

THE DOCTRINE OF CONSIDERATION

(The role of consideration in contract modifications)

by

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CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this dissertation has not previously been submitted for a degree nor has it been submitted as part of the requirements for a degree except as fully acknowledged within the text.

I also certify that the dissertation has been written by me. Any help that I received in my research work and the preparation of this dissertation itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the dissertation.

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ABSTRACT

Since 1809 the common law has clearly provided that a promise by a party to perform an act that he or she is already legally bound to perform is not good consideration. Accordingly a promise received in exchange is not enforceable. This is so whether the promise would have the effect of creating a new contract or modifying the terms of an existing contract. The rule has from time to time been the subject of judicial criticism but nevertheless operated with full vigor until 1991. Hitherto, (except in unilateral contract situations) consideration subsisted in the promises made by the parties at the instant of exchange rendering the promises thenceforth mutually enforceable. The contract or the modified contract effectively existed from that time, unconcerned with what the parties hoped to gain from the exchange or what each in fact gained. The English Court of Appeal decision in *Williams v. Roffey Bros & Nicholls Ltd* has the potential to change the law as settled. This dissertation is concerned with the consequences of the decision in the context of promises intended to modify the terms of existing contracts.

In *Williams v. Roffey* the successful promisee gave the promisor no more than an understanding that he would continue to attempt to perform his undertaking under a prior contract. The Court held that the ‘practical benefit’ that accrued to the promisor from the repetition of the previous promise was sufficient consideration to make the promise of increased payment enforceable. The second promise was made outside the bargaining process and the potential for ‘practical benefit’ was neither solicited nor offered. The fact that there would be a ‘practical benefit’ was a deduction made by the Court as a result of questioning counsel for the defendant during the argument of the appeal.

The dissertation examines the history of the doctrine of consideration, its incidents, which are said to enable consideration to moderate bargains, and how each is potentially rendered redundant by the decision. As a result of the decision, the role of the court has changed with greater emphasis on the substance of the transaction instead of external characteristics. The superior record keeping methods available to commerce in the 20th century facilitates this change. The following matters seem implicit in the decision. First, the bargaining process has lost its significance in contract modification situations.

Second, the courts in determining what is practical and what is not, will find it difficult to avoid investigating the adequacy of consideration. This is an investigation that the courts have steadfastly refused to undertake in the past.

The series of Australian authorities commencing with *Je Maintendrai v. Quaglia* and culminating in *The Commonwealth of Australia v. Verwayen* are examined. Whilst it is correct to say that those decisions, especially *Waltons Stores v. Maher*, introduce reliance based liability into the Australian law, the conclusion is reached that extensions to the law of estoppel do not solve the problems arising out of promises that modify existing contracts. This is because detriment to the promisee is necessary to trigger the operation of the law of estoppel and the remedy, being equitable, is discretionary. In contract modification situations the detriment suffered by the promisee is often ethereal and a discretionary remedy (as opposed to enforcing the promise) deprives the transaction of the certainty that is desirable in commercial transactions.

The work concludes that, in regard to contract modifications, the doctrine of consideration ceases to perform a useful role and the equitable remedies do not meet the needs of commerce. Accordingly, the suggestion is made that all promises having the effect of modifying an existing contract should be enforceable provided that there is satisfactory evidence that the promise was made and the absence of duress.