

THE FORMATION OF VARIATION CONTRACTS IN NEW ZEALAND: CONSIDERATION AND ESTOPPEL

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This article will review the current New Zealand approach to the formation of variation contracts. In particular, it will critique the current position taken by the Court of Appeal that either: a practical benefit can be good consideration, or consideration is not needed for variation agreements. The article will then explore some of the implications of using estoppel as an alternative basis to enforce variation agreements when consideration has not been provided by the promisee.

I INTRODUCTION

Whether or not an agreement to vary an existing contract is to be treated the same as any other contract has been debated in England since the Court of Appeal's decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*.¹ The traditional position was clear: agreements to vary are contracts like any other and thus require consideration like any other contract.² Furthermore, the promisee's consideration could not simply be the repromising of a pre-existing contractual duty as this was nothing that the promisor was not already entitled to.³ Thus, in order for a variation contract to be formed, both parties had to give something additional to the other side that they did not already owe under the original contract. This is the "pre-existing duty rule".

The decision of *Williams v Roffey* departed from this traditional position by expanding the definition of consideration to include "practical benefits". These were the flow-on benefits hoped to be gained by the promisor through the promisee completing its side of the original bargain. This meant

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1 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA).

2 See Brian Coote "Variations Sans Consideration" (2011) 27 JCL 185 and the cases cited in footnote 4 of that article.

3 *Stilk v Myrick* (1809) 2 Camp 317.

that the promisee could repromise to do what was already owed under the original contract as long as the promisor could be said to benefit practically from that repromise.

The New Zealand Court of Appeal has travelled even further away from the traditional view of variation contracts and the pre-existing duty rule. On two separate occasions, *Antons Trawling Co Ltd v Smith*⁴ and *Teat v Willcocks*,⁵ the Court cited *Williams v Roffey* as authority for determining whether there was good consideration to support a variation contract. But the Court also supported removing consideration entirely as a requirement for the formation of a variation contract. In neither case did the Court close the door on either option, leaving the status of consideration in the formation of variation contracts unsettled. Although it could be said that these two cases have at least shown that the pre-existing duty rule is no longer applicable, Court of Appeal dicta is not entirely consistent on that point either. In *Fuel Espresso Ltd v Hsieh*,⁶ decided after *Antons Trawling* but before *Teat v Willcocks*, Hammond J noted without disagreement that the notion that variation contracts require consideration just as much as originating contracts do is a "familiar point".⁷

This article will perhaps add to the unsettled nature of this area of contract law by arguing that neither option put forward by the Court of Appeal is desirable and that the pre-existing duty rule should be returned to if we are to be serious about consideration as a requirement in the formation of contracts. Instead of mangling (or fatally undermining) the doctrine of consideration in order to allow certain variation agreements to be enforced as contracts, the role that estoppel has to play to protect promisees in such situations should be considered. Although estoppel will not allow every variation agreement to be enforced, this article will try to show that doing away with the pre-existing duty rule is so problematic that estoppel, despite its shortcomings, is perhaps a better option.⁸

II THE CURRENT NEW ZEALAND POSITION

In *Antons Trawling* the New Zealand Court of Appeal had to determine whether an oral variation agreement between a ship owner and the ship's master was enforceable. The master had promised to undertake exploratory fishing in return for a promise from the owner of 10 per cent of any additional fishing quota that the owner gained due to the exploration. One of the issues before the Court was that the master was already obligated to do "exploratory fishing" under his original em-

4 *Antons Trawling* [2003] 2 NZLR 23 (CA).

5 *Teat v Willcocks* [2013] NZCA 162, [2014] 3 NZLR 129.

6 *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58, [2007] 2 NZLR 651.

7 At [17].

8 Waiver is another potential avenue that could be revived by the courts to deal with these cases. See HK Lucke "Non-Contractual Arrangements for the Modification of Performance: Forbearance, Waiver and Equitable Estoppel" (1991) 21 UWAL Rev 149. A discussion of waiver is outside the scope of this article.

ployment agreement and was thus merely repromising to do what he was already contractually bound to do.⁹ In deciding that the variation contract was enforceable, the Court of Appeal held that the pre-existing duty rule was effectively no longer binding in New Zealand.¹⁰ Instead, Baragwanath J (delivering the Court's judgment) suggested that consideration was a sufficient, but not necessary, indication of the parties' intention. It was not "an end in itself" and therefore:¹¹

Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement.

Although his Honour had noted earlier that *Williams v Roffey* had been "trenchantly criticised", and despite holding that consideration was not necessary for variation agreements, Baragwanath J declined to take the plunge and expressly state that New Zealand should not follow it.¹² Instead, he left both options hanging in the air: either consideration will not be necessary for variation agreements, or the practical benefit test for consideration will suffice.¹³

As I have previously argued, there are good reasons for thinking that the no consideration option will eventually win out over *Williams v Roffey*, if for no other reason than it is an easier argument for plaintiffs to make than having to prove that there was a practical benefit.¹⁴ Indeed, the subsequent treatment of *Antons Trawling* by the New Zealand High Court seems to support this contention. In *Flight Park Tandems Ltd v Club Flying Kiwi Ltd*¹⁵ Fogarty J cited with approval the dicta in *Antons Trawling* that consideration was a valuable signal of the parties' intentions and not an end in itself.¹⁶ In *Blair v Horne*¹⁷ Associate Judge Doogue made nearly identical comments to those of Baragwanath J during a pre-trial decision as to whether a variation of a sale and purchase agreement was binding. His Honour concluded, "As I understand the judgment in *Antons Trawling Co Ltd v Smith*, consideration is no longer of dominating importance when considering whether a binding

9 For a further discussion of the facts of *Antons Trawling* see Brian Coote "Considerations and Variations: A Different Solution" (2004) 120 LQR 19 at 20–21.

10 *Antons Trawling*, above n 4, at [93].

11 At [93].

12 At [92].

13 Coote, above n 2, at 192–193.

14 Marcus Roberts "Teat v Willcocks: Consideration and Variation Contracts Revisited" (2014) 20 NZBLQ 79 at 85–86.

15 *Flight Park Tandems Ltd v Club Flying Kiwi Ltd* (2005) 2 NZCCLR 508 (HC).

16 At [75].

17 *Blair v Horne* HC Auckland CIV-2005-404-4931, 9 March 2006.

contract has been entered into".¹⁸ Baragwanath J himself was in no doubt as to the effect of *Antons Trawling*:¹⁹

The decision in *Antons Trawling Ltd v Smith*, that consideration is not required in the case of the variation of an existing contract where there is no evidence of oppression ...

More recently, in *Goldsmith v Carter*,²⁰ Woolford J echoed Baragwanath J when he said that "consideration is not necessarily essential for the variation to be effective".²¹ In *MacDonald v C1 Gloucester Street Ltd*, Wylie J stated that "a variation which benefits only one party will not, however, fail for want of consideration if it is freely agreed"²² and cited *Antons Trawling*.²³

Thus, when the Court of Appeal next came to discuss consideration and variation contracts in *Teat v Willcocks*, the High Court had for years been ignoring *Williams v Roffey*. However, once again the Court of Appeal did not drop the practical benefit test. Instead, it stated that the "position is not yet settled" and held that a benefit "in practice" was sufficient to support a variation agreement.²⁴ However, the Court then stated that it was "attracted" to the idea that "no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure".²⁵ Perhaps the Court of Appeal felt that it was unable to unambiguously do away with consideration for a particular class of contracts: a change in the law that is best left to Parliament or the Supreme Court.²⁶ Whatever the reason, the Court of Appeal did not settle the position in New Zealand and left both alternatives open.²⁷

18 At [35]–[36].

19 *Ross Bindon Ltd v PB & CS Properties Ltd (in liq)* (2006) 7 NZCPR 850 (HC) at [36].

20 *Goldsmith v Carter* [2012] NZHC 1693 at [31]–[34].

21 At [34].

22 *MacDonald v C1 Gloucester Street Ltd* [2012] NZHC 2842.

23 At [29].

24 *Teat v Willcocks*, above n 5, at [54].

25 At [54].

26 Professor Bigwood put forward such an argument when commenting on the Canadian position: Rick Bigwood "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *Nav Canada v Greater Fredricton Airport Authority Inc*" (2010) 49 CBLJ 256 at 268–269. But see Associate Professor Reiter's view that "[t]here is no reason why the pre-existing duty rule should not be changed by the courts": BJ Reiter "Courts, Consideration, and Common Sense" (1977) 27 UTLJ 439 at 509.

27 Presumably Hammond J's remarks in *Fuel Espresso*, above n 6, have been relegated to the sidelines by *Teat v Willcocks*, above n 5.

Since *Teat v Willcocks* a decision in the High Court has noted the uncertainty of the current law in New Zealand,²⁸ while another has again picked up the "no consideration" alternative offered by the Court of Appeal.²⁹ Generally therefore, the various dicta of the High Court over the last decade have been to support the doing away with consideration as a requirement for variation agreements and not to support the practical benefit test. However, according to the Court of Appeal, the *Williams v Roffey* practical benefit test for consideration is still a possible argument. Therefore, it is necessary to discuss both of the potential alternatives to the pre-existing duty rule.

III WILLIAMS V ROFFEY

A *The Decision*

In *Williams v Roffey* the parties had an existing contract under which Roffey had engaged Williams as a subcontractor to provide carpentry work on a number of flats that Roffey was refurbishing. When it became apparent that the initial contract price was too low and that Williams was in danger of not finishing the work on time, Roffey promised an additional lump sum for each flat that was completed.

The variation agreement was upheld by the Court of Appeal of England and Wales as legally binding despite the pre-existing duty rule and the fact that Williams was not promising to do anything more than that which he was already legally bound to do (finish the carpentry work on time). The Court held that the consideration received by Roffey in return for the additional payments consisted of a number of practical benefits that would arise from Williams completing the original contract on time. These were: Roffey would have Williams continue the carpentry work; Roffey would avoid the trouble and expense of finding a replacement carpenter; Roffey would avoid being penalised for late completion under the head refurbishment contract; and Roffey would have a more formalised scheme for payment.³⁰

In the course of its judgment the Court of Appeal held that it was not doing away with the pre-existing duty rule or *Stilk v Myrick* but that this rule was to be refined and limited.³¹ Thus, what was good consideration for a variation contract was reformulated to include that which provides the

28 *New Zealand Local Authority Protection Disaster Fund v Auckland Council* [2013] NZHC 1858 at [35] per Lang J.

29 *Mulholland v Hansen* [2015] NZHC 895 at [25] per Muir J.

30 *Williams v Roffey*, above n 1, at 11 per Glidewell LJ, 19 per Russell LJ and 23 per Purchas LJ. Roffey's argument that the variation ran afoul of the pre-existing duty rule might have been completely answered if the Court had recognised that the new payment scheme (whereby Williams was now to be paid upon the completion of each flat) was good, additional consideration provided by Williams. This would have meant that the Court would not have had to turn to the practical benefit formulation of consideration.

31 At 16 per Glidewell LJ.

promisor a benefit "in practice" or that which "obviates a disbenefit" even if it was a promise to do nothing additional to what was already legally due.³²

B The Response

Williams v Roffey certainly caught the attention of academics. Professors Carter, Phang and Poole described the case as "driven by a pragmatic approach to consideration" which was designed to achieve a "commercially acceptable solution".³³ Professor Ogilvie noted that the "possibility of ensuring that contracts can be performed substantially as originally promised" makes the practical benefit test "an attractive one".³⁴ However, she went on to conclude that to accept the practical benefit formulation of consideration is to "substantially dilute and distort" traditionally understood consideration and that, despite "its mysterious appeal", it "should play no role in contract law".³⁵

Such criticisms were echoed by many other commentators. Professor Bigwood described the Court of Appeal's approach as "hopelessly misconceived".³⁶ Professor Coote argued that the undertaking by a promisee to do nothing more than that promised in the original contract was offering "nothing" and that "his purported assumption of obligation is in effect a mere tautology".³⁷ In a widely-cited essay published four years after *Williams v Roffey*, Professor Chen-Wishart wrote that the decision distorted, diluted and muddled what was meant by the term "contractual liability".³⁸ Nor has this criticism been confined to academics. The lower courts of England and Wales have at times been grudging in their acceptance of *Williams v Roffey*.³⁹ And, as I have already noted, while the New Zealand Court of Appeal has cited *Williams v Roffey* twice, the High Court has by and large ignored the practical benefit test in preference for dropping consideration as a requirement.⁴⁰

32 At 15–16 per Glidewell LJ.

33 JW Carter, Andrew Phang and Jill Poole "Reactions to *Williams v Roffey*" (1995) 8 JCL 248 at 248.

34 MH Ogilvie "Of What Practical Benefit is Practical Benefit to Consideration?" (2011) 132 UNBLJ 131 at 135.

35 At 135 and 146.

36 Bigwood, above n 26, at 267.

37 Brian Coote "Consideration and the Variation of Contracts" [2003] NZ Law Review 361 at 372.

38 Mindy Chen-Wishart "Consideration: Practical Benefit and the Emperor's New Clothes" in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, Oxford, 1995).

39 In *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676, [2005] 1 Lloyd's Rep 128 (Comm) at [108], Colman J stated that he would not have followed *Williams v Roffey* if it had not been a decision of the Court of Appeal and thus binding upon him. See also *Adam Opel GmbH v Mitras Automotive (UK) Ltd (Costs)* [2007] EWHC 3481 (QB).

40 However, the case appears to have largely received favourable treatment in Australia. See Mark Giancaspro "The Rules for Contractual Renegotiation: A Call for Change" (2014) 37 UWAL Rev 1 at 17–18.

C *The Criticisms*

There are several reasons why *Williams v Roffey* has been criticised by academics and by the courts. First, the practical benefits identified in *Williams v Roffey* came too late to be consideration for the variation contract. At the time that the variation contract was concluded all that the parties had exchanged were promises. Roffey had promised to pay more in return for Williams' promise to perform the original contract. The practical benefits identified by the Court of Appeal were dependant on Williams' *performance* of the variation contract, but as such, this was too late to be consideration for the *formation* of that same contract.⁴¹

The second flaw in *Williams v Roffey* is that it reconceptualised consideration as the hoped-for benefits or motives of the promisor. The practical benefits listed in *Williams v Roffey* were not promised by Williams; instead they were the consequences that Roffey hoped would accrue if Williams' obligations were fulfilled. The result of this is, as Chen-Wishart noted, that it is therefore unclear what the promisor's remedy is. The hoped-for benefits have not been promised by the promisee and therefore if they do not arrive the promisor can have no remedy if the promisee has performed his pre-existing obligations. Alternatively, if the promisee does not perform his pre-existing obligations, then the promisor is in no better position for having bought the promise to perform twice. In fact, it might be in a worse position as the courts may reduce its expectation losses by the amount that it promised to pay for them *twice*: in the originating contract and in the variation contract.⁴²

The third critique of the practical benefit principle is that it is so ill-defined and elastic that it is able to be found in all contractual variations. If merely being able to avoid having to find another carpenter is a practical benefit, then this suggests that there will be little trouble in finding a practical benefit in every case.⁴³ As Coote noted it is virtually impossible to imagine a situation in which a rational promisor would agree to pay more money and not receive a practical benefit in return.⁴⁴ In effect, the Court of Appeal's refinement of *Stilk v Myrick* was to effectively refine it out of existence.⁴⁵

41 Brian Coote "Consideration and Benefit in Fact and in Law" (1990) 3 JCL 23 at 26–27; and Coote, above n 2, at 187–188. In any event, several of the practical benefits found by the Court of Appeal in *Williams v Roffey* did not eventuate. The promise was made by Roffey to finish the job but performance, which would furnish the practical benefits, was never completed.

42 Chen-Wishart, above n 38, at 132–133.

43 See Ogilvie, above n 34, at 134; and Pey-Woan Lee "Contract Modifications – Reflections on Two Commonwealth Cases" (2012) 12 OJLJ 189 at 195.

44 Coote "Consideration and Benefit in Fact and in Law", above n 41, at 25–26. See also the comments of the Singapore Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 at [30].

45 Lee, above n 43, at 195–196.

D Unilateral Contract/Increased Chance of Performance Analysis

There are two analyses of *Williams v Roffey* that have been put forward to try to save the decision and to escape the criticisms of it listed above. The first is to reconceptualise the variation agreement as a unilateral contract. This was recently proposed by Chen-Wishart, despite her earlier extensive critiques of *Williams v Roffey*.⁴⁶ In 2014 she argued that the pre-existing duty rule fails to take into account that we believe that "a bird in the hand is worth two in the bush".⁴⁷ Furthermore she argued that our legal right to performance will not often be translated into actual performance or the monetary equivalent. Therefore, the courts should defer to the parties' wishes by enforcing a unilateral contract under which the promisor promises to pay more in return for the promisee's actual performance of the original contract. This unilateral contract would only come into effect once the promisee has actually tendered performance. If the promisee fails to do so then the original contract remains in force.⁴⁸

The major attraction of this analysis is that it answers many of the objections to *Williams v Roffey*. The consideration provided by the promisee is the performance of the original obligation and not merely the repromising of that same original obligation. By focussing on the provision of actual performance the difficulty of distinguishing between a hoped-for practical benefit and the promisor's subjective motive in offering to pay more is avoided. The consideration also does not come too late: the unilateral contract is not completed until the consideration is provided in the form of performance. Finally, such analysis would also be more in line with the remedy awarded in *Williams v Roffey* which, as Chen-Wishart shows, was not the expected total amount promised by Roffey, but only an amount representing the work actually completed prior to the breakdown of the relationship.⁴⁹

However, despite being an improvement on the original practical benefit test, the unilateral contract analysis' greatest strength is its fatal flaw. In separating a contractual promise to perform and the actual performance of that promise this analysis undermines the entire idea of contract law as creating binding obligations. The starting point for damages in New Zealand and elsewhere has consistently been said to be Parke B's dicta in *Robinson v Harman*⁵⁰ that the object of contract law damages is to put the plaintiff "so far as money can do it ... in the same situation ... as if the contract had been performed".⁵¹ Thus, the stated aim of the law is for the performance interest to be

46 Chen-Wishart, above n 38.

47 Mindy Chen-Wishart "Consideration for Variation of Contracts" [2014] NZLJ 67 at 68.

48 At 69.

49 At 69.

50 *Robinson v Harman* (1848) 1 Ex 850.

51 At 855. See J Beatson *Anson's Law of Contract* (29th ed, Oxford University Press, Oxford, 2010) at 539; Edwin Peel *Trietel: The Law of Contract* (13th ed, Sweet & Maxwell, London, 2011) at [20-022]; John

protected as far as possible. It is the performance of the contractual promise that sets the standard of recovery. Even if that standard is not actually reached, the reason the promisor receives any remedy at all is that the right to which he or she was owed, performance of the contract, was not fulfilled. Thus the performance of the contract is merely the provision of something that the promisor already had a right to. As Professor Coote noted, under the proposed unilateral contract analysis, the "promisor receives no more than what is already his by right and the supposed unilateral contract is empty of content".⁵²

If performance of the promise is treated as distinct from a contractual promise to perform, in what state does that leave the concept of contract as creating binding obligations? After all, is it not the point of a contractually binding promise to give the promisee the assurance of performance in the future? If a promise to perform is not as valuable as performance, then of what value is it? Chen-Wishart herself acknowledged these difficulties back in 1995, when she wrote that:⁵³

The practical benefit consists only of the promisor's hope that he or she will be put in as good a position as if the *original contract had been performed*. ... Such a break [between a contract and its performance] makes a contract no more than a point for further negotiation ... Acceptance that an increased chance of performance of a contract is consideration for its variation reflects a disrespect for the very idea of contract as creating binding obligations.

Similarly, accepting that the performance of a promise may provide consideration distinct from that promise undermines the entire concept of a contractual promise as an enforceable legal obligation.⁵⁴ Thus, although the unilateral contract analysis may be able to salvage something from *Williams v Roffey*, it is only at the cost of weakening the idea of a binding contractual promise.

The same critique holds good for a second argument put forward to save the practical benefit principle: that the repromise to perform the original contract benefits the promisor in that it increases the chance that the original promise will indeed be performed.⁵⁵ That is, by promising to pay more and by alleviating Williams' financial difficulties, Roffey objectively gained a greater chance that Williams would perform the original contract. Thus, the argument runs, just as the purchasing of a lottery ticket is the purchase of an increase in the chance of winning a prize which is legally

Burrows, Jeremy Finn and Stephen Todd *Burrows, Finn and Todd: Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 823; *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 419 per Cooke J; *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 49 per McKay J; *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344 (HL) at 353 (per Lord Bridge of Harwich); and *Marlborough District Council v Altmarloch* [2012] NZSC 11, [2012] 2 NZLR 726 at [157] per Tipping J.

52 Coote, above n 37, at 372.

53 Chen-Wishart, above n 38, at 128.

54 See Coote "Consideration and Benefit in Fact and in Law", above n 41, at 28.

55 This argument was put forward in Lee, above n 43, at 197–198.

enforceable, the purchase of a repromise is the purchase of an increase in the chance that that promise will actually be performed.⁵⁶

The problem with this analogy is that Roffey was already entitled to the "prize": Williams' performance of the original contract. When I purchase a lotto ticket I go into the shop with no right to the prize at all. When Roffey entered into the variation agreement, it already had every right to demand the performance of Williams' contractual obligation. Under this increased chance of performance analysis, the baseline against which Williams' "additional consideration" is measured shifts from what Roffey was already owed (actual performance) to what Roffey would get if the original contract was breached (no performance).⁵⁷ This is analogous to me going into the lotto shop with my winning ticket and being required to pay for that ticket again before I am able to collect my prize.⁵⁸ Thus, the increased chance of performance analysis is only valid if performance is irrevocably detached from the promise to perform. Once again, what damage will that do to our conception of contractual obligations? What will contractual obligations actually be worth? In short, these two attempts at saving *Williams v Roffey* threaten to seriously undermine contract law as a whole.

IV NO CONSIDERATION REQUIREMENT

A The Rationale for Doing Away with Consideration

In light of the above discussion, it is perhaps not surprising that, as was noted earlier, a number of New Zealand High Court judges have ignored *Williams v Roffey* and have lent their support to the doing away with the requirement for consideration for variation agreements. This approach is not unique to New Zealand. In *Nav Canada v Greater Fredericton Airport Authority Inc*⁵⁹ the New Brunswick Court of Appeal held that consideration was not needed for variation contracts and that greater emphasis should be placed on the presence or absence of economic duress.⁶⁰ One recent decision in the Ontario Superior Court of Justice cited *Nav Canada* to defeat an argument that a contract variation was not supported by consideration.⁶¹ There has also been much academic sup-

⁵⁶ At 197–198.

⁵⁷ Chen-Wishart demonstrated the flaws in this argument in "Consideration: Practical Benefit and the Emperor's New Clothes", above n 38, at 127–128.

⁵⁸ See Coote, above n 37, at 372.

⁵⁹ *Nav Canada v Greater Fredericton Airport Authority Inc* 2008 NBCA 28, (2008) 329 NBR (2d) 328.

⁶⁰ At [31].

⁶¹ *Jonathan's Aluminum & Steel Supply Inc v Retail Alloy Metal & Plastic Plus Ltd* 2015 ONSC 6485 at [72] and [75]. However, it should be noted that support for *Nav Canada* has not been unanimous. The majority of the Alberta Court of Appeal in *Globex Foreign Exchange Corp v Kelcher* 2011 ABCA 240, (2011) 48 Alta LR (5th) 215 did not cite *Nav Canada* and held that variation agreements required additional consideration (at [91]). *Nav Canada* was clearly before the Court since Slatter JA in the minority cited it (at [134]–[136]).

port for a number of years for the idea that you should not need to show consideration to support a binding variation agreement.⁶²

The major reason for the eagerness to do away with the requirement for consideration in variation contracts is that to do so would be more in keeping with the parties' intentions. This certainly seems to be behind the reasoning of the courts in New Zealand and Canada pushing for such a move. For example, the New Zealand Court of Appeal in *Antons Trawling* appealed to Professor Reiter's argument that in an ongoing, arms-length, commercial transaction there should be "a strong presumption" that the promisor has "good commercial 'considerations'" for "any seemingly detrimental modification".⁶³ It concluded that to hold the variation not to be binding would be contrary to what the parties would reasonably have expected and that the law should give effect to "freely accepted reciprocal undertakings".⁶⁴ (One might object that the very point of contention was that there was no *reciprocal* undertaking.) Most tellingly, it stated that "consideration is as a valuable signal that the parties intend to be bound to their agreement, rather than an end in itself".⁶⁵ In *Teat v Willcocks*, the same Court was attracted to the view that consideration would not be necessary when the parties had freely agreed to the variation.⁶⁶ In *Nav Canada* Robertson JA stated that consideration should not be needed in modification contracts because the law must protect the parties' "legitimate expectations" that the modification will be legally enforceable.⁶⁷ (Again, it could be stated that his Honour was begging the question – the very issue at play was whether or not such expectations were legitimate. If you hold to the view that all contracts require consideration to be binding then the parties' expectations that the modifications were legally enforceable were incorrect and not legitimate.)

Similar arguments also arise frequently in the academic commentary. Professor Halson viewed the pre-existing duty rule as frustrating "the reasonable expectations of businessmen who have agreed on a modification".⁶⁸ Mark Giancaspro also saw the pre-existing duty rule as standing in the way of the intention of the parties. The law of contract should facilitate "exchange [rather] than

62 For example FMB Reynolds and GH Trietel "Consideration for the Modification of Contracts" (1965) 7 *Malaya Law Review* 1; Reiter, above n 26; Roger Halson "The Modification of Contractual Obligations" (1991) 44 *CLP* 111; Tan Cheng Han "Contract Modification, Consideration and Moral Hazard" (2005) 17 *S Ac LJ* 566; Coote, above n 2; and Giancaspro, above n 40.

63 *Antons Trawling*, above n 4, at [92] citing Reiter, above n 26, at 507.

64 *Antons Trawling*, above n 4, at [93].

65 At [93].

66 *Teat v Willcocks*, above n 5, at [54].

67 *Nav Canada*, above n 59, at [28]. See also Ogilvie, above n 34, at 138.

68 Halson, above n 62, at 113.

overregulating and even inhibiting it".⁶⁹ Professor Coote in his writings saw *Antons Trawling* as a simpler and more elegant solution than *Williams v Roffey* and viewed it as less of a danger to the traditional doctrine of consideration than the practical benefit doctrine.⁷⁰

B The Problems with this Rationale

The major issue with the appeal to the parties' intentions is that there does not seem to be any reason to limit it solely to variation agreements. As we have already seen, traditionally variation contracts have been treated as the same as any other type of originating contract. Therefore some logically coherent reason must be given to limit the abolition of consideration to just variation agreements. If consideration is seen merely as a "signal" that the parties intend to be bound, and is unnecessary when that intention can be shown by another manner, then is that not true for all contracts?⁷¹ Although Baragwanath J stated that the parties' intention to be bound was "already made ... clear" by entering into legal relations that should be read as an example and not as the only way that intention could be proven.⁷² Intention to be bound might be easier to demonstrate in a variation case, but the arguments for reducing consideration to an indication of intention will be just as valid for all contracts.⁷³ Professor Coote thought that one could accept that consideration was not needed for variation contracts but was "of course" still needed for other contracts, but the trick lies in the "of course".⁷⁴ One answer to this objection is that variation contracts are not the same as originating contracts and that therefore there is some logically coherent way to hold that consideration is not needed for variation contracts only. Associate Professor Lee noted that the two can be seen as "distinct phenomena".⁷⁵ She cited Karl Llewellyn's observation that:⁷⁶

Law and logic go astray whenever [additional or modifying business promises] are regarded as truly comparable to new agreements. They are not. No business man regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management.

69 Giancaspro, above n 40, at 26. This again assumes that a variation contract without consideration *is* an exchange.

70 Coote, above n 37, at 376–379; Coote, above n 2, at 197; and Coote, above n 9, at 20–23.

71 See Chen-Wishart, above n 47; Craig Ulyatt "The Demise of Consideration for Contract Variations" (2003) 9 Auckland U L Rev 1386; and Karen Scott "From Sailors to Fishermen: Contractual Variation and the Abolition of the Pre-Existing Duty Rule in New Zealand" (2005) 11 *Canta LR* 201 at 216.

72 *Antons Trawling*, above n 4, at [93].

73 Compare Scott, above n 71, at 210.

74 Coote, above n 2, at 185.

75 Lee, above n 43, at 199.

76 Karl Llewellyn "What Price Contract? – An Essay in Perspective" (1931) 40 *Yale LJ* 704 at 742 as cited in Lee, above n 43, at 199–200.

Again this argument seems to be predicated on the parties' views and intentions above all else. Because the parties see their adjustments as different from the originating agreements and binding, therefore the law should see them as binding and ignore the absence of consideration. This assumes that consideration is only an indication of intention. But again this argument does not provide a reason to treat variation agreements differently from originating agreements.

Professor Reiter took a slightly different view of consideration to support its removal as a requirement of variation contracts. He cited Professor Fuller's model for determining whether a promise should be legally enforceable. This model includes three "substantive bases of liability" (the "principle of private autonomy", reliance and unjust enrichment) and three functions performed by legal formalities ("evidentiary", "cautionary" and "channelling").⁷⁷ By focussing on these underlying reasons for enforcing a promise, Reiter concluded that "modification promises thus tend distinctly towards 'enforceable' whether made for new consideration or not".⁷⁸ Without needing to discuss the merits of Fuller's model, the problem is that it again proves too much. It is, with respect, an argument to do away with consideration for all contracts and instead to focus on the unstated, "real" reasons for legally enforcing a promise. If the model is what we should be concentrating on, and consideration is merely a mask for those real reasons for enforcing a promise, then that holds true for all contracts. Although the existence of a promise made within the context of an ongoing business relationship might more easily satisfy Fuller's model,⁷⁹ there is again no reason to limit the model to variation contracts only.

Thus, we can see that the arguments advanced to justify doing away with the requirement for consideration for variation contracts are problematic in that they go too far: they are arguments to get rid of consideration *tout court* and not just for variation contracts. Now, there is no doubt that there are many commentators who would probably see the abolishment of consideration for all contracts as a desirable outcome.⁸⁰ But any debate as to the requirement of consideration should be held in the open and for all contracts. It should not be advanced piecemeal by the Court of Appeal for certain types of contracts and without thought as to the consequences or wisdom of doing so. Thus, the Court of Appeal asserted in *Antons Trawling* that consideration's only purpose is to provide evi-

77 Reiter, above n 26, at 454. See Lon L Fuller "Consideration and Form" (1941) 41 Colum L Rev 799.

78 At 458.

79 At 458. Although see Professor Halyk's arguments to the contrary in "Consideration, Practical Benefit and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*" (1991) 55 Sask L Rev 393 at 401–403.

80 For example Lord Wright "Ought the Doctrine of Consideration to be Abolished from the Common Law" (1936) 49 Harv L Rev 1225; Law Revision Committee *Sixth Interim Report: Statute of Frauds and the Doctrine of Consideration* (HMSO, London, 1937); AG Chloros "The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis" (1968) 17 ICLQ 137; and Martin Hogg *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press, Cambridge, 2011) at 274–280 and 460–462.

dence of intention. In doing so, it ignored the argument that consideration has been seen as a substantive requirement in itself, at least since the late 18th century.⁸¹ Consideration not only shows that the parties are serious about their legal obligations but it also distinguishes between bargains the law will enforce and gratuitous promises which it will not.⁸² Whether the law should give effect to bargains only and whether there are normative and practical reasons for getting rid of consideration is an argument to be had another day. But it is an argument that the New Zealand courts have not yet engaged with in their haste to condemn consideration as unnecessary for variation contracts.

C *Whither Foakes v Beer?*

The final difficulty with the no consideration approach is that it adds to the uncertainty that surrounds the ongoing relevance of the House of Lords decision of *Foakes v Beer*.⁸³ This article has so far concentrated on cases where the variation in question has consisted of the promisor promising more (usually money) in exchange for the promisee's original obligation. But there is another form of variation contract: when the promisor promises to accept less from the promisee in return for the same performance by the promisor. In *Foakes v Beer* the House of Lords held that a promise to accept part of the sum owing was not binding since the promisee had not provided consideration in return. This was despite the fact that accepting part payment might be of more benefit to the promisor than insisting on his or her strict legal rights. In the aftermath of *Williams v Roffey* there was a tension between the practical benefit test and *Foakes v Beer*. The Court of Appeal of England and Wales in *Re Selectmove* resolved this tension by refusing to extend the practical benefit doctrine to situations of part-payment as to do so would be to disregard the precedent of *Foakes v Beer*.⁸⁴ This might have been in keeping with precedent, but it is hard to justify logically. How is it that the performance of an existing obligation in return for more money can provide practical benefits which constitute good consideration, but the payment of less money than is owed is not also a practical benefit which can be counted as good consideration?⁸⁵

In New Zealand the attempt to resolve the tension has meant that *Foakes v Beer* and *Re Selectmove* has been confined to one-off payments. In *Machirus Properties Ltd*⁸⁶ the New Zealand High

81 *Rann v Hughes* (1778) 4 Brown 27, 2 ER 18 overturning Lord Mansfield's views to the contrary in *Pillans v Van Mierop* (1756) 3 Burr 1663, 97 ER 1035.

82 See for example Burrows, Finn and Todd, above n 51, at 108–109; Peel, above n 51, at [3-001]; HG Beale (ed) *Chitty on Contract* (31st ed, Sweet & Maxwell, London, 2012) at [3-001]–[3-002]; and KO Shatwell "The Doctrine of Consideration in the Modern Law" (1954) 1 Syd LR 289.

83 *Foakes v Beer* (1884) 9 App Cas 605 (HL).

84 *Re Selectmove Ltd* [1995] 1 WLR 474 (CA).

85 See Carter, above n 33, at 266; Elizabeth Cooke "Working together? Contract, estoppel and the business relationship" (2002) 1 Journal of Obligations and Remedies 5 at 16; and MH Ogilvie "Part Payment, Promissory Estoppel and Lord Denning's 'Brilliant' Balance" (2010) 49 CBLJ 287 at 291.

86 *Machirus Properties Ltd v Power Sports World (1987) Ltd* (1999) 4 NZ ConvC 193,066 (HC).

Court distinguished *Re Selectmove* on the facts. This was done by holding that *Re Selectmove* did not apply to cases which involved an ongoing relationship (such as a long term tenancy) and was instead limited to cases of one-off payments (such as a payment of debt by a taxpayer to Inland Revenue).⁸⁷ Irrespective of the strength of this distinction,⁸⁸ the water is further muddied if no consideration is required for a variation agreement. According to the leading New Zealand contract law text the position of *Machirus* in New Zealand law is unchanged by *Antons Trawling*. Thus, if this view is correct, we do not require consideration for cases in which the variation is to pay more in return for the promisee's original obligation. For all part-payment of debt cases that are "one-off" then *Foakes v Beer* as read through *Re Selectmove* is binding. Finally, for all part-payment cases in which there is a practical benefit arising from an ongoing relationship then *Williams v Roffey* and *Machirus* apply.⁸⁹

This does not seem to be a clear, coherent or logical state in which to leave this area of contract law. Indeed, I do not think that the removal of consideration as a requirement for variation contracts can be limited to agreements to pay more. Although not expressly addressed, there is nothing in the Court of Appeal's reasoning in *Antons Trawling* or *Teat v Willcocks* to suggest that promises to accept less from the other party were not affected. After all, if consideration is only an indication of intention and not a requirement in itself then that also applies to promises to accept less.⁹⁰ If the Court is satisfied that the parties intended that their part-payment arrangement be binding, then that agreement would fit within the parameters of *Antons Trawling* and would be binding.⁹¹

V WHAT ABOUT ESTOPPEL?

We have seen that both options put forward in *Antons Trawling* to replace the pre-existing duty rule are problematic. But there is another tool available for the New Zealand courts (and plaintiffs) in variation cases: promissory estoppel. Estoppel is sufficiently developed in New Zealand to be used in such cases and does not have the drawbacks that departures from the pre-existing duty rule have.⁹² Furthermore, estoppel may address the concern that the Court of Appeal had in *Antons*

87 At 193,076.

88 It can be attacked on the grounds that the Court of Appeal of England and Wales in *Re Selectmove* stated that a creditor who agrees to part-payment of a one-off amount would "no doubt always see a practical benefit to himself in doing so": *Re Selectmove*, above n 84, at 481 per Peter Gibson LJ.

89 See Burrows, Finn and Todd, above n 51, at 139. See also the dicta of Brown J in favour of *Machirus* in *Roke Realty Ltd v Malones Ltd* [2013] NZHC 2520 at [86].

90 Scott, above n 71, at 217.

91 Especially when one reads Lord Blackburn's speech in *Foakes v Beer* when his concern about the parties' intention to be bound nearly led him to deliver a minority judgment: *Foakes v Beer*, above n 83, at 622–623. But see for a contrary view Burrows, Finn and Todd, above n 51, at 139.

92 I am not the first to make this argument: see Halyk, above n 79; and Bigwood, above n 26, at 266.

Trawling that the promisor should not be able to go back on its promise when the promisee has acted upon that promise.⁹³ The Court's concern with the promisee's reliance would best be addressed not by doing away with the requirement for consideration in variation contracts, but by applying promissory estoppel.

The recent Court of Appeal decision of *Hansard v Hansard*⁹⁴ held that an estoppel claim will be successful upon the proving of four "well established" elements:⁹⁵

- (a) The party against whom the estoppel is alleged has acted in a manner that has caused the claimant to have a certain belief or expectation.
- (b) The claimant has reasonably relied upon that belief or expectation.
- (c) The claimant will suffer detriment if the belief or expectation is departed from.
- (d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

Further, there is no longer any requirement in New Zealand that an estoppel claim can only be brought by a defendant using it as a "shield".⁹⁶ The remedies available to the court are discretionary and flexible, and can include the holding of the promisor to his or her promise, as was the remedy awarded in the recent Court of Appeal decision of *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*.⁹⁷

These requirements mean that not all promises to vary a contract will found an estoppel claim. The promisee will need to show that he or she acted in reliance on the promise and that he or she will be in a worse position if the promise is resiled from than if the promise had never been made.⁹⁸ Thus, it is not enough to show that the detriment that will be suffered is merely the restoration of the original contractual obligations. The promisee would then be in the same position as if the promise had not been made. Instead, the promisee needs to show that the variation promise led him or her to

93 *Antons Trawling*, above n 4, at [93].

94 *Hansard v Hansard* [2014] NZCA 433, [2015] 2 NZLR 158.

95 At [63].

96 *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86. The continuing limitation of estoppel as a shield in Canada was the reason that Robertson JA did not think it was an alternative to doing away with the requirement of consideration. See *Nav Canada*, above n 59, at [29].

97 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567. See Marcus Roberts "Equitable Estoppel in New Zealand: *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*" (2016) 27 KLJ (forthcoming).

98 Luke Pearce "*Foakes v Beer* and Promissory Estoppel: A Step Too Far" (2008) 19 KLJ 630 at 633–634.

take a different course of action than if the promise had never been made and that due to that course of action, he or she will be worse off than before if the promise is not fulfilled.⁹⁹

This is the reason why the decision in *Collier v P & MJ Wright (Holdings) Ltd*¹⁰⁰ is so problematic. There, the estoppel was based upon an alleged compromise agreement under which the creditor agreed to accept one-third of the debt in return for not pursuing the debtor for the balance. Despite there being little evidence of detriment arising from the debtor relying on the promise, the Court of Appeal in England and Wales held that there was a triable issue arising from the estoppel argument. Arden LJ held that where a debtor makes part-payment of a debt in reliance on a promise by the creditor not to enforce the debt in full, then it will be unconscionable for the creditor to resile from the promise.¹⁰¹ The detrimental reliance element of estoppel is fulfilled merely by the debtor fulfilling part of the original obligation. But this "detriment" is no more than the debtor would have suffered if the promise had not been made. There was nothing to show that the debtor was in a worse position due to the creditor's promise. If the debtor is no worse off due to the promise being made and then resiled from, then there is nothing unconscionable in the creditor doing so and therefore no reason for equity to intervene.¹⁰²

But is this extra detriment, above and beyond the pre-existing contractual obligation merely the opposite of the *Williams v Roffey* practical benefit test for consideration? If a practical benefit cannot be good consideration, should a practical detriment support an estoppel?¹⁰³ I would submit that the answer is yes. According to the New Zealand Court of Appeal the conceptual unity of all the doctrines of estoppel is the "element of unconscionability".¹⁰⁴ The presence of detriment if the promise is not fulfilled impacts upon the promisor's conscience such that equity should intervene. Whether or not there is consideration in such a promise to support a variation contract is a completely different matter. The reasons why practical benefits should not be held to be good consideration have been outlined above. If there is no consideration, then the law will not find a contract, irrespective of the unconscionability of either party's conduct. However, equity, via estoppel, is intimately concerned with the promisor's conscience and should intervene if there is a practical detriment to the promisee. Whether a court would accept that a promisee can suffer detriment by performing a con-

99 David Capper "The Extinctive Effect of Promissory Estoppel" (2008) 37 *Common Law World Review* 105 at 113–114.

100 *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329.

101 At [42].

102 See Pearce, above n 98; and Capper, above n 99. Thankfully the Court of Appeal of England and Wales appears to have recently retreated from *Collier*, see *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553.

103 See for this argument Donal Nolan "The Classical Legacy and Modern English Contract Law" (1996) 59 *MLR* 603 at 609.

104 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA) at 549.

tractual obligation or that a promisee would be better off by not performing its contractual obligation is the key question. Can it be said that the promisor's conscience is impacted when the promisee argues that "if it were not for your promise, I would have broken our original contract and I would be in a better position"?

For this reason, it must be emphasised that estoppel will not be a panacea for all promisees in variation cases due to this requirement to show detriment. I am not sure that estoppel could have been successfully argued in *Antons Trawling* – what was the alternative course of action open to the master of the ship had the promise of a percentage of the quota not been made? He would have had to satisfy the Court that he would have refused to undertake the exploratory fishing expedition, and that he would have been better off doing so and facing the consequences of being in breach of his employment agreement. Similarly in *Williams v Roffey*, Williams would have to show that he was worse off than he would have been had the promise not been made. Thus, he would have had to satisfy the Court that it would have been better for him to stop work and take his chances of being sued by Roffey than it would be to continue working for the original price. Perhaps Williams could have done so by showing that there was lucrative alternative employment that he could have undertaken instead of the original contract but that he chose not to do so due to the promise of more money by Roffey. At best we can say that estoppel is a tool that may be successfully used by promisees in variation cases. Promisees' readiness to utilise it will perhaps be greater if the courts take the criticisms of the two alternatives to the pre-existing duty rule on board and reaffirm the traditional view that additional consideration is required to support a variation contract.

VI CONCLUSION

If contract law is to continue to enforce bargain agreements then the traditional pre-existing duty rule should be kept. If instead contract law is to enforce seriously intended promises then let us have that debate about the place of consideration as a doctrine for all agreements rather than undermining its place for certain categories of contracts. Until that debate is held, the pre-existing duty rule should be returned to and estoppel should be used by promisees to variation cases. Equitable estoppel is a muscular doctrine in New Zealand and may be used to protect promisees in situations where promisors have promised to vary an existing contractual obligation. Estoppel will not enable all promisees to enforce all variation agreements, but its partial protection is better than the more complete protection afforded by mangling the doctrine of consideration through *Williams v Roffey* or by doing away with consideration completely.