PRACTICAL BENEFITS AND PROMISES TO PAY LESSER SUMS: RECONSIDERING THE RELATIONSHIP BETWEEN THE RULE IN *FOAKES V BEER* AND THE RULE IN *WILLIAMS V ROFFEY*

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Since the decision of the UK Court of Appeal in *Williams v Roffey* there has been a great deal of academic debate about contract modifications and the validity of viewing a 'practical benefit' as sufficient consideration for a fresh promise. At the heart of these objections lies the notion that the promisor gets no more than that which he or she was originally promised. Similarly, the promisee stands to receive more in exchange for doing nothing more than that which he originally agreed to perform. The modification is clearly one-sided. Yet, it has been widely accepted by the courts as a valid exception to the existing duty rule within the doctrine of consideration. The widespread acceptance of the rule in *Williams* sidesteps a crucial question, one posed by Phang JA in *Gay Choon Ing v Loh Sze Ti*; if a promise to pay more can be binding, then why should a promise to accept less not be binding? This article explores the question of whether the rule in *Foakes* should make way for that in *Williams*.

I INTRODUCTION

It is a well-established rule within the doctrine of consideration that a promise to perform an existing duty is not sufficient consideration for a fresh promise.[1] This rule finds a corollary of sorts in the rule developed in *Foakes v Beer*[2] that a promise to accept a lesser sum in payment of a debt is not binding.[3] Yet, as Chen-Wishart has acutely observed, despite the protestations of the UK Court of Appeal, the practical benefit exception that was established in *Williams v Roffey*,[4] 'clearly overturns the pre-existing duty rule for which *Stilk* v *Myrick* is authority'.[5] How then can the rule in *Foakes v Beer* continue to stand in defiance of the rule in *Williams*?

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1 *Stilk v Myrik* (1809) 170 ER 1168. See also *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422; *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* [1979] Q.B. 705, 713 (Mocatta J); *Wigan v Edwards* (1973) 1 ALR 497; *Cohen v iSoft Group Pty Limited* [2012] FCA 1071, [144] (Flick J).

2 (1884) 9 AC 605. For convenience this paper shall mainly refer to the rule that a promise to accept a lesser sum of a debt is not binding as the rule in *Foakes*.

3 See Janet O'Sullivan, 'In Defence of *Foakes v Beer*' (1996) 55(2) *Cambridge Law Journal* 219. O'Sullivan notes that within the prism of consideration the payment of lesser sums becomes 'a tidy mirror image of the principle in *Stilk v Myrick*'.

4 [1991] 1 QB 1.

5 Mindy Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law*, (Oxford University Press, 1995), 125. In *Williams*, Glidewell LJ was at pains to say that the court's ruling served to 'refine and limit' the principle in *Stilk*; [1991] 1 QB 1, 16. Russell LJ was less reserved in his appraisal of *Stilk*: 'I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v. Myrick* is either necessary or desirable. Consideration there must still be but …

In this paper I argue that the basis for a modification of the rule in *Foakes v Beer* has emerged from a slim seam of jurisprudence that has considered the practical benefits exception in light of promises to accept lesser sums.[6] While consideration cases do not routinely appear in Australian courts, it is more likely than not that a society which has such high levels of private debt may one day see, at an appellate level, a case that requires a resolution of the contradictory positions in *Williams* and *Foakes*.

This matter has been brewing for some time. When the Court of Appeal decided *Williams v Roffey* it failed to consider whether the nascent exception to the existing duty rule that it had developed should be extended to the longstanding rule in *Pinnel's Case*[7] and *Foakes v Beer*. This would have been a simple task,[8] albeit one more properly addressed by the House of Lords.[9] Indeed, when the issue later arose in *Re Selectmove Ltd*,[10] the UK Court of Appeal had little choice but to decline to extend *Williams v Roffey* to an agreement to pay a whole debt by instalments in the future.

This paper seeks to argue that the practical benefits exception to the existing duty rule should be explicitly extended to *Foakes v Beer* situations. Over the past three decades there have been some academic commentaries that have grappled with this question.[11] The rule in *Pinnel's Case* and *Foakes v Beer* has its defenders.[12] *Williams* also has its detractors.[13] There are those who have suggested that *Pinnel's Case* and *Foakes v Beer* need to be reconsidered in light of *Williams*.[14] This paper lends its voice to the call for reconsidering the relationship between *Foakes v Beer* and *Williams*.

My view is that despite some well thought-out criticisms, the rule in *Williams v Roffey* has pragmatism on its side. In contrast, though the rule in *Foakes* is longstanding it is surrounded by numerous exceptions. The existence of many carve-outs is in itself an indicator of the rule's underlying inconvenience and unsuitability to many commercial situations. A further exception to *Foakes* needs to be added. Indeed, where a promisor, with full knowledge of all the material circumstances, agrees to accept a lesser sum in payment of a debt, which in turn represents at least a substantial part of the sum originally owing, the promise should be binding unless the promisee has engaged in economic duress or has otherwise misrepresented his true financial

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courts nowadays should be more ready to find its existence so as to reflect the intention of the parties.' [1991] 1 QB 1, 18.

6 See *MP Investments Nominees Pty Ltd v Bank of Western Australia Limited* [2012] VSC 43; *Wolfe v Permanent Custodians Limited* [2012] VSC 275; *Troutfarms Australia Pty Ltd v Perpetual Nominees Limited* [2013] VSC 228.

7 (1602) 5 Co Rep 117a. See also *Cumber v Wayne* (1721) 93 ER 613.

8 In *Gay Choon Ing v Loh Sze Ti Terence Peter & Another* [2009] 2 SLR 332, Phang JA stated at [103], 'It would in fact have required no great leap of logic – let alone faith – to have extended the holding in *Williams* to a *Foakes v Beer* situation.'

9 The barrier faced by the English Court of Appeal in *Williams*, and again in *Re Selectmove Ltd* [1995] 1 WLR 274, was that the decision of the House of Lords in *Foakes v Beer* (1884) 9 AC 605 entrenched the rule in *Pinnel's Case*. The principle of stare decisis would obviously preclude the English Court of Appeal from obliterating the rule in *Pinnel's Case*. See also Edwin Peel, 'Part Payment of a Debt is No Consideration' (1994) 110 *Law Quarterly Review* 353.

10 [1995] 1 WLR 474. See also *Birmingham City Council v Forde* [2009] EWHC 12.

11 See for example, JW Carter, Andrew Phang and Jill Poole, 'Reactions to Williams v Roffey' (1995) 8 *Journal of Contract Law* 248; John Adams and Roger Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 *Modern Law Review* 536; O'Sullivan, above n3.

12 O'Sullivan, above n3.

13 See Carter et al, above n11.

14 John Adams and Roger Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 *Modern Law Review* 536, 540.

position. This might reduce the rule almost to a position of redundancy. Yet, as will be discussed below, it offers the benefit of pragmatism.

Part Two of this article considers the practical benefit exception developed in *Williams* and the criticisms that it has attracted in the academic literature. Part Three considers promises to accept lesser sums. Part Four considers the small emerging body of jurisprudence in Australia that has signalled the possibility of a change in the relationship between the rule in *Williams v Roffey* and that in *Foakes v Beer*. Part Five sets out a brief argument for making this change.

II PRACTICAL BENEFITS

The realisation of a contractual obligation through performance far outweighs the value of the obligation itself. Put another way, a bird in the hand is worth two in the bush.[15] Yet, this observation alone is not sufficient to provide an adequate level of support for the rule in *Williams v Roffey*. Indeed, the rationale for the rule is deeply grounded in the facts of the case.

Those facts are well known, but for the sake of completeness they bear repeating. In *Williams v Roffey Bros*, a contractor, Roffey Bros, entered into a contract to renovate 27 flats. Under the main contract, Roffey Bros faced a penalty if the work was not completed on time. Roffey Bros subcontracted the carpentry work to Williams. Unfortunately, the price that Williams quoted for the work was too low, and though the parties had agreed upon a price Williams eventually encountered financial difficulties. When it became apparent to Roffey Bros that Williams might breach the contract, they renegotiated the deal. Under the terms of the renegotiation, Roffey Bros agreed to pay Williams an extra £10 300 if he would continue the work. Williams accepted and duly continued his work. Nonetheless, the project was not completed on time and Roffey Bros were penalised under the liquidated damages clause in the main contract. Subsequently, Roffey Bros refused to pay Williams the extra money. Williams sued to recover the money he had been promised.

The English Court of Appeal unanimously held that Williams had provided sufficient consideration to bind Roffey Bros to its fresh promise of extra money. The basis of the decision was that by continuing to do the work, Williams had provided Roffey Bros with a practical benefit. The benefit was in the form of the potential to avoid the effect of the liquidated damages clause. Glidewell LJ enunciated a six-part test that has come to be accepted as the correct approach to take in applying the 'practical benefits' test. The test is not uncontroversial and this approach to consideration must account for the possibility that the offeror of the new promise has been subjected to economic duress or fraud. This is accounted for in part (v) of the test. Glidewell LJ stated:

> [T]he present state of the law on this subject can be expressed in the following proposition: (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

[15] Arthur Corbin, *Corbin on Contracts*, (West Publishing, 1952), [172]. Also, *Foakes v Beer* 9 AC 607, 622 (Blackburn LJ). See also Chen-Wishart below n 34, 92.

> 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.[16]

It is not an insignificant fact that *Williams v Roffey* has been followed in other jurisdictions.[17] There is a clear logical appeal to giving effect to the will of the contracting parties. Indeed, one of the major functions of the doctrine of consideration is the channelling effect that it serves.[18] That is, consideration demarcates a line between those promises that should be legally enforceable and those that are merely gratuitous. As Atiyah has argued:

> The truth is that the courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular problem in a particular case should be enforced. Since it is unthinkable that any legal system could enforce all promises it has always been necessary for the courts to decide which promises they would enforce.[19]

Given the circumstances under which a renegotiation might take place, and given the promisor's interest in actual performance, it is highly unlikely that promises to pay more are lightly given.[20] It can be assumed that most contracting parties are rational actors and it is supremely irrational to agree to pay twice in exchange for the same promise. Accordingly, finding that a practical benefit constitutes good consideration for a re-promise gives effect to the will of the parties.

In essence, there are two reasons why the practical benefits exception deserves respect within contract law.

The first is that though a contract may clearly set out the rights and responsibilities of the respective parties, its actual performance is never quite assured. There is risk in any activity, and the performance of a contract is no exception. It must be remembered that a contract is an agreement made between the parties at one point in time with a view to governing future relations between them. Though the deliberate under-quoting by Williams is unhelpful, there might well be situations where the costs associated with a project grow out of proportion to the anticipated benefit under the contract. Where there are bona fide reasons why the actual performance by a contractor has become too difficult, an agreement to pay more in order to secure actual performance nullifies a real risk.

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16 [1991] 1 QB 1, 15–16.

17 In Australia: *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723; *W & K Holdings (NSW) Pty Ltd v Laureen Margaret Mayo* [2013] NSWSC 1063; *Tinyow v Lee* [2006] NSWCA 80; *Foyle Enterprises Pty Ltd v Steve Parcell Building Services Pty Ltd* [2015] QDC 225; *Slipper v Berry Buddle Wilkins Lawyers* [2015] NSWSC 810; In Singapore: *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631; *Gay Choon Ing v Loh Sze Ti Terence Peter & Another* [2009] SGCA; In Canada: *Greater Fredericton Airport Authority Inc v NAV Canada*. (2008) 290 DLR (4th) 405 (NBCA). In the UK, *Williams v Roffey Bros* has been followed in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526; *Lee v GEC Plessey Telecommunications* [1993] IRLR 383; and *WRN Ltd v Ayris* [2008] EWHC 1080 (QB).

18 Patrick Atiyah, *Essays on Contract* (Oxford University Press, 1986), 181.

19 Ibid. See also Barry Reiter, 'Courts, Consideration, and Common Sense' (1977) 27 *University of Toronto Law Journal* 439 at 439–440.

20 This observation should hold true provided of course that there is no fraud or duress present in the renegotiation.

In turn, this increases the importance of effective checks against exploitative behaviour. It is more than possible that the 'bait and hook' tactic of under-quoting to secure a contract and then subsequently seeking to extract further funds from the promisor once he or she is committed, may traverse the borders of economic duress. Where economic duress exists it might displace consideration as a protection against unscrupulous conduct.[21] In *Williams*, Glidewell LJ relied on this concept as an adequate safeguard against unfair commercial practices. Glidewell LJ stated:

> Clearly if a subcontractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the subcontractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since before *Stilk v. Myrick*.[22]

The adequacy of this safeguard may well be open to some doubt.[23] In Australia, at least, there is a substantial divide between the NSW Court of Appeal and its counterparts. In *Australia and New Zealand Banking Group v Karam*,[24] the NSW Court of Appeal appeared to confine economic duress to those situations in which an unlawful threat was made.[25] In contrast, in *Mitchell v Pacific Dawn Pty Ltd*, the Queensland Court of Appeal suggested that such a view would impermissibly blur the lines between duress and unconscionable conduct.[26] Accordingly, should the demand for extra payment by the promisee be found not to have been unlawful, there may be some real difficulty in arguing that it constituted economic duress. Nonetheless, a contractor who purposely under-quotes in order to snare the unsuspecting promisor might still find himself facing an action for misleading or deceptive conduct under s 18 of the Australian Consumer Law. In turn, this would nullify the criticism made by Adams and Brownsword that, 'relaxing the consideration requirement …. shifts the burden of regulating price re-negotiation on to the doctrine of economic duress'.[27] There is a rich body of jurisprudence on misleading or deceptive conduct and it does

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21 See Andrew Phang, 'Consideration at the crossroads' (1991) 107 *Law Quarterly Review* 21, 22. Also Roger Halson, 'Sailors, Sub-contractors and Consideration' (1990) 106 *Law Quarterly Review* 183. See also *Adam Opel GmbH & Anor v Mitras Automotive (UK) Ltd* [2007] EWHC 3205, [42] where Donaldson QC sitting as Deputy High Court Judge stated: 'The law of consideration is no longer to be used to protect a participant in such a variation. That role has passed to the law of economic duress, which provides a more refined control mechanism, and renders the contract voidable rather than void.'

22 [1991] 1 QB 1, 13-14.

23 However, Atiyah is more supportive. See Patrick Atiyah, *An Introduction to the Law of Contract* (Oxford University Press, 5th ed, 1995), 134-135. Atiyah viewed the doctrine of economic duress as a more flexible means of dealing with the problems of unfair pressure than the traditional rules of consideration.

24 (2005) 64 NSWLR 149. See also *Electricity Generation Corporation T/As Verve Energy v Woodside Energy Ltd* [2011] WASC 268; *Electricity Generation Corporation T/As Verve Energy v Woodside Energy Ltd* [2013] WASCA 36, [23] (McLure P), [150] (Murphy JA).

25 See also *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2007] NSWSC 12, [199]. Also, *Westpac Banking Corporation v Billgate Pty Ltd* [2013] NSWSC 1304; *May v Brahmbhatt* [2013] NSWCA 309.

26 [2007] QCA 74, [7] (Keane JA).

27 Adams and Brownsword, above n14, 537.

seem highly likely that concealing the true state of your business in order to entrap others into a contract, and then getting further payments, would be an actionable wrong under the ACL.[28]

Furthermore, though it might be unpalatable to some,[29] deliberately breaching is a right that the contractor enjoys under the general law of contracts.[30] There is an argument to be made here that some form of consideration does exist in the bargaining away of this right, or at least in the loss of a chance to cut one's losses and to walk away from an unprofitable contract. The realisation of actual performance under the contract also saves the promisor from the stress and expense of recouping her losses by suing the promisee.

The second reason supporting the reasoning in *Williams* is that despite the well-established rule in *Stilk v Myrick*, contract law is not hostile to renegotiations. As Carter has pointed out contract law's rules on the mitigation of damages, as well as the rules on certainty and completeness, effectively require the parties to engage in some form of contractual renegotiation.[31] Those that criticise *Williams* effectively overlook the pitfalls associated with discouraging renegotiations.

The rule in *Williams* was designed for operation in a commercial context. It may well be that commercial people are generally experienced and astute, but they are not all-knowing. It is not altogether impossible that a commercial party might underestimate the true cost or difficulty of a given project. Indeed, a copious body of commercial and contract law exists because such situations have arisen with regularity. Not every contingency can be foreseen and not every decision is wise and proper in hindsight. In this context, the rule in *Williams* is a safeguard within the law of contract. It prevents the harsh and unjust operation of a doctrine whose own viability in contract has been questioned.[32] If the doctrine of consideration is these days little more than a rubber stamp to give certain promises the real prospect of enforceability then *Williams* is no worse than the final nail in the coffin. At best, it is a recognition of the notion of freedom of contract and the role of consideration in facilitating the enforceability of promises.

Despite the arguments that can be made in favour of the practical benefits exception, there are some sensible points that count against it.

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28 At least in the sense that the conduct pertaining to the first contract would likely give rise to an actionable wrong. Whether that would still be actionable if the parties renegotiated the agreement is debatable. For a thorough overview of the jurisprudence on misleading or deceptive conduct see Alex Bruce, *Consumer Protection in Australia* (LexisNexis, 2014). See also Dilan Thampapillai, Claudio Bozzi, Vivi Tan and Ann Matthew, *Commercial Law in Australia* (Cambridge University Press, 2015).

29 [1991] 1 QB 1, 23 (Purchas LJ).

30 However, the idea that a contractor can deliberately breach a contract and that it might be more efficient for him or her to do so under certain circumstances draws heavily on the theory of efficient breach. In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, [13], the High Court cast significant doubt on the viability of 'efficient breach' on the basis that it disregarded the possibility of equitable remedies. See also JW Carter, *Contract Law in Australia* (LexisNexis, 2013), 933. Carter suggests that in *Tabcorp* the High Court 'rejected' the theory of efficient breach. While the Court was clearly sceptical and unsupportive of the theory, it may be putting matters too strongly to suggest that it was decisively rejected.

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

32 See Mindy Chen-Wishart, 'In defence of consideration' (2013) 13 *Oxford University Commonwealth Law Journal* 209. Also, Peter Benson, 'The Idea of Consideration' (2011) 61 *University of Toronto Law Journal* 241.

The first is that the promisor gets no more than she originally bargained for with the promisee.[33] As Chen-Wishart notes, all that the promisee provides in the renegotiation is a *re-promise*.[34] This begs the question of why the promisor should be forced to pay twice for the same promise. The answer to this objection must lie in the nature of the 'practical benefit'. Coote suggests that a practical benefit exists where 'actual performance would provide more benefit to the promisor than would non-performance'.[35] Coote's definition can be restated as meaning that a practical benefit exists where the benefit of actual performance outweighs the remedy provided by suing for breach of contract. Treitel has also aligned practical benefit with factual benefit.[36] As Halson notes, preferring factual benefit over legal benefit significantly changes the law of consideration, and, in turn, raises the importance of the chosen safeguard.[37] Chen-Wishart has suggested that practical benefit exists in either the increased chance of contractual performance or where the promisor might acquire some further benefit or avoid a disbenefit.[38]

Both formulations fit in with the facts of *Williams v Roffey*. In *Williams*, the promisor bargained for an increased chance of performance, rather than actual performance itself. Moreover, the promisor sought this increased chance of performance in order to increase the likelihood that it would avoid the penalty set out in the head contract. In *Musumeci v Winadell*, the landlord agreed to charge his tenants a lesser rent so as to obtain the benefit of having his shopping mall appear to customers as though it were full of shops.

The problem that arises here is that while the increased likelihood of performance might be 'the least problematic formulation'[39] of practical benefit, it ignores the reason why performance became imperilled in the first place. As noted above, economic duress is an imperfect vehicle for assessing this problem. Misleading or deceptive conduct might be more suitable. In this context, the promisee in *Musumeci* was more deserving than the subcontractor in *Williams*. In *Musumeci* the tenant shop-holders agreed to a lease with their landlord. The landlord, who owned the shopping mall in which the tenant's grocery store was situated, then agreed to another lease with a large fruit store. The tenant's business suffered due to the actions of the landlord. It was clearly foreseeable that renting out premises to a competing business would hurt his present tenant's capacity to pay the rent. In contrast, Roffey Bros might not have known the extent to which Williams underquoted.

The concerns over the viability of economic duress as an adequate safeguard foreshadow the second objection. Namely, where economic duress does not apply, the promisee effectively benefits from his own wrong. In this sense, the practical benefits exception rewards promisees who under-bid. Without a doubt, these are the facts of

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33 See generally, Mindy Chen-Wishart, 'A Bird in the Hand: Consideration and Contract Modifications,' in Andrew Burrows and Edwin Peel, *Contract Formation and Parties*, (Oxford University Press, 2010), 92-96. See also, Brian Coote, 'Consideration and Benefit in Fact and in Law,' (1990) 3 *Journal of Contract Law* 23, 28.

34 Ibid, Chen-Wishart, 92.

35 Coote, above n34, 25.

36 Guenter Treitel, The Law of Contract, 8th edition, (1991), 65. See also Francis Reynolds & Guenter Treitel, 'Consideration for the Modification of Contracts' (1965) 7 *Malaya Law Review* 1.

37 Halson, above n 21, 184.

38 Chen-Wishart, above n5, 126.

39 Ibid 128.

Williams v Roffey, and the outcome might look enticing to those who are strategic and calculating in their commercial affairs. Yet, Blair and Hird have argued that it is:

> [A] mistake to imagine that the world of business is entirely comprised of hard players who will take advantage of favourable aspects of the law to steal the march, not only on their competitors, but also on anyone with whom they have dealings. If goodwill and a reputation for fair play are valuable business assets then the majority of business people will presumably seek to cultivate them.[40]

Indeed, it would be wrong to view commercial relationships as purely transactional rather than relational.[41] The reputational aspect associated with misleading conduct and the adverse consequences that might follow, may be sufficient to suppress calculating behaviour that falls short of economic duress. Nonetheless, these are safeguards that must be found from sources other than Lord Justice Glidewell's formulation in *Williams*.

The third criticism is that *Williams* undermines the doctrine of consideration because it is all too easy to find that a practical benefit exists. In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*,[42] the Singapore Supreme Court noted:

> More importantly, perhaps, the combined effect of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (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 (see, for example, the Singapore Court of Appeal decision of *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342 at 348, [23]) is that (as Rajah JC had pointed out in *Digilandmall* (see [28] above)) it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties. This would render the requirement of consideration otiose or redundant, at least for the most part.[43]

For all the protestations to the contrary, it must be conceded that *Williams v Roffey* more or less obliterates *Stilk v Myrick*,[44] because factual benefit reduces much of the well-established rules of consideration to a 'practical redundancy'.[45] The only case to which one can point to say that a practical benefit was found not to exist is that of *Schwartz v Hadid*,[46] where a specious argument about a loan variation failed because the alleged practical benefit would have arisen from actions that were not directly connected to the original contract.[47] Leaving aside the arguments in *Hadid*, the redundancy of consideration will almost always exist in the context of renegotiations because promises to pay more are inherently one-sided. The objection remains the

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40 Ann Blair and Norma Hird, 'Minding your own business – *Williams v Roffey* re-visited: consideration re-considered' (1996) *Journal of Business Law* 254, 260.

41 See *Bobux Marketing Ltd v Raynor Marketing Ltd* [2001] NZCA 348, [34] (Thomas J). His Honour stated, 'The fundamental flaw of the classical conception of contract law was its empirical premise that most contracts are discrete. That premise is false. Most commercial contracts are in fact relational contracts. The great bulk of contracts either create or reflect relationships.'

42 [2007] 1 SLR 853.

43 Ibid [30].

44 Carter et al, above n 11 have described the two decisions as 'irreconcilable'.

45 *Gay Choon Ing v Loh Sze Ti* [2009] 2 SLR 332, [101] (Phang JA).

46 [2013] NSWCA 89. See also *Slipper v Berry Buddle Wilkins Lawyers* [2015] NSWSC 810, [44] (Harrison AsJ).

47 [2013] NSWCA 89, [119].

same, the promisor will receive no more than her original entitlement, but the promisee, through his lack of attention to detail or poor planning, effectively gets a windfall. However gently we might phrase the meaning of practical benefit, that windfall comes about only due to the situational vulnerability of the promisor.

Any counter-argument to the propositions raised above must confront the role of consideration head-on. There is a distinguished academic debate about the viability of the doctrine of consideration.[48] It is beyond the scope of this paper to join that debate. Nevertheless, there is an argument to be made that consideration has a legitimate role to play in assessing the formation of a contract, but not the performance and discharge of the contract.[49] By the time that the renegotiation takes place the parties have already signalled their intention to be in a binding legal relationship. A party who does not wish to renegotiate can easily decline the overtures of the other party. In short, the promisor need not promise anything to the promisee. However, once she makes a promise, within the given context of imperilled performance, she should not be able to later decry the solemnity of that promise.

III PROMISES TO ACCEPT LESSER SUMS

There is a compelling logic that appears to underpin the rule in *Foakes*. If a creditor were to lend money to a debtor and the latter were to subsequently say that he could repay only part of the debt, but not the whole amount, the former would be left with the unenviable choice between accepting some money back rather than the whole amount or else suing for the entire sum.[50] Moreover, were the creditor to sue the debtor he or she might not recover all that they had lent. The contract itself offers little concrete protection in light of the burdens of debt recovery. With that in mind, the creditor might settle for the lesser amount to save themselves the hassle.

The balance of power between the debtor and the creditor is no small thing. It may well be that a creditor who lends a small sum can easily hassle the debtor for repayment as she chooses. In contrast, a creditor who lends out a large sum, relative to her own net worth, may find herself more or less captive to the fortunes of the debtor. The greater the amount lent by the creditor, the greater the risk that they bear and the more that they then have riding on the subsequent actions of the debtor.

The rule in *Foakes* thereby protects the creditor from some of the risks that he or she is running in agreeing to lend money to the debtor. The rule protects the creditor where the debtor cries poor one day, so as to avoid the full burden of his debt, but subsequently shows himself to be flush with funds.

While the danger towards which *Foakes* is directed is simple enough to understand, the rule has been subject to some criticisms. There are two criticisms that

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48 See Atiyah, above n 18, 217-243. Also, Guenter Treitel, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 ALJ 439. See further, Roy Kreitner, 'The Gift Beyond the Grave: Revisiting the Question of Consideration' (2001) 101 *Columbia Law Review* 1876. See also James Barr Ames, 'Two Theories of Consideration' (1899) 12(8) *Harvard Law Review* 515; KO Shatwell, 'The Doctrine of Consideration in the Modern Law' (1954) 1(3) *Sydney Law Review* 289.

49 Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 21.

50 The risk being that the debtor may make unreasonable demands of the creditor. See *D & C Builders v Rees* [1966] 2 QB 617. See also *Mitchell v Pacific Dawn P/L* [2003] QSC 86 where a threat was made that unless a lesser sum was accepted no payment at all would be made.

warrant attention here. The first concerns the need for pragmatism in the law. In *Foakes*, Lord Blackburn stated:

> All men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole.[51]

The rule in *Foakes* clearly frustrates the pragmatic concerns of businessmen. The rule appears now to be too well entrenched to be removed.[52] Nonetheless, it is impractical particularly in situations where experienced business people are attempting to make astute decisions in their own self-interest. It has been noted in other contexts that commercial law, and by extension the law of contracts, should serve the needs of industry. In *Coal Cliff Collieries v Sijehama Pty Ltd*,[53] Kirby P stated, 'the law of contracts serves the marketplace. It does not exist to satisfy lawyers' desires for neat rules.'[54] The unfortunate result of the rigidity around the rule in *Foakes* is that the courts might too often be the destroyers of bargains.

The second criticism is that the existence of a number of exceptions to *Foakes*, is in itself a suggestion that the rule is impractical. For example, the rule may be displaced by a deed,[55] payment by a third party,[56] by an agreement amongst multiple creditors,[57] early repayment[58] or at a location other than that which was originally designated.[59] A wholly new agreement may also avoid the rule.[60] Alternately, the rule might be evaded by some other consideration.[61] Indeed, in *Couldery v Bartrun*,[62] the Court expanded on the exception noted by Lord Blackburn in *Foakes* with the observation that a creditor:

> … might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction [since the obligor was under no pre-existing duty to deliver the horse,

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51 (1884) 9 AC 605, 622.

52 *PGA v The Queen* [2012] HCA 21, [222] (Bell J). See further, Sir John Smith, 'Rape of wife - can husband be convicted as a principal or is he exempt?' (1991) *Criminal Law Review* 61, 63. Sir John stated, 'In a matter of common law the absence of binding decisions will not necessarily undermine the binding nature of a rule which has always been accepted as law by the legal profession.' Cf. *Foakes v. Beer* (1884) 9 App.Cas. 605 where the House of Lords held that it was bound to follow the rule in *Pinnel's case* (1601) though they disliked it and there was no case in the House of Lords or even the Exchequer Chamber in which it had been applied. It had been accepted as law for nearly 300 years so it was the law.'

53 (1991) 24 NSWLR 1.

54 Ibid 22. Some support for the sentiments of Kirby J can be gleaned from recent pronouncements of the High Court. In *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37, [51] on the topic of construction French CJ, Nettle and Gordon JJ stated, 'a commercial contract should be construed so as to avoid it making commercial nonsense or working commercial inconvenience.'

55 See Carter above n 31, 146.

56 *Hirachand Punamchand v Temple* [1911] 2 KB 330.

57 *Scuderi v Morris* [2001] VSCA 190, [58] – [70] (Chernov JA). Also, *E T Fisher & Company Pty Ltd v English Scottish & Australian Bank Ltd* (1940) 64 CLR 84.

58 Nick Seddon, Rick Bigwood & Manfred Ellinghaus, *Cheshire & Fifoot – Law of Contract* (10th ed), (LexisNexis, 2014), 216. See also *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56, [65] (Ward JA).

59 Id.

60 *CMA Corporation Limited v SNL Group Pty Ltd* [2012] NSWCA 138

61 *Vanhergen v St Edmunds Properties Ltd* [1933] 1 KB 345.

62 (1880, CA) LR 19 Ch D, 394, 399.

> canary, or tomtit]; but by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was nudum pactum.[63]

As Carter has noted, the 'absurdity of this is patent'.[64] The existence of so many well defined exceptions to the rule should be sufficient to suggest that the rule itself requires a rethink. Why else would there be at least seven carve-outs to the rule if there were not circumstances under which the application of the rule was plainly unreasonable and inconvenient? It cannot be said, given the original mischief at which the rule was plainly aimed, that it is without merit. Yet the rule clearly has the potential to frustrate the needs of business.

IV EXTENDING *WILLIAMS V ROFFEY TO FOAKES V BEER* SITUATIONS?

As Gibson LJ noted in *Re Selectmove*, if the rule in *Williams* is in fact extended to the rule in *Foakes v Beer*, the rule in the latter becomes something of a nullity.[65] For those courts that are not strictly bound by the heavy precedent of *Foakes*, to do so would require little difficulty. In *Gay Choon Ing v Loh Sze Ti Terence Peter & Another*,[66] Phang JA stated that, 'it would in fact have required no great leap of logic – let alone faith – to have extended the holding in *Williams* to a *Foakes v Beer* situation.'[67] Yet other courts, far less constrained than the English Court of Appeal, have thus far failed to take that step.

The rule in *Foakes* is well-established in Australian case law.[68] Nevertheless, the need for a reconsideration of the relationship between the rule in *Williams* and the rule in *Foakes* has arisen because in a small series of Australian cases different courts have suggested that there may be some circumstances under which a promise to repay a substantial part of the amount owing coupled with some other practical benefit may amount to good consideration thereby making a promise to accept less binding upon the creditor.[69] This represents a slight weakening of the position in *Amos v Citibank Ltd*[70] where the Queensland Court of Appeal held that the reasoning in *Williams v Roffey* did not extend to the principle in *Foakes* and *Pinnel's Case*. Crucially, in *Amos* the Court drew a pointed distinction between contracts of debt and other contracts. McPherson and Ambrose JJA stated:

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63 Ibid.

64 Carter, above n 56, 142.

65 [1995] 1 WLR 474.

66 [2009] SGCA 3.

67 Ibid [103].

68 See *Shepparton Projects Pty Ltd v Cave Investments Pty Ltd* [2013] VSCA 152; *Medcalf v Crimeguard International Security Systems Sydney Pty Limited* [2011] FCA 963; *Kelen v Vitamin Pty Ltd* [2010] NSWSC 328; *Amos v Monsour Pty Ltd* [2010] FCA 741; *Hennessey v Architectus Group Holdings Pty Ltd* [2010] NSWSC 1390; *Martech International Pty Ltd v Energy World Corporation Ltd* [2006] FCA 1004; [2007] FCAFC 35; *N Ray v Deputy Commissioner of Taxation* [2005] FMCA 1893; *Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd & Ors* [2006] QCA 194.

69 *MP Investments Nominees Pty Ltd v Bank of Western Australia Limited* [2012] VSC 43; *Wolfe v Permanent Custodians Limited* [2012] VSC 275; *Troutfarms Australia Pty Ltd v Perpetual Nominees Limited* [2013] VSC 228.

70 [1996] QCA 129 (Unreported).

> In circumstances in which a contract of that character remains at least to some extent executory on both sides, it is not difficult to identify as the consideration the commercial benefit which results from having performance in fact carried out, or, conversely, the detriment likely to be suffered if it is not. … But it is a different matter where, as here, the subject matter of agreement is not a contractual obligation which is still to be performed, but simply a debt which has arisen, become due, and is payable forthwith by one party to the other.[71]

In *Amos* the Court of Appeal concluded that the debtor was not proposing to do anything more than that for which he had already contracted. Accordingly, the existing duty rule and the principle in *Foakes v Beer* proved an insurmountable obstacle.[72]

With recent jurisprudence in mind, the best that can be said is that the firm position in *Amos* has now begun to falter, without necessarily having completely fallen apart. While there is no clear expectation that *Amos* will be overturned by future courts, at least not in Queensland, the judicial debate does appear to have evolved past the position set out by McPherson and Ambrose JJA. In *MP Investments Nominees v Bank of WA Ltd*,[73] Judd J stated:

> I accept that there are cases in which a benefit may be obvious even though there are existing contractual obligations and entitlements. The case of a contractor offered an inducement to continue to perform his contract so as to avoid a greater loss is but one example. I also accept that in the case of banker and customer, circumstances may arise in which a bank may compromise its position in order to secure certainty of payment and avoid cost, inconvenience and perhaps loss associated with recovery action. There remains, however, a question of principle involving the requirement that there be consideration moving from the promisee.[74]

However, Judd J found that the plaintiff had not adduced sufficient evidence to suggest that a practical benefit existed. As such the balance between *Williams* and *Foakes* was left untested. That said, Judd J suggested that if it were proposed that most of the debt would be repaid, then the question of a practical benefit would arise.[75]

Notably, in *Wolfe v Permanent Custodians Limited*,[76] her Honour Zammit AsJ in the Supreme Court of Victoria found sufficient new consideration to exist in relation to payment of a lesser sum.[77] Even though *Wolfe*, which was overturned by the Victorian Court of Appeal, is a precedent of dubious value, it is still worth considering for its exploration of the troubled relationship between *Foakes* and *Williams*.

At first instance in *Wolfe*, Zammit AsJ was willing to find that a practical benefit existed in a situation somewhat akin to *Foakes v Beer*. The facts of *Wolfe* are slightly convoluted. Richard Wolfe and his de facto partner had a mortgage with Permanent Custodians. After Wolfe and his de facto partner separated, the former fell into a deep depression and struggled to make the mortgage repayments. Eventually, Permanent Custodians sued seeking a warrant to evict Wolfe from the house in order to facilitate a forced sale. Permanent Custodians obtained a judgment in their favour on 10 August

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71 [1996] QCA 129.
72 See *Wigan v Edwards* (1973) 1 ALR 497, 512.
73 [2012] VSC 43.
74 Ibid [112].
75 Ibid [114].
76 [2012] VSC 275. However, see *Wolfe v Permanent Custodians* [2013] VSCA 331.
77 [2012] VSC 275, [109] – [127].

2009. However, on 1 December 2009, Wolfe and Permanent Custodians came to a bargain. Under the agreement of 1 December 2009, if Wolfe was to pay all his arrears and thereafter make timely repayments, Permanent Custodians would stay the order for eviction. Wolfe paid the arrears and put in place measures to pay the instalments. Regrettably, Wolfe failed to comply with all of his bank's internal formalities for setting up a direct debit facility and a repayment was missed.

There were a number of issues before the Supreme Court of Victoria in *Wolfe*. One of those issues concerned a claim by Permanent Custodians that Wolfe had provided no consideration for the agreement of 1 December 2009. Zammit AsJ stated the issue as follows:

> The issue is whether Mr Wolfe has given adequate or sufficient consideration. Put another way, what consideration has been given by Mr Wolfe, the judgment debtor, to Permanent, the judgment creditor, for Permanent's promise to stay enforcement of its legal right of execution of the judgment?[78]

Wolfe argued that Permanent Custodians received a practical benefit because it was paid the arrears, it was set to receive the profits allocated to the creditor under the mortgage and it was spared the costs associated with the sale.[79] Zammit AsJ noted the dilemma that had faced the English Court of Appeal in *Williams v Roffey* and again in *Re Selectmove* with regard to promises to pay lesser sums. Zammit AsJ did note that Santow J in *Musumeci* confined his endorsement of the *Williams* rule to cases concerning goods or services, which necessarily excluded debts. Nevertheless, in *Wolfe*, Zammit AsJ could see no immediate barrier to extending the rule in *Williams* to cases concerning the payment of debts. Zammit AsJ stated:

> The law as it currently stands in this jurisdiction is that there is no binding authority as to the application or non-application of *Williams v Roffey Bros* principles to the payment of debt. Accordingly, it is a question of first principle involving the requirement that there be sufficient consideration. I consider that there was sufficient consideration moving from Mr Wolfe to Permanent.

Moreover, Zammit AsJ agreed that Wolfe had conferred a practical benefit upon Permanent Custodians:

> I consider, given the nature of the 1 December 2009 Agreement, the benefit to Permanent was avoiding the inconvenience of having to sell the Property. Even though I accept that as a professional lender, Permanent may have to sell property as part of its business, that does not mean that the avoidance of such a step does not amount to some, albeit small, consideration.[80]

The decision at first instance in *Wolfe* represents a bold step against established principle. It certainly sits at odds with the remarks of Bell J in *PGA v Queen*.[81] More to the point most other State Supreme Courts have baulked at the prospect of extending *Williams* to *Foakes v Beer* situations.

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78 Ibid [103].
79 Ibid [105].
80 Ibid [127].
81 [2012] HCA 21, [222].

On appeal before the Victorian Supreme Court of Appeal, Permanent Custodians contended that Zammit AsJ had been wrong to ignore the rule in *Foakes v Beer*.[82] However, the appeal was decided on other grounds and the Court of Appeal did not consider the question in detail. Nonetheless, the Court of Appeal stated:

> … it is contended that the Associate Judge was wrong in concluding that the arrangement made on 1 December 2009 was a 'contract' because, relying on the rule in *Foakes v Beer*, the Associate Judge ought to have found that no consideration moved from Mr Wolfe to Permanent. …
>
> Given our conclusions on the grounds of appeal relied upon on behalf of the appellant, it is unnecessary to deal with these contentions. Our failure to do so should not be taken as endorsement of the conclusions reached by the Associate Judge on those two issues. Each of the issues the subject the notice of contention raises a matter of complexity and significance. [sic] The issue as to consideration was raised as a contention only during the course of argument and the submissions made have, as a consequence, not been as full or as detailed as might otherwise have been the case. In the circumstances, it is preferable to leave those matters to be determined in a case which is a more appropriate vehicle.[83]

The Court of Appeal clearly left open the possibility of revisiting the question of *Foakes* and *Williams*. Accordingly, the decision at first instance in *Wolfe* must be treated with great caution. Nevertheless, Zammit AsJ was not alone in seeing a practical benefit accruing to a creditor in avoiding a recovery action. In *MP Investments*, Judd J also identified that such an action would entail 'inconvenience and perhaps loss'.[84] Similarly, Gardiner AsJ in *Troutfarms Australia Pty Ltd v Perpetual Nominees Limited*,[85] outlined the steps associated with selling the disputed property and suggested that there might have been an argument, albeit a weak one, to be made that receiving $1.6 million sooner and avoiding the burdens of a forced sale represented good consideration.

It is notable that in *Troutfarms* the Court made no mention at all of *Wolfe*, though it was clearly decided after the latter decision had been handed down. Whether that omission was deliberate or accidental is a matter for conjecture. It might well have been that the facts of the two cases were too dissimilar to bear comparison. Yet, given the paucity of decisions contemplating the application of *Williams* to the rule in *Pinnel's case* and *Foakes v Beer* it is an altogether odd omission.

In *Troutfarms*, Gardiner AsJ found that the alleged agreement to release the debt could not be substantiated.[86] The tenor of his Honour's reasoning suggests that even if the agreement had been valid, it would not have been sufficient to displace *Foakes*. His Honour felt that the facts in *Troutfarms* were quite close to those in *MP Investments*

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82 *Wolfe v Permanent Custodians* [2013] VSCA 331.
83 [2013] VSCA 331, [43] – [44].
84 [2012] VSC 43, [112].
85 [2013] VSC 228.
86 Ibid [51].

Nominees Pty Ltd v Bank of Western Australia Limited.[87] On similar facts in *Troutfarms*, Gardiner AsJ stated:

> Troutfarms did not offer Perpetual an opportunity to 'recover all or most of the outstanding debt by a particular date, as against the prospect of realising on its security with the attendant costs, inconvenience and potential loss'. On like facts, Judd J held that the concept of 'practical benefit' did not arise for consideration because there was no proposal to pay all or most of the outstanding debt; the borrower was 'confronted by the well-settled principle in Foakes v Beer'. In this case, Mr Carew submitted, the payment by Troutfarms did not result in anything like the full debt being paid in 2011 and Perpetual was still left to the inconvenience and expense of enforcing it against the other guarantors and the other securities.[88]

Taken together, *Troutfarms* and *MP Investments*, along with the earlier decision of the Queensland Court of Appeal in *Amos v Citibank*,[89] suggest that at the very least a debtor must aim to make a substantial payment on the existing debt and that this must also be regarded as constituting some 'commercial benefit', before any real reconsideration of *Pinnel* and *Foakes* can take place. Strictly speaking, this is different from the exception that Lord Blackburn noted in *Foakes* where a 'horse, canary or tomtit' might satisfy the debt. Suffice it to say, a commercial benefit of the kind alluded to in *Troutfarms* and *Wolfe* is not a chattel good. That said, there is a conceptual similarity between the existing exception and the one that might be drawn from the recent jurisprudence.

While a measure of support does appear to exist for the concept of a 'substantial' repayment, there has been little attempt to define the term. This is an important question that warrants judicial consideration. Indeed, while the stage is set for a future court to contemplate whether some practical benefit, coupled with the payment of a lesser sum which is in turn a substantial part of that which is owing, should displace *Foakes v Beer*, it must take steps to define what 'substantial' means in this context.

Furthermore, it would be wise for the courts to also consider adding in some safeguards to a modified *Foakes* rule. It does seem appropriate that the economic duress safeguard that exists in the rule in *Williams* should be adopted. Moreover, one would expect that the creditor should be made aware of all of the material circumstances. In this sense, there should be no misrepresentation or misleading or deceptive conduct. Some thought should also be given to what might occur if the debtor, having received a promise to take less from the creditor, then failed to make any payment at all. Under such circumstances it would clearly be inequitable to enforce the promise to take less, just as it would be to attempt to enforce a promise to pay more for services that were never rendered.

V SETTING *FOAKES V BEER* ASIDE

Having reviewed the relevant jurisprudence, there are at least two reasons as to why the practical benefits exception from *Williams v Roffey* should be extended to *Foakes v Beer* situations.

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87 [2012] VSC 43.
88 [2013] VSC 228, [66].
89 [1996] QCA 129.

First, there is no logical distinction between promises to pay more and promises to accept less. The point that the Queensland Court of Appeal made in *Amos* is that in contracts such as that in *Williams* the obligations of the parties remain executory. In contrast, where a debt is concerned the creditor has already performed his or her part of the bargain by providing the funds. It is the debtor whose obligations remain to be fulfilled. Yet, either way, the party who offers to pay more or accept less is still waiting for the offeree to engage in some form of performance. As such, it is difficult to see how there is something radically different about a debt contract that sets it apart from other contracts.

Furthermore, it is already an established exception to *Foakes v Beer* that a 'horse, hawk, or robe etc might be more beneficial to the plaintiff than the money'.[90] Why then should a practical benefit be treated as being quite different to any other tangible item, particularly if it is accompanied by the repayment of most of the promised sum? There seems little reason to deny the utility of a practical benefit and it does fit almost neatly into the existing exception, but for the fact that it is an intangible item.

More to the point, if the offeror is aware of all of the relevant facts then why should they not be held to their promise? It is easy enough to see that where the offeree has withheld some crucial fact, or engaged in some other underhanded behaviour, that they should not have the benefit of any promise that they have received. However, contract law is in part built on the value of the promise and its subsequent enforcement.[91] Where it has been knowingly given, it should stand.

Second, the rule in *Foakes v Beer* effectively gives the creditor two sets of choices at two different points in time. At one point, the creditor can suggest that he or she will accept a lesser sum of money, then at another time she can turn around and demand full payment of the debt. In commercial situations such as those in *Wolfe* and *Troutfarms*, the creditors are at least savvy enough to weigh up their options and to see whether there is some benefit in accepting the lesser sum. Even though the Court of Appeal in *Wolfe* did not explicitly support Zammit AsJ's contention that the creditor obviated a disbenefit by not having to claim and sell the house, there is still a perceptible benefit in not incurring all of the costs that would be associated with debt recovery. A sophisticated commercial entity would be aware of all of these costs and benefits and should not be accorded a position that amounts to two bites at the cherry.

Adams and Brownsword have argued that equitable estoppel might well circumvent the rule in *Foakes*.[92] Indeed, the rule in *Foakes* was primarily developed before the revival of promissory estoppel by Lord Denning in *Central London Property Trust Ltd v High Trees House Ltd.*[93] Given that the doctrine of estoppel is now well-developed within our law,[94] it follows that *Foakes* can only operate where the circumstances do not support the operation of an estoppel.[95] In *Amos*, McPherson

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90 *Pinnel's Case* (1602) 77 ER 237.

91 Charles Fried, *Contract As Promise: A Theory of Contractual Obligation* (Harvard University Press, 1988) 40.

92 See above n14, 40. See also, Arthur Corbin, 'New Contract by Debtor to Pay His Existing Debt' (1917) 27 *Yale Law Journal* 535. See also Michael Lobban, 'Foakes v Beer (1884)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, 2008).

93 [1947] KB 130, 135. See also Michael Lobban, '*Foakes v Beer* (1884)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, 2008), 264-267.

94 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Legione v Hateley* (1983) 152 CLR 406.

95 *Collier v P & M J Wright (Holdings) Limited* [2007] All ER D 233, [39] (Arden LJ). See also Richard Austen-Baker, 'A Strange Sort of Survival for *Pinnel's Case*: *Collier v P & M J Wright*

and Ambrose JJA, appeared to support this view.[96] The offeror's promise and the offeree's subsequent reliance may well make it inequitable for the former to backtrack.[97] This might prevent opportunistic behaviour by the creditor. It might well be that extending *Williams* to *Foakes* would also result in promissory estoppel being reduced to a redundancy in this context.[98]

Where promises to take less are concerned, promissory estoppel would not be bedevilled by the sword or shield issue that has recently been reignited in the NSW Court of Appeal in *Ashton v Pratt*.[99] Yet what it does not deliver is certainty, because the creditor's promise cannot be enforced unless the debtor successfully pleads estoppel in court. Provided that some safeguards are created, a modified *Foakes* rule, containing the elements identified in *Wolfe*, *Troutfarms* and *MP Investments* of (i) repayment of a substantial part of the original debt and (ii) some identifiable commercial benefit seems altogether clearer and capable of application by commercial parties. Crucially, safeguard measures requiring the absence of economic duress, misrepresentation or misleading conduct should be added to these requirements.

VI CONCLUSION

While there have only been a few lower court decisions in which the position of *Foakes* has been questioned, it seems only a matter of time before a fuller reconsideration of its relationship with *Williams* will take place. A nascent rules does appear to be emerging in the jurisprudence. There are at least some doctrinal strands that can be gathered together into a workable rule. Indeed, should such a rule emerge it would offer a degree of clarity that might usefully guide the difficult business of contract renegotiations and variations. Despite some telling academic criticisms, the pragmatism offered by *Williams* appears irresistible. Its extension to *Foakes* might well be the next controversial step for the doctrine of consideration. Notwithstanding the objections of learned commentators such as Carter, an appellate court that has cause to consider this matter should take that step and effectively bridge the gap between *Williams* and *Foakes*.

(Holdings) Limited' (2008) 71(4) *Modern Law Review* 611, 618-619. Also, Luke Pearce, 'Foakes v Beer and Promissory Estoppel: A Step Too Far' (2008) 19(3) *Kings Law Journa*l 630.

96 [1996] QCA 129.

97 See also *D & C Builder v Rees* [1966] 2 QB 617, 625 (Lord Denning MR). See further *Williams Adams Leasing Ltd v Clark* [1989] TASSC 49, [6] where the Court stated: 'The question of promissory or equitable estoppel has led a tortuous trail through a maze of cases since *Foakes v Beer* and culminating in the recent High Court case of *Walton Stores (Interstate) Ltd v Maher*.'

98 I am grateful to Professor Chen-Wishart for this observation.

99 [2015] NSWCA 12, [138] – [139] (Bathurst CJ).