

Contractual variations and promises to accept less: pragmatism in the Court of Appeal

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Introduction

The decision of the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*¹ is important for its treatment of two fundamental principles of contract law. First, the court confirmed that a contractual “non-oral variation” clause, that is, a clause limiting contractual variations to a prescribed written form, is not binding in terms and thus does not preclude an oral variation. In so holding, the court applied the recent reasoning of a differently constituted Court of Appeal in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*.² Second, the court in *MWB* confirmed that, in some circumstances, a practical benefit obtained by a creditor in promising to accept a part payment of a debt is capable of amounting to good consideration – a result hitherto thought precluded by the rule in *Foakes v Beer*.³

In reaching these conclusions, the court in *MWB* adopted a pragmatic approach weighing heavily in the favour of party autonomy and the pursuit of a commercially sensible outcome. The treatment of non-oral variation clauses and the approach to consideration are considered in this article.

Facts and decision

MWB Business Exchange Centres Ltd (“MWB”) managed office space. Rock Advertising Ltd (“Rock”) was in the business of providing marketing services. Rock had for some years occupied, as licensee, premises managed by MWB. In August 2011, Rock expanded its business and entered into a fresh written agreement with MWB for larger premises, at an increased licence fee and for a term of 12 months running from 1 November 2011. Under the new agreement, Rock was to pay a licence fee of £3,500 (excluding VAT) per month for the first three months, increasing from February 2012 to £4,433 (excluding VAT) monthly.

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¹ [2016] EWCA Civ 553.

² [2016] EWCA Civ 396.

³ (1884) 9 App. Cas. 605 HL.

By late February 2012, Rock had been unable to meet its licence fee payment obligations and had incurred arrears and other charges exceeding £12,000. MWB thus sought to exercise its right to lock Rock out the premises and gave notice to terminate.

It was Rock's case that, on 27 February 2012, an oral agreement had been reached with MWB to re-schedule the licence fee payments due for the period covering February-October 2012 ("the revised payment schedule"). Specifically, Rock contended that it had been agreed that Rock would, for the first few months, pay less than it was due to pay, and would thereafter pay more, such that the arrears would eventually be cleared. Thus, on 27 February, Rock made a payment of £3,500 to MWB, with this payment representing the first under the revised payment schedule arrangement. On 29 February 2012, MWB sought to resile from the revised payment schedule and treat it as no more than a "proposal". The trial judge, His Honour Judge Moloney, rejected this attempt and held that the revised payment schedule had been agreed in the way contended by Rock.⁴

The first question was whether there could be an effective oral variation notwithstanding the presence of a non-oral variation clause in the parties' contract. The clause, Clause 7.6, was in terms that:

"This licence sets out all of the terms as agreed between MWB and the licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

It was MWB's case that Clause 7.6 precluded any contractual variation, save where the variation had been made in writing and signed by both parties. As the revised payment schedule had not taken this form, MWB argued that it could not amount to a binding variation.

In disagreement with the trial judge, the Court of Appeal (Kitchin, McCombe, and Arden LJ) held that such a clause did not preclude an oral variation of the contract and, as such, found that the revised payment schedule was, in principle, capable of taking effect as a binding variation. For an effective variation, however, it was necessary that valid

⁴ The trial judge found that MWB attempted to resile from the arrangement because its credit controller, Miss Evans, had informed her superior of the arrangement and he had rejected it. The judge held that Miss Evans nonetheless did agree to the revised payment schedule and, moreover, had ostensible authority to commit MWB to the agreement: *MWB* [2016] EWCA Civ 553 at [8].

consideration could be found to support it. The court held that such consideration was located in the practical benefit obtained by MWB in entering into the revised payment schedule arrangement. It followed that the arrangement was binding; to the effect that MWB was bound to accept less for the relevant period covered by the revised agreement than it was originally entitled to.

The analysis of the variation issue

The question whether an agreement containing a non-oral variation clause might nonetheless be varied other than in accordance with the clause had arisen recently before a differently constituted Court of Appeal in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*.⁵ *Globe Motors* concerned an exclusive supply arrangement between TRW Lucas and Globe Motors. The main issue was whether TRW Lucas had been in breach of the agreement by purchasing a certain product from another party. The Court of Appeal held there had been no breach, because the product in question did not fall within the scope of the exclusivity agreement.

A further issue, however, concerned whether a subsidiary of Globe Motors, known as Porto, would have had a cause of action against TRW Lucas, on the basis the parties had over a period of time treated Porto as having been a party to the agreement. TRW Lucas maintained that there could be no such action because a non-oral variation clause in the exclusivity agreement required that any variation be made in writing with reference to the agreement and signed by both parties. Thus, it was said, to allow Porto a right of action would amount to a variation of the main contract by conduct that would be contrary to the relevant clause. Against that, it was argued that the parties had treated Porto as a party to the agreement over a considerable period of time and their doing so amounted to an amendment to the agreement, notwithstanding the non-oral variation provision.

The finding that there had been no breach by TRW Lucas made a decision on the variation issue strictly unnecessary. Nonetheless, Beatson LJ felt compelled to address it in the light of two conflicting Court of Appeal authorities on the point, as well as the fact full argument had been made before the court. As to the conflicting authorities, the earliest was *United Bank Ltd v Asif*,⁶ in which the Court of Appeal had held that a non-oral variation clause was effective in accordance with its terms, thereby limiting variations to the form expressly stated

⁵ [2016] EWCA Civ 396.

⁶ Unreported (Court of Appeal, 11 February 2000).

in the clause. The second authority was *World Online Telecom Ltd v I-Way Ltd*.⁷ There, in contrast, it had been held that a contract could, in principle, be varied orally, notwithstanding a non-oral variation provision. Both cases concerned appeals over summary judgment. The court in *World Online* had not referred to *United Bank*.

Beatson LJ's conclusion (with which Underhill and Moore-Bick LJ agreed) was that, in principle, the non-oral variation clause did not preclude the possibility that the contract might be varied other than in accordance with the clause. His Lordship was persuaded that a contract containing a non-oral variation provision might nonetheless be varied orally or by conduct, even where such a clause purported to preclude such a variation. In reaching that conclusion, Beatson LJ recognised, as a matter of general principle, that parties should have the freedom to agree whatever terms they choose, whether written, by word of mouth, or by conduct – and just because a contract contained a non-oral variation clause, it did not preclude the parties from later making a new agreement by varying the original one.⁸ Nor was Beatson LJ deterred by the argument that allowing an oral variation in such circumstances might encourage “manufactured allegations of oral agreements”. His Lordship pointed out that such difficulties of proof were not unusual whenever it was claimed that a contract had been formed orally or by conduct, and could be resolved by a determination on the evidence by a trial judge.⁹ As to the conflict between *United Bank* and *World Online Telecom*, Beatson LJ observed that the court was not bound by either decision,¹⁰ but that the weight of support from other authorities was in the favour of *World Online Telecom* and the view that a non-oral variation clause was not conclusive.¹¹

⁷ [2002] EWCA Civ 413.

⁸ *Globe Motors* [2016] EWCA Civ 396 at [100]. Moore-Bick LJ, at [199], similarly noted that “the governing principle ... is that of party autonomy”, before holding: “The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties. If there is an analogy with the position of Parliament, it is in the principle that Parliament cannot bind its successors.”

⁹ *Globe Motors* [2016] EWCA Civ 396 at [108]-[109].

¹⁰ *Globe Motors* [2016] EWCA Civ 396 at [110]-[113], relying on the statement of principle in *Young v Bristol Aeroplane Co* [1944] KB 718 CA.

¹¹ In particular because, following the Court of Appeal's decision on the summary judgment application in *World Online Telecom*, there had been a full trial in the Commercial Court where David Steel J ([2004] EWHC 244 (Comm)) held that there had been an effective oral variation notwithstanding the non-oral variation clause: *Globe Motors* [2016] EWCA Civ 396 at [104], [106]. Other authorities supporting the conclusion included *Chitty on Contracts* (see H.G. Beale (ed.), *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), para.22.045, fn 196); *Energy Venture Partners Ltd v Malabou Oil & Gas Ltd* [2013] EWHC 2118 (Comm) at [271]-[274]; and *Virulite LLC v Virulite Distribution* [2014] EWHC 366 (QB) at [55] (albeit with neither case having had to decide the point). See *Globe Motors* [2016] EWCA Civ 396 at [101]-[107].

The court in *MWB* recognised that the discussion in *Globe Motors* had been obiter.¹² *MWB* argued that there were strong policy reasons for upholding a non-oral variation clause in accordance with its terms and, moreover, that while such a clause would not preclude the operation of doctrines such as waiver or estoppel, these doctrines required proof of an element of unconscionability that was not present on the facts.¹³ Rejecting these arguments, Kitchin LJ considered it to “require a powerful reason” for the court to depart from *Globe Motors* given the detailed analysis in that case, before emphasising the importance of “party autonomy” in allowing parties the freedom to vary existing arrangements as they saw fit.¹⁴ Both McCombe and Arden LJJ agreed with Kitchin LJ’s conclusion. It followed that the contract was, in principle, capable of being varied in the way contended.

Was there any consideration to support the modification?

The second question was whether there was an effective variation on the facts, that is, whether the promise by *MWB* to accept less was supported by consideration. Before addressing the court’s approach to that issue, it is first necessary to recall the law’s general approach to consideration in connection with contractual modifications.

(i) Variations and consideration in English law

Generally, English law has denied the possibility that valid consideration can be found in the performance by a contracting party of something it is already (legally or contractually) bound to do. This rule, the so-called “existing duty rule”, is explained by the fact that such a performance cannot be of any “value in the eye of the law”.¹⁵ Thus, in *Stilk v Myrick*,¹⁶ when a ship master promised to divide the wages of two deserting sailors among the remaining crew members if those remaining members ensured the ship’s return home, the court held that the master was not bound to his word, as returning the ship was something the crew members were already contractually committed to. To enforce the promise necessitated that the remaining members do more than that already contractually required.¹⁷

¹² *MWB* [2016] EWCA Civ 553 at [32].

¹³ *MWB* [2016] EWCA Civ 553 at [33].

¹⁴ *MWB* [2016] EWCA Civ 553 at [34]; agreeing on the latter point with Moore-Bick LJ in *Globe Motors* [2016] EWCA Civ 396 at [119].

¹⁵ *Thomas v Thomas* (1842) 2 Q.B. 851 at 859.

¹⁶ (1809) 2 Camp. 317.

¹⁷ See, e.g. *Hartley v Ponsonby* (1857) 7 El. & Bl. 872; *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] Q.B. 705.

Although *Stilk v Myrick* concerned a promise to pay more money, the existing duty rule led, logically, to the similar conclusion in connection with a creditor's promise to accept a smaller sum in satisfaction of a debt: the debtor's existing payment obligation meant that the part payment of that debt, even if accepted by the creditor, could not preclude the creditor's later successfully suing for the balance. That was the position in *Pinnel's Case*,¹⁸ where it was recognised that such a promise was unenforceable because "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole".

The rule in *Pinnel's Case* was confirmed in *Foakes v Beer*.¹⁹ In that case, Julia Beer had obtained a judgment on a debt against Dr Foakes. The parties agreed that the debt would be repaid through an immediate payment and further instalments, and in return Julia Beer would take no action on the judgment. Once Dr Foakes had repaid the sum due, Julia Beer brought an action for interest on the judgment debt. The House of Lords held that she was entitled to the interest claimed and her costs, with the promise not to take any action to enforce the debt being unenforceable for want of consideration.

Against this background, an important turning point came in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*.²⁰ The defendants were main contractors on a building contract for the refurbishment of a block of flats owned by a housing association. The defendants sub-contracted the carpentry work to the claimant carpenter. The carpenter fell into financial difficulty, which put his work for the defendants at risk of not being completed on time, and which would have made the defendants liable via a penalty clause in their contract with the housing association. Accordingly, the defendants promised to make additional payments on the timely completion of each flat. When the carpenter sought to hold the defendants to that promise, the defendants refused to pay, claiming the carpenter had done no more than it was contractually bound to do. The defendants' counsel had accepted that the defendants had, as a result of the promise to pay more, obtained certain benefits, namely: (i) ensuring that the carpenter continued to work and did not stop in breach of the sub-contract; (ii) avoiding the penalty for delay; and (iii) avoiding the trouble and expense of engaging somebody else to complete the carpentry work.²¹ The Court of Appeal held that the carpenter was entitled to the extra payment. The statement of principle by Glidewell LJ is oft-cited. In summary, his Lordship recognised that if, in the context of a promise of additional payment under a

¹⁸ (1602) 5 Co. Rep. 117a.

¹⁹ (1884) 9 App. Cas. 605 HL.

²⁰ [1991] 1 Q.B. 1 CA.

²¹ *Williams v Roffey* [1991] 1 Q.B. 1 CA at 10-11.

contract, the promisor, as a result of the promise, obtained “in practice a benefit” (or obviated a disbenefit) that benefit would, in principle, be capable of amounting to good consideration for the purpose of enforcing the promise.²²

The more pragmatic approach in *Williams v Roffey* soon gave rise to the question whether its scope extended to the situation in *Foakes v Beer*, namely a promise by a creditor to accept a smaller sum in satisfaction of a debt. In *re Selectmove Ltd*,²³ a company owed tax payments to the Inland Revenue. The company’s director had met with the collector of taxes and alleged that at that meeting it had been agreed that the company would pay the arrears through monthly instalments. It was the company’s case, relying on *Williams v Roffey*, that there was valid consideration for the agreement, because the Revenue received a practical benefit via the likelihood of it recovering more than it would have done by putting the company into liquidation. Peter Gibson LJ saw “the force of the argument”, but ultimately rejected it because such an extension would be to effectively leave *Foakes v Beer* “without any application.”²⁴

(ii) The approach to consideration in *MWB* and its implications

Turning now to *MWB*, having established that the contract was, in principle, capable of being varied orally, the next question was whether there was an effective variation on the facts, that is, whether the revised payment schedule arrangement had been supported by consideration. *MWB* argued that the finding of consideration was precluded by the rule in *Foakes v Beer* and, in so far as *MWB* had obtained any practical benefits from the arrangement, any such benefits were just the kind that had been contemplated in *Foakes v Beer* and *re Selectmove* and rejected as not being good consideration in those cases.

Despite having been “initially much attracted” by that argument, Kitchin LJ rejected it. His Lordship held that consideration to support the modification could be found via two “beneficial consequences” for *MWB* that had been identified by the trial judge following the oral agreement, which Kitchin LJ summarised in terms that:

“First, *MWB* would recover some of the arrears immediately and would have some hope of recovering them all in due course. But secondly and importantly, *Rock* would

²² *Williams v Roffey* [1991] 1 Q.B. 1 CA at 15-16.

²³ [1995] 1 W.L.R. 474 CA.

²⁴ *re Selectmove* [1995] 1 W.L.R. 474 CA at 481.

remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB.”²⁵

Drawing on this, Kitchin LJ considered there was a “commercial advantage” for each party in agreeing the revised payment schedule. Thus, MWB would receive an immediate payment of £3,500 while being more likely to recover more than it otherwise would do if it decided to enforce the terms of the original agreement; and, moreover, it would retain Rock as licensee. As for Rock, it would remain in occupation of the property, continue its business, and have the opportunity to overcome its financial difficulties.²⁶ On this basis, the practical benefits to be derived from the revised payment schedule were of a kind different to those that had been contemplated and rejected in *Foakes v Beer* and *re Selectmove*. Critically, the advantage to MWB extended beyond the simple fact of receiving a prompt payment and entailed the collateral benefit of retaining Rock as licensee. Kitchin LJ explained:

“MWB derived a practical benefit which went beyond the advantage of receiving a prompt payment of a part of the arrears and a promise that it would be paid the balance of the arrears and any deferred licence fees over the course of the forthcoming months. This is therefore a case where, as in *Williams v Roffey*, Rock's immediate payment of £3,500 and its agreement to perform its obligations under the revised payment schedule conferred a practical benefit on MWB which amounted to good consideration”.²⁷

Arden LJ also emphasised the advantages gained by MWB in the premises not becoming unoccupied. Her Ladyship referred to the trial judge’s finding as to the possible commercial benefit to MWB of retaining Rock as an existing tenant, even if Rock was a “questionable payer”, as this enabled MWB to keep alive the possibility of recovering its arrears, rather than “getting rid of [Rock], probably saying goodbye to the arrears and allowing the property to stand empty for some time at further loss to themselves.”²⁸ According to Arden LJ, MWB had obtained a practical benefit via Rock’s continued occupation of the property, as this gave MWB the commercial advantage of “avoiding a void”, that is, avoiding having “unoccupied

²⁵ *MWB* [2016] EWCA Civ 553 at [47].

²⁶ *MWB* [2016] EWCA Civ 553 at [48].

²⁷ *MWB* [2016] EWCA Civ 553 at [48].

²⁸ *MWB* [2016] EWCA Civ 553 at [73].

and therefore unproductive property, which may cause loss in the form of loss of rent and in other ways.”²⁹

It was on this basis that Arden LJ distinguished *re Selectmove*. Thus, having Rock continue its occupation elevated the nature of the benefit above and beyond a benefit that comprised the mere fact of the receipt of *some* payment as a lesser sum. In other words, it mattered that MWB had agreed the revised payment schedule for reasons of its own interests, namely to “avoid a void”, and this critical feature enabled the finding of a practical benefit and good consideration.³⁰ In contrast, any benefit in *re Selectmove* amounted to no more than the promise to pay part of the debt which, being what the debtor was already bound to do, could not be valid consideration. Her Ladyship summarised:

“[I]t is apparent that MWB pragmatically accepted Rock's financial problems and was not an unwilling party to the renegotiations and indeed that it desired a settlement if one could be negotiated which would mean that Rock would go back into occupation. This case was not therefore the case of a trade creditor who is faced with a part payment plan which it has no commercial interest in accepting.”³¹

It followed that the relevant distinction, and the finding of valid consideration, turned on the question whether a benefit of something more than the mere receipt of the payment itself could be found. In *MWB*, that “something more” was found in the benefit to MWB of Rock’s continued occupation of the property.

It was on this basis that Arden LJ reconciled her analysis with *Foakes v Beer* and *re Selectmove*. In those cases, any practical benefit to the creditor was characterised as no more than the mere fact of the payment itself which, without more, was not enough. According to Arden LJ, in *re Selectmove* there had been “no finding by the trial judge that there was any *extra benefit* to the Inland Revenue in having an instalment agreement with the taxpayer.”³² Thus, the practical benefit issue had only arisen because it had been argued that there was valid consideration in the fact the instalment agreement was beneficial to the creditor “in the

²⁹ *MWB* [2016] EWCA Civ 553 at [72]. A point of divergence between Arden LJ and Kitchin and McCombe LJ was on the precise mechanics of the variation. Arden LJ considered the revised payment schedule to amount to a “collateral unilateral contract”: *MWB* [2016] EWCA Civ 553 at [88]-[90]. Kitchin LJ, at [49], preferred to express no view on that possibility as it had not been argued and held that the variation was binding providing Rock continued to meet its obligations under it. McCombe LJ, at [67], agreed with Kitchin LJ and preferred “not to base [his] decision” on the finding of a collateral unilateral contract.

³⁰ *MWB* [2016] EWCA Civ 553 at [86].

³¹ *MWB* [2016] EWCA Civ 553 at [76].

³² *MWB* [2016] EWCA Civ 553 at [84] (emphasis added).

sense that it had a promise to make payments in discharge of the existing debt in accordance with an agreed schedule, which would obviate the need for it to take steps to enforce payment of the amount owed to it”. Arden LJ said it was this that Peter Gibson LJ had rejected in *re Selectmove*.³³

It was on a similar basis that Arden LJ explained *Foakes v Beer*. In that case, Lord Blackburn, in what was in effect a dissenting speech, had expressed disagreement with the majority decision. His Lordship observed:

“[A]ll men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.”³⁴

The logic of the proposition was that it is often more beneficial for a creditor to have the certainty *some* payment, even if a smaller sum than it is otherwise contractually entitled to – the “bird in the hand” argument. To this, Arden LJ considered that the court in *re Selectmove* had “held that the practical benefit to the creditor of ... ‘a bird in the hand rather than two in the bush’ did not mean that a contract to pay a lesser sum than originally agreed was enforceable.”³⁵ This enabled *re Selectmove* to be distinguished from *MWB*, with the former standing only for the proposition that “the benefit which a creditor obtains from a promise to pay an existing debt by instalments is not good consideration in law.”³⁶ Arden LJ held that this meant *MWB* was in line with *Williams v Roffey* and the finding in that case that a practical benefit could be good consideration.³⁷ Thus, by analogy with *Williams v Roffey*,

³³ *MWB* [2016] EWCA Civ 553 at [84], and further noting: “Peter Gibson LJ could not reject the general principle that, where there was *other consideration*, which the law recognised was sufficient to support a contract, that was good consideration for a promise” (emphasis added). In *MWB* [2016] EWCA Civ 553 at [85] Arden LJ summarised: “My conclusion that *Selectmove* can be distinguished in this case is not inconsistent with *Foakes v Beer*, where the only suggested consideration was the debtor’s promise to pay part of his existing debt.”

³⁴ *Foakes v Beer* (1884) 9 App. Cas. 605 HL at 622.

³⁵ *MWB* [2016] EWCA Civ 553 at [83].

³⁶ *MWB* [2016] EWCA Civ 553 at [84].

³⁷ Arden LJ also noted that this distinction offered an explanation as to why the court in *Williams v Roffey* did not refer to *Foakes v Beer*: *MWB* [2016] EWCA Civ 553 at [84].

the simple fact of the defendants' "peace of mind" in having the work completed would not have been enough to amount to valid consideration in that case.³⁸

The analysis in *MWB* is bold, for the reason that *Foakes v Beer* and *re Selectmove* had traditionally been understood to represent the more general preclusion of the finding of valid consideration to support a promise to accept a part payment.³⁹ Certainly it had appeared that in *re Selectmove*, Peter Gibson LJ had dismissed the company's practical benefit argument, not for the narrow reason that there was no such benefit on the facts but, rather, on the more general ground that *Foakes v Beer* precluded the finding of consideration via a practical benefit at all. Thus, his Lordship had considered it "impossible, consistently with the doctrine of precedent, for this court to extend the principle of *Williams's* case to *any circumstances* governed by the principle of *Foakes v Beer*."⁴⁰ This reflected the orthodox view of the relationship between *Williams v Roffey* and *Foakes v Beer*, that is, that the distinction rested (even if unhappily) on the fact the former case was a promise to pay more money, with *Foakes v Beer* being of general application in the context of promises to accept a part payment.

Nonetheless, in addressing the arbitrariness of the difference in treatment between promises to pay more and promises to accept less, *MWB* has much to recommend it. More generally, the Court of Appeal's analysis is to be welcomed for bringing the treatment of the kind of promise in question into line with the law's general reluctance to deny the presence of consideration in relation to promises that were freely made and intended to be acted on.⁴¹

Indeed, the problem of the prior position was easily revealed by the way the existing duty rule could be avoided and valid consideration found. Thus, it has been accepted since *Pinnel's Case* that good consideration could be established by a payment in kind ("the gift of

³⁸ Thus, Arden LJ commented that the conclusion in *Williams v Roffey* "was not just a case of making the building contractor sleep more easily at night about the carpenter's performance of his promise": *MWB* [2016] EWCA Civ 553 at [78].

³⁹ See, e.g., *Re C (a debtor)* [1996] B.P.I.R. 535 CA; John Cartwright, *Formation and Variation of Contracts* (London: Sweet & Maxwell, 2014), para.9.23; *Chitty on Contracts* para.4.119; Edwin Peel, "Part Payment of a Debt is No Consideration" (1994) 110 L.Q.R. 353 at 355.

⁴⁰ *re Selectmove* [1995] 1 W.L.R. 474 CA at 481 (emphasis added).

⁴¹ In *New Zealand Shipping Co. Ltd v A. M. Satterthwaite & Co. Ltd* [1974] [1975] A.C. 154 PC (New Zealand) at 167, Lord Wilberforce noted: "English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration." See also *Williams v Roffey* [1991] 1 Q.B. 1 CA at 18 per Russell LJ (rejecting a "rigid approach" to consideration and recognising that the courts should be ready to find consideration "so as to reflect the intention of the parties") and see too at 21 per Purchas LJ. See generally Cartwright, *Formation and Variation of Contracts*, para.8.28.

a horse, hawk, or robe”) in satisfaction of a debt.⁴² Arden LJ considered this supported the conclusion in *MWB*,⁴³ as did other exceptions to the existing duty rule, including the principle that consideration might arise through the performance of an existing legal duty,⁴⁴ and in the performance of an existing contractual duty owed to a third party.⁴⁵

Another factor in support of the result in *MWB* was the development of the doctrine of promissory estoppel.⁴⁶ Thus, Kitchin LJ traced the doctrine’s development following *Central London Properties Trust Ltd v High Trees House Ltd*;⁴⁷ noting that the analysis of Denning J in that case had gone some way to mitigating the harshness of *Foakes v Beer*. Kitchin LJ observed that, although the general nature of promissory estoppel was that it operated to suspend obligations, it could be used to extinguish an obligation where it would be inequitable to allow the promisor to resile from a promise to accept a reduced payment.⁴⁸

The problem post-*MWB*, however, will be defining when a practical benefit can amount to good consideration. Although the court carved out a commercially sensible exception to *Foakes v Beer*, the problem is that the law continues to deny the relevance of a practical benefit in its most obvious form. Thus, it has been said that:

“[W]here the debtor in fact pays part of the debt in return for the discharge of the balance, the creditor has the advantage of having the cash in hand, rather than having to enforce the debt – which is even more clearly a benefit if there is a risk that the debtor might be unable to pay by the time the legal process to enforce the debt has taken its course. The is not only “benefit” in a very real, practical sense, but appears

⁴² (1602) 5 Co. Rep. 117a. See also the examples in JW Carter, Andrew Phang and Jill Poole, “Reactions to *Williams v Roffey*” (1995) 8 J.C.L. 248 at 250-51; and Cartwright, *Formation and Variation of Contracts*, para.9.21.

⁴³ *MWB* [2016] EWCA Civ 553 at [85].

⁴⁴ *Ward v Byham* [1956] 1 W.L.R. 496 CA; *MWB* [2016] EWCA Civ 553 at [79].

⁴⁵ *Pao On v Lau Yiu Long* [1980] A.C. 614 PC (Hong Kong); *MWB* [2016] EWCA Civ 553 at [79]. Both *Ward v Byam* and *Pao On* had been cited by Glidewell LJ in support of his conclusion in *Williams v Roffey*: [1991] 1 Q.B. 1 CA at 15.

⁴⁶ Rock had argued in the alternative that promissory estoppel precluded *MWB* from going back on its promise. That argument was rejected, for the reason that *MWB* had made Rock aware of its intention to return to the original agreement on 29 February 2012, being only two days after the revised payment schedule promise had been made – and as such it would not have been inequitable for *MWB* to resile: *MWB* [2016] EWCA Civ 553 at [61]-[62].

⁴⁷ [1947] K.B. 130.

⁴⁸ *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 W.L.R. 643 at [37]-[39] per Arden LJ; *MWB* [2016] EWCA Civ 553 at [59]-[60] per Kitchin LJ and at [92] per Arden LJ.

to be recognised as such commercially by the fact that creditors do agree to discount debts in order to secure their payment”.⁴⁹

As noted above, this similar point was recognised by Lord Blackburn in *Foakes v Beer*. The point is also seen in *re Selectmove*, in Peter Gibson LJ’s observation that “[w]hen a creditor and a debtor who are at arm’s length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt *always* see a practical benefit”.⁵⁰

There is an obvious logic to this. When a party freely promises to make an increased payment or to accept a part payment, it will be the pursuit of a benefit that motivates the promise *ab initio*. *MWB* tells us that such a benefit is not enough. Yet, if a practical benefit can, conceptually, amount to good consideration, it is difficult to see why the law should differentiate between one benefit and another. Certainly, this appears at odds with the law’s general reluctance to inquire as to the adequacy of consideration. Indeed, if creditors, “guided by economic imperatives, [prefer] to cut their losses rather than gain a Pyrrhic victory by standing on their legal rights”⁵¹ it is difficult to see why a court should interfere.

Despite this, taken to its logical conclusion, *MWB* suggests that, in principle, a promise to accept a part payment will create a binding obligation in situations generally thought precluded by *Foakes v Beer*. Thus, following *MWB* it appears that consideration can be found where a creditor has a compelling desire to avoid litigation and continue to benefit from a future commercial relationship with the debtor. So too, if a creditor wishes to use an immediate part payment to enter fresh transactions with third parties, it would seemingly obtain a collateral “commercial advantage”⁵² or have a sufficient “commercial interest”⁵³ to be bound. Similarly, it seems good consideration would be found if a creditor’s acceptance of a part payment enabled it to settle its own debt to a third party. And it seems possible that where a creditor develops “a reputation for fairness”⁵⁴ by accepting a part payment and taking no action on a debt, there could be a commercial advantage and valid consideration here too.

⁴⁹ Cartwright, *Formation and Variation of Contracts*, para.9.22 (footnote omitted).

⁵⁰ *Re Selectmove* [1995] 1 W.L.R. 474 CA at 481 (emphasis added). See also Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford: OUP, 2016) at 67-68.

⁵¹ John Adams and Roger Brownsword, “Contract, Consideration and the Critical Path” (1990) 53 M.L.R. 536 at 540.

⁵² *MWB* [2016] EWCA Civ 553 at [48] per Kitchin LJ.

⁵³ *MWB* [2016] EWCA Civ 553 at [76] per Arden LJ.

⁵⁴ As in *Musumeci v Winadell Pty Ltd* (1994) 34 N.S.W.L.R. 723 at 748.

Concluding comments

MWB is to be welcomed for reaching a commercially sensible result and for the court's wish to give effect to what the parties agreed. The emphasis on autonomy and parties' contractual freedom in resolving both the main issues on the facts is a desirable one. When contracting parties have resolved a difficulty pragmatically with a mutually satisfactory solution instead of resorting to litigation, there seems little reason why a court should not defer to that attempt to settle the matter.

More generally, however, it remains that a benefit of no more than the physical receipt of some payment – even at the creditor's desire – will not be enough. It may well be that a more satisfactory solution would be to abandon the need for consideration with modifications to existing contracts. Here, there will, *ex hypothesi*, have been consideration via the contract's formation and with this there seems much less need to insist on a fresh search for consideration in connection with a subsequent modification.⁵⁵ This would promote consistency, avoid technical distinctions based on the characterisation of practical benefits, and prevent judges getting “side-tracked down a conceptual cul-de-sac”⁵⁶ in deciding whether consideration via a practical benefit can be found on a given set of facts. On this approach, concerns as to extortion can be met by the doctrine of economic duress. Indeed, it was on the strength of that doctrine that the Court of Appeal in *Williams v Roffey* felt able to distinguish *Stilk v Myrick*,⁵⁷ and enforce the promise to pay.⁵⁸ Subject to this safeguard, there appears good reason to respect party autonomy and recognise that where contracting parties have freely decided to modify their existing obligations to achieve a commercially sensible solution, such a modification should be enforced.

⁵⁵ See, e.g., *Antons Trawling Co Ltd v Smith* [2003] 2 N.Z.L.R. 23 and the comment at [93] per Baragwanath J that “[t]he importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself”. See also Cartwright, *Formation and Variation of Contracts*, para.9.24.

⁵⁶ Adams and Brownsword (1990) 53 M.L.R. 536 at 542.

⁵⁷ *Williams v Roffey* [1991] 1 Q.B. 1 CA at 21 per Purchas LJ.

⁵⁸ *Williams v Roffey* [1991] 1 Q.B. 1 CA at 13-15 per Glidewell LJ and at 21, 23 per Purchas LJ. See also Adams and Brownsword (1990) 53 M.L.R. 536 at 537, 539; *Chitty on Contracts*, paras.4.070, 4.119; Cartwright, *Formation and Variation of Contracts*, para.9.22.