpaid rent during the war when the flats were only partially let. Thus estoppel is generally suspensory in relation to obligations to be performed in the future (in the sense that the obligation can be revived by the giving of reasonable notice) but it may be extinctive in relation to events that have occurred in the past (so that the promisor cannot go back and retrospectively demand that the promisee perform his obligations in the past or maintain that the promisee was in breach of contract as a result of his failure to perform his contractual obligations to the full when the reason for the promisee's failure to perform was his reliance upon the promisor's promise that he need not perform in accordance with the strict letter of the contract).

5.3.3.5 Estoppel Cannot Act as a Cause of Action

Combe v. *Combe* illustrates the final point in relation to the requirements of promissory estoppel, namely that
p. 227 it cannot create a cause of action. This principle is often expressed in ↵ the maxim that 'estoppel can be used as a shield but not as a sword', but the sword/shield metaphor must be handled with some care. While it is true that promissory estoppel often operates, as in *Hughes* v. *Metropolitan Railway* and *High Trees*, as a defence to a claim, the proposition that estoppel cannot create a cause of action requires some refinement, as the following extract demonstrates.

R Halson, 'The Offensive Limits of Promissory Estoppel' [1999] *LMCLQ* 257, 259–261

> **A. The estoppel spectrum described**
>
> **(1) Estoppel can only be used as a defence**
>
> This is the least ambitious claim that can be made. New legal doctrines often make their first appearance in a truncated and non-threatening guise. Therefore it should occasion no surprise that in both of the seminal cases, *Hughes* v. *Metropolitan Ry* and *Central London Property Trust Co Ltd* v. *High Trees House*, estoppel was relied upon as a defence. ...
>
> **(2) Estoppel can be used by a party seeking to enforce a claim based upon a recognized cause of action to defeat the defence or counter-claim of the other party**
>
> A simple example of this use of promissory estoppel would be provided by a variation of the facts of *High Trees*: the lessor lets directly to an occupying tenant; some time after the representation has been made and reduced rent payments have been accepted, the landlord distrains the tenant's property in order to recover the balance of the rent. Here the tenant could bring an action for conversion; the landlord would reply that he was rightfully distraining, and the tenant could use estoppel to defeat this defence. Academic authority also supports this usage.
>
> **(3) Estoppel can be used by a party seeking to enforce a claim to prove one element of a recognized cause of action**
>
> This appears to be the effect the promissory estoppel was stated to have in *Robertson* v. *Ministry of Pensions*, where the plaintiff was relieved of the burden of having to prove that his injury was attributable to war service in order to qualify for a disablement pension because the Ministry were estopped from denying this causal connection. The plaintiff's cause of action was a recognized one; in this case statutory or at least *sui generis*. Yet it could not be said that the estoppel relieved the colonel of the obligation to prove all the elements of his cause of action, e.g., that he had served long enough and in a sufficient capacity to qualify for a pension, that the injury was serious enough to so qualify etc. The estoppel related solely to the question of causation; was the injury attributable to military service. This usage may have been what Denning LJ was thinking of when, in *Combe* v. *Combe*, commenting upon a number of decisions including the *Robertson* case, he said:
>
> > 'In none of these cases was the defendant sued on the promise, assurance or assertion as a cause of action in itself; he was sued for some other cause, for example a pension ... and the promise, assurance or assertion only played a supplementary role—an important role, no doubt, but still a supplementary role.'
>
> p. 228 ↵ **(4) Estoppel can be used by a party seeking to enforce a claim to prove all the elements of a recognized cause of action**
>
> This appears to be the way the promissory estoppel was used in *The Henrik Sif*. The first defendants conducted themselves as if they were a party to a bill of lading, which they were not. This led the plaintiff to allow the limitation period to run out against the second defendant, who was a party to

> the bill of lading. The judge based his finding for the plaintiff in his action against the first defendants, *inter alia*, upon promissory estoppel. It appears that all the elements (agreement, consideration etc) of a recognized cause of action (contract) were proved by the estoppel. …
>
> **(5) Estoppel has created a new cause of action**
>
> This was the effect of the first instance decision in *Combe* v. *Combe*. The judge appeared to have dispensed with the need for consideration in order to enforce a promise, as opposed to giving more limited effect to the promise which the common law and equitable doctrines of waiver and promissory estoppel would *allow*. This would create a new cause of action and abrogate the requirement of consideration. The Court of Appeal strongly disclaimed this view, Denning LJ saying of promissory estoppel: 'the principle never stands alone as giving a cause of action in itself'.

The first and second points on Professor Halson's spectrum are not controversial, but the same cannot be said of the other three points (see further M Barnes, 'Estoppels as Swords' [2011] *LMCLQ* 372). The final point on the spectrum, that promissory estoppel cannot itself create a cause of action, is well established in the authorities (most notably in *Combe* v. *Combe*) but can be said to be controversial for two reasons. The first relates to the justification for the rule: why is it that promissory estoppel cannot create a cause of action? The answer given in *Combe* is that to do so would undermine the doctrine of consideration. This claim was, however, rejected by the High Court of Australia in *Waltons Stores (Interstate) Ltd* v. *Maher* (1987) 164 CLR 387 (see later, 5.3.5), where it was recognized that promissory estoppel could, in an appropriate case, create a cause of action. The second is that the rule does not apply to all estoppels. Proprietary estoppel can create a cause of action (see later, 5.3.5) but other estoppels cannot (*Riverside Housing Association* v. *White* [2005] EWCA Civ 1385, [2006] HLR 15 and *Newport City Council* v. *Charles* [2008] EWCA Civ 1541, [2009] 1 WLR 1884). Why is it that only proprietary estoppel can create a cause of action? The answer to this question is far from obvious. There are also difficulties in relation to Professor Halson's third and fourth points on the spectrum. The first is: why is it that promissory estoppel can provide part of a cause of action, or support a cause of action, when it cannot supply the entire cause of action? The second is whether these propositions are correct as a matter of law, given that some courts seem to interpret the maxim that estoppel cannot be used as a sword to encompass points three and four on Professor Halson's spectrum (see, for example, *Riverside Housing Association* v. *White*).

5.3.4 The Different Types of Estoppel

The proposition that estoppel cannot create a new cause of action is not, however, universally true in English law. Proprietary estoppel, as we shall see, can create a cause of action. But promissory estoppel cannot (at least
p. 229 at present). This raises the question why ↵ it is that English law has different rules for different types of estoppel. This is not the place to embark upon a discussion of the various types of estoppel that exist. The topic is a terminological minefield (especially in relation to words such as 'waiver' and 'forbearance'). For our purposes it suffices to draw attention to the doctrine of waiver and three different types of estoppel.

The word 'waiver' is a difficult one in English law. The cause of the difficulty is that the word has been used in many different situations. Essentially, waiver covers the situation where one party promises to give up some or all of his contractual rights. A waiver that is supported by consideration takes effect as a variation but the type of waiver in which we are interested is a waiver of rights that is not supported by consideration (often

referred to as forbearance). This is a topic of some difficulty and the terminology is particularly confusing. While waiver, in the sense of forbearance, enjoys an ancient history, it may be that today it should be seen as a species of estoppel which should be amalgamated within the *High Trees* line of authority. In *Charles Rickards Ltd* v. *Oppenheim* [1950] 1 KB 616, 623, when considering whether or not a buyer had waived a term in the contract relating to the time of delivery, Denning LJ stated:

> Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he made a promise not to insist on his strict legal rights. That promise was intended to be binding, intended to be acted on, and was, in fact, acted on. … It is a particular application of the principle which I endeavoured to state in *Central London Property Trust Ltd* v. *High Trees House Ltd*.

Turning now to the estoppels, the first is estoppel by representation. It can be distinguished from promissory estoppel on the ground that estoppel by representation is confined to statements of fact and does not extend to promises. Thus a party who makes a representation of existing fact which induces the other party to act to his detriment in reliance upon the representation may not be permitted subsequently to act inconsistently with that representation. Estoppel by representation is a rule of evidence that has the effect of permanently preventing a representor from asserting or proving facts that are contrary to his own representation.

The second type of estoppel is estoppel by convention which has been said to be 'notoriously difficult to pin down' (*Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, [2022] AC 886, [1]). In *Amalgamated Investment & Property Co Ltd* v. *Texas Commerce International Bank Ltd* [1982] QB 84, 130–131 Brandon LJ adopted the following definition of estoppel by convention, taken from the third edition of *Spencer Bower and Turner, Estoppel by Representation* (Butterworths, 1977), p. 157:

> This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

Estoppel by convention is most commonly invoked in the context of the interpretation of documents (see *ING*
p. 230 *Bank NV* v. *Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472). For ↵ example, in *Amalgamated Investment* the defendant bank provided a loan to a subsidiary company of the plaintiff company, and the plaintiff provided the defendants with a guarantee which stated:

> The guarantor will pay to you on demand all moneys which now are or shall at any times hereafter be due or owing or payable to you on any account whatsoever by the principal.

For exchange control purposes the money was advanced not by the defendant bank but by one of the defendant's subsidiaries. The plaintiff claimed that its liability was to the subsidiary and not to the bank so that it could not be liable under the guarantee. The Court of Appeal held that the plaintiff was liable to the

defendant both as a matter of interpretation of the guarantee (on the basis that the guarantee was not to be interpreted on its own but in the context of the negotiations between the parties) and, in the alternative, on the ground that the plaintiff was estopped by convention from denying that it was bound to discharge the indebtedness of its own subsidiary company to the subsidiary of the defendant that had advanced the money. The parties had entered into the transaction on the assumption that the plaintiff was so liable and the parties had acted on that assumption when giving effect to the transaction and the effect of the estoppel was to hold them to the validity of that assumption.

The third type of estoppel is proprietary estoppel. In *Thorner* v. *Major* [2009] UKHL 18, [2009] 1 WLR 776 Lord Walker identified the three principal ingredients of proprietary estoppel, namely (i) a representation or assurance made to the claimant relating to the acquisition by the claimant of an interest in property, typically an interest in land; (ii) reliance on that representation or assurance by the claimant; and (iii) detriment to the claimant in consequence of his (reasonable) reliance on that representation or assurance (the latter two ingredients are not infrequently intertwined: *Henry* v. *Henry* [2010] UKPC 3, [2010] 1 All ER 988, [55]). Cases of proprietary estoppel can be divided into two broad categories. The first consists of cases in which a landowner stands by while another person improves his land in the mistaken belief that he, the improver, is the owner of the land. The second comprises cases in which the promisee relies to his detriment upon the landowner's promise that he has or will be given an interest in the land. While cases of proprietary estoppel appear to defy exhaustive categorization, and cases can be found in which the doctrine has been described in broad, discretionary terms, modern authority (such as *Yeoman's Row Management Ltd* v. *Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 and *Thorner* v. *Major* [2009] UKHL 18, [2009] 1 WLR 776) support a more principled basis for the doctrine. In particular, it is not sufficient to establish a case of proprietary estoppel to allege and prove that the defendant was guilty of 'unconscionable conduct' (see *Yeoman's Row Management Ltd* v. *Cobbe*). Proprietary estoppel must therefore be kept within proper bounds and so the courts can be expected to insist on compliance with the tripartite test set out by Lord Walker in *Major* and they have stated their reluctance to allow proprietary estoppel to introduce uncertainty into commercial transactions (see *Yeoman's Row Management Ltd* v. *Cobbe*).

5.3.5 Unifying the Estoppels

At the moment it cannot be said that we have a common set of rules that govern the various different types of estoppel. A number of differences exist. First, in the case of promissory estoppel there must be a clear and unequivocal promise or representation, whereas in the case of proprietary estoppel the understanding
p. 231 between the parties can be much more imprecise ↵ (see, for example, *Thorner* v. *Major* [2009] UKHL 18, [2009] 1 WLR 776). Secondly, estoppel by representation only applies to statements of fact and cannot apply to representations as to the future, whereas promissory estoppel applies to promises or statements that relate to the future. Estoppel by representation is also permanent in its effects, while promissory estoppel is generally suspensory in effect. Thirdly, there is a need for detrimental reliance in some types of estoppel but not necessarily in others. In the case of estoppel by representation it seems clear that there must be detrimental reliance but in other cases, such as promissory estoppel, there must be reliance but that reliance need not be detrimental. Fourthly, proprietary estoppel can create a cause of action while promissory estoppel presently cannot (*Tinkler* v. *Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39, [2022] AC 886, [75]).

One of the issues that surfaces from time to time in both the case-law and the academic literature is whether or not English law should seek to develop a general principle which is capable of unifying the various estoppels. Cases can be found in which judges have stated that the distinctions drawn between the different types of estoppel are unhelpful (so, for example, in *Crabb* v. *Arun District Council* [1976] Ch 179, 193, Scarman LJ stated that he did 'not find helpful the distinction between promissory and proprietary estoppel' in relation to the issue that was before the court). Other judges have sought to formulate a broad, overarching principle to govern estoppels (see, for example, *Amalgamated Investment & Property Co Ltd* v. *Texas Commerce International Bank Ltd* [1982] QB 84, 122, per Lord Denning, and *Taylors Fashions Ltd* v. *Liverpool Victoria Trustees Ltd* [1982] QB 133, 151–152, per Oliver J ('whether in particular individual circumstances it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment')).

The general judicial response to attempts to unify the estoppels has not, however, been positive (*Tinkler* v. *Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39, [2022] AC 886, [28]). Various objections have been put forward. First, some of the differences are established as a matter of authority (for example, the rule that promissory estoppel cannot create a cause of action) and cannot lightly be set aside. Secondly, if we are to unify the rules which rules should prevail? Should it be the rules of estoppel by representation, promissory estoppel, or proprietary estoppel? The proposition that estoppel by representation should provide the basis for the unification of the law was rejected by Millett LJ in *First National Bank* v. *Thompson* [1996] Ch 231, 236 in the following terms:

> Spencer Bower's valiant attempt in *The Law Relating to Estoppel by Representation* (1923) to demonstrate that all estoppels other than estoppel by record are now subsumed in the single and all-embracing estoppel by representation and that they are all governed by the same requirements has never won general acceptance. Historically unsound, it has been repudiated by academic writers and is unsupported by authority.

Promissory estoppel may be a more suitable candidate as the basis for the articulation of a general principle but would we want to expand the rule that promissory estoppel cannot create a new cause of action to cases of proprietary estoppel? As Professor Treitel points out (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 40) the view that the various estoppels may merge into one general principle 'may encourage cross-fertilization between them, but it can equally encourage cross-infection and
p. 232 even cross-sterilization'. Thirdly, any general principle would have to be stated at a very ↵ high level of abstraction and so may give rise to considerable uncertainty. We may want to recognize that at least some of the estoppels are related to one another but it does not follow from this that we should attempt to formulate a general principle that can unite them all. As Lord Goff stated in *Johnson* v. *Gore Wood & Co (A Firm)* [2001] 1 All ER 481, 508:

> In the end, I am inclined to think that the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them.

Fourthly, there may be good reasons for the differences between (at least some of) the different types of estoppel. In *Republic of India* v. *Indian Steamship Co Ltd (No 2)* [1998] AC 878, 914 Lord Steyn stated:

> The question was debated whether estoppel by convention and estoppel by acquiescence are but aspects of one overarching principle. I do not underestimate the importance in the continuing development of the law of the search for simplicity. I, also, accept that at a high level of abstraction such an overarching principle could be formulated. But … to restate the law in terms of an overarching principle might tend to blur the necessarily separate requirements and distinct terrain of application, of the two kinds of estoppel.

In *Baird Textile Holdings Ltd* v. *Marks and Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, Mance LJ stated (at [83] and [84]):

> Speaking generally, I accept that estoppel is a flexible doctrine, that broad equitable principles underlie its application in different fields (the concept of unconscionability being one such general principle) and that one should avoid 'rigid classification of equitable estoppel into exclusive and defined categories'. … However, not only are we bound in this court by previous authority on the scope of particular types of estoppel, but it seems to me inherent in the doctrine's very flexibility that it may take different shapes to fit the context of different fields.

Given these statements, the way ahead might be to seek to rationalize the principles underpinning the estoppels whenever it is possible to do so with a view to eliminating any unnecessary differences that exist between the different estoppels. This will not be an easy task. It will require us to justify some of the differences that currently exist between the different estoppels. Why, for example, can proprietary estoppel create a new cause of action when promissory estoppel cannot? What is so special about promises that relate to the creation of an interest in land that demands that they be given special treatment? As Brennan J observed in the leading Australian case of *Waltons Stores (Interstate) Ltd* v. *Maher* (1987) 164 CLR 387:

> If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.

p. 233 ↵ In *Waltons Stores* itself the High Court of Australia took the step of recognizing that promissory estoppel can, in an appropriate case, create a cause of action. In so concluding, it rejected the objection that such a step had the effect of undermining the doctrine of consideration. Thus Brennan J stated:

> The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.
>
> If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed. A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting. …
>
> But there are differences between a contract and an equity created by estoppel. A contractual obligation is created by the agreement of the parties; an equity created by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be supported by what is, strictly speaking, consideration. The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.

The facts of *Waltons Stores* provide a helpful illustration of a circumstance in which it may be appropriate to conclude that an estoppel can create a cause of action. Waltons Stores (Interstate) Ltd entered into negotiations in September 1983 with Mr and Mrs Maher for the lease by Waltons of the Mahers' property. The Mahers proposed to demolish the buildings on their land and erect a new building built to Waltons' specifications. Solicitors acting for Waltons sent a form of lease to the Mahers' solicitors. On 1 November the Mahers' solicitor informed Waltons' solicitor that the Mahers had begun to demolish the old building on the site. On 7 November he further informed them that it was essential that the agreement be concluded within a day or so if the work was to progress and that the Mahers did not want to demolish the 'new brick part of the old building' until it was clear that there would be no problems with the lease. Waltons' solicitor replied to the effect that he had received verbal instructions that the amendments made to the lease were acceptable to his clients but that he would obtain formal instructions from them and inform him if there were any problems. No problems were reported to the Mahers' solicitor. On 11 November the Mahers' solicitor sent to Waltons' solicitor 'by way of exchange' the lease which had been executed by the Mahers. The Mahers then began the
p. 234 demolition of the new ↵ part of the old building. On 21 November Waltons began to have second thoughts about the project and they instructed their solicitors to 'go slow'. On 10 December Waltons became aware of the fact that the Mahers had begun the demolition work. In early January the Mahers started to build on the

land in accordance with Waltons' specifications until they were told on 21 January that Waltons did not intend to proceed with the lease, by which time 40 per cent of the works were complete. In these circumstances the High Court held that, although no formal contract had been concluded between the parties, Waltons were estopped from denying that they were bound by such an agreement and that Waltons were therefore liable in damages to the Mahers.

A number of points should be noted about *Waltons Stores*. The first is that the estoppel clearly operated to confer a cause of action upon the Mahers. The second is that the judges were careful to state that not every act of reliance upon a gratuitous promise will bring promissory estoppel into play. Thus Mason CJ and Wilson J stated in their judgment:

> [A]s failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more is required.

The exact nature of that 'something more' will doubtless depend upon the facts of the case but there must be something which renders it 'unconscionable' for the promisor to go back on his promise. Thirdly, it is not clear how *Waltons Stores* would be decided by an English court. It would probably not fall within the scope of proprietary estoppel because the work was done on the Mahers' land and not Waltons' land and, in relation to promissory estoppel, it would run into the obstacle that promissory estoppel cannot create a cause of action. On the other hand, in *Baird Textile Holdings Ltd* v. *Marks and Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, Mance LJ stated (at [98]):

> There was in *Waltons Stores* complete agreement on the terms of the lease. The agreement was merely unenforceable for want of compliance with the statute. It may be arguable that recognition of an estoppel here would not be to use estoppel 'as giving a cause of action in itself', and it would certainly not be to undermine the necessity of consideration. Rather, it would preclude the potential lessee from raising a collateral objection to the binding nature of the agreed lease.

Such an approach would enable the English courts to reach the same result as that reached in *Waltons Stores* without taking on board the broader jurisdiction asserted by the High Court of Australia. The latter jurisdiction may be too broad for English tastes. Thus it has been stated (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 7-062) that it:

> gives rise to the difficulties that there appear to be no clear limits to its scope, and that this lack of clarity is a regrettable source of uncertainty. The doctrine is, moreover, hard to reconcile with a number of fundamental principles of English law, such as the non-enforceability of informal gratuitous promises (even if relied on) and the rule that there is no right to damages for a wholly innocent non-contractual misrepresentation.

p. 235 ↵ The fourth point relates to the remedy. Brennan J is clearly of the view that the aim of the remedy is to compensate the promisee for his detrimental reliance on the promise. The judgment of Mason CJ and Wilson J is more equivocal. They state that the doctrine extends to the 'enforcement of voluntary promises' and, in so

stating, appear to envisage that the remedy may extend to the protection of the expectation interest. The split between those who see the function of estoppel as being to compensate for detrimental reliance and those who see it as being to fulfil the expectations engendered by the promise was further evident in the decision of the High Court in *Commonwealth of Australia* v. *Verwayen* (1990) 170 CLR 394. In *Giumelli* v. *Giumelli* (1999) 196 CLR 101 the High Court took a step in the direction of recognizing the expectation measure as the presumptive remedy in estoppel cases when they stated that 'often the only way to prevent the promisee suffering detriment will be to enforce the promise'.

Waltons Stores is a difficult case for English lawyers as it raises in stark form the problem that English law has in terms of justifying the difference in principle that currently exists between proprietary and promissory estoppel (in that only proprietary estoppel can create a cause of action). Had the Mahers been promised an interest in Waltons' land they might have had a claim against Waltons on the basis of proprietary estoppel. But the fact that they were not, and that it was Waltons who were promised an interest in their land, has the consequence that the case cannot come within the fold of proprietary estoppel and it may be left in the wilderness of promissory estoppel (which cannot create a cause of action). This difference in treatment cannot be justified. Why does English law continue to differentiate between proprietary estoppel and promissory estoppel in relation to the creation of causes of action? Professor Treitel states (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 40):

> Exactly why proprietary estoppel can give rise to a cause of action while promissory estoppel cannot is not made at all clear in the English cases. One possible explanation is that the proprietary estoppel cases originally involved an element of unjust enrichment (though some modern cases apply the doctrine even in the absence of this factor), while promissory estoppel could arise from mere action in reliance by the promisee; and that this was regarded as a less strong ground (than unjust enrichment) for relief.

This is not a convincing explanation for the difference between proprietary and promissory estoppel. Either they both should be able to create a new cause of action or neither of them should be able to do so. The proposition that one can and one cannot is a proposition that can no longer (if it ever could) be justified.

5.3.6 Locating Estoppels

One of the real difficulties with estoppel lies in locating its position within the law of obligations. Take the straightforward case of the party who relies to his detriment upon a promise that is not supported by consideration. What legal basis does such a promisee have for maintaining that he has a cause of action against the defaulting promisor? The question is not an academic one. It is a profoundly practical question as has become evident in the context of the analysis of the remedies available in estoppel cases. Is the aim of the remedy to protect the claimant's reliance interest or to protect his expectation interest? The answer to this question depends, in large part, upon the nature of the cause of action that the claimant asserts. So what is the legal basis of an estoppel claim? There appear to be six possible bases. It is, however, possible to take the view
p. 236 that estoppel straddles more than one of these bases ↵ (in particular, it can be argued that, in certain circumstances, estoppel is contractual in nature but that in other circumstances it operates to provide a remedy for a wrong). This issue will be tackled at two different levels. At the first level, the issue will be

considered as one of principle before turning, at the second stage, to consider the significance of the issue in the particular context of a proprietary estoppel claim following the recent controversial decision of the Supreme Court in *Guest* v. *Guest* [2022] UKSC 27, [2022] 3 WLR 911.

As a matter of principle, the first view is that the claim is contractual in nature. On this view the effect of the estoppel is to render the promise legally enforceable. Estoppel thus functions as an alternative to consideration in that it renders a promise enforceable once there has been detrimental reliance upon it. Thus Professor Birks has argued ('Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 63) that:

> Estoppels have all along been binding promises. … Detrimental reliance promises, binding with limited legal effect, have become and are becoming binding with general effect. But, if that is right, there is no point at all in continuing to call them estoppels. In a jurisdiction where detrimental reliance promises are binding with general effect it has become true that promises are contracts when made by deed, supported by consideration or relied on to the detriment of the promisee.

Adoption of this view leads to the conclusion that the remedies available in estoppel cases are the normal contractual remedies, the aim of which is generally to protect the expectation interest.

The second view is that the estoppel acts as a cause of action to enforce promises and that it operates in a manner akin to contract but that it is not the same as a contractual claim. This view has been taken by Professor (now Justice) Edelman ('Remedial Certainty or Remedial Discretion in Estoppel after *Giumelli*' (1999) 15 *Journal of Contract Law* 179). He argues that it is not a contract on the ground that more than a breach of promise is required in order to trigger the operation of an estoppel. There must be some 'unconscionable conduct' or detrimental reliance in order to render the promise binding. It is the reliance that renders the promise binding rather than the promise that renders reliance possible. Thus Professor Edelman argues (at pp. 188–189) that, although:

> an estoppel cannot be said to be a 'contract' it is still concerned with the enforcement of promises where not to do so would be unconscionable and where they have caused reliance detriment. It is a different doctrine which enforces promises in different situations.

The third view is that estoppel is part of the law of wrongs. It cannot be a tort because tort is the label used by English law to denote a common law wrong and here we are in the realms of equity. Support for the proposition that estoppel is a wrong can be derived from the numerous references to 'unconscionability' in both judicial and academic analyses of estoppel. On this view estoppel appears to be defendant-sided, in that it attaches primary significance to the conduct of the promisor. But the difficulty with this view lies in identifying the wrong that the defendant has committed. Professor Birks has argued (at p. 64) that 'there is no other kind of unconscionable behaviour involved other than that which consists in failing to honour one's promises'. Adoption of the third view leads most naturally to the conclusion that the remedy awarded should aim to compensate the promisee for the loss that he has suffered as a result of his reliance upon the promise that has been made.

p. 237 ↵ The fourth view of estoppel is that it is concerned with the reversal of unjust enrichments. Take the case where A owns land and he promises to give some of the land to B as a gift. B builds a house on A's land in reliance upon A's promise to give him the land. A then revokes that promise. To allow A to go back on his word in such a case is to allow A to enrich himself at B's expense because he gets a house built on his land for nothing. In such cases the courts have generally strained to give B a remedy and proprietary estoppel has often been the remedy to which they have resorted. The case for intervention in this example is stronger in that there is both a detriment to B and an enrichment of A. More difficult is the case where there is a loss to B but A has not made a gain. Unjust enrichment may provide a basis for explaining the remedy in cases where there is a gain to the defendant and a loss to the claimant but it cannot explain the remedy in cases where there is a loss to one party but no corresponding gain made by the other.

The fifth view of estoppel is that the cause of action lies in equity and so it is a flexible remedy that is available at the discretion of the court. Thus one can find references in estoppel cases to the 'minimum equity' on the facts of the case and the need to tailor the remedy to fit the facts of the case. Finn J, writing extrajudicially ('Equitable Doctrine and Discretion in Remedies' in W Cornish, R Nolan, J O'Sullivan, and G Virgo (eds), *Restitution, Past, Present and Future* (Hart, 1998), pp. 269–270) has argued that 'appropriateness' should be the arbiter of the remedy granted by the court. He picks up on the reference in both *Waltons Stores* v. *Maher* and *Commonwealth of Australia* v. *Verwayen* to the 'minimum equity to do justice to the plaintiff' and argues (at p. 270) that:

> [t]he remedies given in estoppel cases can vary widely in character and content—monetary awards, the grants of estates and interests in land, the truncation of the rights arising in or under contracts, etc. But … the … remedy is not at large. Its object is detriment averting. What I would emphasise in this is that in selecting the appropriate remedy in the circumstances there must be *proportionality* between the remedy selected and its effects, and the detriment to be avoided. This, I venture, will be found to be an important constraint on the award of relief. And it necessitates that the selection of remedy cannot in the end be left simply to a plaintiff.

Three points should be noted about this approach. The first is that the discretion is founded on the premise that the aim of the remedy is detriment averting. It is, however, possible to have a different foundation for the exercise of the discretion. In particular, it is possible to start from the assumption that the aim of the remedy should be to give effect to the expectation engendered by the promise but that the court should have the discretion not to fulfil that expectation in certain circumstances. Second, the extent of the discretion given to the court can vary from a totally unstructured discretion, at one end of the spectrum, to a discretion that can be exercised only within very narrow limits, at the other end. The former view is more difficult to defend, given the level of uncertainty it will generate, whereas the latter view does not create the same level of uncertainty and may be said to introduce a welcome degree of flexibility into the law in the sense that it does not confine the court to a single measure of recovery.

This leads us to the third point in relation to the discretionary model and that is that it does not tell us the basis of the claim that is being made. The views advanced tend, in many ways, to be refinements of options 1–3. That is to say the cause of action remains the contract or the wrong but the court is given a discretion to
p. 238 depart from the basic measure ↵ of recovery in certain limited circumstances. This position has its

attractions. Take a case where a claimant is promised a huge sum of money by the defendant and he relies on that promise to his detriment in a relatively minor way. In such a case a court may well baulk at the proposition that it must give the claimant his full expectation as a result of his relatively trivial reliance. In such a case a discretion to commute the basic expectation measure to the reliance measure may not be unwarranted. But it is important to notice that this type of discretion is very different from a discretion which gives the court the ability to award the measure of relief it thinks fit, for whatever reason it thinks fit. It is a structured discretion that operates within an initial commitment to a particular measure of recovery.

Finally, it can be argued that the basis of estoppel can be located in a 'duty to ensure the reliability of induced assumptions'. This view has been put forward by Dr Spence in his book, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart, 1999). He argues (at pp. 2–3):

> The duty to ensure the reliability of induced assumptions places primary and secondary obligations on a party who (i) induces an assumption in the mind of another party and (ii) induces the other party to rely upon that assumption. The primary obligation is that the inducing party must, in so far as he is reasonably able, prevent harm to the relying party. 'Harm' consists in the extent to which the relying party is worse off because the assumption has proved unjustified than he would have been had it never been induced. The secondary obligation is that, if the relying party does suffer harm of the relevant type, and the inducing party might reasonably have prevented it, then the inducing party must compensate the relying party for the harm he has suffered.
>
> It is inducing reliance, rather than merely inducing an assumption, that attracts the duty to ensure the reliability of induced assumptions. The question of whether reliance has been induced, and if so how strongly, determines whether, and if so how strongly, the duty to ensure the reliability of induced assumptions applies. Seven aspects of the parties' dealings and relationship must be considered in determining whether, and if so how strongly, reliance was induced. Four of these seven considerations concern the parties' dealings. They are (i) the way in which the assumption and reliance upon it were induced (a claim that reliance has been induced and that the duty is owed is more plausible when there has been an express representation, than it is when there has merely been conduct or silence), (ii) the content of the assumption (a claim that reliance has been induced and that the duty is owed is more plausible when the relevant assumption relates to present fact, than it is when it relates to evidently less reliable matters such as another party's intentions), (iii) the relative knowledge of the parties (a claim that reliance has been induced and that the duty is owed is more plausible when the inducing party knew that the relying party would rely upon the relevant assumption) and (iv) the parties' relative interest in the activities undertaken in reliance on the assumption (a claim that reliance has been induced and that the duty is owed is more plausible when the relying party is providing the inducing party with some service in the relevant activities in reliance). Three of the seven considerations concern the parties' relationship. They are: (i) the nature and context of the parties' relationship (the claim that reliance was induced and that the duty is owed is less plausible in contexts in which a high degree of self-reliance might be expected, such as highly competitive contexts), (ii) the parties' relative strength of position (the claim that reliance was induced and that the duty is owed is more plausible in situations in which there is a disparity in the parties' strength of position in favour of the inducing party), and (iii) the history of the parties' relationship (the claim that reliance was induced and that the duty is owed is more plausible as between parties with long-standing relationships of trust). I do not claim that this list of seven
> p. 239 considerations is necessarily exhaustive. Nor do ↵ I claim that there is no overlap between them. For example, if parties enjoy a longstanding relationship in a context of close co-operation, it might be assumed that one party knew that the other would rely upon an assumption he induced. However, any consideration of the claim that one party induced another to rely upon a particular assumption must involve assessment of at least these seven aspects of the parties' dealings and relationship.

There are a number of difficulties with this view. The first relates to the moral basis for this duty. In the absence of a promise, is there any justification for imposing an obligation on the party said to have induced the assumption? As Professor Fried points out (*Contract as Promise* (Harvard University Press, 1981), p. 10):

> Should your expectations of me limit my freedom of choice? If you rent the apartment next to mine because I play chamber music there, do I owe you more than an expression of regret when my friends and I decide to meet instead at the cellist's home? And, in general, why should my liberty be constrained by the harm you would suffer from the disappointment of the expectations you choose to entertain about my choices?

The second difficulty relates to the complexity of the factors identified by Dr Spence. It does not give the appearance of providing a high degree of predictive yield when applied to concrete fact situations. The third is that, while it may be consistent with the results in many of the cases, it does not conform with the language of the courts.

The practical significance of the debate about the appropriate remedial response in cases of estoppel was recently illustrated in the context of a proprietary estoppel claim by the decision of the Supreme Court in *Guest* v. *Guest* [2022] UKSC 27, [2022] 3 WLR 911. The issue before the court was one that related to the remedy to be awarded to the claimant (it having been established in the lower courts that the claimant met the conditions necessary to bring a proprietary estoppel claim). The majority judgment was given by Lord Briggs and the minority judgment by Lord Leggatt. Both judgments are long and complex and only the essence of their approach can be set out here.

The central tenets of the analysis adopted by Lord Briggs can be found in the following passages:

> [4] … The perhaps quaint word 'estoppel' encapsulates the notion that the equitable wrong which has been threatened or done is the repudiation of the promise where it would be unconscionable for the promisor to do so. So the equitable remedy is to restrain, or to stop or 'estop' the promisor from reneging on the promise. …
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> [5] Equitable remedies are generally more flexible than those afforded by the common law and they are always discretionary. …
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> [Lord Briggs then engaged in a careful review of the leading authorities on proprietary estoppel and continued]
>
> [61] … For over a century, starting in the 1860s, the courts of equity developed an equitable estoppel-based remedy, the aim of which was to prevent the unconscionable repudiation of promises or assurances about property (usually land) upon which the promisee had relied to his detriment. The normal and natural remedy was to hold the promisor to his promise, because that was the simplest way to prevent the unconscionability inherent in repudiating it, but it was always discretionary, and
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> **p. 240**
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> liable to be tempered by circumstances which might make strict enforcement of the promise unjust, either between the parties or because of its effect on third parties. While reliant detriment was a necessary condition for the equity to arise, the court's focus on holding the promisor to his promise was not aimed at 'protecting' the promisee from the detriment, still less compensating for it. It was aimed at preventing or remedying the unconscionability of the actual or threatened conduct of the promisor, with the effect, but not the aim, that it tended to satisfy the expectations of the promisee. …

> [74] I consider that, in principle, the court's normal approach should be as follows. The first stage. ...is to determine whether the promisor's repudiation of his promise is, in the light of the promisee's detrimental reliance upon it, unconscionable at all. ...
>
> [75] The second (remedy) stage will normally start with the assumption (not presumption) that the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise. The promisee cannot (and probably would not) complain, for example, that his detrimental reliance had cost him more than the value of the promise, were it to be fully performed. But the court may have to listen to many other reasons from the promisor (or his executors) why something less than full performance will negate the unconscionability and therefore satisfy the equity. ...
>
> [76] If the promisor asserts and proves, the burden being on him for this purpose, that specific enforcement of the full promise, or monetary equivalent, would be out of all proportion to the cost of the detriment to the promisee, then the court may be constrained to limit the extent of the remedy. This does not mean that the court will be seeking precisely to compensate for the detriment as its primary task, but simply to put right a disproportionality which is so large as to stand in the way of a full specific enforcement doing justice between the parties. It will be a very rare case where the detriment is equivalent in value to the expectation, and there is nothing in principle unjust in a full enforcement of the promise being worth more than the cost of the detriment, any more than there is in giving specific performance of a contract for the sale of land merely because it is worth more than the price paid for it. An example of a remedy out of all proportion to the detriment would be the full enforcement of a promise by an elderly lady to leave her carer a particular piece of jewellery if she stayed on at very low wages, which turned out on valuation by her executors to be a Faberge worth millions. Another would be a promise to leave a generous inheritance if the promisee cared for the promisor for the rest of her life, but where she unexpectedly died two months later. ...

The focus of the judgment of Lord Briggs is therefore upon the need to remedy the unconscionability which arises from the promisor's repudiation of his promise. While he rejected the view that the fulfilment of the expectation generated by the promise was the 'aim of the remedy' ([94]) he nevertheless concluded that 'in many cases' the 'starting point' for the court in remedial terms is likely to be the fulfilment of the promise. However, that 'starting point' may not turn out to be the finishing point because, as he acknowledged, 'considerations of practicality, justice between the parties and fairness to third parties may call for a reduced or different award' ([94]). It is also important to note in this context that 'justice between the parties may be affected if the proposed remedy is out of all proportion to the reliant detriment, if that can easily be identified without recourse to minute mathematical calculation, and proper regard is had to non-monetary harm' ([94]).

Where on the six point spectrum is the judgment of Lord Briggs to be located? It is probably somewhere between the second option and a variant of the fifth option (the variant being that the object of the remedy is not detriment averting but to prevent or to undo the unconscionability inherent in repudiating the promise on which the promisee has relied to his or her detriment). The fact that the starting point will in future be the
p. 241 fulfilment of the promise is likely to lead to more claimants recovering the value of their lost expectation ↵ rather than being confined to compensation for loss suffered as a result of detrimental reliance upon the promise which has been made.

The minority judgment was given by Lord Leggatt and his focus was a rather different one. He rejected ([174]) the proposition that 'what the law regards as unconscionable conduct is failing to keep a promise to make a gratuitous transfer of property on which the promisee has detrimentally relied' on the ground that such a claim 'is not consistent either with legal principle or with precedent' ([175]). It is not consistent with principle because, in order to be enforceable, a promise must be supported by consideration, it must be intended to be legally binding and sufficiently certain to be enforceable and none of these requirements must be satisfied before a remedy can be given in a proprietary estoppel claim ([176]). In his judgment there was 'no justification for bypassing the requirements for the creation of a legal obligation just because the promisee has acted to his or her detriment in reasonable reliance on the promise' ([178]). However, he then proceeded to observe ([183]) that it does not follow from this 'that what was promised has no role to play in determining the appropriate remedy' to be granted. Rather than seek to fulfil the expectation engendered by the unfulfilled promise, the approach of Lord Leggatt was to focus on the detriment suffered by the promisee in acting in reliance upon the promise. Thus he continued:

> [188] … The object of reliance-based forms of estoppel is to protect a person (B) who has been induced by another person (A) to act in reliance on a particular assumption from detriment that B would suffer if A were afterwards permitted to assert rights against B inconsistent with the assumption. …
>
> [190] This remains the basal purpose of proprietary estoppel … the equity that arises from B's reasonable reliance on a non-binding promise by A to give B an interest in property is not a right or claim that the promise should be kept. Ex hypothesi B has no legal right to performance of the promise because the conditions required to create a legal obligation have not been satisfied. The equity is to be protected from detriment that B will suffer if the promise is not kept. By making a promise on which, although it is not legally enforceable, B has reasonably relied, A comes under a responsibility to ensure that B's change of position does not operate as a detriment to B.
>
> [191] Expressed in terms of unconscionability, what the law regards as unconscionable is not A's failure to keep a non-binding promise. It is A's failure to accept responsibility for the consequences of B's reasonable reliance on the promise and for ensuring that B does not suffer detriment as a result of such reliance.
>
> [192] The most obvious way of preventing such detriment is for the court to compel performance of the promise. A variant of this approach, if specific performance of the promise is impossible or undesirable, is to award monetary compensation aimed at putting B into as good a position as if A's promise had been performed. …
>
> [193] In principle, and sometimes in practice, there is another way of achieving the law's aim. This is to prevent the detriment that would otherwise flow from the failure to perform the promise by awarding compensation which puts B into as good a position, as best money can do it, as if B had not relied on A's promise: in other words, to grant a remedy which compensates B's reliance loss. …
>
> [195] It is important to recognise that both remedial approaches are ways of preventing B from suffering detriment from reasonably relying on A's promise. Such detriment is avoided either if A performs the promise (or pays B the value of the promised performance) or if A pays an amount of money which makes B as well off as if B had not acted in reliance on the promise. …

p. 242

> [196] It follows that the existence of two lines of authority—one comprising cases where the relief granted has been designed to fulfil the claimant's expectation and the other comprising cases where it has been designed to compensate the claimant's reliance loss—is not itself a sign of any incoherence in the law. Each remedial approach is a means of achieving the 'basal purpose' of the equitable doctrine of avoiding detriment to the promisee. But the question which then arises is: how is the court to decide in any particular case which of the two alternative approaches should be preferred?
>
> [197] At a theoretical level the answer to this question is straightforward. Where there is more than one means of avoiding detriment to the claimant, the court should in principle adopt whichever remedial approach imposes the least burden on the defendant … equity permits a court to do what is required, but no more than is required, to prevent detriment to the party who has relied on the promise.

Where on the spectrum is the approach of Lord Leggatt to be placed? It would appear to be somewhere between option 3 and option 5 in the sense that his principal focus is upon the avoidance of detriment to the promisee but he also recognises that the remedy granted in order to avoid that detriment may be the enforcement of the promise. The latter point suggests that the difference between the approach of Lord Briggs and Lord Leggatt might not be as great as at first sight would appear.

In some ways the difference is one that relates to the 'starting point' of the court and to the location of the burden of proof. Lord Leggatt focuses on avoidance of detriment to the promisee and on the remedial approach that will impose the least burden on the promisor, while recognising that avoidance of detriment may in an appropriate case result in the enforcement of the promise made by the promisor. Lord Briggs, by contrast, states that the normal remedy is the enforcement of the promise and that the burden is on the promisor to demonstrate that specific enforcement would be out of all proportion to the detriment to the promisee. Thus the effect of the majority approach is likely to be to lead to more cases in which the appropriate remedy will be held to be the enforcement of the promise and so strengthen the hand of the promisee in the sense that it reduces the likelihood that the promisee will be confined to a remedy which seeks to compensate the promisee for the loss he or she has suffered as a result of his or her detrimental reliance upon the promise made.

Enough has hopefully been said to demonstrate that the theoretical basis of estoppel remains a matter of difficulty and it is, perhaps, for this reason that the courts have had so many problems in terms of working out the appropriate remedy in estoppel cases. The basic choice that has to be made is between a model that aims to protect detrimental reliance (options (iii) and (vi)) and one that aims to fulfil the expectations engendered by the promise (options (i) and (ii)). That choice can be refined through the exercise of a discretion (option (v)) by which the court can depart from the basic measure of recovery in certain, exceptional circumstances. While English law adheres to the rule that estoppel cannot create a cause of action it is spared the need overtly to answer some of these questions. In the context of proprietary estoppel, the English courts, as result of the decision in *Guest* v. *Guest,* will in future take the starting point to be that the measure of recovery is the expectation measure while recognising that they have a discretion to depart from it in the circumstances outlined by Lord Briggs. A similar view would appear to have emerged in Australia in relation to equitable estoppel. It may be that English courts will adopt this view in the event that they decide that promissory estoppel can create a new cause of action.

p. 243

5.4 The Future of Consideration

As was noted at the beginning of this chapter, the doctrine of consideration, while it has its defenders (see M Chen-Wishart, 'Reciprocity and Enforceability' in M Chen-Wishart, L Ho, and P Kapai, *Reciprocity in Contract* (University of Hong Kong, 2010) p. 1) is a doctrine that is under attack. It does not appear to fit with the demands of commercial practice and it is difficult to explain its existence and content in theoretical terms. Further, as a result of the tension that exists between *Williams* v. *Roffey Bros*, on the one hand, and *Foakes* v. *Beer*, on the other, the doctrine cannot even be said to be internally coherent. Things are not much better when we turn to estoppel. The law exhibits a high degree of uncertainty, particularly in relation to the remedies available, the differences between the various estoppels, and in relation to the question whether or not promissory estoppel should be able to create a cause of action.

In these circumstances it is possible that the courts will intervene to set the law on a fresh foundation. But there is little evidence of judicial appetite for such far-reaching reforms. However, it is not impossible that a modern court will take on the challenge. In *Gay Choon Ing* v. *Loh Sze Ti Terence Peter* [2009] 2 SLR 332 Andrew B L Phang JA, delivering the judgment of the Court of Appeal of Singapore, took the rather unusual step of adding a coda to the judgment of the court which analysed the history and rationale of the doctrine of consideration, identified the difficulties to which it currently gives rise, and concluded with the following assessment of the alternatives open to the courts (or the legislature) in the future:

Possible alternatives

The alternatives stated

111. It is axiomatic, in our view, that if the doctrine of consideration is indeed abolished (whether judicially or legislatively), the function it has hitherto performed must be fulfilled by alternative doctrines … There have been a number of suggestions … [these] include the doctrine of promissory estoppel … and the doctrine of economic duress. …

112. Indeed, given the at least possible linkages between economic duress on the one hand and undue influence and unconscionability on the other … there is no reason in principle why undue influence and unconscionability ought not also to be potential alternatives (although unconscionability is still a fledgling doctrine in the Commonwealth law of contract). …

113. On a more general level, the doctrines of economic duress, undue influence and unconscionability appear to be more clearly suited not only to modern commercial circumstances but also (more importantly) to situations where there has been possible 'extortion'. There is also the proposal of the UK Committee to the effect that consideration is merely evidence of a serious intention to contract, with the result that it should not be required where the promise itself is in writing.

The difficulties

114. We pause to observe, if only in the briefest of fashions, that the possible alternatives to the doctrine of consideration set out so very cursorily in the preceding paragraphs are *themselves* subject to *their own specific difficulties*. For example, the fledgling nature of the doctrine of unconscionability … The doctrine of undue influence, however, has been relatively well established in the landscape of the common law of contract, although the doctrine of economic duress (being of very recent origin by common law standards) … stands somewhere in the 'middle' (being not without difficulties of its own).

p. 244

115. On the other hand, the doctrine of promissory estoppel still contains pockets of controversy. One issue that arises is whether it can be used as a 'sword' (*ie*, as a cause of action in and of itself) or merely as a 'shield' (*ie*, merely as a defence, which (it should be noted) applies (depending on the precise facts) equally to plaintiffs and defendants alike) … To take another example, the role of the concept of detriment may still need further elaboration … Finally, the issue as to whether or not the doctrine of promissory estoppel is only suspensory in operation may also require further consideration. …

116. Indeed, even in the context of *proprietary estoppel*, the law has not been static (see, for example, the very recent House of Lords decision of *Yeoman's Row Management Ltd* v. Cobbe [2008] 1 WLR 1752). Finally, the UK Committee's proposal to the effect that consideration should not be required where the promise concerned is in writing is also not free from difficulties … All this having been said, it is almost inevitable that no doctrine is immune from its own specific difficulties although, from a relative perspective, the courts would be wise to utilise only those doctrines with relatively fewer difficulties.

A pragmatic approach?

117. Because so much academic ink has been spilt on the doctrine of consideration over so very many decades (with no concrete action being taken) and because there is … such a dearth of cases on the doctrine itself, it would appear that any proposed reform of the doctrine is much ado about nothing. Indeed, the doctrine of consideration is (notwithstanding the numerous critiques of it) nevertheless still (as also noted) an established part of not only the Singapore landscape in particular but also the common law landscape in general. Not surprisingly, it is a standard topic in all the contract textbooks. In short, it cannot be ignored. However, because the doctrine of consideration *does* contain certain basic weaknesses which have been pointed out, *in extenso*, in the relevant legal literature, it almost certainly needs to be reformed. The basic difficulties and alternatives have been set out briefly above but will need to be considered in much greater detail when the issue next comes squarely before this court. One major difficulty lies in the fact that a legal mechanism must be maintained that will enable the courts to effectively and practically ascertain which promises ought to be enforceable. Hence, even if the doctrine of consideration is abolished, an alternative (or alternatives) must take its place. There then arises the question as to whether or not the alternatives themselves are sufficiently well established in order that they might furnish the requisite legal guidance to the courts. In this regard, it is significant to note that the various alternatives briefly mentioned above *are (apart from the requirement of writing) already a part of Singapore law*.

118. In the circumstances, maintenance of the *status quo* (*viz*, the availability of both (a somewhat dilute) doctrine of consideration *as well as* the alternative doctrines canvassed above) may well be the *most practical* solution inasmuch as it will afford the courts *a range of legal options* to achieve a just and fair result in the case concerned. However, problems of *theoretical* coherence may remain and are certainly intellectually challenging (as the many perceptive pieces and even books and monographs clearly demonstrate). Nevertheless, given the long pedigree of the doctrine, the fact that no single doctrine is wholly devoid of difficulties, and (more importantly) the need for a legal mechanism to ascertain which promises the courts will enforce, the 'theoretical untidiness' may well be acceptable in the light of the existing practical advantages … However, this is obviously a provisional view only as the issue of reform was not before the court in the present appeal.

p. 245 ↵ While this coda holds out the possibility of significant judicial reform (or abolition) of the doctrine of consideration, it remains the case that there are surprisingly few calls for reform of the doctrine from the world of practice. Why is this? Lord Steyn, writing extrajudicially ('Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *LQR* 433, 437) stated:

> I have no radical proposals for the wholesale review of the doctrine of consideration. I am not persuaded that it is necessary. And great legal changes should only be embarked on when they are truly necessary. First, there are a few cases where even in modern times courts have decided that contractual claims must fail for want of consideration. On the other hand, on careful examination it will usually be found that such claims could have been decided on other grounds, e.g. the absence of an intention to create legal relations or the fact that the transaction was induced by duress. Once a serious intention to enter into legal relations and a concluded agreement is demonstrated in a commercial context there is virtually a presumption of consideration which will almost invariably prevail without a detailed search for some technical consideration. On balance it seems to me that in modern practice the restrictive influence of consideration has markedly receded in importance. Secondly, it seems to me that in recent times the courts have shown a readiness to hold that the rigidity of the doctrine of consideration must yield to practical justice and the needs of modern commerce.

Letters of credit provide a useful illustration of the way in which the doctrine of consideration is made to yield to the needs of modern commerce. Letters of credit are often used in the financing of international sales transactions. Sellers generally wish to know that they have a secure right to payment before they ship goods, while buyers are usually reluctant to pay for the goods before receiving them. Letters of credit can break this impasse. The buyer will instruct his bank (the issuing bank, 'IB') to open a letter of credit in favour of the seller under which the bank promises to pay the price to the seller on presentation by the seller of the documents relating to the goods. In this way the seller knows that it has a secure right of payment against the bank when it presents the documents. The buyer is also given some protection in that, if the seller presents non-conforming documents, the bank must reject the documents and refuse to pay unless authorized by the buyer to pay. On what basis is the bank obliged to pay the seller under the letter of credit? This issue is considered in the following passage (*Goode and McKendrick on Commercial Law* (6th edn, Penguin, 2020), paras 35.49–35.51):

> In banking usage an irrevocable credit binds IB upon issue of the credit, … that is, upon the credit's release from the control of the issuer …, irrespective of the time it is delivered to or received by the beneficiary, S. If the credit is rejected by S, for example, because it does not conform to the contract of sale, it ceases to have effect.
>
> Though there is no reported case since the adoption of the 'irrevocable' label [that is to say, that the credit is irrevocable by the bank upon issue] in which the point has directly arisen for determination, there are several dicta in English cases indicating judicial acceptance of the binding nature of the credit by virtue of the issue of the document. … The problem is to reconcile the binding nature of the bank's undertaking with traditional concepts of general law, which deny legal effect to a simple promise unless consideration is furnished by the promisee, producing a contract, or the promisee is induced to act in reliance on the promise, generating some form of estoppel. The difficulty created by
> p. 246 the undertaking embodied ↵ in an irrevocable letter of credit is that it appears to be binding on IB, and enforceable by S, despite the fact that S has furnished no consideration for IB's promise and, indeed, may not have taken steps to act upon it nor even have signified his assent to its terms. … How, then, can the bank concerned become bound to the beneficiary solely by virtue of the issue of the letter of credit to him?
>
> Various ingenious theories have been advanced designed to accommodate the binding nature of the bank's undertaking within the framework of traditional contract law. All of these fall to the ground because, in an endeavour to produce an acceptable theoretical solution, they distort the character of the transaction and predicate facts and intentions at variance with what is in practice done and intended by the parties. The defects in these various theories show the undesirability of trying to force all commercial instruments and devices into a strait-jacket of traditional rules of law. Professor Ellinger has rightly argued that the letter of credit should be treated as a *sui generis* instrument embodying a promise which by mercantile usage is enforceable without consideration. Professor Kozolchyk takes the description a stage further, treating a letter of credit as a new type of mercantile currency embodying an abstract promise of payment, which, like the bill of exchange, possesses a high, though not total, immunity from attack on the ground of breach of duty of S to B.

The adaptability of consideration may be said to be its strength. The ability to find consideration has been described as the practice of 'inventing' consideration. This practice has been described in the following terms (GH Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 3-009):

> Normally, a party enters into a contract with a view to obtaining the consideration provided by the other, eg, the buyer wants the goods and the seller the price. In the US it has been said that this is essential, and that 'Nothing is consideration that is not regarded as such by both parties'. But English courts do not insist on this requirement and often regard an act or forbearance as the consideration for a promise even though it may not have been the object of the promisor to secure it, or the promisee may not have consciously realised that he was giving what was, in fact, consideration. They may also regard the possibility of some prejudice to the promisee as a detriment without regard to the question whether it has in fact been suffered. These practices may be called 'inventing consideration', and the temptation to adopt one or the other of them is particularly strong when the act or forbearance which was actually bargained for cannot be regarded as consideration for some reason which is thought to be technical and without merit. In such cases the practice of inventing consideration may help to make the operation of the doctrine of consideration more acceptable; but the practice may also be criticised on the ground that it gives the courts a wide discretion to hold promises binding (or not) as they please. Thus the argument that the promisee *might* have suffered prejudice by acting in reliance on a promise is in some cases made a basis of decision, while in others precisely the same argument is rejected. The courts have not been very consistent in the exercise of this discretion and its existence is a source of considerable uncertainty in this branch of the law.

But not all writers have adopted such an accommodating approach towards the doctrine of consideration. Its principal critic has been Professor Atiyah. He famously attacked the doctrine of consideration in a lengthy essay, entitled 'Consideration: A Restatement' (contained in *Essays on Contract* (Oxford University Press, 1986), pp. 179–243), the beginning and the conclusion of which are reproduced:

p. 247 ↵

pp. 180–183

The conventional statement of the doctrine of consideration is not perhaps as easily reduced to a simple set of rules as it is often assumed, but few would disagree with the following propositions. First, a promise is not enforceable (if not under seal[3]), unless the promisor obtains some benefit or the promisee incurs some detriment in return for the promise. A subsidiary proposition, whose claim to be regarded as a part of the orthodox doctrine is perhaps less certain, is sometimes put forward, namely that consideration must be of economic value. Secondly, in a bilateral contract the consideration for a promise is a counter-promise, and in a unilateral contract consideration is the performance of the act specified by the promisor. Thirdly, the law of contract only enforces bargains; the consideration must, in short, be (and perhaps even be regarded by the parties as) the 'price' of the promise. Fourthly, past consideration is not sufficient consideration. Fifthly, consideration must move from the promisee. Sixthly (and this is regarded as following from the first three propositions), the law does not enforce gratuitous promises. Seventhly, a limited exception to these propositions is recognized by the *High Trees* principle which, however, only enables certain promises without consideration to be set up by way of defence.

More generally, it would, I think, be commonly agreed that there is such a concept as a 'doctrine of consideration'. This very phrase carries certain implications. In particular it implies that there is *one* doctrine, and *one* concept. The word 'consideration' is invariably used in the singular. Lawyers do not today inquire what are *the considerations* which lead a court to enforce a promise, but whether *there is* consideration. The word 'doctrine' also appears to carry certain implications. In this particular area of the law, it seems to carry the implication that the 'doctrine' is 'artificial', and has no rational foundation except possibly in so far as it may be argued that gratuitous promises should not necessarily be enforceable.

It is my purpose to suggest that the conventional account of the law is unsatisfactory, and that scarcely one of the propositions set out above accurately represents the law. But it is necessary to start by suggesting that one of the principal reasons for the present divergence between the conventional account of the law and its actual operation arises from the more general beliefs about the existence of a set of artificial and irrational rules termed the doctrine of consideration. The truth is that the courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced. Since it is unthinkable that any legal system could enforce *all* promises it has always been necessary for the courts to decide which promises they would enforce. When the courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it. It seems highly probable that when the courts first used the word 'consideration' they meant no more than that there was good 'reason' for the enforcement of a promise. If the consideration was 'good', this meant that the court found sufficient reason for enforcing the promise. All this is not to suggest that the law was ever unprincipled, or that judges ever decided cases according to personal or idiosyncratic views of what promises it was desirable to enforce. As always

with the common law, it was the collective view of the judges, based largely on the conditions and moral values of the community, which prevailed over a period of time. The doctrine of precedent, then as now, was always available as an aid to the courts in deciding what promises to enforce.

p. 248 ↵ The notion that consideration means a reason for the enforcement of a promise was largely borrowed in my original essay from Corbin, and although Professor Treitel has objected to this, and insisted that it cannot just be asserted that this is what consideration means, it seems clear to me that it is both a historical and an analytical truth. I will not inquire further into the historical use of the term here, but at least it must be admitted that in modern law the presence of consideration is a necessary condition for the enforceability of a promise, leaving aside the promissory estoppel and other 'non-contractual' means of enforcement. To translate that into saying that consideration means a *reason* for the enforcement of a promise only requires us to make the assumption that the law is a rational enterprise. To assert that the law 'will not do A unless B' surely entails, if law is purposive in its nature, that the presence of B is a *reason* for doing A—unless (which can hardly be suggested here) it is merely a condition for the doing of A. Of course this does not carry the implication that the *reason* is always a good one; nor that sometimes the reason ought not to be outweighed by other reasons. But unless the presence of consideration is regarded, in general terms, as a reason for the enforcement of promises, the whole doctrine would have to be treated as mumbo-jumbo. Doubtless the law is sometimes irrational, but to treat a whole doctrine of the law as irrational implies both an extraordinary lack of faith in the intelligence of former judges, and an astonishing perversity in the erection of a system of precedent which requires that their decisions should be followed. I decline to make either of these assumptions.

Professor Treitel's critique of my original essay (and his textbook on the *Law of Contract*) insists that the courts have power to 'invent' consideration, and that this ability is an important phenomenon which I have overlooked and which explains many otherwise puzzling things about the doctrine. I find this a difficult concept to grasp. Is an 'invented' consideration something different from a 'real' consideration or is it the same thing? If it is the same thing, then it is hard to see in what sense it is invented; and if it is not the same thing, then it either violates the rules of law, or it modifies them. Presumably Professor Treitel does not mean to suggest that when judges invent consideration they are defying the law and violating their judicial oaths, but if an invented consideration modifies the rules governing ordinary consideration, then an invented consideration becomes again an ordinary consideration, though the legal significance of the doctrine has now changed. The only other possibility that occurs to me is that the courts might use the concept of 'invented consideration' rather like an equitable or merciful dispensation from the ordinary law, but it is unthinkable that judges should behave in this way. They have no power to invent a consideration in one case and refuse to do so in a relatively identical case. Thus an invented consideration must in the end be the same thing as an ordinary consideration. I fear that Professor Treitel has himself invented the concept of an invented consideration because he finds it the only way in which he is able to reconcile many decisions with what he takes to be the 'true' or 'real' doctrine. This is, of course, exactly the sort of process against which Corbin warned us, and I give my full allegiance to Corbin on this point.

> Nevertheless, I would today wish to qualify the suggestion that consideration 'means' a reason for the enforcement of a promise. It now seems to me to be more accurate to suggest that consideration really was and is a reason for the recognition of an obligation, rather than a reason for the enforcement of a promise. Given that … reliance and benefit are often themselves good reasons for the recognition of obligations in law—that we have many non-promissory cases in which the obligation is based upon an element of detrimental reliance or an element of benefit rendered or obtained—and given also that many cases in contract law are based on implied promises which seem more or less fictitious, the wider formulation of the function of consideration seems more accurate.
>
> p. 249 But for the purposes of this essay, I do ↵ not think that it matters much whether I proceed on the narrower or wider understanding of what is the general purpose of the doctrine of consideration.
>
> **pp. 240–243**
>
> The present orthodoxy therefore seems to me unnecessarily cumbrous. It would be a great deal simpler if the courts were willing to treat action in reliance which suffices for estoppel as also sufficient to satisfy the requirements of consideration; but it would at the same time be necessary, of course, for the courts to become more sophisticated about when expectation protection is, and when it is not, justified. If American experience is anything to go by, it may well be necessary to retain considerable flexibility as to when to confine contractual redress to the protection of reliance, and when to go further; it is unwise to try to draw this line by fastening on the absurdly narrow and unreal distinction between an action in reliance which is requested, and one which is not requested, but merely foreseeable. Fortunately, in practice it is so easy for a court to 'imply' a request when it wishes to do so, that no court which wishes directly to enforce a promise in this sort of case need find any difficulty in doing so. …
>
> … there are, I suggest, important conclusions to be drawn from what I have tried to demonstrate. The first is that to talk of abolition of the doctrine of consideration is nonsensical. Consideration means a reason for the enforcement of a promise, or, even more broadly, a reason for the recognition of an obligation. If the broader sense is right, then, of course, talk of abolition is quite absurd. But even if one takes only the narrower sense, it is hard to take seriously talk of abolition. Nobody can seriously propose that all promises should become enforceable; to abolish the doctrine of consideration, therefore, is simply to require the courts to begin all over again the task of deciding what promises are to be enforceable. They will, of course, have to use new technical justifications for this task, and the obvious one that lies to hand is the 'intent to create legal relations'. No doubt there is something to be said for beginning this task all over again, and for using a new technique for this purpose. Changes in social and commercial conditions, and changes in the moral values of the community, mean that the courts will not always find the same reasons for the enforcement of promises to be good today as their forbears did; equally, it is likely that they will often find good reasons for the enforcement of promises where their predecessors did not. Moreover, I think there is less likelihood of the 'intent to create legal relations' formula ossifying into a 'doctrine'; though there is the converse danger that its application may create uncertainty as to what promises will be enforceable. But I question whether the 'intent to create legal relations' formula will in the long run work any better than the rules of consideration.

> In particular, I believe that the problems arising from the enforcement of gratuitous promises are too complex to be adequately dealt with by either the rules of consideration or the 'intent to create legal relations' formula. For a start, the 'intent' formula can only be squared with the importance of detrimental reliance by repeated use of fictions. And if it should be suggested that the law should be more willing to enforce gratuitous promises, I believe that it will be necessary to start by asking more about the concept of a 'gratuitous' promise. To be legally enforceable, gratuitous promises will presumably need to be sensible, rational activities. But surely we then need to ask more about the kind of circumstances in which people do rationally make gratuitous promises, and we may need to distinguish various classes of cases. For instance, there are promises made in a commercial context which may appear gratuitous, but where the promisor expects some return in a rather more indirect way than the present doctrine of consideration recognizes. There is a lot to be said for the view that such promises are really bargain promises, and should be fully enforceable, even while executory, to the same extent as ordinary contracts. (But there is also a lot to be said for achieving this result by
>
> p. 250 modification of the present rather rigid view of what kind of benefit constitutes ↵ sufficient consideration.) Then there are gratuitous charitable promises, gratuitous family promises, and so on. Above all, of course, there is the distinction between gratuitous relied-upon and unrelied-upon promises.
>
> Whether unrelied-upon gratuitous promises should ever be rendered enforceable seems to me a very dubious proposition, and even if the principle is conceded, such promises are difficult to generalise about in advance, because so much depends upon the context out of which they arise. It may conceivably be found desirable to enforce gratuitous promises in a much wider range of circumstances than exists at the moment, but not to the same extent as ordinary commercial promises. For instance, it may be found wise to render some gratuitous promises enforceable in principle against the promisor, but not necessarily against his executors. Whether this would be just may well depend on his family obligations, and the solvency of his estate. It may be wise to provide for a much wider defence of frustration in the case of gratuitous promises, if they are to become enforceable while yet unrelied upon. A man promises his son an allowance while the latter is at the university; it may be just and equitable to enforce this promise, but would it remain just and equitable if the promisor became incapacitated and lost his job? Perhaps, too, a wider latitude should be allowed to some form of defence based on mistake. Perhaps we need to consider a shorter limitation period. And perhaps after all some gratuitous promises may be better treated as merely giving rise to a defence rather than a cause of action. Certainly we shall need to consider whether the same rules will be appropriate for all kinds of gratuitous promises. A promise to render gratuitous services is not necessarily in like case with a promise to make a cash gift; and a promise of money to a charity is not necessarily the same as a promise made to a member of the family. In short we must look to the reasons (or considerations) which make it just or desirable to enforce promises, and also to the extent to which it is just to enforce them.

Professor Atiyah's attack has been the subject of a counter-attack by Professor Treitel ('Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *Australian Law Journal* 439) principally on the ground that his proposal that the courts should look to the reasons which make it just or desirable to enforce promises (or obligations) is too vague to provide a workable standard.

Given all of these criticisms of the doctrine of consideration, it is unlikely that English law would adopt the doctrine of consideration were it to be given the opportunity to start afresh. International restatements on contract law find no role for the doctrine. Thus Article 2:101 of the Principles of European Contract Law states that:

> (1) A contract is concluded if:
>
> (a) the parties intend to be legally bound; and
>
> (b) they reach a sufficient agreement
>
> (c) without any further requirement.
>
> (2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

Article 3.1.2 of the Unidroit Principles of International Commercial Contracts provides that 'a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement'.

p. 251 ↵ But the fact is that English law has not been given, and may never be given, the opportunity to start afresh. This being the case, it is unlikely that the courts will, for the reasons given by Lord Steyn (earlier in this section), abandon the doctrine. They are more likely to continue the process, evident in cases such as *Williams* v. *Roffey Bros*, of being more willing to find the existence of consideration where they believe that the parties intended to be bound by their agreement. One consequence of this may be that greater prominence will be given to the doctrine of intention to create legal relations, to which we shall turn in Chapter 7.

Further Reading

ATIYAH, PS, 'Consideration: A Restatement' in PS ATIYAH (ed), *Essays on Contract* (Oxford University Press, 1986), p. 179.

BARNES, M, 'Estoppels as Swords' [2011] *LMCLQ* 372.

CHEN-WISHART, M, 'Consideration: Practical Benefit and the Emperor's New Clothes' in J BEATSON AND D FRIEDMANN (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), p. 123.

CHEN-WISHART, M, 'A Bird in the Hand: Consideration and Contract Modifications' in A BURROWS AND E PEEL (eds), *Contract Formation and Parties* (Oxford University Press, 2010), p. 89.

CHEN-WISHART, M, *Reciprocity in Contract* (The Hochelaga Lectures, Faculty of Law, University of Hong Kong, 2010).

COOKE, E, 'Estoppel and the Protection of Expectations' (1997) 17 *Legal Studies* 258.

EDELMAN, J, 'Remedial Certainty or Remedial Discretion in Estoppel after *Giumelli*' (1999) 15 *Journal of Contract Law* 179.

HALSON, R, 'The Offensive Limits of Promissory Estoppel' [1999] *LMCLQ* 257.

LOBBAN, M, '*Foakes v. Beer* (1884)' in C MITCHELL AND P MITCHELL (eds), *Landmark Cases on the Law of Contract* (Hart, 2008), p. 223.

LUTHER, P, 'Campbell, Espinasse and the Sailors: Text and Context in the Common Law' (1999) 19 *Legal Studies* 526.

O'SULLIVAN, J, 'In Defence of *Foakes v. Beer*' [1996] *CLJ* 219.

ROBERTSON, A, 'Reliance and Expectation in Estoppel Remedies' (1998) 18 *Legal Studies* 360.

SPENCE, M, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart, 1999).

TREITEL, GH, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *Australian Law Journal* 439.

TREITEL, GH, *Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), ch. 1.

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Notes

[1] In most cases it is not necessary to distinguish between the two categories because both suffice to render a promise enforceable. However, in some transactions relating to the disposition of interests in land it may be necessary to distinguish consideration which is nominal from consideration which is not nominal but nevertheless inadequate: see GH Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), paras 3-014–3-015.

[2] That is to say, ratification.

[3] The requirement of a seal has since been abolished. It now suffices for the promise to be made in the form of a deed: see further Chapter 6.

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