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Consideration: Practical Benefit and the Emperor's New Clothes*

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The doctrine of consideration provides the principal criterion of contractual liability in the common law. Redefining the contents of consideration will effect a consequential shift in the boundaries of contractual liability. *Williams* v *Roffey Brothers and Nicholls (Contractors) Ltd*[1] heralds such a redefinition in the most far reaching manner. This chapter explores the nature and desirability of this redefinition, the reasons motivating it and how these reasons might have been alternatively accommodated in the law.

On its face, the approach in *Roffey* is consistent with the orthodox view that the consideration which arounds contractual liability represents the exchange or bargain element in a contract. Something which counts in law must be given in exchange for a promise to make that promise enforceable as a contract.[2] While there have always been exceptional examples of non bargain enforcement, bargain provides the overwhelming, and commercially, most important explanation of contractual liability. The strength of this orthodoxy is such that bargain consideration has had to be 'invented'[3] where it is lacking to justify enforcement. Moreover, preserving a distinct category for bargain transactions serves two important functions. First, it gives the party seeking to enforce the promise a compelling justification because he or she has given some enforceable agreed exchange for that promise. Secondly, at the remedial end, it provides the basis for determining the extent of liability on the promise. The expectation measure, 'the distinctive feature of a contractual action',[4] gives the promisee the value of the promised performance because 'she has paid the agreed equivalent of that performance.'[5]

These two functions of bargain consideration are seriously undermined

1 [1991] 1 QB 1 (hereafter *Roffey*).

2 GH Treitel, *The Law of Contract* (8th ed 1991) p 63.

3 eg *Hamer* v *Sidway*, 27 NE 256 (1891); *Shadwell* v *Shadwell* (1860) 9 CB (NS) 159, 142 ER 62; *Ward* v *Byham* [1956] 1 WLR 496; and see generally GH Treitel, *The Law of Contract* (8th ed 1991) p 67.

4 GH Treitel, *The Law of Contract* (8th ed 1991) p 831.

5 SM Waddams, *The Law of Contracts* (3rd ed 1993) p 17, para 24.

by the incorporation of practical benefit into the definition of consideration effected by *Roffey*. Promises of more for the same are traditionally regarded as unenforceable, because the promisee logically gives no more for the reciprocal promise to pay more. A confirmatory promise, therefore, has not 'counted' as valid currency for the purchase of contract rights. To say now that it *can* count because it confers a 'practical benefit' on the promisor is a trick no less than that played by the tailor of the emperor's new clothes. It cannot disguise the fact that practical benefit neither confers any enforceable benefit additional to that contained in the original contract, nor buys any enforceable expectation to the reciprocal promise to pay more. Like the emperor's new clothes, the benefit described as 'practical' turns out to be a lot less than presented. The words 'illusory' and 'naked' would not be inapt.

Acceptance of practical benefit as consideration, indeed, 'practically alter[s] the sense of the word'[6] with consequential distortion, dilution and muddying of what we mean by contractual liability. The reach of this adjusted view of contract is undoubtedly extended, but its desirability is highly suspect. However, to deny full contractual effect to practical benefits is not to deny that some enforcement of promises of more for the same may be desirable for reasons other than bargain. The question is, whether such reasons for enforcement are best addressed indirectly via a redefined notion of bargain consideration, or directly via a widened meaning of 'consideration' or some other doctrine which acknowledges such enforcement to be exceptional to the doctrine of consideration.

Practical benefit as consideration

WILLIAMS V ROFFEY

Roffey Brothers contracted to refurbish a block of twenty-seven flats. They subcontracted the carpentry work to Williams for the sum of £20,000. Williams finished nine flats but was at risk of non-completion of the rest due to financial difficulties arising partly from the underprice of the subcontract and partly from deficiencies in Williams' supervision of his workers. Realising this, Roffey Brothers called a meeting at which they agreed to pay Williams the additional sum of £575 on the timely completion of each of the remaining eighteen flats. Eight further flats were substantially completed, but because Roffey failed to pay the additional sums promised, Williams discontinued work and brought an action claiming £10,847. Meanwhile, Roffey engaged other carpenters to complete and incurred a week's time penalty under the main contract. Roffey denied

[6] *Foakes* v *Beer* (1884) 9 App Cas 605, at 613, per the Earl of Selborne LC.

that the amount claimed by Williams was enforceable since he had given no consideration for it. Roffey counterclaimed for damages of £18,121.46 arising from Williams' non completion. The judge at first instance held in favour of Williams and awarded damages of £3,500. Roffey appealed.

In dismissing the appeal, the Court of Appeal reaffirmed that consideration, in the orthodox bargain sense, is still required but that, in the context of promises of more for the same, consideration includes practical benefits.[7] Glidewell LJ said:[8]

> (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.

The court found practical benefits to Roffey in:[9]

(1) Williams' continued performance;
(2) avoiding the trouble and expense of obtaining a substitute;
(3) avoiding the penalty payment for untimely performance under the main contract; and
(4) the institution of a systematized scheme for payment of the additional amount which occasioned a more orderly performance by Williams, allowing Roffey to direct their other subcontractors more efficiently towards timely completion of the main contract.

Hitherto, none of these would have counted as valuable consideration for the additional promise. The first two benefits are the very ones due to Roffey in the existing contract and the third is directly consequential on them. As for the fourth, in the absence of an undertaking to perform sequentially, it is hard to see how Williams' mere acceptance of the mode of payment of the additional sum can constitute consideration for that sum.

Despite strenuous insistence to the contrary,[10] *Roffey* clearly overturns the pre-existing duty rule for which *Stilk* v *Myrick*[11] is authority. Consideration there still must be, but it need not comprise something additional to the obligations owed under the existing contract. Nor is

[7] [1991] 1 QB1, at 16, 19, 22, described as benefits (or the avoidance of disbenefits) 'resulting' or 'accruing' from the promised performance assessed 'practically' or 'pragmatically'.
[8] *Ibid.*, at 15–16. [9] *Ibid.*, at 11, 19, 20, 21. [10] *Ibid.*, at 16, 18–19, 20.
[11] (1809) 2 Camp 317, 6 Esp 129; 170 ER 851 and 1168.

additional detriment to the promisee necessary.[12] Practical benefit moving from the promisee is enough. Thus, Roffey's promise to pay the additional sums was enforceable in contract. Roffey's failure to make due payment on the finished flats constituted a breach[13] which entitled Williams to terminate performance before completion and claim damages.[14]

THE MEANING OF PRACTICAL BENEFIT

To assess the nature of the enlargement of contractual liability effected by practical benefit, we need to define the limits of this term. What precise advantages conferred are regarded as practical benefit? Two meanings are consistent with *Roffey*. First, it is the advantage of obtaining actual (or an increased chance of) contractual performance already due to the promisor over the right to seek legal redress for non-performance. Secondly, it is the chance of obtaining additional benefits (or of avoiding disbenefits[15]) from the promisee's already due performance other than that expressly stipulated in the original contract.

Increased chance of performance already due

The first two practical benefits accepted by the Court of Appeal fall in this category. Williams' continued performance and Roffey's not having to find a substitute are irreducibly the benefits to which Roffey is entitled under the existing contract. A number of formulations have been suggested for this category. Professor Treitel equates it with 'factual benefit'.[16] Thus, so long as an original promise (consideration) conferred factual benefit on the promisor, so will the repromise.[17] Logically, practical or factual detriment to the promisee must follow. This formulation necessitates a distinction between *factual* benefit (invoking the idea of something conferring objective benefit and actually sought by the

[12] *Roffey* [1991] 1 QB 1, at 16.

[13] It does not appear that Roffey breached the original contract.

[14] *Roffey* [1991] 1 QB 1, at 7.

[15] *Ibid.*, at 16.

[16] GH Treitel, *The Law of Contract* (8th ed 1991) pp 65, 88 and 90. *Roffey* is seen as sanctioning, in the context of a confirmatory promise, the sufficiency of 'factual benefit to the promisor ... even in the absence of a legal benefit to him or of a legal detriment to the promisee', bringing the two party cases into line with the three party cases.

[17] B Coote, 'Consideration and Benefit in Fact and in Law' (1990–91) 3 JCL 23, 25. Practical benefit will exist so long as 'actual performance would provide more benefits to the promisor than would non-performance (or, for that matter, fewer harms than would breach). It would be absent only where the promisor had stood to obtain no advantage under the existing contract when first made, or where the change of circumstances meant that all chances of the promisor's obtaining an advantage from performance had been lost. In the latter cases no rational party is likely to offer further payment for the completion.'

promisor as the bargain equivalent of his or her own reciprocal promise)[18] and *legal* benefit (something not previously owed but which may confer only nominal or trivial benefit to the promisor or may be 'invented'). This distinction involves an open inquiry into factors hitherto said to be non-justiciable or non-dispositive (the adequacy of consideration and a party's motives) in determining prima facie contractual liability.[19] The formulation entails the further corollary that contracts involving factual value can be modified at will while those involving only legal value cannot be modified unless supported by further legal value. Further explanation is required.

It has been suggested that the benefit conferred by Williams' repromise is the comfort Roffey could derive 'from their own perception of a greater chance of completion of the project on time'.[20] But this is no more than sentimental value and, despite some questionable decisions,[21] rightly repudiated as valid consideration.[22] To regard them now as practical benefit collapses the doctrine of consideration from within. All promises, whether to perform an existing duty, to be loving, good or not complain, confer reassurance on the promisee (unless known not to be intended seriously). Indeed one can even be said to derive reassurance and satisfaction from one's own altruistic promises without receiving any reciprocal promise. Benefit is confused with motive, and consideration becomes meaningless as a criterion of enforceability. There is always a motive unless the promisor acts entirely irrationally.

A promisor of additional payment is not intending to buy the same promise of reciprocal performance twice. He or she agrees does so to in the hope of obtaining either actual performance, or a better chance of actual performance. This is what each member of the Court in *Roffey* fastened upon.[23] While the first formulation has the support of Professor Treitel[24] and the New Zealand High Court,[25] Professor Coote points out that consideration 'is required for the formation of a contract. Performance, ex hypothesi, comes too late to qualify'.[26] The second

[18] C Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 Yale LJ 997, 1066–73.

[19] GH Treitel, *The Law of Contract* (9th ed 1991) pp 68, 70–2, 79–81.

[20] R Hooley, 'Consideration and the Existing Duty' [1991] JBL 19, 28.

[21] For examples see note 3, above.

[22] *White* v *Bluett* (1853) 23 LJ Ex 36; *Thomas* v *Thomas* (1842) 2 QB 851.

[23] B Coote, 'Consideration and Benefit in Fact and in Law' (1990–91) 3 JCL 23, 26.

[24] GH Treitel, *The Law of Contract* (8th ed 1991) p 90, a party's 'actual performance of his earlier contract . . . will normally suffice to constitute consideration'.

[25] *Newman Tours Ltd* v *Ranier Investments Ltd* [1992] 2 NZLR 68, at 80. In applying *Roffey*, Fisher J said that 'the agreement to perform [its] existing contractual obligations, followed by actual performance in reliance upon that subsequent agreement, can constitute fresh consideration.'

[26] B Coote, 'Consideration and Benefit in Fact and in Law' (1990–91) 3 JCL 23, 26. This objection may be overcome by a unilateral contract analysis, but more of this later.

formulation (an objectively better chance of performance of the existing contract) is more apt. Consistently, Glidewell LJ's test of consideration requires the promisor to have 'reason to doubt whether A [the promisee] will, or will be able to, complete his side of the bargain'.[27] If so, it is a benefit to the promisor to secure an objectively better chance of completion by promising an additional payment, than to resort to what may be unsatisfactory or incomplete remedies. The practical benefit of performance over the right to sue is assumed. There appears to be no need to show that damages would in fact be inadequate to compensate the promisor.

The court abandons the language of existing rights and obligations. Consideration to support the promise to pay more need not be additional to that baseline of benefits already owed under the existing contract. It need only be additional to the baseline of losses consequential on a real likelihood of breach of that existing contract. As Purchas LJ recognized, it amounts to saying 'that a contracting party can rely upon his own breach to establish consideration'.[28]

Practical benefit as the 'objectively better chance of performance' is the least problematical formulation. It is determinable at contract formation, is more than motive or sentiment and does not require a distinction between factual and legal benefit. However, in common with other formulations, it is morally neutral about the reasons for the promisee's likely non-performance and shifts the burden of assessing the merits of these reasons under some other legal rubric such as duress or hidden behind a functional definition of consideration. More problematically, however formulated, we are still essentially talking about the *same* performance to which the promisor is already entitled under the original contract. The practical benefit consists only of the promisor's hope that he or she will be put in as good a position as if the *original contract had been performed*. In the words of Professor Coote, this

> provides nothing that is not already the promisor's right. It could constitute fresh consideration only if the law were to recognise some break in that link between a contract and its performance which is inherent in the concept of enforceable legal obligation.[29]

Such a break makes a contract no more than a point for further negotiation.[30] This is no small problem of academic logic. Acceptance that an increased chance of performance of a contract is consideration for its variation reflects a disrespect for the very idea of contract as creating binding obligations.

It could be argued, of course, that contract law itself does not have an

[27] *Roffey* [1991] 1 QB 1, at 15. [28] *Ibid.*, 23B.
[29] B Coote, 'Consideration and Benefit in Fact and in Law' (1990–91) 3 JCL 23, 28.
[30] P Birks, 'The Travails of Duress' [1990] LMCLQ 342, 346.

adequately high view of contractual obligations.[31] A number of doctrines and rules are said to weaken the commitment of the law to the protection of the expectation interest.[32] Damages given on breach are often inadequate to compensate even the ordinary losses of breach, while the nonpecuniary costs of seeking legal redress, typically delay, hassle, time and effort are not normally susceptible to compensation at all. This inadequacy of remedies provides the occasion for the parties to seek and agree to modifications of the more-for-the-same or the same-for-less variety. It lies at the heart of arguments that such modifications are commercially necessary, realistic and in the parties' own best interests. It is also central to concerns about opportunistic renegotiations discussed under the rubric of economic duress.[33]

Holmes[34] supports the separation of the promise to perform from performance itself since, in his view, a contract party has an option to perform or to pay damages for not performing. Thus it was said in *Roffey* that it was 'open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially.'[35] Nevertheless, inadequacy of remedy is not peculiar to contract law and the rights and liabilities created in its exploitation should not be accorded the same recognition as that created by an exchange.[36] The chance to avoid the inadequacies of contract redress ought not be recognized as valid currency for the purchase of additional contract rights.

Practical benefit as chance of consequential benefit

Practical benefit is used in *Roffey* in a second sense, to designate the chance of obtaining benefits additional to that expressly stipulated in the existing contract. Purchas LJ emphasized the need for 'some *other* consideration

[31] See, eg, PS Atiyah, *Essays on Contract* (1986) pp 29–30, 124–5.

[32] The exceptional nature of the remedy of specific performance, the limits relating to causation, remoteness, mitigation and the disregard for subjective losses, sentimental uniqueness or the consumer surplus.

[33] *Roffey* [1991] 1 QB 1, at 13 the promisee may be guilty of securing the promise 'by taking unfair advantage of the difficulties he will cause if he does not complete the work'.

[34] *The Common Law* (1881) p 298. See PS Atiyah, 'Holmes and the Theory of Contract' in his *Essays on Contract* (1986) pp 59 *et seq*, describing it as a 'brilliant but wholly unsound paradox'. It is inconsistent with established rules of law such as anticipatory breach and the tort of inducing breach of contract and with the remedy of specific performance; it obscures the distinction between damages as part of the remedial response to non-performance and as part of a promise in the alternative; it is unrealistic and artificial to say that a contract party is merely betting on performance rather than buying the performance itself.

[35] [1991] 1 QB 1, at 23.

[36] See further S Williston, 'Successive Promises of the Same Performance' (1894–95) 8 Harvard LRev 27, 30–1.

. . . to support the agreement to pay the extra sum'.[37] The third and fourth practical benefits accepted in *Roffey* (avoiding the time penalty under the main contract and obtaining the chance of a more orderly mode of performance) fall into this category. *Anangel Atlas Compania Naviera SA* v *Ishikawajima-Harima Heavy Industries Co Ltd (No 2)*[38] provides a further illustration of this type of practical benefit. There, the defendant ship builder was faced with a serious slump in the shipping industry. Many buyers were threatening cancellation, seeking delays in delivery and price reductions. In response, the defendant promised various concessions, inter alia, to the plaintiffs if they would accept the timely delivery of a hull as they were already contractually bound to do. Applying *Roffey*, Hirst J held that the concessions were supported by practical benefit as it was 'conclusively demonstrated' that the defendants' main objective 'was to make sure that the plaintiffs, who they described as their "core" customers, did indeed take delivery . . . in order to encourage their other reluctant customers to follow suit.'[39] That is, practical benefit consisted of the *chance that other buyers would follow the promisee's example of due acceptance and be deterred from breach.* These are presented as benefits (or avoidance of disbenefits) 'resulting' or 'accruing' from the promised performance assessed on a 'practical' or 'pragmatic' approach.[40] They are spin-off advantages, not guaranteed or assured by the promisee but, desired and hoped for by the promisor. Their potentially all-encompassing nature threatens to destroy the traditional boundaries of contractual liability. How far can it go?

Practical benefit obviously includes avoiding liability to a third party for breach of contract, the fulfilment of which relies on the promisee's performance of *its* contract with the promisor, as in *Roffey*. It would also logically include the avoidance of other consequences of such a breach, such as damage to the promisor's reputation, loss of a valuable commercial relationship with that third party, and consequential threat to the financial viability of the promisor's business. A case like *Atlas Express Ltd* v *Kafco (Importers and Distributors) Ltd*[41] may now be reversed on the issue of consideration. Additionally, 'practical benefit' includes the hope of obtaining a performance which will set an example for others to follow. Would it also include the good will of or favourable future dealings with the promisee, or the enhancement of the promisor's reputation in the industry which will translate into some commercial gain in the future? Would *Gilbert Steel Ltd* v

[37] *Roffey* [1991] 1 QB 1, at 21 (emphasis added). Glidewell LJ, at 12–13 purported to follow the majority in *Ward* v *Byham* [1956] 1 WLR 496, who found additional consideration albeit on rather questionable facts.

[38] [1990] 2 Lloyd's Rep 526 (hereafter [1956] 1 WLR 496, *Anangel*).

[39] *Ibid.*, at 544. [40] *Roffey* [1991] 1 QB 1, at 16, 19, 22. [41] [1989] QB 833.

University Construction Ltd[42] also now be decided differently on consideration?

But if practical benefit includes the chance, as opposed to the assurance, of obtaining a specified benefit, how small must the chance be before it ceases to count as consideration? If any hope of benefit by the promisor, however speculative, vague or tangential, is to count, consideration amounts to little more than a requirement of motive for a promise. Moreover, the requirement that consideration 'move from the promisee'[43] is stretched to breaking point where the hoped for practical benefit, if it eventuates at all, must come from parties other than the promisee, as in *Anangel*.

Three limits may be implied to the definition of practical benefit. First, the courts can require very clear evidence of the promisor's *intention* to bargain for the practical benefit. Secondly, courts may take into account the objective likelihood of benefit eventuating. Where there is no actual or reasonable belief in the risk of non-completion by the promisee, or the objectively assessed chance of obtaining actual performance or other 'additional' benefits is too remote, the court may question the existence of the relevant promisor intention. Consistently *Roffey* emphasizes the importance of giving effect to the intention of the parties in finding consideration.[44] In both *Roffey* and *Anangel*[45] the promisors clearly spelt out the practical benefits which they subjectively hoped to obtain. There was also much evidence of the chance of objective benefit which the promisors stood to gain in the particular circumstances of the cases.[46] Such evidence is treated as corroborative of the promisor's intention. The use of objective value as evidence of intention to bargain is evident elsewhere,[47] but to discount clear

[42] (1973) 36 DLR (3d) 496, affirmed (1976) 67 DLR (3d) 606, in which the promisee agreed to give the promisor 'a good price' on the steel for the second building. The judge remarked at 504 that factually this 'might have been more than adequate compensation for an increase in the cost of the first building'.

[43] *Roffey* [1991] 1 QB 1, at 16, Glidewell LJ interprets this to mean that it must be 'provided by the promisee, or arise out of his contractual relationship with the promisor'.

[44] *Ibid.*, at 18.

[45] *Ibid.* at 11; *Anangel* [1990] 2 Lloyd's Rep 526, at 544.

[46] *Roffey* [1991] 1 QB 1, at 19 per Russell LJ; 20, 23 per Purchas LJ ('there were clearly incentives to both parties to make a further arrangement'; and 'As a result of the agreement the defendants secured their position commercially'); *Anangel* [1990] 2 Lloyd's Rep 526, at 528, 544–5.

[47] The consideration-conditional gift distinction is said to depend on whether 'a reasonable man would or would not understand that the performance of the condition was requested as the price or exchange for the promise'; Williston on Contracts (3rd ed 1961) s 112. C Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 Yale LJ 997, 1068, notes that the commitment of contract law to objective intentions and subjective values means that reliance on subjective intention in the realm of consideration is 'frequently "objectivised" by derivation from notions of objective value.' Objective value appears 'often by reference to the intention of the parties.' This raises the same problems as the attempt to distinguish between factual and legal value.

evidence of subjective intention because of an absence or inadequacy of objective value would require independent justification.

Thirdly, a substantive limit can be imposed by excluding benefits of a purely sentimental nature or requiring that the benefit be of a commercial nature or conferred in a commercial context. Both *Roffey* and *Anangel* involved commercial transactions and certainly the judges in the former emphasized the need for a more flexible notion of consideration in this context.[48] Such a pragmatic limit would meet calls for reform of the pre-existing duty rule based on reasonable commercial expectations or necessity. But precisely what is it about the commercial context that is being responded to? Is it the promotion of economic efficiency, the protection of a promisee's reasonable reliance, or the recognition of the promisor's serious intention to be bound, which are commonly considered desirable in a commercial context? If so should they not be responded to directly, rather than mediated through the doctrine of consideration and the notion of commercial context? Anyway, how is a 'commercial context' to be identified away from the core? How and why should non-commercial modifications be dealt with differently ?

Uncertainty in defining practical benefit and so consideration has serious implications in the uncertain enlargement of contractual liability. Rules of contract 'should not make contracting so easy that it hooks the unwary signer or the casual promisor.'[49] It should protect parties' freedom to contract as well as freedom from contract. The impact of a consistently applied notion of practical benefit to other questions of contract enforcement are discussed in below. Before that, the precise legal consequences triggered by a transfer of practical benefits are examined.

THE LEGAL EFFECT OF PRACTICAL BENEFIT

Rights conferred by practical benefit

The exchange of consideration in a contract traditionally provides the basis for the assessment of each party's expectation at the remedial stage.[50] If consideration is to be found not in what was promised but in a party's hopes of benefits, then it is unclear what the appropriate

[48] *Roffey* [1991] 1 QB 1, at 21. Russell LJ, at 18, emphasizes the intention of the parties where the bargaining powers are not unequal and commercial transactions are commonly assumed to be such cases; and Glidewell LJ, at 15, relies on *Pao On* v *Lau Yiu Long* [1980] AC 614, at 634–5 in which Lord Scarman noted the undesirability of interference in the absence of duress 'where businessmen are negotiating at arm's length'. However, he also relies on cases within a family context.

[49] EW Patterson, 'An Apology for Consideration' (1958) 58 Colum LR 929, 948.

[50] GH Treitel, *The Law of Contract* (8th ed 1991) p 831.

measure is. These benefits have by definition not been promised. To what extent can their expectation be protected?

If the promisee (of the additional payment) performs the existing contract there can be no remedy if the promisor's hopes of consequential benefits fail to eventuate. The promisor has got the chance bargained for. Thus, practical benefit in the second sense cannot be independently enforced. If the promisee ultimately fails to perform, the promisor's expectation of practical benefits, whether in the first or second sense (performance and the chance of consequential benefits), are either already protected by the original contract[51] or, if not, derive no more protection from having been purchased twice.

Consequential losses on breach (eg loss of profits or time penalties[52]) are compensable within the rules of remoteness and causation.[53] Where the loss is too remote and so uncompensable the promisor's position is not improved by paying more for it.[54] Where the promisor has lost the chance of some consequential gain, damages may be awarded in proportion to the chance of loss,[55] unless the chance was purely speculative. It is doubtful whether loss of benefits such as the hope of favourable future contracts or, as in *Anangel*, the hope that other buyers would follow suite and perform their contracts with the promisor are within the remoteness rules. The compensability or quantifiability of such practical benefits is not increased by the payment of an additional sum. Halson's suggestion,[56] that the scope of practical benefit should be confined to avoiding uncompensable losses on the promisee's breach, thus takes us no further in remedial terms. Practical benefits, comprising of chance rather than assurance, confer benefits of an illusory and unenforceable kind.

Rights bought by practical benefits

Going the other way, what enforceable right does practical benefit buy? Not, it appears from *Roffey*, an expectation to the reciprocal promise of the additional sum. It is often overlooked that it was Roffey Brothers who were in breach by failing to make due payment and that

[51] *Ibid.*, 831: 'A contract may give rise to two quite separate expectations: that of receiving the promised performance and that of being able to put it to some particular use.'

[52] Roffey could have claimed these if Williams had breached.

[53] *Hadley* v *Baxendale* (1854) 9 Ex 341, at 354; 156 ER 145, at 151.

[54] Unless the promisee expressly accepts that additional risk of loss which would constitute legal consideration.

[55] *Chaplin* v *Hicks* [1911] 2 KB 786. See generally M. Bridge, ch 17 below; AS Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) pp 33–4; GH Treitel, *The Law of Contract* (8th ed 1991) p 845. The quantification 'depends on the value of the expected benefit and the likelihood of the plaintiff's actually getting it.'

[56] See R Halson, 'Sailors, Sub-Contractors and Consideration' (1990) 106 LQR 183, 184.

this entitled Williams to terminate his performance before completion. On a contract action, Williams should prima facie be entitled to the full expectation on the additional promise.[57] This was not what the court awarded.[58] Williams' total expectation can be calculated as:[59] £20,000 (original promise) + £10,300 (additional promise) – £17,700 (benefit received) – £*x* (cost avoided by not having to complete) – £*y* (deductions for defective performance on the flats substantially completed) = £12,600 – £*x* – *y* (as the potential claimable sum). Williams claimed £10,847.

The court awarded only £3,500. The figure is based on the extent of Williams' performance at the point of Roffey's breach calculated as:[60] £4,600 (actual performance on eight flats at £575 each) + £*z* (a reasonable proportion of the unpaid original sum of £2,300) – £*y* (deductions for defective performance) – £1,500 (the sum already paid). While it may be possible to maintain an expectation calculation by virtue of a bad bargain for Williams resulting in a high £*x*, such a scenario was never suggested by the court. Indeed this is unlikely given the contract was originally underpriced by £3,783, but topped up by an enforceable promise of £10,847.

The award to Williams appears to be reliance- and not expectation-based. On an orthodox contractual analysis, the real question on the facts of *Roffey* is not 'why was the plaintiff's claim treated so generously?'[61] posed by Adams and Brownsword, but 'why so mean?' The suggestion must be that practical benefits impose a less than expectation liability on the promisor, and confer a less than expectation right on the promisee. To describe such rights and liabilities as contractual seriously compromises contract as an action which enforces expectations.

That is not to suggest that expectation is the appropriate measure. Indeed, it is particularly inappropriate where the promisees, through breach, eventually fail to perform their existing obligations, despite being promised greater payment. A contractual analysis would treat that greater sum as cost avoided or saved by the promisors and deduced from their damages. Thus, promisors faced with breach would find that while they have obtained no more enforceable rights

[57] To put the plaintiff 'so far as money can do it . . . in the same situation . . . as if the contract had been performed' *Robinson* v *Harman* (1848) 1 Ex 850, at 855, 154 ER 363, at 365; and see generally GH Treitel, *The Law of Contract* (8th ed 1991) pp 830–1.

[58] *Roffey* [1991] 1 QB 1, at 7.

[59] See AS Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 141 for the general formulae in assessing pecuniary loss.

[60] *Roffey* [1991] 1 QB 1, at 7.

[61] J Adams and R Brownsword, 'Contracts, Consideration and the Critical Path' (1990) 53 MLR 536, 538. The assumption here seems to be that the non-completion was due to the promisee's default. They refer, at note 11, to the 'promise of additional payment having failed to keep the plaintiff working.'

than were already due, their own promises to pay more *are* enforceable to reduce the quantum of their damages and make them worse off than if no additional promise had been made. The intuitive unfairness and inappropriateness of contract analysis to this situation is recognized by the Ontario Law Reform Commission. In such an instance, the appropriate deduction is the original sum promised, and not the greater sum of the variation, because '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.'[62] The promisor's liability on the additional promise is therefore conditional on the other's performance thus implicitly revocable without performance. This is inconsistent with a view of the additional promise as a contractual obligation supported by consideration.

The rights and liabilities created by the exchange of a promise to pay more for a practical benefit do not, and should not, have full effect as a contractual exchange. To treat practical benefit as consideration is no minor adjustment in the definition of consideration. The suggestion that valid consideration may now be unenforceable, may be previously owed, and may not support an expectation to the reciprocal promise represents a serious challenge to contract fundamentals and has far reaching implications for other questions of contractual enforceability.

PRACTICAL BENEFIT AND OTHER QUESTIONS OF ENFORCEMENT

Promises to relieve: part performance and promissory estoppel

The Court of Appeal has already had to contend with the argument that practical benefits, which support the enforcement of promises of more for the same, must also logically support the enforcement of promises of the same for less.[63] Practical benefit in the latter case consists of obtaining part of the benefit already contractually owed by the other party, rather than insisting on the whole and getting even less or none at all while incurring delay, effort, and expense.[64] Practical ben-

[62] Ontario Law Reform Commission, Report on Amendment of the Law of Contract (1987) p 13, discussing the promise to accept part performance.

[63] *Re Selectmove Ltd, The Times* 13 January 1994. See, in support of this extension, GH Treitel, *The Law of Contract* (8th ed 1991) p 116 and J Adams and R Brownsword, 'Contracts, Consideration and the Critical Path' (1990) 53 MLR 536, 540.

[64] *Foakes* v *Beer* (1884) 9 App Cas 605, at 622, Lord Blackburn ('all men of business . . . do every day recognize 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'); *Robichaud* v *Caisse Populaire de Pokemouche Ltée* (1990) 69 DLR (4th) 589, at 595, Angers JA ('The consideration . . . was the immediate receipt of payment and the saving of time, effort and expense').

efit may also consist of avoiding losses consequential on breach (such as inability to trade or survive economically[65]) or obtaining the chance of other benefits (such as enhanced reputation for fair dealing and good will which may translate into future dealings with the promisee or others).

In *Re Selectmove Ltd*,[66] the plaintiff company challenged an order for its compulsory winding up on the petition of the Revenue to which the company owed arrears in taxes. The company argued that the debt had not become due, because the Revenue had agreed to an enforceable deferral in payment. The company had given practical benefit in the increased likelihood of the Revenue 'recover[ing] more from not enforcing its debt against the company which was known to be in financial difficulties, than from putting the company into liquidation'. Peter Gibson LJ saw the force of the analogy with *Roffey*. He recognized that any creditor who accommodates a debtor at arm's length 'will no doubt always see a practical benefit to himself in doing so.' However, since this was expressly rejected as consideration in *Foakes* v *Beer*[67] and *Foakes* v *Beer* was not even referred to in *Roffey*,[68] he declined to make the extension since it would leave that well established principle without any application. Any extension, he felt, should be made by the House of Lords, 'or more appropriately, by Parliament after consideration by the Law Commission.'

Quite apart from precedent, which did not deter the court in *Roffey*, other reasons caution against the extension. The present rule of unenforceability is mitigated by a functional (if inconsistent) approach to its exceptions[69] and by resort to the rules relating to waivers and promissory estoppel. These exceptions and doctrines allow the courts some flexibility in assessing a broad range of circumstances in determining appropriate enforcement. This flexibility would be lost if practical benefit could support the blanket enforcement of relieving promises. Unlike promissory estoppel, promises supported by consideration are enforceable without reliance, are unrevocable and unaffected by equitable considerations (such as the conduct of the parties and changes of circumstances) short of duress or other established defences.

Like the promise to pay more, the promise to accept less should be

[65] eg *D & C Builders Ltd* v *Rees* [1966] 2 QB 617.

[66] *The Times* 13 January 1994. The quotations in the text are taken from the transcript.

[67] (1884) 9 App Cas 605.

[68] [1991] 1 QB 1. The ratios are directed at promises of more for the same. See Glidewell LJ at 15–16, Russell LJ at 19, and Purchas LJ at 21.

[69] For example, rescission followed by a new contract, accord and satisfaction, compromise, new (legal or invented) consideration. See BJ Reiter, 'Courts, Consideration and Common Sense' (1977) 27 UTLJ 439 and R Halson, 'The Modification of Contractual Obligations' [1991] CLP 111.

regarded as conditional on the promisee's actual part performance and revocable without it. For, if the promisee does not render even the less performance it is surely unfair to allow damages to the promisor to be reduced to this lesser performance. The Ontario Law Reform Commission recommends that promises to accept part performance in satisfaction of the whole be binding 'subject to actual performance'.[70] It is implicit in the promise to relieve that if the promisee fails to honour the new arrangement the promisor should be able to enforce the rights under the original contract. A consideration analysis cannot directly address this concern but a different approach can, as *Re Selectmove* shows. There, Peter Gibson LJ held that even if the Revenue had agreed to the part performance raising promissory estoppel, 'it was not inequitable or unfair' to go back on that agreement because the company failed to honour its [lesser] promise'.

Illusory consideration, bad faith forbearance and firm offers

Practical benefit can be extended to contract formation. Currently where B gives A a real promise in exchange for A's promise of no value (which B is duped into believing has real value),[71] A's promise imports illusory consideration and B's promise is unenforceable. If A's promise is now accepted as importing practical benefit of a broad, subjective kind then B's promise is enforceable subject only to the defence of unconscionability.

Promises conferring factual but not legal value may now also be enforceable by virtue of practical benefit. Forbearance to enforce a bad faith claim can no longer be assumed to import no consideration. In *Pitt* v *PHH Asset Management Ltd*[72] the plaintiff successfully made out an enforceable obligation by the defendant to sell property at a set price. The consideration for this included the plaintiff withdrawing the threat of an injunction which had no chance of succeeding and refraining from making trouble for the defendant by telling a third party that he was withdrawing from the contest for the property so that the third party would reduce her offer. To accept the avoidance of such bad faith nuisance as importing consideration encourages opportunistic behaviour and circumvents the policy against abuse of the judicial process.

[70] Report on Amendment of the Law of Contract (1987) p 10. At pp 12–13 the Commission explains that 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'.

[71] See MA Eisenberg, 'The Principles of Consideration' (1982) 67 Cornell LR 640, 651.

[72] [1994] 1 WLR 327, see p 11 above.

Where B promises A a firm offer (to keep an offer open for a period of time) or some other performance in exchange for A's promise to perform at A's discretion, the traditional position has been that A's promise is illusory, and B's promise is unenforceable. This is now open to challenge. In English law[73] A's actual performance of the terms of the agreement may import consideration, even though A was not legally bound to do it. On this unilateral contract analysis, B can revoke before acceptance by A of the firm offer or so long as the agreement is executory, ie not performed by A. It is now arguable that 'performance' is rendered by the conferral of practical benefit, and practical benefit can connote giving B a chance of a benefit, including the benefit of a contract with A.[74] In that case, B is bound immediately on making the promise.

The line between practical benefit to the promisor and the promisor's commercial motive would be indistinguishable. This result is in line with calls for some enforcement of firm offers[75] based on the reasonable expectations and needs of the business community, the promisor's commercial motive,[76] and the induced reliance of the promisee in deliberating on the offer, not seeking alternatives, or in submitting its own tender.[77] However, full enforcement of B's promise may be neither fair[78] nor necessary. Enforcement as justice requires to protect A's induced reliance is generally thought to be enough.[79] This result is incompatible with enforcement based on the presence of consideration. A different approach is warranted.

[73] *Cambridge Nutrition Ltd* v *BBC* [1990] 3 All ER 523, at 538, noted by GH Treitel, *The Law of Contract* (8th ed 1991) p 81.

[74] MA Eisenberg, 'The Principles of Consideration' (1982) 67 Cornell LRev 640, 649, 653, proposes an analysis in terms of 'a promise for an act-the act of giving the promisor a chance.' But he favours enforcement here not on the basis of consideration but because 'the law should enforce promises that facilitate or augment the likelihood of exchange.'

[75] See eg, Ontario Law Reform Commission, Report on Amendment of the Law of Contract (1987) pp 20–5; JP Dawson, *Gifts and Promises: Continental and American Law Compared* (1980) pp 211–21; The Law Revision Committee, *Sixth Interim Report* (Statute of Frauds and the Doctrine of Consideration) (1937), Cmd 5449, Para 50(6); Firm Offers (1975) Law Com Working Paper No 60.

[76] JP Dawson, *Gifts and Promises: Continental and American Law Compared* (1980) p 215 'no one surely would suggest that such transactions should fail because they are conceived on either side as promises of gift. The purpose clearly is to effect an exchange that both parties desire.' And see MA Eisenberg, 'The Principles of Consideration' (1982) 67 Cornell LRev 640, 649–50, the promise by restricting the promisor's freedom, conveys information about the attractiveness of the promisor's offer and alters the promisee's incentives.

[77] *Ibid.*, p 653: 'In deciding whether to accept an offer, an offeree must make an investment of time, trouble, and even money. The offeree is more likely to make such an investment if he is sure the offer will be open while the investment is being made than if the offer may be revoked during that period.'

[78] It would bind the offeror while the offeree remains free to continue bid shopping.

[79] MA Eisenberg, 'The Principles of Consideration' (1982) 67 Cornell LRev 640, 652.

Gratuitous promises

Despite strenuous insistence in *Roffey* that gratuitous promises not under seal are unenforceable,[80] the reality of this position will depend on how rigorously the courts are prepared to limit the notion of practical benefit. If it is accepted that practical benefit includes avoiding the expense, time, delay and hassle of suing or finding a substitute (in the context of contract modifications); and the chance of a contract or some other unpromised benefit or the chance of avoiding some nuisance threatened by the promisee (in the context of contract formation) it will be impossible to hold the line against enforcing all promises. *Any* motive or desire of the promisor is capable of being turned into practical benefit.

Past consideration

Consideration may be past and so be insufficient consideration to support a counter promise in two senses. First, the promise may have been executed before the counter promise is given. *Roffey* does not change its legal effect. Secondly, the promise may be executory but, being already enforceable, have been regarded as incapable of supporting the enforcement of any additional counter promise.[81] In such cases it is now arguable that actual performance or even an increased chance of performance of that past promise confers practical benefits and imports valid consideration. *Roffey* was so applied in a recent New Zealand case.[82]

Frustration

Roffey deprives the frustration principle of its sting where the increased difficulty or cost of performance (short of that necessary to satisfy the frustration principle) can be passed onto the other party, by obtaining from that party, a promise to pay more or to accept less. Such promises are now enforceable if supported by practical benefit to the promisor.

[80] [1991] 1 QB 1, at 16, 19, 21.

[81] eg *Roscorla* v *Thomas* (1842) 3 QB 234, where the plaintiff had purchased a horse from the defendant who subsequently assured the plaintiff that the horse was sound and free from vice. The horse failed to match that description but the assurance was held to be unenforceable because what consideration *was* given for it, the price, was past.

[82] *Newman Tours Ltd* v *Ranier Investments Ltd* [1992] 2 NZLR 68, at 80.