

The Rules for Contractual Renegotiation: A Call for Change

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Whether it be through the fault of the parties or as a consequence of external influences, those party to a contract often need to modify it to counteract the effects of any adverse variables threatening the agreement. More commonly the change affects only one of the parties directly, who then seeks a compromise which ultimately prompts the other party to provide additional assistance to keep the contract on foot. This article examines the obstacles that stand in the way of contractual modifications and attempts to identify the rules which govern renegotiation. Whilst numerous expedients allay the effect of these obstacles, it will be shown that these are often unknown to the parties or overly cumbersome to utilise. The article also recommends solutions to make this process more commensurate with the needs of modern business.

INTRODUCTION

It is not wise to violate the rules until you know how to observe them

T. S. Eliot

Contracts rule the world. They pervade every aspect of human relations and underpin every economic system. They give legal force to mere promises which, putting aside the application of such doctrines as waiver and estoppel, would otherwise be unenforceable under the Anglo-Australian law of contract for want of consideration.¹ Since the 1800s courts and academics have strained to reduce the essential elements of a contract to a discernible structure and today it can be said with some measure of confidence that the ingredients are settled. If you follow the recipe, you can make a contract. With the development of increasingly complex methods of doing business and our exponentially growing reliance upon technology, however, contracts have increased in intricacy and lifespan and their vulnerability to changes in economic, social or other conditions has consequently

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1 '[A mere promise] without any consideration at all, is nudum pactum: but the least spark of consideration will be sufficient': *Pillans v Van Mierop* (1765) 3 Burr. 1663, 1666; 97 ER 1035, 1036 (Wilmot J). See also *Eastwood v Kenyon* (1840) 11 Ad. & E. 438; 113 ER 482; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 498-9 (Windeyer J). Other doctrines would also affect the enforceability of promises i.e. intention to create legal relations. These will be explored later in this article.

been amplified.²

Generally speaking there are two classes of variable that can affect a party's ability to perform their obligations: *internal* factors (eg. a party's behaviour or poor time or finance management) and *external* factors (eg. market movements increasing costs, natural disasters affecting supplies etc.). When any one or more of these conditions afflicts the contractual relationship the need for renegotiation may present itself. Sometimes both parties will be affected by the change in circumstance but more often such variables 'tend to operate unevenly between the parties, and result in a loss to one party, rather than a loss to both'.³ Consequently, the need for change seldom affects both parties simultaneously such that most modifications are required to assist only *one* of the parties. That only one of the parties is prompted to do something more than their counterpart gives rise to a number of further issues. This article therefore places greater weight of analysis upon the rules governing *unilateral* contractual modifications, although bilateral modifications will also be considered.⁴

The question therefore remains to be answered: what are the rules for renegotiation? What rubrics do parties follow in order to effect a valid modification to their contract? From Carter's perspective many years ago, the 'classical' law of contract lacks a doctrine of renegotiation and so there are no rules to speak of.⁵ Unsurprisingly then, the same author notes in his most recent textbook, 'it is unusual to devote any section of a contract text to the topic'.⁶ Some assistance can, however, be drawn from the small amount of case law directly addressing the point. This authority will be discussed in due course. Moreover there are a number of known obstacles to achieving unilateral contract modifications as well as formalities which can escape their reach. These will be critically examined before an affirmative statement of statutory or common law principle is recommended to provide contractual parties with clear guidance on how to change their agreements whilst providing them with the flexibility that modern business demands.

2 Burton F Brody, 'Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation' (1975) 52(2) *Denver Law Journal* 433, 434-5. See also Kevin M Teeven, 'Development of Reform of the Preexisting Duty Rule and its Persistent Survival' (1996) 47(2) *Alabama Law Review* 387, 419-20.

3 John Carter, 'The Renegotiation of Contracts' (1998) 13(3) *Journal of Contract Law* 185, 186.

4 The term 'unilateral modification' will be used to describe one-sided modifications where one party promises additional consideration and the other merely promises to perform or maintains their existing contractual obligation(s). Conversely, 'bilateral modification' refers to a modification which affects both parties' obligations.

5 Carter, above n 3, 185. This article was published the same year Google Inc. was founded. Sadly not even their famous search engine could answer the question.

6 John W Carter, *Carter's Guide to Australian Contract Law* (LexisNexis Butterworths, 2nd ed, 2011) 64.

MAKING CONTRACT MODIFICATIONS

Scenario 1

Occasionally both parties to a contract will want (or need) to change it. This desire will often be prompted by some event which threatens to adversely affect the agreement on its original terms. For example, Darth Vader might contract with Luke Skywalker, now a resident of Sydney, to ship a cargo of lightsabres to him on May 4 in return for a flat fee.⁷ Just weeks before consignment it emerges that Skywalker has run out of room in his storage warehouse, C-3PO calculating that he will not have sufficient room for the stock until May 10. Vader discovers he may also be unable to carry through with delivery on May 4 due to expected staff shortages that week. Both parties require the delivery date to be pushed back at least a week to guarantee fulfilment of the agreement and mutually consent to the variation.

Scenario 2

Now consider a variant of the previous scenario: delivery on May 4 is earmarked as essential by both parties (notwithstanding their staff/space shortages). The delivery fee charged by Darth Vader is fixed at \$10,000. The week before delivery is due Vader informs Skywalker that fuel costs have risen dramatically due to a spike in the market price of crude oil. He indicates that, unless an additional \$5,000 is paid to cover the fuel, he will be unable to make delivery by May 4. Luke ponders his options but fearing inability to fulfil retail orders for the lightsabres and losing thousands of dollars, and to avoid having to find a substitute freight company and commence legal proceedings against Vader, he agrees to pay the additional \$5,000. Vader accordingly assures he will honour his existing contractual obligation.

Categorising the Scenarios

To summarise we have two scenarios at play here:

1. A *bilateral* modification (where the contractual obligations of both Vader and Skywalker have been affected); and
2. A *unilateral* modification (where only Vader's contractual obligations have been affected with Skywalker's remaining the same).

How do the parties in each of these scenarios achieve a legally valid modification? What rules apply? The answer depends upon *how* a modification is perceived and requires a consideration of both the elements of a contract and the scarce case law pertaining to renegotiation.

⁷ See *Pasqualotto v Pasqualotto* [2011] VSC 550 for an idea of the potential perils involved in going into business with your parents.

STATUS OF THE MODIFIED CONTRACT

The leading judicial statement as to the status of a modified contract under Australian law is found in *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd*.⁸ There a majority of the High Court stated:

When the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two contracts. For one reason or another, it may be material to determine whether the effect of the second contract is to bring an end to the first contract and replace it with the second, or whether the effect is to leave the first contract standing, subject to the alteration. For example, something may turn upon the place, or the time, or the form, of the contract, and it may therefore be necessary to decide whether the original contract subsists.⁹

The starting position is therefore indisputable: two contracts are made when the one is varied.¹⁰ You have the original version and the modified version, the secondary question being whether the latter merely alters, or rescinds and substitutes for, the original. This second question must be answered by reference to a body of authority of far older pedigree.

In *Morris v Baron & Co*¹¹ the House of Lords had to decide whether a contract for the sale of goods of a certain value, evidenced in writing per the requirements of s 4 of the *Sale of Goods Act 1893* (UK), could be verbally varied and/or rescinded. This statute used similar language to the *Statute of Frauds 1677* (UK), which in general terms required contracts for the sale of goods over £10 (and modifications thereto) to be in writing. Viscount Haldane held that whilst a parol variation of an original written contract cannot be enforced, a parol rescission of such a contract *can*.¹² The other members of the Court agreed and added that whether a parol variation or rescission had been attempted was a question of the intention of the parties.¹³ The same court reiterated this view five years later in *British and Benningtons Ltd v North Western Cachar Tea Co Ltd*.¹⁴

8 (2000) 201 CLR 520 ('Sara Lee').

9 Ibid 533 (Gleeson CJ, Gaudron, McHugh and Hayne JJ). Some American courts have expressed the same view that the modification of a contract is, in itself, a contract: see, eg, *Angel v Murray* 322 A (2d) 630, 634 (1974) (Roberts J).

10 See also *Tallerman and Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, 128 (Williams J), 135 (Kitto J).

11 [1918] AC 1.

12 Ibid 17-19.

13 Ibid 11-13 (Lord Finlay LC), 26-7 (Lord Dunedin), 31, 33-4 (Lord Atkinson), 37-8 (Lord Parmoor).

14 [1923] AC 48, 62 (Lord Atkinson), 69 (Lord Sumner), 73, (Lords Buckmaster, Wrenbury and Carson). The Court of Appeal followed suit in *Royal Exchange Assurance v Hope* [1928] 1 Ch 179.

In *Tallerman and Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd*¹⁵ the Australian High Court was called upon to determine whether the effect of a verbal agreement made between the parties post-contract was to modify or rescind the original written contract.¹⁶ The Court endorsed the test expressed in *Morris v Baron & Co.* in stipulating that this was a matter to be determined by ascertaining the intention of the parties.¹⁷ Justice Taylor stated the position thus:

It is firmly established by a long line of cases ... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement.¹⁸

This ratio was approved by the same court in *Sara Lee*,¹⁹ whilst *Tallerman* itself was later deemed to stipulate the 'relevant principles'.²⁰ To this point we can state the relevant law: (1) a contract may be modified by subsequent agreement, in which case a second contract has, in theory, been created; (2) whether or not the second contract varies the first, or entirely rescinds and replaces it, depends upon what the parties intended. This is not the end of the matter, for the pertinent question still remains: knowing that parties *can* modify a contract if they intend to do so, how do they do this?

GIVING FORCE TO A MODIFICATION

Elements of a Contract

The essential elements or features of a contract under English have been developed and refined over centuries, the majority of texts attempting to comprehensively structure and explicate them first appearing in the 1800s.²¹ The framework that these present, as drawn from the case law, have remained relatively unchanged to the present day.²² Hence the ingredients you will need to form a contract can generally be reduced to the following:²³

¹⁵ (1957) 98 CLR 93 ('*Tallerman*').

¹⁶ The contract was for the sale of rifle ammunition – not quite as exhilarating as lightsabres but it beats the proverbial peppercorn which we will encounter shortly.

¹⁷ *Tallerman and Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, 113 (Dixon and Fullagar JJ), 122-4 (Williams J), 135 (Kitto J), 144 (Taylor J).

¹⁸ *Ibid* 144.

¹⁹ (2000) 201 CLR 520, 534 (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

²⁰ *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 698 (Gleeson CJ, Gaudron and Gummow JJ). See also Kirby J's comments at p 709.

²¹ P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 682-3. See also D W Greig and J L R Davis, *The Law of Contract* (The Law Book Company, 1987) 14-15.

²² Michael Furmston, *The Law of Contract* (Butterworths, 1999) 159.

²³ N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (Butterworths, 10th Australian ed, 2012) 10. Other factors may operate to vitiate or render

- agreement (offer and acceptance);
- consideration;
- intention to create legal relations;
- certainty and completeness of terms.

A vital question emerges here: do any or all of these rules apply to *variations* of a contract, or are they specific to *formation*? The limited case law on point provides some guidance and appears to suggest that, putting aside the application of waiver or estoppel, the principles governing the formation of a contract also apply to modification.²⁴

In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,²⁵ a case famous for establishing the test for the implication of terms in fact, the Privy Council, on appeal from the Australian High Court, stated that ‘a contract can only be terminated by agreement *if there is manifested a bargain between the parties* so to terminate it’.²⁶ The implication is that a secondary agreement, whether it varies or replaces an original agreement, must nevertheless be founded upon a *bargain* and thus conform to the requirements for contractual formation in order to be legally enforceable. A similar sentiment presents in the High Court’s joint judgment in *Agricultural and Rural Finance Pty Ltd v Gardiner*.²⁷ In describing the effect of the doctrine of waiver, Gummow, Hayne and Kiefel JJ stated: ‘[F]rom time to time “waiver” has been used to describe some modification of the terms of a contract *without the formalities, or consideration, necessary for an effective contractual variation*’.²⁸

The strongest statement of legal principle on point, however, comes from the Federal Court of Australia. In *GEC Marconi Systems Pty Ltd v BHP Information Technology*, Finn J stated:

Parties to an existing agreement may vary or extinguish some of its terms by a subsequent agreement. In so doing the parties will have made ‘two contracts’ with the latter, no less than the former being subject to the ordinary rules governing contract formation.²⁹

voidable a contract validly made i.e. illegal contracts or contracts entered into by minors or those suffering a mental disorder or under the effects of intoxication. These factors are not considered here.

- 24 There are statements to this effect in some US cases i.e. *Chicago College of Osteopathic Medicine v George A Fuller Co* 776 F (2d) 198, 208 (1985): ‘[A] valid modification must meet all the criteria essential for a valid contract: offer, acceptance, and consideration’. Note however that §2-209(1) of the *Uniform Commercial Code* (US) abolishes the requirement of consideration for modifications to sales contracts.
- 25 (1977) 180 CLR 266.
- 26 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 286 (Lord Simon, Viscount Dilhorne, Lord Keith) (emphasis added).
- 27 (2008) 238 CLR 570.
- 28 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 (emphasis added).
- 29 (2003) 128 FCR 1, 63. His Honour also cited the comments of Miles CJ in *Tekmat Pty Ltd*

A number of commentators concur with this view.³⁰ Ulyatt notes that in practice when confronted with a contractual variation the courts have simply applied the principles of formation.³¹ The current legal position, therefore, appears to be that contractual modifications must ‘conform to the requirements for formation, namely agreement, consideration and an intention to effect legal relations’.³²

Let us then apply these principles to the two scenarios described above. Recall that we had (1) a bilateral modification and (2) a unilateral modification. As will be seen, the rules applicable to each vary considerably when the question of consideration is addressed. In either scenario, the perceptive contract lawyer will note that the parties need only change the contract as they please, for if there is a mutual agreement which benefits both parties the issue is extremely unlikely to become the subject of litigation. The more perceptive contract lawyer will point out that just because it works does not mean it is *lawful* and that on the off chance the matter reaches the courts it may not be enforceable. This is particularly so in the case of unilateral modifications, to be discussed later.

BILATERAL MODIFICATIONS (SCENARIO 1)

In Scenario 1 there has clearly been a requisite offer (or request) from one party to modify the contract which has been accepted by the other.³³ The modification has been given effect under a clearly manifested agreement, as required under the rules of formation.³⁴ Consequently, this is a non-issue.

The requirement that the terms be certain and complete³⁵ is also likely to be immaterial. Contractual modifications will normally tinker with existing terms,

v Dosto Pty Ltd (1990) 102 FLR 240 at 248 in support. See also *Coghlan v Pyoanee Pty Ltd* [2003] QCA 146 (4 April 2003).

30 Seddon and Ellinghaus, above n 23, 1108-9; Brian Coote, ‘Consideration and Variations: A Different Solution’ (2004) 120 *Law Quarterly Review* 19, 19-20; Brian Coote, ‘Variations Sans Consideration’ (2011) 27 *Journal of Contract Law* 185, 185; Craig Ulyatt, ‘Should Consideration Be Required for the Variation of Contracts?’ (2002) 9(3) *Auckland University Law Review* 883, 883-4.

31 Craig Ulyatt, ‘The Demise of Consideration for Contract Variations’ (2003) 9(4) *Auckland University Law Review* 1386, 1386.

32 Brian Coote, ‘Consideration and Variations: A Different Solution’ (2004) 120 *Law Quarterly Review* 19, 20.

33 In the absence of duress or other vitiating factors, which of the parties makes the initial request is inconsequential.

34 *Tallerman & Co Pty Ltd v Nathan’s Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, 111 (Dixon CJ and Fullagar J). Only in exceptional circumstances will a valid contract be found in the absence of an identifiable agreement: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, 525 (Allsop J).

35 A binding contract must be sufficiently complete (*Thorby v Goldberg* (1964) 112 CLR 597, 607 (Menzies J)) and clear on its terms (*G Scammell and Nephew Ltd v Ouston* [1941] AC 251, 255 (Viscount Maugham), 268-9 (Lord Wright); *The Council of the Upper Hunter County District v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429, 436-7 (Barwick CJ)).

such as changing a delivery date³⁶ or adjusting the fee for a product or service.³⁷ Doubt can sometimes arise with respect to the certainty/completeness requirement where, for example, the variation is implied through conduct,³⁸ or said to be effected through waiver.³⁹ A change of date has been requested in Scenario 1; this is sufficiently straightforward.

Just as the law assumes that the parties intended to create legal relations upon formation,⁴⁰ so too can it be assumed they bear the same intention in modifying their contracts. In *Antons Trawling Co Ltd v Smith*⁴¹ the New Zealand Court of Appeal noted that consideration serves ‘as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself’.⁴² The Court went on to say that such intention logically manifests in a subsequent agreement to vary the original terms of the contract.⁴³ Swan offers a concurring argument: ‘Once parties are in a contractual arrangement it should be presumed that any modification of that arrangement is made with the kind of care that would preclude any argument that the parties had no intention to alter their legal relationships’.⁴⁴

Professor Lucke, on the other hand, rejects the view that the law should presume that parties in a pre-existing contractual relationship habitually intend every alteration in the terms of the agreement to effect a binding contractual modification, particularly where the alteration is unilateral (i.e. where it benefits only *one* of the parties, as in Scenario 2).⁴⁵ He draws a distinction between permanent contractual

36 See, eg, *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd’s Rep 128.

37 See, eg, *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

38 See, eg, *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251.

39 See, eg, *Gange v Sullivan* (1966) 116 CLR 418; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

40 Intention to create legal relations is determined objectively: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 105-6 (Gaudron, McHugh, Hayne and Callinan JJ). The primary enquiry is whether, in the circumstances, ‘reasonable people’ would have regarded ‘the agreement as intended to be binding’: *Merritt v Merritt* [1970] 1 WLR 1211, 1213 (Lord Denning MR). Presumptions do operate in this regard. For example, ‘[g]enerally in commercial agreements there is a strong presumption in favour of an intention to create legal relations, a presumption that will only be rebutted with difficulty’: *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235 (8 July 2005), [48] (Young CJ in Eq). Whilst agreements between family members are normally presumed not to have been intended to create legal relations (see, eg, *Jones v Padavatton* [1969] 1 WLR 328), where each side is clearly in pursuit of distinct and separate commercial interests and the ‘whole setting of the arrangement’ indicates that it is ‘commercial rather than social or domestic’, the intention requirement will be satisfied with little difficulty: *Roufos v Brewster* (1971) 2 SASR 218, 222 (Bray CJ).

41 [2003] 2 NZLR 23.

42 Ibid 45-6.

43 Ibid.

44 John Swan, ‘Consideration and the Reasons for Enforcing Contracts’ in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (Butterworths, 1980) 23, 30.

45 H K Lucke, ‘Non-Contractual Arrangements for the Modification of Performance, Forbearance, Waiver and Equitable Estoppel’ (1991) 21 *Western Australian Law Review* 149, 167, 181.

modifications and temporary non-contractual *concessions*, arguing that the vast majority of unilateral contract variations are of the latter class and therefore should not be regarded as promissory in any way nor as ‘giving rise to fully-fledged legal relations’.⁴⁶ In his view, a presumption of intended modification is untenable:

A party who is approached with a request for a postponement of delivery or similar concession may find it sensible to make a *de facto* concession. At the same time, there would be little sense in relinquishing any of his legal rights which may stand him in good stead should the present difficulty develop into controversy or even litigation. His own willingness to abide by the terms of the contract gives him a position of strength which renders the making of *contractually agreed* concessions quite unnecessary.⁴⁷

The point is certainly debatable. Assuming, however, that the parties in Scenario 1 intended to effect a legally binding modification, they must then establish consideration. This must be present in every contract. The classic definition was expressed by Lush J in *Currie v Misa*.⁴⁸ In his Honour’s words, ‘[a] valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other’.⁴⁹ Of equal importance is that whatever be exchanged between the parties be *bargained for* – it is ‘the price for which the promise of the other is bought, and the promise thus given for value is enforceable’.⁵⁰

In Scenario 1 the presence of consideration does not appear to be in issue: the variation of date is legally enforceable as the additional period of time benefits both parties and therefore suffices.⁵¹ Alternatively it could be said, given that

46 Ibid 156. If unilateral tips (such as the promisor’s agreement to pay more in Scenario 2) or concessions (such as the promisor’s agreement to accept a lesser amount of rent from the promisee during a period of financial hardship in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130) were intended by the parties to *modify* the contract then they would require consideration. Professor Lucke’s view, however, is that this cannot be the intention of the parties, certainly not from the promisor’s perspective. If consideration is required to entitle the promisee to receive more (as in Scenario 2) or pay less (as in *High Trees*) then it is also required to entitle the promisor to revert to the original terms of the agreement i.e. to pay \$5,000 less in Scenario 2 or receive £1250 more in *High Trees*. What promisee in their right mind would *agree* to receive less or pay more in these circumstances!

47

Ibid.

48

(1875) LR 10 Ex 153.

49

Ibid 162.

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Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915] AC 847, 855 (Lord Dunedin). His Honour was citing the words of Sir Frederick Pollock in his work *Pollock on Contracts* (8th ed, 1911) 175. This is the ‘bargain theory’ of consideration and has been expressly approved by the High Court: *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456-7 (per curiam).

51

Currie v Misa (1875) LR 10 Ex 153, 162 (Lush J).

the obligations on both parties remain executory, that the mutual relinquishment of each party's right to sue the other for breach of contract amounts to valid consideration.⁵² However one frames the arrangement, there has clearly been a valid bargain and therefore a legitimate agreement.⁵³

All elements being satisfied, the variation in Scenario 1 appears enforceable. But what of Scenario 2 involving a *unilateral* modification?

UNILATERAL MODIFICATIONS (SCENARIO 2)

As in Scenario 1, there exists no doubt as to the presence of a plainly identifiable agreement to modify the contract: Skywalker has agreed to pay Vader an additional \$5,000 to absorb the cost of the crude oil price hike in return for Vader's confirmatory promise to deliver the lightsabres. The variation is also clear on its terms: increase the freight charge from \$10,000 to \$15,000. Intention for this arrangement to have legal effect, once again, appears to be present and is therefore a non-issue. We come, then, to consideration.

Scenario 2 differs significantly from Scenario 1 in that one of the parties (Vader) has promised to do what he was already contractually bound to do in return for something more from the other party (Skywalker). Does this matter? *YES* scream the contract lawyers! *YES* yells Luke Skywalker! *NO* growls Vader in his trademark baritone! The ayes have it – the law in this instance does not favour the dark side of the force.

Existing Legal Obligations as Consideration: Why Give More for the Same?

Now it is fair to ask, as Robertson JA did in *NAV Canada v Greater Fredericton Airport Authority Inc.*,⁵⁴ why anyone would 'agree to pay more or do more than is required under an existing contract in return for nothing?' The truth is that there are many good reasons why one contractual party (the *promisor*) would promise additional consideration to the other party (the *promisee*) in return for what they were already due to receive from the latter. As Collins argues, such a promise

may reflect a recognition that the original contract price was based upon a mistake about the burdens entailed, or an error in drafting in terms of the contract so that they do not fully accord with the intentions of the parties, or it may be a response to changing circumstances which render performance more onerous.⁵⁵

52 See, eg, *Schwartzreich v Bauman-Basch Inc.* 231 N.Y. 196 (1921).

53 *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, 855 (Lord Dunedin). (2008) 290 DLR (4th) 405, 426.

54 (2008) 290 DLR (4th) 405, 426.

55 Hugh Collins, *The Law of Contract* (Butterworths, 3rd ed, 1997) 318.

Moreover, the risks and inconvenience involved in pursuing litigation for breach of contract, as well as the difficulty and bother of obtaining substitute performance, may make the promisee's promised performance worth more than any right of action against them.⁵⁶ Alternatively, a promisor may simply react to feelings of guilt⁵⁷ or feel compelled to commit a selfless act of generosity with the added benefit of maintaining amicable relations with the other party.⁵⁸ In Scenario 2, a number of such motivational factors may have influenced Skywalker's decision to pay more money for Vader's services i.e. convenience, avoidance of litigation, guarantee of stock delivery etc.

Mention should also be made of the established duty of cooperation that subsists in every contract under our law. In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*⁵⁹ the High Court affirmed the principle established in the earlier case of *Butt v McDonald*:⁶⁰ 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract'. Does such a duty entail a requirement to renegotiate if one party experiences hardship in the performance of their contractual obligations? Seemingly not. For a start, the implied duty to cooperate only qualifies enforceable obligations required to be performed under a contract. As the New South Wales Supreme Court remarked in *Australis Media Holdings Pty Ltd v Telstra Corporation*:⁶¹ '[L]eaving aside fiduciary obligations ... there cannot be a duty to co-operate in bringing about something which the contract does not *require* to happen'.

Secondly, from a mitigation perspective, a party cannot be expected to abandon their legal rights merely to salvage the endangered party's prospects of performance.⁶² There exists no duty at common law to mitigate loss.⁶³ Failure to take 'reasonable steps' to do so will affect the quantum of damages to which the plaintiff might be entitled upon the defendant's breach,⁶⁴ but this does not impose any obligation upon the plaintiff and certainly not one which is enforceable by the hapless defendant.⁶⁵ Hence, whilst it may be unreasonable from both a commercial

56 Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27(3) *The Yale Law Journal* 362, 380-1; Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 26-7.

57 Rembert Meyer-Rochow, 'The Requirement of Consideration' (1997) 71 *Australian Law Journal* 532, 536.

58 Corneill A Stephens, 'Abandoning the Existing Legal Duty Rule: Eliminating the Unnecessary' [2008] 9 *Houston Business and Tax Journal* 355, 387.

59 (1979) 144 CLR 596, 607 (Mason J).

60 (1896) 7 QLJ 68, 70-1 (Griffith CJ).

61 (1998) 43 NSWLR 104, 124 (per curiam) (emphasis in original).

62 *Westland Investment Corp v Carswell Collins Ltd* (1996) 179 AR 272, 282 (McBain J).

63 *Sealace Shipping Co Ltd v Oceanvoice Ltd (The 'Alecoss M')* [1991] 1 Lloyd's Rep 120, 124 (Neill LJ).

64 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, 689 (Viscount Haldane LC).

65 *Sealace Shipping Co Ltd v Oceanvoice Ltd (The 'Alecoss M')* [1991] 1 Lloyd's Rep 120 at 124 (Neill LJ).

and moral standpoint to refuse to renegotiate, it is not necessarily unreasonable in the eyes of the law.

Unfortunately for Vader, the Anglo-Australian law of contract turns its back on the many good reasons why parties might agree to give more for the same (and imposes no obligation to do so) and instead renders all modifying promises lacking consideration unenforceable. This cut-throat principle is known as the ‘existing legal duty rule’ and stems from a stream of litigation embroiling the British maritime industry during the Napoleonic war era.

The Existing Legal Duty Rule

The seminal case on point is *Stilk v Myrick*.⁶⁶ In that case a pair of sailors deserted a ship travelling from London to the Baltic. The captain attempted to obtain replacements during a stopover in Sweden but was unsuccessful. To guarantee the ship’s return to England, the captain promised the nine remaining crew-members that he would divide the deserters’ wages equally among them if they agreed to remain with the ship and guide it home. They agreed to his terms. When the ship arrived back in England the captain refused to pay the extra sum promised to the crew. The plaintiff, one of the crewmen, sued to recover the money. Lord Ellenborough held that the promise of extra payment was void for want of consideration, saying:

Before [the crew] sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed ... [T]he desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port.⁶⁷

The clear principle to emerge from this judgment is that a promise to perform a duty one was already contractually bound to perform cannot amount to consideration for a promise of something more from the party to whom the existing obligation is owed.⁶⁸

⁶⁶ (1809) Camp. 317; 170 ER 1168 (*‘Stilk v Myrick’*).

⁶⁷ *Ibid* Camp. 319-20; ER 1169.

⁶⁸ Similar sentiments were expressed around the same time by judges across the Pacific: see, eg, *Bartlett v Wyman* 14 Johns. 260 (1817) where a ship captain’s verbal promise of additional wages to seamen was held to be void for want of consideration. Justice Spencer held (at 262):

To allow the seamen, at an intermediate port, to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract, thus extorted, binding on the master of the ship, would be ... holding out encouragement to a violation of duty, as well as of contract. ... [T]o put the master at the mercy of the crew, takes away all reciprocity.

Counsel for the defendant contended that the agreement ‘was contrary to public policy’ and should not have been enforced on this basis.⁶⁹ This submission was based on Lord Kenyon’s earlier and markedly different judgment in *Harris v Watson*.⁷⁰ In *Stilk v Myrick*, however, Lord Ellenborough held that, whilst *Harris v Watson* ‘was rightly decided’, it was not grounded upon principles of public policy as much as on the rules of contract law.⁷¹ The agreement was not void because it would have invited extortionate demands from sailors in similar situations, but because it lacked consideration. His Honour explained that the defendant’s promise of extra wages may have been enforceable if, for example, the sailors had the option of leaving their positions of employment once in Sweden and forbore from doing so, or if they had assumed greater duties than those they were already contractually bound to fulfil.⁷²

Despite its ancient pedigree the existing legal duty rule remains good law in a number of common law countries including England,⁷³ Australia,⁷⁴ Singapore⁷⁵ and Canada.⁷⁶ If Darth Vader stands any chance of enforcing what is prima facie a gratuitous promise from Luke Skywalker, and escaping the cuffs of *Stilk v Myrick*, he must establish consideration. We turn now to examining the available methods of doing so.

69 *Stilk v Myrick* (1809) Camp. 317, 318; 170 ER 1168, 1169.

70 (1791) Peake 102; 170 ER 94.

71 *Stilk v Myrick* (1809) Camp. 317, 319; 170 ER 1168, 1169. In *The ‘Araminta’* (1854) 1 Sp. Ecc. & Ad. 224; 164 ER 130, however, a case which involved similar facts, it was held that a ship captain’s executed promise of additional wages to his crew (above that which they were already entitled to receive) in return for their continued service on the vessel from which several crew members had deserted was not only void for want of consideration, but illegal in its entirety.

72 *Stilk v Myrick* (1809) Camp. 317, 319; 170 ER 1168, 1169.

73 See, eg, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (‘The Atlantic Baron’)* [1979] QB 705; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd’s Rep 128, 149: ‘[It is] a firmly established rule of law that a promise to perform an enforceable obligation under a pre-existing contract between the same parties is incapable of amounting to sufficient consideration’ (Colman J).

74 *Wigan v Edwards* (1973) 1 ALR 497, 512 (Mason J).

75 *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631.

76 *Gilbert Steel Ltd v University Construction Ltd* (1976) 76 DLR (3d) 606. Cf *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405 and *River Wind Ventures Ltd v British Columbia* [2009] BCSC 589 (28 November 2008). It is submitted that *Gilbert Steel*, having long been recognised as good law in Canada and attacked only recently by the dubious reasoning of another appellate court and lower court respectively, continues to hold sway. The question remains open: *Matchim v BGI Atlantic Inc* [2010] NLCA 9 (11 February 2010) [83] (Green CJ).

GETTING AROUND THE CONSIDERATION HURDLE IN UNILATERAL MODIFICATIONS

Fresh Consideration

If an agreement to do something one was already contractually bound to do is void for want of consideration, it stands to reason that an agreement to do something more is not. This rule was expressed in *Hartley v Ponsonby*,⁷⁷ a case factually similar to *Stilk v Myrick* save that the crewmen that remained with the ship in the former case were no longer contractually obliged to do so because of the high desertion rate (17 from 36) and the excessive labour this imposed upon them.⁷⁸ Thus Darth Vader could simply have tendered fresh consideration in return for Skywalker's promise of additional money.

He needn't, however, have troubled himself finding something of worth, for even *nominal* consideration will normally be enough. Consideration must be sufficient but need not be adequate.⁷⁹ In modern times this rule has come to be known as 'the peppercorn principle', a shorthand reference to Lord Somervell's ratio in *Chappell & Co Ltd v Nestlé Co Ltd*: 'A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn'.⁸⁰ Anything of 'some value in the eye of the law'⁸¹ – an empty chocolate wrapper,⁸² a canary,⁸³ a promise not to smoke, drink, swear or play cards or billiards for money until the age of 21,⁸⁴ even an undertaking not to

77 (1857) 7 El. & Bl. 872; 119 ER 1471. See also *Hanson v Royden* (1867) LR 3 CP 47.

78 See the comments of Coleridge J: 7 El. & Bl. 872, 878; 119 ER 1471, 1473.

79 *Haigh v Brooks* (1839) 10 Ad. & E. 309, 320; 113 ER 119, 123 (Lord Denman CJ); *Westlake v Adams* (1858) 5 C.B. (N.S.) 248, 265; 141 ER 99, 106 (Byles J): 'It is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration'.

80 [1960] AC 87, 114. In this case used chocolate bar wrappers were held to constitute valid consideration. This case is attributed as the origin of the 'peppercorn principle' but it appears to have far earlier origins. In Bermuda, on the Wednesday closest to St George's Day (April 23) every year, the Masonic Lodge of St George's pays its annual rent of a single peppercorn to the island's Governor for the use of the Old State House which formerly housed Bermuda's parliament. The tradition has continued every year since 1815 and has developed into an elaborate ceremony attended by hundreds and involving national dignitaries and the military. The peppercorn is presented upon a velvet cushion atop a silver platter. See Owain Johnston-Barnes, 'Hundreds Attend Annual Peppercorn Ceremony', *The Royal Gazette* (online), 28 April 2011 < <http://www.royalgazette.com/article/20110428/NEWS/704289973>>. Similarly, the Sevenoaks Vine Cricket Club of England pays the Sevenoaks Town Council an annual rent of two peppercorns for the use of the Vine Cricket Ground and its pavilion. If requested, the Council must then give one cricket ball to the current Baron Sackville: Sevenoaks Life, *History of Sevenoaks* < <http://www.sevenoaks-life.co.uk/content/view/166/89/>>.

81 *Thomas v Thomas* (1842) 2 QB 851, 859 (Patteson J).

82 *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.

83 *Couldery v Bartrum* (1881) 19 Ch. D. 394.

84 *Hamer v Sidway* 124 NY 538 (1891) (consideration for payment of \$5,000 found in promisee's agreement not to smoke, drink, swear or play cards or billiards for money until age 21).

live in a certain area and not to visit or annoy a particular person⁸⁵ – would have sufficed to stave off the existing legal duty rule. Wessman is correct, therefore, in likening consideration to Tabasco sauce, in that ‘a little of it goes a long way’.⁸⁶

Practical Benefit

Even if Darth Vader did not tender fresh consideration in return for Luke Skywalker’s promise of additional money, it might be possible for the courts to *retrospectively identify* consideration in his reiterated promise to deliver the lightsabres. Courtesy of a highly controversial decision of England’s Court of Appeal in 1989, Vader might be able to enforce Skywalker’s promise on the basis that his undertaking to carry through with delivery conferred *factual* or *practical benefits* upon the young Jedi. To explain this exception it is necessary to outline the facts of the case.

*Williams v Roffey Bros & Nicholls (Contractors) Ltd*⁸⁷ involved an archetypal dispute between a builder and a subcontractor. The defendants,⁸⁸ building contractors, were engaged by a housing association to refurbish a block of flats in London. Four months later in January 1986, the defendants hired the plaintiff, a carpenter, under a subcontract to carry out the carpentry work in the flats. The agreed price for the plaintiff’s work was £20,000.

Around two months into this contract the plaintiff began to experience financial difficulty, primarily because the agreed price was too low to allow him to ‘operate satisfactorily and at a profit’ and due to his inadequate supervision of his workmen.⁸⁹ The defendants became concerned that the plaintiff would not be able to complete the required work on time which would trigger the penalty clause contained within their primary contract with the housing association and cause them to incur a significant fee for delay. To avoid this scenario, the defendants made an oral agreement with the plaintiff to pay him an additional £10,300 ‘at the rate of £575 for each flat in which the carpentry work was completed’.⁹⁰

85 *Jamieson v Renwick* (1891) 17 VLR 124 (promisee’s promise not to live in a certain area and not to visit or annoy the promisor held to be good consideration for the promisor’s promise of an annual payment of £25).

86 Mark B Wessman, ‘Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration’ (1996) 29 *Loyola of Los Angeles Law Review* 713, 789.

87 [1991] 1 QB 1 (‘*Williams v Roffey*’).

88 Mr Lester Williams was the respondent in this action but the order of parties in the case citation was not reversed on appeal. For the purposes of continuity, he is referred to throughout as ‘the plaintiff’, with the appellants being given the corresponding title of ‘the defendants’.

89 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 6 (Glidewell LJ). This was the finding of Mr Rupert Jackson QC, Assistant Recorder of the Kingston-upon-Thames County Court, whose judgment was challenged in this appeal.

90 *Ibid.*

Nearly two months later, having substantially completed work on eight more flats, the plaintiff had received just one further payment of £1500. He ceased work on the flats and sued the defendant to recover the additional sum promised.

On the face of things the plaintiff had done no more than promise to do what he was already contractually bound to do in return for the defendants' promise of extra money. Prima facie it appeared to be, as said by Purchas LJ, 'a classic *Stilk v Myrick* case'.⁹¹ The Court of Appeal, however, came to decide otherwise.

Lord Justice Glidewell (with whom Russell and Purchas LJJ agreed), referred to two authorities⁹² in which the 'practical benefit' of contractual performance on the part of one party had previously been held to constitute valid consideration. The cumulative effect of these decisions, and others referred to in the judgments in the Court of Appeal,⁹³ was to encourage the recognition of 'practical benefit' of contractual performance as valid consideration for the purposes of giving effect to a modification. The law on this subject was famously summarised by Glidewell LJ thus:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.⁹⁴

The 'practical benefits' said to have been conferred upon the defendants included: the avoidance of the need to employ other subcontractors to carry out the carpentry work in the flats;⁹⁵ the replacement of the 'haphazard method of payment [in place] by a more formalised scheme involving the payment of a specified sum on the completion of each flat'⁹⁶ and the subsequent ability for the promisor to efficiently 'direct their other trades to do work in the completed flats',⁹⁷ the safeguarded security of the promisor's commercial position through ensured performance

91 Ibid 23.

92 *Ward v Byham* [1956] 1 WLR 496; *Williams v Williams* [1957] 1 WLR 148.

93 In particular *Woodhouse A.C. Israel Cocoa Ltd S.A. v Nigerian Produce Marketing Co Ltd* [1972] AC 741; *Pao On v Lau Yiu Long* [1980] AC 614.

94 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 15-16. See also the judgments of Russell LJ (at 19) and Purchas LJ (at 23).

95 Ibid 10-11 (Glidewell LJ), 19 (Russell LJ).

96 Ibid 19 (Russell LJ).

97 Ibid 20 (Purchas LJ).

on the part of the promisee;⁹⁸ and the removal of the incentive to the promisee to deliberately breach the contract which would have exposed the promisor to a delay penalty under the primary contract with the housing association⁹⁹ (and avoidance of the penalty clause generally).¹⁰⁰

Could Darth Vader not argue that his promise conferred similar practical benefits upon Skywalker? Recall that Skywalker was spared the trouble of certain financial loss, obtaining substitute performance and commencing litigation. *Williams v Roffey* has been accepted by the New South Wales Supreme Court¹⁰¹ and Court of Appeal,¹⁰² as well as the Supreme Courts of Victoria¹⁰³ and Queensland.¹⁰⁴ It has been cited with apparent approval by the Federal Court of Australia¹⁰⁵ and in other instances at State level,¹⁰⁶ and has received favourable treatment across a number of international jurisdictions.¹⁰⁷ Most recently both the Supreme Court of Victoria¹⁰⁸ and the Federal Court of Australia¹⁰⁹ appear to have regarded the practical benefit principle as an established feature of the Australian law of contract. It has even been referred to with apparent approval by the High Court in *DPP (Vic) v Le*.¹¹⁰ Moreover, the High Court had previously suggested that, given there is a single common law of Australia, intermediate appellate courts should not depart from other such courts' rulings on the common law unless convinced

98 Ibid 10-11 (Glidewell LJ), 22-3 (Purchas LJ).

99 Ibid 22-3 (Purchas LJ).

100 Ibid 10-11 (Glidewell LJ).

101 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723; *Figjam Pty Ltd v Pedrini* (2007) Aust Contract Reports ¶90-259; *Tinyow v Lee* [2006] NSWCA 802 (13 April 2006); *Silver v Dome Resources NL* (2007) 62 ACSR 539; *Vella v Ayshan* [2008] NSWSC 84 (15 February 2008).

102 *Tinyow v Lee* [2006] NSWCA 802 (13 April 2006).

103 *Ajax Cooke Pty Ltd t/a Ajax Spurway Fasteners v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993); *MP Investments Nominees Ptd Ltd v Bank of Western Australia* [2012] VSC 43 (6 March 2012).

104 *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 86 (4 April 2003).

105 *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FCA 1306 (8 November 2002), [241] (Lindgren J); *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 (12 March 2003) [594] (Allsop J).

106 *Amerinaus Financial Resource Corporation Pty Ltd v Residence Company Pty Ltd* (Unreported, Supreme Court of Victoria, Byrne J, 4 July 1997) 7.

107 See Mark Giancaspro, 'Practical Benefit: An English Anomaly or a Growing Force in Contract Law?' (Paper presented at the Advanced Contract Law Conference, Adelaide, 11 November 2011) 9-11.

108 *MP Investments Nominees Ptd Ltd v Bank of Western Australia* [2012] VSC 43 (6 March 2012) [107]-[115] (Judd J); *Wolfe v Permanent Custodians Ltd* [2012] VSC 275 (11 October 2012) [113] (Zammit AsJ).

109 *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 (28 September 2012) [144]-[147] (Flick J).

110 (2007) 232 CLR 562. This case actually concerned a provision in the *Confiscation Act 1997* (Vic) which required applicants seeking exemptions from restraining orders imposed upon property allegedly involved in criminal enterprise to have obtained their interest in the property 'from the accused, directly or indirectly ... for sufficient consideration'. The High Court noted that, in the context of contract law, examples of things that suffice as consideration include the 'conferral of practical benefits' (at 566-7 per Gummow and Hayne JJ). The authority cited for this proposition was *Musumeci*.

they are plainly wrong.¹¹¹ On this basis, and on the strength of the foregoing case law, it could be said that the principle in *Williams v Roffey*, expressly accepted as good law but qualified in *Musumeci v Winadell Pty Ltd*,¹¹² form a part of the common law of Australia until the High Court indicates otherwise.

Compromise of Disputed Claim or Forbearance to Sue

In *Wigan v Edwards*¹¹³ the Australian High Court expressly approved the existing legal duty rule,¹¹⁴ before recognising a significant exception:

An important qualification to the general principle [i.e. the existing legal duty rule] is that a promise to do precisely what the promisor is already bound to do is a sufficient consideration, when it is given by way of a bona fide compromise of a disputed claim, the promisor having asserted that he is not bound to perform the obligation under the pre-existing contract or that he has a cause of action under that contract.¹¹⁵

Accordingly, provided the beneficiary of the additional promise reciprocally agrees to waive its purported legal entitlement to refuse performance or pursue a cause of action on the contract, this will amount to valid consideration. There is no need to threaten ‘to bring an action or enter a defence’ in order to demonstrate a bona fide compromise; ‘it is enough if there is a claim ... that the contracting party is not bound to perform the contract’ and that this claim is based on an belief honestly held by the party refusing (or threatening to refuse) performance that they were entitled to do so.¹¹⁶

If Vader can establish an honestly made claim that he is not bound to carry through with delivery under the original terms of the agreement then he may fall within the scope of this exception. He might, for example, contend that the contract might have been frustrated¹¹⁷ by reason of the unanticipated hike in the global crude oil price. There is US authority suggesting that market movements can have such effect.¹¹⁸ This would support the contention of an honestly-held belief that performance was no longer due.

111 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-2 (per curiam).

112 (1994) 34 NSWLR 723, 746-7 (Santow J).

113 (1973) 1 ALR 497.

114 *Ibid* 512 (Mason J).

115 *Ibid*.

116 *Ibid* 513.

117 ‘[F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do’: *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729 (Lord Radcliffe); approved in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

118 See, eg, *Bishop v Busse* 69 Ill. 403 (1873) (spike in costs prompted by increased demand for carpentry services following the Great Chicago Fire of 1871).

On the strength of English authority, however, Skywalker has the upper hand. The frustration principle ‘firmly sets its face against assisting a contractor to re-negotiate an underpriced contract, despite the underpricing arising through circumstances beyond the control of the parties’.¹¹⁹ A contract will not generally be frustrated merely because an unexpected turn of events renders the obligations it imposes more onerous than initially contemplated.¹²⁰ To this, Vader might counter, the Australian authorities demonstrate that the frustration doctrine can apply even where performance is still possible and simply made more expensive or inconvenient.¹²¹

Mutual Rescission/Replacement

Another technique judges might use to circumvent the existing legal duty rule is to find that the original contract had been mutually rescinded and replaced with a new contract on the modified terms, rather than merely varied.

The consideration for the contract of rescission is satisfied by the parties giving up their rights to take action for the other’s failure to perform. The consideration requirement for the new contract is satisfied by the exchanged promises to complete the outstanding obligations, albeit on amended terms.¹²²

Recall from earlier that the question of whether rescission and replacement or mere modification was intended is a question of the intention of the parties.¹²³ Often this will ‘turn upon the place, or the time, or the form, of the [renegotiated] contract’.¹²⁴ In *Concut Pty Ltd v Worrell*,¹²⁵ for example, an employee, W, commenced employment with the appellant company under an oral agreement. In 1986 the parties executed a formal written employment contract. In 1988 W was terminated without notice. The appellant defended its decision, arguing W had breached his employment conditions by alleged misconduct which occurred prior

119 John Adams and Roger Brownsword, ‘Contract, Consideration and the Critical Path’ (1990) 53 *Modern Law Review* 536, 541.

120 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 716 (Viscount Simonds).

121 See, eg, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. Cf *Tsakiroglou & Co v Noblee* [1962] AC 93, 112, 115 (Viscount Simonds), 118-19 (Lord Reid), 123 (Lord Radcliffe), 128-9 (Lord Hodson), 133-4 (Lord Guest).

122 John Wilson Twyford, ‘Additional Payments Under Construction Contracts’ (2007) 25 *Construction Management and Economics* 739, 744.

123 *Morris v Baron & Co* [1918] AC 1; *British and Benningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48; *Tallerman and Co Pty Ltd v Nathan’s Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93; *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693.

124 *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533 (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

125 (2000) 176 ALR 693.

to the formal employment contract being signed in 1986.

The High Court held that the text of the written contract and the surrounding circumstances¹²⁶ suggested the parties did not intend for it to terminate and replace the original oral agreement and thus entirely eradicate the appellant's right to dismiss W for his earlier indiscretion.¹²⁷ Amongst other things, the formal written agreement preserved W's accrued leave entitlements¹²⁸ and utilised the same language as before in his role description¹²⁹ and it could hardly be said that it was intended to deprive the appellant of its rights under the original oral contract.¹³⁰

In other cases of course an intention for a variation to terminate and replace the original contract will be more easily established on the facts. The language utilised by Vader and Skywalker in Scenario 2, however, is unmistakably indicative of modification rather than rescission and replacement. The terms of the renegotiation were that Skywalker would simply pay an additional \$5,000 for the freight of his lightsabres.

The Seal

In *Pinnel's Case* it was stated: '[I]f a man acknowledges himself to be satisfied by deed, it is a good bar, without anything received'.¹³¹ Similarly in *Williams v Roffey* the Court of Appeal stressed that gratuitous promises were perpetually unenforceable in accordance with the rule in *Stilk v Myrick* unless given under seal.¹³² Hence, if an agreement is set out in a deed, consideration is not necessary at all. Vader might, therefore, ask that Skywalker incorporate his promise into a deed and escape the question of the presence of valid consideration altogether.

Estoppel/Waiver

It is also possible for a gratuitous promise of additional consideration from one party to the other to give rise to legal liability through the doctrines of estoppel or waiver. The purpose of estoppel 'is to prevent an unjust departure by one person from an assumption adopted by another on the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment'.¹³³ It does not of itself ground an action for damages for breach of contract, but rather prevents the representor from acting inconsistently with their

126 *Concut Pty Ltd v Worrell* (2000) 176 ALR 693, 699 (Gleeson CJ, Gaudron and Gummow JJ).

127 *Ibid* 709 (Kirby J).

128 *Ibid* 699 (Gleeson CJ, Gaudron and Gummow JJ).

129 *Ibid* 708 (Kirby J).

130 *Ibid* 708-9 (Kirby J).

131 (1601) 5 Co. Rep. 117a, 117b; 77 ER 237, 238.

132 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Glidewell LJ), 19 (Russell LJ), 21 (Purchas LJ). 'Historically deeds were referred to as documents under seal or specialties': John Gooley and Peter Radan, *Principles of Australian Contract Law* (LexisNexis Butterworths, 2006) 60.

133 *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J).

promise. The core elements of estoppel¹³⁴ are established within the common law: (1) the relying party has adopted an assumption; (2) this assumption was induced by the representor's conduct; and (3) the relying party will suffer detriment in reliance on the assumption.¹³⁵ If Vader could establish that he had acted upon Skywalker's promise of additional consideration in such a way that he would suffer detriment if Skywalker were not held to his promise, this may give rise to an estoppel. He could commence an action for debt and 'estop' Skywalker from denying the obligation to pay the additional \$5,000.

The term 'waiver' has various meanings within the law and 'is commonly used loosely to encompass doctrines as diverse as election, estoppel and contract variation'.¹³⁶ Generally speaking it is said to apply to circumstances where a party has voluntarily or intentionally abandoned or relinquished a 'known right, claim or privilege', though it is debatable whether it is a doctrine in and of itself.¹³⁷ The authorities make clear that contingent conditions can be 'waived' by the party in whose favour they operate,¹³⁸ but the modifying capabilities of waiver remain highly unclear. Some international cases suggest that parties may 'waive' their rights under an existing contract through conduct¹³⁹ or even the obligations of the promisee in a unilateral modification scenario.¹⁴⁰

The Australian cases, however, lend support to the view that a waiver can only be effective where it relates to the 'mode and manner' of the performance of an existing obligation.¹⁴¹ Elsewhere it has been remarked that a waiver cannot

134 Sourced from the judgment of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428-9. This is said to be the 'most commonly cited passage for the requisite elements of estoppel': Seddon and Ellinghaus, above n 23, 63. A number of additional 'sub-requirements' also apply i.e. the relying party's reliance must be reasonable and the representor's departure from the assumption they created must be unconscionable: see Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 181-94 for an excellent summary of the principles.

135 For a case example of estoppel being raised to enforce a unilateral modification see *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101.

136 *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 (Finn and Sundberg JJ); *Commonwealth v Verwayen* (1990) 170 CLR 394, 406-7 (Mason CJ), 431 (Deane J), 451-3 (Dawson J), 491 (McHugh J); *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 (Gummow, Hayne and Kiefel JJ).

137 *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 (Finn and Sundberg JJ); *Banning v Wright* [1972] 1 WLR 972, 979 (Lord Hailsham LC). Justice Toohey in *Commonwealth v Verwayen* (1990) 170 CLR 394 clarified the need for 'intention' in this context: 'That is not to say that there must be an intention to bring about the consequences of waiver; rather, the conduct from which waiver may be inferred, must be deliberate' (at 473).

138 *Gange v Sullivan* (1966) 116 CLR 418; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

139 See, eg, *Iwanczuk v Center Square Developments Ltd* (1967) 61 DLR (2d) 193.

140 *Watkins & Son v Carrig* 91 N.H. 459 (1941). This case suggests that, where one party promises more in return for actual or promised performance of the other party's existing legal duty, it may be said that the promisor has 'waived' the promisee's requirement to perform on the initial terms and may instead rely upon the secondary promise.

141 See, eg, *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 233-4 (Starke J), 243-4

substantially change the ‘value’ of a transaction from the perspective of a promisor (i.e. the ‘waiving’ party).¹⁴² ‘[W]here the modified version of the original contract involves such changes in the contractual obligations of the parties that its structure is clearly affected, then the change goes beyond any question of waiver and must be regarded as a “variation” requiring consideration or a deed’.¹⁴³

It is equally unclear whether an alleged ‘waiver’ is either temporary or permanent in duration, though recent authority indicates it may be permanent provided: (1) the parties were not subject to any relevant ‘disability or disadvantage’; and (2) it would be ‘manifestly unfair’ on the beneficiary for the party that waived its legal rights to later adopt an inconsistent position and seek to enforce those rights.¹⁴⁴

In *Commonwealth v Verwayen*,¹⁴⁵ one of the leading Australian authorities on point, the High Court attempted unsuccessfully to address the concept of waiver and instead left it in a highly unsettled state, with no clear majority decision on principle emerging.¹⁴⁶ The best that can be said for Vader in Scenario 2 is that it would be risky to attempt to enforce Skywalker’s promise of additional money on the basis Skywalker had ‘waived’ his obligation to pay \$10,000 as opposed to the renegotiated \$15,000. He might be better off utilising more established and less-controversial doctrines such as promissory estoppel to do so.

THE SYSTEM FAILING ITS PLAYERS

So there are numerous ways to circumvent the existing legal duty rule and, more broadly, satisfy the requirement of consideration for unilateral contractual modifications. It most certainly does not follow that these rules are satisfactory features of Anglo-Australian common law. On the contrary, they run contrary to the needs of businesspersons in contemporary society.

One could give nominal consideration but this is a trifling ritual which makes a mockery of the legal system and is often a veil for coercion.¹⁴⁷ A promisee could

(Williams J).

142 Randy E Barnett and Mary E Becker, ‘Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations’ (1987) 15 *Hofstra Law Review* 443, 461.

143 *Watson v Healy Lands Ltd* [1965] NZLR 511, 513 (Woodhouse J).

144 *Agricultural and Rural Finance v Gardiner* (2008) 238 CLR 570, 620 (Kirby J).

145 (1990) 170 CLR 394 (*Verwayen*’).

146 Christopher Bevan, ‘Waiver of Contractual Rights: A Non Sequitur’ (2009) 83 *Australian Law Journal* 817, 819.

147 Token consideration can be ingeniously disguised as an act of kindness when it is actually to give force to an extortionate demand: Corneill A Stephens, ‘Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary’ [2008] 8 *Houston Business and Tax Journal* 355, 363-4 (author provides an apt example); Craig Ulyatt, ‘Should Consideration Be Required for the Variation of Contracts?’ (2002) 9(3) *Auckland University Law Review* 883, 890; Mark B Wessman, ‘Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration’ (1996) 29 *Loyola of Los Angeles Law Review* 713, 746. See also *United States of America v Stump Home Specialties Manufacturing Inc* 905 F (2d) 1117, 1122 (1990) (Posner J): ‘Slight consideration, therefore, will suffice to make a contract or a

also argue that the promisor derived practical benefits from their repeat promise to fulfil their existing legal obligations, the concern for the courts being that such benefits can almost always be identified on the facts.¹⁴⁸ As the Singapore Court of Appeal recently remarked in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*:

[T]he combined effect of *Williams v Roffey* ... (to the effect that a factual, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate ... is that ... it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties.¹⁴⁹

We may thus be introducing considerable uncertainty into the law of contract if the practical benefit principle is to become an established exception to the existing legal duty rule. The two seem irreconcilable.¹⁵⁰ Parties will never be able to be sure whether they have an enforceable agreement or not, particularly if the courts are equipped to 'find', 'detect' or 'look for' consideration *post-contract*, as they are within the parameters of the practical benefit test.¹⁵¹

The compromise/forbearance exception is problematic in that it involves an enquiry into the subjective mindset of the promisee, who must be shown to have honestly held a belief that they were not bound to perform or that they had a valid cause of action on the contract.¹⁵² This is a vastly complex evidentiary task for any court to undertake, the attendant dangers of which are well known.¹⁵³ Moreover, with little ingenuity the cunning promisee could easily construct the facade of genuine belief in almost any factual circumstance.

contract modification enforceable. And slight consideration is consistent with coercion. To surrender one's contractual rights in exchange for a peppercorn is not functionally different from surrendering them for nothing'.

148 J W Carter, E Peden and G J Tolhurst, *Contract Law in Australia* (Butterworths, 5th ed, 2007) 134; Paterson, Robertson and Duke, above n 134, 106; Dan 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, 398.

149 [2007] 1 SLR 853, [30]; cited in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332 at 377.

150 Craig Ulyatt, 'Should Consideration Be Required for the Variation of Contracts?' (2002) 9(3) *Auckland University Law Review* 883, 910; Sir Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Press, 2002) 21; Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 12th ed, 2007) 103. Lord Justice Purchas noted in *Williams v Roffey* that *Stilk v Myrick* might well have been decided differently if tried today (at [1991] 1 QB 1 at 21). One need only recall the facts to see that the ship captain must surely have received a factual benefit by way of being able to navigate his ship home safely.

151 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 16 (Glidewell LJ), 18 (Russell LJ), 21 (Purchas LJ).

152 *Wigan v Edwards* (1973) 1 ALR 497, 512-13 (Mason J).

153 Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94(5) *Yale Law Journal* 997, 1040; Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 12th ed, 2007) 1.

The judicial use of the mutual rescission/replacement device also involves probing into the subjective intentions of the parties and gives rise to similar problems. As Brody argues: ‘Frequently there is not even the slightest hint that the parties feel themselves totally relieved from their contractual obligations. At no point do the parties believe that either of them may abandon the contract with impunity’.¹⁵⁴

The function of the doctrine of waiver in the context of contract modification remains patently unclear, and promissory estoppel, being an equitable doctrine, is available only at the court’s discretion and may not even apply if its various elements are not satisfied. Moreover, like the practical benefit principle, these are judicial devices the effects of which can only be determined by the courts post-contract.

And then there is the seal. The seal is commonly used where there is doubt as to whether a promise is supported by consideration and therefore enforceable.¹⁵⁵ Whilst seals retain importance, particularly for property transactions and settlement of disputes, they are nonetheless an antiquated remnant of centuries past and a cumbersome formality for anyone not using a lawyer to document their contractual arrangements.

There might well be a plethora of exceptions to the existing legal duty rule and methods of satisfying the consideration requirement for unilateral contract modifications, but one must necessarily ask *why*. If the rule mandating consideration to change an agreement is so important, why are contractual parties and the courts constantly dodging or finding novel ways of satisfying it?

It is true that this rule serves a critical function: it guards against extortion in modification cases by insisting that any purported variation be supported by consideration from *each* party.¹⁵⁶ It acts as a preliminary safeguard against contractual impropriety by rendering unenforceable at the outset any modification of an existing contract which confers additional benefits on one party who has tendered nothing extra in return. This provides a ‘simple and uniform test’ of enforceability¹⁵⁷ and helps to distinguish between bona fide renegotiations and blackmail which, in Corbin’s famous words, ‘separate[s] the sheep from the

154 Burton F Brody, ‘Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation’ (1975) 52(2) *Denver Law Journal* 433, 473.

155 Paterson, Robertson and Duke, above n 134, 113.

156 ‘[The existing legal duty rule] gives no comfort to a party who by merely threatening a breach of contract seeks to secure an additional contractual benefit from the other party on the footing that the first party’s new promise of performance will provide consideration for that benefit’: *Wigan v Edwards* (1973) 1 ALR 497 at 512 (Mason J). See also *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 741 (Santow J); *United States of America v Stump Home Specialties Manufacturing Inc* 905 F (2d) 1117 at 1121 (1990) (Posner J); Lindy Willmott, Sharon Christensen and Des Butler, *Contract Law* (Oxford University Press, 2nd ed, 2005) 162; Seddon and Ellinghaus, above n 23, 209-10.

157 K O Shatwell, ‘The Doctrine of Consideration in the Modern Law’ (1954) 1 *Sydney Law Review* 289, 329.

goats'.¹⁵⁸

But the rule suffers from a glaring flaw: it is both underinclusive, in failing to capture extorted modifications concealed through the use of nominal consideration; and overinclusive, in striking down one-sided modifications that 'do not offend the tenets of the economic duress doctrine'.¹⁵⁹ In presupposing that all unilateral variations are the product of illegitimate pressure and striking them down unless consideration is established, the law thus 'frustrate[s] the intentions of the parties in cases of genuine adjustments of obligations'.¹⁶⁰ Little wonder then, that the number of expedients utilised to escape the rule continues to balloon.

'There comes a time', as Cartwright says, 'when the exceptions to a rule become so well developed that one must begin to reconsider the validity of the rule itself'.¹⁶¹ The conditions of our modern economy, operating in a fast-paced and technological society, demand that parties be permitted to modify their agreements with as little encumbrance as possible. The consideration requirement is little more than a stubborn obstacle impeding such vital exchanges. As Justice Paul Finn writes:

There is no requirement of consideration [in civil legal systems] as generally obtains in common law systems. But as is well recognised in common law systems, the impediment posed by the consideration requirement becomes most apparent in practice in relation to modification (or variation) of a contract and especially of long-term or complex contracts – hence the attempts to manufacture consideration or else the resort to such expedients as reliance upon the doctrines of estoppel, election or waiver where contracting parties have apparently departed from the strict terms of their contract.¹⁶²

158 Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? – Recent Noteworthy Decisions' (1918) 27 *Yale Law Journal* 362, 373. This phrase has Biblical origins: *Matthew* 25: 31-46.

159 *NAV Canada v Greater Fredericton Airport Authority Inc.* (2008) 290 DLR (4th) 405, 424 (Robertson JA); Mark B Wessman, 'Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration' (1996) 29 *Loyola of Los Angeles Law Review* 713, 746; Robert A Hillman, 'Contract Modification under the Restatement (Second) of Contracts' (1982) 67 *Cornell Law Review* 680, 685.

160 Collins, above n 55, 318.

161 John Cartwright, 'The English Law of Contract: Time for Review?' (2009) 2 *European Review of Private Law* 155 at 175. Hillman goes so far as to suggest that frustrating rules such as the requirement of consideration for a modification might even discourage parties from entering into contractual relationships: Robert A Hillman, 'Contract Modification under the Restatement (Second) of Contracts' (1982) 67 *Cornell Law Review* 680, 681.

162 Justice Paul Finn, 'Internationalisation or Isolation: The Australian Cul De Sac? The Case of Contract' in M Hiscock and W Van Caenegem (eds) *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar, 2010) 145, 154.

It is crucial that the law focusses more on facilitating exchange than over-regulating and even inhibiting it.¹⁶³ The more sensible option is to have an effective rule, as opposed to an elaborate collection of effective exceptions to an *ineffective* rule. What is necessary, therefore, is a ‘flexible product’ which meets the needs of contractual parties; ‘a product which will allow renegotiation in the light of changed circumstances but also one that will protect them from extortion’.¹⁶⁴

As we have seen there are numerous methods of satisfying the consideration requirement to give legal force to a contract variation. But this doesn’t mean it is *easy* to change a contract. At first this sounds paradoxical, but consider the following. Such methods are only worthwhile if contractual parties are actually *aware* of them. Countless empirical studies across various industries,¹⁶⁵ notably Macaulay’s pioneering analysis in 1963,¹⁶⁶ demonstrate that people typically do not structure and administer their agreements according to the law of contract and seldom resort to its processes when disputes arise. Consequently, ‘the enforceability of sensible contractual variations will often depend on whether the party benefiting was legally advised’.¹⁶⁷ If parties don’t know the options available to them, and don’t have competent legal counsel to advise them of such, then those options make the renegotiation process no more flexible.

These methods, even if known to the parties, often come at some cost. Utilising a deed, proffering new consideration (nominal or otherwise) or rescinding and replacing a contract all involve expense – sometimes considerable – and, of course, effort. The ‘practical benefit’ and ‘compromise/forbearance’ options cannot be facilitated by the parties as such; these are judicial devices which will come to a party’s aid if the facts support their case and may therefore cost at least the price of litigation.

Sometimes it might not be practical or even possible to use these options. Rescission and replacement, for example, might be hindered by statutory requirements and taxation implications.¹⁶⁸ The use of a deed or nominal consideration mightn’t assist

163 Cheng Han Tan, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17 *Singapore Academy of Law Journal* 566, 579.

164 Richard Hooley, ‘Consideration and the Existing Duty’ [1991] *Journal of Business Law* 19, 34. Cf John Gava, ‘Can Contract Law be Justified on Economic Grounds?’ (2006) 25 *University of Queensland Law Journal* 253, 265.

165 See, eg, Lisa Bernstein, ‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21(1) *Journal of Legal Studies* 115; James J White, ‘Contract Law in Modern Commercial Transactions, An Artefact of Twentieth Century Business Life?’ (1982) 22 *Washburn Law Journal* 1; Thomas M Palay, ‘Comparative Institutional Economics: The Governance of Rail Freight Contracting’ (1984) 13 *Journal of Legal Studies* 265.

166 Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28(1) *American Sociological Review* 55.

167 John Land, ‘The Enforceability of Contractual Variations: *Moyes & Groves Ltd v Radiation New Zealand Ltd*’ (1985) 15 *Victoria University of Wellington Law Review* 287, 292.

168 J W Carter, Andrew Phang and Jill Poole, ‘Reactions to *Williams v Roffey*’ (1995) 8 *Journal of Contract Law* 248, 251.

a party seeking equitable relief.¹⁶⁹ Contractual clauses providing a mechanism for change are becoming more commonplace, but cases such as *Commonwealth v Crothall Hospital Services (Aust) Ltd*¹⁷⁰ demonstrate that these are far from perfect. There is, after all, ‘a limit to human foresight’¹⁷¹ and parties may even neglect these clauses despite them attempting to cover the field of potential contingencies. In sum, reliance upon the various available expedients to satisfy the requirement of consideration for unilateral contract variations can be seen as merely delaying the development of a more appropriate test of legal enforceability.¹⁷²

MAKING RENEGOTIATION EASIER: A SUGGESTION FOR REFORM

The ideal test would enforce all contract modifications agreed between parties, denying them legal effect only if procured by economic duress, undue influence or similarly unconscionable behaviour. This view has much judicial¹⁷³ and academic¹⁷⁴ support. It is the approach taken by the US *Uniform Commercial Code* (UCC), § 2-209(1) of which reads: ‘An agreement modifying a contract within this Article needs no consideration to be binding’.¹⁷⁵ Article 3.2 of the UNIDROIT *Principles of International Commercial Contracts*, developed by the Governing

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- 169 Ibid.
- 170 (1981) 36 ALR 567. Crothall was engaged by the Commonwealth Government to clean buildings occupied by the Department of Defence in Canberra for the sum of \$158,492 per annum. The contract contemplated variations in the contract price due to variations in wages paid and areas cleaned. The parties enjoyed a seven-year working relationship during which Crothall, at certain times, claimed increased fees for its services. The Commonwealth paid these sums but later terminated the agreement and sought to claim what it contended were ‘overpayments’ miscalculated under the variation clause. The Commonwealth’s claim was dismissed, the Federal Court holding that, notwithstanding how they were calculated, the inflated invoices submitted by Crothall constituted an offer to vary the contract which was accepted by the Commonwealth’s payment of these invoices (at 580-1 per Ellicott J, Blackburn and Deane JJ concurring).
- 171 Cheng Han Tan, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17 *Singapore Academy of Law Journal* 566, 579.
- 172 Craig Ulyatt, ‘Should Consideration Be Required for the Variation of Contracts?’ (2002) 9(3) *Auckland University Law Review* 883, 899.
- 173 See, eg, *United States of America v Stump Home Specialties Manufacturing Inc* 905 F (2d) 1117, 1122 (1990) (Posner J); *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 744 (Santow J); *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23, 45-6.
- 174 See, eg, Varouj A Aivazian, Michael J Trebilcock and Michael Penny, ‘The Law of Contract Modifications: The Uncertain Quest for a Benchmark of Enforceability’ (1984) 22 *Osgoode Hall Law Journal* 173, 179; Edwin W Patterson, ‘An Apology for Consideration’ (1958) 58 *Columbia Law Review* 929, 937; Rembert Meyer-Rochow, ‘The Requirement of Consideration’ (1997) 71 *Australian Law Journal* 532, 548-9.
- 175 This provision is tempered by a ‘good faith’ requirement. The official comment to this Section states: ‘Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding. However, modifications made thereunder must meet the test of good faith imposed by this Act’. The applicable good faith provisions include §§ 1-304 (‘Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement’) and 2-103(1)(j) (‘*Good faith* means honesty in fact and the observance of reasonable commercial standards of fair dealing’).

Council of the International Institute for the Unification of Private Law in 2004,¹⁷⁶ states: ‘A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement’. A similar sentiment can be found in Article 29(1) of the *United Nations Convention on Contracts for the International Sale of Goods 1980*. It is the approach of the civil legal systems, including those of France,¹⁷⁷ Italy¹⁷⁸ and Spain.¹⁷⁹

This is all hardly surprising. Presupposing that every modification was extracted through extortionate means is a markedly defeatist stance for the law to take. It reflects the outmoded judicial mentality of 19th Century England. The consideration requirement is not unlike the unwanted party guest – once invited but now an annoyance no longer welcome. It is a dinosaur, a relic of centuries past which often nonsensically defies the desires of contractual parties. As Steyn argues:

The question may be asked why the law should refuse to sanction a transaction for want of consideration where parties seriously intend to enter into legal relations and arrive at a concluded agreement. If the court refuses to enforce such a transaction for no reason other than that the parties neglected to provide for some minimal or derisory consideration, is it not arguably a decision contrary to good faith and the reasonable expectations of the parties?¹⁸⁰

The Anglo-Australian doctrine of economic duress is now sufficiently developed and capable of policing contractual modifications and guarding against extortion.¹⁸¹ As Purchas LJ pointed out in *Williams v Roffey*, the modern modification cases ‘tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement’.¹⁸²

176 This instrument was endorsed by the United Nations Commission on International Trade Law (UNCITRAL) in 2007.

177 *Code Civil des Français 1804*, Article 1108.

178 *Il Codice Civil Italiano*, Article 1325.

179 *Código Civil Español*, Articles 1274-1277.

180 Johan Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *Law Quarterly Review* 433, 437.

181 Whilst there have been relatively few Australian authorities applying the doctrine of economic duress, it has generally found acceptance in this jurisdiction since the late 18th Century: Andrew Stewart, ‘Economic Duress – Legal Regulation of Commercial Pressure’ (1984) 14 *Melbourne University Law Review* 410, 416. The doctrine is now well-developed courtesy of a series of pivotal English decisions in the last quarter of the 20th Century: *Occidental Worldwide Investment Corps v Skibs A/S Avanti (The ‘Siboen’ and the ‘Sibotre’)* [1976] 1 Lloyd’s Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705; *Pao On v Lau Yiu Long* [1980] AC 614; *Universe Tankships Inc. of Monrovia v International Transport Workers Federation* [1983] AC 366. This being said, the scope of the doctrine remains unclear: see, for example, the contrasting views in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 and *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 as to the requirement of ‘illegitimate pressure’ amounting to compulsion of the will of the victim.

182 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, 21.

If change is going to occur, it is unclear which institution is best placed to set the wheels in motion. Some contend the courts are best-equipped to do so¹⁸³ whilst another school claims it is strictly a job for the legislature.¹⁸⁴ Others take a middle ground and say either approach is fine so long as change occurs.¹⁸⁵ This view, it is argued, is most correct. It seems superfluous to labour the point, for a succinct and appropriate principle can be expressed either through statute or as a principle of the common law. The suggested model reads as follows:

- (a) An agreement modifying a contract does not require consideration to be binding.
- (b) If an agreed modification is proven to have been procured by duress, fraud, undue influence or unconscionable conduct on the part of a party, the modification is voidable at the option of the aggrieved party. This right of election remains subject to any common law and statutory bars to rescission.¹⁸⁶
- (c) The onus rests upon the party alleging that the modification was procured by any such unlawful means described in (b) to prove that it was so.

The use of the term ‘good faith’ has purposely been avoided in lieu of more established doctrines (such as economic duress and unconscionability). The definition, content and scope of the good faith doctrine is uncertain and has caused immense difficulties for the English and Australian courts¹⁸⁷ and for the US courts applying § 2-209(1) of the UCC.¹⁸⁸ The onus of proof has also been placed on the

183 See, eg, B J Reiter, ‘Courts, Consideration and Common Sense’ (1977) 27 *University of Toronto Law Journal* 439, 510.

184 See, eg, Meyer-Rochow, above n 57, 548; F M B Reynolds and G H Treitel, ‘Consideration for the Modification of Contracts’ (1965) 7 *Malaya Law Review* 1, 21.

185 Edwin W Patterson, ‘An Apology for Consideration’ (1958) 58 *Columbia Law Review* 929, 963.

186 It is an established principle that duress renders a contract *voidable* not void: *Pao On v Lau Yin Long* [1980] AC 614, 634. Generally the same holds for contracts affected by fraud, undue influence or unconscionable conduct: see, eg, Paterson, Robertson and Duke, above n 134, 613, 707, 721, 753; Seddon, Bigwood and Ellinghaus, above n 23, 543, 774, 804-5. These doctrines would, of course, operate in the absence of an express legislative provision or judicial statement of principle akin to the model proposed. However, express stipulation that these doctrines (as opposed to the doctrine of consideration) are to serve the function of detecting extortion in contract modifications, and renders the contract in question voidable not void, serves to eliminate any doubt and provides firm guidance to parties and to the courts as to the sorts of behaviour prohibited when determining the validity of a post-contractual variation, and the subsequent status of the agreement in question. The mere presence of sufficient consideration is no longer the determinative factor. Moreover, it also rejects any ‘good faith’ assessment which, as will be discussed further on, has caused great difficulty in the United States under the UCC model.

187 See the discussion in Seddon and Ellinghaus, above n 23, 446-60.

188 Robert A Hillman, ‘Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress’ (1979) 64 *Iowa Law Review* 849; Robert A Hillman, ‘Contract Modification in Iowa – *Recker v Gustafson* and the Resurrection of the Preexisting Duty Doctrine’ (1980) 65 *Iowa Law Review* 343, 349, 356; Timothy J Muris,

complainant in accordance with logic and civil legal custom.

The suggested model or similar, whether legislatively or judicially prescribed, would make the renegotiation process simpler for contractual parties seeking efficient modifications of their contracts with protections against extortion in place. The benefits of this are threefold: (1) parties will know where they stand from the outset when contemplating and giving effect to contract modifications; (2) flowing from the first benefit, this will likely discourage or dispense with the need for litigation and ease the burden on our backlogged judiciary; (3) parties will be able to quickly and easily amend their agreements to combat changes in circumstances without overzealous scrutiny from the law.

CONCLUSION

This article has sought to cast new light on Carter's assertion that the classical law of contract lacks any rules as to renegotiation. It does not suggest that it was 'wrong' but rather that the limited case law on point suggests that the rules of formation also apply to modification, certainly with respect to consideration. In Furmston's view, this was a mistake from the start,¹⁸⁹ although it is arguable the English High Court had little other options available to it at the time *Stilk v Myrick* was decided. There was no established doctrine of economic duress. The British maritime industry was at the mercy of dissident seamen. Consideration was the answer in 1809, but times have changed. The challenge for the legislature or the courts of today is to acknowledge this fact and remove the impediments which currently inhibit efficient contract modifications. The law should not avoid scrutinising variations altogether. Rather, it should go only so far as necessary to protect parties without hindering their efforts to contract in a rapidly moving economy. The secret's out: there are rules for renegotiating contracts. But as Darth Vader and Luke Skywalker will tell you, they need to change. To parliament, and the courts, may the force be with you.

189 'Opportunistic Behaviour and the Law of Contracts' (1981) 65 *Minnesota Law Review* 521, 541; Kevin M Teeven, 'Development of Reform of the Preexisting Duty Rule and its Persistent Survival' (1996) 47(2) *Alabama Law Review* 387, 450-1; Henry Mather, 'Contract Modification under Duress' (1982) 33(4) *South Carolina Law Review* 615, 623-5. M P Furmston, 'Commentary on "The Renegotiation of Contracts"' (1998) 13 *Journal of Contract Law* 210, 210.