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.

CHAPTER 1 Objects

Introduction

It is an axiomatic principle of Anglo/Australian law that a promise must be supported by consideration before it will bind a promisor. What is true for the formation of contracts is equally true where the parties wish to vary the terms of an existing contract by making new promises. 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 a good consideration. This dissertation is concerned with the consequences of two decisions of the courts that will have a profound effect on the law relating such promises. The English Court of Appeal in *Williams v. Roffey Bros & Nicholls Ltd*[1] avoided the potential injustice by a finding, after a post-transactional analysis, that a 'practical benefit' would satisfy the consideration requirement. In *Walton Stores (Interstate) Ltd v. Maher*[2] the High Court of Australia held that unconscionable conduct manifested in a failure to keep a promise, outside of a concluded contract, triggered the application of equitable estoppel. Both of these decisions represent substantial extension of existing legal principles. The changes implied in the decisions are such as to raise the question whether or not the consideration requirement for contract modifications ought to be discarded and another solution to the problem sought. The purpose of this work is to attempt to answer that question.[3]

A contract in Western economies is essentially an economic tool whereby the ownership of present and future property is transferred, goods and services are provided or limitations are placed on freedom of action. The word 'contract' is used here as a description of a promise declared by the law to be binding on the person who made it.[4]

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[1] [1991] 1 QB 1.
[2] (1988) 164 CLR 387.
[3] The remedy granted by the English court involved enforcement of the promise. The Australian solution required an application of the court's discretion and adjustment of the remedy to do justice. The latter may or may not involve enforcing the promise. It may be suggested that the difference in approach is historical. London is a major commercial centre and the English law has developed as a commercial law of contract whereas Australian law has been more concerned with private transactions; hence the emphasis on equity as a basis of relief.
[4] Although the law of contract ultimately concerns the binding effect of a transaction on both parties, the language of contract is often directed toward the particular promises made by each of the parties. For example, Glidewell LJ in *Williams v. Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at p16 said, 'so that the promise will be legally binding'. A similar view is taken by modern text writers. See DW Greig & DLR Davis, *The Law of Contract* (Law Book Co,1987), (hereafter Greig & Davis), p2 where the authors made the point, '[c]ontract law is concerned with the enforcement of promises'. JW

The chief characteristic of a contract is that at the time of formation, the parties intend and expect to be bound. Much of the law of contract is devoted to overcoming deficiencies that were overlooked by the parties to a transaction or prescribing consequences where one of the parties refuses or is unable to perform what has been promised.

The concern of this work is commercial contracts. By commercial contracts it is meant contracts for the provision of goods and services between traders. These transactions have evolved from more or less instantaneous exchanges of goods for money to complex transactions where reciprocal obligations might extend over months or even years. Such contracts are common in the: building, civil engineering, shipbuilding, information technology and banking industries. The contracts will often have been professionally drawn up or based on industry standards. Ultimately, the party in the stronger bargaining position will secure the more favourable terms. Further, the texts of these contracts will allocate risk and attempt to make provision for foreseen contingencies.

Contract variations

Notwithstanding the elaborate provisions that the parties might make or fail to make to anticipate changed circumstances, there is still a frequent need to vary contracts beyond what has been originally provided for. This is because one party considers himself or herself to be subject to a greater burden than contemplated as a result of the happening of an unforseen event, changed economic circumstances or a mistake in estimating the appropriate price. Given this situation, the parties might negotiate a change to their contractual relationship. The law requires such changes to be made in the same manner as a new contract. That is, a promisee must have given fresh consideration for any new promise that he or she seeks to enforce. This is a result of the decision of Lord Ellenborough in *Stilk v. Myrick*.[5] The introduction of the requirement for consideration to modify an existing contract did not escape criticism.[6] The difficulty is that, changes

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Carter & DJ Harland, *Contract Law in Australia* (3rd ed., Butterworths, 1996) (hereafter Carter & Harland) made the same point, p21, '[t]he law of contract is concerned with the rights and obligations which arise from the making of a promise which the law will enforce'.

[5] (1809) 2 Camp. 317; 170 ER 1168.

[6] Sir Frederick Pollock, *Principles of Contract* (9th Edition, Stevens and Sons Limited, 1921) (hereafter Pollock), p202 said: 'The doctrine of consideration has been extended with not very happy results beyond

to a contractual relationship, are frequently made by one party making a promise to the other, without regard to the legal rules. There is agreement about the making of the promise but the promise is not supported by fresh consideration. The attitude of the parties is understandable; it would be reasonable for them to assume that if they can create binding obligations by the giving of their assent — then the obligation thus created ought to be as easily changed. Subsequently, the promisee may have altered his or her position on the faith of the promise.

It is common for a party to promise his or her contracting partner an additional payment to secure the efficient timely fulfilment of the other's obligations. In this regard timely performance is closely connected with the adequacy or otherwise of the contracted payment for the work. Given that a promisee will proceed to completion on the basis of a promise by the other party to pay more than what is stated in the contract, if the payment does not materialise, a dispute is the likely outcome.

If the parties had seriously turned their minds to the problem it would have been possible to provide legal certainty by the use of a written agreement providing consideration of the order of a few dollars or the use of a deed.[7] There are further options in this regard. The parties to a contract where there is performance outstanding on both sides can mutually rescind the existing contract. The promise of forbearance given by a party not to sue being the consideration that renders the promise of the other party not to sue enforceable. A new contract is then substituted for the contract thus rescinded in terms of the revised agreement. It would seem that the courts are reluctant to deal with a situation in this manner without the intention of the parties to do this being clear.[8] This option is not viable where the original contract needs to be in writing. It is possible to rescind a written contract orally but the substituted contract will need to

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its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts.'

[7] It should be noted that in the event of a failure by the promisor to keep a promise given by deed, the equitable remedy of specific performance is not available where no consideration has been given for the promise and accordingly the promisee would be remitted to an action at common law for damages, RP Meagher, WMC Gummow & JRF Lehane *Equity Doctrines and Remedies* (3rd edition, Butterworths, 1992) (hereafter Meagher, Gummow & Lehane*),* p498.

[8] *Gilbert Steel Ltd v. University Construction Ltd* (1976) 76 DLR (3d) 606 at 609, see also Carter & Harland, op. cit., n.4, above, p183. This argument was raised in the pleadings in *Williams v. Roffey* [1991] 1QB1 1.

be in writing to be enforceable.[9] A further possibility for changes to the terms of an existing contract is for a party to waive the requirement to comply with a term. Waiver can apply only to terms that are subsidiary in nature and do not alter the fundamental obligations of the parties.[10] Apart from waiver (which does not involve action on the part of either party to a contract — more likely inaction) parties do not regularly use these devices, in fact they sometimes fail to have a written agreement at all or when there is a written agreement fail to give the appropriate notices.[11]

Satisfying the consideration requirement for contract modifications

The dissertation will in Chapter 2 examine the historical development of the doctrine of consideration to the point where it has become the means of identifying bargains. A present view of the law of contract is that (given a requisite level of intention, consensus, capacity and consent on the part of the parties) bargains should be enforced.[12] The bargain aspect of contract is especially supported in Australia.[13] It is then proposed to examine critically the rules that are said to be part of the doctrine with the view to identifying the purpose served by each rule. The reason for the examination of the rules is that the decision in *Williams v. Roffey*[14] raises questions as to their continued relevance. The rules will be examined in terms of their origins and the way in which each defines promises that the law will enforce. A tentative statement is made as to the present purpose served by the rules. These will be discussed in the appropriate parts of this work. The rules that will be discussed are listed below:

1. The benefit to the promisor or the detriment to the promisee proposed as consideration must be more than merely illusory.[15] A subset of this rule is that a promise

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[9] *Phillips v. Ellison Bros Pty Ltd* (1941) 65 CLR 221 Per Williams J at pp243–244.
[10] See Greig & Davis, op. cit., n4, above, p123.
[11] It has been said that contract modification is a difficult area of the law. Samuel Stoljar, *The Modification of Contracts* (1957) 35 Canadian Bar Review 486 at p486 said: '[M]odification has technically been handled in a most disorganized way. Thus the very nature of modification remains submerged in a variety of concepts such as waiver, estoppel, variation, forbearance, substitution and several more.'
[12] *Australian Woollen Mills Pty Ltd v. The Commonwealth* (1954) 92 CLR 424.
[13] *Beaton v. McDivitt* (1987) 13 NSWLR 162, per Kirby P at p168 and McHugh JA at p181.
[14] [1991] 1 QB 1.
[15] *Wigan v. Edwards* (1973) 47 ALJR 586 per Mason J at p594.

by a party to do no more than he or she is already bound to do by the law[16] or the terms of an existing contract[17] is not good consideration. The rule, when related to an existing contractual duty, is thought to prevent enforced contract modifications.[18]

2. Consideration must move from the promisee[19] and result in a detriment to the promisee or a benefit to the promisor.[20] Here the rule restricts contractual obligations to the contracting parties.

3. The need for the benefit or detriment to comply with the description *legal.* The rule identifies categories of acts that the law will accept as consideration. [21] The list is not closed.

4. The law will not investigate the adequacy of the consideration.[22] It is more difficult to assign a reason for the retention of this rule. No doubt it is a survival from the original notion of consideration as an investigation into the reason why a promise was made. It is also the result of a clear judicial policy of non-intervention into matters of freedom of contract.

5. The requirement for mutuality.[23] This requirement separates transactions or bargains from gratuitous promises.

At the conclusion of Chapter 2 it will be submitted that the doctrine of consideration was evolved as a test in relation to simple transactions. It will be argued that consideration is less suited to ongoing transactions that require adjustment by the parties. The decision in *Williams v. Roffey*[24] will be examined in Chapter 3. A view will be expressed as to whether or not the decision is a correct application of the precedents cited to the English Court of Appeal. It will be submitted that the effect of the decision is to encourage courts to analyse the impact of a promise on the parties rather than look

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[16] *Collins v. Godfroy* (1831) 1 B. & Ad. 950; 109 ER 1040.
[17] *Stilk v. Myrick* (1809) 2 Camp. 317.
[18] *Harris v. Watson* (1791) Peake 101; 170 ER 94.
[19] *Thomas v. Thomas* (1842) 2 QB 851; 114 ER 330 per Patterson J at p859.
[20] *Currie v. Misa* (1875) L.R. 10 Exch 153 per Lush J at p162.
[21] *Thomas v. Thomas* (1842) 2 QB 851 per Patterson J at p859.
[22] *Williams v. Williams* [1957] 1 WLR 159 per Morris LJ at p155.
[23] *Larkin v. Girvan* (1940) 40 SR (NSW) 365 per Jordan CJ at p367.
[24] [1991] 1 QB 1.

to external characteristics in determining which promises ought to be enforced. The way in which *Williams v. Roffey* has potentially modified each of the rules set out above will be discussed in Chapter 4.

The *ratio decidendi* of *Williams v. Roffey* has been applied by the courts of first instance in England and New Zealand and by the Supreme Court of NSW. The leave granted to the unsuccessful respondent to appeal to the House of Lords was not taken up. Accordingly it is yet to be determined whether the decision will be overruled, followed or whether an appellate court will seek to emphasise those judgments where there remained something of the orthodox doctrine. A further question arises as to whether or not the principle will be accepted by the Australian appellate Courts. The need to adopt the *Williams v. Roffey*[25] principle in Australia has been questioned on the basis that the problem that the decision is intended to overcome has already been solved by the decision in *Waltons Stores v. Maher*.[26]

The role of equitable estoppel in contract modification

The series of Australian authorities commencing with *Je Maintendrai v. Quaglia*[27] and culminating in *The Commonwealth of Australia v. Verwayen*[28] have effectively introduced a reliance based liability into the Australian law. This is an independent liability based on unconscionable conduct not necessarily related to contractual relationships. It does however have clear implications for parties who have made promises that modify existing contracts. In Chapter 5 it is proposed to examine the history and development of the law of estoppel as it relates to contract variations.

In summary, the work aims to assess whether or not the decision in *Williams v. Roffey* accords with established legal precedent and, notwithstanding the answer to this question, whether or not the ratio of the case ought to be adopted by the Australian legal hierarchy. It will continue with an examination of the powers of the court to uphold variations consciously made by the parties to a contract and express a view as to

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[25] [1991] 1 QB 1.
[26] (1988) 164 CLR 387, see JW Carter, Andrew Phang & Jill Poole, *Reactions to Williams v. Roffey* (1995) 8 Journal of Contract Law 248 at p270.
[27] (1980) 26 SASR 101.
[28] (1990) 170 CLR 394.

whether or not the available common law or equitable remedies suit the requirements of commerce.

Approach

In examining the material it emerges that the courts have acted on two premises. First, the requirement to conform to established legal principles (the doctrine of *stare decisis*)[29] and secondly, the need to do justice between the parties. Although this is not a work on jurisprudence, the tension between these two principles needs to be acknowledged. Accordingly, the authorities will be discussed from the point of view of conformity with precedent. In addition, the situation where the courts have found it necessary to 'develop and mould [the law]' will be discussed.[30]

[29] 'Judicial authority belongs not in the exact words used in this or that judgment, nor even to all of the reasons given, but only to the principles accepted and applied as necessary grounds of the decision,' *Close v. Steel Company of Wales Ltd* [1962] AC 367 per Lord Denning at p388.

[30] Sir Frederick Pollock, *Judicial Caution and Valour* (1929) 45 LQR 293 at p293. This is a conservative statement of the role of the judiciary. At the opposite end of the spectrum is PS Atiyah, *From Principles to Pragmatism* (Oxford, Clarendon Press, 1978), at p32 believes that the increase in judicial discretion has been such as to threaten a growth in the power and paternalism of the State. Due allowance should of course be made for the half century that elapsed between the works of these two authors.

CHAPTER 2 The historical development of the doctrine of consideration

The act of promising confers 'the capacity to dispose of the future as though it were the present'.[1] All sophisticated political systems need to accommodate promise making[2] and the Anglo/Australian system is no exception. The earliest judicial reference to the word 'consideration', in what might be described as a contractual context, occurred in 1557 in relation to an agreement for marriage.[3] As the enforcement of an agreement for marriage is temporally and conceptually far removed from the refurbishment of a London apartment building in 1986,[4] a brief study of the legal history of the doctrine of consideration is necessary to assist in our understanding of the development of this area of the law.

2.1 The origins of the doctrine of consideration

The substantial academic debate that has prevailed as to the origin of consideration is beyond the scope of this work. Whilst there is no need to reach a conclusion on these matters, some mention is made of the main contentions. Professor Shatwell[5] has argued

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[1] Arendt, *The Human Condition* (1959) p219, quoted by MP Ellinghaus, *Consideration Reconsidered Considered* (1975) 10 Melbourne University Law Review 267 at p276. Ian R MacNeil in his essay *The Many Futures of Contracts* (1974) Vol 47 Southern Californian Law Review 691 at p712 advances the matter stating, 'Contract [for the purposes of the author's work] is the projection of exchange into the future, a projection emanating from a combining in a social matrix of the three contract roots'. The roots were identified earlier in the work as: specialisation of labour and exchange at p701, the existence of a sense of choice and its exercise at p705 and a conscious awareness of the past, present and future at p706.

[2] 'Assurance given to a person that one will do or not do something or will give or procure him something.' *Concise Oxford Dictionary* (1990) s.v. 'promise'. '1. a declaration made, as to another person, with respect to the future, giving assurance that one will do, not do, give, not give etc., something. 2. an express assurance on which expectation is to be based.' *The Macquarie Dictionary* (1981) s.v. 'promise'. P.S. Atiyah in his work *Promises, Morals and Law* (Clarendon Press, 1981), p99 reminds us that John Austin proposed that certain words had a performative function. Thus to say 'I warn' or 'I reprimand' is to do the thing by the act of saying it. He continues that promising fits into the same category and is performed for the purpose of placing oneself under an obligation, and if the promise is performed correctly, creating a resultant obligation. Statements of this nature cannot be true or false. If this analysis is correct it needs to be remembered that certain promises will have the trappings of a statement of fact. For example, the vendor of goods can either promise that the goods possess certain qualities or express an opinion to a similar effect. Only minor differences in syntax can result in what has been stated as being a term of a contract or a representation. Professor Atiyah, at p105 notes that, 'the law appears to protect the expectations derived from a promise more highly than derived from a bare statement'.

[3] *Joscelin v. Shelton* (1557) 2 Leon. 4; 74 ER 503. The Leonard report of this case was first published 130 years after the event. The pleadings aver: 'the defendant *in consideration* that the son of the plaintiff would marry the daughter of the plaintiff' (italics added). There is no mention in the report of prior authorities.

[4] This is broadly the factual background to *Williams v. Roffey* [1991] 1 QB 1.

[5] KO Shatwell, *The Doctrine of Consideration in the Modern Law* (1954) 1 Sydney Law Review 289 at

strenuously that consideration had its origin in the dilemma of the 16th century common law judges contemplating how the action of *assumpsit* could be extended to the enforcement of wholly executory mutual promises without according legal recognition to serious unilateral promises. The answer was the systematic development of the doctrine of consideration as a means of identifying and enforcing bargains.

SFC Milsom writing in 1981 thought that more research into the early rolls was needed before a final answer could be given.[6] He did, however, venture the view that consideration might be a product of the evolution of *assumpsit* from an action grounded in misfeasance to one grounded in non-feasance.[7] During this process it was possible to detect the strong influence of the 14th century doctrine of *quid pro quo*.[8] Professor Plucknett appeared broadly to agree.[9] Milsom[10] suggested that the common law judges might have been influenced by the cannon law doctrine of *causa*. Pollock[11] rejects the possibility that *causa* influenced the early development of consideration and attributes it to the example of *quid pro quo* and the reliance element in the early action of *assumpsit*. Sir William Holdsworth[12] saw the doctrine of consideration as having its origin in the way in which the action of *assumpsit* developed under the influence of the earlier doctrine of *quid pro quo* and the indirect influence of the equitable principles discussed later.

The most persuasive explanation comes from Professor Simpson.[13] In a comprehensive examination of the topic the author puts forward the view that an earlier concept of

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p299. Perhaps a later generation of readers ought to be exposed to Professor Shatwell's colourful language: 'He [the common law judge] had to avoid the Scylla of restricting Assumpsit to simple contracts wholly executed by the plaintiff, without falling into the Charybdis which would engulf him if he abandoned the maxim *ex nudo pacto non oritur actio*; and to get out (changing the metaphor) of the frying pan of the proved inadequacy of the common law doctrine of "reality" without getting into the fire of canonist theory that any serious unilateral promise is enforceable'.

[6] SFC Milsom, *Historical Foundations of the Common Law* (2nd ed., Butterworths, 1981) (hereafter Milsom), p358.

[7] id., p357.

[8] ibid.

[9] Theodore F.T. Plucknett, *A Concise History of the Common Law* (5th ed., Butterworths, 1956) (hereafter Plucknett), p651.

[10] op. cit., ch.2, n.,6 above p357.

[11] op. cit., ch.1, n.,6 above pp183–184.

[12] Sir William Holdsworth *History of English Law* (Methuen & Co Ltd, Sweet and Maxwell, 1922) (hereafter Holdsworth), vol VIII p8.

[13] A.W.B. Simpson, *A History of the Common Law of Contract* (Clarendon Press Oxford, 1987) (hereafter Simpson), Chapter V.

consideration, developed in connection with the law of *uses* of land, 'must surely have a strong claim upon the attention of anyone who sets out to investigate the history of the contractual doctrine'.[14] The principle being that the presence or absence of consideration determines the nature of the grant. Simpson pointed out that: [15]

> [W]hen a feoffer to uses had not declared his wishes or intentions expressly, the circumstances surrounding the feoffment became important in determining what ought to be done about the use; in particular, what had induced, motivated, or caused the feoffment was treated as critical. The motivating circumstances ... were called the considerations.

Where the feoffment was made as a result of a bargain and sale or the payment of a money price, the circumstance was treated as a consideration and the *use* passed to the feoffee. If, on the other hand, there were no such circumstances and the feoffment gratuitous, the *use* did not pass. In modern law the latter transaction would give rise to a resulting trust. It is clear that the equitable doctrine of consideration had been worked out before consideration was invoked as a pre-requisite to *assumpsit* and that the common lawyers were familiar with it.[16] Not only did consideration in the two manifestations exhibit striking similarities but it also served a similar purpose. This point was made in part of counsel's argument in *The Duke of Buckingham's Case*:[17] '[I]f in this case there had been any bargain between the Duke and the Lord, or other consideration, then the grant would change the use'. Simpson[18] points out that *The Duke of Buckingham's Case* in 1504 was the first recorded instance where the expression 'consideration' had been used in relation to a transaction. *Joscelin v. Shelton*[19] was the earliest recorded *assumpsit* case to include an averment of consideration.

2.2 The history of the doctrine

The action of *assumpsit* had evolved to the point where it could be regarded as a remedy for breach of certain promises by 1533 with the decision in *Pickering v. Thoroughgood*.[20] There a disappointed brewer successfully sued a person who had

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[14] id., p327.
[15] id., p345.
[16] id., p350.
[17] (1504) Y.B. 20 Hen.VII, M.f. 10, pl.20.
[18] op. cit., ch.2, n., 13 above p341.
[19] 1557) 3 Leonard 4; 74 ER 503.
[20] (1533) Spilman's Reports. Spilman J was one of the judges in the case however, as at 1981 his reports

'assumed and promised to deliver' malt for use in the brewing trade. The expression 'consideration' was first used twenty-four years later in *Joscelin v. Shelton* where the plaintiff pleaded that the defendant '*in consideration* that the son of the plaintiff would marry [his] daughter, assumed and promised to pay to [the plaintiff] 400 marks' (italics added). After the marriage the plaintiff succeeded in an action based on *assumpsit* to recover the 400 marks. The manner of use of the word 'consideration' in the brief Leonard report[21] merely identifies the reason why the defendant's promise was given. The report continues '[a]nd upon non assumpsit pleaded, it was found for the plaintiff'. The plaintiff was successful because of the defendant's failure to keep the promise. It is no doubt overly speculative to read too much into the report but it seems clear that the failure to keep the promise was foremost in the Court of Common Pleas' thinking. The court did not consider whether or not the promise was binding because it had been made as a result of a promise made by the plaintiff. The first instance judgment was set aside on the basis that the time limits allowed the defendant had not elapsed at the time the action was commenced and this fact was disclosed in the declaration.

The first statement in the law reports descriptive of the factors that were to emerge into the concept of consideration is found in the 16th century authority *Stone v. Wythipol*[22] where the plaintiff sued an executor on a promise by the executor to pay certain debts of the testator. The debts arose from the supply of the goods and money lent to the testator by the plaintiff. The executor at time of the making of the promise was a minor and did so on the basis that the plaintiff would delay initiating action to recover the debt. The text of the statement is not to be found in the judgment but rather in the submission of counsel for the executor, Sir Edmund Coke who urged upon the Common Pleas:[23] 'That there is no consideration, for every consideration that doth charge the defendant in an *assumpsit*, there must be a benefit of the defendant or charge of the plaintiff and no case can be put out of this rule …. and staying of suit is no benefit to the defendant'. The report concluded without discussion of the legal principle '[a]nd it was adjudged against the plaintiff'.

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have not been published. This account was taken from Simpson p289.
[21] 3 Leonard 4. The text of the report occupies only nine lines.
[22] (1588) Cro. Eliz. 126; 78 ER 383.
[23] (1588) Cro. Eliz. at pp126–127.

Many elements of the present concept of consideration are present in this statement. Explicit is the notion that the plaintiff cannot succeed unless he had suffered a detriment or the transaction had conferred a benefit on the defendant. Nevertheless what Coke submitted should be read with circumspection. It is suggested that Coke was saying there was no reason, acceptable to the law, why the promise should be enforced. The notion of exchange was present, however, the action related to an executed as opposed to an executory transaction. As will emerge later in this work, the common law dealt with realities as they manifested themselves and was unconcerned with enforcing promises on any basis of conscience.

Slade's Case[24] is usually cited because of the change it effected in the procedural law whereby debts might be recovered by the action of *assumpsit* in lieu of the more cumbersome action of debt. John Slade sued Humphrey Morley for the sale price of a crop of wheat and rye. The date for payment passed without Morley making the payment. Slade in his pleading alleged that Morley in consideration of the sale of the grain 'did assume, and there faithfully promised' to make the payment. It was further pleaded that the failure was intended 'subtilly and craftily to deceive and defraud'. Ordinarily this was a cause that would have been brought under the more cumbersome action of debt.[25] The King's Bench and Common Pleas had failed to agree on an outcome and because of the importance of the issue the matter was referred to the Justices of England and the Barons of the Exchequer. Morley argued that to deprive him of the ability to wage his law under the action of debt was to deprive him of his birthright and, potentially, the King of the revenue that would be forfeited to the Crown in the event that the plaintiff refused to participate in the proceedings. The defendant further argued that debt was a specialised remedy, whereas an action on the case lacked precision. These arguments were rejected. The Justices restated the law relating to simple transactions giving rise to an obligation to pay money or deliver goods in the

[24] (1602) 4 Co. Rep. 91a; 76 ER 1072.
[25] The action of debt was a 12th Century form of action analogous to the real actions that was instituted to compel 'debtors to pay their obvious dues'. The writ was available to recover debts acknowledged by seal, loans, rent due, or statutory penalties. The essence of the action was the recovery of a sum certain, Plucknett op. cit., ch.2, n.9, p363. In addition the writ was available to recover the price after a sale. These transactions were referred to as 'contracts'. This was an early use of the word in a way that resembled the modern use of the word, Simpson op. cit., ch.2, n.13, pp187–189.

future in terms of contract and incidentally laid the foundation for the analysis of contract in terms of promise:[26]

> It was resolved, that every contract executory imports into itself an *assumpsit*, for when one party agrees to pay money, or deliver any thing, thereby he assumes a promise to pay, or deliver it, and therefore when one sells any goods to another, *and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money as such a day*, in that case both parties have an action of debt, or an action on the case on *assumpsit*, *for the mutual executory agreement of both parties imports in itself reciprocal actions on the case as well as actions of debt* .... And therefore it was concluded, that in all cases where the register has two writs for one and the same case, it is in the party's election to take either (italics added).

The words italicised are ultimately related to the issue of whether or not *assumpsit* was available. However the word 'consideration' is arguably used to denote a condition rather than the reason for the promise and the reference to 'mutual executory agreement' giving rise to 'mutual actions on the case' seems addressed to the bargain element in the transaction.[27] It might be suggested (perhaps with the benefit of hindsight) that the court, in declaring a change in the procedural law for the type of transaction envisaged, had anticipated the independent existence of a doctrine of consideration and the emergence of bargain theory. It is hard to overestimate the significance of *Slade's* case on the development of the common law of contract. The action on the case became the vehicle for the enforcement of simple agreements. It was still possible to sue in debt, however this became rare because plaintiffs preferred a jury to wager of law.[28]

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[26] (1602) 4 Co. Rep. 91a at p94a–94b; 76 ER 1072.

[27] Taken alone the reference to 'consideration' might be no more than a description of the *quid pro quo* within the transaction. This view was taken by Samuel Stoljar in his article *The Consideration of Request* (1966) 5 Melbourne University Law Review 314 at p319. The author does however allow that a change to the substantive law was in the offing where at p319 he continues: '[y]et the same forces that had so successfully been pressing for a simplification of contract-liability, ... also brought to the fore other situations urging themselves upon the courts. It is as regards these newer situations that *assumpsit*, and only *assumpsit*, could be of help'.

[28] In this context however, it is worthy of note that wager of law was not as problematic as supposed nor juries as enlightened. Taking an oath was a serious business and 15th century juries were not without imperfections. See Simpson op. cit., ch.2, n.13, above, p139 where the author points out, '[a] ... jury was an oath taking body which closely resembled a set of eleven compurgators, the main difference being the fact that its composition [the set of compurgators] was determined by the defendant.'

Plucknett[29] pointed out that during the 18th Century the prevailing view was that 'the requirements of consideration were fulfilled if there existed a moral obligation. Shatwell[30] took a more restrictive view of the potential describing the authorities in support of this proposition as 'avowed and narrow exceptions arising from the pressure of moral sentiment in the case where an obligation originally binding, had ceased to be enforceable'. Put at its widest the proposition was that a promisor who made a promise to a promisee pursuant to a moral obligation owed to that promisee was bound by the promise.

It is not clear if Lord Mansfield in *Pillans v. Van Mierop*[31] was stating the law, as he understood it or (as Shatwell argues), seeking to bring moral obligations into the ambit of legal enforceability. Presumably moral obligation in this context is a reference to the obligation imposed on persons of the time by Christian ethics. The plaintiff made advances on behalf of a third party on the basis of the defendant's undertaking to honour a bill drawn on the defendant. After finding that the third party had failed, the defendant advised the plaintiff that he would not honour the bill. Lord Mansfield CJ of the Kings Bench said:[32]

> The law of merchants, and the law of the land, is the same .... A nudum pactum does not exist, in the useage and law of merchants .... I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it was reduced into writing, as in covenants, specialties, bonds etc. there was no objection to want of consideration.

These remarks were treated in a small number of cases[33] that immediately followed as having the potential for recognizing moral obligation as a basis for contract. However it was pointed out that the instances that Lord Mansfield used to illustrate his proposition were acknowledged situations where a promise was enforceable without the need for consideration.[34] Wilmot J, Yates J and Ashton J each agreed with Lord Mansfield's point about the law merchant but then went on to find consideration in the transaction.

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[29] op. cit., ch.2, n.9, above, p654.
[30] op. cit., ch.2, n.5, above, at p303.
[31] (1765) 3 Burr. 1664; 97 ER 1035.
[32] id., at p1669.
[33] For example, *Scarman v. Castell* (1795) 1 Esp. N. P. 270; 170 ER 353.
[34] Lord Mansfield referred to covenants, specialities and bonds.

The potential for a change to the law was perhaps due to Lord Mansfield's reputation as a law reformer.

Orthodoxy was restored in *Eastwood v. Kenyon*[35] where the plaintiff executor advanced money to maintain the estate of which the defendant's wife was beneficiary whilst she was a minor. To do so, the plaintiff had borrowed money and given a promissory note. On coming of age the wife had promised to repay the note and had in fact paid the interest for one year. The action was based on that promise. It was argued for the plaintiff that the moral obligation of the wife was sufficient consideration to support the promise to repay. The defence was non assumpsit. Lord Denman (for the court) rejected the argument pointing out that the law was correctly stated in Bonsanquet and Puller's note to their report of *Wenall v. Adney.*[36] His Lordship continued:[37]

> Indeed the doctrine (Lord Mansfield's views about moral obligations amounting to consideration) would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it .... The enforcement of such promises by law, however plausibly reconciled by the desire to affect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts.

For most of the 20th century the courts have been content to rely on the words of Lord Dunedin who, in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd,*[38] adopted in its entirety Pollock's definition. Pollock[39] had this to say:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

The language of promise has remained and was readily subsumed into bargain theory in the 20th century. The analysis of contract in terms of the component promises is still part of judicial thinking, for example, the words of Glidewell LJ in *Williams v. Roffey.*[40]

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[35] (1840) 11 A & E 438; 113 ER 482.
[36] (1802) 3 B. & P. 247 at p251; 127 ER 137.
[37] (1840) 11 A & E 438 at pp450–451.
[38] [1915] AC 847 at p855.
[39] Sir Frederick Pollock, *Principles of Contract* (Stevens and Sons Limited, 8th Edition) p175. The same definition appears in the 9th edition p177.

2.3 Attempts to define consideration

Several academic writers have found the challenge of defining consideration irresistible and the need to criticise the work of others equally irresistible. Other academic writers have resisted the temptation.[41] Professor Atiyah[42] describes consideration as, 'a compendious word simply indicating whether there are good reasons for enforcing a promise.' Professor Treitel[43] has criticised this statement as 'negative' and Carter and Harland[44] go a little further, '[t]he vagueness of this concept scarcely needs to be pointed out'. Professor Atiyah's words are more of a description of the function of consideration. SFC Milsom[45] also favoured the descriptive approach and suggested that consideration should not be seen as a unified concept but rather as 'the label on a package containing many separate rules about the liabilities which may arise in the context of a transaction'. Carter and Harland[46] propose their own definition in the following terms, 'some act or forbearance involving legal detriment to the promisee, or the promise of such an act or forbearance, furnished by the promisee as the agreed price of the promise'. Pollock's definition as cited by Lord Dunedin in *Dunlop v. Selfridge*, like that of Carter and Harland, emphasises the element of detriment to the promisee. Both definitions when using the words 'act or forbearance of one party' must be taken to be referring to unilateral contracts. In the case of executory contracts, at the contract formation stage, it will always be a promise that is the consideration.[47] For the purpose of this work, either definition will suffice. Both emphasise the exchange element in a

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[40] [1991] 1 QB 1, see ch., 1 n.4, above.

[41] Notably: Karl Llewellyn, *What Price Contract?* 40 Yale Law Journal 717 (hereafter Llewellyn) at pp742–743; Greig & Davis, ch.3 and N.C. Sneddon and M.P. Ellinghaus, *Cheshire & Fifoot's Law of Contract* (7th Australian edition, Butterworths, 1997), chapter 4 (hereafter Sneddon & Ellinghaus) are content to assent to Pollock's definition.

[42] P.S. Atiyah, *Consideration in Contracts: a Fundamental Restatement* (Australian National University Press, 1971), p9. Much the same thing was said by *Holdsworth* op. cit., ch.2, n.12 above, p7 and B.J. Reiter, *Courts, Consideration and Common Sense* (1977) 27 University of Toronto Law Journal 439 at p444.

[43] G.H. Treitel, *Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement* (1976) 50 ALJ 439 at p439.

[44] op. cit., ch.1, n.4 above, p97.

[45] SFC Milsom, *Historical Foundations of the Common Law* (2nd edition, Butterworths 1981), 360.

[46] op. cit., ch.1 n.4 above, p95.

[47] On this matter see the article of Brian Coote, *Consideration and Benefit in Fact and in Law* (1990) 3 Journal of Contract Law, 21.

transaction and, as will be seen in the next part of this work, exchange has received a high level of approval from the Australian courts.[48]

2.4 Contracts as bargains

By the end of the 19th century and early 20th Century commentators[49] were seeing contracts in terms of bargain. The doctrine of consideration proved a useful aid in this, as the presence of consideration was said to distinguish transactions (bargains) from mere gratuitous promises. It is not altogether clear why a bargain as such was so desirable to the 19th century legal mind. Of course, bargains were inevitably associated with trade and this was the golden age of English commerce. Perhaps the respect accorded bargains represents a stage in the transition of the law of contract from the recognition of the value of a strategic marriage to profitable arbitrage contracts dealing with commodities that are yet to come into existence. Professor Shatwell defended the bargain as central to the Anglo-Australian law of contract: [50]

> The doctrine of consideration is not a survival from the procedural necessities of assumpsit, but an inheritance in the field of modern substantive law …. the effect of the rules as to consideration is to make bargains enforceable without further requirement as to form (italics added).

A desirable end for the law of contract is therefore to isolate and enforce bargains. The presence or absence of consideration in a transaction should serve that end.

2.5 What is a bargain?

The discussion of the bargain theory of simple contracts should start with a clear understanding of what the word bargain means in the English language. The fact that the word is both a noun and a verb creates some confusion. The given meanings are:

> *n*. an agreement on terms of a transaction or sale.
> *v. intr* (often foll. by *with, for*) discuss the terms of a transaction.[51]
> *n*. an agreement between parties settling what each shall give, and take, or perform, and receive, in a transaction.

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[48] *Beaton v. McDivitt* (1987) 13 NSWLR 162, per Kirby P at p168 and McHugh JA at p181.
[49] Notably Pollock, op. cit., ch.1, n.6, above, p175 and Llewellyn, op. cit., ch.2, n.41, above, at p717.
[50] op. cit., ch.2, n.5, above, at p328.
[51] *Concise Oxford Dictionary* (1990) s.v. 'bargain'.

> *v.i.* to discuss the terms of a bargain; haggle over terms, to come to an agreement; make a bargain.[52]

In the discussion on this matter that follows, the word 'bargain' is used both to denote a concluded transaction and the process whereby it is achieved.

2.6 Evolution of bargain theory

Before testing the proposition that consideration facilitates the identification of bargains, it is necessary to look at the evolution of the theory. There is little doubt that the famous definition of consideration in Pollock's[53] work introduced the notion of bargain to English jurisprudence. His definition is repeated, '[a]n act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other party is bought, and the promise thus given for value is enforceable'. The exact text of the definition was adopted by Lord Dunedin in *Dunlop v. Selfridge* who added some fulsome praise: 'My Lords, I am content to adopt the words of Sir Frederick Pollock, to which I have often been under obligation'.[54]

Pollock used the words of Lush J in *Currie v. Misa*[55] to introduce his chapter on consideration. The case is unusual, with the need to define consideration arising out of the question of whether or not a person was the holder of a bill. The judgment of the Court of Exchequer (Keating, Lush, Quain and Archibald JJ, Lord Coleridge CJ dissenting) was delivered by Lush J. Consideration was defined thus:[56]

> A valuable consideration in the sense of the law, may consist in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, suffered, or undertaken by the other: Com. Dig. Action on the Case, Assumpsit, B.1-15.[57]

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[52] *The Macquarie Dictionary* (1981) s.v. 'bargain'.
[53] op. cit., ch.1, n.4 above. The discussion of the work of Pollock assumes that the 7th, 8th and 9th editions of his work include a similar text on this point. The text cited as well as the later citation were taken from the 9th edition of his work published in 1921, p177. Lord Dunedin cited in *Dunlop v. Selfridge* the same passage from the 8th edition of the work. Greig & Davis op. cit., ch.1, n.4, above, p21 point out that the passage first appeared in the 7th edition although the work was then titled *Principles of Contract at Law and in Equity*. The authors make the further point that no such passage appears in the first edition of the work published in 1876.
[54] [1915] AC 847 at p855.
[55] (1875) LR 10 Exch 153.
[56] id., at p162.
[57] A conceptually similar description of consideration had been given by Lord Ellenborough. See *Bunn v.*

Lord Coleridge CJ, although dissenting indicated his agreement with what was said:[58]

> [A]nd my brother Lush has put together, from Comyn's Digest, Action on the Case, Assumpsit, B. 1-15, a definition or description of consideration, to the accuracy of which I entirely assent.

The significant matter is that the word 'valuable' is used. This implies bargain, sale and money changing hands.[59] Pollock[60] develops the argument that it is the second aspect of the statement of Lush J that is important. The author continues in the following terms:

> The second branch of this judicial description is really the more important one. Consideration means not so much that one party is profited as the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first.

There are two important features of this statement. Firstly, consideration is proposed in terms of detriment. This is merely to underline some of the difficulties with the description of Lush J. In this, Pollock is correct, in that the only *relevant* consideration in a transaction will be that moving from the plaintiff in relation to the promise sought to be enforced. There is no need to refer to the benefit aspect as this can at best be no more than the result of the consideration that moves from the plaintiff. In terms of the way a transaction is structured, the *relevant* consideration will always be some kind of detriment to the plaintiff.

Pollock, in the passage cited, makes the further important point that the detriment suffered must induce the promise sought to be enforced. This was not stated by Lush J. It is arguable that the words of Lush J imply the notion that the detriment suffered by the plaintiff was induced by the promise of the defendant from the reference to a benefit to the defendant. Otherwise why would the defendant make the promise? This is by no means clear and perhaps this aspect of the discussion should be considered Pollock's unique contribution to the subject. The word 'bargain' was not used in Pollock's definition however the use of the past tense of the verb 'to buy' is the language of bargain. The use of the word 'value' reinforces the position. There is a paradox in the

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Guy (1803) 4 East 190; 102 ER 803 at p194. His Lordship's remarks are set out below at p40 of this work.
[58] op. cit., ch.2, n.55, at p69.
[59] Greig & Davis make the same point, op. cit., ch.1, n.4, above, p21.
[60] op. cit., ch.1, n.6, above, p177.

fact that from an attempt to define consideration the notion of bargain evolved. Subsequently consideration was used to identify bargains. It might be suggested that in redefining consideration the theorists had redefined the basis of simple contract.[61] The emphasis had now shifted, from reasons why discrete promises should be enforced, to exchange.

Similar views of contract were emerging in the United States. Both Holmes[62] and Ames[63] defined consideration in a way that emphasised the exchange element in a transaction. Since the works of Holmes and Ames antedate that of Pollock, Greig and Davis[64] make the suggestion that he was converted to their cause. It is noteworthy that neither Holmes nor Ames mentioned bargains as such.

2.7 The Australian position on bargain theory

Two Australian cases recognized a bargain as an essential element in contract. The first was *Australian Woollen Mills Pty Ltd v. The Commonwealth*[65] where the Commonwealth Government offered a subsidy on the purchase of wool at the Australian wool auctions to manufacturers who sold manufactured garments into the local price controlled market. It was a post war scheme to maximise the price obtained for wool sold overseas and yet protect local consumers. The plaintiff purchased such wool and sued for the subsidy. The High Court looked to the terms of the announcement of the subsidy for language of contract. Was the advertisement a promise offered in consideration of the doing of an act? The court concluded no. There was no relationship between the announcement and the act. The court considered the presence or absence of a request on the part of the defendant a useful test. The fact that the Government could and did vary the terms of the subsidy was also considered fatal to the existence of a

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[61] Or did they? Part of the judgment in *Slade's Case* (1602) 4 Co. Rep. 91a; 76 ER 1072 at pp94a–94b conveys the suggestion of bargain, 'for the mutual executory agreement of both parties imports in itself reciprocal actions'.
[62] Oliver Wendell Holmes, *The Common Law* (Boston: Brown and Company, 1881), p230.
[63] James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Buffalo NY: W.S.Hein Co, 1913, reprinted Harvard University Press 1986), p340.
[64] op. cit., ch.1, n.4, above, p21.
[65] (1954) 92 CLR 424.

contract. The views of the court were encapsulated by Dixon CJ, Williams, Webb, Fullagar and Kitto JJ:[66]

> If we ask (what we think is the real and ultimate question) whether there is a promise offered in consideration of the doing of an act, as a price which is to be paid for the doing of the act, we cannot find such a promise. No relation of *quid pro quo* between a promise and an act can be inferred. If we ask whether there is an implied request or invitation to purchase wool, we cannot say that there is. If we ask whether the announcement that a subsidy would be paid was made in order to induce purchases of wool, no such intention can be inferred.

Some significant points emerge from the judgment. First, it was a case of deciding if a unilateral (as opposed to a wholly executory) contract did or did not exist. Perhaps this is why *Dunlop v. Selfridge* and Pollock were not cited in counsel's arguments or the judgment. Second, the word 'bargain' was not used in the context of the existence of a contract or indeed at all. Is the court in its references in the last three sentences of the passage cited to 'the relation of *quid pro quo* between promise and act,' the 'request or invitation to purchase wool' and 'induce purchases of wool', referring to the concluded agreement or the process of engagement prior to the parties becoming bound, or both? The answer would seem to be both, but with some emphasis on the process of engagement.[67] The significant matter was whether the plaintiff's action was triggered by the promise of the defendant.

The case went on appeal to the Privy Council where the decision of the High Court was upheld however there was some criticism of the way the High Court had dealt with the matter. Lord Somervell delivering the opinion of the Judicial Committee observed:[68]

> There may be cases where the absence of a request negatives the existence of a contract. The presence of a request does not however in itself establish a contract. Manufacturers may be requested to come into and work a non-contractual scheme. On this aspect of the argument their Lordships think with all respect there

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[66] id., at p461.
[67] Samuel Stoljar, *The Consideration of Request* (1966) 5 Melbourne University Law Review 314, at p320 emphasises the close connection between request and promise, 'without a promise, the request might simply be the request for a favour, while without an initial request the subsequent promise would stand alone, and standing alone would amount to no more than a gratuitous undertaking, instead of amounting to promise: one, so to speak, confirming and completing a bargain begun by the initial request'.
[68] (1955) 93 CLR 546 at p550.

> was force in the criticism of that passage in the judgment of the High Court in which it was said there was nothing in the nature of a request or invitation.

Whilst this statement is no doubt correct, it is a little hard on the High Court, which in the first sentence of the passage cited, identifies the appropriate principle in similar terms to the way as the Judicial Committee finally resolved the issue. The Committee continued:[69] 'Their Lordships are of the opinion that these letters cannot be read as an offer or offers to contract'.[70]

Greater emphasis was placed on the end result in *Beaton v. McDivitt and another.*[71] There the plaintiff entered an informal arrangement to occupy land belonging to the defendant. The defendant had said at the time the arrangement was made that, if the plaintiff would occupy the land and engage in permaculture; he would convey a portion of the land to the plaintiff when the expected rezoning took place. The plaintiff occupied the land with his family, built a stone dwelling, planted trees and failed in an attempt at permaculture. After the original promise was made, the plaintiff agreed to construct and maintain a road into the property. The road was constructed but never maintained. Some eight years after the agreement the rezoning had not taken place and after a disagreement the defendant excluded the plaintiff from the property. Both Kirby P and McHugh JA unequivocally supported the bargain theory and expressly adopted the view put forward in *Australian Woollen Mills v. The Commonwealth*.[72] Even so, the utility of bargain theory to establish the existence of a contract or otherwise might be doubted, for Kirby P and McHugh JA reached opposite conclusions. In support of the theory Kirby P:[73]

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[69] id., at pp554–555.
[70] The statements of the High Court and Privy Council assume but do not mention the close link between consideration and offer and acceptance in a transaction such as the one under examination. The link has been previously documented. See CJ Hamson *The Reform of Consideration* (1938) 54 LQR 233 at p234: 'Consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain. Indeed, consideration may conveniently be explained as merely the acceptance viewed from the offeror's side'. This view is shared by Sir Owen Dixon, *Concerning Judicial Method* (1956) 29 ALJ 468 at p474 where the author said, 'It is therefore possible to push the analysis of the theory of the formation of a simple contract to the point of finding no more in offer and acceptance and in the doctrine of consideration than two aspects of the same thing'.
[71] (1987) 13 NSWLR 162.
[72] (1954) 95 CLR 424.
[73] (1987) 13 NSWLR at p168.

> The modern theory of consideration has arisen from the notion that a contract is a bargain struck between the parties by an exchange. By that modern theory, consideration must be satisfied in the form of a price in return for the promisor's promise or a quid pro quo. The price can be in the form of an act, forbearance or promise.

His Honour continued citing Lord Dunedin in *Dunlop v. Selfridge*[74] and the passage from Pollock discussed above but from the 13th Edition published in 1950. On the same page his Honour said of *Australian Woollen Mills v. The Commonwealth*: 'The High Court of Australia has accepted this "modern" or bargain doctrine of consideration'. In his application of the law to the facts in the instant case his Honour held:[75]

> It is just not possible, however indulgently one approaches those facts with sympathy to the appellant, to classify the promise he made as quid pro quo for the suggested promise of the respondent, in certain circumstances, to transfer title in the land to him .... In my opinion the expenditures and actions of the appellant are more properly to be categorised as entirely for his own benefit and that of his family. The congeniality of having on the land a neighbour of like horticultural practices is not valuable consideration. It is more akin to domestic and social arrangements.

There is a difficulty with the manner in which his Honour applied the law as stated to the facts of this case. The first sentence of the passage in its reference to 'promises made as quid pro quo', recognised the need for a nexus between the respondent and the appellant's promises, but was this the basis for his Honour's decision? It is submitted no. The remainder of the passage quoted is directed to the content of the promise rather than the way it was solicited.

McHugh JA saw bargain theory in much the same light:[76]

> But the reasoning of the High Court in insisting on the necessity for a quid pro quo accepts the basic element of the bargain theory of consideration and amounts to a rejection of a reliance based theory of consideration.

His Honour discussed the basis of the decision in *Australian Woollen Mills v. The Commonwealth*:[77]

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[74] [1915] AC 847.
[75] (1987) 13 NSWLR at p169.
[76] 13 NSWLR at p182.

> In *Australian Woollen Mills v. The Commonwealth*, it was the absence of any request or invitation to purchase the wool which caused the High Court to hold that the purchases of wool by the plaintiff were not a quid pro quo for the subsidy.

His Honour then referred to the comments of the Privy Council in relation to the matter of request. In his application of the law to the facts he found consideration in the facts rejected by Kirby P as amounting to consideration.

Mahoney JA found the existence of a contract, using what his Honour described as an 'Ansonian approach'.[78] That is, he found the contract on the basis of an accepted offer without mentioning the need for consideration or citing *Australian Woollen Mills v. The Commonwealth.* The contract, however, had been frustrated by the failure of the authorities to rezone the land to permit a subdivision.

In terms of what was said by Kirby P and McHugh JA, the case clearly embraces bargain theory. However, the way in which the decision was reached is less clear. Perhaps what should be understood from the decision is that the bargain theory of contract formation is in the ascendancy over any reliance based theory. In fact, both Kirby P and McHugh made this point.[79] The court came to this conclusion largely from the use of the expression *quid pro quo*[80] in *Australian Woollen Mills v. The Commonwealth*.[81] It can be asserted that *Beaton v. McDivitt*[82] and *Australian Woollen Mills v. The Commonwealth* establish that bargain is an element in the initial formation of a contract in Australia.

Bargains, it is suggested, are concluded agreements achieved after a process of engagement[83] culminating in an exchange. Engagement of itself is meaningless unless it is consummated by exchange (be it promise for promise, action for a promise or exchange of property). Even so, it is essential to the existence of a bargain for it is the

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[77] id., at p183.
[78] id., at p175.
[79] Per Kirby P at p168 and per McHugh JA at p181.
[80] 'One thing in return for another', *The Macquarie Dictionary* (1981) s.v. *quid pro quo*. 'Something for something,' *CCH Macquarie Dictionary of Modern Law* s.v. *quid pro quo*.
[81] (1954) 92 CLR 424.
[82] (1987) 13 NSWLR 162.
[83] The use of the word 'engagement' here is to convey the notion of an interaction between the parties that is akin to the negotiating process. The essence is that the actions of each party trigger a response in the other.

engagement aspect of the transaction that confirms that the promise is a response to the actions of the defendant. Consideration must therefore verify both elements in a transaction. This view has been supported by the work of two academic commentators. The first, Edwin W. Patterson[84] pointed out:

> The conception of consideration here referred to includes not only a thing (promise or performance) that the promisor bargains for, but also the *process* of bargaining for it.
>
> . . . . .
>
> [The courts and legal profession] overlook the necessity of proof of bargaining and the necessary inference that an exchange has occurred.

Obscurely, MP Ellinghaus wrote:[85]

> If consideration requires not merely that the promise be scrutinised as made, that it set a price, but also that there be the requisite response, its payment, then there is a sense in which the doctrine can be regarded as distinguishing *among* bargain promises [promises conditional on the payment of a price], as sorting out those that have merely been made from those that have elicited the stipulated response.

Bargain theory may, after all, be only a matter of semantics. The discovery of consideration in a transaction tells us that a deal has been struck, there are at least two parties and that the promise of one of the parties was a response to the conduct of the other.[86] If consideration has enabled the courts to identify bargains, properly so called, and thus accord or withhold validity to transactions at the time of formation, a further question arises as to the nature of the consideration needed to support a change to an existing contractual relationship. In particular, need the consideration be directed

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[84] Edwin W Patterson, *An Apology For Consideration* (1958) 58 Columbia Law Review 929 at pp932–933.

[85] MP Ellinghaus, *Consideration Reconsidered Considered* (1975) 10 Melbourne University Law Review 267 at p274.

[86] The modern textbook writers seem evenly divided on the value of bargain theory. Carter & Harland, op. cit. ch.1, n.4, above, p97 accept that the Australian Courts have embraced bargain theory but nevertheless express some reservations about the utility of the theory. M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (12th edition, Butterworths, 1991) p73 (hereafter Furmston) take the view that a definition of consideration in terms of bargain is easier to understand and 'emphasises the commercial character of the English contract'. Sneddon & Ellinghaus, op. cit., ch.2, n.41, above do not mention bargain theory at all. The authors do however emphasise exchange in a context that has a close resemblance to bargaining, pp11, 41. GH Treitel, *The Law of Contract* (4th Edition, Stevens & Sons, 1975) p47 considers Pollock's definition vague. In *Chitty on Contracts* (27th Edition, Sweet & Maxwell, 1994) Treitel as editor of that work repeats his criticism.

toward the establishment of a new bargain within the transaction to be varied? The issue will be pursued later in this work.

2.8 Consideration must not be illusory

The promise to perform an act or forbearance relied on as consideration to support a reciprocal promise must be of substance. Merely illusory promises will not suffice. Within this concept are collected a number of seemingly disparate situations. They include: a promise to perform an act which the promisor is already under a legal duty (as opposed to duty under a contract which is also a legal duty) to perform,[87] a promise to perform an act which the promisor is already under a contractual duty to perform,[88] a promise to perform an act that is prohibited by the law,[89] a promise to perform an act which is vague or uncertain[90] and a promise where the performance of the promisor is discretionary.[91] Although the law in this regard is of considerable antiquity the nomenclature is of comparatively recent origin. In the High Court decision *Wigan v. Edwards* Mason J said in the context of the second proposition:[92] '[the] rule expresses the concept that the new promise, indistinguishable from the old, is an illusory consideration'.

An examination of the legal history of the first three rules said to be part of the general rule suggests that public policy played a substantial role in the evolution of the each.[93] The need for each of the rules could not be questioned and the test of whether or not consideration was given for the promise sought to be enforced became a convenient determinant of the efficacy of the transaction in question.[94] Each rule developed discretely to the point where the consideration test was applied and even after the rules

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[87] *Collins v. Godfroy* (1831) B. & Ad. 950; 109 ER 140.
[88] *Stilk v. Myrick* (1809) 2 Camp. 317 .
[89] *Nerot v. Wallace and Others* (1789) 3 TR 17; 100 ER 432. A promise by the Commissioners in Bankruptcy not to publicly examine a bankrupt on certain issues is not good consideration for the promise of a third party to the bankruptcy to pay certain moneys into the bankrupt's estate because it is 'against the policy of the bankrupt laws'.
[90] *White v. Bluett* (1853) 23 L.J. Ex. 493. Here the promise in question was from a son who promised not to pester his father about the intended distribution his father's estate.
[91] *Placer Development Ltd v. The Commonwealth* (1969) 121 CLR 353.
[92] [1973] 47 ALJR 586 at p594.
[93] This is no doubt true of all common law rules however the point of departure from a rule to prevent a perceived mischief to a rule of principle is not always so readily discernable or the point of departure has been lost.
[94] The first rule would appear directed to the prevention of corruption of public officials, the second the prevention of enforced contract modifications and the third, compliance with the law.

were subsumed into the doctrine of consideration, each to some extent maintained a separate existence. Only the first two rules are of relevance to this work.

2.9 Development of the existing legal duty rule (public duty)

It is appropriate therefore to first examine the legal duty cases. An early example was *Bilke v. Havelock*.[95] There a sheriff brought an action in *indebitatus assumpsit* for the expenses incurred in seizing and keeping goods under a writ of *fieri facias* at the request of the party suing out the writ. The sheriff argued that, since he had laid out money at the defendant's request, the law would raise a promise to make a reasonable compensation. Lord Ellenborough stated:[96]

> The law knows of no promise to pay the sheriff for executing the King's writ. Such an action as this never was heard of in Westminster Hall. It is the duty of the sheriff under a writ of *fieri facias* to seize the goods in his bailiwick belonging to the defendant …. The office of sheriff would become a very lucrative one, if he could maintain an action for every ineffectual attempt by his officers to execute a writ.

It is significant that no mention of consideration is made either in counsels' arguments or Lord Ellenborough's judgment. A finding of consideration was needed for the *indebitatus assumpsit* claim to succeed. The suggestion is made that Lord Ellenborough had firmly in mind the potential damage to public order if officials were permitted to claim additional payment for carrying out their day-to-day duties. As will be seen later Lord Ellenborough had an excellent understanding of the doctrine of consideration.

The clearest case dealing with the issue is *Collins v. Godefroy*[97]. There the plaintiff was under a subpoena to attend and give evidence on behalf of the defendant. The defendant had promised to pay him six guineas if he would do so. After the case the defendant refused. The plaintiff's action to recover the sum failed on the basis that the subpoena imposed a separate obligation on the plaintiff to attend court. Lord Tenterden based his decision on the presence or absence of consideration. He referred to the duty imposed by *5 Eliz. C.9, s10.* The statute required a person upon whom a subpoena was served, after having tendered to him reasonable costs and charges, to attend court. A person

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[95] (1813) 3 Camp. 372; ER 1415.
[96] id., at p375.
[97] (1831) B. & Ad. 950; 109 ER 140.

who failed to attend was liable to a penalty of £10. His Lordship continued:[98] 'If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration.' Here the public policy requirement is identified and comfortably married to the doctrine of consideration without any theoretical discussion.

Counsel for the defendant (appellant) in *Glasbrook Bros v. Glamorgan County Council*[99] referred to both *Bilke v. Havelock* and *Collins v. Godefroy*. This was a case where the council provided more police protection to a colliery during a strike than it deemed necessary. The colliery owners promised to pay for the additional police protection but subsequently refused on the basis that the council was under a duty to provide protection and accordingly there was no consideration furnished for the promise to pay. The House of Lords found for the council on the basis that the consideration could be found in the provision of the additional protection. In their speeches their Lordships referred to no authorities other than one that dealt specifically with the position of the police. Clearly the public policy question was the most significant. In a judgment extending over nine pages Viscount Cave LC referred to the consideration issue:[100] 'In this case, of course, there is an express promise, and in my judgment this promise is not without consideration and must be fulfilled'. Viscount Finlay considered the matter even more fleetingly:[101] 'It is clear that there was abundant consideration' and Lord Shaw decided the question on the basis of public policy with the matter of consideration arising only by inference. Lord Carson and Lord Blanesburgh dissented. Perhaps this seemingly cursory finding of consideration demonstrates the utility of the concept as a vehicle for deciding whether or not a promise ought to be enforced. A simple application of the rule gives the answer.

The discussion of promises to perform existing legal duties continues with an examination of the English Court of Appeal decision in *Ward v. Byham.*[102] There a father of an illegitimate child agreed with its mother to pay her one pound per week to

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[98] id., at pp956–957.
[99] [1925] AC 270.
[100] id., at p282.
[101] id., at p285.
[102] [1956] 1 WLR 496.

care for the child. The terms of the arrangement were contained in a letter dated 27 July 1954 from the father to the mother: 'Mildred, I am prepared to let you have Carol and pay you £1 per week allowance for her providing you can prove that she will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you'. The payments were continued until the mother married. Section 42 of the *National Assistance Act 1948* (UK) imposes a duty on the mother and not the father to care for an illegitimate child. No consideration could be found in the mother's refraining from taking affiliation proceedings as she had denied her intention to do so in evidence and her subsequent marriage prevented her from doing so in the future. Denning LJ regarded a promise to perform an existing duty sufficient consideration. His Lordship stated:[103]

> I approach this case, therefore, on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given.

These remarks have been taken to be a portent of a new era where the existing duty rule will be relaxed to a point of ceasing to exist. Perhaps the remarks should be seen as a kind of judicial kite flying. In the second sentence where his Lordship states that there was 'consideration to support the promise' he introduces his surmise with the words 'even so'. Although this phrase has some ambiguity, it serves as 'a conveniently short reminder to the reader that the contention before him is not the strongest that could be advanced'.[104] It is suggested that here Denning LJ was qualifying his own opinion in this way. He then continued 'I have always thought ... should be regarded'. These are the words of persuasion rather than a declaration of the perceived law. The judgment concluded with the statement: 'The case seems to me to be within the decision of *Hicks v. Gregory*'. *Hicks v. Gregory*[105] was a case where the majority of the court was able to find consideration in the more onerous than usual basis on which a mother undertook to care for a child. It is argued that the remarks of Denning LJ were obiter and that this part of his judgment represents a minority view.

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[103] id., at p498.
[104] HW Fowler, *A Dictionary of Modern English Usage* (Oxford: Clarendon Press, 1965) s.v. 'even so'.
[105] (1849) 8 C.B. 378; 137 ER 556.

Morris LJ was able to find consideration in the additional obligation undertaken by the mother. His Lordship paraphrased the letter of 27 July 1954 and continued:[106]

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

Although not entirely free from doubt[107] Parker LJ agreed:[108] 'I have come to the same conclusion. I think that the letter of July 27, 1954, clearly expresses good consideration for the bargain'.

The difficulty for future commentators is; the same conclusion as whom? Denning LJ or Morris LJ, assuming each decided on a different basis. The use of the word 'bargain' is indicative of the fact that he thought that the wife was doing more than she was bound to do. The letter reinforced this by making reference to the child being well looked after, happy and having a choice. Professor Goodhart observed of the case that the mother's duty to maintain the child was not owed to the public generally or to the father but pursuant to s42 of the *National Assistance Act 1948* to the National Assistance Board or local authority. Her performance of this duty was therefore analogous to the performance of duties owed to third parties according to the *Shadwell v. Shadwell* [109] model.[110]

The significance of *Ward v. Byham* is not that a clear principle emerged from the case (for none did) but rather the very ambiguity. Denning LJ said that he 'thought' a promise to perform an existing duty would be sufficient consideration to support a new promise. The fact is that this was stated (in a sense speaking the doctrinally unspeakable) and human affairs did not come to a sudden stop. As indicated above, it is not clear if Parker LJ is supported Denning LJ or Morris LJ although Professor

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[106] [1956] 1 WLR 496 at p498.
[107] See Greig & Davis op. cit., ch.1, n.4, above, p106.
[108] [1956] 1 WLR 496 at p499.
[109] (1860) 9 C.B. (N.S.) 159; 142 ER 62.
[110] A.L. Goodhart, *Performance of an existing duty as consideration* (1972) 52 LQR 490 at p493.

Goodhart thought the latter.[111] What the case does suggest is that a court determined to uphold a transaction for reasons of justice can 'find' consideration without much difficulty. It was the less conservative Denning LJ who said so. A significant factor here is the fact that the consideration that did move from the wife was clearly stipulated as part of the agreement and did not need to be 'wrung out' of the transaction at the time its validity was questioned.

Denning LJ continued his campaign in *Williams v. Williams*.[112] The plaintiff wife deserted her husband in 1952. Soon after, the parties entered an agreement which provided inter alia: '(1) The husband will pay to the wife for her support and maintenance a weekly sum of one pound ten shillings ... (2) The wife will out of the said weekly sum or otherwise support and maintain herself and will indemnify the husband against all debts to be incurred by her and will not in any way or at any time pledge the husband's credit'. The husband successfully sued for a divorce on the grounds of desertion and the wife commenced proceedings to recover the arrears under the agreement to the date of the pronouncement of the decree nisi. The husband argued that since a wife in desertion was bound to maintain herself the agreement did not amount to consideration moving from his wife to support his promise to make the payments. Denning LJ repeated his view expressed in *Ward v. Byham*[113] that the promise of itself was sufficient consideration with the added caveat of the need to be mindful of the public interest. His Lordship did not acknowledge himself to be in the minority. He added that in the instant case the agreement foreclosed potentially unsuccessful but nevertheless troublesome claims against the husband. There followed an argument that consideration could be spelled out of the wife's unquestionable right to end the desertion by a genuine offer to return to her husband. Denning LJ explained:[114]

> Her right to maintenance was not lost by the desertion. It was only suspended. If she made a genuine offer to return which he rejected, she would have been entitled to maintenance from him. She could apply to the magistrates or the High Court for an order in her favour. If she did, however, whilst this agreement was in force, the 30s. would be regarded as prima facie the correct figure. It was of

[111] id., p491. There was however some potential for confusion, see *Popiw v. Popiw* [1959] VR 197.
[112] [1957] 1 WLR 148.
[113] [1956] 1 WLR 496.
[114] [1957] 1 WLR 148 at p151.

> benefit to the husband for it to be so regarded, and that is sufficient consideration for his promise.

As to the second point, the benefit to the promisor in this transaction was that his contingent unfixed liability had become a contingent liability of one pound ten shillings per week. Both Hodson LJ and Morris LJ declined to adopt the first point based on the trouble, expense or embarrassment the husband had been spared but specifically embraced the second point in relation of the potential of the wife to end the desertion.

The case failed to adopt the views of Denning LJ in *Ward v. Byham.* Glidewell LJ referred to this matter in *Williams v. Roffey*[115] where he said: 'Denning LJ sought to escape from the confines of the rule [existing duty], but was not accompanied in this attempt by the other members of the court'. Hobhouse J in *Vantage Navigation Corporation v. Suhail and Saud Bahwan Building Materials LLC (The "Alev")* made a similar point:[116]

> Secondly, they [the plaintiff] alleged that an agreement simply to perform pre-existing contractual duties already owed by the promisor to the promisee is good consideration. It is not. The dicta of Lord Denning in *Ward v. Byham* and *Williams v. Williams*, upon which they relied, related to non-contractual duties or duties owed to another.

What is important is that the consideration finally adjudged to uphold the transaction was not bargained for, but, rather, arose from an inference from the transaction. The point is made here in a preliminary manner that, if consideration is detected as opposed to bargained for, it ceases to play a cautionary role and becomes instead a motive. This would also mean that the courts' role would change (if it has not already).

A question arises as to how the views of Denning LJ are to be reconciled with the later cases dealing with existing duties. The passage cited above from the judgment of Hobhouse J in *Vantage Navigation v. Suhail and Saud* suggests that there has been a divergence in the separate development of the two aspects of the principle. If the dictum of Denning LJ was taken as the *ratio decidendi* of the case then this might be so. It is submitted however that the answer to the question is immaterial. The conclusion is that

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[115] [1991] 1 QB 1 at p14.
[116] [1989] 1 Lloyd's Rep 138 at p147.

the majority in *Ward v. Byham,*[117] Morris LJ and Parker LJ, decided in a manner that was consistent with a unitary existing duty rule. This was also true of the majority, Hodson LJ and Morris LJ, in *Williams v. Williams.*[118] And, although not cited, *Glasbrook Bros v. Glamorgan County Council*[119] might have been applied to the facts of either case to justify the conclusion reached. Curiously, in not one of the cases referred to above was *Stilk v. Myrick*[120] cited in counsels' submissions or the judgments. In the existing legal duty cases, coercion was not likely to be a factor and this is perhaps the explanation for the suggestion that the existing duty rule might be relaxed in relation to public, as opposed to, contractual duties.

The evolution of the theoretical basis of the rules from public policy to consideration can be seen in *Bilke v. Havelock*[121] and to anticipate, *Stilk v. Myrick*.[122] The fully fledged working of the rules is demonstrated by cases like *Glasbrook Bros v. Glamorgan County Council* [123] and again to anticipate, *Swain v. West (Butchers) Ltd*.[124] The interest in the discussion of the separate legal history of the rules is to be found in the fact that the theoretical basis for the development of the concept of 'practical benefit' in the *Williams v. Roffey*[125] case (concerning a contract modification) was first articulated by Morris LJ and Parker LJ in *Ward v. Byham*[126] (a case concerning a legal duty).

2.10 Development of the existing duty rule (contractual duties)

The remainder of the chapter will comprise a detailed discussion of the development of the rule as it relates to the promise of performance of an act where the promisor is already under a contractual duty to perform that same act. This requirement has often been expressed in the epithet 'past consideration is no consideration'. Again it will be seen that public policy influenced the court in the development of this rule. This chapter will investigate how effective the existing duty rule has proved in protecting a party against an enforced contract modification.

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[117] [1956] 1 WLR 496.
[118] [1957] 1 WLR 148.
[119] [1925] AC 270.
[120] (1809) 2 Camp. 317.
[121] (1813) 3 Camp. 372.
[122] (1809) 2 Camp. 317.
[123] 1925 AC 270.
[124] [1936] 3 Ch. D. 261.
[125] [1991] 1 QB 1.
[126] [1956] 1 WLR 496.

The earliest cases where the existing duty question was analyzed in terms of policy appear to be those arising out of contracts for the employment of seamen.

2.11 The existing duty rule and the sailors' wages cases[127]

By the 18th Century international trade was crucial to the British economy with the result that sailors were regarded as performing a public service analogous to that of a modern day policeman or fireman.[128] Strict statutory provisions[129] applied to the manner of their engagement and certain incidents of their employment were enforced by criminal sanctions.[130] Contracts for the engagement of merchant seamen incorporated the customs of the trade. The first two cases to be discussed show this process working. The relevance of the *rationes decidendi* of these cases to the topic under discussion is not immediately apparent. However, as will be seen later, the cases exerted a considerable influence. How these cases intruded on later judicial thinking is the significant issue.

The first was the decision in *Hernaman v. Bawden.*[131] There a sailor sued for wages earned on a voyage 'to Newfoundland; and thence from Spain to Portugal, or some port in the Mediterranean'. The object of the voyage was to transport a cargo of fish from Newfoundland to Spain or Portugal. The ship was said to have been taken (presumably captured by an enemy) *en route* from Newfoundland to Europe. The issue was: when did sailors' wages become customarily payable in these circumstances? The statement was made in argument that 'freight is the mother of wages'.[132] Lord Mansfield found that wages became payable at the 'port of delivery' and in this case that would be 'Spain or Portugal or some port in the Mediterranean at the election of the freighter'. Accordingly, the plaintiff was not entitled to wages. Yates J put the matter succinctly

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[127] Superficially the cases dealt with to this point and the sailors' wages cases are part of separate lines of authority. The hypothesis does not hold up as the authorities show that even in the 19th Century the influence of *Stilk v. Myrick* went well beyond the sailors' wage situations. The editors of *Halsbury* vol. 43 para 227 and the *Digest* vol. 42 cases 2694–2728 deal with separate lines of authority by discussing the cases relating to recovery of sailors' wages under the title of *Shipping and Navigation*. The editors identify *Stilk v. Myrick* as the point where the authorities converge.

[128] This point is made by BJ Reiter, *Courts, Consideration and Common Sense* University of Toronto Law Journal (1977) 439 at p461.

[129] See 2 Geo II c.36 s1.

[130] Offences like absence without leave were provided for by the *Merchant Shipping Act 1894*.

[131] (1766) 3 Burr 1844; 97 ER 1129.

[132] id., at p1844.

that ‘as the freighter lost his cargo, the mariner ought to lose his wages’.[133] Both Lord Mansfield and Wilmot J saw the relationship as one of contract, with it open to the court to imply terms based on the customs of the trade.

The decision in *Abernethy v. Landale*[134] adopts a similar stance. The facts of the case have the elements of a CS Forrester novel. The plaintiff, a ship's officer, joined the ship ‘Winchombe’ as second lieutenant on a privateering voyage. The ship was authorized by *letters of marque*[135] to attack enemy shipping (Spain then being at war with Britain). After three months cruising it was proposed that the ship would sail to the coast of Africa and transport slaves to America. The pleadings state that:[136]

> [T]he plaintiff, in consideration of five pounds by the month as wages and of certain shares of all prizes ... entered on board the ship, as second lieutenant ... and that the wages ... should be paid to, and accepted in the manner following, viz. one half thereof at the place or places of delivery of the negroes in America, and the remaining part ... at her port of discharge in Great Britain.

The initial object succeeded with the capture of a Spanish vessel. The plaintiff was appointed prize-master and as such he sailed the captured ship to Lisbon where it was disposed of. He returned to Great Britain to find that the ‘Winchombe’ had been captured en route Africa to America and as a consequence did not complete the voyage. The plaintiff was paid his share of the prize and claimed wages on the basis that he continued in the services of the defendant master of the ‘Winchombe’ until he returned to Great Britain. He argued that he did not desert the ‘Winchcombe’ and only left her at the command of the defendant. The defendant argued that the ship had been captured before any freight had been earned. The argument prevailed.

The court divided the agreement into two transactions. First, the privateering aspect of the voyage was seen as a joint venture with the owners and the crew sharing any benefit that might accrue. The second aspect was a trading voyage that had failed. The court clearly saw payment of the sailors' wages as contingent on the outcome of the voyage.

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[133] id., at p1846.
[134] (1780) 2 Dougl. 539; 99 ER 342.
[135] According to the *CCH Macquarie Concise Dictionary of Modern Law* (1988) s.v. ‘letters of marque’: ‘an authority given to a private ship owner by a state to wage war on enemy shipping’.
[136] 2 Dougl. at p539.

Lord Mansfield made the point:[137] 'As a sailor on board a ship on a trading voyage, the plaintiff is entitled to nothing; for freight is the mother of wages, and the safety of the ship the mother of freight.' Counsel for the plaintiff conceded that 'freight is the mother of wages' describing the expression as 'laid down as a general maxim'[138] but cited no authority nor did Lord Mansfield. The question of consideration did not arise in this case as there was no promise other than that contained in the original agreement. It was a question of the implication of a custom of the trade into a contract.

There was a promise to pay additional wages in *Harris v. Watson*[139] where the defendant master of the 'Alexander' in consideration that the plaintiff would perform some extra work promised to pay him five guineas over and above his wages. The plaintiff proved that the ship was in danger and the promise was made to induce the seamen to exert themselves. Lord Kenyon dealt with the case thus:[140]

> If this action be supported, it would materially affect the navigation of the Kingdom. It has long since been determined, that when the freight is lost, the wages are also lost. This rule is founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger entitled to insist on extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.

In a footnote to the English Reports[141] (and presumably Peake's), his Lordship cited *Hernaman v. Bawden*[142] and *Abernethy v. Landale*[143] in support of the 'long since determined principle'. Lord Kenyon justified this as a matter of public policy, viz. 'the navigation of this kingdom'. The purpose of the policy was to encourage sailors to exert themselves to ensure the safe arrival of the cargo. There was no promise to pay additional wages in either case. The outcome of each case depended upon the implication of a term into the sailors' contracts of employment to the effect that payment was contingent on the successful outcome of the voyage. The sailors were required to share with the ship owner the risks associated with seafaring. This was presumably

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[137] id., at p542.
[138] id., at p540.
[139] (1791) Peake 101; 170 ER 94.
[140] id., at p103.
[141] 170 ER 94.
[142] (1766) 3 Burr 1844. It is noted that the plaintiff's name is misspelled in the English Reports. The correct spelling is *Hernaman* as referred to above.
[143] (1770) 2 Dougl. 539.

justifiable on the grounds of public policy. His Lordship, in something of a quantum leap, used the same public policy argument to deny promises of additional wages where additional effort on the part of the crew was needed to save a ship in danger. It is suggested that this is not the same public policy argument, the vice here to be guarded against being the potential for extortion.

The judicial imperative had moved from determining the terms to be implied into existing contracts in *Hernaman v. Bawden* and *Abernethy v. Landale* to denying the validity of an agreement modifying the terms of an existing contract or perhaps the validity of a new contract in *Harris v. Watson.*[144] The fact that this was happening was not addressed. It could be asserted that *Harris v. Watson* is the first case dealing with the modification of the terms of an existing contract. Otherwise, counsel for the defendant could have argued that the existing duty rule applied. *Dixon v. Adams*[145] and *Cumber v. Wade*[146] were surely known to counsel and might have been cited if thought relevant. It is suggested that the cases were not cited because the existing duty rule was thought to apply only to antecedent transactions and did not involve modification of existing contracts. The stage is now set for the most controversial of all of the early cases on this subject, *Stilk v. Myrick.*

2.12 Stilk v. Myrick

The plaintiff and other members of a ship's crew were engaged for a voyage from London to the Baltic and back to London. The plaintiff signed the ship's articles before the voyage commenced. In the course of the voyage two seamen deserted. The captain, after failing to fill their places at Cronstadt, promised that if additional hands were not found at Gottenburg and the ship was sailed shorthanded back to London, the wages of the deserters would be divided amongst those who remained. No new crew were available at Gottenburg and the ship was sailed home. The plaintiff sued for his share of the wages. The great interest in this case lies in the fact that two reporters reported it

[144] (1791) Peake. 101.
[145] (1597) Cro. Eliz. 538: 72 ER 785.
[146] (1718) 11 Mod. 342:88 ER.1077.

differently. John Campbell's (later Lord Campbell) account reported the significant part of Lord Ellenborough's judgment thus:[147]

> I think that *Harris v. Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here I say, the agreement is void for want of consideration. There is no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all that they could under all of the emergencies of the voyage. They had sold their services til the voyage should be completed .... Therefore, without looking to the policy of this agreement, I think it is void for want of consideration.

His Lordship added that if the seamen were at liberty to quit the vessel at Cronstadt or the capricious actions of the captain had triggered the problem there might have been sufficient consideration for the new promise. Isaac Espinasse, junior counsel for the plaintiff, reported the same passage, incidentally spelling the name of the defendant 'Meyrick':[148]

> His Lordship said, That he recognised the principle of the case of *Harris v. Watson* as founded on just and proper policy. When the defendant [sic. the plaintiff] entered on board the ship, he stipulated to do all work his situation called upon him to do. Here the voyage was to the Baltick and back, not to Cronstadt only; if the voyage had then terminated, the sailors might have had what terms they pleased.

Proponents of the contention that consideration should play no part in contract modification transactions point to the Espinasse report suggesting that the judicial respect might have been misplaced. If this were so it would be open to the courts to look afresh at the situation.

The question arises as to whether the facts of *Stilk v. Myrick* and *Harris v. Watson*[149] are sufficiently alike to require the same outcome. Lord Ellenborough thought so but changed the basis of the decision to want of consideration and declined to look at the public policy basis of *Harris v. Watson*. In doing so, his Lordship made little apology

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[147] (1809) 2 Camp. 317 at p319; 170 ER 1168.
[148] (1809) 6 Esp. 128; 170 ER 851.
[149] (1791) Peake. 101.

for his actions. If the correctness of either of the reports[150] were capable of determining the question, one would suppose that the Campbell report, being, prima facie the more complete of the two should be taken as the correct account of what Lord Ellenborough had to say. The reporter Campbell, as Lord Campbell 45 years later in *Harris v. Carter* reaffirmed the consideration requirement:[151]

> The voyage remained the same for which the man had shipped; there is no consideration for the promise to the plaintiff …. I cannot altogether agree with Lord Ellenborough, in *Stilk v. Myrick*, in discarding the ground of public policy on which Lord Kenyon relied in *Harris v. Watson*; for I think it would be most mischievous to commerce, if it were supposed that captains had power, under such circumstances, to bind their owners by a promise to pay more than was agreed for.

The facts of *Harris v. Carter*[152] were similar to *Stilk v. Myrick*[153] save that the captain may have exacerbated the situation by consenting to discharge some of the crew in port. The remarks modestly support the view put, although Lord Campbell restated the public policy issue in terms of agency. Needless to say Lord Campbell cited his own reports. The words of Lord Campbell have a ring of correctness about them.[154]

Perhaps revisiting the Espinasse reports should conclude this aspect of the discussion. Undeniably the first sentence of the report has Lord Ellenborough reaffirming the public policy issue. But the report continues:[155] 'When the defendant [plaintiff] entered on board the ship, he stipulated to do all the work his situation called on him to do.' Campbell has Lord Ellenborough say a similar thing:[156] '[b]efore they sailed from

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[150] See Reiter op. cit., ch.2 n.42, above, p461. The author, who argues that consideration should play no part in contract modification situations, expresses the view: '[I]t is difficult to accept that Espinasse would have erred in reporting a case in which he appeared as one of the counsel for the plaintiff'. Lord Denning, in a work, admittedly for general readership, puts forward an explanation for Espinasse's participation in the case and yet inaccurate reporting. These remarks also have a bearing on the Campbell report: 'After his time [Coke] there were reporters of varying qualities. Some were bad such as Espinasse. He was so deaf that "he only heard half of what was said and reported the other half". Others were good, such as John Campbell, afterwards Lord Campbell. As a young man he sat in Lord Ellenborough's court and reported his correct decisions — with improvements — and discarded the incorrect ones'. Rt Hon Lord Alfred Denning, *The Family Story* (Butterworths, 1981), p222.

[151] (1854) 3 El. & Bl. 559 at p562; 118 ER 1251.

[152] (1854) 3 EL. & Bl. 559.

[153] (1809) 2 Camp. 317.

[154] If further fuel were needed to be added to the controversy, the point could be made that Volume IV of the Espinasse reports was published in 1811 two years after the event whereas Volume II of the Campbell reports was not published until 1818 seven years later.

[155] (1809) 6 Esp. 128 at p129.

[156] (1809) 2 Camp. 317 at p319.

London they had undertaken to do all that they could under all the emergencies of the voyage'. The public policy issue was the potential for extortion at a time when the ship's captain is least able to resist a claim. This is what Lord Kenyon had in mind. The statement from the Espinasse report like that of the Campbell report is inconsistent with the public policy argument articulated in *Harris v. Watson*. Espinasse's reference to 'the stipulation to do all the work his situation called on him to do' can only be an incomplete reference to the content of the agreement. Those words have no relevance to the denial of recognition to a promise because it was forced. It is therefore suggested that the Espinasse report, notwithstanding its incompleteness and ambiguity, confirms the view that Lord Ellenborough based his decision on the presence or absence of consideration in the transaction.[157] Even so, the public policy reason for the rule did not diminish. The application of the consideration rule became the means of maintaining a situation that, for good public policy reasons, should continue.

The remarkable provenance of the case does not answer the question why did Lord Ellenborough shift the basis of the decision? Reiter[158] suggests that there might be less discrepancy than generally believed in Lord Ellenborough's remarks in that his Lordship was using the word 'consideration' in the 18th century sense as a reason why a contract should be enforced. Accordingly the requirements of maritime policy would fulfil this specification. Even so, Lord Ellenborough demonstrated a clear grasp of the modern principles of consideration in *Bunn v. Guy* [159] he said: 'A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise of such other as a consideration of profit or convenience to himself'. This was to anticipate the later view formed by Holdsworth[160] and reveals a surprising degree of foresight in regard to how the doctrine of consideration would develop. It is instructive to compare the language of *Stilk v. Myrick* and *Bunn v. Guy*. In *Bunn v. Guy* decided in 1803, Lord Ellenborough spoke of 'a consideration' twice in the passage quoted whereas his Lordship in *Stilk v. Myrick*[161] (in

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[157] Lord Scarman noticed this point and refers to it in *Pao On v. Lau Yiu Long* [1980] AC 614 at p633.
[158] op. cit., ch.2, n.42, above, p461. This view is also shared by John Adams & Roger Brownsword, *Contracts, Consideration and the Critical Path* (1980) 53 Modern Law Review 536 at p539 (hereafter Adams & Brownsword).
[159] (1803) 4 East 190 at p194.
[160] op. cit., ch.2, n.12, above, p11.
[161] (1809) 2 Camp. 317 at p319.

the Campbell report), decided in 1809, held that the 'agreement is void for want of consideration'. The use of the indefinite article suggests that his Lordship was in the earlier case referring to discrete reasons why promises would be enforced and in the later case to a more general principle. The question might be asked whether *Stilk v. Myrick* is the point in legal history where consideration begins to evolve into a general principle.

Grant Gilmore[162] has suggested two reasons for Lord Ellenborough's insistence on the presence of consideration or otherwise as the determinant of the validity of a transaction. First, that *Stilk v. Myrick* was a reaction against Lord Mansfield's 'attempt to uproot consideration theory' and second, as the promise was made onshore, the extortion issue did not arise. As to the first point, it is true that Lord Mansfield started his crusade in *Pillans v. Van Mierop*[163] and was a member of the court in both *Hernaman v. Bawden*[164] and *Abernethy v. Landale.*[165] The latter cases did not involve the giving of promises and accordingly the question of consideration did not arise. In those cases Lord Mansfield seemed bent on his other great preoccupation of incorporating mercantile custom into the common law. His Lordship's views on consideration started to falter as early as *Rann v. Hughes*[166] and were finally rejected in *Eastwood v. Kenyon.*[167] If there were a move to distance the law from those views it was subtle and not manifest in *Stilk v. Myrick.*[168]

The second reason is more feasible perhaps. The Attorney-General and his junior Espinasse had a good argument. There is no evidence mentioned in the report of *Stilk v. Myrick* that the ship was in any danger. This was in sharp contrast with the facts in *Harris v. Watson*[169] where the ship was in danger and might have been saved by the extra exertion of the crew. In *Stilk v. Myrick* the promise of extra wages came from the captain and was made in the most safe of circumstances. Gilmore[170] suggests that a

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[162] Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1974), p27.
[163] (1765) 3 Burr. 1664 at p1669.
[164] (1766) 3 Burr. 1844.
[165] (1780) 2 Dougl. 539.
[166] (1788) 4 Brown 27 & 7 T. R. 350; 2 ER 18.
[167] (1840) 11 A&E 438 at pp450–451.
[168] (1809) 2 Camp. 317.
[169] 3 Peake 101 at p101.
[170] op. cit., ch.2, n.162, above, p27.

finding based on the absence of consideration represented the easy option. It is also notable that the earlier cases dealing with the existing duty[171] were not mentioned in argument or the judgment. It is suggested that the line of authority requiring consideration for contract modifications started with Lord Ellenborough's paradigm shift.[172]

Most significantly, the point is made that changing the basis of the decision in *Harris v. Watson* does not deny the validity of the public policy underlying the case. It remained essential to protect a party to an existing contract from enforced or extorted contract modifications. Lord Ellenborough's paradigm shift did no more than declare that henceforth the vehicle for affording this protection was to be the doctrine of consideration. The rule in *Stilk v. Myrick*[173] would confirm whether or not a contract modification had been extorted.[174]

In terms of the mode of investigation suggested in chapter 1 of this work, the discussion on this point demonstrates how precedents can be manipulated to produce a desired outcome. It is doubtful if Lord Ellenborough changed the set of the substantive law. He did, however, change the conceptual basis for the further development of the law. The answer as to whether or not he achieved a just result is distorted by the passage of time and the change in 20th century attitudes. Even so, the answer is arguably yes. Lord Ellenborough was preferring the interests of a whole maritime nation to those of individual sailors.

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[171] *viz. Dixon v. Adams*(1597) Cro. Eliz. 538, *Pinnel's Case* (1602) 5 Co Rep 117a; *and Cumber v. Wade* (1718) Mod. 342.

[172] The point is made by J Cumberbatch, *Of Bargains, Gifts and Extortion: An Essay on the Function of Consideration in the Law of Contract* (1990) 19 Anglo-American Law Review 239 where at p248 the author points out: 'But with *Stilk v. Myrick* came the fully fledged intromission of the consideration principle and policy took a back seat'. Shatwell op. cit., ch.2, n.5, above, p304 has also proved prophetic on this point: 'Round these two questions, the value of the consideration and the protection of the public interest, the courts from the 16th to the 20th century, built up a body of rules many of which only received final judicial settlement in the 19th century, and a few of which still remain unsettled. The position is further complicated by the fact that the two questions, although logically and theoretically distinct, are sometimes raised by the one set of facts, and in some cases the courts appear to avoid the decision that a contract is contrary to public policy by treating the consideration as worthless'. As will be pointed out later the reverse of Professor Shatwell's proposition is also true in that the courts can detect ethereal consideration where justice demands.

[173] (1809) 2 Camp. 317.

[174] Lon L Fuller, *Consideration and Form* (1941) 41 Columbia Law Review 799 at p822 gives qualified support for consideration fulfilling this role.

Some of the later cases raised further discussion. For example, *Clutterbuck v. Coffin.*[175] The facts of this case are a social comment on the times. The plaintiff agreed to enter as a captain's cook on board a vessel of the Royal Navy after an undertaking by the defendant commander to pay the plaintiff wages beyond that which he would be entitled to as a seaman in the navy. Although irrelevant to the outcome, it seems the plaintiff served fish that displeased the defendant. The latter ordered the plaintiff flogged with 36 lashes. When the vessel was paid off, the defendant refused to pay the sum promised. The court treated the case as depending on the presence or absence of consideration. The facts of *Harris v. Watson*[176] and *Stilk v. Myrick* were distinguished but the principle applied. Erskine J confirmed a finding of consideration:[177] 'Here the contract was made at a time when the plaintiff was free, and not bound to enter into the service. There was consequently a good consideration for the promise of the defendant'.

The next question that must be asked is: did the further development of the existing duty rule satisfactorily guard against enforced contract modifications?

2.13 The existing duty rule and enforced contract modifications

The court in *Hartley v. Ponsonby*[178] considered a promise by a captain of extra payment to the plaintiff to assist to sail a dangerously shorthanded ship from Port Phillip to Bombay. *Harris v. Carter*[179] and *Stilk v. Myrick*[180] were cited. Lord Campbell did not make a direct connection between the presence of consideration and the absence of coercion:[181]

> For the ship to go to sea with so few hands was dangerous to life. If so it was not incumbent on the plaintiff to perform the work; and he was in the condition of a free man. There was therefore a consideration for the contract; *and the captain made it without coercion*. This is therefore a voluntary agreement upon sufficient consideration. This decision will not conflict with any former decision (italics added).

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[175] (1842) 3 Man. & G. 841; 133 ER 1379.
[176] (1791) Peake. 101.
[177] (1842) 3 Man. & G. 841 at p848.
[178] (1857) 7 El. & Bl 872; 119 ER 1471.
[179] (1791) Peake. 101.
[180] (1809) 2 Camp. 317.
[181] (1857) 7 El. & Bl 872 at p878.

The connection is nevertheless, clearly implied, by his Lordship's reference to both concepts in successive sentences.[182]

2.14 The existing duty rule as a rule of general application

Apart from the sailors' wages cases there was a series of decisions in the 19th and 20th centuries that applied the existing duty rule. The rule was applied to a variety of situations where the duty arose outside of the contract under examination.[183] The first case where *Stilk v. Myrick*[184] was cited was *Jackson v. Cobbin.* There, Willes (counsel), supporting a demurrer, argued: [185]

> [I]n Selwyn's Nisi Prius 8th edit. p48 citing *Harris v. Watson*, and *Stilk v. Myrick* it is stated that 'the mere performance of an act, which a party was already bound

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[182] The remainder of the sailor's wages cases do little more than demonstrate the intransigence of ship owners when faced with the prospect of paying more wages than they deem appropriate. *Turner v. Owen* (1862) 3 F. & F. 176; 176 ER 179, was almost a repetition of the facts in *Hartley v. Ponsonby* save that the danger was alleged to have arisen from damage to the vessel and a shortage of seamen. Cockburn CJ stated the principles to the jury that found as a fact that the vessel was seaworthy. In *Hanson v. Royden and Others* (1867) L.R.C.P. Vol III 47, because of the death of the captain, an able seaman was promoted second mate with a promise to pay him for the additional duties. The argument that the need for the plaintiff to perform additional duties fell within the emergency situation considered in *Harris v. Watson*, failed. The outbreak of war can change the degree of danger inherent in a sailor's contract. The first example is *O'Neill v. Armstrong, Mitchell & Co* [1895] 2 QB 418, where a British crew was engaged to deliver a Japanese warship built on the Tyne to its owners in Japan. Before the ship reached Japan war broke out between Japan and China. The plaintiff refused to continue with the voyage and sued for his wages. The Court of Appeal held that the plaintiff in continuing the voyage would be exposed to greater risks and accordingly justified in leaving the ship and entitled to his wages. A similar result followed in *Palace Shipping Company v. Caine and Others* [1906] AC 386. There the ship owners, unsuccessful in the Court of Appeal, reaffirmed their intransigence by appealing unsuccessfully to the House of Lords. In *Liston and Others v. Owners of Steamship Carpathian* [1915] 2 KB 43 the crew refused to sail because of the outbreak of World War 1. The ship was carrying war materials, there was a danger of mines and the German cruiser *Karlsrule* was thought to be in the area. The captain agreed to pay the crew additional wages if the crew would sail the ship back to Europe. The action was to recover the wages promised. Lord Coleridge CJ at p48 said: '[I]t was perfectly reasonable [for the crew] to consider every risk of capture .... [They] were justified in remaining on shore at Texas and refusing to proceed ... they were discharged from their obligation to sail ... the master ... was impliedly clothed with authority from the owners to make such reasonable contract as he could to obtain their services'. The last three cases did not involve any detailed discussion of how the question of consideration might apply to the situation. Once it was established that the declaration of war discharged the sailors from their prior obligation, the ability to make a new contract followed.

[183] In *Lewis v. Edwards* (1840) 7 M. & W. 229; 151 ER 780 the promise of the plaintiff to provide funds 'to cover any deficiency' after the bankruptcy of his former partners was held by the Court of Exchequer not to constitute the consideration necessary to support a promise made by the trustee of his former partners to the plaintiff, on the basis that the plaintiff was already bound to make up the deficiency. Similarly in *Cowper v. Green* (1841) 7 M. & W. 632; 151 ER 920 a party who had received payment as a result of participating in a scheme of arrangement cannot rely on his promise to give up security as consideration to support a further promise by the debtor. His participation in the scheme of arrangement discharges the debt and obliges him to give up the security.

[184] (1809) 2 Camp. 317.

[185] (1841) 8 M. & W. 790; 151 ER 1259 at p746.

> by the law to perform, is not a sufficient consideration'. Much less can a mere promise to perform such an act be any consideration.

The promise in question was a promise by the plaintiff to perform his obligation under a prior agreement. The demurrer succeeded. *Stilk v. Myrick* was also mentioned in counsel's argument in *Mallalieu v. Hodgson*.[186]

2.15 Application of the existing duty rule

The courts were applying the existing duty rule by the beginning of the 20th century with little discussion of the underlying principles. An early application was *Sanderson v. Workington Borough Council*.[187] There the plaintiff schoolteacher sued for the recovery of arrears in salary and a declaration that he was still employed by the defendant education authority. The defendant had promised to keep his position open and make up the difference between his pay as a teacher and his army pay during war service.

No cases were cited in support of the argument that there was 'no binding agreement and no consideration'. Younger J said:[188]

> [A]ssuming the letter was a contract [sic, surely an offer] he [the plaintiff] ... must establish ... [the defendant] would keep the plaintiff in their employment for the duration of the war, and that they would not determine the contract and that after the war they would take him back on the terms of the original contract of service ... there was no obligation on the plaintiff to return after the war …. There was no consideration for the alleged promise. The plaintiff did not agree *to do anything more or to alter his position beyond what he was bound to do*' (italics added).

The second case, *Swain v. West (Butchers) Ltd*[189] also involved the master and servant relationship. The plaintiff, a servant of the defendant, became aware of the misconduct of his managing director and was to some extent, himself, implicated in the misconduct. The chairman of the defendant company promised the plaintiff that if he co-operated in securing the managing director's dismissal, he would not be dismissed himself. The

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[186] (1851) 16 QB 690; 117 ER 1045. There the Queen's Bench held that the plaintiff could not rely on the fact of his having taken up bills as consideration because he was already obliged under a prior agreement to do so.
[187] (1918) TLR 386.
[188] (1918) TLR 386 at p387.
[189] [1936] 3 Ch. D. 261.

plaintiff complied but nevertheless was dismissed. He then sued on the verbal agreement he had made with the chairman. The defendant argued that the plaintiff's contract of employment contained a term requiring him to 'do all things in his power to promote, extend and develop the interest of the [defendant]'. Accordingly, since the plaintiff was already bound to assist the defendant, he had given no consideration for the defendant's promise not to exercise its right to dismiss him. The Court of Appeal accepted this argument. Lord Justice Greer unqualifiedly adopted the principle of law applied by the trial judge and pointed out[190] 'it is not good consideration for a person to promise the performance of something which is already his legal duty to perform'.

Again no authority was cited. Paradoxically, here a bargain clearly struck and apparently intended to be acted on was avoided by an application of the existing duty rule. The application of the rule was not needed to protect the promisor from an extorted contract modification (or, it could be argued from entering a new transaction). In fact if either party had been guilty of intimidatory conduct it had been the promisor.

Post 1947,[191] it is likely that an argument based on estoppel might have been mounted on behalf of the appellant. This would have posed a dilemma for the court as a public policy issue is thereby raised. Should a party be allowed to benefit from his own dishonest acts, the act in question being to carry out the managing director's orders and the benefit to keep his job as promised by the chairman. The alleged misconduct of the managing director was ambiguous, sharp, but to the ultimate advantage of the defendant.

2.16 The existing duty rule in other jurisdictions

The examination now turns to the Australian, New Zealand and Canadian authorities that fit, coincidentally, into the chronology of the discussion. It is noteworthy that these cases have treated the issue with more circumspection than has been the case in the United Kingdom. The absence of consideration, because of the application of the existing duty rule, has allowed the courts to protect a party whose promise of additional

[190] id., at p263.
[191] 1947 is the date of the decision in *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130.

performance was given in circumstances that would now have the potential for the application of the principles of economic duress.

The decision of the Full Supreme Court of NSW in *T.A. Sundell Pty Ltd v. Emm Yannoulatos (Overseas) Pty Ltd*[192] is a good example of the process at work. The plaintiff ordered iron from the defendant importer at an agreed price. The defendant notified the plaintiff of an increase in the price due to the intervention of the French Government. It was clear that if the plaintiff did not pay the increased price it would not get delivery of the iron. The plaintiff paid the increased price and sued for the overpayment. The court found for the plaintiff on general principles without citing authority. The general principle was stated thus:[193] 'One person cannot by any promise or performance which does not go beyond the limits of his pre-existing legal duty to another person provide a new consideration for a promise by that other person in his favour.'

Next is a decision of the Supreme Court of Victoria in *Popiw v. Popiw.*[194] Here a husband promised his estranged wife that if she would return to live with him he would transfer the matrimonial home to their joint names. The wife returned but later left because of further disputes. She sued for partition of the property. The defence raised was that the promise from the wife was to do no more than the law already required her to do, that is, to cohabit with her husband. Hudson J[195] cited a passage from Pollock[196] in support of the defence but noted that the proposition had been rejected by the Court of Appeal (UK) in *Ward v. Byham*.[197] He described the husband's position as 'untenable in the light of *Ward v. Byham'*.[198] With respect, his Honour might have been premature in citing Lord Denning's judgment as though it were the *ratio decidendi* of the case. His

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[192] [1956] S.R. (NSW) 323.
[193] id., at p327.
[194] [1959] VR 197.
[195] [1959] VR 197 at p199.
[196] 13th Edition at p146: 'neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party.'
[197] [1956] 1 WLR 496.
[198] Although his Honour was at pains to point out that *Ward v. Byham* [1956] 1 WLR 496 was not reported in the authorised reports he makes no mention of *Williams v. Williams* [1957] 1WLR 148, a later decision of the Court of Appeal (UK) with similar facts to *Ward v. Byham* and which goes part of the way to restoring orthodoxy.

Lordship may have been in the minority[199] with the majority view being that of Morris LJ[200] and Parker LJ[201] who each found an additional benefit accruing to the plaintiff. Hudson J, as an afterthought, found consideration moving from the plaintiff in the fact that, although she was under an obligation to cohabit with the defendant, there was no machinery to compel her to do so and the cruelty she had been subjected to may have given her a legal reason to remain apart. Here the existing duty rule would have worked unfairly against a promisee who, (if any) of the parties to the transaction was the victim of intimidatory conduct. Seemingly, the ultimate just result was brought about by his Honour's ability to find consideration in other conduct of the promisee.

In New Zealand, the strictly orthodox position was applied by Mahon J in *Cook Island Shipping Co Ltd v. Colson Builders Ltd*[202] where his Honour admonished those who might deviate from it. There the plaintiff carrier sued for additional freight payable in respect of the alleged need for a ship to remain in port for another day loading. The requirement for the ship to remain in port for the extra day arose from the plaintiff's miscalculation of the quantum of cargo (and consequently the time needed to load the cargo) and an industrial dispute.

His Honour found as a matter of fact that the contract required the plaintiff to load a quantity of cement and an unspecified tonnage of other materials and plant.[203] Furthermore the freight rates were assessable and payable by reference to an agreed schedule. Accordingly, the performance of this obligation could not be consideration for the promise of the shipper to pay an additional sum in respect of the delayed sailing. His Honour decided the issue categorically reaffirming *Stilk v. Myrick*[204] citing an American text writer[205] and an American authority.[206] As to those who criticised the correctness of *Stilk v. Myrick* his Honour said:[207] 'Such views, not acceptable in the courts of the United States, seem mainly to originate from jurists whose allegiance to the settled

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[199] This will depend on how his Lordship's remarks are interpreted. On this matter see the discussion of *Ward v. Byham* above at p29 et seq. of this work.
[200] [1956] 1 WLR at p498.
[201] [1956] 1 WLR at p499.
[202] [1975] 1 NZLR 422.
[203] id., at p434.
[204] (1809) 2 Camp. 317.
[205] *Williston on Contracts* (3rd edition), vol 1, p532.
[206] *Lingenfelder v. Wainwright Brewery Co* 15 SW 844 (1891).
[207] [1975] 1 NZLR 422 at p435.

doctrine of consideration is reluctant'. His Honour then cited the often quoted passage from Lord Denning's judgment in *Ward v. Byham*[208] and the criticism of it by Professor Goodhart.[209] He stressed the importance of consideration in the instant case and cases like *Lingenfelder v. Wainwright Brewery Co,* where demands for an additional payment were addressed to a party whose exposed position in terms of the original contract made that party vulnerable to extortion. This was a factor in the instant case as the carrier threatened to sail without the cargo. His Honour was able, with a firm application of the existing duty rule, to achieve a just result. What is more, this was done consciously on the basis that the rule had evolved for this very purpose.

The application of the existing duty rule in Canada was confirmed by the Ontario Court of Appeal in *Gilbert Steel Ltd v. University Construction Ltd.*[210] The facts and decision of the court are unexceptional. A supplier of steel sought to impose a price increase on a builder during a project. The builder acquiesced in the increase but refused to pay at the end of the transaction.

Wilson JA summed up the defendant's case:[211] '[w]here then was the *quid pro quo* for the defendant's promise to pay more?' The outcome[212] was in accordance with the principles discussed to date; however, the arguments that were put to the court that failed, are of interest. First, the argument that there had been a mutual rescission followed by a new contract was rejected on the basis that the negotiations related solely to price and were not directed to replacing *in toto* the original contract.[213] Second it was held that the promise of a 'good' price for the subsequent supply of steel lacked commitment on the part of the supplier.[214] The third argument was the most ingenious. Since the steel was supplied on credit allowing the purchaser 60 days in which to pay,

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[208] [1956] 1 WLR 496 at p498.
[209] A.L.Goodhart, *Performance of an existing duty as consideration* (1972) 52 LQR 490. This article is a case note and the author draws attention to the fact that the House of Lords decision in *Collins v. Godfroy* (1831) B. 4 Ad. 950) is probably still the law and that Lord Denning's statement in *Ward v. Byham* may have gone too far.
[210] (1976) 76 DLR (3d) 606.
[211] id., at p608.
[212] This decision has been strenuously criticized by Reiter op. cit., ch.2, n.42, above at p452, largely because of the absence of any discussion of the underlying policy reasons for the judgments.
[213] (1976) 76 DLR (3d) at p609.
[214] id., at p610.

an increase in the price necessarily increased the credit given to the purchaser.[215] This increase in credit was said to be a detriment to the promisee (in respect of the promise to pay a higher price for the steel). Conceptually, it is close to the consideration found to be sufficient in *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd.*[216] *Stilk v. Myrick* [217] was cited by counsel and the outcome required an application of that principle. The potential mischief that underpins the need for the existing duty rule was not discussed. The case was ultimately resolved by the failure of the promisee to demonstrate consideration that flowed from it in respect of the promise of a higher payment for the steel.

2.17 Summary of the working of the existing duty rule

The question posed above is repeated. How effective has the existing duty rule proved to be protecting parties against enforced contract modifications? In *Clutterbuck v. Coffin*[218] and *Hartley v. Ponsonby*,[219] the two sailor's wages cases immediately after *Stilk v. Myrick,* a finding of consideration negatived the suggestion of an enforced contract modification. The principle appears to have worked well for the remainder of the sailors' wages cases. *Bayley v. Honan*[220] and *Jackson v. Cobbin*[221] were cases involving an antecedent transaction and, accordingly, not concerned with contract modification. The existing duty rule was applied in both, and, in the latter case *Stilk v. Myrick* was cited for the first time, in support of the wider proposition that 'the mere performance of an act, which a party is already bound by law to perform, is not a sufficient consideration'.[222] Notwithstanding the intrinsic interest of the case, *Sanderson v. Workington Borough Council* [223] did not involve a contract modification. In *Swain v. West,*[224] the application of the rule seemingly produced an unjust result. For similar reasons, in *Popiw v. Popiw*,[225] an application of the rule would have caused rather than

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[215] ibid.
[216] [1979] 1 QB 705 per Mocatta J at p714.
[217] (1809) 2 Camp. 317.
[218] (1842) 3 Man. & G. 841.
[219] (1859) 7 El. & Bl. 872.
[220] (1837) 3 Bing. (N.C.) 915.
[221] (1841) 8 M. & W. 790.
[222] 8 M. & W. 790 at p796.
[223] (1918) TLR 386.
[224] [1936] 3 Ch. D. 261.
[225] [1959] VR 197.

prevented injustice. *Sundell v. Yannoulatos,*[226] *Cook Island Shipping v. Colson*[227] and *Gilbert Steel v. University Constructions*[228] were all cases where the promisor was relieved from the potential consequences of an extorted contract modification. These cases demonstrate the rule working at its best.

The rule will protect a promisor (in an existing contractual relationship) from the consequences of a further promise. This will not always guarantee a just result. In cases like *Swain v. West,* the promisor was able to refuse to perform the terms of what was ostensibly a carefully struck bargain. A further shortcoming of the rule is the fact that a person bent on coercing a concession from his or her contractual partner can easily fulfil the consideration requirement.[229] There is no great difficulty in forcing the victim to agree to accept payment of one dollar in return for the concession he or she has made. This is one of the reasons why the courts developed the doctrines economic of duress[230] and promissory estoppel. The doctrines of economic duress and promissory estoppel are discussed later in this work.[231] It is noted that whilst both doctrines have particular relevance to contract modifications, each has wider applications. Economic duress may be invoked to render voidable transactions outside an existing contractual relationship and affect the position of third parties.[232] A party who has been a victim of unconscionable conduct may invoke promissory estoppel in situations where there is no binding contract.[233]

2.18 The incidents of the doctrine of consideration

During the 19th century, with the increase of English commerce and the incursion of the common law courts into the law merchant, the doctrine of consideration responded by becoming more sophisticated. That sophistication was dictated by the needs of

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[226] [1956] S.R. (NSW) 323.
[227] [1975] 1 NZLR 422.
[228] (1976) 76 DLR (3d) 606.
[229] In this regard see the remarks of Hobhouse J in *Vantage Navigation v. Suhail and Saud Building Materials* discussed at p71 of this work.
[230] In the cases where economic duress has been held to have been a factor the courts have found sufficient consideration to uphold the extorted transaction and then granted or withheld relief to the victim under the rubric of economic duress. The consideration found to uphold the transaction in *Syros Shipping v.Elaghill* could at best be described as ethereal. This is equally true of the consideration found in *North Ocean v. Hyundai*.
[231] Economic duress below at p77 and equitable estoppel in chapter 5.
[232] See *Universe Tankships Inc of Monrovia v. International Transport Workers Federation and others* [1983] AC 366.
[233] *Walton Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387.

commerce and took the form of a number of sub-rules. The existing duty rule is an example and the discussion that follows it is proposed to trace the history of the other rules. In some instances those rules will need re-appraisal in the light of the decision in *Williams v. Roffey.*[234]

2.19 Consideration must move from the promisee

This proposition has and continues to be consistently applied by the courts and remains one of the essential characteristics of consideration. That is not to say that the rigid adherence to the rule does not at times lead to injustice or that the rule has escaped criticism.[235] As will be seen below, to apply the rule to the facts of a case like *Trident General Insurance Co Ltd v. McNiece Bros Pty Limited*[236] would have led to a manifest injustice. What is significant is that the requirement that consideration move from the promisee is under threat from the decision in *Williams v. Roffey*. The purpose of this discussion is to examine the origin of the rule and establish what policy requirement lay behind it. An extension of the discussion is the question of whether or not present social/economic circumstances justify the retention of the rule. If not, the developments implicit in the decision in *Williams v. Roffey*[237] need careful evaluation. This will form a later part of the work.

At the beginning of this discussion a preliminary issue is raised. Is the requirement that consideration move from the promisee equivalent to the doctrine of privity of contract? The question is asked because the cases do not always clearly identify the basis of the decision and some cases are decided on both principles simultaneously. In part, this

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[234] [1991] 1 QB 1.

[235] The most trenchant judicial criticism is found in the opening words of Lord Dunedin's speech in *Dunlop v. Selfridge* [1915] AC at p855: 'My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce'. As to academic criticism, particularly in regard to the rights of third parties, see F E Dowrick *A Jus Quaesitum Terti by way of Contract in English Law* (1956) 19 MLR 374 at p398. The Sixth Interim Report of the English Law Revision Committee (1937) recommended abolition of the rule. In some States of Australia the rule has been amended to give rights to third parties, see ss11(2)–11(3) of the *Property Law Act 1969* (Western Australia) and s55 of the *Property Law Act 1974* (Queensland). Section 48 of the *Insurance Contracts Act 1984* (Commonwealth) protects the rights of a third party beneficiary under an insurance contract. Had the legislation been in force at the time, the decision in *Trident v. McNiece* would have been unnecessary.

[236] (1988) 165 CLR 107.

[237] [1991] 1 QB 1.

arises from the fact that the rules relating to contracts for the benefit of third parties did not crystallize until the mid-19th century and the fact that there were many instances where the rules truly overlap. The position is described in the judgment of Mason CJ and Wilson J *Trident v. McNiece* where[238] their Honours pointed out: 'Thus, if A, B and C are parties to a contract and A promises B and C that he will pay C $1000 if B will erect a gate for him, C cannot compel A to carry out his promise, because, though a party to the contract, C is a stranger to the consideration'. As illustrated there will be cases where the privity rule will be met but the promisee cannot sue because of the absence of consideration flowing from the promisee. The reverse is not true; a promisee from whom consideration had moved wishing to sue a promisor would always be a party to the transaction. The question is not of great significance to the thesis of this work because the discussion will always be about a party to the relevant transaction in a contract modification situation. That party may or may not have given consideration for the promise sought to be enforced. The cases are best understood with the two principles in mind.

As with the previous discussion on the existing duty rule, the early decisions do not reveal a policy reason for the evolution of the rule. The earliest instances of the application of the rule show it to have been applied carefully[239] but without reference to a social context. Treitel[240] and Carter and Harland[241] suggest that the rule was clearly established by the mid-19th century but date its origins to the late-17th century.

A line of authority starts with *Crow v. Rogers.*[242] This was an action for *assumpsit* based on a promise of the defendant to pay a debt due by a third party to the plaintiff on the basis that the third party would give a mortgage over a property to the defendant. The short report does not say to whom the defendant gave the promise. It appears however that the promise was given to the third party. The report stated that[243] 'without much debate, the court held, the plaintiff was a stranger to the consideration, and gave

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[238] (1988) 165 CLR at pp115–116.
[239] See *Spratt v. Agar* (1658) 2 Sid 115; 85 ER 1287.
[240] Treitel, op. cit., ch.2, n.86 above, p65.
[241] op. cit., ch.1, n.4, above, 103.
[242] (1795) 1 Strange 592; 93 ER 719.
[243] id., at p592.

judgment pro def.' Again the case was based on want of consideration but might equally have been based on privity.

Crow v. Rogers was cited by Solicitor-General Campbell (later Lord Campbell) in *Price v. Easton*[244] where the court first thought it necessary to state some theoretical reasons for the position. The case was based on *assumpsit* involving the defendant Easton promising William Price to pay his debt (William Price's) to the plaintiff John Price after the William Price performed services for the defendant. William Price performed his part of the agreement. The court stopped Campbell's argument for the defendant short. Three of the four short judgments make a contribution to the discussion and accordingly each is set out. Firstly Denman CJ made a clear statement of the rule:[245]

> I think the declaration cannot be supported, as it does not *shew any consideration for the promise* moving from the plaintiff to the defendant (italics added).

Littledale J put the matter in terms of privity:[246]

> *No privity is shown* between the plaintiff and the defendant. This case is precisely like *Crow v. Rogers* (1 Str. 582), and must be governed by it (italics added).

Taunton J gave a practical reason why the rule should be maintained:[247]

> It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between William Price and the defendant.

Lord Denman based his judgment on want of consideration and Littledale J on the absence of privity. Both decisions are correct. It is suggested that the three judgments encapsulate the scope, conceptual basis and practical reason for the rule. Essentially the rule is to identify the parties to an enforceable transaction and to ensure that those parties are in a position to know the potential consequences of their actions. Implicit in the judgment of Taunton J is the assumption that consideration identifies the reason why the transaction was entered. Otherwise why would the plaintiff's knowledge of the

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[244] (1833) 4 B. & AD. 432; 110 ER 518.
[245] id., at p434.
[246] ibid.
[247] id., at p435.

transaction between John Price and William Price be relevant? It remains to examine some further applications of the rule in order to see how well it has performed the role assigned to it.

The first is the difficult case of *Thomas v. Thomas*[248] where a husband, prior to his death expressed a wish that his widow, the plaintiff, should receive a life estate in the matrimonial home and its contents or the sum of £100 in lieu. After the husband's death, the executors in consideration of the desire expressed by the deceased, on the basis that the plaintiff paid one pound annually toward the ground rent and gave an undertaking to keep the premises in good and tenantable repair, agreed to convey a life interest to her. The court was unanimous in holding that the moral obligation resulting from the deceased's wishes was not consideration but found it in the undertaking to pay one pound annually and to maintain the premises. The judgments of Denman CJ and Coleridge J are largely confined to matters of construction of the instrument. Patterson J dealt with the issue under examination here:[249]

> Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff, or some detriment to the defendant: *but at all events it must be moving from the plaintiff* (italics added).

The question is why did his Lordship find it necessary to emphasize the proposition by introducing it with the words 'but at all events?' The answer is to be found in the drafting of the instrument where the only consideration appropriately referred to was the desire of the testator to benefit his widow.[250] The agreement to repair and to pay the ground rent of one pound per annum merely added a proviso. For the widow to succeed, it was necessary to establish the connection between her detriment and the promise she sought to enforce. Here the requirement that consideration move from the plaintiff was used to fulfil the function of identifying the transaction and the party who was to benefit from it.

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[248] (1842) 2 Q.B. 851; 114 ER 330.
[249] id., at p859.
[250] This instrument was drawn up in 1837 three years before the decision in *Eastwood v. Kenyon* (1840) 11 A & E 438. On one view the moral obligation referred to in the document as consideration would have sufficed however after *Eastwood v. Kenyon* (1840) 11 A & E 438 this was not so. See Plucknett, op. cit., ch.2, n.9, above, 654.

Further justification of the rule is found in *Tweddle v. Atkinson*[251] where the fathers of an intended bride and groom promised each other that they would settle marriage portions on their children. A written agreement was entered when the marriage took place. After the death of his father, the groom sued the estate of his wife's father to recover the unpaid portion. The court apparently considered that some earlier precedents to the contrary did not apply because counsel for the defendant was stopped after citing *Price v. Easton*.[252] Wightman J put the position succinctly:[253] '[I]t is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.' The expression 'stranger to the consideration' is ambiguous because it could be a reference to a person who has not provided consideration or a person who was not a party to the transaction. The words 'although made for his benefit' suggest the latter. It seems that the remarks can be taken as authority for both principles. The most emphatic statement was that of Crompton J:[254]

> The modern cases have, in effect, overruled the old decisions; they shew that consideration must move from the party entitled to sue upon the contract. *It would be a monstrous proposition to say that a person was a party to a contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued* (italics added).

These are strong words and clearly indicate the *rationale* of the rule. Here again the rule was used to identify a party who should be entitled to the benefit of an agreement (although in this case the effect of the application of the rule was to deny a benefit to the plaintiff). Not only did the rule identify a party to a transaction but also the consideration moving from that party implied his or her consent to the transaction.

The principle seems equally applicable to commercial transactions. The clearest statement of the position is to be found in the speech of Viscount Haldane LC in the House of Lords decision *Dunlop Pneumatic Tyre Company v. Selfridge & Company Limited* where his Lordship, after referring to the privity rule, said:[255]

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[251] (1861) 1 B. & S. 393; 121 ER 762.
[252] *Price v. Easton* (1833) 4 B. & AD. 432 and *Tweddle v. Atkinson* are also considered to be authorities for the doctrine of privity of contract.
[253] (1861) 1 B. & S. 393 at pp398–399.
[254] id., at p398.
[255] [1915] AC 84 at p853.

> A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

This rule his Lordship described as 'fundamental'.

The Australian position was considered in the judgment of Windeyer J in *Coulls v. Bagot's Executor and Trustee Co Ltd.*[256] The transaction in question involved a landowner granting certain rights over his land in consideration of the payment of a royalty. The agreement authorized payment of the royalty to the grantor and his wife as joint tenants. On the grantor's death the question arose as to whether the wife was entitled to continued payments. His Honour noted the parallel existence of the rule relating to privity and the requirement that consideration move from the promisee:[257]

> By the common law of England only those who are parties to a contract can sue upon it. For us that statement is incontrovertible. But what exactly is meant by it? Is there a useful distinction between denying a right of action to a person because no promise was made to him, and denying a right of action to a person to whom a promise was made because no consideration for it moved from him?

Later, on the same page, his Honour reflected on the continued discrete existence of both rules: 'Doubtless the two requisites merge in the strict view of a contract as a bargain, a promise for which the promisee has paid the price'. After discussing the views of the American academic writer Williston and the inconclusive state of the English authorities, he concluded:[258] 'For us the rule prevails that a plaintiff who sues on a promise must shew a consideration for it provided by him'. The recognition by the courts that only a person from whom consideration moves can sue on the contract was a significant event in the evolution of the modern doctrine of consideration. His Honour pointed this out:[259]

> The law [the extent of rights of third parties to contracts] was not in fact 'settled' either way during the two hundred years before 1861 [the date of the decision in *Tweddle v. Atkinson*]. But it was, on the whole, moving toward the doctrine that was to be then and thereafter taken as settled. And with the growth of the rule that consideration must move from the promisee there went a hardening of the

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[256] (1962) 119 CLR 460.
[257] id., at p494.
[258] (1962) 119 CLR 460 at p495.
[259] id., at p498.

> meaning of consideration. For the common lawyers it was not something evidencing an intention to be bound by a simple promise, rather it was an essential of an action of express assumpsit.

The High Court was subsequently required to consider similar issues in *Trident General Insurance Co Limited v. McNiece Brothers Pty Limited.*[260] This was a case where justice certainly required the outcome arrived at by the Court but in doing so the Court failed to provide a definite basis for future development of the law. The respondents claimed indemnity under an insurance policy issued by the appellant insurer. The respondent was not a party to the insurance contract, which was issued in terms that the indemnity extended to the insured named in the contract, and 'all its subsidiary, associated and related companies, all contractors and subcontractors and/or suppliers'. The respondent was such a subcontractor and had suffered a loss contemplated by the terms of the policy. It was not a party to the insurance contract thereby directly raising the issue of privity and clearly no consideration had moved from it. The appellants refused indemnity on the basis that the respondent was not a party to the contract.

Whilst the actual decision implies some retreat from the requirement that consideration move from the promisee and the judgments considered the authorities in both the consideration and privity contexts, it seems clear that the majority of the High Court thought that it was the privity rule that was under threat. Mason CJ and Wilson J found in favour of the subcontractor but were careful not to disturb too much of the existing law in saying:[261] 'In the ultimate analysis the limited question we have to decide is whether the old rules apply to a policy of insurance'. Toohey J came to a similar conclusion. In his dissenting judgment Brennan J supported the continued existence of the principle posing the question to be answered with clarity:[262] 'The true question for decision is, therefore, this Court should now decide to overrule the settled and fundamental doctrine of privity'. Dawson J dissented on a similar basis. Deane J supported the principle pointing out:[263] 'No such reasons [compelling] are available to justify the wholesale abrogation of the general common law rule of privity of contract'. He then proceeded to decide in favour of the subcontractor on the basis of an implied

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[260] (1988) 165 CLR 107.
[261] id., at p123.
[262] id., at p131.
[263] id., at p143.

trust. Gaudron J found for the subcontractor on the basis of unjust enrichment. The view of the court seems evenly divided. Three of the justices (Mason CJ, Wilson J and Toohey J) were prepared to admit a limited exception to the privity rule. Three of the remainder (Brennan J, Dawson J and Deane J) supported the continued existence of the rule. Gaudron J did not express a view on this aspect of the case. To the extent that consideration and privity are parallel doctrines the conclusion must be that if the force of the privity rule has been diminished, so too has the requirement that consideration move from the promisee.

Professor Sutton typifies the reaction to the decision: 'and it is suggested that it will have major repercussions throughout the law of contract generally, despite the differing bases for the majority opinions and the cautious approach of some of its members'.[264]

To date these predictions have not materialized. Notwithstanding the just outcome, the decision has received criticism. The most persuasive is that of Peter Kincaid[265] who wrote:

> The Trident case is unsatisfactory not because it allowed a third party beneficiary a cause of action or because it challenges privity and bargain, but because it offers no satisfactory replacement for the theory of bargain. The reasons the court gave for recognizing a right to sue are weak and inconsistent with the common law's approach to civil liability. That approach is to give a plaintiff a cause of action against a defendant not solely because of something the defendant has done, but because there is a legally relevant link between what he has done and the plaintiff's condition.

The Federal Court had the opportunity to take the matter further in *Winterton Constructions Pty Limited v. Hambros Australia Limited*,[266] a case concerning a building contractor who sued the financier of a party with whom it contracted to erect a building (building owner). There was no contract between the building contractor and the financier although the financier had made payments on behalf of the building owner to the contractor. These payments were made at the direction of the building owner. This claim put the position of third party rights at the most ambitious level imaginable.

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[264] Kenneth Sutton, *Insurance* (1988) Vol 16 *Australian Business Law Review* at p478.
[265] Peter Kincaid, *Rationalizing a Right to Sue* (1989) 48 Cambridge Law Journal 243 at p243.
[266] (1991) 101 ALR 363.

Gummow J described the proposition as 'untenable' and adopted a cautious stance as to the ratio of *Trident v. McNiece*:[267]

> At best from the viewpoint of [the builder], there is support by three only of their Honours (Mason CJ, Wilson J and Toohey J) for the proposition that in addition to the qualifications and exceptions already established to the doctrine of privity of contract, the old rules do not apply in their full rigor. And their Honours confined their decision to the position of third parties claiming under some policies of insurance.

2.20 Benefit to the promisor or detriment to the promisee

Text writers have asserted that it is the detriment to the promisee that is of the essence to the notion of consideration. For example, Holdsworth argues strenuously '[i]n truth, detriment to the promisee is of the essence of the doctrine, and benefit to the promisor is, when it exists, merely an accident'.[268] This view was derived from the tortious origins of the action of *assumpsit*. The expectation that there should be some causal relationship between detriment to the promisee and benefit to the promisor is a remnant of the requirement for *quid pro quo* under the earlier form of action in debt.[269] However, Treitel[270] points out that there have been a number of cases where benefit to the promisor or a third party alone without actual detriment to the promisee have been held to be consideration. One case cited was *Bolton v. Madden*[271] where the plaintiff and the defendant were both members of a charity board and as such entitled to cast a vote as to the identity of the beneficiaries of the charity. The plaintiff expressly agreed that if he gave his votes to an object of the charity favoured by the defendant, at the next election the defendant would vote for an object favoured by the plaintiff. The plaintiff performed his part of the transaction but the defendant failed to do so. Blackburn J resolved the issue on general principles without citing any cases. His Lordship said:

> The general rule is, that an executory agreement, by which the plaintiff agrees to do something on terms that the defendant agrees to do something else, may be enforced, if what the plaintiff agrees to do is 'either for the benefit of the

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[267] id., at p368.
[268] op. cit., ch.2, n.12, p11.
[269] id., at. p7.
[270] op. cit., ch.2, n.86, above, p65.
[271] (1873) L.R. 9 Q.B. 55.

> defendant or to the trouble or prejudice of the plaintiff:' see Com. Dig. Action of the case in assumpsit, B. 1.[272]

This authority is not as definite on the point as is suggested by Treitel. Whilst the undertaking and subsequent action did not cause any measurable detriment to the plaintiff, it did limit his future action.

Furmston[273] is sceptical about the importance of detriment to the promisee and suggest that Lord Dunedin's definition in *Dunlop v. Selfridge*[274] is more in keeping with the commercial character of the English contract. The rule is an extension of the requirement that consideration move from the promisee. If A claims to have a promise enforced, as evidence of his or her case, it is necessary to plead that consideration was furnished in terms of a benefit or detriment. It is suggested that the requirement facilitates the proof of the transaction alleged. Accordingly, this substantive requirement also fulfils an evidentiary role.

2.21 Does the detriment or benefit need to comply with the description *legal*?

A third aspect of consideration to emerge from the 19th Century cases is the suggestion that consideration must confer a benefit or occasion a detriment that is described as 'legal'. Treitel[275] sees the benefit or detriment as having the capacity to be either legal or practical. The author's work was completed since the decision in *Williams v. Roffey*[276] and the practical requirement was introduced into the text to recognize that decision. As to the legal concept, the author points out that:

> [T]he promisee may provide consideration by doing anything that he is not legally bound to do, whether or not it actually occasions a detriment to him or confers a benefit on the promisor; while conversely he may provide no consideration by doing what he is legally bound to do, however much this may in fact occasion a detriment to him or confer a benefit on the promisor.

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[272] id., at pp56–57.
[273] op. cit., ch.2, n.86, above, p73.
[274] [1915] AC 847.
[275] op. cit., ch.2, n.86, above, p65.
[276] [1991] 1 QB 1.

Here it would seem that Treitel sees the 'legal' requirement as a refinement of the existing duty rule. The distinction is not always easy to see. Other authors however maintain that there might be two separate rules. Lindgren, Carter and Harland[277] in formulating their definition of consideration qualified the word 'detriment' with the adjective 'legal'. The authors continued their discussion of the characteristics of consideration under the title 'Consideration must be something of value in the *eye of the law*'[278] (italics added). The basis of the proposition was a remark by Patterson J in *Thomas v. Thomas*[279] that the authors described as 'elliptical'. In their discussion of the existing duty rule the authors went close to anticipating the decision in *Williams v. Roffey*.[280]

Suggestions that consideration meet the specification of 'legal' or 'value in the eyes of the law' are comparatively recent.[281] Greig and Davis[282] suggest that the development was a corollary to the rejection of Lord Mansfield's liberal views of consideration in *Eastwood v. Kenyon*.[283] In the view of the authors the requirement was taken up to account for the cases where the promisee had acted in reliance on a promise but where the advantage/disadvantage element was obscure. This was a supplementary matrix to account conceptually for those transactions hitherto recognised by the law but not admitting of analysis in terms of bargain. The decisions supporting that view certainly start soon after. The most significant was *Thomas v. Thomas*.[284] Greig and Davis[285] develop their argument by making the point that the courts in this regard: 'were no longer concerned with the actual benefit or detriment, but fictional substitutes for those

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[277] KE Lindgren, JW Carter & DJ Harland, *Contract Law in Australia* (Butterworths, 1986) (hereafter *Lindgren, Carter & Harland*), p82. This work is an earlier edition of Carter & Harland.
[278] id., p87.
[279] (1842) 2 Q.B. 851 at p859, the passage is set out in full at p55 of this work.
[280] op. cit., ch.2, n.277, above, pp101–102.
[281] But c.f. the slight suggestion of the distinction between 'legal' and 'practical' benefit in *Smith v. Smith* (1585) 3 Leonard 88; 74 ER 559. There the defendant promised a testator that he would procure an assurance of land to one of the testator's children in return for a promise to be made executor of the testator's estate. He was sued on an *assumpsit* to enforce this promise and the action failed on the basis that the transaction was a *nudum pactum*. Although the consideration moving to the promisee was of considerable practical benefit in that it presented an opportunity for profit, the law did not permit an executor to benefit in this way and accordingly the consideration failed to meet the description 'legal'. This is also an early case where the consideration moving to the plaintiff tainted the transaction as in *Larkin v. Girvan* (1940) SR (NSW) 365.
[282] op. cit., ch.1, n.4, above, p78.
[283] (1840) 11 A & E 438 at pp450–451; see the discussion at p15 of this work.
[284] (1842) QB 330.
[285] op. cit., ch.1, n.4, above, p78.

factors'. *De La Bere v. Pearson*[286] is cited as an example. The discussion is concluded with a reference to a passage in an article by Corbin where the American author inverts the principle by saying that the courts undertake 'the necessary process to find out whether it is a legal benefit or legal detriment, by determining whether or not the courts have held it to be legally operative'.[287] This is in keeping with the views of Professors Atiyah and Holdsworth.[288] Over time the courts have clearly identified certain categories of conduct as fulfilling the description 'legal'. Those categories include: promises of marriage,[289] payment of money,[290] promise to perform an existing duty to a third party[291] and compromise of legal claims.[292] The list seems not to be closed and the courts are prepared to add to it. It will be suggested later in the work that this is what happened in *Williams v. Roffey*.[293]

The rules under discussion were developed to identify the parties to a transaction and to ensure that the assumption of contractual obligations was a deliberate act involving the consent of the parties.[294] The requirement, that the acts that suffice as consideration, result in a benefit or detriment or fulfil a description 'legal' are essentially qualitative. This can be met by a slight but observable alteration in the position of the promisee. It is likely that in terms of categories of benefits or detriments that will be recognized as 'legal', 'practical benefit' has been added to the list.

2.22 Consideration need not be adequate

In this discussion, it is intended to examine the nature of the refusal of the courts to investigate the adequacy of consideration and the reasons for this refusal. The logic of the requirement that consideration amount to the conferring of a 'benefit' is not entirely consistent with the courts' unwillingness to investigate the adequacy of consideration. The rules, as well as overlapping, also have discrete elements. The 'legal benefit'

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[286] [1908] 1 KB 280. In this case the benefit/detriment dichotomy is elusive. The plaintiff lost money as a result of being introduced to a fraudulent stockbroker through an investment advice column in a newspaper. Vaughan-Williams LJ at p287 found a benefit to the promisor in the potential increased circulation gained from publishing letters seeking financial advice.
[287] Corbin, *Some Problems in Restatement of the Law of Contracts* (1928) 14 Am. Bar. Ass. Jo. 652 at p653.
[288] op. cit., ch.2, n.42.
[289] *Joscelin v. Shelton* (1557) 2 Leon 4, discussed above at p11 of this work.
[290] *Thomas v. Thomas* (1842) 2 QB 330 discussed at p55 of this work.
[291] *Shadwell v. Shadwell* (1860) 9 C.B. (N.S.) 159.
[292] *Callisher v. Bischoffsheim* (1870) LR 5 QB 449.
[293] [191] 1 QB 1.
[294] See Compton J in *Tweddle v. Atkinson* (1861) 1 B. & S. 393 at p398.

requirement involves a discussion of what category of act, promise or transfer of property the courts will treat as consideration to support a promisor's promise. The present discussion raises the question: once it is established that what is relied on as consideration falls within an acceptable category, will the courts attempt any quantitative analysis of the worth of the putative consideration? The courts answer has always been definitely in the negative, however, the matter merits further examination as this may have been rendered less certain by the *Williams v. Roffey* [295] decision.

Thomas v. Thomas [296] illustrates the interface between the two rules. The case is dealt with in detail in this work,[297] however, it will be recollected that it was held that the payment of a nominal annual ground rent and an undertaking to maintain a property was a good consideration for the conveyance of a life interest in the property. The court held that the recited testator's wish, arising from moral and familial obligations, was a category of historical event not regarded as consideration. However, the promise to pay an insignificant sum of money was accepted as good consideration.

It would seem obvious that the task of investigating every disputed transaction for its intrinsic value to the parties would be beyond any legal system. At the theoretical level Reiter,[298] citing Morton Horwitz[299] explains the phenomenon in terms of economic history. The author points out that contracts until the 19th century involved face to face changes in ownership of non-fungible goods of objectively, roughly equivalent value. The value of the goods was obvious, assessable in terms of custom and not subject to change. However the rise of wider-than-local markets and the speculation in fungible commodities undermined the theory of objective value leading to the only workable position: that a thing was worth what or whatever the purchaser was willing to pay and the seller willing to accept. Clare Dalton[300] warns that the seeming objectivity of acceptance of the fact that the parties have named a price does not divorce the process from questions of intention. Greig and Davis[301] make the point that application of the

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[295] [1991] 1 QB 1.
[296] (1842) 2 QB 330.
[297] See above at p55.
[298] B.J. Reiter, op. cit., ch.2, n.42, above, p471.
[299] Morton Horwitz, *The Transformation of American Law* (1976), pp161–167.
[300] Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine* (1985) 94 Yale Law Journal 997 at p1072.
[301] op. cit., ch.1, n.4, above, p90.

rule made it possible for the courts to give effect to a range of promises that did not easily fit into the bargain analysis. The authors go on to point out that it was necessary for the courts to develop the concept of an intention to enter legal relations to overcome shortcomings in the principle under discussion.[302]

There have been many clear judicial statements that the courts will not investigate the adequacy of consideration. An early example is *Sturlyn v. Albany*[303] where the court said: 'for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action'. There the defendant assignee from a life tenant promised that if the plaintiff showed him a deed that the unpaid rent was due, he the defendant would pay the arrears. The production of the deed was held to be a good consideration to support the promise. The case also identifies a category of promise that will be held to be good consideration. Nearly three centuries later Lord Denman made the same point in *Skeate v. Beale*: [304] 'The consideration being not unlawful, we cannot enter into its adequacy'. For a more modern example see Morris LJ in *Williams v. Williams*: [305] 'The probability of such events (a wife offering to return to the matrimonial home thereby ceasing to be in desertion) need not be measured, for the court does not inquire into the adequacy of consideration.' Soon after, at the highest judicial level, in *Chappell & Co Ltd v. Nestlê Co Ltd* Lord Somervell said: [306]

> It was said that when received the wrappers [chocolate] were of no value to Nestlês. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.

There are many examples where a trifling benefit has been held to be good consideration. The most remarkable modern example is *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co Ltd* [307] where Mocatta J held that the shipbuilder's increasing the security for its own performance of a contract (the shipbuilder increased the monetary value of a bond), pursuant to a term in the same contract was

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[302] id., pp92, 191.
[303] (1587) Cro. Eliz. at p67.
[304] (1841) 11 Ad & E 984 at p992.
[305] [1957] 1 WLR 149 at p155.
[306] [1960] AC 87 at p114.
[307] [1979] 1 QB 705 at p714.

consideration for the owner's agreement to pay an increase in the contract price for the ship. Admittedly, his Lordship doubted that the requirement to increase the security was necessarily a term of the original contract.

A modern explanation of the continued application of the rule was found in *Woolworths Ltd v. Kelly.*[308] There the plaintiff sued for the recovery of an annuity. The defendant sought to show by simple arithmetic that the consideration given for the annuity was worth much less than the performance of the defendant's promise. There Kirby P pointed out:[309]

> In the marketplace, in the myriad of situations that lead to contracts, different participants will put different values upon the bargain they are getting. The subject of a bargain may be specially important to a party. It may be valued for idiosyncratic, sentimental, ethical or other reasons as well as economic reasons. That is why it has been said so often that it is impossible for the law to indulge in an evaluation of the equivalence of the promises exchanged by parties to a contract.

His Honour continued that if an evaluation had to be made, it would be made by lawyers who by training are not fitted to the task. In addition it would multiply disputes and lead to uncertainty in a branch of the law where certainty is essential. He continued:

> The restraint of the common law in this regard is also an attribute of economic liberty. That liberty exacts a price in social terms. However, respecting the rights of the parties at law to reach their own bargains, untroubled by the paternalistic superintendence of the courts as to the adequacy of their bargains is the approach which the common law has adopted. It is an approach protective of economic freedom.

As Lindgren, Carter and Harland[310] have pointed out, the exception to this rule is where an obligation has been reduced to money and is thus readily measurable. A promise by a debtor to pay a lesser sum is not good consideration for the creditor's promise to release the debt.[311] The proposition is older than the doctrine of consideration itself and was first

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[308] (1990) 22 NSWLR 189.
[309] id., at pp193–194.
[310] op. cit., ch.2, n.27, above, pp77, 88.
[311] Care needs to be taken in analysing the legal concepts involved in a debt and the subsequent modification of the transaction. Suppose A lends money or supplies goods to B thereby creating a debt from B to A. It is submitted that the transaction should be analysed in the following terms. Before the money is advanced or the goods supplied there might exist an executory contract between A and B. The consideration moving from A being the promise to make the advance or supply the goods and that

stated in relation to the action of debt in *Pinnel's Case*.[312] The circumstances of the case justify examination. Pinnel brought an action of debt on a bond payable on a stated date. The defendant pleaded that he had paid a lesser sum prior to the due date, which Pinnel had accepted. Pinnel sued for the balance. The Common Pleas gave judgment for the plaintiff on a technical point although the facts of the case seemed to meet a criterion referred to. The text of the judgments is not to be found in the report but in lieu Coke's description of the decision survives. It was said:[313]

> [I]t appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff's action for a greater sum: but the gift of a horse, hawk, or robe & c. might be more beneficial to the plaintiff than the money, in respect of some circumstances, or otherwise the plaintiff would not have accepted of it in satisfaction.[314]

A similar principle was approved in respect of lesser payments before the due day and lesser payments at a place other than that originally stipulated for payment. There are three matters to note about the case. First, the court seems to be declaring well-established law and in doing so cited unnamed but nevertheless clear authorities. Second, the decision was followed in *Cumber v. Wade.*[315] The third matter of comment is the great respect accorded both the decision and Lord Coke's report of it by the House of Lords in *Foakes v. Beer*.[316] There the principle was subsumed into the law on consideration.

Foakes v. Beer concerned an agreement between the appellant judgment debtor and the respondent judgment creditor. The respondent undertook in writing that in consideration

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moving from B the promise to pay for the goods or repay the loan. The creation of the relationship might be instantaneous as in the case of the supply of the goods by A to B on credit. Once the advance is made or the goods supplied the contract is partially executed with only B's performance outstanding. To modify B's obligation it is necessary to make a new contract to discharge the first contract and this requires consideration moving from B to support A's promise to accept a reduced payment. What has been described is, the legal principle, accord and satisfaction. On this matter see Furmston op. cit., ch.2, n.86, above, p557.

[312] (1602) Co. Rep. 117a; 77 ER 237.

[313] id., at p117a.

[314] Respect for *Pinnel's Case* was by no means universal. Of it Sir George Jessel MR said in *Couldery v. Bartrum* (1880) 394 at p399: 'According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19s. 6d. in the pound; that was a nudum pactum'.

[315] (1718) 11 Mod. 342; 88 ER 1077.

[316] (1884) 9 App. Cas. 605.

of the debtor making an initial payment of part of the judgment debt and paying the balance by instalments the respondent would not take action on the judgment. All payments were made on time and the judgment debt with the costs was paid in full. The respondent then claimed the interest to which she was entitled by law under the judgment. The issue was whether the agreement not under seal, without consideration and not operating as an accord and satisfaction was enforceable. Lord Selborne LC pointed to the dilemma.[317]

> The question, therefore, is nakedly raised by this appeal, whether your Lordships are prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by the judges of the Common Pleas in *Pinnel's Case* ... but to treat a prospective agreement not under seal ... as binding in law.

Lord Selborne and the remainder of their Lordships answered the question in the negative. His Lordship considered that to hold otherwise might have been 'an improvement in our law'.[318] Lord Blackburn pointed out that the statements in *Pinnel's Case* about payment of a lesser sum on the due date being no satisfaction were obiter although Lord Coke has reported them as a statement of the law. Further, there was no reported decision on the subject from *Pinnel's Case* to *Cumber v. Wade*, a period of 112 years. Accordingly it was open to the House of Lords to reconsider the question. His Lordship, it seems, had thought about writing a dissenting speech but out of deference to the other members of the House refrained from doing so. His Lordship, however did not suffer in silence:[319]

> What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment as a whole. Even where the debtor is perfectly solvent.

Lord Fitzgerald acknowledged the difficulty posed by the rule and concluded that since *Pinnel's Case* had stood for 282 years it was 'not now within our [the House of Lords] province to overturn it'.[320] It is noted that *Stilk v. Myrick* was mentioned only in the

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[317] id., at pp611–612.
[318] id., at p613.
[319] (1884) 9 App. Cas. 605 at p622.
[320] id., at p630.

argument of counsel for the respondent and there referred to as one of the 'cases on seaman's wages'.[321]

It might be argued that the outcome of *Foakes v. Beer* produced an unjust result. In *Builders Ltd v. Rees*[322] a similar application of the rule produced a patently just result. There the plaintiff carried out building work for the defendant at a cost of £750 on which £480 remained unpaid five months later. The defendant offered £300 in satisfaction saying that he would pay that sum or the plaintiff would get nothing. The plaintiff took the sum in order to avoid bankruptcy. Payment was made by cheque and the plaintiff gave a receipt saying: 'received £300 in completion of the account'. Lord Denning MR considered that promissory estoppel might have waived the need for consideration in the application of the principle of accord and satisfaction. This could not be so because the defendant's conduct was such as to disentitle him to the discretionary equitable remedy and prevented him maintaining that there had been a true accord. He said:[323]

> The debtor's wife held the creditor to ransom …. She was making a threat to break the contract [by paying nothing] and she was doing it so as to compel the creditor to do what he was unwilling to do [accept the £300 in settlement]: and she succeeded. He complied with her demand …. There is no equity in the defendant to warrant any departure from the due course of the law. No person can insist on a settlement procured by intimidation.[324]

Dankwerts LJ agreed with Denning MR relying heavily on *Foakes v. Beer*. Winn LJ found for the plaintiff on the basis that the absence of consideration was fatal to the defence of accord and satisfaction. On the question of the operation of the doctrine of accord and satisfaction Winn LJ said:[325]

> In my judgment it is an essential element of a valid accord and satisfaction that the agreement which constitutes the accord should itself be binding in law, and I do not think that any such agreement can be so binding unless it is made under seal or supported by consideration.

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[321] id., at p609.
[322] [1966] 2 QB 617.
[323] id., at p625.
[324] Reiter, op. cit., ch.2, n.42, above, p462 described Lord Denning's reasoning as 'tortured', presumably on the basis that the author favoured a direct approach in dealing with duress for what it was, rather as an element of accord in the plea of accord and satisfaction.
[325] [1966] 2 QB 617at p632.

And continued in a way that informs the question how parties to an existing contract can modify that contract:

> Satisfaction, viz. performance, of an agreement of accord, does not provide retroactive validity to the accord, but depends for its effect upon the legal validity of the accord as a binding contract at the time when it is made: this I think is apparent when it is remembered that, albeit rarely, existing obligations of debt may be replaced effectively by a contractually binding substitution of a new obligation.

Winn LJ made the point very clearly that accord and satisfaction involved the making of a new contract rescinding the original terms and substituting the new. Ultimately the case was not about the adequacy of consideration because there was no consideration given for the somewhat reluctant promise to accept a lesser sum. What is interesting about the case is that the factual situation is the mirror reverse of *Williams v. Roffey*.[326] The question arises whether a promise to accept a sum less than a contractual debt can confer a 'practical benefit' on the creditor. This question has been answered in the affirmative.[327]

Carter and Harland[328] cite four situations where the courts might be persuaded to look at the adequacy or otherwise of the consideration furnished by one of the parties. Those situations are economic duress, undue influence, unconscionability and the availability of the remedy of specific performance. Strictly, as the authors noted, the situations cited were not contract formation situations, but rather, occasions where the validity of the contract, once formed, might be impeached. The matters of undue influence and specific performance are well outside the scope of this work and a passage from the judgment of Fullagar J in *Bromley v. Ryan* explained the position in regard to unconscionability. There his Honour said:[329]

> But inadequacy of consideration, while never of itself a ground of resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways — firstly as supporting the

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[326] [1991] 1 QB 1.
[327] *See Anangel Atlas v. IHI* [1990] 2 Lloyd's Rep. 526 and *Musumeci v. Winadell* (1994) 34 NSWLR 723.
[328] op. cit., ch.1, n.4, above, p106.
[329] (1956) 99 CLR 362 at p405.

> inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.

This statement clearly is not intended to go to the substance of a transaction but, rather, uses the language of consideration as evidence of other vitiating elements in the transaction. *T A Sundell & Sons Pty Ltd v. Emm Yannoulatos (Overseas) Pty Ltd*[330] and *North Ocean Shipping v. Hyundai*[331] were cited in relation to economic duress. The authorities are inconclusive, because in the first case, the contract modification failed because of the absence of any consideration and, in the second, the court detected a minuscule benefit to the defendant to allow it to enforce the subsequent promise. In neither case did the court investigate adequacy of the consideration provided. Perhaps in *North Ocean Shipping v. Hyundai* the court did so in a negative sense in that it was only the most illusory of benefits that amounted to the consideration that saved the transaction. The court did this comforted by the fact that the nascent doctrine of economic duress would protect a party from an extorted contract modification. The minimalist approach to the need for consideration reached a high-water mark in the judgment of Hobhouse J in *Vantage Navigation Corp v. Suhail and Saud Bahwan Building Materials LLC:* [332]

> Ultimately the question of consideration is a formality as is the use of a seal or the agreement to give a peppercorn. Now that there is a properly developed doctrine of avoidance of contracts on the grounds of economic duress, there is no warrant for the court to fail to recognize the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.

His Lordship suggested here that a court might be relatively nonchalant in finding the existence of a binding agreement in the knowledge that an extorted agreement can be dealt with under the law of economic duress. This overlooks some of the other benefits claimed for the doctrine of consideration.

The point to be made at the conclusion of this discussion is that the courts have steadfastly refused to examine in any quantitative sense the adequacy of the consideration. In modern times this has been for the reasons cited by Kirby P in

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[330] (1955) 56 SR (NSW) 323.
[331] [1979] 1 QB 705.
[332] [1989] Lloyd's Rep138 at p147.

Woolworths v. Kelly.[333] There has even been a tendency to require less in the way of consideration. All that has been necessary was to show that the conduct relied on by the promisee as consideration fitted a category referred to above under the discussion of 'legal benefit'. The promise of any alteration of position by the promisee at the time the original contract was made (or at the time of agreement to modify an existing contract) would suffice. It is suggested that in the post *Williams v. Roffey* [334] world things might be different. Courts will henceforth be invited to find a 'practical benefit'. What is practical and what is not practical is very much a question of degree. This matter will be returned to after the discussion of *Williams v. Roffey.*

2.23 Is there a requirement for mutuality?

This issue was raised in the Full Court of the Supreme Court of NSW in *Larkin v. Girvan*[335] the facts of which are given below. There, the question was raised whether or not a contract should be mutually enforceable before either party could enforce it. Jordan CJ answered the question in the affirmative.

The examination of *Larkin v. Girvan* is undertaken out of chronological order because the case exemplifies the issue under discussion. There the defendant contracted to construct a house for the plaintiff. The plaintiff complained that the standard of workmanship was not in accordance with the contract. Subsequently, the plaintiff and defendant agreed that the plaintiff would refrain from commencing arbitration proceedings in respect of the defects, which the defendant agreed to rectify within six months. The plaintiff sued on the second agreement for the cost of rectifying the defects because the defendant failed to carry out his promise. The defendant argued that the second agreement to rectify the defects was not enforceable on the basis that the consideration moving from him and the promise sought to be enforced was the subject matter of the original building contract. Jordan CJ accepted the argument of the defendant. His Honour said:[336]

> It is essential to the validity of a contract not under seal that there should be consideration moving from each party to the other ... nor is it enforceable unless

[333] (1990) 22 NSWSR 189, these remarks are set out at p66 above.
[334] [1991] 1 QB 1.
[335] (1940) SR (NSW) 365.
[336] (1940) SR (NSW) 365 at p367.

> there is also consideration moving from the promisor. If there be no such consideration, any apparent consideration moving from the promisee is not real consideration because, *in the absence of a reciprocal consideration moving from the other side it is purely gratuitous* (italics added).

He then goes on to say that the situation where the promisor is bound under a previous contract is a matter of special importance. Where the promise of the promisor is identical to that given pursuant to a previous contract, his Honour points out:[337] 'In this class of case, no contract is constituted by the promise, and there is nothing either party can enforce by virtue of the new promise'. He continues that if the second promise is to do more than was originally promised then it is good consideration. That additional undertaking was found in this case. The analysis of Sir Frederick Jordan is at first sight puzzling and in only a few other cases is consideration explained in this way. What is unusual is the way in which the litigation arose. In the typical case A sues B to enforce a promise. B pleads that no consideration moved from A to support the promise. In the situations under discussion, A sues B and B pleads that he gave no consideration for A's promise and accordingly the whole transaction is unenforceable as a *nudum pactum.* It is not the failure of A to give consideration for the promise he seeks to enforce that taints the transaction but the failure to receive consideration makes his promise gratuitous and as such it cannot be relied on to support B's promise.

The issue will only be of significance where, for some reason, the original promise becomes unenforceable or the plaintiff pleads the wrong promise; as it might be speculated happened in this case. Otherwise, why did the plaintiff sue on the second promise? Another explanation could be that the plaintiff's right to sue was compromised in the negotiations leading to the giving of the second promise. No reasons are given in the report. The matter was complicated by the fact that the case was an appeal from a direction of a District Court Judge to a jury. The only authority referred to by Jordan CJ was the Canadian case *Fenwick Brothers v. Gill*.[338]

The principle has been urged on the courts over a considerable period of time. Generally it is accepted that a contract must be capable of enforcement against both parties for the obvious reason that contracts are formed by an assumption of mutual

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[337] id., at p368.
[338] (1924) 52 New Bruns. Rep 227.

obligations. The issue arose as early as *Barber v. Fox.*[339] There the court held that an action for *assumpsit* could not be maintained against a defendant who promised to pay money due on a bond entered by his deceased father unless the defendant had been expressly bound in bond. The promise was given in exchange for a promise by the plaintiff (the person in whose favour the father had given the bond) not to sue. The plaintiff failed because he had promised not to do something that he could not legally do. Factually, the plaintiff had not given consideration for the promise he sought to enforce. As mentioned above, it is the notes to this case that provide the statement of law. The provenance was obscure; however, it is reasonable to assume that the 19th-century editor of the English Law Reports added the notes. Note (e) to the report of the case comprised a general description of the characteristics of consideration. The note continued:[340]

> It has been supposed that if one party were never bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. Chitt. Contr. 3d ed.

The note then qualified the proposition in the same terms as Tindall CJ in *Arnold v. The Mayor, Aldermen and Burgesses of the Borough of Poole*[341] discussed next.

The confines of the rule are stated in *Arnold v. The Mayor of Poole.* There the plaintiff carried out work for the borough without the agreement being under seal as required by the law. Tindall CJ stated the principle thus:[342]

> [A]nd it was contended that all contracts to be binding must be mutual, and that therefore, where corporations may sue upon simple contracts, it follows as a legal consequence that they may also be sued. *But we think the proposition as to the necessary mutuality of contracts was stated too broadly, and that it must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise* (italics added).

In applying the law to the facts of the case, the court relaxed the mutuality requirement by allowing the plaintiff to set off part of his claims for payment against money already

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[339] (1670) 2 Wms. Saund. 134; 85 ER 860.
[340] Vol.85 ER pp866–868.
[341] (1842) 4 Man. & G. 861; 134 ER 354.
[342] 4 Man. & G., at p869.

paid by the defendant. There have been clear cases where only one party could enforce a contract.

In the case of *Fenwick Brothers v. Gill*[343] referred to by Jordan CJ in *Larkin v. Girvan*[344] the original promise was unenforceable. The defendant, in consideration of the plaintiff promising to forbear from prosecuting a claim based on a promissory note, promised to repay the debt by instalments. The plaintiff sued on the promise to repay by instalments because action based on the original debt was statute barred. The court held that the defendant's promise to pay was no more than he was already obliged to do and, accordingly, the second agreement was a mere *nudum pactum*. The position was encapsulated in the judgment of Crocket J:[345]

> There is no doubt, as far as the plaintiffs' promise of forbearance is concerned, that it carried a recognized legal consideration moving from them to the defendant, but unless they received some valuable consideration in return for their promise they would clearly not be bound by it, and no valid contract could result from it, for, if the plaintiffs were not bound, neither was the defendant.

Apart from the Canadian authority there seems to have been little recent discussion of the question. Professor Simpson[346] points out that there is old authority on the point to the effect that promises must be mutually actionable.[347] The author makes the further point that the law in the intervening centuries has 'moved from an essentially one-sided conception — a promise broken — to an essentially two sided notion — a contract broken'.[348] The engrafting of the principles of offer and acceptance on to the doctrine of consideration has submerged the issue. In practical terms, sensible people do not deliberately conduct their affairs this way unless there is a very good reason. It might be

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[343] (1924) 52 New Bruns. Rep. 227.
[344] (1940) SR (NSW) 365.
[345] (1924) 52 New Bruns. Rep. 227 at p234.
[346] A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law* (1975) 91 Law Quarterly Review 247 at p261.
[347] The case referred to was *Nichols v. Raynbred* (1615) Hobart 88; 80 ER 238. The brevity of the report affords the luxury of setting it out in full: 'Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver to the defendant to his own use a cow, the defendant promised to deliver to him 50 shillings: adjudged for the plaintiff in both courts, that the plaintiff need not aver the delivery of the cow, because it is a promise for a promise. Note here the promises must be at one instant, for else they would both be nuda pacta'.
[348] Simpson op. cit., ch.2, n.346, above, at p257.

added that a plaintiff seeking specific performance of a contractual obligation must demonstrate the mutuality of each of the parties' obligations.[349]

For the sake of argument the principle is extrapolated to the *Williams v. Roffey* [350] situation; if the subcontractor had promised to complete the work in return for the builder's promise of extra payment, but failed to carry out the work, could the builder sue on the second promise? This would depend on the finding of practical benefit but practical benefit was not promised. The 'practical benefit' is something, which is detected by a tribunal after a post execution examination of the transaction. The suggested obligation of mutuality is not a rule of law but rather a matter of semantics. The illusion is created by the atypical way in which the litigation arises.

2.24 Consideration in the context of ongoing transactions

An observable aspect of the evolution of the legal theory of contract is the increasing complexity of the transactions that are made the subject of obligation. In the cases discussed to this point, where many of the rules relating to the doctrine of consideration were first developed, it is clear that the obligations of each of the parties were more or less capable of instantaneous performance. In *Joscelin v. Shelton,*[351] the unfulfilled promise was the payment of £200 given in consideration of a marriage. The defendant in *Sturlyn v. Albany* [352] promised the payment of a sum of money if a deed could be produced to him. The decision in *Dixon v. Adams* [353] dealt with a contract of guarantee. In *Slade's Case*[354] the defendant promised to pay an agreed price for a crop of grain on a particular day and in *Nicholls v. Raynbred* [355] the defendant promised to pay 50 shillings as the purchase price of a cow. The defendant in *Barber v. Fox* [356] promised to pay the

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[349] See Greig & Davis op. cit., ch.1, n.4, above, p1480.
[350] [1991] 1 QB 1.
[351] (1557) 2 Leon. 4. The case is the earliest judicial reference to the word 'consideration' in a contractual context and is dealt with more fully in this work at p11.
[352] (1587) Cro. Eliz. 67.The case is the first articulation of the rule that the courts do not investigate the adequacy of consideration.
[353] (1597) Cro. Eliz. 538. In this case the existing duty rule first emerged.
[354] (1602) Co. Rep. 91a. The effect of this decision was to permit debts to be recovered by means of an action of assumpsit rather than the more cumbersome action of debt. The case is discussed in detail at p12 of this work.
[355] (1615) Hobart 88. The first reference to the suggested requirement of mutuality within a transaction. The case is discussed in detail in ch.2, at p75, n.347, of this work.
[356] (1670) 2 Wms. Saund 134. An early authority on the requirement that consideration move from the promisee. The case is discussed in detail at p74 of this work.

debt of an ancestor and in *Crow v. Rogers* [357] the debt of a third party. It is suggested that these are relatively simple transactions and in the event of a failure of a party to fulfil his or her part, the obligation was obvious enough and all the court needed to do was to declare that the promise had been broken.

The difficulty that the courts were to face was illustrated by *Stilk v. Myrick* [358] where the dispute was about sailor's wages on a voyage by sailing vessel from 'London to the Baltick and back'. Such a voyage would take several weeks with a considerable risk of loss of crew members. How such a contingency was to be dealt with was not mentioned in the contract; presumably, in a situation short of frustration, the parties were bound absolutely by their promises. In this sense the risk was allocated by default. The contingency materialized, requiring the ship's captain to secure the crew's co-operation to complete the voyage by the promise of additional wages. The court resolved the question by extrapolating the requirement for consideration into contract modification situations. It is doubtful if the court saw the significance of allocating potential risk by means of contract. Certainly the court did not accept the autonomy of the parties to make ongoing adjustments to their obligations. The decision reflected the social mores of the time and was consistent with the fact that the sailors had no bargaining power at the time the contract was made. The decision was an omen for things to come. As transactions became more complex, the need to make adjustments increased. It is submitted that the rules relating to consideration were evolved to suit transactions capable of complete and indisputable performance. Those same rules seem less suited to transactions requiring incremental performance over a long period of time.

2.25 The development of the Doctrine of Economic Duress

The problem arose in *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd.* [359] The construction of an oil tanker was to extend over two and a half years at a cost of US$31m. The construction period coincided with a period of international economic instability, and although the parties made detailed provisions as to the mode of

[357] (1795) 1 Strange 592. A later authority on the requirement that consideration move from the promisee. The case is discussed in detail at p53 of this work.
[358] (1809) 2 Camp. 317. This decision is discussed in detail in starting at p37 of this work.
[359] [1979] 1 QB 705.

payment,[360] a further agreement was made during the course of the construction that one of the parties would bear the loss arising from the devaluation of the currency designated in the contract for payment. The court resolved the ensuing dispute by deciding that the second agreement was valid and then relying on the principles of economic duress to bring about a just result. There could be little argument about the finding of economic duress based on the ship builder's threat to breach its contract; but to get to that point the court had to hold that there was an otherwise valid agreement capable of being tainted by duress. This involved the finding of consideration. The consideration was found in a collateral aspect of the parties' negotiations related to the increased security given for its due performance of the contract by the ship builder. The security was expressed in the original contract as a percentage of the final cost. The percentage did not increase and in the negotiations for the increased price the parties did not address the question of security. The security only increased because the final contract price increased. The point to be made is that the detected consideration did not play a cautionary role in the negotiation of the contract modification. The finding of consideration was little more than a formality in conformity with the suggestion made by Hobhouse J in *Vantage Navigation Corporation v. Suhail and Saud Bahwan Building Materials LLC.*[361] The cautionary role formerly played by consideration is being supplanted by the principles of economic duress.

It is difficult to categorize the situations where the parties will wish to make adjustments to ongoing transactions. The most obvious cases would be where particular risks are overlooked or imperfectly allocated in the original transaction. The litigation in *Codelfa Construction Pty Ltd v. State Rail Authority of NSW* [362] is a good example. There will also be cases where one of the contracting parties, for valid commercial or other reasons, will wish to make a concession to the other party. The question is raised whether or not a combination of the doctrines of consideration and economic duress[363]

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[360] The parties to the contract were a Korean ship builder and a corporation registered in Monrovia. It is arguable that the choice of a currency other than that of either of the parties is an attempt at risk allocation. There are however other good reasons why such a choice might be made.

[361] [1989] 1 Lloyd's Rep. 138 at p147 where his Lordship pointed out: 'Ultimately the question of consideration is a formality as is the use of a seal or the agreement to give a peppercorn.'

[362] (1982) 149 CLR 337.

[363] It is also acknowledged that the principles of promissory estoppel, waiver and the provisions of s52 of the *Trade Practices Act 1974* (Commonwealth) have a bearing on the same issue. These remedies are based more on the conduct of the parties than the substance or validity of the transaction.

serves the interests of the business community when the need arises to adjust an ongoing relationship.

In dealing with these situations the courts will need to ask three questions. First, can any event in the conduct of the promisee be characterized as consideration moving from him or her? The courts seem anxious to answer this question in the affirmative.[364] Second, was the promisor's promise secured by means of economic duress? The doctrine of economic duress has been held to apply to NSW although the exact extent of its application is yet to be determined. McHugh JA in *Crescendo Management Pty Ltd v. Westpac Banking Corporation*[365] held that it was the application of illegitimate pressure to the victim that triggered the operation of the doctrine. He continued: 'Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed.'[366] The use of the expression 'unconscionable' in this context is capable of creating confusion. The matter was addressed in *Westpac Banking Corporation v. Cockerill.*[367] Where Kiefel J stated:

> I do not think his Honour was intending in this passage to refer to the equitable doctrine of unconscionable dealing which is recognised as affording an independent ground on which a court exercising equitable jurisdiction can relieve from a contract.
>
> The point of distinction which is relevant for present purposes is that duress, like undue influence, focuses upon the effect of the pressure, upon the quality of the consent or assent of the pressured party, rather than the quality of the conduct of the party against which relief is sought.[368]

Third, has the victim of economic duress acted in time to preserve his or her rights?[369] What has been described above, even when applied with the doctrines of estoppel, waiver and the provisions of the *Trade Practices Act,* leaves parties wanting to make adjustments to an existing contract in a legal no man's land. The true position of the parties can only be determined after the event.

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[364] See, for example *Williams v. Roffey* [1991] 1 QB 1 and in Australia *Musumeci v. Winadell* (1994) 34 NSWLR 723.
[365] (1988) 19 NSWLR 40.
[366] id., at p46.
[367] (1998) 152 ALR 267.
[368] id., at p289.
[369] *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd* (1979) 1QB 705 at p721.

CHAPTER 3 The decision in Williams v. Roffey Bros & Nicholls

3.1 Overview

The issues raised by the Court of Appeal decision in *Williams v. Roffey* [1] are central to the discussion of this dissertation. Prior to the decision, the application of the consideration test was capable in a reasonably clear way of determining whether a contract had come into existence or whether a promise made in modification of an existing contract was binding. The utility of the test was that it focused on the actions of the parties to the time the agreement was made. In particular the operation of the doctrine was thought to police enforced contract modifications (although, it is submitted — not very well) and at the same time allow the parties considerable freedom in their contractual behaviour. Even so, parties experienced difficulty modifying existing contracts.[2] In addition, a vulnerable party to a contract could be coerced into making concessions to the stronger party.[3] The decision recognized the problems and attempted a solution with the development of the concept of 'practical benefit' and acceptance of the emerging law of economic duress. It will be submitted that the development of the concept of 'practical benefit' was at some cost to legal principle.

The notion of 'practical benefit' was first adumbrated in *Ward v. Byham.*[4] To some extent the views set out in *Ward v. Byham* were reaffirmed in *Williams v. Williams*.[5] These cases are discussed in full in this work.[6] It was possible for the Court of Appeal in *Williams v. Roffey* to rely on a decision of the Privy Council in *Pao On v. Lau Yiu Long*[7] for the acceptance of the doctrine of economic duress. Lord Scarman recognized the extension of the law into situations involving economic duress without a detailed discussion of the principles. He said:[8]

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[1] [1991] 1 QB 1.
[2] *Foakes v. Beer* (1884) 9 App. 605 per Lord Blackburn at p622. This case is discussed at p67 of this work.
[3] *D & C Builders Ltd v. Rees* [1966] 2 QB 616. This case is discussed at p68 of this work.
[4] [1956] 1 WLR 496.
[5] [1957] 1 WLR 148.
[6] These cases are discussed in this work commencing at p28.
[7] [1980] AC 614.
[407] [1980] id., at p636.

> Recently two English judges have recognized that commercial pressure may constitute duress the pressure of which can render a contract voidable: Kerr J in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293 and Mocatta J, in *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd* [1979] QB 705. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordship's view, there was nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates the contract.

3.2 The facts

Those facts are as stated in the judgment of Glidewell LJ. The plaintiff was a carpenter (hereafter referred to as the subcontractor) who had agreed with the defendant (hereafter called the builder) to execute carpentry work in each of 27 flats being refurbished by the builder. In addition, work was required to the roof structure. The original obligation was comprised in three oral agreements, which were reduced to one written agreement dated 21 January 1986. By that agreement the subcontractor undertook to carry out carpentry work to the roof structure and the first and second fix-outs to each of the 27 flats. This suggests a two-stage obligation whereby preliminary work would initially be executed in all 27 flats and at some later date the flats would be completed. The builder agreed to pay the sum of £20,000 for the work.

Curiously, the agreement did not include an express provision for staged payments and the trial judge found this to be so. The judge however went on to find an implied term to the effect that the builder would make interim payments to the subcontractor at reasonable intervals based on the work carried out to that date. The subcontractor commenced work on 10 October 1985 (presumably pursuant to one or more of the oral contracts). The trial judge found that by 9 April 1986 the subcontractor had completed the work to the roof, carried the first fix-out to all flats and substantially completed the second fix-out to nine of the flats. To this date the subcontractor had been paid the sum of £16,200 which was well in excess of the contract value of the work carried out to that date.

It was common ground between the parties that the subcontractor was in financial difficulties. The trial judge found on the basis of evidence given by the builder's surveyor that the original agreed contract price was too low and that the subcontractor

could not operate satisfactorily at a profit. Further, the subcontractor had failed to properly supervise the execution of the work.

The builder made it clear that it was concerned that the subcontractor would not complete his work on time thereby rendering it liable to liquidated damages under the head contract. The trial judge found that on the 9 April 1986 the builder promised to pay the subcontractor an additional £10,300 to be paid at the rate of £575 for each flat in which the work was completed. The builder in its pleadings admitted the agreement. The sum recognized the fact that there remained 18 flats that required a final fix-out. The subcontractor continued work until May 1986. By that time the builder had made only one further payment of £1,500. At the end of May the subcontractor ceased work altogether. The builder completed the work using other labour. The work under the head contract was not completed on time and as a result the builder became liable to pay liquidated damages for one week.

The trial judge found that the agreement of 9 April 1986 was an oral variation of the original written contract. When the subcontractor ceased work at the end of May 1986, he had substantially completed eight flats entitling him to a payment of £5,000. Of this sum, only £1,500 had been paid and accordingly the subcontractor was entitled to cease work. The subcontractor succeeded in his initial action for the value of the work completed.

3.3 The parties' cases

The appellant builder based its case on both the want of consideration moving from the subcontractor plaintiff in the agreement of 9 April 1986 and that, since the agreement was in the nature of an entire contract, the requisite level of performance had not been achieved. The second issue does not form part of the subject matter of this work and accordingly that aspect of the case is not discussed in detail.

The appellant builder's grounds of appeal were as follows:[9]

> (1) the assistant recorder [trial judge] erred in law in holding that (i) an agreement between the parties reached on the 9 April 1986 whereby the defendant agreed to

[9] [1991] 1 QB 1 at pp2–3.

pay the sum of £10,300 over and above the contract price originally agreed of £20,000 was enforceable by the plaintiff and did not fail for lack of consideration; (ii) the plaintiff's pre-existing contractual obligation to the defendants to carry out works was capable in law of constituting good consideration for an additional £10,300 in respect of identical works; (iii) notwithstanding the lack of consideration moving from the plaintiff promisee, the benefit to the defendant promisors which might result from payment of an increased contract price was itself capable of constituting good consideration for the increase; and (iv) a main contractor who agreed to too low a price with a subcontractor was acting contrary to his own interests, and that if the parties subsequently agreed that additional moneys should be paid, such agreement was in the interests of both parties and for that reason did not fail for lack of consideration.

(2) [The second defence was based on a failure to perform an entire contract.]

(3) [The third defence amounted to denial by the builder that it had repudiated the contract by failure to make payments.]

The respondent subcontractor replied on the basis of the sufficiency of the consideration, the formation of a new contract and implied terms as follows:[10]

(1) when a new price was agreed between the parties, in the absence of duress and in the case of a commercially reasonable renegotiation, the promise to pay that new price was enforceable and *Stilk v. Myrick* (1809) 2 Camp. 317 did not correctly state the position in English law;

(2) on the facts as found, the assistant recorder should have held that there was a termination of the earlier agreement by mutual consent and the parties entered into a new agreement on the 9 April 1986; and

3) alternatively, the assistant recorder should have held that there was an implied term in the first agreement to the effect that in the event of both parties agreeing that the price was too low, a higher price would be agreed and substituted for it.

Since, on one view of the *ratio* of this case, it can be said that the strict requirement for consideration in contract modification situations has been relaxed on the basis that the nascent principle of economic duress will protect a weaker party from the oppression of a stronger, it is important to see how the matter was put to the Court of Appeal.

As may be seen from the parties' grounds of appeal set out above, the builder did not rely on economic duress as a defence. Indeed it was precluded from doing so because it

[10] [1991] id., at p3.

initiated that part of the transaction that might be said to have resulted from economic duress. The circumstances of the additional payments were set out in the builder's case and Glidewell LJ pointed out that this was found to be the correct version of the facts by the trial judge. The statement follows:[11]

> In or about the month of May 1986 at a meeting at the offices of the defendants between Mr Hooper and the plaintiff on the one hand and Mr Cottrell and Mr Roffey on the other hand it was agreed that the defendants would pay the plaintiff an extra £10,300 over and above the contract sum of £20,000. Nine flats had been first and second fixed completely at the date of this meeting and there were 18 flats left that had been first fixed but on which the second fixing had not been completed. The sum of £10,300 was to be paid at the rate of £575 per flat to be paid on completion of each flat.

The statement was remarkably bland and contractually neutral. Notably, in no way did it seek to constitute satisfactory completion and handover of each flat a condition precedent to the subcontractor's right to receive the £575. It is certain that was the result that the builder would wish to achieve. The payment was described by Glidewell LJ[12] as a ‘bonus’ which suggests that this had also occurred to his Lordship. As matters stood, the pleadings left the door open for the case to proceed (as it did) along the path of entire contract and want of consideration. There was no suggestion of duress. A builder is normally the stronger party in these transactions but can be subject to duress by a weaker party who has little to lose by breaking the contract.

The reported submissions of counsel for the builder make no express reference to economic duress. He did refer to *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd*[13] but only in the context of the remarks of Mocatta J to the effect that *Stilk v. Myrick*[14] was still good law. The following cryptic words followed on:[15] ‘Reference was made to *Syros Shipping Co SA v. Elaghill Trading Co* [1980] 2 Lloyd's Rep. 390; *Atlas Express Ltd v. Kafco (Importers and Distributors) Ltd* [1989] 3 WLR 389 and *Bush v. Whitehaven Port & Town Trustees* (1888) 2 Hudson's BC, 4ed. p122’. The first case was a peripheral authority on promissory estoppel and economic duress,

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[11] [1991] 1 QB 1 at p6.
[12] id., at p10.
[13] [1979] 1 QB 705.
[14] (1809) 2 Camp. 317.
[15] [1991] 1 QB 1 at p4.

the second clearly involved issues of consideration and economic duress and the third did not touch these topics at all.

Counsel for the subcontractor argued that *Stilk v. Myrick* was distinguishable, at least in the building industry, but if not:[16]

> Now that the concept of duress has been developed, the principle in *Stilk v. Myrick* is neither necessary nor desirable and should no longer be regarded as good law.
>
> . . . . .
>
> The modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement. For the possible application of the concept of economic duress, see *Pao On v. Lau Yiu Long* [1980] AC 614.

Presumably, he was confident about the position of his client. If economic duress were an issue, it could only be so at the expense of his client. The test laid down in *Pao On v. Lau Yiu Long* could have been met by the subcontractor.

3.4 The judgments of the members of the Court of Appeal

Glidewell LJ

His Lordship disposed of the entire contract argument in favour of the subcontractor on the basis of the principles applied by the Court of Appeal in *Hoenig v. Isaacs*[17].

On the question of consideration his Lordship pointed out that the trial judge had found the consideration in the fact that the original price was too low and, accordingly, the subsequent agreement was in the interests of both parties. Counsel for the builder conceded the benefits flowing to his client from the agreement of 9 April 1986 which he elaborated as follows: (i) avoiding the delay caused by a breach of the subcontract by the subcontractor; (ii) avoiding the need to pay liquidated damages under the terms of the head contract; and (iii) avoiding the trouble and expense of engaging others to complete the work. Counsel went on to submit that the builder 'derived no benefit in law, since the [subcontractor] was promising to do no more than he was already bound

[16] [1991] 1 QB 1 at p4.
[17] [1952] 2 All E.R.176.

to do by his subcontract.' He relied on *Stilk v. Myrick*.[18] Counsel for the subcontractor submitted that the case was based on public policy. His Lordship rejected this submission taking some care to set out the facts and quoting extensively from the judgement of Lord Ellenborough CJ. His Lordship referred to the decision in *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd* [19] where Mocatta J accepted that *Stilk v. Myrick* was good law notwithstanding the attempts by Denning LJ to widen the concept of consideration to include 'a promise to perform an existing duty or the performance of it' in *Ward v. Byham.*[20]

His Lordship pointed out that, in *Ward v. Byham* the majority of the Court of Appeal found additional benefits accruing to the promisor that justified a finding of the existence of consideration. After setting out the facts in detail and citing extensively from the judgments of Denning LJ and Morris LJ he made the following observation about what Morris LJ had said:[21]

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

It is submitted that the above words were the genesis of the legal thinking that led to his Lordship's decision. He noted that Denning LJ continued his efforts in *Williams v. Williams*[22] where the remainder of the Court disagreed, but, nevertheless, all three members were able to find that the promisee had given up legal rights that amounted to consideration.

To this point in his judgment Glidewell LJ appeared to take the orthodox view of *Stilk v. Myrick*. From the tenor of his next remarks it seems clear that his Lordship considered that an important policy reason behind the existing duty rule was to guard against enforced contract modifications. His Lordship said:[23]

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[18] (1809) 2 Camp. 317.
[19] [1979] 1 QB 705 at p713.
[20] [1956] 1 WLR 496.
[21] [1991]1 QB 1 at p13.
[22] [1957] 1 WLR 148.
[23] [1991] 1 QB 1 at pp13–14.

> There is, however, another legal concept of relatively recent development which is relevant, namely, that of economic duress ... Thus this concept may provide another answer in law to the question of policy which has troubled the Courts since before *Stilk v. Myrick*, *and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration* (italics added).

In support of his views as to the significance of the doctrine of economic duress to the matter his Lordship cited extensively the speech of Lord Scarman in *Pao On v. Lau Yiu Long*.[24] It is not certain how he saw the relevance of *Pao On v. Lau Yiu Long* to the instant problem. He opened the discussion with the words: 'The possible application of the concept of economic duress was referred to by Lord Scarman.'[25] There followed a lengthy quotation from Lord Scarman's speech where the paramount question seemed to be how the performance of an obligation to a third party can amount to consideration. *New Zealand Shipping Co Ltd v. A.M. Satterthwaite & Co Ltd (The "Eurymedon")* [26] was cited.

The second passage cited from Lord Scarman dealt with an argument put by counsel that there is a third position between consideration and economic duress. That position was stated by Lord Scarman as:[27] '[I]n a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position'. This submission was rejected. He asserted that what is true of a tripartite contractual situation (in *Pao On v. Lau Yiu Long*) would also be true of a bilateral agreement. That is, a threat to breach a contract stopping short of economic duress in a bi-party situation does not render the contract void on the grounds of public policy.

He then synthesized the *rationes decidendi* of *Ward v. Byham,*[28] *Williams v. Williams* [29] and *Pao On*[30] as a statement of the present law thus:[31]

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[24] [1980] AC 614.
[25] [1991] 1 QB 1 at p14.
[26] [1975] AC 154.
[27] [1980] AC 614 at pp634–635.
[28] [1956] 1 WLR 496.
[29] [1957] 1 WLR 148.
[30] [1980] AC 614.

> (i) [I]f 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 not 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.

His Lordship maintained that these propositions left *Stilk v. Myrick* 'unscathed' and in terms of his statement above, where B obtains no benefit by his promise, that promise will remain unenforceable. He went on to say that in any event it would not be surprising that a decision made 180 years ago in relation to the 'seafaring life during the Napoleonic wars' would undergo some refinement.[32] Propositions (iii) and (iv) would appear derived from *Ward v. Byham* and *Williams v. Williams*. Proposition (v) appears derived from *Pao On*.

On the requirement that consideration must move from the promisee his Lordship cited *Chitty* 26th Edition (1989) p126 para 183 where it was stated that: '[T]he requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment'.[33]

Russell LJ

Russell LJ agreed with Glidewell LJ on the entire contract point and also cited *Hoenig v. Isaacs*.[34] His Lordship noted that the defendant builder pleaded the agreement of 9

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[31] [1991] 1 QB 1 at pp15–16. Richard Hooley in his article *Consideration and the Existing Duty* (1991) Journal of Business Law 19 at p23 expressed doubt about this transposition. He said: 'In so far as propositions (iii) and (iv) can be interpreted as being drawn from *Ward v. Byham* and *Williams v. Williams* in this way, the accuracy of that summary is doubtful'. Even so, at p35 the author welcomed the changes to the law. There is merit in what the author said as to how the propositions are derived and this issue will be discussed later.

[32]The world had changed since *Stilk v. Myrick* (1809) 2 Camp. 317 but perhaps not the law. *Liston and others v. Owners Steamship Carpathian* [1915] 2 KB 43 reached a different conclusion but seems to have been decided on the same principles, namely the validity and interpretation of a contract of employment.

[33]The present edition, *Chitty on Contracts* (27th Edition 1994), accommodated the decision at p168, 'The most recent authority regards factual benefit to the promisor as sufficient in one situation, even in the absence of a legal benefit to him or of a legal detriment to the promisee. It is possible, though not yet certain, that this approach may spread to at least some of the situations in which the courts have in the past insisted on legal benefit or detriment'.

[34] [1952] 2 All E.R. 176.

April 1986 in the original proceedings and there was no suggestion of duress or lack of consideration. He further stated that he would have welcomed an argument based on estoppel. On the question of whether or not the builder could resile from the agreement of 9 April 1986 after both parties had acted in accordance with it, on the basis that the plaintiff promised to do no more than he was originally bound to do, his Lordship said:[35] 'It would certainly be unconscionable if this were to be their [the builder's] legal entitlement'. He cited the judgment of Robert Goff J in *Amalgamated Investment & Property Co Ltd v. Texas Commercial International Bank Ltd* [36] as authority for the proposition that estoppel will on occasions allow a 'party to enforce a cause of action which without estoppel, would not exist'. Reference was also made to the judgments of Lord Denning MR and Brandon LJ in the same case on appeal.

His Lordship explained that the citations demonstrate:[37]

> [T]hat whilst consideration remains a fundamental requirement before a contract not under seal can be enforced, *the policy of the law in its search to do justice between the parties* has developed considerably since the early 19th century when *Stilk v. Myrick* was decided ... I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v. Myrick* is either necessary or desirable ... the Courts nowadays should be *more ready to find its existence so as to reflect the intention of the parties* to the contract where the bargaining powers are not unequal (italics added).

The words italicised suggest that if the true intention of the parties is established by some means, the Courts should bestow legal validity on the transaction. In the next paragraph his Lordship posed the question: 'What was the true intention of the parties when they arrived at the agreement pleaded?' As to that intention his Lordship observed:[38]

> There was a desire on the [builder's] part to retain the services of the [subcontractor] so that the work could be completed without the need to employ another subcontractor. There was a further need to replace what had hitherto been a haphazard method of payment by a more formalized scheme involving the payment of a specified sum on the completion of each flat ... *the terms on which he was to carry out the work were varied and, in my judgment, that variation was*

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[35] [1991] 1 QB 1 at p17.
[36] [1982] QB 4 at p105.
[37] [1991] 1 QB 1 at p18.
[38] [1991] 1 QB 1 at p19.

> *supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates* (italics added).

In essence, the acts that the subcontractor might rely on as consideration for the promise of payment of £10,300 were the builder's relief from the need to employ another subcontractor and the institution of an orderly regime for payment. There was no mention of the argument put by counsel for the builder that consideration must move from the promisee. His Lordship cautioned that his remarks should not be taken as 'reservations on the correctness of ... *Stilk v. Myrick*. A gratuitous promise, pure and simple, remains unenforceable'.[39] He continued:[40]

> But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.

Purchas LJ

The remarks of Purchas LJ about the *critical path*[41] suggest some knowledge of the building process. This is confirmed in his reference to the outcome of the meeting on 9 April 1986 as the builder having agreed to pay an 'extra £10,300 by way of increasing the *lump sum* (another term of art) for the total work'. His Lordship continued:[42]

> This arrangement was beneficial to both sides. By completing one flat at a time rather than half completing all the flats the [subcontractor] was able to receive moneys on account and the [builder] was able to direct its other trades to do work in the completed flats which otherwise would have been held up until the [subcontractor] had completed his work.

He rejected a detailed submission that *Stilk v. Myrick* [43] should be overruled and endorsed the views of Mocatta J in *North Ocean Shipping*.[44] Accordingly, an agreement

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[39] In practice this will mean a gratuitous promise outside a transaction.
[40] [1991] 1 QB 1 at p19.
[41] Gwen Lowery and Rob Ferrara, *Managing Projects with Microsoft Project 98* (Van Nostrand and Reinhold, 1998), p352 defined 'critical path' as: 'The sequence of tasks that has the latest finishing date in a project. The critical path determines the project finish date. If any task in the critical path is delayed the finish date will also be delayed'. Critical paths are management tools that are almost universally used in the construction industry to plan projects. As the name of the publication implies, the preparation of a critical path plan may be accomplished by computer.
[42] [1991] 1 QB 1 at p20.
[43] (1809) 2 Camp. 317.
[44] [1979] 1 QB 705.

that falls within the rule will remain unenforceable[45] 'unless some other consideration is *detected*' (italics added). His Lordship observed that modern cases in this category depend more on the defence of economic duress than the lack of consideration for the second agreement. Here the question of duress did not arise as the initiative for the second agreement came from the builder. The relationship between consideration and economic duress was explained:[46] 'The court is more ready in the presence of this defence being available in the commercial context to look for mutual advantages which would amount to sufficient consideration to support the second agreement'.

This view was prompted by the desire of the courts to accord businessmen autonomy over their own affairs. His Lordship found support in the remarks of Lord Hailsham LC in *Woodhouse A.C. Israel Cocoa Ltd S.A. v. Nigerian Produce Marketing Co Ltd.* Lord Hailsham's remarks are relevant to this discussion for he said:[47] 'Businessmen know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration'.

To this point Purchas LJ dealt with the question of the nature of the benefit that accrued to the builder. The secondary question then arose as to whether or not the consideration moved from the plaintiff subcontractor. Even if a benefit to the builder could be demonstrated, was it necessary to show that an additional burden was imposed on the subcontractor? This question was answered in the negative. The requirement that consideration move from the subcontractor was satisfied by the mutual benefits in the new transaction. His Lordship made this point:[48]

> In the particular circumstances which I have outlined above, there is clear commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April ... I consider that the modern approach to the question of consideration ... If both sides benefit from an agreement it is not necessary that each also suffers a detriment.

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[45] [1991] 1 QB 1 at p19.
[46] ibid.
[47] [1972] AC 741 at pp757–758.
[48] [1991] 1 QB 1 at pp22–23.

3.5 Comment on the judgments

It is suggested that the novel aspect of the judgment of Glidewell LJ is to be found in proposition (iv) in that consideration can amount to conduct that 'in practice [confers] a benefit or obviates a disbenefit'.[49] This amounted to a denial of the submission of counsel for the builder that a practical benefit was not the same as a legal benefit. Clearly in his Lordship's perception no further legal rights were conferred by the subcontractor's promise. However as a result of the promise the builder was potentially spared a great deal of inconvenience and this was enough. Had the subcontractor breached the contract the matter of the potential liquidated damages and other losses could have been addressed in an action for damages. The problem was that, as a consequence, the subcontractor was likely to become insolvent and the builder's remedies rendered worthless. What the promise was intended to secure was the subcontractor's active co-operation in the completion of the project. It is suggested that Gidewell LJ has advanced the notion of the benefit component of consideration into the realm of the incorporeal. This is not perhaps so surprising when it is recollected that the law does not investigate the adequacy of consideration. The practical benefit gained here was certainly worth more than a peppercorn. The consideration relied on in the earlier cases is more readily identifiable.

It is appropriate to compare the position of the promisee in *Ward v. Byham*[50] with that in *Williams v. Roffey*.[51] Since Glidewell LJ observed a 'practical element' in the first case that was extrapolated to the second, the comparison will help to test the validity of the process of reasoning. In *Ward v. Byham* the mother was obliged under s42 of the *National Assistance Act 1948* (UK) to care for the child. She had, in addition, promised to prove that the child was well looked after and to allow the child to decide herself if she wished to live with her. Whilst it might be argued that the undertakings of the mother conferred no more than a degree of assurance (in terms of benefit to the promisor father) about the welfare of his daughter, the mother's position must also be taken into account. She had clearly altered her position. The letter from the father

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[49] Glidewell LJ first used the expression 'practical benefit' in the judgment at p13 where he states that in *Ward v. Byham* [1956] 1 WLR 496 Morris LJ and Parker LJ held that the child being 'well looked after and happy' was of practical benefit to the father. This could only have been an inference as neither the word 'practical' nor any other epithet was used by their Lordships to qualify the word 'benefit'.
[50] [1956] 1 WLR 496.
[51] [1991] 1QB1.

required her to *prove* that the child was well cared for. Even in layman's language, this requirement could only be satisfied by a degree of effort; for example, demonstration of the care accorded the child, the provision of details about her health, her progress at school and the child's own view of her happiness. Giving the child the right to decide where she wanted to live also involved the mother giving up rights she had. In *Ward v. Byham* Morris LJ merely comments that there was ample consideration to be found for the promise. His Lordship does not characterize it as a detriment to the promisee or a benefit to the promisor. Clearly it was a detriment to the promisee and, as such good, consideration. The examination by Glidewell LJ of the authority seems to have overlooked this possibility and concentrated on the illusory benefit to the promisor. The earlier authorities[52] and the commentators[53] make it certain that a detriment to the promisee is equally valid if not better consideration.

A question arises as to the significance of lapse in reasoning of Glidewell LJ (if it is in fact a lapse). Arguably his Lordship attributed the finding of consideration to the benefit aspect of reasoning of Morris LJ when properly it should have been related to the detriment. Does this lapse throw doubt on the formulation of consideration in terms of 'practical benefit'?[54] The answer would seem to be no. Sir Frederick Pollock pointed out: [55]

> Judicial authority belongs not to the exact words used in this or that judgment, nor even all of the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.

Lord Denning sitting in the House of Lords approved the statement.[56]

Finally it seemed that Glidewell LJ understood that his acceptance of a notion of consideration defined in terms of promises of acts that might do no more than add to the promisor's comfort needed safeguards. For this reason, the notion of economic duress was introduced.

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[52] See, for example, *Currie v. Misa* (1875) L.R. 10 Exch 153 per Lush J at p162 where the proposition was stated and attributed to Comyn's Digest under the title *Action on the Case, Assumpsit*, B. 1-15.
[53] Pollock op. cit., ch.1, n.6, above, p177.
[54] The point was important because in subsequent cases that applied the *Williams v. Roffey* principle it was the 'practical benefit' aspect that was relied on. See the cases cited in Chapter 4.
[55] *Continental Law in the Nineteenth Century* (Continental Legal History Series), xliv.
[56] *Close v. Steel Company Of Wales Ltd* [1962] AC 367 at p388.

Russell LJ devoted more than half of the total space occupied by his reasons to a discussion of estoppel. He then sought to demonstrate how the law has moved from an emphasis on objective issues in *Stilk v. Myrick*[57] to an investigation of the intention of the parties. The paramount question for the court was: what did the parties intend? After establishing the parties' intention to be bound, the courts will take a 'pragmatic approach' to *clinch the deal*. The pragmatic approach recognized: the plaintiff's financial difficulties, the inadequacy of the original price, the desire of the defendant to have the plaintiff continue with the work without the need to employ another subcontractor and the need to replace a haphazard method of payment with a more formalized scheme. His Lordship saw these matters as advantages to the defendant that amounted to consideration and described the final exchange of promises as a 'bargain'. He pointed out that the plaintiff did not undertake any work beyond that described in the original transaction.

It is submitted that the rearrangement of the payment terms would amount to consideration on any test. Each party would benefit from the other's promise to replace an uncertain regime for progress payments with one that made it clear what the responsibilities of the builder and subcontractor were. Equally, each party was potentially foregoing any advantage that might have been inherent in an haphazard payment scheme and this could be characterized as a detriment.

In his judgment, Russell LJ set out the passage from the builder's defence dealing with the agreement of 9 April 1986 and spoke of the builder having 'pleaded the agreement'. Glidewell LJ cited the same passage but refered to the builder's 'promise to pay an additional £10,300' and refers to the payment as a 'bonus'. At the risk of being pedantic, it might be suggested that the difference in syntax reveals a difference in approach. It is argued that Glidewell LJ to some extent treated the promise in isolation and therefore there was a need to seize on some factor that could be identified as consideration. Russell LJ appeared to treat the promise as a variation to the terms of the original contract where the consideration requirement was to some extent obscured. This left Russell LJ free to concentrate on the intention of the parties and a 'pragmatic approach'.

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[57] (1809) 2 Camp. 317.

It is not certain if Purchas LJ's statement,[58] that the effect of the agreement of 9 April 1986 required a rearrangement of the sequence of the subcontractor's work, was an extrapolation or is to be found in the facts of the case. If the subcontractor had agreed to a change in the sequence of his work, the change might be of considerable value to the builder and disadvantage to the subcontractor. Under those circumstances the question of consideration moving from the subcontractor was answered. This finding was open to the whole Court but would have represented the easy option.[59] His Lordship appeared to have concentrated on the mutual benefit aspects of the transaction and overlooked, what it is submitted, would be a clear detriment to the subcontractor. Another easy option would have been a decision couched in terms of the subcontractor's second reply, that is, that the original contact agreement had been terminated by mutual consent and a new agreement formed on 9 April 1986. Prima facie this point seems to have substance although it appears from the judgments that it was not pressed. In the event there was no need. The way the Court dealt with the matter has invited a reassessment of the doctrine of consideration.

[58] [1991] 1 QB 1 at p20.
[59] This point has been noticed by Brian Coote, op. cit., ch.2, n.47, p25 and by Richard Hooley, *Consideration and the Existing Duty* (1991) Journal of Business Law 19 at pp25–26.

CHAPTER 4 Analysis of the decision in Williams v. Roffey

It is submitted that there has been a shift in the way the court perceives its role. Russell LJ[1] indicated that 'the courts nowadays should be more ready to find its existence [consideration] so as to reflect the intention of the parties' and in a revealing remark Purchas LJ[2] mentioned consideration being 'detected'. It is suggested that so far as Russell LJ and Purchas LJ are concerned the court will undertake an examination of a transaction with the view to finding reasons to uphold the transaction. This is also implicit in the judgment of Glidewell LJ. This reasoning overlooks the fundamental role played by the doctrine of consideration in establishing a contractual obligation between two parties at the time they exchange promises that are of value. Brian Coote[3] has properly pointed out a benefit to a promisor detected after or during the performance of the contract does not qualify. As will be seen the decisions that followed (with the exception of *Re Selectmove*[4]) perpetuate the error by concentrating on what might or might not amount to 'practical benefit'. This concentration leaves parties to such a transaction in the difficult position of only knowing for certain if a promise is binding after a court has examined the transaction.

The decision is equivocal in the finding of Russell LJ of advantage to the builder arising from the rearrangement of the 'haphazard method of payment'[5] and the reference of Purchas LJ to the benefit to the builder inherent in the rearrangement of the schedule.[6] These are both matters that could be argued to qualify as consideration under any test. Both involved potential detriment to the plaintiff. At some future time the House of Lords might treat the 'practical benefit' test proposed by Glidewell LJ as obiter and hold that the judgments of Russell LJ and Purchas LJ do not extend the law beyond that adumbrated in *Ward v. Byham*.[7] This is a view that is still open to the NSW Court of Appeal or the High Court of Australia.

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[1] [1991] 1 QB 1 at p18.
[2] [1991] id., at p20.
[3] op. cit., ch.2, n.47, above.
[4] [1995] 2 All E.R. 531.
[5] [1991] 1 QB 1 at p19.
[6] [1991] 1 QB 1 at p20.
[7] [1956] 1 WLR 496.

It will be suggested that the path forward for the law is either to recognise that there was a proper jurisprudential basis for the decision in *Williams v. Roffey* [8] or to abandon the need for consideration in contract modification situations. There are, however, good reasons of business efficacy why the result should stand.

4.1 Subsequent judicial application

Soon after the decision in *Williams v. Roffey* the issues were again before the Queen's Bench (Commercial Division) in *Anangel Atlas Compania Naviera S.A. and Others v. Ishikawajima-Harima Heavy Industries Co Ltd (No.2).*[9] The defendant contracted to build a ship for the plaintiff for delivery by an agreed date. The market began to fall and it was in the plaintiff's interest to delay taking delivery of the ship. The defendant then offered 'most favoured customer' status to the plaintiff purchaser to secure its adherence to an earlier agreed delivery date. The plaintiff accepted that delivery would be on the original date. 'Most favoured customer' status meant that there was to be a refund of the price differential between the price of the plaintiff's ship and the price paid by others in a falling market. The defendant refused to make the payment. The question was whether the letters manifesting this arrangement amounted to a binding contract. The defendant argued that the plaintiff was already bound to take delivery on the agreed date.

Hirst J pointed out that:[10] '[T]he law had undergone a radical development as result of the recent decision of the Court of Appeal in *Williams v. Roffey.*' He found consideration in the practical benefit that would accrue to the ship builder whose other customers would become more interested when it was seen that this transaction proceeded. Counsel for the defendant argued for a narrow interpretation of the ratio of *Williams v. Roffey* [11] on the basis that *Stilk v. Myrick* [12] had been expressly preserved. It was said that practical benefit could not amount to consideration where the defendant was the party who rendered the service. Of this argument Hirst J said:[13]

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[8] [1991] 1 QB 1.
[9] [1990] 2 Lloyd's Rep 526.
[10] [1990] 2 Lloyd's Rep 526 at p544.
[11] [1991] 1 QB 1.
[12] (1809) 2 Camp. 317.
[13] [1990] 2 Lloyd's Rep 526 at p545

> I do not think that such a very narrow and artificial distinction can properly be drawn, and consider that the ratio of the *Williams* case is that, whoever provides the services, where there is a practical conferment of benefit or a practical avoidance of disbenefit for the promisee, there is good consideration, and it is no answer to say that the promisor was already bound; where, on the other hand, there is a wholly gratuitous promise *Stilk's* case still remains good law.[14]

The case indicates that a promise to accept a reduced payment can equally be supported by consideration amounting to nothing more than practical benefit. Conceptually, once practical benefit is accepted as consideration, it should make no difference if the promise is made by the party undertaking the execution of the work or the party making payment. Equally either party is capable of receiving a practical benefit from some aspect of the other party's performance. Where, however, the party who has executed the work is sued for a promised reduction in price supported by consideration of practical benefit the spectre of *Foakes v. Beer*[15] is raised. The outcome in this case was dictated by an application of the principle in *Williams v. Roffey*[16] but the inroads made there into the application of the existing duty rule probably hastens the time when *Foakes v. Beer* needs to be reappraised.[17] Another noteworthy feature of this case was the absence of evidence that the second proposition of Glidewell LJ was evident, that is, that the plaintiff had reason to doubt whether the defendant will or will be able to complete its side of the bargain.

In *Newmans Tours Ltd v. Ranier Investments Ltd*[18] the defendant seller of a travel business refused to pay an agreed sum of US$100,000 to a former employee of the seller. This payment was agreed as part of a collateral agreement with the plaintiff purchaser of the business to secure the loyalty of the employee to the new owner. After the failure of the defendant the plaintiff made the payment itself to ensure the employee's loyalty and prevent him from setting up in competition. The plaintiff alleged that it had in fact paid twice, that is, the part of the purchase price relating to the

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[14] Counsel's argument is not set out in detail in the judgment and accordingly it is not certain what it was. In *Williams v. Roffey* [1991] 1 QB 1 the promisor promised to pay more for the service he was yet to receive. Turning the argument around would involve a promisor promising to accept less for specified service (i.e. the construction of a ship). It is speculated that counsel had in mind some argument analogous to the ratio of *Foakes v. Beer* (1884) 9 App. Cas. 605.
[15] ibid.
[16] [1991] 1 QB 1.
[17] Adams & Brownsword op. cit., ch.2, n.158, above at p540 share this view.
[18] [1992] 2 NZLR 68.

employee and the payment made directly to the employee. The defendant resisted the action on the basis that the only consideration alleged for its promise to make payment to its employee was the plaintiff's promise to complete the contract for the sale of the business. This, the plaintiff was already bound to do under the sale and purchase agreement. It is not certain how Fisher J has interpreted the facts for he said:[19]

> But even more importantly, the plaintiff proceeded actually to perform its obligations under the sale agreement. Even the agreement to perform existing contractual obligations, followed by actual performance in reliance upon that subsequent agreement, can constitute fresh consideration; *Moyes & Grove v. Radiation New Zealand Ltd* [1982] 1 NZLR 368; *North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd* [1979] QB 705 and *Williams v. Roffey Bros & Nicholls* [1990] 2 WLR 1153.
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> I consider that the plaintiff was relying upon the defendants' offer to pay the US$100,000 ... when it proceeded to execute and perform the main sale agreement. That execution and performance constituted fresh consideration for the supplementary promise by the defendants to pay the US$100,000.

His Honour's use of the expression ‘execute’ is ambiguous. ‘Execute’ could mean enter the agreement by signing a document or carry out the terms of an existing agreement. If the former were the position, the question of a promise of performance of an existing contractual agreement constituting consideration does not arise. The defendant has offered to sell the business and pay $100,000 to a former employee. The plaintiff has accepted the offer by promising to purchase the business. The use of the word ‘can’ is adverting to the *possibility* of a promise of performance of a past obligation constituting fresh consideration. To remain faithful to *Williams v. Roffey*[20] it would still be necessary to find some practical benefit accruing to the promisor. If the analysis given above is correct, there is no need to find a ‘practical benefit’ as the entering of the contract would suffice in its own right. The ‘practical benefit’ that accrued to the defendant vendor of the business as a result of the plaintiff's promise to complete the transaction was not identified. His Honour seems to have taken the view that *Williams v. Roffey* made substantial inroads into the existing duty rule.

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[19] id., at p80.
[20] [1991] 1 QB 1.

The reason his Honour cited *Moyes & Grove v. Radiation NZ* and *North Ocean Shipping v. Hyundai* is not immediately clear. *Moyes & Grove v. Radiation NZ* dealt with compromised claims as consideration and Mocatta J in *North Ocean Shipping v. Hyundai* found consideration in the obligation undertaken by a promisee to provide increased security. This obligation Mocatta J characterised as an 'additional obligation' rather than the fulfilment of an 'existing contractual duty'.[21] The decision does not advance the understanding of the problem.

4.2 The contract of employment cases

During 1993 both the Queen's Bench and the Victorian Supreme Court dealt with cases where it was argued that redundancy packages offered to employees were incorporated into contracts of employment. Although it has been suggested that employment contracts form a special category[22] both cases were argued on the basis of the application of the ordinary principles of the law of contract. In particular, the rules of offer and acceptance and the presence or absence of consideration were argued.

The first of these cases was *Lee & others v. GEC Plessey Telecommunications.*[23] Between 1970 and 1985 a union to which the plaintiff belonged negotiated with the defendant redundancy packages on behalf of the employees of the defendant. The plaintiff was such an employee. The defendant announced in1985 that these collective agreements were incorporated into the individual contracts of employment. In 1990 the defendant withdrew the package unilaterally and purported to replace it with one less generous to the employees. The plaintiff who had been made redundant after the 1990 announcement sued to recover the difference between the 1985 and the 1990 redundancy packages. The defendants argued that the plaintiff had given no consideration for the introduction of the enhanced redundancy terms into their individual contracts of employment. In rejecting this submission Connell J said:[24]

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[21] [1979] QB 705 at p714.
[22] Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine* (1985) 94 Yale Law Review 996 at p1014 has commented that employment contracts belong to a special category and as such are characterised by a lack of contractual freedom and the outcome of the transaction more akin to status than mutually agreed obligations.
[23] [1993] IRLR 383.
[24] id at p391.

> Where in the context of pay negotiations, increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim and the continuation of the same employee in the same employment. The situation is similar with an increase in the severance payments made to those who lose their employment due to redundancy ... The employee continues to work for the employer, thereby abandoning any argument that the increase should have been greater and removing a potential area of dispute between employer and employee. The employer has secured a benefit and avoided a detriment (see *Williams v. Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1).

His Lordship went on to say that the relevant terms remained part of the contract until removed by agreement or pursuant to a specific provision in the contract. The reference to the securing and avoidance of a detriment found at the end of the quoted paragraph suggests a broad-brush approach by his Lordship. The use of the word 'detriment' seems out of place in this context as it is usually used as an indication of the position of the promisee. In *Williams v. Roffey*, Glidewell LJ chose his words carefully when he speaks of obtaining 'in practice a benefit, or obviat[ing] a *disbenefit*'.[25]

The conduct that was identified by his Lordship as amounting to consideration had two elements. Firstly, the settlement of the redundancy payment claims seems to have resulted in a detriment to the workers (promisees) in that they had forgone rights to claim higher payments. No doubt this could also be seen as a benefit to the employer (promisor) in that it gained immunity from industrial action. Whether or not agitation for higher payments in the circumstances is lawful is another question. The second element involved the continuation of work by the employees. Here the detriment to the employees is more ethereal in that they were fulfilling the terms of a contract and if there is detriment it can only be found in the fact that the workers did not engage in industrial action or terminate their contracts. Equally the practical benefit to the employer was to found in it being spared the trouble of dealing with industrial action or finding other employees. In a redundancy atmosphere the latter seems a questionable benefit.

In the first instance the detriment or benefit accruing from the resolution of the dispute was not part of a conscious agreement. In the second these elements were not sought,

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[25][1991] 1 QB 1 at p16.

offered or bargained for. This decision in this respect, suggests a more promise-based view of the law of contracts with less emphasis on bargains. It might be said that in these cases the court is at pains, as Russell LJ pointed out in *Williams v. Roffey,*[26] to discover the intention of the parties. It is arguable that the subjective intention of the parties, in this case, could only be guessed at.[27] Again the second proposition of Glidewell LJ seems absent.

The facts of *Ajax Cooke Pty Ltd v. Nugent*[28] are similar to *Lee v. GEC Plessey*.[29] The defendant negotiated a redundancy package with the unions representing the workers employed in its factory. Prior to that date the plaintiff had resigned from union membership. The defendant posted a notice in its factory notifying workers of the package. The notice stated: 'Redundancy Package-Australia ... the following arrangements will apply to all employees.' The plaintiff read the notice and assumed it applied to him. Subsequently he received a promotion, however, it is uncertain if the package was included in his new contract of employment. After the plaintiff was retrenched, the defendant refused to make a redundancy payment in terms of the package. This was an appeal against an order by a magistrate in favour of the plaintiff.

Phillips J held that the terms of the redundancy package displayed on the notice board were incorporated into the plaintiff's contract of employment on the basis of the principle found in *Carlill v. Carbolic Smokeball Co.*[30] The question remained, was there good consideration for the defendant's promise to pay? The defendant relied on the principle in *Stilk v. Myrick*[31] without citing the case. After reviewing the authorities his

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[26] id., at p18.
[27] In a situation of potential redundancies one might 'guess' that a worker's intention would be not to lose his or her job, but if it become inevitable, to maximize the payment he or she received without prejudice to chances of future employment. An employer has an obligation to its shareholders to maximize profits and this might involve redundancies. If redundancies become necessary, these must be carried out in a way that protects not only the long term and short-term financial position of the employer, but in compliance of the canons of good corporate citizenship.
[28] (Phillips J, Supreme Court of Victoria, 29 November 1993 unreported).
[29] [1993] IRLR 383.
[30] [1893] 1 QB 256.
[31] (1809) 2 Camp. 317.

Honour cited *Williams v. Roffey*[32] as presaging a 'less rigorous' application of *Stilk v. Myrick.* Of the case his Honour said:[33]

> The judgments in [*Williams v. Roffey*] indicate a willingness to spell out consideration where the conduct of the parties is seen to be to their mutual advantage, in a practical sense. That approach might have served the plaintiff here, for it was at least open to the magistrate to have found mutual advantage to both plaintiff and defendant in the redundancy package. The benefit to the plaintiff is obvious. As for the defendant, it was open to infer that, in posting notice of the redundancy package, and thereby announcing the benefits to be paid during the relevant period, the defendant acted to secure some benefit or advantage to itself, whether by inducing its employees to refrain from further industrial disputation or by encouraging them to continue in their present employment.

The analysis has emphasised the mutual advantage present in the transaction. Whilst this is no doubt true, it is hardly the essence of the *Williams v. Roffey* decision. Glidewell LJ was primarily concerned with the practical benefit or removal of the disbenefit accruing to the promisor,[34] Russell LJ saw the intention of the parties as being the decisive factor[35] and only Purchas LJ emphasised the mutual benefit.[36]

Even allowing for the lack of proper pleadings and legal argument it is hard to see how the elements of the transaction said to amount to consideration arose out of any conscious bargaining between the parties. It is more realistic to recognise that consideration will depend on a judicial examination of the transaction after the event. The examination in this case revealed a 'practical' benefit accruing to the promisor. As with the previous cases purporting to apply *Williams v. Roffey* the second proposition of Glidewell LJ was absent.

Ajax Cooke Pty Ltd v. Nugent[37] and the preceding case concerned contracts of employment. The question arises whether or not the law deals with such contracts differently. As mentioned previously[38] it is arguable that there is an element of status in employment contracts however in the two cases considered here the decisions were

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[32] [1991] 1 QB 1.
[33] (Phillips J, Supreme Court of Victoria, 29 November 1993 unreported), at p12 of transcript.
[34] [1991] 1 QB 1 at p16.
[35] id., at p18.
[36] id., at p23.
[37] (Phillips J, Supreme Court of Victoria, 29 November 1993 unreported).
[38] op. cit., ch.4, n.22, above.

clearly based on acknowledged principles of contract. Generally, where the law is concerned with employment contracts, it is to see that the seemingly superior bargaining position of the employer is not abused. There is often statutory intervention to protect the position of the employee.[39]

4.3 Williams v. Roffey restricted

Adams and Brownsword[40] have suggested that *Pinnel's Case*[41] and *Foakes v. Beer*[42] will need to be reconsidered in the light of *Williams v. Roffey*.[43] This view was urged on the English Court of Appeal in *Re Selectmove Ltd* [44] but rejected. There, Selectmove was in financial difficulties and failed to pay PAYE deductions and National Insurance premiums to the Inland Revenue Commissioners. The company purported to enter an arrangement with the Inland Revenue whereby the previous indebtedness would be reduced by instalments and current liabilities kept up to date. After some payments and default the Inland Revenue moved to wind up the company. Selectmove Ltd sought to defend itself by alleging that it had entered a binding contract in relation to the payment of arrears by instalments. It argued that the promises to pay the arrears and the current liability promptly constituted the necessary consideration moving from the promisee. The consequence was that the promisee remained in business and the promisor was benefited by the further payment it was enabled to make. The promise sought to be enforced was a promise to accept the instalments and refrain from winding up proceedings.

Peter Gibson LJ, with whom the remainder of the Court agreed, held that the House of Lords decision in *Foakes v. Beer*[45] applied and accordingly there was no good consideration. His Lordship noted[46] Lord Blackburn's reservations in *Foakes v. Beer* and pointed out that the payment of a lesser sum was often a 'practical benefit'. The

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[39] For example, *Industrial Relations Act 1996* (NSW), s106 giving the Commission power to declare certain contracts void or varied.
[40] op. cit., ch.2, n.158, at p540 where the authors continue: 'After all, the parallel is obvious: whether you are dealing with a stricken creditor or a stricken debtor, in certain circumstances, the economic imperatives may dictate that financial adjustments should be made (the doctrine of consideration notwithstanding)'.
[41] (1602) 5 Co rep 117a.
[42] (1884) 9 App. Cas. 605.
[43] [1991] 1 QB 1.
[44] [1995] 2 All E.R. 531.
[45] (1884) 9 App. Cas. 605.
[46] [1995] 2 All E.R. 531 at p537.

judgment then continued with an analysis of *Williams v. Roffey,*[47] noting that Glidewell LJ had carefully confined his remarks to situations where the promisee was bound to carry out work or supply goods. After citing with approval Adams and Brownsword's article, his Lordship declined to extend the principle to cases where the obligation was to pay money. Any further extension of the principle must await the House of Lords or Parliament. Clearly his Lordship was sympathetic to the argument but considered his hands tied. He pointed out that *Foakes v. Beer* was not even mentioned in the judgments in *Williams v. Roffey*. Strictly, the discussion of *Williams v. Roffey* was not necessary to the Court's judgment as it had held that the officer of the Inland Revenue had no authority to enter the agreement. Selectmove Ltd failed in this case because the circumstances of its transaction with the Inland Revenue Commissioners did not fit the rule laid down in *Williams v. Roffey*.

4.4 Williams v. Roffey explained

The Supreme Court of NSW made a comprehensive effort to illuminate the decision in *Williams v. Roffey*. In *Musumeci and another v. Winadell Pty Ltd,*[48] the plaintiffs sought relief from the terms of a lease. The defendant landlord had leased another shop in the same complex to a competitor of the plaintiffs' thereby reducing their potential income. The plaintiffs sought a one third reduction in the rent for the remainder of the term of the lease and a new lease on different terms. The defendant's solicitors replied offering to reduce the rent but refusing the request for a new lease. The plaintiffs accepted. Later a dispute arose as to the scope of the concession made. The plaintiffs arguing for the validity of subsequent agreement maintained that it was supported by consideration. The consideration moving from the promisee being the compromise of the plaintiffs' claims against the lessor arising from the lease to the plaintiffs' competitor and the practical benefit accruing to the defendant from the plaintiffs continuing with the lease. In addition the doctrine of promissory estoppel applied. Santow J rejected a compromise argument, found consideration in the practical benefit and concluded that promissory estoppel did not apply. The judgment canvasses almost all of the available material on the subject including: *Anangel Atlas v. IHI,*[49] *Lee v. GEC Plessey*

[47] [1991] 1 QB 1.
[48] (1994) 34 NSWLR 723.
[49] [1990] 2 Lloyd's Rep. 526.

Telecommunications,[50] *Ajax Cooke v. Nugent,*[51] *Re Selectmove*[52] and the article by Adams and Brownsword.

It is clear that his Honour saw the propositions of Glidewell LJ as central to the decision and portents for the future direction of the law in relation to contract modifications. The propositions (i) to (vi) are set out in full.[53] Even so, his Honour considered that the third, fourth and fifth propositions needed to be recast. Of the third proposition his Honour said[54] (note: that in the material cited from his Honour's judgment the italicised text forms part of the transcript of the original judgment):

> So far as element (iii) is concerned, conceptually it can make no difference whether B promises A an additional payment for A's promise of performance or grants A the equivalent concession of promising a reduction in A's payment obligations, where these pre-exist.

The third proposition thus became:

> B thereupon promises A an additional payment or other concession (*such as reducing A's original obligation*) in return for A's promise to perform this contractual obligation *at the* time.[55]

Here it is pointed out that his Honour's views seemed at odds with those expressed by Peter Gibson LJ in *Re Selectmove*.[56]

The most radical suggestions are applied to Glidewell LJ's fourth proposition. His Honour raises the issue:[57]

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[50] [1993] IRLR 383.
[51] (Phillips J, Supreme Court of Victoria, 29 November 1993 unreported).
[52] [1995] 2 All E.R. 531.
[53] (1994) 34 NSWLR 723 at p740.
[54] (1994) 34 NSWLR 723 at p741.
[55] The words shown in italics in the three restated propositions are the words added by Santow J. It is noted that the words 'at the' are substituted for 'on' in the original however this presumed to be merely a clerical error. In addition Glidewell LJ's nomenclature has been preserved throughout. As to this proposition his Honour recognises tension between the *Williams v. Roffey* principle and concessions in relation to debt making the point at p739: 'logic dictates that there should be no ultimate distinction in result'. Nevertheless the proposition is put forward without direct reference to the potential conflict with *Foakes v. Beer* (1884) 9 App. Cas. 605 and *Re Selectmove* [1995] 2 All E.R. 531.
[56] [1995] 2 All E.R. 531.
[57] (1994) 34 NSWLR 723 at p741.

> [S]hould Australian Courts follow the English Court of Appeal, in taking a more pragmatic approach to the true relationship between the parties in accepting practical benefits as consideration? And, if so, subject to what qualifications?

The question is answered later in the judgment:[58]

> [I]t should be apparent that *Stilk's* case involved no less a practical benefit than was held as sufficient consideration in *Williams v. Roffey*. What then is sufficient practical benefit to B, so as to take the situation beyond a wholly gratuitous promise by B? The answer lies in the proposition put by Treitel[59] ... It is indeed inherent in the situation posed *Williams v. Roffey* itself (and indeed *Stilk's* case itself, despite the decision). There sub-contractor A's performance was worth more to B (the principal contractor) than likely damages, even taking into account the cost of any concession to obtain greater assurance of that performance.

The fourth proposition thus becomes:

> (a) As a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit provided that A's performance, having regard to what has been so obtained, is capable of being viewed by B as worth more to B than any likely remedy against A (allowing for any defences or cross-claims), taking into account the cost to B of any such payment or concession to obtain greater assurance of A's performance, or (b) as a result of giving his promise, A suffers a detriment (or obviates a benefit) provided that A is thereby foregoing the opportunity of not performing the original contract, in circumstances where such non-performance, taking into account B's likely remedy against A (and allowing for any defences or cross-claims) is capable of being viewed by A as worth more to A than performing the contract, in the absence of B's promised *payment or concession to A*.

Some fine-tuning was needed to the fifth proposition to accommodate the manner in which the doctrine of economic duress has been propounded by the Australian Courts.[60]

> (v) B's promise was not given as a result of economic duress or fraud or undue influence or unconscionable conduct on the part of A nor was it induced as a result of unfair pressure on the part of A, having regard to the circumstances.

In applying the law thus propounded to the facts of the instant case, his Honour said:[61]

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[58] id., at p745.
[59] G. H. Treitel, *The Law of Contract* (8th edition, Sweet & Maxwell/Stevens & Sons, 1991) at p88. His Honour cites p90 although the passage referred to is at p88.
[60] See the remarks of McHugh JA in *Crescendo Management Pty Ltd v. Westpac Banking Corporation* (1988) 19 NSWLR 40, above at p79 of this work.
[61] (1994) 34 NSWLR 723 at p741.

> Thus I find that the particular practical benefit here, was that the lessor had greater assurance of the lessees staying in occupation and maintaining viability and capacity to perform by reason of their reduction in their rent, notwithstanding the introduction of a major, much larger competing tenant. The practical detriment to the lessees lay in risking their capacity to survive against a much stronger competitor, by staying in occupancy under their lease, rather than *walking away at the cost of damages* (italics added).

It is with the third and fourth propositions that this work is concerned. As indicated above the restating of the third proposition does not sit comfortably with the House of Lords decision in *Foakes v. Beer.*[62] It would seem that his Honour might be suggesting that the decision not be followed in Australia.[63]

The restated fourth proposition is drawn from the passage cited in Treitel.[64] There the author is answering the view that the new promise should not be enforced because the 'promisee suffered no legal detriment'. He points out that this might not be so because the promisee might suffer 'a detriment'. At this point, the description 'legal' is dropped. In the example given (based on *Stilk v. Myrick*), it was suggested that the wages that the seamen could have earned elsewhere may have exceeded those under the original contract plus the damages payable as a result of the breach. Equally, getting the ship home may have been worth more to the owners than any legal remedy against the crew. Either the detriment or benefit inherent in this situation depends on whether or not the crew breaches its contract of employment. It will also be observed from the last passage quoted from his Honour's judgment that the nexus between detriment and benefit is maintained.

His Honour's use of the expression 'is capable of being viewed by ...' [the promisor] in both legs of the fourth proposition is significant. It requires the Court to view the

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[62] (1884) 9 App. Cas. 605.

[63] Edwin Peel in a casenote to *Re Selectmove*, (1994) 110 Law Quarterly Review 353 at p355 makes the point that if, *Foakes v. Beer* and *Williams v. Roffey* both remain part of the law, a promise to perform an existing obligation *may* be good consideration depending on whether the promise was to pay money or perform services. Here of course the author is referring to the promise relied on as consideration. In *Foakes v. Beer* the promise sought to be enforced was one to discharge an existing debt after payment of a lesser sum and the promise relied on as consideration to support that promise was the promise to pay that lesser sum. The result may depend upon how the parties have structured the second transaction. In *Musumeci v. Winadell* it would seem that the promise sought to be enforced was one to accept a reduced rent. The consideration relied on to support that promise was a promise to continue in occupation under an existing lease in changed circumstances. This is not necessarily at odds with *Foakes v. Beer* and complies with Peel's thesis.

[64] op. cit., ch.2, n.86, above, p88.

transaction from the subjective viewpoint of a party to determine the presence of consideration. The point is consistent with the remarks of Russell LJ in *Williams v. Roffey*[65] about the intention of the parties. Another matter of significance the rigid adherence to the requirement that there be a doubt that the promisee 'will, or will be able to complete his side of the bargain'.

A recurring theme throughout the judgment was his Honour's concern for the fact that the 'practical benefit' had not been expressed to be part of the transaction. Firstly it was noted[66] that the practical benefit referred to in *Williams v. Roffey* was not 'expressly promised'. The matter was later returned to[67] where it was noted that Pollock's[68] definition excluded the possibility of a practical benefit or, as his Honour put it, 'hoped for end result of performance' constituting consideration. His Honour pointed out that the reasoning of Glidewell LJ did not require the practical benefits to be 'explicitly the subject of the parties promised bargain'.[69] His Honour attempted to come to terms with the problem in a passage immediately before his recasting of Glidewell LJ's propositions:[70]

> I recognise that they will be further refined in the light of experience. One particular issue is the extent to which a benefit or detriment, said to be 'practical', as distinct from explicitly bargained for, must nonetheless be consistent with, and not extraneous to, the bargaining process, as at least its intended result if not necessarily its moving force.

In both *Williams v. Roffey* and *Musumeci v. Winadell*, although there were no specific promises to perform the same obligations, the very fact that the negotiations were taking place implied what the promisor was afraid of. The matter remains unresolved and, as indicated, will have a bearing on how the law evolves.

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[65] [1991] QB at p19
[66] (1994) 34 NSWLR 723 at p738.
[67] id., at p740.
[68] op. cit., ch.1, n.6, above, p177. The famous definition is repeated: 'An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is *bought*, and the promise thus given for value is enforceable' (italics added).
[69] (1994) 23 NSWLR 723 at p740.
[70] id., at p747.

4.5 Should practical benefit be seen in terms of legal remedies?

The extrapolation by Santow J from Professor Treitel's work has led him to the obvious conclusion that the value to a party to a contract of the other party fulfilling his or her contractual obligations is a practical benefit measurable in terms of the efficacy of available legal remedies; the proverbial bird in the hand being worth two in the bush. The position was conceptualised by Professor Corbin who pointed out:[71]

> It is true that failure to render the performance would have left the promisee liable in damages for breach of his duty; but it should be obvious that the damages he could be compelled to pay would have *no definite relation* to the extent of the advantage that he might have derived from using his time and money other wise (italics added).

There would seem two factors that need to be taken into account if the law is to develop along these lines.

The first factor is the very correctness of the proposition itself. Recourse to legal remedies is always a last resort attended by the uncertainties of litigation and the need to obtain alternative performance in the meantime. Santow J himself allowed[72] that it 'was a notorious fact that concessions are made to avoid the necessity for enforcing a contract whose performance is in jeopardy'. That being so, it is hard to imagine a contractual situation where it would not be of practical benefit, to have the other party perform without recourse to litigation. Hence a further promise affords reassurance. The restricted basis on which damages are assessed for breach of contract, the inability in most cases to recover costs on an indemnity basis and the reluctance of the Courts to decree specific performance in a large number of contractual situations all enhance the practical benefit.

The second factor is the reluctance of the courts hitherto to allow a party to benefit from his or her own breach of contract. At this point Lord Ellenborough reappears in the narrative. In *Rede v. Farr*[73] a lessee of certain lands and tithes for a term of years had

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[71] *Corbin on Contracts* (St Paul: West Publishing Co, 1963), Vol 1A at p108. The statement was cited by Richard Hooley, op. cit., ch.3, n.30, above, at p30.
[72] (1994) 23 NSWLR 723 at p744.
[73] (1818) 6 M. & S. 121; 105 ER 1188.

agreed to a condition that if the annual rental was not paid within forty days of the due date 'the lease shall be void'. The lessee defaulted and the action was brought against the party liable on the bond. It was argued for the defence that the actions of the lessee in not making the required payments had rendered the lease void. Lord Ellenborough CJ rejected this argument saying:[74]

> In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that the lessee by not paying his rent should be at liberty to say that the lease is void.

Lord Ellenborough in reaching this conclusion cited a hypothetical example from Lord Coke.[75] The significant aspect of what has been said is the fact that the rule applied to the position of the party who has been guilty of a wrong *after* the event. It does not purport to deal with the position of a party who merely threatens contractual misconduct. The rule was applied by Lord Watson in *Sailing Ship "Blairmore" Co Ltd and Others v. MaCredie* who said:[76]

> The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligation which he has undertaken to fulfil.

Lord Diplock thought in *Cheall v. Association of Professional Executive Clerical and Computer Staff* [77] that there might be two parallel rules; one of construction and the other of law. Lord Jauncey appears to have put the matter to rest in *Alghussein Establishment v. Eton College* where he said:[78]

> For my part I have no doubt that the weight of authority favours the view that in general the principle is embodied in a rule of construction rather than an absolute rule of law.

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[74] id., at p124.
[75] Co. Litt. 206 b: 'And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for he himself is the mean that the condition could never be performed. And this is regularly true in all cases.'
[76] [1898] AC 593 at p607.
[77] [1983] 2 AC 180 at p188.
[78] [1983] 2 AC 180 at p188.

The rule, as a rule of construction, was adopted by the NSW Court of Appeal in *TCN Channel 9 Pty Ltd v. Hayden Enterprises Pty Ltd.*[79]

How a rule of construction ought to work in the situations under discussion is not clear. Presumably, if a dispute arose over a promise that modified a contract, the Court would not accord a meaning to the course of dealings that acknowledged a promisor's promise was triggered by a promise (or the perception that) the other party would not to avail himself or herself of the option not to perform the contract. In *Musumeci v. Winadell,* Santow J must have considered that it was unnecessary to take into account the potential application of the rule. There the plaintiff promisees did not threaten to breach the contract but rather sought damages for a perceived breach by the promisor and to hold it to its promise to accept a reduced rental. The omission is made puzzling by the fact that his Honour quoted from Hooley's article on the question of good faith[80] but did not mention Hooley's doubt about recognising a party's right to refuse to perform his or her obligation under a contract.[81] There the point is made emphatically citing *Blairmore, Cheall v. A.P.E.X* and *Alghussein Establishment v. Eton College*. A clear Australian statement of the law is to be found by Windeyer J in *Coulls v. Bagot's Executor and Trustee Co Ltd* where his Honour said:[82]

> The primary obligation of a party to a contract is to perform it, to keep his promise. That is what the law requires of him. If he fails to do so, he incurs liability to pay damages. That however is the ancillary remedy for his violation of the other party's primary right to have him carry out his promise. It is, I think, a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or pay damages.

It is suggested that the difficulties such statements pose for the development of the law on consideration based on the abstaining from breaching a contract being treated as consideration may be more illusory than real. There are judicial statements that support a slightly different position.[83] The 'practical benefits' identified by counsel for the

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[79] (1989) 16 NSWLR 130 per Hope JA at p147.
[80] (1994) 34 NSWLR 723 at p744.
[81] Richard Hooley op. cit., ch.3, n.31, above, at p31.
[82] (1966) 119 CLR 460 at p504.
[83] White J in *Je Maintiendrai Pty Ltd v. Quaglia* (1980) 26 SASR 101 at p115 regarded giving up an option to breach a contract as sufficient detriment to ground promissory estoppel.

subcontractor and accepted by Glidewell LJ in *Williams v. Roffey*[84] are all consequences of the subcontractor not breaching his contract and continuing with the work. The matter that distinguishes the situation was that *the subcontractor was already in financial difficulties at the time the promise was made*. That the subcontractor could not perform was a new situation rendering the builder's potential losses certain. The promise of additional payment was the consequence.

Even so, it is submitted that the interpretation of 'practical benefit' in terms of a promisee's option to refuse to perform his or her obligation under a contract is contrary to business efficacy and in this sense *Musumeci v. Winadell*[85] was wrongly decided. For this reason the decision should not be followed and when the appropriate occasion arises it should be overruled. It is noted that where a similar factual situation arises, in most instances, the rights of a tenant will be accommodated by an application of the principles of equitable estoppel.

4.6 Summary of post Williams v. Roffey decisions

At this stage it is useful to make a short summary of the *rationes* of the cases discussed. It is suggested that *Anangel Atlas v. IHI*[86] identifies a new factual situation that could be characterised as practical benefit. This was the acceptance of the ship at a previously agreed delivery date in a buyer's market where the buyer might have forced further concessions. Also practical benefit can be good consideration for a reduction in price. *Newman's Tours v. Ranier*[87] is a somewhat obscure case; however it seems relatively clear that the factual practical benefit accruing to the promisor arose out of the completion of an agreement for the sale of a business. The decisions in both *Lee v. GEC Plessey*[88] and *Ajax Cooke v. Nugent*[89] rest on the fact that employees continued in their employment after the employers promulgated a change in their employment contracts. The practical benefit was identified as the benefit accruing to an employer whose work force remained constant and the avoidance of industrial disputes. In the latter case

[84] [1991] 1 QB 1 at pp11, 15–16.
[85] (1994) 34 NSWLR 723.
[86] [1990] 2 Lloyd's Rep. 526.
[87] [1992] 2 NZLR 68.
[88] [1993] IRLR 383.
[89] (Phillips J, Supreme Court of Victoria, 29 November 1993 unreported).

mutual advantage was emphasised. *Re Selectmove*[90] represents a swing of the pendulum in the other direction. Here the bird in the hand principle was not applied to the repayment of debts and the Court held, albeit obiter, that *Foakes v. Beer*[91] was still a binding authority. It should be added that the practical benefit claimed was somewhat obscure. It amounted to a promise that the Crown might recover a statutory debt if it waited long enough.

Santow J in *Musumeci v. Winadell*[92] went beyond identifying instances of practical benefit and attempted to conceptualise what was said in *Williams v.Roffey*.[93] Whether or not his Honour has added to the learning on the subject will depend on how the senior Courts in the Australian judicial hierarchy deal with *Musumeci v. Winadell*. The practical benefit was identified as the greater assurance of the lessees performing and being capable of performing their obligations notwithstanding a deterioration in their commercial position initiated by the lessor. His Honour did not fail to mention the corollary to this, namely the risk to economic survival against a stronger competitor accepted by the lessees. There was no provision in the lease document preventing the lessor from allowing a competitor into the shopping centre.

It is also noteworthy that, in all of the post *Williams v. Roffey* cases, with the exception of *Musumeci v. Winadell,* the courts have emphasised the fact that a promise that confers a 'practical benefit' could (or did not in the case of *Re Selectmove*[94]) amount to consideration. The discussions have centred on what might or might not be 'practical benefit' and in essence applied the exposition of Glidewell LJ to novel situations. But this, in a sense, overlooks the exact nature of the second proposition namely:[95]

> (ii) at some stage before A has completely performed his obligations under the contract B *has reason to doubt whether A will, or will not be able to*, complete his side of the bargain (italics added).

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[90] [1995] 2 All E.R. 531.
[91] (1884) 9 App. Cas. 605.
[92] (1994) 34 NSWLR 723.
[93] [1991] 1 QB 1.
[94] [1995] 2 ALL E.R. 531.
[95] [1991] 1 QB 1 at p15.

It is argued that this proposition restricts the scope of 'practical benefit' to situations where new circumstances render performance by the promisee of his or her original obligation different or more problematic. It is submitted that the statement is related to the promisee's ability and not to his or her willingness. A change of intention to perform on the part of the promisee will in most circumstances be characterised as economic duress and as such covered by his Lordship's fifth proposition. The promisor is seeking to salvage what he or she can from the new situation. If this is so then the cases that follow *Williams v. Roffey*[96] have extended the circumstances where 'practical benefit' will suffice as consideration. In *Anangel Atlas v. IHI*,[97] *Lee v. GEC Plessey*[98] and *Ajax Cooke v. Nugent,*[99] the question of whether or not the promisee 'will or will not be able to complete his side of the bargain' did not arise. The question did arise in *Musumeci v. Winadell*[100] where the circumstances had changed to the point where performance of the original obligation became more onerous and was in doubt.

Apart from the effective sidestepping of *Stilk v. Myrick,*[101] there are several questions of principle requiring attention.

4.7 The effect of Williams v. Roffey on the cautionary function of consideration

It is clear that the doctrine of consideration did not play any significant role in the minds of the parties at the time the agreement was struck. The defence of want of consideration was raised as an afterthought. This point is well made by Russell LJ.[102] It did not, for instance, perform the cautionary role described by Lon Fuller who suggested that the presence or absence of consideration in a transaction was a matter of form and continued: '[a] formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action'.[103]

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[96] [1991] 1 QB 1.
[97] [1990] 2 Lloyd's Rep. 526.
[98] [1993] IRLR 383.
[99] (Phillips J, Supreme Court of Victoria, 29 November 1993 unreported).
[100] (1994) 34 NSWLR 723.
[101] (1809) 2 Camp. 317.
[102] [1991] 1 QB 1 at p17.
[103] op. cit., ch.2, n.174, above at p800.

It is not clear why the builder allowed itself into the position where the subcontractor could claim that the contract was fundamentally breached. The matter was raised in the builder's third defence and is not mentioned in any of the judgments. The dispute appeared to be about the level of payments made to the subcontractor. If the English building industry has the same characteristics as the Australian, what happened is not surprising. Builders highly value the 'power of the purse' as a means of securing a subcontractor's performance. No doubt the builder countered that the subcontractor had not performed within the time constraints of the agreement. One thing is certain and that is, the builder did not decline to make payments because of the absence of consideration.

A distinction should be made between the supposed cautionary role of consideration and the potential of consideration to prevent enforced contract modifications. Fuller in the passage cited above suggested that there would occasionally be a connection between the two concepts. It is pointed out, however, that where sufficient pressure is applied, a victim might yield although aware of the consequences. It has been held that in these circumstances the victim very willingly complies with the demand and no level of caution would make a difference.[104]

4.8 The impact of the decision on the incidents of consideration

Bargain theory

The *rationes* of *Australian Woollen Mills v. The Commonwealth*[105] and *Beaton v. McDivitt*[106] clearly establish that bargain theory applies in Australia to the initial formation of a contract. By bargain theory it is understood that the action of the promisee was a response to the conduct (offer) of the promisor. The facts and the tenor of the judgments of both authorities make it clear that contract modification situations were in no way dealt with. In *Williams v. Roffey*[107] the conduct amounting to 'practical benefit' had not been the subject of any bargaining process (engagement) and the matter

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[104] *DPP for Northern Ireland v. Lynch* [1975] AC 653. This was a criminal case although their Lordships thought, that the principles would apply to civil cases involving duress.
[105] (1954) 95 CLR 424.
[106] (1987) 13 NSWLR 162.
[107] [1991] 1 QB 1.

was not even adverted to by the Court of Appeal. The only reference to the transaction being a bargain is found in the judgment of Russell LJ where his Lordship speaks of the 'new bargain'. Here though, it is clear that the reference is to the outcome of the transaction rather than the process.[108] The conclusion is therefore drawn that, notwithstanding the acceptance of bargain theory as an aspect of contract formation, it is less significant to contract modification situations. This greatly emphasizes the role of the court in a post-dispute analysis of a contract modification transaction.

In *Musumeci v. Winadell*[109] Santow J was clearly uneasy with the fact that the practical benefits did not arise from any bargaining process nor were they embodied in any promise. This would need to be worked out in the future. The question might be: should only those practical benefits that are identified by the parties be recognised or should the matter depend on an examination by the court after the event? If the latter is the case, consideration might ultimately be treated the same way as offer and acceptance in *Integrated Computer Services Pty Ltd v. Digital Equipment Corp (Aust) Pty Ltd*.[110] The references by Purchas LJ in *Williams v. Roffey*[111] to transactions being 'beneficial to both sides' and Phillips J in *Ajax Cooke v. Nugent*[112] to 'mutual advantage' are references to the fact that the end result might be characterized as a bargain and not to the parties having engaged in a bargaining process. The decision of *Ajax Cooke v. Nugent* on this issue would appear to be at odds with the decision in *Australian Woollen Mills v. The Commonwealth*.[113]

The existing duty rule

The rule originated at a time when the expression 'consideration' denoted no more than one of a number of reasons why a court might hold a promise binding. The notion of 'consideration' survived to describe an essential element within a transaction. In the cases prior to *Stilk v. Myrick*[114] the existing duty had arisen out of an antecedent transaction. It is speculated that Lord Ellenborough's judgment in this case marked the

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[108] id., at p19.
[109] (1994) 34 NSWLR 723.
[110] (1988) 5 BPR 11,110.
[111] [1991] 1 QB at p18.
[112] (Phillips J, Supreme Court of Victoria, 29 November 1993) at p12.
[113] (1954) 95 CLR 424.
[114] (1809) 2 Camp. 317.

emergence of consideration as a unitary principle. Although Lord Ellenborough changed the theoretical basis of the decision in *Harris v. Watson* [115] to want of consideration, the practical need for the rule remained, namely the prevention of enforced contract modifications. The decision in *Stilk v. Myrick* [116] was the embodiment of the existing duty rule.

All members of the Court, although invited, declined to overrule *Stilk v. Myrick.* Glidewell LJ[117]confined the decision to gratuitous promise situations. Even so, he was able to say that the principle was 'unscathed'. Russell LJ did likewise.[118] Purchas LJ signally pointed to the antiquity and acknowledged authority of the case as the reason for not now overruling it. However, he too restricted its application to gratuitous promise situations. The factual situation in *Williams v. Roffey* was described by Purchas LJ[119] as '[p]rima facie ... a classic *Stilk v. Myrick* case'. The matter that distinguishes the two situations and makes the promise of the ship's captain gratuitous was the nature of the contract between seamen and ship owners. The seamen had agreed to the ship's articles and thereby as Lord Ellenborough said: 'sold all their services until the voyage should be completed'.[120] Accordingly, the seamen were already obliged to do anything (including the conferring of a practical benefit) that might have been offered in return for higher wages.

There will be few contracts in modern commerce that will impose such all-embracing obligations. The courts, if they are minded to do so, will in most cases be able, as Purchas LJ said, 'to detect' consideration.[121] Very clearly the significance of *Stilk v. Myrick* has been diminished. This will be especially evident in construction contracts where the contractor's obligation extends beyond the timely completion of the specified works for an agreed price to such imponderables as maintenance of a construction schedule, setting up regimes for quality assurance and implementing government policy on matters like employment of apprentices. A change of a peppercorn magnitude in any

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[115] (1791) Peake 101.
[116] (1809) 2 Camp. 317.
[117] [1991] 1 QB 1 at p16.
[118] [1991] 1 QB 1 at p19.
[119] [1991] QB 1 at p23.
[120] 2 Camp. 317 at p317.
[121] [1991] 1 QB at p20.

of these matters will serve as a legal basis to enforce any promises made in respect of those changes.

The 'practical benefit' found in *Williams v. Roffey* [122] was an expectation that the promisee would carry out the terms of his original undertaking after he had encountered financial difficulties. The simple affirmation of an existing duty may not be enough. Accordingly it is submitted that in proportion to the courts' preparedness to find 'practical benefit', the *existing duty* rule will cease to be of relevance. The point made by Glidewell LJ that the decision in *Williams v. Roffey* leaves *Stilk v.Myrick* [123] 'unscathed'[124] is, it is submitted, unlikely to prove to be the case.

Consideration must move from the promisee

The previous discussion has demonstrated the need for consideration to move from the promisee. Until the decision in *Williams v. Roffey* the rule had not been seriously questioned. The utility of the rule being that it enabled courts to indicate with some certainty which recipient of a promise would be able to insist on performance of that promise. Crompton J in *Tweddle v. Atkinson* [125] summed up the proposition best where his Lordship saw the matter in terms of justice. That is, it was unfair to give a party a right to sue on a promise if he were not liable to be sued for aspects of his own conduct. The privity aspect of consideration is not an important factor in contract modification situations. Normally the expression 'move from the promisee' implies some action or statement that has the effect of verifying the altered position of the promisee. This is not clearly evident in the reports of any of the judgments in *Williams v. Roffey*. The members of the court seem to have implied the 'practical benefit' as a necessary consequence of the promisee attempting to perform his contract. There was, it seems, no specific promise to confer a 'practical benefit' or continue with the project until completion. Only in the sense that the 'practical benefit' was a necessary corollary of the promisee attempting to perform his contract, could it be said that consideration did move from the promisee. The further question arises as to whether a benefit accruing to

[122] id., p1.
[123] (1809) 2 Camp.317.
[124] [1991] 1 QB 1 at p19.
[125] (1861) 1 B. & S. 393.

a promisor in this way can be characterised as consideration at all.[126] Accordingly, the principle is potentially modified by this case.[127]

Benefit to the promisor or detriment to the promisee

It is hard to see how in *Williams v. Roffey*[128] the promisee suffered any measurable detriment, unless an implied promise to forego the potential to breach a contract could be argued to amount to detriment. This is the view adopted by Santow J in *Musumeci v. Winadell* [129] and it is discussed earlier in this work.[130] As has been argued in this work the law should not on principle recognize this possibility.[131] The question of detriment to the promisee is not seriously raised by the case as the consideration was found in a 'practical benefit' to the promisor. Two other sources of detriment to the promisee in the case were the subcontractor's acceptance of the rearranged payment regime and the re-scheduled construction program. The matters were not significantly relied upon, although as pointed out above, each might have amounted to consideration in its own right.

What made the arrangement of any practical value was that circumstances had changed and the promisee was in danger of becoming bankrupt. What the promisor had secured was the promisee's co-operation in trying to avoid the difficulties attendant on this result. Glidewell LJ was careful to make this point in his reference to the promisee having 'reason to doubt whether [the promisor] will, or is able to, complete his side of the bargain'.[132] The doubt was an essential part of the equation, for without it the promisor does no more than repeat his or her original promise. It was the doubt that invested the second promise with 'practical benefit'. Generally doubt is a subjective concept; however in his carefully chosen words it was clear that the doubt will need to be demonstrable. His Lordship referred obliquely to the evidence of that doubt[133] and

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[126] For a discussion of the question, see p126 et seq. of this work**.**
[127] The principle was impliedly questioned by the decision in *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd,* however the only direct statement is in the judgment of Toohey J (1988) 165 CLR 107 at p621 and there the doubts are restricted to insurance contracts.
[128] [1991] 1 QB 1.
[129] (1994) 34 NSWLR 723.
[130] Above, at p107.
[131] The clearest Australian authority is the judgment of Windeyer J in *Coulls v. Bagot's Executor and Trustee Co Ltd* [1976] 119 CLR at p504.
[132] [1991] 1 QB 1 at p15.
[133] id., at p6.

Purchas LJ[134] made the matter clear: 'the plaintiff had been paid for more than 80 per cent of the work but had not completed anything like that percentage'. The difficulty for courts in future cases will be to decide whether a properly held doubt triggers the promise. There are two matters that the courts will need to have regard to. First, the tension between the self-serving potential of a promisor to deny any doubt and the fact that it will always be some measure of reassurance to a promisor to be promised that a contractual partner intends to fulfil his or her obligations.[135] Second, the problem a party in financial difficulties faces in bringing those difficulties to the attention of his or her contracting partner without the communication acquiring the trappings of economic duress. These matters will be exacerbated where there is a difference in the bargaining powers of the parties.

Where the need to modify a contract is driven by financial difficulties on the part of the future promisee (as in *Williams v. Roffey*[136]), communicating the problem to the future promisor becomes especially delicate. Furmston point out:[137]

> This leaves a rather narrow track in which he brings his difficulties to the attention of the promisor and enables the promisor to realise that he may not complete performance unless he is paid more but without coming anywhere near threatening not to perform. It is not clear that this would prove an easy distinction to apply in practice.

So far as the potential for duress is concerned, almost any statement by the promisee that he or she is about to fail financially could qualify. Once the promisor is on notice of the problem, the likelihood of the promisee not performing is obvious as are potential consequences. Presumably the promisee could only make a statement of the facts together with an assurance that he or she will perform to the extent of his or her

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[134] [1991] 1 QB 1 at p19.
[135] *Hooley* pointed out, op. cit., ch.3, n.31, at p29: 'At the very least, by mere confirmation that the duty will be performed, the promisor may feel more certain that the promisee would do the thing bargained for and he is relieved from seeking alternative performance .... If the courts recognize such a benefit, then the doctrine of consideration loses much of its effect in policing a bargain'. Dan Halyk in *Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in the light of Williams v. Roffey Bros* (1991) 55 Saskatchewan Law Review 393 at p398 went further saying: 'By stretching the doctrine of consideration to include factual benefits, one could conceivably make virtually all promises to vary existing contractual relationships enforceable where the promisee would not or could not have performed if the new promise had not been maintained .... [T]here is no logical limitation on what constitutes a "practical" benefit'.
[136] [1991] 1 QB 1.
[137] op. cit., ch.2, n.86, above, p92.

capacity. It would then be up to the promisor to make an offer of an additional payment. It is emphasised that this is a problem arising from the law relating to economic duress. In terms of contract law such a transaction is easily rendered binding by the use of a deed or by a nominal increase in promisee's performance in return for the additional payment. For example in the construction contract situation, the promisee could agree to complete the work one day earlier.

Does the detriment or benefit need to comply with the description 'legal'?

The type of benefit identified by Patterson J in *Thomas v. Thomas* [138] as 'legal' is not a closed list. It is likely that another category has been added to the list of 'legal' benefits, namely 'practical' benefits.

Consideration need not be adequate

The continued refusal of the courts to examine the adequacy of consideration has already been discussed.[139] The *quantum* of the consideration furnished has only been a factor in situations where a debtor has attempted to discharge his or her obligation by payment of a lesser sum. The principle expressed in *Foakes v. Beer* [140] outdated the action of *assumpsit* and has its origins in the action of debt. For this reason, the decision could be regarded as an historical anomaly. The decision in *Williams v. Roffey* [141] introduced a further situation where the *quantum* of the consideration furnished by the promisee might need to be investigated. It is clear that the courts will now carefully examine transactions to establish or deny the existence of 'practical benefit'. Purchas LJ spoke of the need of the court to 'detect' consideration.[142] As a matter of syntax, it is submitted that an investigation to discover a 'practical benefit' is a different investigation from the simple task of discovering the existence or otherwise of a benefit. The introduction of the adjective 'practical' adds a quantitative element to the investigation. The word has, *inter alia*, the following meanings:

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[138] (1842) 1 QB 330.
[139] Above p63 et seq.
[140] (1884) 9 App. Cas. 605.
[141] [1991] 1 QB 1.
[142] [1991] 1 QB 1 at p21.

> 3. pertaining or connected with the ordinary activities, business or work of the world. 6. inclined towards or fitted for actual work or useful activities. 7. mindful of the results, usefulness, advantages or disadvantages etc. of action or procedure.[143]

Since the 'practical benefit' may not have been stipulated or bargained for by the promisor, the act of detecting its existence involves an evaluation of the benefit in terms of the definition set out above. The question might be: was the benefit detected of some use to the promisor? It is suggested that this question cannot be answered other than in terms of the extent (or *quantum*) of the resultant benefit. In terms of the judgments of the Lords Justices of Appeal the conferring of a benefit on the promisor of the magnitude of a peppercorn might not fit the prescription. If the value of a benefit is seen as being on a sliding scale, there must be a point where whatever the courts hold to accrue to the promisor ceases to be illusory and becomes practical. Accordingly, it is further suggested that the rule relating to the reluctance of the courts to investigate the adequacy of consideration needs to be restated to accommodate the decision in *Williams v. Roffey*. If a practical benefit continues to be seen as consideration, the decision in *Foakes v. Beer* might need reconsideration.

The requirement for mutuality

Although the decision in *Williams v. Roffey*[144] probably leaves the legal position as stated in *Arnold v. The Mayor, Aldermen and Burgesses of the Borough of Poole*[145] and *Larkin v. Girvan,*[146] an important question arises out of the discussion. In some cases a promisee who has given a valuable consideration for the repetition of a promise arising out of an existing duty (as in *Williams v. Roffey*), plus the 'practical benefit' inherent in that repetition, might want to sue for the 'practical benefit'. Sometimes the value of the repetition of the promise is obvious as in the case of a promise that is statute barred, but what of other cases? Could Roffey Brothers have sued for the 'practical benefit'? The answer seems no and in most cases it will be possible to sue on the original obligation. Roffey Brothers were only entitled to expect the performance provided under the original contract. In this sense, there was a want of mutuality in the transaction.

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[143] *The Macquarie Dictionary* (1981) s.v. 'practical'.
[144] [1991] 1 QB 1.
[145] (1842) 1 Man. & G 861.
[146] (1940) SR (NSW) 365.

4.9 How did the decision accommodate the requirements of justice?

Although the messages that have emerged from *Williams v. Roffey* are conflicting, it is suggested that the judgment of Glidewell LJ contains the most pronounced departure from previous legal principle. The judgments of Russell LJ and Purchas LJ can be read as supportive of the position taken by Glidewell LJ. Assuming, at the least, that the court here 'developed and moulded' the law as envisaged by Sir Frederick Pollock;[147] what element within the transaction required the departure? After all Purchas LJ was able to say '[p]rima facie this would appear to be a classic *Stilk v. Myrick* case'[148] yet the result was very different. There was an agreement followed by a subsequent promise. The court upheld the validity of the subsequent promise. There would seem three possible sources of injustice that might have triggered the court's action. Those were:

- The conduct of the parties up to and including the conclusion of the first agreement.

- The content of the first agreement.

- The conduct of the parties in terms of execution of the first agreement and the making of the subsequent promise.

Nowhere in the judgments was there a suggestion that the conduct of the parties, leading up to the conclusion of the first agreement, had a bearing on the outcome. However the terms of the first agreement gave rise to the need for the subsequent promise. The conduct of the parties between the attempted execution of the first agreement and the negotiation of the giving of the subsequent promise *might* have been a factor; however all members of the court recognized the potential for, but expressly negatived the presence of, duress.[149] The court's benign attitude to the subsequent promise arises out of the relationship between the first and the subsequent promise agreements.

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[147] Sir Frederick Pollock, *Judicial Caution and* Valour (1929) 45 LQR 293 at p293.
[148] [1991] 1 QB 1 at p23.
[149] [1991] 1 QB 1 per Glidewell LJ at p16, per Russell LJ at p17 and per Purchas LJ at p21.

What was unjust about the relationship? It is suggested that the answer is found in the fact that the subsequent promise was made necessary by the severity of the first agreement. The subcontractor had been made to undertake a commercial risk. The risk involved was that the subcontract work could be carried out profitably within the time and money constraints of the subcontract. The trial judge found on the evidence of the builder's surveyor that the subcontract price of £20,000 was £3,783 less than that which would have enabled the subcontractor to operate at a profit,[150] a factor of almost 20 per cent. Although not stated in the report, it is not unreasonable to speculate that the builder would always have expected to pay more to have the subcontract work completed. The builder would thereby put itself in an unassailable position to dictate the basis on which incomplete subcontract work would be completed. This presupposes that the subcontractor remained in business long enough to be dictated to in this way. The inadequacy of the original subcontract price was not lost on the court. Glidewell LJ made references to the trial judge's findings in this regard twice.[151] Russell LJ said on the same matter:[152]

> The plaintiff had got into financial difficulties. The defendants through their employee Mr. Cottrell, recognised the price that had been agreed originally with the plaintiff was less than what Mr. Cottrell himself regarded as a reasonable price.

And Purchas LJ pointed out:[153]

> Evidence given by Mr. Cottrell, the defendant's surveyor, established that, to their knowledge, the original contract price was too low to enable the plaintiff to operate satisfactorily at a profit by something a little over £3,780.

The role generally of risk allocation within a transaction is well described by Professor Atiyah.[154] The allocation of the risk in this transaction left the risk with the party least able to deal with it.

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[150] According to Glidewell LJ id., at p6.
[151] [1991] 1 QB 1 at pp6, 10.
[152] id., at p19.
[153] id., at p19.
[154] Patrick Atiyah, *Promises Morals and the Law* (Oxford: Clarendon Press, 1981) p208.

4.10 Intention of the parties post Williams v. Roffey

The approach that emerged from the judgment of Russell LJ in *Williams v. Roffey*[155] where his Lordship suggested that the courts should seek to discover the intention of the parties will probably not go away. This raises the question of whether or not the whole problem should be treated as a matter of evidence. Perhaps some evidentiary provision such as the requirement for contract variations to be in writing would suffice? This solution would have caused some problems in *Lee v. GEC Plessey*[156] where Mr Lee had 1,323 co-plaintiffs.

4.11 The nature of consideration as exemplified by Williams v. Roffey Bros

Brian Coote[157] has suggested that the Court in *Williams v. Roffey* misunderstood the true nature of consideration. The author points out that the essence is to be found in the exchange of promises and not performance or its consequences. The reason for this phenomenon is that consideration is an ingredient in the formation of contracts. Since executory bilateral contracts are formed by exchange of promises, *ex hypothesi* performance comes too late to qualify. The only situation where the performance is more closely related to consideration is in unilateral contracts, for example, reward cases. On this basis the decision in *Williams v. Roffey*[158] suffers two vices: first, the practical benefits to the builder that flowed from the transaction could never be consideration (consideration could only be found in a promise to furnish those benefits at the time of the promise of extra payment) and second, no such promise was made. In fact the subcontractor did not mention the matter. The author concludes that the decision is wrong but adds that it would be doctrinally sound for the courts to decide that consideration is not required at all for contract modifications.

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[155] [1991] 1 QB 1 at p18.
[156] [1993] IRLR 383.
[157] op. cit., ch.2, n.47, above, at p27 .
[158] [1991] 1 QB 1.

It is suggested that Professor Coote's article displays considerable insight into the difficulties raised by the *Williams v. Roffey* decision. The author warns that the law will need to be developed cautiously. For this reason his conclusion is set out in full:[159]

> Theoretically, it may still be open to a court of final resort in a common law country to decide that consideration should not be necessary for the variation of a contract. After all, the High Court of Australia recently did something not to dissimilar in *Trident General Insurance Co Ltd v. McNiece Bros Ltd*,[160] though the chances of the present House of Lords acting in such a way seem remote. But what it is submitted no court of final resort could do without hopelessly compromising the doctrine of consideration would be to hold, as the Court of Appeal did in *Roffey Bros*, that additional consideration is to be found in the benefits flowing from the mere performance of a duty already owed to the promisee under a contract between the same parties. By the same token, neither could additional consideration be found in the performance itself.

With respect, it is submitted that what the author suggests a court of final resort may do, at least in Australia a court ought to take that step.

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[159] op. cit., ch.2, n.47, above.
[160] (1988) 165 CLR 107.

CHAPTER 5 The application of equitable principles to contract modifications

It is proposed in this chapter to examine the development of the law of estoppel in detail in relation to the ability of parties to modify the terms of ongoing contracts. In addition, it is proposed to examine briefly the developing law relating to good faith as it impacts on the law of contract. Whilst it is acknowledged that this development may not necessarily be classified under the rubric of equitable principles, the concepts are have sufficient in common to justify the inclusion of the discussion in the chapter.

The requirement for the application of the rules of estoppel does not necessarily arise from a contractual relationship but rather from the defendant acting in a way that is unconscionable. Even so, resiling from a promise made within a contractual setting has the potential to be unconscionable. The law of estoppel will intervene to alleviate the harm accruing to the beneficiary of the promise where it is not kept. Where the promise is made within the ambit of an existing contract, the granting of equitable relief manifests itself as an exception to the requirement for consideration. As the title of this work indicates, the discussion is about the consideration requirement for contract modifications. Accordingly it becomes necessary to discuss the exception.

5.1 Estoppel

In broad terms, the discussion starts with the decision of Denning J in *Central London Property Trust Limited v. High Trees House Limited* [1] and concludes with the extension of the principles to Australia. The decision of the High Court in *Waltons Stores (Interstate) Limited v. Maher* [2] may have gone beyond the point reached by the English Courts.

There has been a substantial academic discussion about the impact of *Waltons Stores v. Maher* on the law of contract in Australia.[3] Without detracting from the wider significance of the decision, it is pointed out that here, the discussion is limited to the

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[1] [1947] 1 KB 130.
[2] (1988) 164 CLR 387.
[3] For example: Eugene Clark, *The Swordbearer Has Arrived* (1987) 9 University of Tasmania Law Review 68; KE Lindgren, *Estoppel in Contract* (1989) 12 University of New South Wales Law Journal 30 and Samuel Stoljar, *Estoppel and Contract Theory* (1990) 3 Journal of Contract Law 1.

effect of the decision on a promise given by a party to a contract which modifies the obligation of his or her contracting partner. Such a promise is a statement or representation about the maker's future conduct. As has been the case with the discussion in the earlier parts of this work, it is proposed to examine the authorities on the subject and make an assessment of how the present state of the law accommodates the requirements of commerce.

In discussing the estoppel recognised in the *High Trees* case, the expression equitable estoppel will be used. When the principles were first recognised in *Hughes v. Metropolitan Railway Company*[4] Lord Cairns made it clear that it was an equitable principle that was under discussion.[5] Equally, Denning J in the *High Trees* case saw the principle as the 'natural result of the fusion of law and equity.'[6] The same principle is frequently referred to as promissory estoppel and by the authors of one work, *High Trees* estoppel.[7] The use of the expression will only be departed from when cited as part of a judgment or the work of another author. As will be seen the discussion broadens to include other forms of estoppel.

5.2 Limitations on the application of the rules of estoppel

Historically, the law of estoppel has several facets. These include: estoppel by deed, common law estoppel, estoppel by judgment, equitable estoppel by acquiescence and estoppel by representation. Estoppel by representation, with which this work is concerned, was a rule of evidence that could be pleaded in certain circumstances as a defence to an action by a plaintiff who was seeking to enforce rights clearly at odds with representations he or she had made.[8]

A difficulty for a party who relied on such a representation was identified by the House of Lords in *Jorden v. Money*.[9] In that case the defendant inherited rights under a bond from her deceased brother. The defendant had frequently stated to the plaintiff and

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[4] (1877) 2 App. Cas. 439.
[5] (1877) 2 App. Cas. at p448.
[6] [1947] 1 KB 130 at p134.
[7] Meagher, Gummow & Lehane, op. cit., ch.1, n.7.
[8] Per Jordan CJ in *Discount and Finance Ltd v. Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 at pp602–3.
[9] [1854] 5 HLC 184; 10 ER 868.

others that she did not intend to enforce the bond but nevertheless refused to give it up on the basis that it might be enforced against the plaintiff's co-debtor. The plaintiff intended marriage and his future parents-in-law enquired of the defendant and were assured that the bond would not be enforced. As a result they settled money on their daughter in anticipation of marriage. In addition the plaintiff's father had granted an interest in an overseas property to the defendant that might have been defeated in his will. On the basis that the plaintiff would not enforce the bond against his son he reaffirmed the grant in his will. The marriage took place. The defendant obtained judgment against the plaintiff under the bond. The plaintiff sought a declaration that the bond was unenforceable. Lord Cranworth LC pointed out that the matter was not free from judicial opinion to the contrary but continued:[10]

> I think that that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do.
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> [W]hat is here contended for, is this, Mrs Jorden, … over and over again represented that she abandoned the debt. Clothe that in any way you please, it means no more than this, that she would never enforce the debt; she does not mean, in saying that she abandoned it, to say that she had executed a release of the debt so as to preclude her legal right to sue
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> [I]t seems to me that the distinction is founded upon perfectly good sense, and that in truth in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say, "Enter into a contract." And then all difficulty is removed.

Lord Brougham[11] noted that the defendant did no more than state her present intention. It was not a misrepresentation of fact. She required the plaintiff to trust her. Lord St Leonards dissented on the basis that the debt is abandoned for the consideration of the plaintiff's marriage and the forbearance in regard to the transfer of foreign property.

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[10] [1854] 5 HLC 184 at pp212–215.
[11] id., at pp226–229.

The House of Lords sitting as a court of equity heard the matter. The appeal was from a decree of the Master of the Rolls in favour of the plaintiff and affirmed by the Court of Appeal. The decision represented an opportunity for the equity courts to take a more benign attitude to the nature of the conduct that would ground an estoppel. Greig and Davis say that this is a difficult case with all judges within the judicial hierarchy then prevailing in England being about evenly divided.[12] In the Court of Appeal Lord Cranworth dissented. When promoted to the House of Lords he maintained his point of view and that carried the day for the defendant. MacKinnon LJ referred to the doubt in *Salisbury v. Gilmore.*[13] Despite the uncertain origins of the principle and Lord St Leonards' misgivings the case remained an authority for nearly a century.

5.3 Equitable estoppel

The principles of equitable estoppel were re-examined in *Central London Property Trust Limited v. High Trees House Limited.*[14] There a block of flats was leased under seal to the defendant for a ground rent of £2,500 per annum. Due to lack of tenants during the war the owner reduced the rent to £1,250. The defendant was notified of the reduction by letter. The plaintiff (the receiver of the owner) sued for the foregone rent. The report of the case does not show counsels' arguments as citing all of the case material relied on by Denning J. If the material was not cited, it is surprising, as the view finally taken by his Lordship was one he had himself pursued as counsel in *Salisbury v. Gilmore.*[15] Counsel for the defence concentrated on the deed/parol variation dichotomy but as an alternative argued estoppel, and cited *Re William Porter.*[16] He noted that the defendants had arranged their affairs on the basis of the reduced rent. Denning J decided the matter in a short judgment first referring to the difficulty of *Jorden v. Money* [17] which he distinguished on the basis that there, the 'promisor made it clear that she did not intend to be legally bound.'[18] His Lordship further developed his views:[19]

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[12] op. cit., ch.1, n.4, at p137.
[13] [1942] 1 KB 38 at p51.
[14] [1947] KB 130.
[15] [1942] 1 KB 38.
[16] [1937] 2 AER 361.
[17] [1854] 5 H.L.C. 184.
[18] [1947] KB 13 at p134.
[19] ibid.

> There has been a series of decisions over the last fifty years which, although they were said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and was so acted on. In such cases the courts have said that the promise must be honoured. The cases which I particularly desire to refer to are: *Fenner v. Blake,*[20] *In re Wickham,*[21] *Re William Porter* [22] and *Buttery v. Pickard.*[23]
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> . . . . .
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> The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow a party making it to act inconsistently with it. In that sense, and in that sense only, such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes v. Metropolitan Railway Company,*[24] *Birmingham and District Land Company v. London & North Western Railway Company*[25] and *Salisbury (Marquess) v. Gilmore,*[26] afford sufficient basis for saying that a party would not be allowed in equity to go back on such a promise.

His Lordship noted that the Sixth Interim Report of the Law Revision Committee supported the view he was taking. He had mentioned this as counsel in *Salisbury v. Gilmore* to receive a mild rebuff from MacKinnon LJ who said: 'We were told by Mr Denning that the Law Revision Committee had had the audacity to propose the legislative abolition of this refinement, but for us it remains binding'.[27] In the judgment there is no reference to promissory or equitable estoppel as such.

The passage cited but not quoted by Denning J from *Hughes v. Metropolitan Railway Company* [28] was part of the speech of Lord Cairns LC. What Lord Cairns said is the beginning of the discussion on the subject and accordingly part of his speech is set out:[29]

> It was not argued at your Lordship's bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way of merely of saving property

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[20] [1900] 1 QB 426.
[21] (1917) 34 TLR 158.
[22] [1937] 2 All E.R. 361.
[23] [1946] W.N. 25.
[24] (1877) 2 App. Cas. 439, 448.
[25] (1888) 40 Ch D 268, 286.
[26] [1942] 2 KB 38, 51.
[27] [1942] 2 KB 38 at pp51–52.
[28] (1877) 2 App. Cas. 439.
[29] id., at p448.

> from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results-certain penalties or legal forfeiture-afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it *would be inequitable having regard to the dealings which have thus taken place between the parties* (italics added).

It is submitted that in the concluding words of this citation, Lord Cairns, in his reference to restricting a party's ability to enforce rights where it would have been 'inequitable', considered unconscionable conduct to be a basis of the exercise of the equitable jurisdiction.

In *Birmingham Land Company v. London & North Western Railway Company* [30] Cotton LJ applied *Hughes v. Metropolitan Railway Company,* [31] as did both Lindley LJ and Bowen LJ. Each cited the passage from Lord Cairns.[32] Bowen LJ[33] pointed out that it is not merely a principle for relief against forfeiture but extends to contractual obligations. His Lordship continued, 'I will not say that it is not a principle that was recognised by courts of law as well as equity. It is not necessary to consider how far it was always a principle of common law.'

The decision in the *High Trees* case immediately generated interest. GC Cheshire and CHS Fifoot[34] foresaw the utility of the development (perhaps with unjustified prescience) in the following terms:

> This equitable principle is capable, if resolutely followed, of making this part of the law intelligible without resort to artificial distinctions, and in particular circumventing the unnecessary and technical distinction between fact and promise which has confined the doctrine of estoppel within arbitrary limits.

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[30] (1888) 2 Ch D 268.
[31] (1877) 2 App. Cas. 439.
[32] (1888) 2 Ch D 268 at pp281, 286.
[33] id., at p286.
[34] GC Cheshire & CHS Fifoot, *Central London Property Trust Ltd v. High Trees House Ltd* (1947) 63 Law Quarterly Review 283 at pp300–301.

JF Wilson[35] was more sceptical saying: 'It would appear, therefore, that no new principle has emerged from the *High Trees* case,[36] but rather that this case is merely a modern application of a well established equitable remedy'. He attributed the basis of the decision to *Hughes v. Metropolitan Railway Company*[37] noting that no speech by their Lordships cited authority to support what Lord Cairns described as a 'first principle'.[38] The author further pointed out that in all of the cases preceding the *High Trees* case the promisee had suffered a detriment as a result of the promisor resiling from the promise yet Denning J omitted this requirement from his formulation of the principle simply requiring the promise to be 'acted on'.[39] He considered Denning J's remarks about the requirement for detriment inappropriate. In the cases before and those that applied the *High Trees* case detriment was always present. The detriment might be found in the promisee's failure to carry out his legal obligations. Presumably this would expose the promisee to legal action and in the case of a tenancy, possible forfeiture.[40] On the basis suggested by Wilson the promisee in the *High Trees* case did suffer a detriment. It is this last matter that causes problems as the principal cause of injustice is likely to arise from the promisee acting to his or her detriment. In any event most changes in position would involve some detriment.

It is appropriate to return to Lord Denning to conclude the discussion of the significance of the *High Trees* case. Writing extrajudicially, his Lordship argued that promises ought to be enforceable on a wider basis than that reached in the *High Trees* case:[41]

> If one compares the cases concerning promises on the formation of a contract, with those concerning cases on its modification and discharge, it would seem that, since the fusion of law and equity, we are approaching a state of affairs which Ames regarded as desirable, namely, that any act done on the faith of a promise should be regarded as sufficient consideration to make it binding. If the law should develop in this way, nearly all the recommendations of the Law Revision Committee will be achieved without recourse to legislation at all.

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[35] JF Wilson, *Recent Developments In Estoppel* (1951) 67 Law Quarterly Review 330.
[36] [1947] KB 130.
[37] (1877) 2 App. Cas. 439.
[38] op. cit., ch.5, n.35, above, at p333.
[39] id., at p348.
[40] op. cit., ch.5, n.35, at p350.
[41] AT Denning, *Recent Developments in the Doctrine of Consideration* (1952) 15 Modern Law Review 1 at pp9–10.

5.4 Recognition of equitable estoppel

The first opportunity for the House of Lords to review the emerging principle of equitable estoppel came in *Tool Metal Manufacturing Co Limited v. Tungsten Electric Co Limited.*[42] The importance of this case lies in the fact that it is apparently the first case where equitable estoppel has been applied to a commercial transaction. Hitherto the doctrine appears to have been applied in landlord and tenant transactions. Whilst it is conceded that many of these transactions are related to commerce it should be remembered that they have the effect of creating an interest in land, which has an overtone of status and to some extent the related law, has developed separately. In this work, a commercial transaction is considered to be one for the exchange of goods and services.

The next case to be discussed had more of the trappings of a commercial transaction for it involved the supply of goods and risk allocation. *Woodhouse Israel A.C. Cocoa Ltd S.A. v. Nigerian Produce Marketing Co Ltd*[43] was an appeal to the House of Lords. The appeal involved a contract for the purchase of Nigerian cocoa. The payment clause clearly stipulated that the purchase price was calculated by reference to, and payable in, Nigerian currency. Fearing the devaluation of the pound sterling, the appellant requested the respondent to accept payment in sterling. The respondent acceded saying 'payment can be made in sterling … you are at liberty to make payments in sterling'. Sterling was subsequently devalued against the Nigerian currency. The question was; who should bear the loss due to the devaluation? The appellants argued that as a result of the respondent's agreement they (the appellants) had acted to their prejudice. They might have insured against devaluation or forward purchased Nigerian currency.

Lord Hailsham LC held the letter whereby the concession was made is a reference to the payment of the purchase price, not to its measurement. He did not think the document was ambiguous but if it were then the ambiguity would prevent its operation

[42] [1955] 1 WLR 761.
[43] [1972] AC 741.

as an estoppel as claimed by the appellant. His Lordship did not totally exclude the possibility of estoppel operation in this situation for he continued:[44]

> But basically I feel convinced that there was never here any room for the doctrine or estoppel at all. If the exchange of letters was not a variation, I believe it was nothing. The buyers asked for a variation in the mode of discharge of a contract of sale. If the proposal meant what they claimed, and was acted upon, I venture to think that the vendors would have been bound by their acceptance at least until they gave reasonable notice to terminate, and I imagine that a modern court would have found no difficulty in discovering consideration for such a promise.

The difficulty with this passage is that his Lordship suggests that there was a potential for the parties to have varied the contract and if this were so, consideration could have been 'discovered' (as the Court of Appeal was able to do in *Williams v. Roffey*[45]). Surely if this were the case the promise, whatever its terms, would need to have been enforced in its entirety. The reference to the giving of a reasonable notice to terminate is more consistent with the operation of the doctrine of estoppel unless the promise was *to accept payment in sterling until the arrangement was brought to an end by the giving of reasonable notice*. This suggests a deal of coexistence between the operation of the doctrines of consideration and equitable estoppel, which may or may not be of assistance to parties in contract modification situations. Lord Hailsham LC understood that the law of equitable estoppel was in its infancy for he concluded his speech thus:[46]

> I desire to add that the time may soon come when the whole sequence of cases based on promissory estoppel since the war, beginning with *Central London Property Trust Limited v. High Trees House Limited* [1947] 1 KB 130, may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored.

The acceptance of the principle of equitable estoppel was not unqualified. *Brikom Investments v. Carr*[47] was another case where a landlord made concessions to tenants in circumstances that lacked consideration. Denning MR found for the tenants applying the doctrine of promissory estoppel. Roskill LJ was less enthusiastic preferring to base

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[44] [1972] AC 741at p758.
[45] [1991] 1 QB 1.
[46] id., at p758.
[47] [1979] 1 QB 467.

his judgment in favour of the tenants on a collateral contract and waiver. He said:[48] 'I would respectfully add that it would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in this backhanded way the doctrine of consideration.' To this point all of the authorities involved a promisee successfully resisting a claim by a party who had resiled from a promise.

5.5 Estoppel as a component in a cause of action

In *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd*[49] the action was brought by the liquidator of the plaintiff property company. The plaintiff sought a loan on behalf of its subsidiary ANPP from the defendant secured by a mortgage over a property in the Bahamas. The defendant bank through its own subsidiary Portsoken Properties made the advance. The interpolation of the subsidiary company was to avoid Bahaman monetary exchange regulations. The plaintiff agreed to guarantee repayment of the loan by the ANPP. There was a defect in the documentation in that it guaranteed repayment to the bank and not Portsoken Properties. On default by ANPP it was Portsoken Properties that needed to seek repayment of the loan. The situation resulted from an oversight and the inappropriate use of standard documents. Neither party was aware of the error and proceeded on the basis that the correct documentation was in place. The liquidator sought a declaration that the guarantee was ineffective for the benefit of unsecured creditors.

The trial judge, Robert Goff J, found as a fact that the parties believed that the guarantee was binding and had the deficiency been discovered by the immediate actors it would have been rectified. The point taken by the liquidator was technical and to some extent unmeritorious. On the question of equitable estoppel having the effect of perfecting a cause of action his Lordship said:[50]

> Third, it is in my judgment not of itself a bar to estoppel that its effect may be to enable a party to enforce a cause of action which, without estoppel would not exist. It is sometimes said that an estoppel cannot create a cause of action, or that an estoppel can only act as a shield, not a sword. In a sense this is true-in the

[48] id., at p486.
[49] [1982] 1 QB 84.
[50] [1982] 1 QB 84 at p105.

> sense that estoppel is not, as a contract is, a source of legal obligation. But as Denning MR pointed out in *Crabb v. Arun District Council* [1976] Ch. 179,187, an estoppel may have the effect that a party can enforce a cause of action which, without estoppel, he would not be able to do.

On appeal, to the Court of Appeal Denning MR agreed but for a different reason, considering that the trial judge construed the guarantee literally *in vacuo.* Robert Goff J did not look at the factual matrix including the correspondence. On this basis the guarantee was effective. Everleigh LJ and Brandon LJ agreed that the guarantee was effective.

Despite the uncertainty of the *ratio decidendi* of this case, the genie was nevertheless out of the bottle. Some disquiet has been expressed about the potential open-ended effect of the *High Trees* [51] case. Reynolds and Treitel[52] argued: 'If the *High Trees* doctrine is not kept within such bounds, [waiver and debts accruing periodically by instalments] it could cover all discharge or modification of contract, which would thus become independent of consideration by a different route' and the authors continue in a manner that proclaims the utility of hindsight, '[n]or does there seem to be much chance of persuading the courts to introduce the American idea of "economic duress", since the scope of duress … in English law is, on the authorities, very narrow'.[53]

5.6 Development of the law of estoppel in Australia

The developments described to this point did not get off to a flying start in the Australian courts. In New South Wales there existed a procedural obstacle in that law and equity were yet to be fused. An attempt to do this had been made with reforms introduced in to the *Common Law Procedure Acts 1899–1957* (NSW) by the *Supreme Court Procedure Act 1957* (NSW). The former Act provided in s95(1) that a party to proceedings 'entitled to relief against [a] judgment on equitable grounds may plead the facts which would entitle him to such relief by way of defence, and the court may receive such defence by way of a plea'. The reform introduced by the latter Act provided that where such a plea was raised the matter would be transferred to the jurisdiction of the court in equity.

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[51] [1947] KB 130.
[52] FMB Reynolds & GH Treitel, *Consideration for the Modification of Contracts* (1965) 7 Malaya Law Review 1 at p17.
[53] id., at p22.

In *N.S.W. Rutile Mining Co. Pty. Limited v. Eagle Metal and Industrial Products Pty Limited*[54] it was held by the Full Court of the NSW Supreme Court that this defence was only available where the equity claimed could itself ground an injunction. Sugerman J made the point:[55]

> It is not merely a question of whether equity would grant an absolute, unconditional and perpetual injunction; the defendant at law cannot, as a plaintiff in equity, obtain an injunction *at all* in reliance of this doctrine [promissory estoppel].
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> • • • • •
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> But I think it is clear that an estoppel, whether promissory or true estoppel, can never be used to found a cause of action whether in equity or common law. In one sense it is true to say that the defendant here is seeking to use this promissory estoppel as a shield and not a sword, but it can do so here only if it could use it as a sword in proceedings in which it was a plaintiff, and this, in my opinion, it could not do.

The problems described above would appear to have been overcome by the enactment of ss57–60 of the *Supreme Court Act 1970* (NSW).

Matters got off to a more promising start in South Australia. *Je Maintiendrai Pty. Ltd. v. Quaglia and Quaglia*[56] was a case concerning a written lease of a shop for a term of years. The lessor agreed at the request of the lessee to accept a reduced rent indefinitely. After accepting the reduced rent for 18 months, the lessor claimed the arrears on discovering that the tenant was about to vacate the shop. The trial judge held that the lessor was estopped from claiming the arrears. On appeal to the Full Court King CJ pointed out that the effect of *Jorden v. Money* [57] was ameliorated by *Hughes v. Metropolitan Railway Company* [58] and *Birmingham and District Land Company v. London & North Western Railway Company* [59] in that the representation needed to trigger the defence moved from ones of fact to statements about future conduct. After reviewing the law as expressed by Dixon J in *Grunt v. Great Boulder Gold Mines Pty.*

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[54] [1960] SR (NSW) 495.
[55] id., at p510.
[56] (1980) 26 SASR 101.
[57] [1854] 5 H.L.C. 184.
[58] (1877) 2 App. Cas. 439.
[59] (1888) 40 Ch D 268.

Ltd.[60] and the English authorities he concludes that there is no difference between a departure from a representation of fact and future conduct. Both should be actionable but only after some detriment in the promisee. His Honour, with some reluctance accepted the trial judge's view that the detriment was to be found in the fact that the defendants must now face a lump sum liability for the foregone rent rather than the opportunity to pay it by instalments.

White J noted that counsel in argument had not been able to point to a case where the *High Trees*[61] case had been applied in Australia. He continued, saying that Denning LJ in his Modern Law Review article saw no need for the promisee to act to his detriment. His Honour cited a passage from the judgment of Bowen LJ in *Birmingham Land Company v. London & North Western Railway Company*[62] which was approved by the House of Lords in *Tool Metal Manufacturing Co Limited v. Tungsten Electric Co Limited*[63] which concluded with the words, 'those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before'. He continued:[64]

> The last part of the passage does seem to suggest that there must be some restoration of the altered position before the resiling promisor will be permitted to go back on his promise; in turn the necessity to restore the position seems to suggest or assume that there has been some suffering of a detriment by the promisee.

His Honour, from the point of view of this work, took an important step. He adopted the statement from Spencer Bower and Turner, *Estoppel by Representation*[65] derived from the judgment of Dixon J in *Grunt v. Great Boulder Gold Mines Pty Ltd* that detriment must be judged at the moment the promisor proposes to resile from the representation. This is important because it will bring within the rubric of promissory estoppel situations where the detriment is not immediately obvious. For example, where the promise relied on makes a concession to the promisee, in many instances it is only after the promisee has acted on the promise for some time that he or she will suffer a

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[60] (1937) 59 CLR 641 at p674.
[61] [1947] KB 130.
[62] (1888) 40 Ch. D 269 at p286.
[63] [1955] 1 WLR 761 at p763
[64] (1980) 26 SASR 101 at p111.
[65] GS Bower & AK Turner, *Estoppel by Representation* (3rd Edition, Butterworths, 1977).

detriment by the promisor reverting to his or her original position. This point will be returned to later in the work. Cox J found for the defendant on the factual basis that the evidence (part of the transcript was set out) did not disclose any detriment.

Promissory estoppel was first argued in the High Court in *Legione v. Hateley.*[66] The case concerned a contract for the purchase of an allotment of land. The contract included a clause that time was to be of the essence of the contract and requiring the parties to issue a written notice before enforcing rights or remedies. The purchaser erected a house on the land before completion. The vendor issued a notice to complete expiring on the 10 August 1978. On the 8 August 1978 the purchaser's solicitor telephoned the vendor's solicitor and spoke to a clerk stating that bridging finance has been arranged and as the bank needed to make searches, settlement would not take place until 17 August 1978. The clerk replied: 'I think that will be all right but I will have to get instructions.' Subsequently the vendor refused to complete and forfeited the moneys paid under the contract. The purchasers' tender of the purchase price on 15 August 1978 was rejected. The purchasers sued for specific performance of the contract.

Gibbs CJ and Murphy J noted that the authorities on estoppel had not been reduced to a coherent body of doctrine and continued that this was not an appropriate case to do so. Their Honours concluded that the conduct of the vendor's solicitor's clerk fell within the compass of estoppel on the basis that the purchasers' solicitor was induced to believe that the vendors' right to rescind the contract would be kept in abeyance, the purchasers acted on the faith of the inducement and it would be inequitable to allow the vendors to rescind. They did not specify the nature of the estoppel that they applied but since they reviewed the authorities commencing with *Hughes v. Metropolitan Railway Company* it is reasonable to assume that they had equitable estoppel in mind. Their decision was also based on the equitable principle of relief against forfeiture.

Mason and Deane JJ considered that the matters in issue were an example of estoppel *in pais*[67] which had been defined by Dixon J in *Thompson v. Palmer*[68] as preventing 'an unjust departure by one person from an assumption adopted by another. It was essential

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[66] (1983) 152 CLR 406.
[67] id., at p430.
[68] (1933) 49 CLR 507 at p547.

that the other party place himself in a position of material disadvantage.[69] They continued that Dixon J in *Grunt v. Great Boulder Gold Mines Pty Ltd*[70] had made it clear that the doctrine did not depend on 'idiosyncratic concepts of justice and fairness', but required conduct on the part of the promisor that leads the promisee into difficulties.[71] Their Honours considered that Dixon J in *Thompson v. Palmer*[72] seemed not to distinguish between representations of existing fact or future conduct or may have transmogrified the latter into the former.[73] It was noted that Bowen LJ in *Birmingham Land Company v. London & North Western Railway Company*[74] extended the principle to contracts. Their Honours referred to the inconsistency of the *High Trees* principle with *Jorden v. Money*[75] as highlighted in *Chadwick v. Manning*[76] and some High Court decisions but concluded that equitable estoppel (but the term promissory was used) now applies in Australia:[77]

> The clear trend of recent authorities, the rationale of the general principle underlying estoppel in pais, established equitable principle and the legitimate search for justice and consistency under the law combine to persuade us to conclude that promissory estoppel should be accepted in Australia as applicable between parties in such a relationship [parties in a existing contractual relationship].

The judgment left open the question whether equitable estoppel is an extension of estoppel *in pais* into a field where the doctrine of consideration otherwise predominates.[78] There were however, two rules that are common to estoppel *in pais* and equitable estoppel. First, the representation relied upon must be clear before it can found an estoppel.[79] Second, the party who acted on the basis of the representation 'must have placed himself in a position of material disadvantage' for the principle to

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[69] (1983) 152 CLR 406 at p431.
[70] (1937) 59 CLR 641at p676. It will be seen as this chapter develops that, on the subject of estoppel, the High Court relied heavily on this and other judgments of Dixon J. It has been commented: 'The decisions of Dixon J have had a marked effect on the formulations (not by any means consistent) of principle in *Waltons Stores (Interstate) Ltd v. Maher*', Meagher, Gummow & Lehane op. cit., ch.1, n.7, p409.
[71] (1983) 152 CLR 406 at p431.
[72] (1933) 49 CLR 547.
[73] (1983) 152 CLR 406 at 432.
[74] 40 Ch. D 268 at p286.
[75] [1854] 5 HLC 184.
[76] [1896] AC 231.
[77] (1983) 152 CLR 406 at pp434–435.
[78] id., at p435.
[79] ibid.

apply. The text[80] of the second proposition was taken from the judgment of Dixon J in *Thompson v. Palmer*.[81] Their Honours concluded that the solicitor's clerk did not make any representations and therefore the doctrine does not apply in the instant case however the purchasers might be entitled to relief against forfeiture.

Brennan J resolves the whole question on the want of authority in the solicitor's clerk to bind the vendors.

In summary two of the five justices applied the principle of equitable estoppel in making their decision. Two more recognised the principle but found it unnecessary to apply it. Their remarks at this point could be considered obiter but no doubt a pointer to the future. The remaining judge did not refer to the principle at all.

5.7 The decision in Waltons Stores v. Maher[82]

A great deal has been made of this decision of the Australian High Court and its potential impact on the law. The discussion here will concentrate on the utility of the decision for parties wishing to modify the terms of an existing commercial contract. Accordingly it will be necessary to examine the basis of the availability of the remedy of estoppel and the extent of that remedy. The Mahers owned commercial premises that, after negotiation, they agreed orally to lease to Waltons. Part of the agreement was that they would demolish the existing premises and build a shop as specified by Waltons. Waltons' solicitors forwarded to the Mahers' solicitor a lease and a schedule of finishes. The solicitor suggested some alterations and subsequently asked if the alterations were agreed to. He was told ‘we believe approval will be forthcoming, we will let you know tomorrow.’ There was no further advice. Mahers' solicitor sent a letter a few days later to Waltons' solicitors together with the executed lease and schedule of finishes ‘by way of exchange’. During the negotiations the urgency of the matter was emphasised to enable construction to be finished by the date required by Waltons for possession. Waltons' solicitor did not reply and the Mahers demolished the building and half completed the new shop before Waltons indicated that they had had a change of policy and would not go ahead with the transaction.

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[80] id., at p437.
[81] 49 CLR at p547.
[82] (1988) 164 CLR 387.

Mason CJ and Wilson J pointed out that Waltons had instructed their solicitors to 'go slow' whilst they made up their minds and concluded that Mahers did not believe that a formal contract had come into existence but that one would follow as a matter of course. To hold that this situation could be resolved by an application of the principles of common law estoppel would require *Jorden v. Money*[83] to be reversed as the principle cannot apply to mistaken assumptions about future events. Their Honours considered the difficulty of promissory estoppel becoming a cause of action but noted that it could become a component of a cause of action.[84] Could the principle be taken a step further where there is no pre-existing relationship? Greig and Davis[85] were cited for the lack of justification for distinguishing between contractual and non-contractual promises. Their Honours continued:[86]

> The point is that, generally speaking, a plaintiff cannot enforce a voluntary promise because the promisee may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract.

On the question of how the law of equitable estoppel has developed their Honours said:[87]

> The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. *Something more would be required*. *Humphreys Estate*[88] suggests that *this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party* (italics added).

This passage is important to the discussion of equitable estoppel because it encapsulates the basis of equitable intervention in a transaction. Firstly, it is to be noted that the

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[83] [1854] 5 HLC 184.
[84] *Combe v. Combe* [1951] 2 KB 215 per Denning LJ at p220.
[85] The passage cited is found at op. cit., ch.1, n.4, at p184.
[86] (1988) 164 CLR 387 at p403.
[87] id., at p406.
[88] *Attorney-General of Hong Kong v. Humphreys Estate Ltd* [1987] 1 AC 114.

reason for enforcement (to the degree that equity will enforce such a promise) is that to allow the promisor to do otherwise would be unconscionable.[89] Their honours however were at pains to point out that neither failure by the promisor to fulfill the promise nor detrimental reliance on the part of the promisor either separately or cumulatively will trigger the operation of the doctrine. A further element is necessary and that is, an inducement by the promisor, that is relied on by the promisee to the knowledge of the promisor. It is suggested that the reference to 'creation or encouragement' bespeaks the need for a causal connection between the failure to make good the promise and detriment arising from the reliance on that promise. The inference is that the conduct of the promisor must contain an element of culpability. Although not relevant to this discussion the actions of the promisor to qualify have a marked resemblance to the developing law of negligent misstatement.

In this case the urgency and the want of action after the document was forwarded supplied the links. The judgment concluded:[90] 'To express the point in the language of promissory estoppel the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.'

Brennan J pointed out that if Mahers had proceeded on the basis of 'that an exchange would be duly completed' then there was a potential for equitable estoppel to apply. On the other had if the Mahers proceeded on the basis of an already 'concluded agreement' then there was the potential for an application of estoppel *in pais*. He said:[91] 'The effect of an estoppel *in pais* is not to create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is established.' At this point in the judgment it became clear that his Honour favoured equitable estoppel as the appropriate remedy, he continued:[92] '[it] does not operate by establishing an assumed state of affairs. Unlike estoppel *in pais* an equitable estoppel is a source of legal obligation, it is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs' and[93] '[t]he element which both attracts the jurisdiction of equity and shapes the remedy to be

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[89] The nature of the equitable remedy is discussed below at p160.
[90] (1988) 164 CLR 387 at p408.
[91] id., at p414.
[92] id., at p416.
[93] id., at p419.

given is unconscionable conduct'. His Honour further explains the nature of equitable estoppel in the following terms:[94]

> The object of the equity is not to compel the party bound to fulfil the assumption or expectation it is to avoid the detriment which, if the expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon.
>
> If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed. A non-contractual promise can give rise to an equitable estoppel only *when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise.* When these elements are present, equitable estoppel wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting (italics added).

Here too the elements of unconscionable conduct are identified, namely: a promise intended to affect legal relations, encouragement and knowledge of the promisee's reaction to the promise, detrimental reliance and failure to fulfil the promise. The tests thus set out were essentially those proposed by Mason CJ and Wilson J. He concluded the discussion by dealing with the issue of equitable estoppel being used as a sword:[95] 'There is no logical distinction to be drawn between a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one'. In applying the law to the facts his Honour stated[96] that Walton's solicitors could only retain the contract executed by Maher on the basis that there had been an exchange otherwise they were bound to return it.

Deane J after a careful and detailed analysis of the sequence of events in a conveyancing stated:[97] 'Whatever the possible legal rationalisation might be, the operative finding for the purposes of the present case was that the Mahers, who were not lawyers, believed that there was a binding agreement between Waltons and

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[94] id., at pp423–424.
[95] (1988) 164 CLR 387 at pp426–426.
[96] id., at p429.
[97] Id., at p438.

themselves'. His Honour said that the facts as rehearsed by him were sufficient to found an estoppel precluding Waltons from denying the existence of a binding agreement for lease. In doing so his Honour accepted the finding of the trial judge and as a consequence the estoppel thus found was common law or estoppel by conduct. As to the authorities to the effect that estoppel is only available as a defence his Honour said:[98]

> The authoritative expositions of the doctrine of estoppel by conduct (or, in more obscure language, in pais) to be found in the judgments of this court have been consistently framed in general terms and lend no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying on the assumed represented mistaken state of affairs (which the defendant is estopped from denying) as the factual foundation of a cause of action arising under ordinary principles of law… There is no basis in principle for such a constriction of the doctrine. In so far as the decisions or statements in judgments in cases in other courts would support a contrary view, they should not be accepted in this country.

His Honour continued his argument for a rationalisation of the various streams of estoppel:[99]

> There is much to be said for the view that this Court should, in the interests of clarity and simplicity of the law, immediately take the final jump to the conclusion which Lord Denning MR informs us was reached by Sir Owen Dixon some 40 years ago, that the doctrine of estoppel by conduct should be generally extended "to include an assumption of fact or law, present or future"… If it were necessary to consider such a general extension of the doctrine, my present inclination would be to accept it. It is not however necessary to resolve the matter for the purposes of the present case.

And concluded in a more orthodox vein:

> [A]nd it seems to me to be preferable to proceed, at least for the time being, with the development of the law in that area on a more cautious basis. That being so, promissory estoppel should, for the time being, continue to be seen in this country in the manner envisaged in *Legione v. Hateley*, that is to say, an extension of the doctrine of estoppel by conduct to representations or assumptions of future fact in at least certain categories of case. In identifying those categories of case, it remains, at this stage, necessary to proceed by the ordinary process of legal reasoning and be conscious of the currently entrenched importance of the doctrine of consideration.

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[98] id., at p445.
[99] id., at p452.

For those who would argue for the primacy of the doctrine of consideration his Honour offered a note of reassurance:[100]

> To the contrary, the extension of the existing applicability of estoppel by conduct in those fields to that category of case would, if anything, strengthen the overall position of the doctrine of consideration by overcoming its unjust operation in special circumstances with which it is inadequate to deal.

Gaudron J found that the plaintiffs believed that exchange had taken place and therefore the decision involved an application of common law estoppel (estoppel by convention). Once Waltons had changed their minds they 'came under a duty' to inform the Mahers and were accordingly were estopped from asserting any matter contrary to the impression they had created.

Eugene Clark[101] expressed the view that there are three issues of principle that could be said to be part of the *ratio decidendi* of the decision. Briefly those issues are: first; unconsionability is the unifying principle which forms the basis of the different heads of equity incorporated under equitable estoppel; second, it is now clear that a pre-existing legal or contractual relationship is not essential to the operation of the doctrine of promissory estoppel and, finally, promissory estoppel may now be used as a cause of action rather than be restricted to a defence, in other words the sword/shield dichotomy has been dropped.[102] It is only with the first and third of these propositions that this work is concerned. The second is excluded by the scope of the work namely, the role of consideration in contract modifications. Even so, it raises a pedantic point. Certainly the High Court considered that there was no existing legal relationship but this was largely because the parties said so. On ordinary contractual principles, there was an accepted offer, the terms of the agreement were determined and all that remained was the need to comply with s54 of the *Conveyancing Act 1919* (NSW). This was not how the High Court saw the matter although Deane J did refer to the possibility.[103]

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[100] id., at p453.
[101] op. cit., ch.5, n.3, at pp73–75.
[102] It is noted that the author in the first point used the word 'equitable' and subsequently 'promissory'. Generally, the discussion on this topic treats the expressions as interchangeable. It is not clear if the author is suggesting that there is some significance in his choice — if he does he does not say why.
[103] (1988) 164 CLR 387 at p445.

From the point of view of this work the important aspect of the decision is that four of the five justices sitting: Mason CJ, Wilson J, Brennan J and Deane J stated that the principle of equitable estoppel applies in Australia. The judgment of Mason CJ and Wilson J[104] made it clear that the basis of the operation of the doctrine is the inducement by the promisor to a promisee to rely on the assertion and the promisor must know of the detrimental reliance. Brennan J put a similar formula forward although there his Honour stated that he was speaking of non-contractual promises. It is suggested *a fortiori* these remarks would apply to contractual promises. Both passages are set above[105] with the relevant parts italicised. Despite his argument for a wider conceptual basis for the doctrine, Deane J made a similar point (although more obscurely) by his deference to *Legione v. Hateley*[106] on the question.[107] It is suggested that in general terms what has been set out above is the basis of the operation of the doctrine in Australia at the present.

5.8 An attempt to unify the principles of estoppel

The decision in *The Commonwealth of Australia v. Verwayen* [108] did not concern a contract or an existing legal relationship at all. Therefore its chief interest lies in the way that the High Court developed the conceptual framework established in *Legione v. Hateley* [109] and *Waltons Stores v. Maher*.[110] The plaintiff, a former member of the Royal Australian Navy, sued the Commonwealth for injuries sustained as the result of a collision between two warships of the navy engaged in combat exercises in 1964. The legal proceedings were commenced by statement of claim on 2 November 1984 and the Commonwealth filed its defence on 14 March 1985. On 25 January 1985 the Australian Government Solicitor advised the plaintiff's solicitor that it proposed to admit liability and waive a defence based on the *Limitation of Actions Act 1958* (Vic). This advice was subsequently confirmed in writing. In its defence the Commonwealth did not plead that the claim was statute barred or that it owed no duty of care to the plaintiff. The Commonwealth adhered to this position by joining with the plaintiff in several

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[104] id., at p406.
[105] Above, pp144, 146.
[106] (1983) 153 CLR 406.
[107] (1988) 164 CLR 387 at p452.
[108] (1990) 170 CLR 394.
[109] (1983) 153 CLR 406.
[110] (1988) 164 CLR 387.

applications to the Victorian Supreme Court for an expedited hearing. After a change of policy, the Commonwealth sought and was granted leave to amend its defence to raise the issues of the claim being statute barred and the absence of a duty of care. The trial judge dealt with the issues as a preliminary point finding in favour of the Commonwealth. The appeal raises the question, was the Commonwealth bound by its earlier admissions?

Mason CJ discussed the desirability of bringing together the various categories of estoppel. His Honour elaborated and in doing so, made a point that is important to the theme of this work:[111]

> The obstacle to a single overarching doctrine is a suggested difference in the nature of estoppel by conduct on the one hand and equitable estoppel (including promissory estoppel) on the other and in the character of the protection which they respectively provide. Traditionally, estoppel by conduct has been classified as a rule of evidence, available where there is a cause of action, to prevent a person from denying what he previously represented, and has not itself constituted a cause of action … Being an evidentiary principle, estoppel by conduct achieved, and could only achieve, the object of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the party estopped to that state of affairs. The rights of the parties were ascertained by reference to that state of affairs. On the other hand, equity was more flexible. Equity was concerned, not to make good the assumption, but to do what was necessary to prevent the suffering of detriment.

His Honour concluded that in *Waltons Stores v. Maher*[112] the majority adopted the view that 'equitable estoppel entitled a party only to that relief which was necessary to prevent unconscionable conduct'. He noted how the Court had adopted the words of Scarman LJ in *Crabb v. Arun District Council*[113] that required the court to determine 'the minimum equity to do justice to the plaintiff'. In this sense the rules of equity were seen as being more flexible. He synthesised the modern authorities including *Walton Stores v. Maher* as follows:[114]

> The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but no more, to prevent a person who has relied upon an assumption as to a present,

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[111] (1990) 170 CLR 394 at p411.
[112] (1988) 164 CLR 387.
[113] [1976] Ch. D 179 at p198.
[114] (1990) 170 CLR 394 at p413.

> past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of a denial of its correctness. A central element of that doctrine is that there must be proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.

Here, it seems his Honour is taking up the theme initiated by Deane J. Another feature of this statement is that he has dropped as a requirement of the operation of the doctrine the need for knowledge in the promisor that the promisee has acted to his or her detriment as a result of the promise (as referred to by Mason CJ and Wilson J in *Waltons Stores v. Maher*). It could that this matter is to be implied from what has been said. In any event this is possibly a matter of semantics. The statement is more directed to the remedy than the basis of liability. Later he makes a distinction between detriment in the broad sense (from denial of the correctness of the assumption) and the narrow sense (the detriment actually suffered).[115] This is, in more general terms, the difference between the value to a plaintiff from the lost potential benefits of a promise and the losses incurred through reliance on that promise. He continued:[116]

> But, as we have seen, the relief which equity grants is by no means necessarily to be measured by the extent of that detriment. So, while detriment in the broader sense is required in order to found an estoppel (and it would be strange to grant relief if such detriment were absent), the law provides a remedy which will often be closer in scope to the detriment suffered in the narrower sense.

It is assumed that detriment in the broader sense will include detriment in the narrow sense. From the point of view of this work, adjusting the remedy to detriment in the narrow sense will introduce an uncertainty that is hardly conducive to harmonious commercial relations. His Honour then concluded that the evidence of detriment suffered by the plaintiff did not warrant the disproportionate response of depriving the Commonwealth of its defence.[117] The detriment suffered by the plaintiff could be accommodated by an order for costs in his favour and accordingly the decision of the trial judge stands.

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[115] id., at p415.
[116] id., at p415.
[117] id., at p417.

Brennan J confirmed[118] the principle enunciated by the majority in *Walton Stores v. Maher* and repeated the statement about the need for 'the minimum equity to do justice'.[119] He noted that on occasions this would entail enforcing the promise, as was the case in *Walton Stores v. Maher.* His Honour then dismissed the appeal and proposed that the matter be remitted to the trial judge for an assessment of the detriment suffered by the plaintiff to the time that the Commonwealth amended its pleadings.[120]

Deane J indicated that he considered that the resolution of this case lay in an application of 'the general doctrine of estoppel by conduct.'[121] He reiterated his view from *Walton Stores v. Maher*[122] that promissory estoppel is an aspect of a wider general doctrine of estoppel, but acknowledged the views of other members of the court who maintain that the doctrines are separate.[123] His Honour again reviewed the authorities in detail and argued for his view that all of the streams of estoppel ought to be merged into a common doctrine.[124]

Whether his views will prevail is yet to be determined. It is in only in one sense that the future development of the law will be significant. For that reason the eighth of his Honour's eight propositions is set out:[125]

> 8. The recognition of estoppel by conduct as a doctrine operating consistently in law and in equity and the prevalence of equity in a Judicature Act system combine to give the whole doctrine a degree of flexibility which it might lack if it were an exclusively common law doctrine. In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party. In such case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed (italics added).

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[118] id., at p437.
[119] This statement was cited from the judgment of Scarman LJ in *Crabb v. Arun District Council* [1976] Ch. 179 at p198.
[120] (1990) 170 CLR 394 at p431.
[121] id., at p431.
[122] (1988) 164 CLR 387.
[123] (1990) 170 CLR 394 at p432.
[124] id., at pp444–446.
[125] id., at pp445–446.

His Honour concluded by pointing out that the detriment could not be measured in terms of wasted legal costs.

Dawson J acknowledged the common elements of estoppel by conduct and equitable estoppel but concluded that it is not necessary for the present case to go beyond *Legione v. Hateley*[126] where the distinction was maintained.[127] The nature of the detriment identified by his Honour as needed to ground equitable estoppel had wide applications. He stated:[128]

> The subsequent abrupt change on the part of the appellant, unexplained as it was, constituted a breach of a firm assurance deliberately given on more than one occasion over a considerable period of time.
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> • • • • •
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> But the real detriment to the respondent was that he was induced by the assumption that the appellant would not insist upon the statute to allow the litigation to proceed for more than a year without taking any steps to bring it to a conclusion by way of settlement or, if necessary, withdrawal. Furthermore … justice cannot always be measured in terms of money and the strain of litigation, particularly where the litigation is between a natural person and a defendant with the resources of the Commonwealth, is not to be underestimated.

This is in contrast to the views of Mason CJ and Brennan J. His Honour here saw detriment as going well beyond the economic consequences of the failure to make good the representation. The relationship was not commercial (indeed it was only that of plaintiff and defendant). The result of applying similar reasoning to commercial transactions would lead to unpredictable results.

Toohey J and Gaudron J found for respondent on the basis that the Commonwealth had waived its right to deny the existence of a duty of care or plead that the period of limitation had expired. Both however respectively noted that the remedy in estoppel only goes so far as is necessary to avoid the detriment.[129]

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[126] (1983) 153 CLR 406.
[127] (1990) 170 CLR 394 at pp454–455.
[128] id., at pp461–462.
[129] id., respectively at pp475–476, 487.

McHugh J found for the appellant on the basis that the conduct of the Commonwealth did not involve making the representations contended for.

5.9 The juridical basis of equitable estoppel

As early as *Hughes v. Metropolitan Railway Company*[130] the reference by Lord Cairns to allowing a defendant to enforce rights contrary to an assurance it had given as being 'inequitable' identified the basis of the court's intervention in such transactions. In Lord Cairn's lexicology 'inequitable' was clearly a reference to conduct that was contrary to good conscience, which is, the basis of the equity jurisdiction. This point has prefaced all of the significant judicial pronouncements on equitable estoppel. The seeming exception is the judgment of Denning J in the *High Trees* case.[131] The factor is especially so in the Australian cases. Some examples include: King CJ in *Je Maintiendra. v. Quaglia* in his reference to 'injustice to the representee',[132] White J in the same case referred to 'it being inequitable for the court to condone such action',[133] Gibbs CJ and Murphy J in *Legione v. Hateley* said 'it would be inequitable to allow the purchasers to rescind',[134] Mason CJ and Wilson J in *Waltons Stores (Interstate) Limited v. Maher* stated that such actions 'must be unconscionable'[135] Brennan J in the same case referred to 'unconscionable conduct',[136] Mason J in *The Commonwealth of Australia v. Verwayen* noted that the object of the principle was 'prevention of unconscionable conduct',[137] Deane J in the same case said 'if the departure [from a presumed state of affairs] would in all the circumstances be unconscionable',[138] and finally in *The Commonwealth of Australia v. Verwayen* Dawson J stated 'where the unconscionable conduct … gives rise to an equity'.[139]

The next question is: what characteristics must a transaction exhibit before it will be deemed unconscionable? The more traditional notion of unconscionability arising from inequality between the parties described in *Commercial Bank of Australia Limited v.*

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[130] (1877) 2 App. Cas. 439.
[131] [1947] KB 130.
[132] 26 SASR at p106.
[133] id., at p115.
[134] 152 CLR at p506.
[135] 164 CLR at p406.
[136] id., at p419.
[137] 170 CLR at p407.
[138] id., at p436.
[139] id., at pp453–454.

Amadio[140] is not appropriate in this situation. The clearest exposition of how the concept works in the situations now under discussion is to be found in the judgment of Mason C J and Wilson J in Waltons Stores (Interstate) Limited v. Maher.[141] The passage referred to is set out in full in this work.[142] It is appropriate here to set out the elements of the basis of intervention by the court in tabular form:

(a) The making of a promise that is intended to affect the legal relationship between a promisor and a promisee.

(b) Encouragement by the promisor to the promisee to accept the fact that the promise will be performed.

(c) Detrimental reliance on the promise by the promisee.

(d) The promisor is aware of that detrimental reliance.

(e) Failure by the promisor to make good the promise.

(f) Given the circumstances described in (a) to (e) the court will grant a discretionary remedy to relieve injustice to the promisee consequent to his or her reliance on the unkept promise. The remedy will not necessarily involve enforcement of the promise.

The matters raised by points (a) to (f) constitute a matrix for the application of the principles of equitable estoppel in Australian law as it presently stands. Points (a), (b), (d) and (f) do not present conceptual problems. Points (a), (b), (c), (d) and (e) are matters of evidence that must be adduced before the court will grant relief. Point (f) describes the remedy that the court may grant assuming the other matters are made out. Points (c) and (e) require further examination. The High Court has stated that it is the resiling from the promise by the promisor that has been relied on by the promisee that triggers the intervention.[143] This raises the question of the connection of the elements of

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[140] (1983) 151 CLR 447.
[141] 164 CLR 387 at p406.
[142] Above, at p144.
[143] *Waltons Stores v. Maher*, especially per Brennan J at 164 CLR 387 at pp423–424 set out above at

'detriment' and 'reliance' and the failure to keep the promise. It is clear that failure to keep the promise is essential to the operation of the principle but the relationship of detriment and reliance is less clear. In one sense, all failures on the part of the promisor will lead to detriment in the promisee (because he or she is thereby deprived of the benefit implied by the promise). The problem arises in the difficulty in giving meaning to the expression 'detriment'. Here a distinction might be drawn between a legal detriment and an operational detriment. A party who has an obligation under a contract to supply goods and services (as in *Williams v. Roffey*[144]) suffers no legal detriment by supplying those goods and services in return for the agreed payment. The party may however suffer an operational detriment by needing to purchase the goods at a higher price or incurring greater labour costs. It will be recollected that these matters are to be judged from the standpoint of the time when the promisor proposes to resile from the promise.[145] The question of how far the courts will go in recognising operational detriment is yet to be determined. The matter is further discussed below.

If the detriment results from the promisor's failure to perform the promise: this can logically only be because of the promisee's reliance on the promise. If detriment were suffered independently of the reliance then the remedy would not be available. Accordingly it is suggested that it is the reliance factor that causes the promisee to suffer detriment as a result of the promisee's failure to keep the promise. Although reliance is accorded the meaning 'trust' or 'confidence'[146] it is suggested that in this context for the reliance to result in a detriment, the promisee must in some respect have altered his or her position. The question of detriment is discussed in more detail later in this work.[147]

5.10 Application of the High Court decisions to contract modifications

The typical modification of an ongoing contract involves one of the parties indicating to the other that in some way the position of that other party vis-à-vis the contract is to be

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p146.
[144] [1991] 1 QB 1.
[145] See discussion below at p159
[146] The Macquarie Dictionary (1981) s.v. 'reliance'.
[147] Below at p157 et seq.

improved by what is proposed. This will be by way of a promise (representation) that an additional payment will be made, a reduced payment accepted or the required contractual performance of the other party in some way diminished. As has been indicated elsewhere in this work, the promise will need to be made in circumstances where duress is absent. The usual motivation for making such a promise is the perception in the promisor that the promisee will not be able to fulfil his or her obligations. This was the case in *Williams v. Roffey*.[148]

From the point of view of commerce two aspects of equitable estoppel require further discussion.

Detrimental reliance

At the time the promise is made it will be difficult for a promisee to show detriment because in almost all cases he or she will be offered what is prima facie a concession. In *Williams v. Roffey* the subcontractor was offered additional payment. In the *High Trees* case,[149] *Je Maintiendrai v. Quaglia*[150] and *Musumeci v. Winadell,*[151] the tenants were offered a reduction in rent. Denning J recognised this problem for he said in his article in the Modern Law Review referring to the *High Trees* case: 'On the faith of the promise the tenant remained in the premises paying the less sum. It is difficult to see that this was any detriment to him. It was indeed a benefit to him. But does that mean that the landlord should be allowed, years afterwards, to go back on his promise and claim the full rent for the back periods?'[152] All that Denning J required for the operation of the doctrine was an alteration in position. In fact in the *High Trees* case it was not even stated that the reason for holding the promisor to his promise was because it would be 'inequitable' to do otherwise. It must be conceded however that Denning J purported to apply *Hughes v. Metropolitan Railway*[153] where Lord Cairns did use the expression. The more recent cases make it clear that some detriment is required.

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[148] [1991] 1 QB 1.
[149] [1947] KB 130.
[150] (1980) 26 SASR 101.
[151] (1994) 34 NSWSR 723.
[152] op. cit., ch.5, n.41, above, at p6.
[153] (1877) 2 App. Cas. 439.

The requirement for detriment was much more clearly spelled out in the Australian cases. In *Je Maintiendrai v. Quaglia* both King CJ[154] and White J[155] were at pains to find that the plaintiff had suffered a detriment and Cox J[156] decided against the plaintiff because, on his view of the evidence there was no detriment. Examples abound in the High Court. In *Legione v. Hateley* Gibbs CJ and Murphy J[157] referred to the need and Mason J and Deane JJ spoke of the need for the plaintiff to suffer 'material disadvantage'.[158] Mason CJ and Wilson J in *Waltons Stores v. Maher* said: 'the other party relied on that assumption to his detriment.'[159] In the same case Brennan J noted that the 'promisee would suffer detriment.'[160] In *The Commonwealth v. Verwayen* Mason CJ spoke of the need: 'to avoid detriment to the party who has relied on the assumption'[161] and Dawson J referred to: 'real detriment to the respondent'.[162] Finally, in the same case where Deane J formulated a matrix for the operation of a doctrine of estoppel by conduct, his Honour refered to conduct that would 'operate to the other party's detriment'.[163]

The difficulty arises as to the nature of the detriment that will qualify. It would seem commercially undesirable to accept as detriment, forgoing the opportunity to break the contract. Even so, there was some judicial support for this view expressed by White J in *Je Maintiendrai v. Quaglia*.[164] The principal objection to the proposition is that the parties to every contract have the option to breach the contract. To accept that the forgoing of this option qualified as a detriment would mean that a party who continued to fulfil his or her contractual obligations after being made a promise by his or her contractual partner could expect to succeed in a claim based on equitable estoppel. This may not be an unsatisfactory result but it would render the principle meaningless. The requirement of detriment would then cease to operate as the 'gatekeeper' regulating

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[154] (1980) 26 SASR at p106.
[155] (1980) 26 SASR at pp115–116.
[156] (1980) 26 SASR at p117.
[157] (1983) 152 CLR at p421.
[158] (1983) 152 CLR at p437.
[159] (1988) 164 CLR at p406.
[160] (1988) 164 CLR at p424.
[161] (1990) 170 CLR at p412.
[162] (1990) 170 CLR at p461.
[163] (1990) 170 CLR at p444.
[164] (1980) 26 SASR at p115.

entitlement to the remedy. Another view of the detriment that might arise out of a party continuing to fulfil obligations under that contract is to look at the party subjectively.

Part of the solution is to be found in the analysis of Dixon J in *Grundt v. Great Boulder Pty Gold Mines Ltd*[165] where it was stated that the detriment is to be judged at the time the promisor proposes to resile from the promise. At the time a promise is first acted on by a promisee within an existing contractual arrangement, in most cases there will be little or no detrimental effect flowing from the action, to the contrary there is likely to be a benefit. The benefit could be a reduction in rent or an additional payment. When the detriment is viewed at the time the promisor purports to resile there could be hardship, for example, an accumulation of rent now payable as a lump sum as in the *High Trees*[166] case or *Je Maintiendrai v. Quaglia*.[167] Viewed in this light the references of Denning J to a change in position could be seen as a detriment. What has been said does not solve the problem in all contract modifications in commercial transactions. Where however the promisee deploys extra resources or incurs additional liabilities in an effort to fulfil the terms of the original contract the situation may be different. For example, in many ongoing contractual situations the problem that the promise is intended to address is the potential of the promisee to exceed the stipulated completion time. This was the case in *Williams v. Roffey*.[168] The promise of the additional payment was intended to encourage the promisee to deploy additional resources. If the promisee complied, on Dixon J's formula, there would be no difficulty establishing detriment. It is submitted that from the tenor of the judicial pronouncements that this is the likely direction that the Australian law will take in the future. The view of King CJ in *Je Maintiendrai v. Quaglia* is likely to prevail. There his Honour said:[169]

> The evidence as to detriment is sparse. The respondents' case would be stronger if there were evidence of financial hardship or embarrassment as a result of the debt accumulating or … that the money had been spent in other ways and that the respondents were unable to pay, at any rate without difficulty and inconvenience. It would be stronger if there were evidence that they conducted their affairs differently as a result of the reduction, for example that they had refrained from exploring the possibility of selling the business or assigning the lease.

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[165] (1938) 59 CLR 641, at p674 .
[166] (1947) KB 130.
[167] 26 SASR 101.
[168] [1991] 1 QB 1.
[169] 26 SASR 101 at p107.

It is submitted that there is less possibility of the view of Dawson J expressed in *The Commonwealth v. Verwayen* that mental anguish would satisfy the requirements.[170] This would be especially so in commercial transactions. In *Legione v. Hateley* Mason J and Deane J spoke of the need for the plaintiff to suffer 'material disadvantage'.[171] If this test were to become the yardstick of detriment further problems arise. How is 'material' to be established or measured? Is it primarily concerned with relevance or quantum?

The discretionary nature of equity

The point has been consistently made by the High Court in its embracing of equitable estoppel that so far as remedies go, it is the equitable remedy that is to prevail. In *Waltons Stores v. Maher* Brennan J made the point that a successful outcome would not 'compel the party bound to fulfil the assumption or expectation' but 'avoid the detriment'.[172] Mason CJ in *The Commonwealth v. Verwayen*[173] adopted the words of Scarman LJ in *Crabb v. Arun District Council*[174] that the court should determine what was the 'minimum equity to do justice' and then his Honour made the point that there 'must be a proportionality between the remedy and the detriment'. In the same case Deane J held that: 'the assumed state of affairs would be the outer limits within which the relief appropriate to do justice between the parties should be framed.'[175]

It is submitted that the result of these authorities is that the court will not necessarily enforce the promise made to modify a contract but rather fashion a remedy that does justice. In this sense the High Court has abandoned the certainty of the remedy for common law estoppel in favour of the more flexible equitable remedy. There is doubt if this flexibility is in fact an aid to the business community. Usually a contract modification promise is made for good commercial reasons and it is suggested that there are good policy reasons why such promises should be kept. The knowledge that such a promise will be enforced should have a cautionary effect on those likely to make them. Furthermore, it is submitted, there is a high requirement for certainty in commercial transactions. The parties enter them on the basis that they will be bound and

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[170] 170 CLR 394 at pp461–462, the passage is set out at p153 above.
[171] (1983) 152 CLR at p437.
[172] (1988) 164 CLR at p423.
[173] (1990) 170 CLR at pp411–413.
[174] [1976] Ch. 179 at p198.
[175] (1990) 170 CLR at p446.

expect their contractual partner to do likewise. There would be little point making commitments if this were not so. It is appropriate to speculate on the 'ripple effect' that subcontractor's delay could produce in *Williams v. Roffey*.[176] It was part of the evidence that if the subcontractor performed on time, the contractor would be spared the need to pay liquidated damages or deploy extra resources. In addition, the developer to whom Roffey Brothers were contracted would no doubt have contracted to lease or sell the apartments to third parties. Equally, those third parties might have had existing accommodation that might be disposed of by way of contract. All of these contracts would have provisions requiring timely performance. In this situation an attempt to 'do equity' as opposed to the fulfilment of an expectation will lead to uncertainty in transactions. It would be preferable to avoid what one author, writing on an aspect of this subject, has called 'palm-tree' justice.[177]

Consideration versus estoppel

If, as has been assumed in this work, commercial certainty in transactions is a desirable end, then the question arises as to whether certainty after a contract has been modified is best achieved by the application of either doctrine. Prior to the decision in *Williams v. Roffey* it could reasonably have been asserted that the application of the rules of consideration would indicate to the parties at the time the contract modification was instigated if it were binding or not. As has been argued, much of that certainty has been lost.

Typically, the proceeding that arises out of a failure of a contract modification transaction will involve a promisee suing to recover the promised benefits after a promisor has reneged. If the issue is to be resolved by an application of the rules of consideration, the investigation will centre on the position of the promisor. In the pre-*Williams v. Roffey* era this was a comparatively simple task. What was needed was for the promisor to gain a benefit or the promisee to suffer a detriment of the scale of a peppercorn. There also needed to be some nexus between the benefit/detriment and the

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[176] [1991] 1 QB 1.

[177] PD Finn (ed.), *Essays in Equity* (1985, The Law Book Company Limited) at p70. The reference is in an article by the editor entitled *Equitable Estoppel.* The author was quoting the second edition of *Meagher, Gummow & Lehane.* It is not certain what the provenance of the expression 'palm-tree justice' is; however, it is assumed to be some form of informal dispute resolution used by a colonial power without reference to a particular legal system and taking its name from the venue.

promise. This was the request or exchange element. As indicated, the decision in *Williams v. Roffey*[178] has shifted the emphasis. All that is now required is that some practical benefit accrue to the promisor. This does not need to be bargained for and can be established by a post-transactional analysis of the promisor's position. This potential deprives commercial transactions of much of the certainty that the parties would have hoped for.

To apply the principles of equitable estoppel to the same promise; the focus shifts to the promisee who must demonstrate that as a result of relying on the promise he or she suffered a detriment, that it would be inequitable to allow the promisor to resile from the promise and then the court would do 'minimum equity'. At best this will involve an investigation of the position of the promisee although it may be necessary to examine the conduct of the promisor to gauge what was or was not equitable and devise the appropriate remedy. The need to extend the *Williams v. Roffey* principle to Australian law has been questioned because of the advances made in equitable estoppel.[179]

The juxtaposition of the two doctrines has been referred to judicially. First, by Brennan J in *Waltons Stores v. Maher*: [180]

> But there are differences between contract and an equity created by estoppel. A contractual obligation is created by the agreement of the parties; an equity created by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be supported by what is, strictly speaking, consideration. The measure of a contractual obligation depends upon the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.

And by Handley J in *Hawker Pacific Pty Ltd v. Helicopter Charter Pty Ltd*:[181]

> While a single peppercorn may constitute valuable consideration which can support a simple contract it seems to me that the loss of such an item would not

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[178] [1991] 1 QB 1.
[179] JW Carter, Andrew Phang & Jill Poole, *Reactions to Williams v. Roffey* (1995) 8 Journal of Contract Law 248 at p270: 'It may also be questioned whether, in a jurisdiction (such as Australia) advocating an expansion of promissory estoppel, the principle of *Roffey* is actually necessary'.
[180] (1988) 164 CLR 387 at p425.
[181] (1991) 22 NSWLR 298 at pp307–308.

> constitute a "material detriment", "material disadvantage", or a "significant disadvantage" for the purposes of the law of estoppel. It may seem strange that there should be such a distinction. However in the first case the consideration has been accepted as the price of a bargain which the law strives to uphold. Promissory estoppels and estoppels by representation lack this element of mutuality, and the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation or promise.

The problem is exacerbated by the fact that both principles could be argued in a dispute arising out of the one transaction. In *Williams v. Roffey* Glidewell LJ said: 'However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed …. Interesting though it is, no reliance can in my view can be placed on the concept in the present case.'[182] Russell LJ stated: 'I would have welcomed the development of an argument, if it could have been properly raised in this court, on the basis that there was here an estoppel.'[183] His Lordship then uses the development of the law of estoppel to re-enforce his argument that the rules relating to consideration ought to be relaxed. The discussion is set out in this work.[184] It is submitted that on the reported facts of the case the argument would have failed. There is no evidence that the promisee altered his position or suffered any detriment at all. Whilst counsel for the builder (promisor) could concede that practical benefit accrued to his client in the potential relief from liquidated damages and the costs associated with finding another subcontractor; there was no evidence that a subcontractor offered extra payment for the same work suffered a detriment. The argument was also raised in *Musumeci v. Winadell;* however, Santow J held that the doctrine did not apply on the basis that the promise had been revoked and it was possible for the parties to return to their original position.[185]

It would seem that a disappointed promisee now has two potential means of redress arising out of modification to an existing contract. If the consideration argument succeeds the promise will be enforced. If the estoppel argument succeeds the court will relieve the promisee from any injustice resulting from he or she acting on the basis of the promise. Of the two, the consideration argument would marginally be more attractive to a promisee. Unfortunately either remedy is available only after an

[182] [1991] 1 QB at p13.
[183] [1991] 1 QB at p17.
[184] Above, at p89.
[185] (1994) 34 NSWLR 723 at p750.

investigation of the conduct of the parties by the court to the prejudice of certainty in commercial dealings.

5.11 Good faith

Very frequently the need to vary the terms of an ongoing contract arises from the length of the period of time required for the parties to perform their obligations. A contract for more or less instantaneous sale of goods is not exposed to this problem whereas a contract for the construction of a building or civil engineering works may require a lapse of several years before the parties are finally discharged by the performance of their obligations. During the intervening period changes in the parties circumstances or the materialisation of unanticipated risks (despite efforts to draft comprehensive risk allocation provisions in the contract) can require the parties to modify the contract.

Another solution to the problem is for the parties to accept the possibility in advance and draft the obligations in more general terms. A provision is then added to the contract requiring the parties to deal with each other in good faith should the need to resolve unspecified issues arise. Although not strictly relevant to the central theme of this thesis, the principles applied by the court to give effect to these arrangements have a marked similarity to the principles discussed in this chapter. Such obligations can arise either by implication or by agreement of the parties. In respect of the former, the question arises as to the circumstances when such an obligation will be implied. In respect of the latter the question is: what limits will the courts impose on the stated obligation of the parties to act towards each other with good faith.

The question of implied terms was considered by the NSW Court of Appeal in *Renard Constructions (ME) Pty Ltd v. Minister for Public Works.*[186] The question before the court was whether a power conferred on a principal under a construction contract 'to take over and exclude the contractor' was subject to the implied term that such power must be exercised reasonably. The court answered the question in the affirmative. Priestly JA said:[187]

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[186] (1992) 26 NSWLR 234.
[187] (1992) 26 NSWLR 234 at p258.

> The over-riding purpose of the contract from both the contractor's and the principal's point of view is to have the contract work completed by the contractor in accordance with the contract, in return for payment by the principal in accordance with the contract …. The contract can in my opinion only be effective as a workable business document under which the promises of each party to the other may be fulfilled, if the subclause is read in the way I have indicated, that is, as subject to the requirements of reasonableness.

A recent example of how a court may interpret the obligation to act in good faith was *Theiss Contractors Pty Ltd v. Placer (Granny Smith) Pty Ltd*.[188] There the contract provided that 'the successful operation of this Contract requires that Thiess and Placer agree to act in good faith in all matters relating both the carrying out of the works, derivation of rates and interpretation of this document.' Templeman J found that good faith in this context extended to the derivation of rates (for the execution of unspecified work) but not to a clause allowing Placer to terminate the contract. His Honour stated:

> In addition, I think that the obligation of good faith requires the parties to deal honestly with each other. For example, in relation to carrying out the works: if Thiess sought to nominate mining equipment in accordance with [the contract] it would be required to provide an honest justification to Placer in demonstrating that the proposal resulted in the lowest overall unit costs and achieve the required mining selectivity.

The approach taken in the case was one of careful interpretation of the document that the parties had executed. Clearly the court was not minded to adopt a 'blanket' approach to the requirement of good faith to all of the provisions of the contract. Furthermore, the specific good faith provision (which was contained in a separate subsidiary contract) addressed to the execution of work and derivation of rates, precluded the implication of the good faith requirement in respect of the termination of the contract.

The authors of an article on this subject in the context of construction contracts noticed the parallel between good faith and unconscionability.[189] They pointed out:

> Acting, fairly, reasonably and in good faith are terms often (and incorrectly) used interchangeably in Australian contract law. The duty of good faith is a duty to

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[188] (Templeman J, Supreme Court of Western Australia, 16 April 1999 unreported).
[189] Andrew Wallis & Melanie Maslem, *The Scope and Operation of the Duty of Good Faith and Reasonableness* (2001) 79 Australian Construction Law Newsletter 33 at p35.

> refrain from conduct which is capricious or unconscionable. While lack of good faith bears semblance to unconscionability in equity, it is a natural extension of the law that the duty of good faith be moulded by the standards of conduct identified as unconscionable.

It is submitted that the principle described above has not developed to the point where it resolves the problems faced by parties wishing to modify the terms of an ongoing contract.

5.12 Contract modifications in the United States of America

For the sake of completeness it is instructive to examine how a common law jurisdiction with a similar economic profile to Australia and England deals with the problems identified in this work. At the outset the point is made that American commentators have been concerned with the problem of evolving a satisfactory jurisprudence to accommodate contract modifications for some time.

As early as 1931 Karl Llewellyn said:[190]

> A third and hugely important class is that of either additional or modifying business promises made after the original deal has been agreed upon. Law and logic go astray whenever such dealings are regarded as truly comparable to new agreements. They are not. No businessman regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management: and the line of dealing with them which runs over waiver and estoppel is based on sound intuition.

Ten years later Lon Fuller expressed the view that consideration, to some extent, fulfilled the role of policing contract modifications. The author pointed out:[191]

> [T]here is some relation between coercion and the desiderata underlying the use of formalities: whatever tends to guarantee deliberateness in making of promises tends in some degree to protect against the milder forms of coercion.

A significant feature of the work of the American commentators has been the care they have taken to identify the policy behind the legal initiatives. Robert Hillman illustrates this point:[192]

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190 Karl N. Llewellyn op. cit., ch.2, n.41, above, at p742.
191 Lon Fuller, op. cit., Ch.2, n.174, above.

> The fundamental goal of contract modification law is to promote enforcement of freely-made alterations of existing contractual arrangements and to deny enforcement to coerced modifications. Enforcing voluntary contract modifications supports the policy of freedom of contract and facilitates economic growth.

As will be seen later, the author doubts that the American law has achieved the goal. The American law started from a position not dissimilar from that of England and the Commonwealth countries. Mahon J in *Cook Island Shipping Co Ltd v. Colson*[193] cited *Lingenfelder v. Wainwright Brewery Co*[194] in support of the existing duty rule.

In *Lingenfelder v. Wainwright Brewery Co* the plaintiff architect was engaged to erect a brewery. He declined to proceed with the undertaking on discovering that the contract for the refrigerating plant had been awarded to a business rival. The plaintiff took away his plans and withdrew his superintendent from the site thereby terminating the construction work. The defendant brewer, who needed the work completed urgently, promised an additional payment as an inducement to the plaintiff to resume work. The promise was held to be unenforceable for want of consideration. The court said:[195]

> What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefore, and, although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum pactum and not lend its process to aid in the wrong.

The American law has advanced considerably since the decision in *Lingenfelder v. Wainwright Brewery Co., Watkins & Son Inc. v. Carrig*[196] was cited in *Williams v. Roffey* as representing a view that the Court of Appeal might adopt. Purchas LJ declined saying: 'By the same token I find myself unable to accept the attractive invitation offered by Mr Makey (counsel for the subcontractor) to follow the Supreme Court of New Hampshire'.[197] Watkins agreed to excavate a cellar for a lump sum price. Watkins' undertaking was unqualified as to the quality or quantum of material that might need to be excavated. During the excavation rock was encountered and Carrig agreed to pay for

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[192] Robert A Hillman, *Contract Modification Under The Restatement (Second) Of Contracts* (1982) 67 Cornell Law Review at p680.
[193] [1975] 1 NZLR 422.
[194] 15 SW 844 (1891).
[195] id., at p848.
[196] (1941) 21 A. 2d 591.
[197] [1991] 1 QB1 at p20.

the additional work involved. On completion Carrig refused to pay. The court found for the Watkins the plaintiff. Allen CJ raised several important issues in a judgment delivered on behalf of the court. His Honour said:[198]

> In common understanding there is, importantly, a wide divergence between a bare promise and a promise in adjustment of a contractual promise already outstanding. A promise with no supporting consideration would upset well and long-established human interrelations if the law did not treat it as a vain thing. But parties to a valid contract generally understand that it is subject to any mutual action they may take in its performance. Changes to meet changes in circumstances and conditions should be valid if the law is to carry out its function and service by rules comfortable with reasonable practices and understandings in matters of business and commerce.

The statement recognized the need for and potential validity of modifications mutually agreed to by the parties. It did not deal with the basis of contract modifications in the sense of what characteristics other than consent and business practice would be needed. Within the parameters set by his Honour, namely, 'a promise in adjustment of a contractual promise' there will be many situations where the Anglo-Australian law would deal with the question in the same way. Here the reference is to situations where the conduct of both parties satisfies the consideration requirement. It is arguable that this statement did not necessarily advance the facility of parties to make contract modifications. However having regard to the factual matrix of the case, the ultimate decision and the next citation from his Honour's judgment it is submitted that the law has so advanced.

Further, he stated:[199]

> If the creditor agrees to take a part of the debt in full payment, and the part is paid, no exception to the need for consideration is apparent. The completed transaction is of a promise fulfilled. The debt is satisfied, according to the intention of the parties, and it is thought that the law should validate the action. The law has no policy that a creditor may not make voluntary and gratuitous concessions to his debtor. It is the everyday experience of business life, and is consistent with legal principle, and no rule of the law of evidence interposes to require proof of the present by other than oral testimony of it.

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[198] 15 SW 844 (1891) at p593.
[199] 15 SW 844 (1891) at p594.

This proposition distinguishes the American law from the Anglo-Australian law. There would appear to be no direct reference to the abandonment of the existing duty rule in the *Restatement on Contracts 2d*[200] although §89(a) and §90 (1) would clearly have a bearing on a similar factual situation.

His Honour continued:[201]

> The foregoing views are considered to meet the reasonable needs of standard and ethical practices of men in their business dealings with each other. Conceding that the plaintiff threatened to break its contract because it found the contract to be improvident, yet the defendant yielded to the threat without protest, excusing the plaintiff and making a new arrangement. Not insisting on his rights but relinquishing them, fairly he should be held to the new arrangement.

What has been said here, when taken with the first citation, suggests that the American law will enforce a contract modification promise that has been freely consented to by the parties. The second sentence of the quotation is a reference to the requirement that the defendant, after agreeing to an enforced contract modification, act in a timely manner to protect his or her position. A similar rule exists in the English law. The clearest case was *North Ocean Shipping v. Hyundai*[202] where a plaintiff, guilty of economic duress, nevertheless succeeded because the defendant did not exercise its rights within a reasonable time thereby adopting the new situation created by the economic duress.

It is appropriate at this point to comment on relevant provisions of the *Restatement on Contracts 2d* that touch on the question of contract modifications. The provisions are:

> §73 Performance of a Legal Duty
>
> Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

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[200] American Law Institute, *Restatement Of The Law Second* (St Paul Minn: American Law Institute Publishers, 1973) Chapter 4.
[201] 15 SW 844 (1891) at p594.
[202] [1979] 1 QB 705.

Section 73 is a statement of the existing duty rule. The outcome in *Stilk v. Myrick*[203] however may have been different had the rule been applied as set out in §73. It is suggested that there the crew performed their duty 'similarly' but clearly in a way that was more than a 'pretense of a bargain'. The captain had made a bargain with the crew. The section maintains an element of bargain theory. Bargain theory is notably absent in the Anglo-Australian decisions starting with *Williams v. Roffey*.[204]

> §89 Modification of Executory Contract
>
> A promise modifying a duty under a contract not fully performed on either side is binding
>
> (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
>
> (b) to the extent provided by statute; or
>
> (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

Here the intention appears to be to rationalize the existing duty rule. Subsection (a) and (c) are read disjunctively (subsection (b) is not related to this discussion) providing different bases on which a contract modification promise will be enforceable. Subsection (a) proposes a test of the promise being 'fair and equitable in view of circumstances not anticipated by the parties'. Such a requirement is directed to promises resulting from economic duress. Subsection (c) in its use of the words 'to the extent that justice requires' invokes the principles of equitable estoppel. Hillman[205] has criticized sections 73 and 89 on the basis of:

> [T]he difficulties of defining 'unanticipated circumstances' and the broadness of 'fair and equitable' …. The approach is also potentially harmful because the occurrence of 'unanticipated circumstances' does not ensure the voluntariness of a modification and because the 'fair and equitable' and 'pretense of a bargain' language may be insufficient to direct the courts to the issue of economic duress.

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[203] (1809) 2 Camp. 317.
[204] [1991] 1 QB 1.
[205] op. cit., ch.5, n.192, above at p703.

The final provision of *Restatement on Contracts 2d* that is of concern to this work is section 90.

> §90 Promise Reasonably Inducing Action or Forbearance
>
> (a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

This provision recognizes the principle of equitable estoppel. The texts of sections 90 and 89, in the use of the words 'limited as justice requires' and 'extent that justice requires' respectively vest a discretion in the court as to the remedy that may be granted.

It would seem that the authorities referred to above or the *Restatement on Contracts 2d* have not resolved all of the difficulties in the American law on this subject. Otherwise the following statement from the judgment of Posner J in *United States v. Stump Home Specialties Mfg. Inc.*[206] would hardly have been necessary. There his Honour, in discussing the 'cautionary, evidential and other policies' behind the requirement for consideration, said:[207]

> The requirement of consideration has however, a distinct function in the modification setting — although one it does not perform well — and that is to prevent coercive modifications. Since one of the main purposes of contracts and contract law is to facilitate long-term commitments there is often an interval in the life of a contract during which one party is at the mercy of the other.
>
> **…..**
>
> The law does not require that the consideration be adequate — that it be commensurate with what the party accepting is giving up. Slight consideration, therefore, will suffice to make a contract or a contract modification enforceable …. And slight consideration is consistent with coercion. To surrender one's contractual rights in exchange for a peppercorn is not functionally different from surrendering them for nothing.

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[206] 905 F. 2d 1117 (7th Cir 1990).
[207] id., at p1121.

> The sensible course would be to enforce contract modifications (at least if written) regardless of consideration and rely on the defence of duress to prevent abuse …. All coercive modifications would then be unenforceable, and there would be no need to worry about consideration, an inadequate safeguard against duress.

The conclusion is that the American law has advanced beyond that of Anglo-Australian jurisdictions in recognizing the importance of contract modifications in commerce. Section 89 in its reference to 'circumstances not anticipated by the parties when the contract was made' does provide a workable basis for the recognition of promises that modify existing contracts. Certainly the Australian High Court has been mindful of the American developments. In *Walton Stores v. Maher* Mason CJ and Wilson J said: [208] '[T]he direct enforcement of promises made without consideration by means of promissory estoppel has proceeded apace in the United States.' Their Honours then set out the text of *Restatement on Contracts 2d,* section 90. Even so, the reason given earlier in this chapter, it is suggested that the shortcoming of the American law is the failure to enforce modification promises as such.

[208] (1988) 164 CLR 387 at p402.

CHAPTER 6 Conclusions

The common law doctrine of consideration was originally concerned with promises made in family settings and property transactions. Promises made in commerce were dealt with by tribunals set up for the purpose by traders within the fairs and markets where the trade was carried on. It is speculated that in medieval times these transactions were of less significance, as the major source of wealth was land and the connection families had with the land. Accordingly, the Royal Courts were less interested in commercial transactions. The incorporation of the law merchant into the common law started in the 18th Century and was in evidence in the decision of Lord Mansfield in *Hernaman v. Bawden*.[1] Once this process was under way the legal theories of the common law needed to develop to accommodate a far more complex range of transactions.

Parties who consciously negotiated with the intention of being bound could make their transaction binding by the use of a seal. It is suggested that the doctrine of consideration evolved to meet the situation where the parties had not necessarily addressed the question of the binding extent of their transaction.[2] The evolution of the doctrine gave the courts a touchstone by which to determine the nature of the conduct that should be deemed binding. The common law (whilst it was still primarily concerned with family and property transactions) developed external tests to isolate those promises that, for policy reasons, should be enforced.[3] An objective test was the obvious solution, as at the time the facilities did not exist to examine the litigant's intentions or states of mind. In 1557, when *Joscelin v. Shelton*[4] was decided, the printing press was barely a century old;[5] paper,[6] metal pen nibs,[7] typewriters,[8] universal literacy[9] and word processors[10] were

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[1] (1766) 3 Burr 1844. The case is discussed at p34 above.

[2] It is suggested that this proposition is implicit in the development of the rules described above under the heading *The Incidents of the Doctrine of Consideration* and the *existing duty rule.* The rules represents a method of determining which promises will be enforced. In the cases cited in support of the discussion, the fact of the litigation shows that, at the time the transaction was entered at least one of the parties thought that there was a mutual intention to be bound.

[3] The operation of the principle of *stare decisis* does not often allow examination of how the common law judges of the 16th, 17th and 18th centuries were influenced by policy questions. The clearest example is Lord Kenyon's identification of the 'well being of the navigation of the Kingdom' as the basis of his decision in *Harris v. Watson*. For a complete discussion of this decision see p36.

[4] (1557) 2 Leon. 4. The case is discussed at p11 above.

[5] The printing press was invented by Johannes Gutenberg in 1450, *The New Encyclopaedia Britannica*, 15th ed., s.v. 'Printing'.

[6] Paper was known in China in 105 AD however it was prohibitively expensive until the invention of an

in the distant future. The early common law was administered in a regime of restricted pleading rules and fact-finding techniques. These restrictions included the limitations of the action of *assumpsit*, wager of law, the inability of parties to give evidence on their own behalf and problems with the early jury system. Under these circumstances the development of objective tests like the doctrine of consideration is understandable. The technology that enables the convenient keeping of records sufficient to allow a tribunal to make an informed judgment about the parties' contractual intentions was a creature of the late 20th century.

The legal history of the existing duty rule shows a conscious change in the legal justification for the rule. In *Harris v. Watson*[11] the decision was stated by the court to be based on the public policy reason of the prevention of enforced contract modifications. In *Stilk v. Myrick* the public policy reason was subsumed into a wider doctrine of consideration, which purported to be a determinant of which promises would be enforceable and which would not. The refusal of the courts to investigate the adequacy of consideration in a given transaction has deprived the rule of much of its utility in preventing enforced contract modifications in the complex commercial world of the latter half of the 20th Century.

The rule was criticised in *Ward v. Byham*[12] by Denning LJ. Subsequently Glidewell LJ in *Williams v. Roffey*[13] took up the notion of 'practical benefit' referred to in *Ward v. Byham* and incorporated it into the definition of consideration. It is submitted that this extrapolation by Glidewell LJ was not in accord with the authorities. The lapse in logic however, did not prevent *Williams v. Roffey* from serving as a precedent where a court decided that justice required a promise to be enforced. It open a higher court to overrule *Williams v. Roffey*.

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industrialized process for its manufacture by John Dickinson in 1809, id., s.v. 'Paper'.
[7]John Mitchell invented the first steel pen nib in 1828, id., s.v. 'Pen'.
[8] The typewriter was invented in 1867 by Christopher Latham Sholes and manufactured seven years later by a New York gunsmith E. Remington & Sons, id., s.v. 'Typewriter'.
[9] Universal education probably dates to the *Elementary Education Act 1870* (UK), id., s.v. 'Education, History of'.
[10] The first true word processor was invented by IBM engineers in 1964, id., s.v. 'Word Processor'.
[11] (1791) Peake. 101.
[12] [1956] 1 WLR 496.
[13] [1991] 1 QB 1.

Williams v. Roffey [14] put several of the acknowledged canons of the doctrine of consideration under threat. In particular the ability of the court to detect practical benefit removes the need for any detriment to the promisee for there was none. Further, it is suggested that in determining whether or not the benefit is 'practical' the courts will need to undertake a quantitative assessment of the benefit. The use of the expression 'practical' invites such an investigation, as it will be a matter of degree. This is contrary to the firmly established rule that the courts will not investigate the value of the consideration in relation to the formation or modification of contracts.

The decision overlooks the bargaining process as a prelude to a promise becoming binding. The emphasis has been shifted from what the parties exchanged at the instant the contract became binding to what the parties expect to receive from performance. Because of this shift in emphasis, the cautionary and evidentiary functions of the doctrine of consideration are severely diminished.

The greatest significance of the decision has been the way it has been received by the courts in the intervening years since it was handed down. The judges in subsequent cases have been persuaded to examine the transaction carefully to establish the presence of a 'practical benefit' accruing to the promisor. This has been done in disregard of Glidewell LJ's prerequisite that the promisee create (justifiably) the perception in the promisor that the promisee would be unable to fulfil his/her obligations. Such a broad-brush approach taken by later judges ignores this limitation placed on 'practical benefit' satisfying the consideration requirement.

It is submitted that the decision in *Williams v. Roffey* and the decisions that have sought to apply it effectively dispense with the need for consideration in contract modifications. With respect, it is suggested that to analyse the position of the promisee in terms of his or her option to breach the contract and pay damages as done by Santow J in *Musumeci v. Winadell* [15] is inappropriate. To pursue this analysis would mean that practical benefit could be found in every transaction. If, however the courts accept the

[14] [1991] 1 QB 1.
[15] (1994) 34 NSWLR 723.

proposition then, *a fortiori, Williams v. Roffey* [16] has dispensed with the need for consideration in contract modifications.

It follows that the decision in *Williams v. Roffey*, in so far as it embraces the concept of practical benefit, should not be followed in Australian. Equally the decision in *Musumeci v. Winadel* should be overruled when the appropriate occasion arises.

If, as has been assumed in this work, commercial certainty in transactions is a desirable end, then the question arises as to whether certainty after a contract has been modified is achieved by the application of the doctrine of consideration or the principles of estoppel. Prior to the decisions in *Legione v. Hateley* [17] and *Williams v. Roffey* it might reasonably have been asserted that an application of the rules of consideration told the parties at the time a contract modification was made if it were binding or not. Much of that certainty has been lost.

There are two reasons why the principles of estoppel are not the answer. First, there is clearly a requirement for detriment to be suffered by the promisee as a result of the promisor resiling from his or her promise. Such a detriment will not always be easily established in a contract modification situation.[18] Second, the point was strongly made by the High Court[19] in its recognition of equitable estoppel that the court will not necessarily enforce the promise made to modify a contract but rather fashion a remedy that accords with the court's view of the circumstances. Whilst it is conceded that flexibility is desirable in many judicial situations, there is doubt if this flexibility is in fact an aid to the business community. Usually a contract modification promise is made for commercial reasons and it is suggested that there are good policy reasons why such promises should be kept as such. The knowledge that such a promise will be enforced should have a cautionary effect on those likely to make such promises and enable the parties to make their plans accordingly. Parties enter or modify contracts on the basis that they will be bound and expect their contractual partner to do likewise. There would be little point making commitments if this were not so.

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[16] [1991] 1 QB 1.
[17] (1983) 153 CLR 406.
[18] See the discussion at 157 et seq. above.
[19] ibid.

It is suggested that neither the further development of the doctrine of consideration in terms of practical benefit nor the principle of equitable estoppel provide a totally satisfactory means for parties to modify an existing contract. It is suggested that the most important issue in contract modifications is verification of the agreement of the parties. The quality of the agreement is policed by the doctrine of economic duress. The fact of the agreement is a matter of evidence and it is submitted that the efforts of the courts should be directed to developing rules to identify and give effect to that agreement.

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