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A Bird in the Hand: Consideration and Contract Modifications

MINDY CHEN-WISHART*

1. INTRODUCTION

English contract law has accepted for centuries that a sufficient reason for enforcing a promise is that it is part of a freely agreed exchange between two parties. It explains why a *promisee* is entitled to enforce the promise and why her remedy should be based on her expectation (the distinctively contractual measure of enforcement); namely, because she has paid for it. Formalities and reliance provide exceptional reasons for the (sometimes only partial) enforcement of promises, but bargain is overwhelmingly the usual one. Yet the literature on the consideration doctrine is conspicuous in the intensity and depth of the hostility it has inspired. It is described as an 'enormous and shapeless grab bag'; uncertain in scope, and in places overly technical, artificial, internally incoherent, and inconsistent with the parties' intentions.[1] It is commonly explained as a historical accident; the result of the tyranny exercised in English law by the mediaeval forms of action. Lord Goff observed in *White v Jones*[2] 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'.

Abolition has been urged.[3] The 1937 Law Revision Committee in its Sixth Interim Report[4] proposed extending the enforceability of promises in a wide range of circumstances. The Law Commission's report (implemented by the Contracts (Rights of Third Parties) Act 1999)

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[1] See, eg P Atiyah, 'Consideration: A Restatement' in (ed) *Essays on Contract* (Oxford: Clarendon Press, 1986) 181; EW Paterson, 'An Apology for Consideration' (1958) 58 *Columbia L Rev* 929.

[2] [1995] 2 AC 207, at 262–3.

[3] L Wright, 'Should the Doctrine of Consideration Be Abolished?' (1936) 49 *Harv L Rev* 1225.

[4] Statute of Fraud and the Doctrine of Consideration (1937), Cmnd 5449, paras 26-40, 50. See similarly the Ontario Law Reform Commission *Report on Amendment of the Law of Contract* (Report No 85, 1987), ch 2.

commented that 'the doctrine of consideration may be a suitable topic for a future separate review'.[5] Professor Burrows concludes that:[6]

> The law would be rendered more intelligible and clear if the need for consideration were abolished and gratuitous promises which have been accepted or relied on were held to be binding (subject to the operation of normal contractual rules relating to, for example, the intention to create legal relations, duress, and illegality).

Nevertheless, the wholesale extermination of the consideration doctrine is unlikely any time soon. One reason is, paradoxically, the very reason for dissatisfaction with the consideration doctrine in the first place, namely, its uncertainty (or, which amounts to the same thing, its flexibility). The result is that, in practice, the consideration requirement causes little injustice or difficulty. My argument here is that, whatever we might ultimately conclude about the desirability of the consideration doctrine, we can resolve the most glaring target of criticism *within* the doctrine itself, without artificiality or deviation from the core idea of contract as exchange.

This is the problem traditionally posed by the requirement of consideration for the enforcement of one-sided contract modifications; one-sided in the sense that one party promises to give more for the same reciprocal obligation (an adding modification), or to accept a reduced reciprocal obligation (a subtracting modification) from, the other party. *Stilk v Myrick*[7] and *Foakes v Beer*[8] stand for the orthodox answer that such modifications are never enforceable because the promisee gives nothing in exchange for the modifying promise; she merely undertakes to perform (or partly perform) what she was already obliged to do. This apparently logical position has been described as 'the most harmful distortion' that has 'distracted attention from its central idea—bargain as a ground for enforcing promises.'[9] While the concern to protect the sanctity of contract and to prevent opportunistic exploitation point against enforcement, the stark reality is that change of circumstances (external or internal to the promisee) may make her

[5] Law Commission 'Privity of Contract: Contracts for the Benefit of Third Parties' (Law Com No 242 Cmnd 3329, 1996) para 6.17.

[6] 'Improving Contract and Tort: the View from the Law Commission' in A Burrows, *Understanding the Law of Obligations* (Oxford: Hart Publishing, 1998) 197, citing H McGregor, *Contract Code Drawn up on Behalf of the English Law Commission*, and the *Unidroit Statement of Principles for International Commercial Contracts*, art 3.1.

[7] *Stilk v Myrick* (1809) 2 Campbell 317.

[8] Traceable to *Pinnel's Case* (1602) 5 Co Rep 117a.

[9] J Dawson, *Gifts and Promises: Continental and American Law Compared* (Yale: Yale University Press, 1980) 4.

contractual performance practically impossible without some adjustment by the promisor. No less than Professors Treitel and Reynolds have observed that 'these cases are of great difficulty. The task of weighing these conflicting factors is a delicate one'.[10]

The enforceability of an agreement is subject to a two-stage test.[11] Stage one deals with formation and broadly requires the parties' intention to be bound and an exchange signified by the consideration requirement. Only after an agreement satisfies stage one does the question of vitiation arise at stage two; namely, whether a prima facie valid contract should nevertheless be set aside in the particular circumstances. It is here that the concern to prevent opportunistic exploitation by the promisee properly belongs, to be resolved under the rubric of duress. My concern is how we get past stage one. The modern case law has thrown up three main solutions which mirror the major reasons for some enforcement of promises; namely, bargain consideration, reliance, and serious intention.

2. CONSIDERATION

While *Williams v Roffey Brothers*[12] affirms the *Stilk v Myrick* requirement of fresh consideration for adding promises, it crucially overrules the decision by recognizing fresh consideration in the promisee's mere *promise* to perform his pre-existing contractual obligations where 'the promisor obtains in practice a benefit, or obviates a disbenefit'.[13] The risk of opportunistic exploitation was held to be adequately dealt with by reference to the doctrine of economic duress. I previously criticized the decision in *Williams v Roffey*.[14] While I stand by these criticisms, I now see them as resolvable by a refinement of the practical benefit approach; an approach which is preferable to the alternatives being mooted.

[10] F Reynolds and G Treitel, 'Consideration for the Modification of Contracts' (1965) 7 *Malaya L Rev* 1, 22.

[11] HLA Hart, 'The Ascription of Responsibility and Rights' in *Proceedings of the Aristotelian Society* (1948) 49; also in A Flew (ed), *Logic and Language—First Series* (Basil Blackwell, 1952) 145, 173.

[12] [1991] 1 QB 1.

[13] *Ibid*, 15-16; followed in *Adam Opel GmbH and Renault SA v Mitras Automotive (UK) Ltd [2008] EWHC 3205*.

[14] 'Consideration, Practical Benefit and the Emperor's New Clothes' in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995) 123–50.

(a) A bird in the hand

My main criticism was of *Roffey*'s acceptance that the mere promise to perform a pre-existing duty can confer practical benefit and so be good consideration for the reciprocal promise to pay more. A *re-promise* to do something already owed to the promisee really gives her nothing more than she had before. The crux of the widespread discontent with the traditional bar against one-sided modifications is our belief that: 'A bird *in the hand* is worth two in the bush';[15] the practice of selling debts at a discount on their face value tells us so. Logically, then, a bird in the hand must be worth more than *one* in the bush. This is recognized in *Williams v Roffey*,[16] and by those who deny that one-sided modifications are gratuitous.[17] This suggests that adding and subtracting promises should be enforceable *so long as the promisor receives the stipulated bird in the hand*. But precisely in what sense does this give the promisor 'more' than she had before?

To answer this question we need to fix the baseline against which to measure whether 'more' consideration has been given. Two are possible. First, the baseline can be fixed by reference to the 'eye of the law'. *Stilk v*

[15] *Foakes v Beer* 9 App Cas 607 at 622 (emphasis added): Lord Blackburn noted his '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 is often so. Where the credit of the debtor is doubtful it must be more so.' And see *Collier v Wright* [2007] EWCA Civ 1329, [2008] 1 WLR 643 at [3] where Arden LJ notes that *Pinnel's Case* frustrates the parties' expectations and makes it difficult to make modifications when this may 'be commercially beneficial for both parties to do'.

[16] *Ibid*, at 20-1, Purchas LJ notes that 'there were clearly incentives... to relieve [Williams] of his financial difficulties and also to ensure that he was in a position, or alternatively was willing, to continue with the sub contract works to a reasonable and timely completion.... Businessmen know their own business best even when they appear to grant an indulgence'. See also Russell LJ at 19.

[17] B Coote, 'Consideration and Benefit in Fact and in Law' (1990) 2 *Jl of Contract L* 23; FMB Reynolds and G Treitel, 'Consideration for the Modification of Contract' (1965) 7 *Malaya L Rev* 1; J Beatson, *Anson's Law of Contract* (28th edn, Oxford: Oxford University Press, 2002), 125-6; H Kotz and A Flessner, *European Contract Law*, vol 1 (Oxford: Oxford University Press, 1977), 68-71. In *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23, at [92]: 'insofar as consideration serves to exclude gratuitous promise, it is of little assistance in the context of on-going, arms-length, commercial transactions where it is utterly fictional to describe what has been conceded as a gift, and in which there ought to be a strong presumption that good commercial "considerations" underlie any seemingly detrimental modification.' See also B Reiter, 'Courts, Consideration and Common Sense' (1977) 27 *U of Toronto L J* 439, 507; and MA Eisenberg, 'The Principles of Consideration' (1982) 67 *Cornell L Rev* 640, at 644: 'The proposition that bargains involving the performance of a pre-existing contractual duty are often gratuitous is empirically far-fetched.'

Myrick and *Foakes v Beer* take this approach. The 'eye of the law' sees a 'contract right' as the 'right to contractual performance' and this, in turn, is equated with the '*receipt* of performance'. On this view, the promisor gets nothing more when she gets her hands on the stipulated bird than she originally had (the right to the bird in the bush). The problem is that if you start with a legal fiction, you are bound to end up with some odd results. Here, you prevent the promisor from bargaining for actual performance or part performance because the promisee knows that the law will not enforce it.

We should be wary of tracking logical deductions beyond common sense. An analogy can be drawn with the perverse outcomes that would follow from rigid adherence to the 'postal acceptance rule'. An offeree who posts her acceptance, then immediately changes her mind and tells the offeror that she rejects the offer before her letter arrives would nevertheless be bound if the offeror insists (although the offeror is not prejudiced and the parties were never in agreement). If the offeror had relied on the offeree's apparent rejection and sells to another, he may be in breach if the offeree insists on her postal acceptance. It is unsurprising that 'few, if any, judges or writers have been prepared to follow all these deductions to their logical conclusion'.[18] Equating a *right to* performance with the *receipt of* performance creates a baseline against which the value of actual performance over the right to performance simply disappears. As Dawson observes, 'within the limits of the obligation their agreement had created, the parties had destroyed their own power to contract.'[19] We need an alternative baseline which is intellectually coherent, yet sufficiently open to account for human and legal realities.

The second, and preferable, baseline is fixed by reference to the 'eyes of the parties'. We bargain for performance, but what we get is a more fragile right in remedial terms. The unpalatable truth is that there is no straightforward equivalence between the two. In recognizing the possibility of gain-based damages for breach of contract in *Attorney-General v Blake*, Lord Nicholls[20] noted Lionel Smith's argument[21] that contract rights should be protected as strongly from expropriation by the defendant's breach as property rights (which traditionally yield

[18] *Treitel: The Law of Contract* (12th edn, London: Thomson Sweet & Maxwell, 2007) para 2-033.

[19] J Dawson, *Gifts and Promises: Continental and American Law Compared* (Yale: Yale University Press, 1980) 210.

[20] [2001] 1 AC 268, at 283.

[21] L Smith, 'Disgorgement of Profits of Contract: Property, Contract and "Efficient Breach"' (1995) 24 *Canadian Business L J* 121.

gains-based remedies). However, it is trite law that many features of contract law are inconsistent with the protection of an innocent party's performance interest.[22] Unless contractual performance comprises the payment of money, an innocent party's right to performance will not normally translate into actual performance or its moneys-worth in remedial terms. Against *this* baseline, the receipt of actual performance or part performance may well give the promisor *more* than she had before. Likewise, it may be a detriment for the promisee to perform a pre-existing duty. This is clear where a promisee would otherwise risk bankruptcy. But even when solvent, the promisee's performance might be more advantageously applied elsewhere and her liability for breach will generally bear no relationship to the extent of this advantage.[23] The potential availability of gain-based damages[24] does not substantially undermine this argument given its very exceptional nature, and the uncertainties surrounding its basis,[25] availability,[26] and measure.[27]

Professor Coote objects to this line of reasoning because it would necessitate 'some break in the link between a contract and its performance which is inherent in the concept of an enforceable legal obligation'.[28] It appears to contradict the idea of contract as creating binding obligations and to support the Holmesian heresy that the contractual obligation is only to perform or pay damages

[22] For example, the rarity of gain-based damages itself; the limited availability of specific performance; agreed damages clauses are unenforceable if they amount to penalties or indirect specific performance; agreed specific performance will generally be unenforceable; rules such as remoteness and mitigation cut back the expectation damages to leave the claimant's pecuniary losses inadequately compensated, meanwhile her non-pecuniary losses from the breach (anxiety, annoyance, and so on) and from seeking legal redress (typically delay, hassle, time, and effort) are not normally compensable at all; punitive damages are generally rejected; and the innocent party may even be prevented from affirming and performing the contract on the other's breach if it would be wholly unreasonable to do so.

[23] P Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) 190 quoting *Corbin on Contracts* (rev edn, 1963) vol 1, para 172.

[24] *Attorney-General v Blake* [2001] 1 AC 268.

[25] *Ibid*, at 920. The remedy is available when (i) contract remedies would be inadequate; (ii) the claimant has a 'legitimate interest' in preventing the defendant from making or retaining his profits, and (iii) 'all the circumstances of the case'.

[26] Contrast *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC 458 (Ch) with *AB Corp v CD Co (The Sine Nomine)* [2002] 1 Lloyd's Rep 805.

[27] For example, 5% was awarded in *Wrotham Park v Parkside Homes* [1974] 1 WLR 798, 100% in *Attorney-General v Blake*; 30-50% in *Lane v O'Brien Homes Ltd* [2004] EWHC 303; the case was sent back for quantification of the reasonable user in *Experience Hendrix LLC v PPX Enterprises* [2003] EWCA Civ 323, (2003) EMLR 25 and for damage to the innocent party's reputation in *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445.

[28] B Coote, 'Consideration and Benefit in Fact and in Law' (1990) 2 *J of Contract L* 23, at 28.

for non-performance.[29] Purchas LJ recognized in *Williams v Roffey* that it was 'open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially'.[30] His Lordship conceded that 'the suggestion that a contracting party can rely on his own breach to establish consideration is distinctly unattractive'[31] and it is certainly arguable that exploitation of the inadequacies of contract remedies should not be recognized as valid consideration to support one-sided modifications.[32]

However, recognition that the contractual right will not always be vindicated by an order for specific performance or the cost of cure need not contradict the idea that contract law recognizes a duty to perform or mean that the remedy determines the right.[33] It is simply that the law on contractual remedies is not solely concerned with vindicating performance. The latter must be weighed against contract law's *other* concerns, for example, to avoid waste and unnecessary harshness to the contract-breaker; to encourage mitigation; to promote finality in dispute resolution, and to terminate hostile relationships. If we accept these concerns as important and legitimate, then 'inadequacy of remedies', on account of them, is inevitable. We can agree with Professor Friedmann that 'the essence of contract is performance. Contracts are made in order to be performed.'[34] But, this just fixes the starting point from which deviation is not only possible, but likely, in recognition of the other interests in play. Those who support the primacy of the performance interest nevertheless recognize the need to qualify its protection in many circumstances. No value is absolute; the fact that multiple policies are at work in our contract law means that trade-offs will be required. Thus, it is widely accepted that where harm can be remedied in different ways, the law should opt for that which is least restrictive of the defendant's liberty.[35]

[29] OW Holmes, *The Common Law* (1881) 298. See P Atiyah, 'Holmes and the Theory of Contract' in (ed) *Essays on Contract* (Oxford: Clarendon Press, 1986), 59ff.

[30] [1991] 1 QB 1, at 23.

[31] *Ibid*.

[32] S Williston, 'Successive Promises of the Same Performance' (1894-95) 8 *Harvard L Rev* 27, 30–1.

[33] As suggested by Holmes and Atiyah, above, n 29.

[34] D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628, at 629; C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *Oxford J of Legal Studies* 41.

[35] D Kimel, 'Remedial Rights and Substantive Rights in Contract Law' (2002) 8 *Legal Theory* 313. Compelling specific behaviour is more oppressive than requiring the payment of damages, particularly where the former is backed by a finding of contempt of court, potentially punishable by imprisonment. If a money award of a fine were the penalty, courts may be more prepared to order specific performance as in France or Germany. See H Beale,

To press the point, unless contract law is prepared to make specific performance the primary remedy, backed up by the cost of cure or account of profits from breach, then, ironically, in order to protect the promisor's performance interest, contract law should concede that obtaining actual performance will often be more valuable than simply having the right to sue for non-performance. The 'eye of the law' should defer to the 'eyes of the parties' so long as contract law does not fully protect the performance interest, particularly when the concern to prevent opportunistic exploitation can be controlled directly at stage two by the doctrine of economic duress.[36]

(b) The unilateral contract device

A bird in the hand is better than one in the bush. On this view, the promisor of additional payment is not intending to buy the same *right* twice. She is now bargaining for *actual performance*.[37] This describes a unilateral contract: the promisor's offer to pay more (or accept less) is only accepted if and when the promisee actually completes the stipulated part of the promisee's pre-existing contractual duty. The bilateral contract analysis in *Williams v Roffey* will not do the job. The Court of Appeal's acceptance of the promisee's mere *repromise* to perform her pre-existing contractual duty provoked Professor Coote's comment that consideration in a bilateral contract 'is required for the formation of a contract. Performance, *ex hypothesi*, comes too late to qualify'.[38]

However, a complete answer is provided by supplementing the original bilateral contract with a collateral unilateral contract to pay more (or accept less) *if* actual performance is rendered. This unilateral contract can prevail over an inconsistent term in the main written contract.[39] But if the unilateral contract does not eventuate, because the promisee fails to render the stipulated performance, then the original contract retains full force. This approach is also preferable because it avoids the absurd and unjust results of a bilateral contract analysis

A Hartkamp, H Kotz, and D Talon, *Ius Commune Casebook for the Common Law of Europe: Contract Law* (Oxford: Hart Publishing, 2002) 68081.

[36] TE Robison, 'Enforcing Extorted Contract Modifications' (1983) *Iowa L Rev* 699, 751.

[37] In *Newman Tours Ltd v Ranier Investment Ltd* [1992] 2 NZLR 68, at 80, Fisher J applied *Williams v Roffey Bros*, saying: 'the agreement to perform [its] existing contractual obligations, followed by actual performance in reliance upon that subsequent agreement, can constitute fresh consideration.'

[38] 'Consideration and Benefit in Fact and in Law' (1990–91) 3 *J of Contract L* 23, at 26.

[39] See *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129; *Brikom Investments Ltd v Carr* [1979] QB 467; *Harling v Eddy* [1951] 2 KB 739; *Mendelssohn v Normand Ltd* [1970] 1 QB 177.

which would leave a promisor of additional payment worse off than before because her damages would be reduced by the original *and additional* sums she undertook to, but now need not, pay.[40] A bilateral contract analysis of *relieving* promises yields the same perverse outcome. If the promisee fails to render the lesser performance, the promisor's claim would be confined to that lesser performance.[41]

Consistently, the Ontario Law Reform Commission states that where the promisee of additional payment fails to perform, the appropriate deduction is the *original sum* promised, and not the greater modified sum; 'it would be an implicit understanding between the parties that failure to comply with the terms of the new agreement would revive the old one.'[42] Likewise, subtracting promises are binding 'subject to actual performance' by the promisee.[43] The promisor 'has agreed to accept less on the ground that "a bird in the hand is worth two in the bush". It would be unfair, in such a case, to limit the rights absolutely to the single bird of the subsequent agreement'. The same reasoning underlies the 1937 Law Revision Committee's recommendation on reversing the effect of *Pinnel's Case*.[44] It would be more straightforward to say that, with both adding and relieving promises, the promisor's liability on the additional promise only crystallizes *on the promisee's performance* on a unilateral contract analysis.

A unilateral contract analysis avoids another potentially anomalous result, instanced by *Pao On v Lau Yiu Long*.[45] The parties exchanged shares in their companies. P also agreed to delay selling 60 per cent of the shares received for at least a year to avoid triggering a fall in their value; L agreed to *buy back* those shares at a fixed price at or before the end of the year. When P realized that he would be disadvantaged if the shares rose above the fixed price, he refused to proceed unless L agreed to a *guarantee by way of indemnity* (if the shares should fall below

[40] For example, X promises to pay Y £5,000 for a job; later X promises another £3,000 (total £8,000), but Y still does not perform and it would cost X £10,000 for substitute performance. The expectation damages under the original contract is £10,000–£5,000, while under the modified contract it would be £10,000–£8,000.

[41] X promises to accept £70 in discharge of Y's debt of £100 in the hope of actually getting £70, but, if Y disappoints, X's claim is confined to £70.

[42] Ontario Law Reform Commission 'Report on the Amendment of the Law of Contract' (No 82, 1987) 12–13, discussing the promise to accept part performance.

[43] *Ibid*, 10, 12–13.

[44] *Sixth Interim Report on the Statute of Frauds and the Doctrine of Consideration*, Cmd 5449, paras 33-5: 'It would be possible to enact only that actual payment of the lesser sum should discharge the obligation to pay the greater, but we consider that it is more logical and more convenient to recommend that the greater obligation can be discharged either by a promise to pay a lesser sum or by actual payment of it, but that if the new agreement is not performed then the original obligation shall revive.'

[45] [1980] AC 614.

the fixed price). L agreed in order to avoid the delay and loss of public confidence that a legal action against P would attract at a critical time in their company's restructuring. Moreover, L believed that the risk entailed in the modification was 'more apparent than real'. When the share price plummeted, L would neither buy back the shares under the original contract (alleging this arrangement was ended by the modification) nor indemnify P under the modified bilateral contract (alleging that it was voidable for duress). The modification was upheld. However, the Privy Council opined that, even if duress had been found, it would not have countenanced the 'stark injustice' of denying P 'the safeguard which all were at all times agreed [P] should have—the safeguard against fall in value of the shares'.[46] A unilateral collateral contract analysis of the modification would restrict the vitiating effect of any duress, leaving the original contract in place.

(c) The award in *Williams v Roffey*

A unilateral contract analysis of the promise to pay more comes closest to explaining the damages actually awarded in *Williams v Roffey*. Williams had already received more than 80 per cent (£16,200) of the £20,000 originally agreed for the work on the 27 flats when Roffey Brothers promised an extra £575 *if, as and when* he finishes *each* of the 18 remaining flats on time. Williams claimed his expectation of £10,847, which is slightly more than the additional sums for the remaining flats (18 x £575 = £10,300). This should have followed logically from the Court of Appeal's bilateral contract analysis (even with an 'entire obligations' overlay)[47] since it was Roffey Brothers' breach (by paying only £1,500 more although Williams had completed eight further flats) that entitled Williams to terminate.

However, the trial judge, with whom the Court of Appeal agreed, only awarded £3,500. Glidewell LJ explains the calculation:[48] the judge started with £4,600 (being 8 x £575) 'less some small deduction for defective and incomplete items'. Additionally, Williams was entitled to a reasonable proportion of the sum outstanding from the original price.[49] This entitled Williams to £5,000. From this is deducted

[46] *Ibid*, at 635.

[47] *Williams v Roffey Bros* [1991] 1 QB 1 at 8-10, 16-17; and 23.

[48] *Ibid*, at 6.

[49] This should be £3,800 although the trial judge said £2200 and Glidewell LJ said £2,300. The error probably occurred because Roffey Brothers made an additional payment of £1500 (£3,800–£1500 = £2,300). However, this was credited twice by being deducted again from Williams' original entitlement of £5,000.

the £1,500 already paid, leaving the final figure of £3,500. Since Roffey Brothers' offer is to pay a specific sum on completion of specified work, this can be interpreted as 18 separate unilateral offers. One interpretation is that Williams only accepted eight of these by substantial performance; by ceasing work, it accepted no more.

(d) Revocation of the unilateral offer

An alternative interpretation is that Roffey's breach (in not paying) amounts to an implied revocation of its unilateral offers in respect of the *incomplete* flats. There is no suggestion that Williams had commenced work on *these* flats nor that Roffey had prevented Williams from further performance, so there is nothing to stop Roffey from revoking its offer on the incomplete flats. A third interpretation is that Roffey's unilateral offer is for completion of all 18 flats. On this view, we would run into the supposed rule that a unilateral offer can be accepted 'as soon as the offeree has unequivocally begun performance of the stipulated act or abstention..., so that the offer can no longer be withdrawn'.[50] But, is there a universal rule to this effect?

On the 'yes' side is the judgment of Denning J in *Errington v Errington*.[51] A father promised his son and daughter-in-law that if they paid off the mortgage, amounting to two-thirds of the value of the house they were all living in, it would be theirs. When the father died nine years later and a substantial part of the mortgage had been paid, the Court of Appeal prevented his representatives from revoking the arrangement because the couple had commenced payment, provided that the couple's performance was not left 'incomplete and unperformed'.[52] Aside from this family case, there is only Court of Appeal dicta in *Daulia Ltd v Four Millbank Nominees Ltd*[53] (involving an unenforceable oral agreement for property) and *Soulsbury v Soulsbury*[54] (where no question of revocation arose because the stipulated performance of a family arrangement was completed). On the other side is *Luxor (Eastborne) Ltd v Cooper*.[55] The House of Lords denied a real estate agent's claim for a £10,000 commission payable on completion of a sale when the agent found buyers but the owners refused to complete. The commission was the equivalent of a Lord Chancellor's annual pay

[50] *Chitty on Contracts*, (30th edn, London: Sweet & Maxwell, 2008) para 2-079.

[51] [1952] 1 KB 290.

[52] *Ibid*, at 295.

[53] [1978] Ch 231, especially at 239.

[54] [2007] EWCA Civ 969, [2008] 2 WLR 834, at [50].

[55] [1941] AC 108.

for work done within eight or nine days. The court held that the common understanding was that estate agents take 'the risk in the hope of a substantial remuneration for comparatively small exertion'.[56]

It is tempting to opt for a clear rule prohibiting or permitting revocation of the modifying offer once performance has commenced. However, the answers 'never' or 'always' will sometimes yield unintended and unjust results. In *Morrison Shipping Co v The Crown*[57] the Lord Chancellor doubted: 'whether a conditional offer in general terms, whether made to the public (as in the *Carbolic Smoke Ball* case) or to a class of persons, is converted into a contract so soon as one of the persons to whom the offer is made takes some step towards performing the condition.' The Federal Court of Australia in *Mobil Oil Australia Ltd v Wellcome International Pty Ltd and Others*[58] declined to recognize a 'universal proposition that an offeror is not at liberty to revoke the offer once the offeree "commences" or "embarks upon" performance of the sought act of acceptance'. The issue is one of construction, but also of protecting a performing offeree from exploitation by the offeror.[59] These features will vary greatly from case to case. Relevant factors would include:

(i) *Construction*—The parties' intention or the prevailing convention (eg estate agents' contracts) as to whether the offeror should be able to withdraw at any time (ie a *locus poenitentiae*) which may be inferable from other relevant factors.

(ii) *The length of time* over which the offeror would have to keep the offer open without knowing whether the offeree will complete the act. *Errington v Errington*[60] involved a lengthy period but was a family property case where 'the parties were not considering future possibilities at arms length'.[61]

(iii) *Whether the stipulated performance requires the offeror's cooperation*—if so, it is less likely that the parties intended to bar revocation (eg real estate agents' contract and by analogy to the test of whether affirmation is available).

(iv) *The extent of performance*—The demands of justice will vary between an offeree who has completed 1 per cent of the stipulated performance and one who has completed 99 per cent.

[56] *Ibid*, at 126.
[57] (1924) 20 Ll L Rep 283, at 287.
[58] (1998) 153 ALR 196, at 228.
[59] This mirrors the concern to protect the promisor from the promisee's exploitation via duress.
[60] [1952] 1 KB 290.
[61] *Ibid*, at 293.

Revocation should be barred if the offeree has incurred significant reliance or change of position (eg by not declaring bankruptcy) or has substantially completed the stipulated performance (by analogy to the entire obligations rule).[62]

(v) *The extent of benefit conferred on the offeror* by the offeree's part performance.

(vi) *Acquiescence*—Whether the offeror knows of the offeree's commencement of performance. In *Soulsbury v Soulsbury*[63] Waller LJ thought it inconceivable that the offeror 'should be free to watch [the offeree] work once the offer had been made, take advantage of the work done' and then revoke the offer.

(vii) *Subsequent change of circumstances*—Revocation should be permitted if the modifying offer was made on a common assumption which is untrue or does not eventuate (eg you offer to pay more or accept less because of dramatic price increases which then fall back quickly to their original level) or the promisor has reason to lose confidence in the promisee's ability to perform and can salvage the situation with a substitute.

In *Mobil Oil Australia Ltd*,[64] franchisees of Mobil alleged that Mobil could not revoke its 'nine-for-six' offer (to give nine additional years of franchise free if the franchisee obtained at least 90 per cent in the annual 'Circle of Excellence' judging for six years). The court found no implied offer not to revoke because the act of acceptance was ill-defined and the franchisees were already obliged to achieve high standards in order to run an efficient business. The court questioned the suggestion 'that the attainment of 90 per cent in the first year or even perfect operation of the service station for a day, a week or a month, albeit by reference to the offer, represents a commencement of attainment of 90 per cent in all six years so it is immediately to bind Mobil not to revoke?'[65]

Even if an offeror has impliedly promised not to revoke on commencement of the stipulated performance, it does not follow that a purported revocation would be ineffective. In the absence of specific relief in respect of that implied promise, the offeror will simply be liable to damages; but on what measure? The most obvious is loss of expectation measured by the chance that the performance would have been

[62] *Hoenig v Isaacs* [1952] 2 All ER 176.
[63] [2007] EWCA Civ 969, [2008] 2 WLR 834, at [44].
[64] (1998) 153 ALR 196, at 228.
[65] *Ibid*, at 224.

completed[66] less the expenses saved or, where completion depends on the hypothetical acts of third parties, by reference to the offeree's loss of a chance.[67] *Chitty* puts forward 'an intermediate possibility'[68] by analogy to *White & Carter Ltd v McGregor*.[69] Namely, that the offeree should cease performance and recover damages amounting to his expenses unless she has a 'substantial legitimate interest' in completing performance. A third possibility is put forward by the Lord Chancellor in *Morrison Shipping Co v The Crown*:[70] 'It may be that, when work is done and expense incurred on the faith of a conditional promise, the promisor comes under an implied obligation not to revoke his promise, and if he does so may be sued for damages or on a *quantum meruit*.'

3. PROMISSORY ESTOPPEL IN *COLLIER V WRIGHT*

Lord Denning opened the way to using the promissory estoppel doctrine in *Hughes v Metropolitan Railway Co*[71] to enforce relieving promises in *Central London Property Trust v High Trees House Ltd*.[72] His Lordship staked further ground for the equitable doctrine in dicta in *D&C Builders v Rees*.[73] Namely, that it is in principle, although not on the facts, applicable to part payment of a debt agreed by the parties to discharge the whole debt. In *Collier v Wright*[74] the Court of Appeal applied the dicta in *Rees* to override the House of Lords decision in *Foakes v Beer*.[75] Collier and his two former business partners were jointly indebted to Wright for £46,800, each servicing his share. When Collier's former partners ceased paying, Collier alleged that Wright told him to continue his payments and Wright would chase the other debtors. Over four years later, when Collier had repaid his third of the debt, Wright demanded the other two-thirds from Collier.

[66] *Mobil Oil Australia Ltd v Wellcome International Pty Ltd and Others* (1998) 153 ALR 196, at 225.

[67] *Allied Maples v Simmons & Simmons* [1989] 1 WLR 1602; and see *Schweppe v Harper* [2008] EWCA Civ 442, at [53].

[68] *Chitty on Contracts* (30th edn, London: Sweet & Maxwell, 2008) para 2-086.

[69] [1962] AC 413; and see P Atiyah, 'Consideration: Restatement' in (ed) *Essays on Contract* (Oxford: Clarendon Press, 1988) 204.

[70] *Morrison Shipping Co v The Crown* (1924) 20 Ll L Rep 283, at 287.

[71] (1876-77) LR 2 App Cas 439.

[72] [1947] KB 130.

[73] [1966] 2 QB 617.

[74] [2007] EWCA Civ 1329; [2008] 1 WLR 643.

[75] (1883-84) LR 9 App Cas 605.

In a preliminary hearing, the Court of Appeal found that although Collier gave no consideration on the authority of *Foakes v Beer* and *Re Selectmove*,[76] he had established a 'genuine triable issue' on promissory estoppel. If Wright had given the alleged undertaking, which was unclear, Collier's subsequent part payment would, without more, bar Wright from suing for the balance. Arden LJ reformulated the promissory estoppel doctrine:[77]

> [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.... To a significant degree it achieves in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937.

Collier v Wright[78] is a clear break with precedent. In place of promissory estoppel's flexible weighing of the parties' conduct and potential losses, Arden LJ substitutes an absolute rule. Her Ladyship's approach substantially alters our understanding of the reliance requirement for the purposes of promissory estoppel. The trial judge found no relevant reliance by Collier.[79] Collier's claim, that absent Wright's assurance, he would have pursued the other debtors prior to their bankruptcy, struck the trial judge (and Longmore LJ)[80] as 'wild speculation' given Wright's 'inability to recover a single penny from them, despite being in possession of a judgment debt'.[81] Indeed, Arden LJ agreed that:[82]

> there is no evidence that Mr Collier's position now is in any material respect different from that immediately before the agreement was made. For instance, there is no evidence that he entered into any business venture or made any substantial investment on the strength of the agreement. Nor is there any evidence that he could not raise the money now to meet Wright's claim.

[76] [1995] 1 WLR 474.

[77] [2007] EWCA Civ 1329, [2008] 1 WLR 643, at [42].

[78] A Trukhtanov, '*Foakes v Beer*: Reform of Common Law at the Expense of Equity' (2008) 124 *LQR* 364.

[79] [2007] EWCA Civ 1329, [2008] 1 WLR 643, at [19].

[80] *Ibid*, at [46].

[81] *Ibid*, at [28].

[82] *Ibid*, at [36].

Neither did the trial judge think that Collier's *part payment* amounted to relevant reliance. This is unsurprising since part payment has never previously, *in itself*, been sufficient to raise promissory estoppel. Otherwise, one would wonder what all the fuss surrounding *Foakes v Beer*. Nevertheless, Arden LJ held that part performance *per se, does* amount to the relevant reliance, *and* that this, *without more*, makes it inequitable for the creditor to resile from the agreement, *and* completely extinguishes the creditor's right to the balance of the original debt. This makes the requirement of promisor unconscionability in resiling redundant and departs from the reliance basis of the doctrine. It cuts the doctrine adrift from its justification. The analogy with 'pratical benefit' is inescapable; *Collier v Wright* undermines *Foakesv Beer* in the same way that *Williams v Roffey Brothers* undermined *Stilk v Myrick*.

Longmore LJ conceded that Lord Denning's dicta in *Rees* 'seems' to have the effect attributed by Arden LJ,[83] but he was distinctly unenthusiastic about it. He doubted that Wright had *permanently* foregone its original right or that Collier had 'relied ... in any meaningful way'. His Lordship recognized that it was arguably inequitable for Wright to resile, but thought there was 'much to be said on the other side', concluding that:[84]

> If, as Arden LJ puts it, the 'brilliant obiter dictum' of Denning J in the *High Trees* case [1947] KB 130 did indeed substantially achieve in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937, 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.

Lord Denning's dicta in *D & C Builders Ltd v Rees*[85] is weak precedent for *Collier*'s version of promissory estoppel. Lord Denning found his own formulation inapplicable because Rees' bad faith meant that it was not inequitable for the builders to resile. Thus, Rees' part payment did not, *per se*, make the builders' resiling inequitable, contrary to Arden LJ's formulation.[86] The greater part of Lord Denning's judgment simply applied *Foakes v Beer*. Danckwerts LJ's judgment spent just 14 lines rejecting promissory estoppel (because there was no true accord and *no detrimental change of position*).[87] Winn LJ, giving the longest judgment,

[83] *Ibid*, at [45]–[47].

[84] *Ibid*, at [48].

[85] [1966] 2 QB 617.

[86] Arden LJ could explain the outcome of *Rees* by saying that the builders made no promise to start with.

[87] *D & C Builders Ltd v Rees* [1966] 2 QB 617, at 627.

made no mention of promissory estoppel at all. It is, therefore, paradoxical that a case which applies *Foakes v Beer* should be interpreted in direct contradiction of it. All three judges agreed that the modification was unenforceable because there was no accord and satisfaction where: 'The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.'[88] In contrast, Arden LJ[89] relies on Lord Denning's different use of the terminology of 'accord and satisfaction'[90] to mean 'agreement and part-payment'.[91]

Adopting the unilateral contract analysis in relation to both adding and subtracting would not only avoid the difficulties raised by *Collier v Wright*, it would also counter the glaring inconsistency between *Williams v Roffey*[92] and *Re Selectmove*[93] which *Collier v Wright* perpetuates. There is no functional difference between an adding and subtracting promise; in both cases the promisor is getting *proportionately* 'less' than his original entitlement and the promisee is getting 'more'. Moreover, the unilateral contract analysis is entirely consistent with outcome in *Collier v Wright* and Arden LJ's requirement of actual performance.

4. ABOLISHING CONSIDERATION IN ADDING MODIFICATIONS

Another way around the traditional obstacle to the enforcement of adding promises posed by the consideration requirement is to abolish the requirement. This is the approach advocated by the New Zealand Court of Appeal in *Antons Trawling v Smith*.[94] Smith was employed by Antons to fish for orange roughy. The standard agreement provided for payment as a percentage of the net value of the fish caught.

[88] *Chitty on Contracts*, (30th edn, London: Sweet & Maxwell, 2009) para 22-012. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, at 643; *Bank of Credit and Commerce International SA v Ali* [1999] ICR 1068, at 1078.

[89] *Collier v* Wright [2007] EWCA Civ 1329, [2008] 1 WLR 643, at [33], [39], and [42].

[90] In *D&C Builders Ltd v Rees* [1966] 2 QB 617, at 625, Lord Denning MR held: '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.'

[91] [2007] EWCA Civ 1329, [2008] 1 WLR 643, at 644. According to the Weekly Law Reports, *Collier v Wright* held, inter alia, that Collier had raised a triable issue 'that there had been an accord and satisfaction in that he had paid his share of the debt and the company had voluntarily agreed to accept the payments on that basis'.

[92] [1991] 1 QB 1.

[93] [1995] 1 WLR 474.

[94] [2003] 2 NZLR 23, citing Chen-Wishart, 'The Enforceability of Additional Contractual Promises: A Question of Consideration' (1991) 14 *New Zealand U L Rev* 270 at [92].

When Smith realized the risk that this arrangement entailed when performing exploratory fishing, he requested a daily rate as he was entitled to do under the agreement. Antons declined but agreed to give Smith a 10 per cent share of any additional fishing quota allocated by the government to Antons as a result of Smith proving the existence of a commercial fishery. Antons argued that it was not bound by this additional promise because Smith was already paid to fish and so gave no consideration. The court endorsed the 'practical benefit' approach[95] of *Williams v Roffey*. However, acknowledging the trenchant criticisms of the decision, the court held, in the alternative, that consideration is unnecessary for the variation of a contract. Baragwanath J said:[96]

> [Denying enforcement] would be inconsistent with the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted *reciprocal* undertakings.... Where the parties who have already made such intention clear by entering legal relations have *acted upon* an agreement to a variation, *in the absence of policy reasons to the contrary* they should be bound by their agreement.

Although the court did not choose between recognizing 'practical benefit' and dispensing with consideration, the two approaches are conceptually incompatible; one liberalizes consideration, the other abolishes it, albeit only in the context of adding modifications. The latter approach is objectionable on a number of fronts. First, Baragwanath J's view that '[t]he importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself'[97] will be contested below.[98] Second, if 'the essential principle underlying the law of contract' is the parties' intention to be bound, then its logic should extend to both adding and relieving promises,[99] and even to contract formation. The fact that his Honour confines his abolition to adding promises where there is already 'freely accepted *reciprocal* undertakings'[100] shows that reciprocity is not dispensable to contractual enforcement. Third, the intention to be bound approach cannot explain why the enforceability of the promise should be conditional on the promisee *actually* performing her pre-existing obligations.

[95] Reference was made at [91] to a previous Court of Appeal's endorsement in *Attorney-General for England and Wales v R* [2002] 2 NZLR 91, at 109, which praised the approach as appropriately paying attention to the practical realities of the parties' circumstances rather than to 'legal niceties'.

[96] [2003] 2 NZLR 23, at [93] (emphasis added).

[97] *Ibid*.

[98] See text accompanying n 110–111.

[99] There is no suggestion that the court intended to abrogate the rule in *Foakes v Beer*.

[100] [2003] 2 NZLR 23, at [93] (emphasis added).

On the other hand, this condition is entirely consistent with the unilateral contract approach premised on consideration proposed in this essay. Indeed, Baragwanath J specifically held that 'the agreement about the issue of quota was a unilateral contract. Mr Smith did not assume the obligation of achieving the goals so as to expose oneself to liability if he failed'.[101] Lastly, there is no guidance as to the content of the additional qualification that enforcement of adding promises is subject to the 'absence of policy reasons to the contrary'.

5. ABOLISHING CONSIDERATION OUTRIGHT

An even more radical departure is signalled by the dicta of Andrew Phang Boon Leong JA of the Singapore Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter*.[102] The case was decided on the basis that the parties had reached a valid compromise on the ordinary principles of contract law, there being 'no fundamental difficulties with respect to the doctrine of consideration'.[103] Nevertheless, his Honour went on to give an 11-page critique of the doctrine in anticipation of the day that 'the issue of reform does squarely arise before this court in the future'.[104] He explains that 'the doctrine might now be outmoded or even redundant, and that its functions may well be met by more effective alternatives'.[105] In particular, '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"'.[106] While recognizing the impossibility of enforcing all promises, his Honour's only stated restriction is that any agreement should be *seriously intended*[107] because '[t]he marrow of contractual relationships should be the parties' intention to create a legal relationship'.[108]

[101] *Ibid*, at [59]. This unilateral contract contains additional *legal* benefit for Antons; namely, the prospect of satisfying the Ministry of Agriculture and Fisheries of the existence of a commercial fishery in the area. The 10% deal was offered to encourage Smith to redouble his efforts and to agree to the extensive research programme and record keeping which the Ministry would require before issuing further quota, at [31]–[41].

[102] [2009] SGCA 31.

[103] *Ibid*, at [92].

[104] *Ibid*, at [94].

[105] *Ibid*, at [92].

[106] *Ibid*, at [113]. Another possible 'alternative doctrine' is promissory estoppel; see [111].

[107] *Ibid*, at [113].

[108] *Ibid*, at [86], citing VK Rajah JC in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594, at [139].

Consideration is dispensable because 'consideration is merely evidence of serious intention to contract'.[109]

The idea that consideration merely performs the functions of formalities has been standard fare since Fuller's famous article in 1941.[110] The idea is that consideration is a reasonably efficient indicator that a promise has actually been made (evidentiary), the promisor understood the consequences of making it (channelling), and took care in making it (cautionary). Now, it is true that, exceptionally, nominal consideration may *only* evince a serious intention to be bound, but it is a mistake to confine the role of consideration in this way. Even *with* consideration an oral promise may be very difficult to prove, given impulsively or without thought of the legal consequences. Conversely, the *absence* of consideration does not necessarily, or even normally, point towards a promise being perjured, careless, or unintended.[111] There can be no doubt about my seriousness in solemnly promising you £5,000 in front of witnesses, or even in writing. Yet, you cannot enforce my promise. In contract law, a promisor can change her mind *unless* the promisee has given or promised to give a reciprocal inducement for the promise.

The idea that an undertaking seriously made is sufficient to justify its enforcement is simply wrong as a description of contract law. If it were true, contract law would have little content. All contractual questions (When is there a contract? What are its contents? Is a contract vitiated? What are the remedies for breach?) would be answered by sole reference to the parties' serious intentions. The only issue becomes one of fact finding. We would wonder why contract books need to run to many hundreds, even thousands of pages. No legal system does or can enforce all promises and the idea of respect for seriously intended promises is not determinative of the promises which should be enforced.

Nor is the idea of enforcing every seriously intended promise normatively attractive. First, if we value freedom of choice then we should value equally highly an individual's subsequent abandonment of her initial choice. Why should we prioritize a past choice over a present one when both are equally valid expressions of her will?[112] Second, it would be a very different world from the one we know if we were 'bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness.

[109] *Ibid*, at [113].

[110] 'Consideration and Form' (1941) 41 *Columbia L Rev* 799.

[111] A Kull, 'Reconsidering Gratuitous Promises' (1992) 21 *J of Legal Studies* 39, 55.

[112] A Brudner, 'Reconstructing Contracts' (1993) 43 *U Toronto LJ* 1, 21.

Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience'.[113] An integral part of any valuable autonomous life is the ability to learn, change, mature and recreate oneself. This may entail the rejection or alteration of previous beliefs or goals. Even when account is taken of the value of learning from one's mistakes, coerced performance of one's regretted promises may unduly compromise one's integrity and self-respect[114] (hence damages is the primary remedy for breach, rather than specific performance), or may jeopardize one's future autonomy (hence the invalidity of slavery contracts and unreasonable restraints of trade, and the facility of bankruptcy which allows a fresh start).

Even if we believe that the promisor should do as she promises (for example, as a matter of self-consistency), this does not explain why contract law should weigh in on behalf of the *promisee* as a matter of justice. For this, we need the doctrine of consideration.[115] Contract law will not generally assist a promisee *unless* she has given or promised to give the reciprocal inducement for the promise.

It is doubtful that a substantive requirement of intention to create legal relations 'will in the long run work any better than the rules of consideration'.[116] There is the risk of confusion with the misnamed doctrine of 'intention to create legal relations', which is more concerned to map the boundaries of appropriate legal involvement in private affairs[117] than to interrogate the parties' intentions. Moreover, to say that the question is the parties' 'intention to be bound' simply begs the question: bound to *what*? What rights or liabilities were intended to be transferred, created, waived, or suspended by the promisor? Was it to be absolute or conditional?[118] It is not obvious that by promising to pay more or accept less, a promisor *necessarily* intends to extinguish his original rights absolutely and irrespective of changes of circumstances or failure by the promisee to perform under the new arrangement.

Contract orthodoxy sets a threshold of enforceability based on bargain consideration, is restrictive of the scope of excuses for non-performance, and normally enforces to the full extent the promisee's expectations. Expanding the basis for enforcement will necessitate the

[113] M Cohen, 'The Basis of Contract' (1933) 46 *Harv L Rev* 553, 572.

[114] A Kronman, 'Paternalism and the Law of Contract' (1983) *Yale LJ* 763.

[115] E Weinrib, *The Idea of Private Law* (Harvard: University Press Harvard, 1995) 136–40.

[116] P Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) 241.

[117] S Hedley, 'Keeping Contract in its Place: *Balfour v Balfour* and the Enforceability of Informal Agreements' (1985) 5 *Oxford J of Legal Studies* 391.

[118] This is the point made by Longmore LJ in *Collier v Wright* [2007] EWCA Civ 1329, [2008] 1 WLR 643, at [48].

appropriate recalibration of the excuses and remedies and so undermine the internal coherence of contract law. If enforcement is to be divorced from exchange, it is not obvious what the appropriate remedial response should be. The demands of justice will vary with the particular *context* (whether commercial, consumer, charitable, family, and so on) and the particular *reason* for enforcement (whether bargain, reliance suffered, benefit received, fulfilment of family responsibilities, and so on).

Thus, German and French law define 'contract' to include gratuitous promises but recognize special excuses (derived from Roman law) for the non-performance of gratuitous transactions. These include: the donee's 'gross ingratitude',[119] the donor's deterioration of circumstances such that 'he is not in a position to fulfil the promise without endangering his own reasonable maintenance or the fulfilment of obligations imposed upon him by law to furnish maintenance to others',[120] and the subsequent acquisition of a child by a previously childless donor.[121] Even completed gifts are revocable in comparable circumstances. Most notably the enforceability of gratuitous promises in German and French law is subject to a stringent formality requirement *unless* they are 'synallagmatic' contracts (containing bilateral reciprocal undertakings).[122] This is simply a different way of stating the common law position that an enforceable promise must be supported by consideration *unless* it is accompanied by the requisite formality.

Phang JA's view that consideration is evidence of serious intention and that duress, undue influence, and unconscionability can *replace* consideration assumes what HLA Hart warns against. In *The Ascription of Responsibility and Rights*[123] Hart describes the line of reasoning that since consent gets you into contract, only lack of consent will get you out[124] as 'a disastrous over-simplification and distortion' of the law on the vitiation of transactions. It fails to recognize: (i) that consent is a *necessary but not sufficient*, condition of transactional liability; and

[119] § 530 (1) of the German Civil Code (*BGB*); Arts 953, 955 of the French Civil Code (*Code civil*). This includes, eg, serious misconduct towards the donor or a close relative, infidelity of the donee spouse, filing an unmeritorious petition to declare the donor disabled, and the donee's failure to perform an express condition.

[120] § 519 of the German Civil Code (*BGB*).

[121] See further J Dawson, *ibid*, 53.

[122] §§ 320-26 of the German Civil Code (*BGB*); Art 1102 of the French Civil Code (*Code civil*).

[123] HLA Hart, 'The Ascription of Responsibility and Rights' in *Proceedings of the Aristotelian Society* (1948) 49; also in A Flew (ed.), *Logic and Language—First Series* (Oxford: Basil Blackwell, 1952) 145, 173.

[124] *Ibid*, 183.

(ii) that the validity of a transaction is a *two-stage* inquiry, so that even when the language of consent is used in determining both the formation and vitiation stages, they deal with *qualitatively different* concerns. It is a mistake to think 'that there are certain psychological elements required by the law as necessary conditions of contract and that the defences are merely admitted as negative *evidence* of these'. Rather, talk of 'defective consent' in relation to vitiating factors is conclusory, not explanatory; it is merely short-hand for the variety of factors rendering a transaction 'defeasible'.[125] Understanding this allows us to detach the basis for *vitiating* transactions from the basis for *enforcing* them. Space is then opened up to consider values at work *other* than consent and exchange. The question is whether, in the circumstances, a claimant should be relieved of responsibility for the transaction, *despite her consent* to it.[126]

Consistently, Lord Scarman said that '[t]he classic case of duress is... not the lack of will to submit but the victim's intentional submission arising from the realization that there is no practical choice open to him'.[127] Where this results from the defendant's illegitimate pressure, the law does not ascribe the normal responsibility it would to the victim's consent. This view avoids the fiction that the claimant gave no consent despite acting knowingly and intentionally.[128] Rather, it takes the realistic and respectful view that the claimant engaged with reason in consenting,[129] but should nevertheless be excused from responsibility in the circumstances.

In 1994 I criticized *Williams v Roffey* for 'passing the buck' to the doctrine of economic duress because the latter was still too unstable and undeveloped to distinguish appropriate one-sided modifications from the inappropriate.[130] For example, it is unclear how the line can

[125] *Ibid*, 145, 174-8 (emphasis in the original). At 180, Hart explains that 'the logical character of words like "voluntary" are anomalous and ill-understood. They are treated in such definitions as words having positive force, yet, as can be seen from Aristotle's discussion in *Book III of the Nicomachean Ethics*, the word "voluntary" in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, the stakes, etc, and not to designate a mental element or state; nor does "involuntary" signify the absence of this mental element or state.'

[126] *Ibid*, 174.

[127] *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366, at 400.

[128] P Atiyah, 'Economic Duress and the Overborne Will' (1982) 98 *LQR* 197; *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913, 926–38.

[129] Hence the requirement that she has no practicable alternative.

[130] 'Consideration, Practical Benefit and the Emperor's New Clothes' in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995) 123.

be drawn between the content of 'practical benefit' to the promisor (avoiding the consequences of breach) which points towards enforcement and the promisor having 'no practicable alternative' but to agree (to avoid the consequences of breach) which points against enforcement. However, there is nothing for it but to engage with the task of marking out the appropriate shape of economic duress. Suffice it to say that since scarcity is pervasive, *all* choices are constrained. It is impossible to generate a coherent theory of duress by reference to the internal psychology of the parties. To distinguish acceptable constraints from the unacceptable, we will need to appeal to factors *external* to the will of the parties.

The consideration doctrine cannot be replaced by the vitiating factors of duress, undue influence, and unconscionability. Consideration is not merely a proxy for serious intention to be bound, and despite the justificatory language of the courts, the vitiating factors do not primarily concern the negation of this serious intention.

6. CONCLUSION

Evolution, not revolution, has always been the common law way. Lord Steyn's extra-judicial comment is exemplary:[131]

> 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 change should only be embarked on when they are truly necessary.... [T]he 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.

The story of the pre-existing duties problem is partly one of the richness, ingenuity, and evolutionary capacity of the common law to overcome obstacles to reaching just and sensible results. Faced with the perceived obstacle of consideration, *Williams v Roffey* widened its scope; *Collier v Wright* circumvented it; and *Antons Trawling* and *Gay v Loh* abolished it. The three approaches are interconnected; there is an order of priority in their application. Expansion of consideration reduces the need to resort to circumvention via promissory estoppel. But abolition of consideration makes the expansion of consideration or of promissory estoppel redundant. Consideration bites before promissory estoppel, but abolition swallows all.

[131] 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *LQR* 433, 437.

At the end of the day, the desirable approach to pursue depends on our assessment of the core functions of the doctrine of consideration. The crux of this essay is that enforcement of one-sided modifications *can* be accommodated within the traditional framework by further refinement of the enlargement of consideration recognized in *Williams v Roffey*. To one who promises more for performance already owed, receipt of that performance is superior to the right to sue for it and she should be able to bargain for it. The promise to pay more can be understood as a unilateral offer which becomes binding only if the stipulated performance is rendered. The logic should be extended to relieving promises. The concern to prevent exploitation must be worked out at stage two, under the rubric of economic duress. A coherent resolution of the problem of one-sided modifications eliminates one of the major sources of discontent with the consideration doctrine. This should inform the debate over whether the consideration doctrine should be sustained and rehabilitated or be dismantled wholesale by legislation, or piece by piece in the courts.

A bird in the hand is better than one in the bush. The Emperor who is merely given a repromise of new clothes gets nothing more than he had before; he may still end up naked. But the Emperor who actually gets his new clothes receives something more than he had before. The 'eye of the law' may not see it, but the Emperor, facing a state occasion, will have no doubt.