Canterbury Law Review [Vol 11, 2005]

FROM SAILORS TO FISHERMAN: CONTRACTUAL VARIATION AND THE ABOLITION OF THE PRE-EXISTING DUTY RULE IN NEW ZEALAND

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I am grateful to Professor Stephen Todd for his helpful comments on earlier drafts of this article.

I. Introduction

The doctrine of consideration and its place in English (and subsequently New Zealand and Australian) contract law has been under siege since the middle of the eighteenth century.[1] Although consideration has withstood direct assaults from both the bench[2] and from law reformers over the years,[3] its Holdsworthian image as an anachronistic doctrine tied to the law of actions long since dispensed with, has proved impossible to entirely shake off.[4] Laudable attempts to re-conceptualise consideration as a doctrine central to past and present contract law based on a re-reading of legal history[5] have failed to prevent it from being modified or marginalised in order to respond to perceived pressures of justice and commercial reality.[6] Moreover, the function of consideration as an arbiter of agreements to vary long-standing arrangements has also been challenged by the development of alternative doctrines such as duress and promissory estoppel. Nevertheless, up until recently, no twentieth or twenty-first century court within the jurisdictions of England and Wales, Australia or New Zealand had directly challenged the requirement of consideration within the context of contract formation or variation *per se.*

In 2002 the New Zealand Court of Appeal in *Antons Trawling Co Ltd v Smith*[7] issued such a challenge. In overturning almost two hundred years of legal history, the Court of Appeal held that an agreement to vary a contract is enforceable without consideration.[8] In eight short paragraphs, the Court of Appeal emphatically abandoned the controversial but hitherto fundamental rule of contract law which denied that a promise to perform or performance of a pre-existing duty owed to the promisor can ever constitute consideration in return for a new promise from that promisor. In its place, Baragwanath J devised a test whereby a variation agreement becomes enforceable on the basis of reliance. As such, this decision represents a bold and radical departure from the fundamental principles of contract law as traditionally conceived. However, a close examination of the decision in *Antons* suggests that the new rule is as likely to cause hardship to parties who chose to vary a contract as earlier decisions in *Stilk v Myrick*[9] and *Williams v Roffey Bros.*[10] Moreover, the decision to abolish consideration and introduce a reliance based test within the limited sphere of contractual variation, challenges and compromises the doctrine as a whole, without providing the conceptual tools for the (arguably necessary) reform of consideration more generally.

II. From Pre-Existing Duty to Practical Benefit

Origins of the Pre-Existing Duty Rule and Stilk v Myrick

The modern origins of the pre-existing duty rule are normally attributed to the seminal nineteenth century case of *Stilk v Myrick.*[11] In this case, an agreement between a master of a vessel and his crew to divide the wages of two deserting sailors among the remaining crew, in return for them working the vessel back to London, (which they were already obliged to

do), was held to be unenforceable for want of consideration. In fact, the decision in *Stilk v Myrick* comprises only the first in a trinity of rules which apply within the context of a pre-existing obligation. The second rule within the trinity denies that the performance of a public duty can amount to consideration.[12] Under the third rule, the payment of a lesser sum, even when accepted by a creditor, will not operate to discharge the entire debt.[13] Whilst the first two rules relate to the control of what has been described as 'increasing pacts' (or more for the same), the latter rule operates in connection with 'decreasing pacts' (or less for the same).[14] It should be noted that rules one and three within this trinity apply to two-party situations only. Where a pre-existing duty is owed to a third party, its performance (or a promise to perform) by the promisee will amount to good consideration.[15] Likewise, a debt may be discharged by the payment of a lesser sum by a third party.[16] Although all three rules exist independently of one another, their common factual and legal context (pre-existing obligation) has meant that all have been subject to comparable criticism, are regularly avoided by analogous technical avoidance techniques and the abolition of all three rules has been recommended.[17]

Critiquing Stilk v Myrick

The rule in *Stilk v Myrick* has been trenchantly criticised and as a result, more often than not, avoided during its two hundred year history. Reynolds and Treitel point out that it is not clear from either law report whether the original contract of employment was with the master of the vessel or, as is more likely, with its owners. If the original contract was in fact between the sailors and the owners then, arguably, *Stilk v Myrick* should now be regarded as inconsistent with later authority which decides that performance of a pre-existing duty owed to a third party may constitute good consideration.[18] More broadly, the rule has been criticised as failing to meet the expectations of parties to a renegotiated contract and ignoring any actual benefits received by the promisor as a result of the contractual variation.[19] Moreover, the facts of *Stilk v Myrick* concerned the renegotiation of a contract at sea during the Napoleonic wars. Arguably, the Court's concern was not so much the presence of consideration, but the need on public policy grounds to prevent extortive agreements, particularly in the absence of an expanded notion of duress.[20] Today, the pre-existing duty rule has been described as a blunt instrument which invalidates 'non-extortive as well as extortive re-negotiations'[21] and is arguably superfluous following the emergence of other doctrines such as economic duress. Nevertheless, the Law Revision Committee's recommendation that the rule be abolished in 1937 was not implemented by the government of the day, or by any other government since.[22]

Avoiding Stilk v Myrick

Dissatisfaction with the rule in *Stilk v Myrick* has led to the development of a number of avoidance techniques. B J Reiter in 1977 identified four principal mechanisms which have been adopted by the courts to mitigate the undesirable effects of the pre-existing duty rule.[23] First, a contractual variation may be enforceable where a court makes a finding that a party promises to do more than her pre-existing duty in return for an additional payment or other benefit.[24] Secondly, a court may find that the surrounding factual circumstances have substantially changed since the conclusion of the original contract, and that a promise to perform in these new circumstances may constitute consideration for an additional payment.[25] Thirdly, a court may conclude that the parties have not modified the old agreement but, in fact, have entered into a new agreement.[26] Finally, where a promise to modify a contract has been relied upon, that promise may be enforceable by virtue of the equitable doctrine of promissory estoppel.[27]

Practical Benefit and Williams v Roffey

In 1990 this quartet of avoidance techniques was expanded so as to include a fifth member as a result of the English Court of Appeal's decision in *Williams v Roffey*[28] and the development of the practical benefit test. In addressing the issue of pre-existing duty, Glidewell LJ focused not on whether the promisee suffers a detriment, nor on whether the promisor receives a legal benefit, but on whether the promisor *in practice* obtains a benefit or obviates a disbenefit.[29] In his concluding remarks, Glidewell LJ summarised the law as follows:

> (i) if A has entered into a contract with B to do some work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B

has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B' s promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit of B is capable of being consideration for B's promise, so that the promise will be legally binding.[30]

The practical benefit principle as developed in *Williams v Roffey* was immediately followed by the High Court in England and Wales,[31] has been endorsed by the New Zealand Court of Appeal,[32] and adopted (with modifications) by the Supreme Court of New South Wales in Australia.[33] The notion of practical benefit and even its terminology is however, not as radical or as innovative as it initially appears. Denning LJ in the 1950s relied on the existence of practical (as opposed to additional) benefit in order to enforce promises made in connection with the maintenance of both an illegitimate daughter and a separated wife in circumstances where the existence of a public duty would otherwise have precluded the conclusion of a legally binding contract.[34] Although this principle did not find favour with the majority of the Court in either of these cases,[35] Denning LJ was able to generate significant academic support for a practical or factual benefit test.[36]

Critiquing Williams v Roffey

Nevertheless, the decision in *Williams v Roffey* is not unproblematic and as a result, has not been greeted with universal approval.[37] The concept of 'practical benefit' itself was not defined in *Williams v Roffey.* On the facts, Glidewell LJ noted that in return for the additional payment, the main contractors hoped to avoid becoming liable under a penalty clause (or more accurately, a liquidated damages clause) for late completion, as well as avoiding the trouble and expense of having to engage alternative carpenters.[38] This catholic conception of practical benefit has been criticised for 'hopelessly compromising the doctrine of consideration.'[39] It has been suggested that consideration for a promise of additional remuneration would only be absent 'in cases where the promisor had stood to obtain no advantage from performance of the contract when it was first made, or where circumstances had so changed since the contract was made that all chance of the promisor's obtaining an advantage from performance had been lost.'[40] Moreover, it is questionable as to whether, particularly in a bilateral contract, consideration can be found in the performance of a contract as opposed to in a promise to perform or in the obligation which results from a promise to perform.[41] Furthermore, if practical benefit is defined so as to include merely the perception of an increased or better chance of performance, then this amounts to little more than sentimental value which traditionally, does not constitute good consideration.[42] In any case, as pointed out by Halyk, the practical benefit as defined in terms of performance did not in fact materialise in *Williams v Roffey.*[43]

It is possible that some of these criticisms may be mitigated if, for example, the notion of practical benefit were restricted to losses which would not be otherwise recoverable under an action for damages for breach of contract.[44]

¶On the facts of *Williams* itself, it is not obvious that any of the advantages identified by Glidewell LJ (including liability under the liquidated damages clause) would not be recoverable in an action against the carpenters for a breach of contract. Arguably, the new method of remuneration which replaced haphazard payments with a more formalised system, which was identified by Russell LJ as a practical benefit, would fall into this category, although such a loss might, in practice, prove difficult to quantify. Moreover, a formal adoption of this approach may well lead to an unsatisfactory result whereby a court must enquire into issues such as remoteness of damages and causation in order to ascertain as to whether a party received a practical benefit from a renegotiated contract.[45] Alternatively, it has been suggested that the notion of practical benefit should be confined to benefits of a commercial nature or conferred within a commercial context.[46] However, there would appear to be no doctrinal basis for such a distinction nor, in the light of a modern notion of economic duress, is there a practical reason for upholding a contractual variation on the basis of practical benefit only in a commercial context or where the benefit is commercial in nature. Furthermore, if such a distinction were to be created, it is not clear how a commercial practical benefit or a commercial context should be defined.[47] Whilst the practical benefit identified in *Williams v Roffey* is clearly commercial in both nature and context, there would appear to be no reason why the application of this test should always be so limited.

Criticism of *Williams v Roffey* has not been confined to the definition of practical benefit. In their reluctance to depart absolutely from *Stilk v Myrick,* the members of the Court of Appeal contented themselves with refining and limiting the application of its principle.[48] Russell LJ in particular noted that 'I wish to make it plain that I do not base my judgment on any reservation as to the correctness of the law long ago enunciated in *Stilk v Myrick.* A gratuitous promise, pure and simple, remains unenforceable unless given under seal.'[49] However, as Treitel has pointed out, the absence of consideration in *Stilk v Myrick* did not mean that the promise made by the master was gratuitous. Arguably, the master did in fact receive a practical benefit in return for his promise.[50] Moreover, the characterisation of *Stilk* by the Court of Appeal as a case involving duress or issues of public policy is also questionable. According to the report of *Stilk v Myrick*[51] cited in *Williams v Roffey,* the master's promise was unenforceable for want of consideration. Although in a second (and less well regarded) report,[52] Lord Ellenborough concluded that the agreement was contrary to public policy, this version was *not* relied upon by the Court in *Williams v Roffey.* Furthermore, there was no evidence of duress or of a threat to desert on the facts of *Stilk v Myrick.*[53] In fact, so difficult is it to reconcile *Williams v Roffey* with *Stilk v Myrick,* at least one commentator has suggested that *Williams* ought to be recognised as a significant new development which departs from the traditional pre-existing duty rule.[54] Although the practical benefit test has received judicial support from other jurisdictions,[55] *Williams v Roffey* has yet to be confirmed by the House of Lords and its extension to part payment of debt cases has been expressly rejected by the Court of Appeal. Moreover, in a recent High Court decision in England and Wales, the decision in *Williams v Roffey* was subjected to searing criticism from Coleman J who stated that '[b]ut for the fact that *Williams v Roffey Bros* was a decision of the Court of Appeal, I would not have followed it.'[57] However, Coleman J's concerns relate not to the notion of practical benefit itself or to the treatment of *Stilk v Myrick,* but to the extent to which the decision in *Williams* apparently contravenes the rule that consideration must move from the promisee.[58] Coleman J disapproved of what he interpreted as a substitution by Glidewell LJ 'for the established rule as to consideration moving from the promisee a completely different principle - *that the promisor must by his promise have conferred a benefit on the other party*.'[59] Such criticism with all due respect to Coleman J seems to be somewhat misplaced. The Court of Appeal in *Williams v Roffey* did not concern itself with what was provided by the *promisor* (an additional payment was correctly assumed to constitute consideration), but what was provided by the *promisee* in return for the promise of extra remuneration. Furthermore, the issue of whether consideration moves from the promisee was in fact addressed by Glidewell LJ who interpreted the rule as merely requiring that the promisee (as opposed to a third party) provide consideration in return for the promise.[60] Although traditionally the promisee must suffer a detriment in return for the promise (such as the price paid), Glidewell LJ concluded that as long as the promisee confers a benefit on the promisor (or for that matter a third party) consideration moves from the promisee regardless of whether she incurs a detriment.[61] This notwithstanding, it is in any case arguable that the carpenters in *Williams* having agreed to continue work for increased remuneration *did* incur a detriment, in that they forewent an opportunity to cut their losses and seek alternative (more profitable) employment. Nevertheless, whilst accepting that the decision in *Williams v Roffey* has, in effect, marginalised the concept of detriment in favour of that of benefit,[62] it cannot be doubted that the benefit is provided by the promisee and does not therefore compromise the principle that consideration must move from the promisee.

Dissatisfaction with *Stilk v Myrick* and the pre-existing duty rule has led many commentators to recommend its abrogation.[63] Moreover, the development of the practical benefit solution in *Williams v Roffey* has failed to stymie demands that contractual variations should be regarded as enforceable regardless of whether consideration can be found to support the amended agreement.[64] In *Antons Trawling v Smith,* the New Zealand Court of Appeal finally heeded those demands and boldly, and without ceremony, abolished the requirement that consideration be found in order to vary a contract.

III. Replacing Consideration with Reliance

The Decision in Antons Trawling v Smith

The facts of *Antons Trawling Co Ltd v Smith* as they impact on the issue of consideration can be summarised as follows. Mr Smith was employed by Antons Trawling as the master of a fishing vessel operated by Antons and engaged in catching orange roughy off the coast of the

North Island of New Zealand. Antons held a small quota for orange roughy in respect of which a commercial fishery had yet to be established. The Court of Appeal found that Antons had promised Mr Smith a ten percent share of any additional quota awarded to Antons as a result of Mr Smith demonstrating to the Ministry of Agriculture and Fisheries (MAF) the existence of orange roughy in commercial quantities so as to justify the setting of a larger quota. The Court found as a fact that Mr Smith had indeed demonstrated to MAF that a (small) commercial fishery in orange roughy was sustainable, and that MAF had, as a consequence, awarded Antons a small increase in its quota. Antons, however, denied that Mr Smith was entitled to ten percent of that increase as he had provided no consideration for their promise. Mr Smith had merely performed his pre-existing duty owed to Antons in establishing a commercial fishery and thus, according to *Stilk v Myrick,* which had been followed in New Zealand,[65] provided no consideration for their promise.

On the facts of *Antons,* the Court of Appeal was arguably blessed with at least five mechanisms through which Anton's promise could be rendered enforceable. Three of these mechanisms would have involved no more than the application of entirely orthodox principles of contract law. The remaining options, on the other hand, would have led (and in fact did lead) to a departure from the pre-existing duty rule and *Stilk v Myrick.* In the event, the Court of Appeal explored only one of those options. The report of *Antons* provides minimal information concerning the contents of the original contract of employment between Antons and Mr Smith. It is not clear as to the extent to which Mr Smith was already under an obligation to Antons to take steps in order to prove a commercial fishery for orange roughy within the designated locations. Depending on the exact terms of the original contract between Antons and Mr Smith, it may have been open to the Court of Appeal to conclude that the agreement created a *new* contract between the parties as opposed to modifying the old one. Alternatively, the Court might have found that Mr Smith had provided consideration for the promise by agreeing to do something *extra,* something beyond his pre-existing duty owed to Antons.

Even if the terms of the original contract between Antons and Mr Smith rendered these two options inapplicable, it was undoubtedly open to the Court of Appeal to find that Antons obtained a practical benefit in return for their promise. If Mr Smith was successful in persuading MAF that a commercial fishery in orange roughy was sustainable, then Antons would benefit from an inevitable increase in their quota. Moreover, Mr Smith, in undertaking to prove a commercial fishery, had arguably suffered a detriment: he had forgone the opportunity to fish elsewhere and risked the possibility that orange roughy could not be caught sustainably within the designated locations. Although *Williams v Roffey* has been applied by the High Court in New Zealand and recently approved by the Court of Appeal,[66] Baragwanath J appeared to support its critics[67] and refrained from examining the issue of practical benefit as it might be applied to the variation in *Antons.*[68] A fourth option which would have had the same practical effect as that of the route chosen by the Court of Appeal, but arguably have constituted less of a direct challenge to the doctrine of consideration as a whole, would have been to decide that the performance of a pre-existing duty owed to the promisor *perse,* may constitute good consideration. This option, which essentially has been adopted in connection with three party situations, does not deny the role of consideration within the context of contractual variation but merely re-defines what may constitute consideration in these circumstances.[69] The final[70] and most radical option, which was ultimately adopted by the Court of Appeal, was to eliminate the requirement of consideration altogether from agreements to vary contracts.[71] In a laconic final paragraph, Baragwanath J concluded:

> We are satisfied that *Stilk v Myrick* can no longer be taken to control such cases as *Roffey Bros, Attorney-General for England and Wales* and the present case where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr Smith of the benefit of what Antons promised he should receive would be inconsistent with the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the

Conditions for Enforcement of Contractual Variations in the Absence of Consideration

In his concluding paragraph, Baragwanath J identifies four elements which must be present in order to render a promise binding in law in the absence of consideration. First, the parties must have made their intention to be bound clear by entering into legal relations. The phraseology used would suggest that the only way of proving an intention to be bound is

through the conclusion of a prior contract. The decision in *Antons* is therefore confined to agreements to vary existing contracts and will not apply to the conclusion of new contracts. Moreover, this new rule will only operate to attach legal consequences to an agreement where each party reasonably expects as much. Thus each variation is viewed objectively, and where no reasonable person would have expected a promise to be legally binding, no legal consequences will attach to that promise.

Secondly, a variation will only be enforced in the absence of consideration where it has been acted upon. Baragwanath J fails to provide any further elaboration as to the circumstances in which a variation is acted upon. In *Antons* itself, Mr Smith took steps to prove a commercial fishery in orange roughy and therefore clearly acted upon the varied contract. The carpenters in *Williams v Roffey* continued to work on the flats and therefore, likewise, acted on the variation. However, where a promisee promises to perform a pre-existing duty in return for additional remuneration, at what stage does she act upon the varied agreement? The use of the phrase 'act on the variation' as opposed to the more familiar term 'reliance' would suggest that simply changing one's position is not enough to create a legally binding promise. A promisee must actually begin *performing* her pre-existing duty owed to the promisor before legal consequences are attached to the agreement. Thirdly, a promisee would appear to be able to rely on this rule only where the agreement has been duly performed. This element would appear to complement and further elaborate on the requirement that the variation be acted upon. It confirms that a mere promise to perform in return for an additional payment will not lead to the conclusion of a binding agreement. However, the language used by Baragwanath J is somewhat ambiguous. This rule surely cannot depend on the *agreement* being duly performed as this would imply that in the event that the promisor fails to make the additional promised payment, the agreement has not been duly performed and her promise is no longer legally binding. It is likely that Baragwanath J meant that the *pre-existing obligation* owed by the promisee must be duly performed. Although it is not instinctively unreasonable to suggest that a promisee who fails to perform what she is already required to do, should be denied additional payment in full or, (as is more likely) in part, this criterion is somewhat equivocal. Does 'duly performed' mean that unless the promisee completes *all* contractual undertakings she is not entitled to any part of the additional payment? If so, and the varied agreement is essentially reconstituted as an entire agreement, should the doctrine of part performance and the rule in *Hoenig v Isaacs*[73] apply to mitigate any potential hardship suffered by the promisee who substantially completes performance? In practical terms, would this criterion prevent an application of the rule to a case such as *Williams v Roffey* where the extra payments were designed to be made in instalments on the completion of each flat as opposed to at the end when all flats were completed? Furthermore, what happens if the promisor directly or indirectly prevents due performance on the part of the promisee? In *Williams v Roffey* the main contractors stopped paying the carpenters and this ultimately forced them to discontinue work under the contract. Although the carpenters did not, as a consequence, duly perform their duties under the contract, they may well have done so had the main contractors continued to make the extra payments as promised. Finally, only those contractual variations which do not contravene considerations of public policy will be enforceable. Baragwanath J gives only one example of a policy factor which would preclude a variation from otherwise attracting legal consequences: duress. Early advocates of the abolition of the pre-existing duty rule emphasised the importance of introducing safeguards to prevent promises being extracted through extortion or trickery on the part of the promisee.[74] Economic duress,[75] as identified by Baragwanath J in *Antons*[76] and Glide well LJ in *Williams v Roffey,*[77] arguably provides a more effective means of policing contractual variations than the focus on the presence (or otherwise) of consideration. Nevertheless, although an unlawful threat not to perform under a contract may amount to duress,[78] it must effectively leave the promisor with no practical choice but to accede to the promisee's demands.[79] In reality, economic duress, as it has been applied by the courts to date, will render agreements voidable only in the most extreme circumstances. Moreover, the courts are traditionally unsympathetic towards persons making promises as a result of pressure which falls short of duress. In *Pao On v Lau Yiu Long,* in response to the argument that in a case where 'duress has not been 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 dominant bargaining position', the Privy Council concluded that 'where businessmen are negotiating at arms length it is unnecessary for the achievement of justice, and unhelpful in the development of the law to invoke such a rule of public policy.'[80]

A number of commentators who welcomed the development of practical benefit in *Williams v Roffey,* have called for the 'finessing'[81] of economic duress which is currently 'too coarsely calibrated to distinguish between meritorious and unmeritorious variations.'[82] This critique of duress as a safeguard within the context of contractual variation which ensued from the decision in *Williams v Roffey,* is likely to prove even more vital following the decision in *Antons Trawling v Smith.* In maintaining that consideration (albeit re-defined so as to encompass practical benefit) is required for contractual variations, the courts retain (in practical terms) the option of refusing to enforce a promise for want of consideration in circumstances where they feel an agreement should not be upheld. This relative flexibility in dealing with contractual variations[83] has been discarded in New Zealand (for the vast majority of cases) as a result of the decision in *Antons Trawling v Smith.* As a consequence of this, it is imperative that the doctrine of economic duress be applied sensitively and flexibly by the courts when examining promises to vary long-standing agreements. For example, there is no obvious reason why duress should not operate to render an agreement voidable even in circumstances where the offer to vary the contract was made by the party who later comes to rely on the duress.[84] Alternatively, safeguards may be improved if the party seeking to rely on the variation is obliged to bear the burden of proving that the promise was made in the absence of duress or other undue pressure.

Although duress was the only policy factor highlighted by Baragwanath J in *Antons,* he implied that there are likely to be other grounds on which to refuse to enforce a contractual variation. Alternative options may include undue influence or unconscionable bargain. However, in practice, neither of these grounds are likely to offer much relief to parties pressured or tricked into varying their contractual obligations by means short of duress. The equitable doctrine of undue influence seeks to relieve persons from bargains they have entered into under pressure which traditionally, does not amount to duress.[85] Although undue influence is wider than duress in that no actual threat need be made,[86] it is not clear as to whether the doctrine can be invoked to impugn a contractual variation agreed to within a commercial context. Indeed the dicta of Lord Scarman in *Pao On v Lau Yiu Long* strongly suggests otherwise.[87] On the other hand, where dealings between the parties are not commercial in nature, undue influence may provide an important safeguard against promises extracted under pressure not amounting to duress. The doctrine of unconscionable bargain (which is restrictively applied in New Zealand and in England and Wales) would appear to offer even less scope for setting aside a varied contract. Relief by virtue of unconscionable bargain would appear to be available only where a party is suffering from a special disadvantage (such as poverty or ignorance) which is known to, and subsequently abused by, the other party, and the transaction which results is both harsh and unconscionable.[88] Only the most extreme contractual variations could be regarded as falling into the category of 'harsh and unconscionable', and it is unlikely that a party who merely desires or needs to ensure that the original contract is performed would be considered to be at a special disadvantage *vis a vis* the promisee. The more flexible approach to unconscionable bargain which has been adopted in Australia[89] and impugns transactions obtained where one party has taken unfair advantage of their superior bargaining power, has found little favour with the English courts.[90] Moreover, a discussion paper issued by the New Zealand Law Commission in 1990 which advocated the selected abrogation of agreements obtained as a result of unequal bargaining power was subsequently abandoned, and Law Commission support for the scheme has been withdrawn.[91]

Furthermore, whilst the doctrines of duress, undue influence and unconscionable bargain all operate (more or less) to protect persons from entering into agreements as a result of undue pressure, they are not likely to benefit a person who has varied a contract as a consequence of unfair dealing or trickery. Where a promise has been made as a result of fraud or misrepresentation then clearly it cannot be enforced on policy grounds. However, these doctrines operate to contain the extremes of wrongdoing and are not designed to catch lesser forms of bad faith dealing. In the past, an application of the so-called technical rules of consideration has from time to time rescued promisors from agreements concluded as a result of unfair behaviour on the part of the promisee. For example, although the rule which prevents the payment of a lesser sum operating to discharge the whole debt as confirmed in *Foakes v Beer*[92] has been subject to cogent criticism,[93] the actual outcome of the case is generally considered to be just.[94] It would appear that Dr. Foakes set a trap for Julia Beer and tricked her into apparently forgiving the interest on the loan.[95] Although the Court

applied a rather technical solution to her predicament, Treitel has pointed out that there was no obvious alternative legal mechanism which might have been employed in order to ensure that Mrs Beer received the interest due to her.[96] This situation would appear to be unchanged today and as a consequence of the abolition of consideration, it is likely that a court will have no option but to uphold variations agreed to as a result of unfair conduct except where that conduct constitutes duress, fraud, misrepresentation or any other recognised category.

It is arguable that a promisor may benefit from improved protection against unfair conduct on the part of the promisee if the phrases 'policy factors' or 'policy reasons' as adopted by Baragwanath J in *Antons* were given a much more expansive and flexible interpretation. It would not be unreasonable to uphold variation agreements without consideration only where they have been negotiated fairly or in good faith. However, whilst this approach may promote justice in individual cases, it would effectively introduce the concept of good faith into New Zealand law by the back door. Good faith as a doctrine of itself is not a part of English or New Zealand contract law, and has been expressly rejected by the House of Lords.[97] Moreover, although there may be merits in recognising a general good faith doctrine in New Zealand or for that matter English contract law, the restriction of its application to the relatively narrow sphere of contractual variation is arguably inappropriate. It is not immediately obvious why persons who choose to vary pre-existing contracts should benefit from greater protection than those who are concluding new contracts. In the context of contract formation, the courts will not examine whether it was reasonable for both or either party to enter into a contract or whether the parties dealt fairly with each other (to the extent that duress, fraud etc is not alleged). Whilst consideration is still required to conclude (as opposed to vary) an agreement, the fact that it may be nominal means that, in practical terms, a party is no less vulnerable in concluding as opposed to varying a contract.

Status of Williams v Roffey in New Zealand

Finally, just as the English Court of Appeal in *Williams v Roffey* has been criticised for the manner in which it dealt with *Stilk v Myrick,* the New Zealand Court of Appeal in *Antons* is open to similar criticism with regard to its treatment of *Williams v Roffey.* Baragwanath J was undoubtedly correct in noting that '[w]hichever option is adopted, whether that of *Roffey Bros* or that suggested by Professor Coote and other authorities, the result is in this case the same.'[98] However, the process of reasoning through which this result was reached in *Antons* could not have been more different from that which was applied in *Williams v Roffey.* In *Williams, Stilk v Myrick* was refined but confirmed, and consideration was found for the contractual variation in the form of a practical benefit bestowed by the promisee on the promisor. In *Antons* on the other hand, *Stilk* was expressly not followed and the variation was upheld since it had been acted upon and duly performed and there was an absence of policy reasons which would have prevented the agreement from being enforced. In the light of the tentative acceptance of *Williams v Roffey* by the New Zealand courts, it is lamentable that the Court of Appeal in *Antons* did not expressly refuse to follow *Williams* and those subsequent cases. The status of *Williams* and the practical benefit test in New Zealand law is now ambiguous. Although trenchantly criticised and not followed by the Court of Appeal in *Antons,*[9] the notion of practical benefit has not been expressly rejected. Thus it may now be possible for a claimant to plead on the basis of practical benefit under *Williams or* reliance under *Antons* in order to enforce a varied contract. Moreover, the Court of Appeal also failed to clarify the legal consequences of an agreement to vary a contract which has not been duly performed or not acted upon. Such a variation would not be enforceable by virtue of *Antons* itself, but Baragwanath J omitted to indicate whether such an agreement should not attract contractual consequences, or whether it could be rescued by virtue of the practical benefit test.

IV. The Broader Implications of Replacing Consideration with Reliance

Implications for the Requirement of Consideration in the Formation of Contracts

The most pressing question to be answered in the light of *Antons* is whether this decision will begin a judicial revolution to extirpate consideration in general from New Zealand contract law. Although the Court of Appeal did not question the need to find consideration for the purpose of contract formation, Baragwanath J emphasised that '[t]he importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself.'[100] The tenor of his judgment arguably supports a return to a Mansfieldian notion of moral consideration, and in noting that 'the essential principle underlying the law of contract [is] that the law will seek to give effect to freely accepted reciprocal undertakings',[101] Baragwanath J provides support to Fried's theoretical conclusion that 'the life of contract is indeed promise'.[102] Consideration is ultimately concerned with the protection of freedom from contract.[103] The doctrine comprises a substantive component which controls the content of promises (prohibiting gifts, payments in return for past acts and so forth) and a formal component which regulates the manner in which promises are entered into.[104] Thus consideration channels and provides evidence of an intention of the parties to be bound, as well as cautioning persons against undertaking inconsiderate promises.[105] However, in practice, consideration wholly fails to distinguish between gratuitous and onerous promises as the adequacy of consideration is immaterial and purely nominal consideration is recognised as good consideration.[106] Moreover, the traditional technical rules which prevent past acts and pre-existing duties from constituting consideration are regularly evaded by their technical manipulation. Furthermore, the presence or absence of consideration does not always coincide with a corresponding presence or absence of legal intention,[107] and thus the doctrine no more performs a formal than a substantive function in regulating contracts. Arguably, other doctrines such as intention to create legal relations are better suited to ensure that freedom from contract is suitably protected.

Although the Court of Appeal in *Antons* did not question the role of consideration in the context of contract formation, it did not explain why an agreement to vary a contract should be treated so very differently. Baragwanath J endorsed the view expressed by Reiter that consideration 'is of little assistance in the context of on-going, arms-length, commercial transactions where it is utterly fictional to describe what is being conceded as a gift, and in which there ought to be a strong presumption that good commercial considerations underlie any seemingly detrimental modification.'[108] However, the reference to 'on-going' transactions is arguably superfluous when dealings take place at arms length in a commercial context. It is equally fictitious to suggest that any concession made pursuant to the conclusion of a contract in a commercial context should be regarded as a gift. It is illogical to presume that good commercial reasons underlie a decision to vary a contract but not to the decision to enter into the contract in the first place. Nevertheless, the Court of Appeal in *Antons* did not confine itself to the mere abolition of consideration within the context of contractual variation. Baragwanath J essentially replaced the requirement of consideration with that of reliance. The contractual variation *in Antons* was only enforceable as it had been acted upon and Mr Smith's pre-existing duty owed to Antons was duly performed. Whilst the merits of consideration have long been debated and a number of commentators have demanded its abolition altogether,[109] there is generally no appetite for its replacement with a reliance based model. As such, the decision in *Antons* is unlikely to auger a more generalised movement towards the elimination of consideration altogether from New Zealand contract law.

Implications for Cases Involving the Part Payment of a Debt or the Performance of a Public Duty

Whilst the doctrine of consideration *per se* may prove impervious to the development of a reliance based test in *Antons,* the rule in *Stilk v Myrick,* as noted above, comprises only one part of a trinity of rules which operate within the context of a pre-existing duty. The second rule prohibits the performance of a pre-existing public duty from constituting good consideration and the third prevents the good discharge of a debt on the payment of a lesser sum. In the past, these distinct rules have essentially been treated as components of a general category of undertakings which fail to constitute consideration. The decision in *Williams v Roffey* has arguably not disturbed the conceptual coherency of this trinity of rules.¶There is no obvious reason why a promise of payment (or other concession) in return for the performance of a public duty should not be enforced where the promisor obtains a

practical benefit from this performance, provided there are no policy reasons to militate against the enforceability of such an agreement. Similarly, it has been argued that where a creditor receives part of a debt owed to her and obtains a practical benefit from that payment, the debt ought to be fully discharged as a consequence.[110] Although the test of practical benefit has yet to be extended to either of these situations,[111] conceptually, the reasoning in *Williams v Roffey* may be applied (if the courts so choose) to the entire trinity of rules in connection with a preexisting obligation.

The reliance based model as adopted by the New Zealand Court of Appeal in *Antons* is by contrast of more restricted application. Having accepted that an agreement to vary a contract is enforceable, provided that the variation has been acted upon and the pre-existing duty has been duly performed, there would appear to be no conceptual reason why a promise to accept payment of a lesser sum should not operate to discharge an entire debt owed under a contract. An extrapolation of the reasoning in *Antons* to part payment of debt cases would necessitate a formal departure from *Foakes v Beer.*[112] However, the rule in *Foakes* has been cogently criticised for failing to reflect the needs of commercial practice[113] and, arguably, should no more govern part payment of debt cases today than *Stilk v Myrick* should govern pre-existing duty cases. Those dissatisfied with the rule can, in any case, generally find a way around it. In New Zealand in particular, a debt may be discharged where part payment has been received and acknowledged in writing by the creditor or her agent under s 92 of the *Judicature Act 1908.* The requirement that the preexisting duty must be duly performed under *Antons* would ensure that only where the part payment has been received would the promise to discharge the debt become fully enforceable. In contrast to the formalities required under the *Judicature Act 1908,* a debtor would not have to obtain a written acknowledgement of the discharge from the debtor where she based her action on the reliance based approach articulated in *Antons.* It is not however obvious why additional formalities should be imposed in a situation where money is owed by the promisee as opposed to where the promisee owes a duty to provide goods or services to the promisor. However, where a promisee owes a pre-existing public duty to the promisor or where the debt arises as a consequence of a public duty as opposed to a contract, the rule in *Antons* is arguably of no application. In both these situations the promise to pay for the performance of a pre-existing public duty and the promise to accept a lesser payment in connection with a debt owed under a public duty, are both made within the context of contract *formation* as opposed to variation. Whilst both situations are concerned with pre-existing duties, these are public as opposed to contractual duties. Whereas the notion of practical benefit which redefines, as opposed to discarding, consideration does not necessarily depend on the parties having already entered into a contractual relationship, the reliance test as defined by Baragwanath J indubitably does. The scope of the decision *in Antons* is therefore confined to promises made in return for the performance of a pre-existing *contractual* as opposed to public obligation.

V. Concluding Remarks

Invariably, good commercial or practical reasons underlie most decisions to vary the terms of an otherwise binding agreement and, consequently, such contractual variations should be *prima facie* enforceable. Moreover, a variation agreed to which lacks a commercial or practical rationale should be likewise enforceable, provided that the agreement was not entered into as a result of duress or fraud etc. Courts generally refrain from analysing a party's motives for entering into an agreement in the first place and do not assess the commercial advantages (or otherwise) of an agreement. There is no compelling reason why an agreement to vary a contract should be treated any differently from its initial conclusion. The Court of Appeal in *Antons* was therefore correct in both departing from *Stilk v Myrick,* and in rejecting the practical benefit test as devised in *Williams v Roffey.*[114] However, in abolishing consideration for contractual variation and introducing a reliance or performance based test, the New Zealand Court of Appeal has adopted a solution to the problem of the pre-existing duty as fraught with difficulties as the practical benefit test developed by the English Court of Appeal. Arguably, most of these difficulties, as well as the broader challenge to the doctrine of consideration *per se,* could have been avoided if the Court of Appeal had chosen to *re-define* as opposed to abolish consideration in pre-existing duty cases.

By simply concluding that a promise to perform or performance of a preexisting contractual duty may itself constitute good consideration in return for a promise of additional remuneration, the Court of Appeal would have achieved their desired result in the case of

Antons itself. Moreover, this solution makes no distinction between varied agreements which have been fully performed and those which have yet to be acted upon. The potential injustice of the decision in *Antons* which would prevent a promise of additional payment being enforced in the event of partial performance is therefore avoided. However, where performance is incomplete or unsatisfactory, the promisor will retain a remedy against the promisee for damages or may set off an appropriate sum against the contract price owed. Furthermore, this solution may be applied in respect of all pre-existing obligations whether owed publicly or as a result of a contractual undertaking. Arguably, a promise to pay or the payment of a lesser sum should constitute good consideration for the discharge of a debt and a promise to perform or performance of a public duty should likewise constitute good consideration, provided that neither agreement is contrary to public policy considerations.

Most importantly, in redefining, as opposed to abolishing consideration, this solution upholds contractual variations in a manner which is consistent with the expectations of the parties without compromising the wider doctrine of consideration.

The decision in *Antons Trawling v Smith* is unlikely to represent the last word on the enforceability (or otherwise) of contractual variations either in New Zealand or elsewhere in the Commonwealth. Academic, and increasingly, judicial concerns[115] expressed in connection with the practical benefit test, may well lead to its reconsideration by the English or even Australian courts. However, rather than *abolish* consideration within the context of contractual variation, it is suggested that both English and Australian courts *redefine* it so as to encompass the promise to perform or the performance of a pre-existing duty. Whether consideration constitutes an anachronism which leads to injustice or is, in the words of K O Shatwell, as fundamental to twenty-first century contract law as the Prince is to Hamlet,[116] is a question which has yet to be definitively answered after more than one hundred years of debate. Arguably, developments in relation to the pre-existing duty, privity and the increasing importance of promissory estoppel, support the demise of the doctrine of consideration. However, its abolition should not be effected on a piecemeal, *ad hoc* basis without regard to the impact that such action may have on the doctrine more generally or other principles of contract law. Either, the doctrine of consideration should be retained (and refined so as to encompass the promise to perform or performance of a pre-existing contractual or public duty to provide goods and services or pay a sum of money), or it should be abolished in its entirety. The future of consideration within the law of contract cannot ultimately be decided by the judiciary within any Commonwealth jurisdiction; rather, reform of the doctrine must be undertaken by the legislature, preferably as part of broader contractual reform, through which good faith requirements are explicitly introduced into the rules regulating contractual formation and performance. Thus far however, legislatures in all three jurisdictions have demonstrated little enthusiasm for such reform.

1. In *Pillans v Van Mierop* (1756) 3 Burr 1664, Lord Mansfield held that consideration constituted only evidence of the parties contractual intention and where that intention could be otherwise proved through, for example, the conclusion of a written agreement, consideration was unnecessary for the purposes of contract formation.
2. Ibid. *Pillans v Van Mierop* was overruled in *Rann v Hughes* (1778) 7 Term Rep 350. A second assault on the doctrine was led by Lord Mansfield in 1782 whereby he equated consideration with a moral obligation *(Hawkes v Saunders* (1782) 1 Cowp 289). Although this was temporally more successful, this equation was ultimately rejected in 1840 in *Eastwood v Kenyon* (1840) 11 Ad & El 438.
3. The Sixth Interim Report of the Law Revision Committee, *Statute of Frauds and the Doctrine of Consideration,* Cmmd 5449 (1937) refrained from the entire abolition of consideration root and branch (although this did appeal to most of its members) and instead recommended the pruning of a number of its aspects most likely to cause hardship or inconvenience (at [17], [27]).
4. See Holdsworth, *A History of English Law* (Volume III) (1922) 47.
5. See K Shatwell, 'The Doctrine of Consideration in the Modern Law' (1953-1955) 1 *Sydney Law Review* 289-331.
6. See, for example, *Ward v Byham* [1956] 2 All ER 318; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.
7. [2003] 2 NZLR 23.
8. Ibid [93].
9. (1809) 2 Camp 317; 6 Esp 129.
10. [1991] 1 QB 1.
11. (1809) 2 Camp 317; 6 Esp 129. Confirmed in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, (The Atlantic Baron)* [1978] 3 All ER 1170. See also *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512, 522 where the basic principle in *Stilk v Myrick* was confirmed although its application was significantly refined and limited. *Stilk v Myrick* was held to be good law in New Zealand in *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422 and in *New Zealand Needle Manufacturers v Taylor* [1975] 2 NZLR 33. It should be noted that the pre-existing duty rule is commonly believed to have originated from part-payment of debt cases prior to *Stilk v Myrick.* See J Ames, 'Two Theories of Consideration' (1898-1899) 12 *Harvard Law Review* 515, 521.
12. *Collins v Godefroy* (1931) 1 B & Ad 950.
13. *Pinnel's Case* (1602) 5 Co Rep 117a; *Foakes v Beer* (1884) 9 App Cas 605.
14. G Treitel, *Some Landmarks of Twentieth Century Contract Law* (2002) 12.
15. *Shadwell v Shadwell* (1860) 9 CB (NS) 159, as confirmed by the Privy Council in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 and *Pao On v Lau Yiu Long* [1980] AC 614.
16. *Welby v Drake* (1825) 1 C&P 557.
17. Sixth Interim Report of the Law Revision Committee, above n 3.
18. F M B Reynolds & G H Treitel, 'Consideration for the Modification of Contracts' (1965) 7 *Malaya Law Review* 1, 4. See the authorities cited in n 15 above.
19. Lord Blackburn in *Foakes v Beer* (1884) 9 App Cas 605, 615 noted that 'all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment as a whole.' Lord Blackburn's dicta was endorsed by the Law Revision Committee in 1937 both in connection with part payment of a debt and the performance of a pre-existing duty: Sixth Interim Report of the Law Revision Committee, above n 3, [35].
20. See *Stilk v Myrick* as reported in 6 Esp 129.
21. J Beatson, *Anson's Law of Contract* (28th ed, 2002) 105.
22. Sixth Interim Report of the Law Revision Committee, above n 3, [33-36]. The Committee also recommended that the rule which prevents the performance of a public duty constituting consideration, and the rule which prevents the discharge of a debt on the payment of a lesser sum be similarly abolished.
23. B J Reiter, 'Courts, Consideration and Common Sense' (1977) 27 *University of Toronto Law Journal* 439, 474.
24. *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270; *Ward v Byham* [1956] 1 WLR 496.
25. *Hartley v Ponsonby* (1857) 7 E&B 872.
26. *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128.
27. *Central London Property Trust v High Trees House* [1947] KB 130.
28. [1991] 1 All ER 512.
29. Ibid 522.
30. Ibid 522.
31. *Anangel Atlas Compania Naviera S.A. v Ishikawajima-Harima Heavy Industries Co Ltd (No. 2)* [1990] 2 Lloyd's Rep 526; *Simon Container Machinery Ltd v Emba Machinery Ltd* [1998] 2 Lloyd's Rep 428.
32. *Attorney General for England and Wales v R* [2002] 2 NZLR 91, [51]. See also *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68; *United Food & Chemical Workers Union of New Zealand v Talley* [1993] 2 ERNZ 360; *Machinus Properties v Power Sports World* (1999) 4 NZ ConvC 193,066.
33. *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723. As reformulated by Santow J, a promise of an additional payment *or other concession* is enforceable where the promisor obtains a practical benefit *or the promisee suffers a detriment* so long as the benefit to the promisor is *worth more to the promisor than any likely remedy against the promisee* is binding provided that it was not made as a result of economic duress, fraud, undue influence or unconscionable conduct on the part of the promisee nor *induced as a result of unfair pressure on the part of the promisee* (at 747). For an overview of developments since *Williams v Roffey* in Australia, see J W Carter et al, 'Reactions to *Williams v Roffey'* (1995) 8 *Journal of Contract Law* 248, 258-262.

34. *Ward v Byham* [1956] WLR 496; *Williams v Williams* [1957] WLR 148.
35. In *Ward v Byham* and *Williams v Williams* the majority found that the promisee had provided something extra, something that went beyond their simple public duty which amounted to consideration in the circumstances.
36. Reynolds & Treitel, above n 18, 9.
37. See in particular J W Carter & D J Harland, *Contract Law in Australia* (4th ed, 2002) 127; B Coote, 'Consideration and Benefit in Fact and in Law' (1990) 3 *Journal of Contract Law* 23; D Halyk, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers'* (1991) 55 *Saskatchewan Law Review* 393.
38. *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512, 518.
39. Coote, above n 37, 29. See also Halyk, above n 37.
40. Coote, above n 37, 25.
41. Ibid 26-27. See also B Coote, 'Common Forms, Consideration and Contract Doctrine' (1999) 14 *Journal of Contract Law* 116, 122-129.
42. M Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in J Beatson & D Friedmann (eds), *Good Faith and Fault in Contract Law* (1995) 127.
43. Above n 37, 405.
44. As suggested by R Halson in 'Sailors, Sub-Contractors and Consideration' (1990) 106 *Law Quarterly Review* 183, 184.
45. M Chen-Wishart, 'The Enforceability of Additional Contractual Promises: A Question of Consideration?' (1990-1991) 14 *New Zealand Universities Law Review* 270, 276.
46. Chen-Wishart, above n 42, 132.
47. A difficulty acknowledged by Chen-Wishart, above n 42, 132.
48. *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512, 522.
49. Ibid 524.
50. Treitel, above n 14, 21.
51. (1809) 2 Camp 317.
52. 6 Esp 129.
53. Treitel, above n 14, 21.
54. Ibid 23.
55. See text accompanying n 32-33 above.
56. *Re Selectmove Ltd* [1995] 2 All ER 531. Although Peter Gibson LJ expressed sympathy for the view that part payment of a debt which confers a practical benefit on the creditor should constitute consideration for a promise to discharge the whole debt, an application of *Williams v Roffey* was rejected on the basis that it would contravene the principle established in *Foakes v Beer* (decided in the House of Lords) and not referred to in *Williams* itself (at 538).
57. *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128, 149.
58. Ibid.
59. Ibid 150 (emphasis added).
60. *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512, 522.
61. This position also receives support from the editors of *Chitty on Contracts* (Volume 1) (2004) [3-037].
62. J Adams & R Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 *Modern Law Review* 536, 537.
63. A G Davis, 'Promises to Perform an Existing Duty' (1936-1938) 6 *Cambridge Law Journal* 202; A T Denning, 'Recent Developments in the Doctrine of Consideration' (1952) 15 *Modern Law Review* 1; C J Hampson, 'The Reform of Consideration' (1938) 54 *Law Quarterly Review* 233; J Land, 'The Enforceability of Contractual Variation: *Moyes & Groves Ltd v Radiation New Zealand Ltd'* (1985) 15 *Victoria University of Wellington Law Review* 287; Reiter, above n 23; Reynolds & Treitel, above n 18.
64. Beatson, above n 21, 108; Carter & Harland, above n 37, 138; Chen-Wishart, above n 45; Coote, above n 37; Halson, above n 44; R Meyer-Rochow, 'The Requirement of Consideration' (1997) 71 *Australian Law Journal* 532.
65. *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422.
66. See note 32 above and accompanying text.
67. [2003] 2 NZLR 23, [92] citing Coote, above n 37.
68. Baragwanath J did however imply that Antons had obtained a practical benefit in return for their promise, noting in his conclusion that '[w]hichever option is adopted, whether that of *Roffey Bros* or that suggested by Professor Coote and other authorities, the result in this case is the same.' (ibid [93]).
69. Re-defining consideration so that it may include the performance of a pre-existing duty has received support from Hampson, above n 63, and Beatson, above n 64.
70. These options are of course limited to those available on the basis of contractual principles. A further remedy may have been available on the basis of equitable principles such as promissory estoppel.
71. The elimination of consideration from agreements to vary contracts has received support from a number of commentators including Reynolds & Treitel, above n 63; Land, Chen- Wishart and Halson, above n 64.
72. [2003] 2 NZLR 23, [93].
73. [1952] 2 All ER 176.
74. Reynolds & Treitel, above n 18, 22 were particularly pessimistic in 1965 as to whether appropriate safeguards could be introduced, particularly, as in their view, there did not seem to 'be much chance of persuading the courts

to introduce the American idea of "economic duress" since the scope of duress and even of undue influence in English law, is on the authorities, very narrow.' Hampson, above n 63, 239-240 suggested that the promisee bear the burden of proving that a promise was made, that the bargain was reasonably necessary and made without advantage being taken of the promisor. Although these remarks were made in connection with a recommendation to abolish the part payment of a debt rule, they are equally applicable to the abrogation of the pre-existing duty rule.

75. See *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; *Pao On v Lau Yiu Long* [1980] AC 614; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366. For a recent application of economic duress in New Zealand see *Haines v Carter* [2001] 2 NZLR 167.
76. [2003] 2 NZLR 23, [93].
77. [1990] 1 All ER 512, 520.
78. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705.
79. *Pao On v Lau Yiu Long* [1980] AC 614; *Attorney General for England and Wales v R* [2002] 2 NZLR 91.
80. [1980] AC 614, 634.
81. R Bigwood, *Exploitative Contracts* (2003) 331-332.
82. Chen-Wishart, above n 42, 144. See also A Phang, 'Consideration at the Crossroads' (1991) 107 *Law Quarterly Review* 21-24.
83. The flexible virtues of the *Williams v Roffey* approach to contractual variation has been noted by Chen-Wishart, above n 42, 136.
84. As would appear to be the case in Australia. See *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419. But cf *Williams v Roffey* [1990] 1 All ER 512.
85. G Treitel, *The Law of Contract* (11th ed, 2003) 408.
86. Ibid 409.
87. [1980] AC 614, 634. See text accompanying n 80 above.
88. *Alec Lobb Garages Ltd v Total Oil Great Britain* Ltd [1985] 1 WLR 173; *Credit Lyonnais Bank v Burch* [1997] 1 All ER 144; *O'Connor v Hart* [1985] 1 NZLR 159.
89. *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 459.
90. The notion of inequality of bargaining power was developed by Lord Denning MR in *Lloyd's Bank Ltd v Bundy* [1975] QB 326 but gained little support and was in essence, disapproved of by the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614 and the House of Lords in *National Westminster Bank plc v Morgan* [1985] AC 686.
91. New Zealand Law Commission, Preliminary Paper 11 (1990). See J Burrows, J Finn & S Todd, *Law of Contract in New Zealand* (2nd ed, 2004) 368.
92. (1883-1884) LR 9 App Cas 605.
93. See in particular J Adams & R Brownsword, above n 62; Beatson, above n 21, 110; Wright, 'Ought the Doctrine of Consideration to be Abolished from the Common Law?' (1935- 1936) 49 *Harvard Law Review* 1225.
94. Treitel, above n 14, 45-46.
95. Ibid.
96. Ibid 46.
97. ¶*Walford v Miles* [1992] 2 AC 128. Cf the position in Australia where a nascent concept of good faith is beginning to emerge. See Carter & Harland, above n 37, [113].
98. [2003] 2 NZLR 23, [93].
99. Ibid [92]. It should be noted that the report of *Antons* somewhat surprisingly states that *Williams v Roffey* was followed by the Court of Appeal.
100. Ibid [93]. This view of the relatively limited function of consideration is of course most notably supported by P S Atiyah. See, in particular, 'Contracts, Promises and the Law of Obligations' (1978) 94 *Law Quarterly Review* 193, 202.
101. [2003] 2 NZLR 23, [93].
102. C Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981) 37.
103. E W Patterson, 'An Apology for Consideration' (1958) 58 *Columbia Law Review* 929, 948.
104. L L Fuller, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799, 799.
105. Ibid 800-803.
106. A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 263; Bigwood, above n 81, 102.
107. As noted by the Law Revision Committee in 1937, above n 3, [20]. In cases such as *Balfour v Balfour* [1919] 2 KB 571 although consideration was present the Court concluded that an intention to create legal relations was not. By contrast, in *Dunlop v Pneumatic Tyres Co Ltd* [1915] AC 847 whilst there was an evident intention to create a legally binding agreement the absence of consideration made 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' (at 885).
108. Reiter, above n 23, 507, as quoted by Baragwanath J at [2003] 2 NZLR 23, [92]. 109 B Mescher, 'Promise Enforcement by Common Law or Equity?' (1990) 64 *Australian*
109. *Law Journal* 536; Wright, above n 93.
110. The fact that the payment of a lesser sum may be of practical benefit to the creditor was acknowledged by Lord Blackburn in *Foakes v Beer* [1881-1885] All ER 106. See also Adams & Brownsword, above n 62, 540.
111. The application of the practical benefit test to a case involving a debt was rejected in *Re Selectmove* [1995] 2 All ER 531 on the grounds of precedent although the Court of Appeal appeared to favour its extension to part payment of debt cases via legislative reform or a decision of the House of Lords (at 538).

112. [1881-1885] All ER 106.
113. Beatson, above n 21, 110. Moreover, Adams & Brownsword, above n 62, 540 contend that the original decision in *Pinnel's Case* (1602) 5 Co Rep 117a concerned a bond and the rule need not have been extended so as to encompass debt cases.
114. Although, as discussed above in the text accompanying n 98-99, the Court of Appeal's failure to expressly depart from *Williams v Roffey* will result in considerable uncertainty concerning its status under New Zealand law.
115. See the remarks of Coleman J in *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128, 149-150.
116. Shatwell, above n 5, 326.