

Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law

Adam Shaw-Mellors* and Jill Poole**

Abstract: This article analyses and critiques English law's response to the enforceability of renegotiations of terms of existing contracts in the light of dramatic changes in circumstances, such as an economic recession. The article exposes English law's difficulties and inadequacies in developing clear principles governing renegotiations, and suggests possible solutions.

* Lecturer in Law, Aston Law School, Aston University.

** Professor of Commercial Law, Aston Law School, Aston University. This article is dedicated to Jill Poole, who was a great friend and an excellent contract law scholar.

A. Introduction: addressing changed circumstances in English law

What was initially a good bargain can look very different in the light of a major market downturn, economic recession, or change in the contractual landscape. Scenarios that can occur in such circumstances include: a contract to purchase land for development can look very different if the property market declines suddenly and rapidly;¹ a contract for the construction and purchase of an oil tanker can suddenly become unnecessary (or undesirable) due to an oil crisis when the supply of oil dries up;² a sub-contractor prices a contract at too low a fixed price to secure the work and is then unable to meet the performance deadline;³ long-term contracts to supply materials or major components at fixed prices become uneconomic due to an unprecedented rise in the costs of those raw materials or of manufacturing the components, or as a result of dramatic currency fluctuations or rampant inflation. In many instances, the continued viability of one or both of the parties may depend on the performance of a single contract, particularly in the context of long-term (or relational) supply contracts, and so any issues can have considerable commercial consequences.

Generally, English law rejects any notion of relief in changed circumstances that do not amount to impossibility and thereby activate the doctrine of frustration.⁴ The fundamental assumption is that the contract terms as originally agreed must be performed or the party will be in breach and thus bound to suffer remedial consequences. The law does not require parties to attempt to negotiate revised terms with a view to securing performance. This could be because English law implicitly recognises performance is not everything where that performance would be achieved at too high an economic cost, and it may coincide with the prominence in some quarters of the theory of the efficient breach. Avoiding inefficiency can, however, also be a reason to justify requiring

¹ *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277 HL.

² *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 W.L.R. 989 HL. See also *Stocznia Gdanska SA v Latvian Shipping Co* [1996] 2 Lloyd's Rep. 132 CA and [1998] 1 W.L.R. 574 HL.

³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1 CA.

⁴ *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696 HL.

attempts to negotiate and the possibility – to be discussed below – of court intervention to assist, even if that flies in the face of freedom of contract.

The closest English law can be said to come to recognising commercial impracticability as an excuse for contractual non-performance is the tightly circumscribed instance of failure of the purpose of both parties.⁵ In practice, however, the parties' purposes in seeking contractual performance are unlikely to be the same and economic recession will often affect parties' purposes in different ways. An examination of the scenarios identified earlier serves to highlight such differences in purpose. This principle is, therefore, of only marginal practical relevance.

More interesting is English law's response in instances where the parties do not have identical purposes and post-formation events have resulted in an imbalance in their positions, but both parties have a continued interest in performance occurring. This may mean it is in both parties' interests to negotiate for an adjustment in the contract terms and may necessitate one party making a concession in the overall interests of both. It is to a discussion of the law's response in such cases that this article will return.

The doctrine dealing with instances of impossibility is, however, a default principle and parties may attempt to pre-empt such instances and other changed circumstances. Sometimes, the aim is to avoid non-performance constituting a breach of contract, e.g. *force majeure* clauses, and, in some instances, to provide for the performance to continue on revised terms, e.g. extension of time clauses and price escalation clauses. Such clauses may, however, replace one problem with another if they have unforeseen operational effects, e.g. a price escalation clause not drafted to deal with severe economic recession and which operates in such a way that the buyer is compelled to pay astronomical current market prices or find itself in breach.⁶ These clauses, therefore, provide a fixed solution for an anticipated changed circumstance, but may not provide

⁵ *Krell v Henry* [1903] 2 K.B. 740 CA. See also *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164 CA; *Ocean Tramp Tankers Corporation v V/O Sovfracht, The Eugenia* [1964] 2 Q.B. 226 CA; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93 HL.

⁶ See, e.g., *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm); [2006] 1 Lloyd's Rep. 441.

sufficient flexibility where economic circumstances have changed dramatically but not fatally. Accordingly, it might be thought sensible to include a specific renegotiation clause in a contract in an effort to introduce flexibility by requiring that parties negotiate to reach an outcome agreeable to both where a change of circumstances occurs. It is, however, the very nature of the inherent flexibility of such clauses that causes problems in English law.

This article seeks to highlight the mechanisms available to contracting parties to rescue contractual performance through renegotiation and explain how to avoid potential pitfalls that can arise through a lack of knowledge of the legal machinery. The discussion begins by looking at express contractual commitments to negotiate, before turning to consider the position where one party promises to make a contractual alteration. With the inadequacy of principle highlighted, a potential solution involving court intervention will be mooted.

B. English law and attempts to (re)negotiate

Agreements to agree and lack of certainty

Parties to a contract are free to insert a clause requiring negotiation or renegotiation.⁷ This might, for example, relate to the cost of a specified matter,⁸ or the event of major physical or financial changes in circumstances affecting the parties' operations.⁹ The general problem with renegotiation clauses is that, due to English law's requirements of certainty and completeness, such clauses must be clear and explicit in identifying what is to be renegotiated and in what circumstances. Uncertainty and incompleteness will mean

⁷ See J.W. Carter, "The Renegotiation of Contracts" (1998) J.C.L. 185.

⁸ *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)* [2005] EWCA Civ 891; [2006] 1 Lloyd's Rep. 121.

⁹ *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch). See also *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch); [2009] B.P.I.R. 1315 (clause requiring that, if another clause was struck down as being invalid or unenforceable, the parties enter into good faith negotiations to draft a new clause to achieve as far as possible the objectives of the original clause). As to how a general contractual commitment to act in good faith in performance might give rise to an obligation to renegotiate in changed circumstances, see *Gold Group Properties Ltd v BDW Trading Ltd (formerly Barratt Homes Ltd)* [2010] EWHC 1632 (TCC).

such a clause is void.¹⁰ By requiring negotiation, as distinct, for example, from the fixed response available with a price escalation clause, the clause comprises an agreement to agree and is, therefore, at risk of lacking the necessary certainty;¹¹ there being no implied duty to negotiate in good faith in English law.¹²

The courts require particular precision for a negotiation clause to be enforceable. As well as setting out the circumstances in which it will operate, the clause needs to contain a provision which requires the parties negotiate about the specific matter, e.g. the price, in good faith,¹³ and by reference to some assessable criteria.¹⁴ Even if the clause contains an express undertaking to negotiate in good faith, it will fail for uncertainty if it is an abstract obligation not referable to such criteria.¹⁵ The courts will also react more warmly where a method of dispute resolution, such as arbitration, has been stipulated to cover the event the parties cannot reach agreement.¹⁶

Even the existence of a valid clause would not represent a complete panacea, since it would not mean the parties would have to reach *agreement* on a set of revised terms. It may still result in a repudiation of the contract by the party in difficulties. A valid renegotiation clause would, however, provide a remedy if there was a breach of the good

¹⁰ *Scammell & Nephew Ltd v Ouston* [1941] A.C. 251 HL; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503 HL; *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All E.R. (Comm) 737.

¹¹ *May & Butcher v R* [1934] 2 K.B. 17 HL; *Walford v Miles* [1992] 2 A.C. 128 HL.

¹² *Walford v Miles* [1992] 2 A.C. 128 HL at 138; *Georgi Velichkov Barbudev v Eurocom Cable Management Bulgaria Eood* [2012] EWCA Civ 548, [2012] 2 All E.R. (Comm) 963 at [44]-[46]. See also *Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [84]-[86]; H. Hoskins, “Contractual Obligations to Negotiate in Good Faith: Faithfulness to the Agreed Common Purpose” (2014) 130 L.Q.R. 131.

¹³ *Petromec Inc* [2005] EWCA Civ 891; [2006] 1 Lloyd’s Rep. 121 (the relevant provision was not an agreement to agree where the contract contained an express provision requiring the parties negotiate in good faith in relation to the cost of certain contractual extras. Given the existence of criteria for this express obligation, there was certainty since it was possible to anticipate the results of those negotiations: see at [115]-[121]).

¹⁴ *Petromec Inc* [2005] EWCA Civ 891 at [115]-[121]; *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2014] EWHC 2104 (Comm), [2015] 1 W.L.R. 1145 at [64]; *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch) at [48]-[61]; *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), [2017] 1 Lloyd’s Rep. 476 at [62]-[67].

¹⁵ *BBC Worldwide Ltd v Bee Load Ltd (T/A Archangel Ltd)* [2007] EWHC 134 (Comm) at [95]; *Charles Shaker v Vistajet Group Holding SA* [2012] EWHC 1329 (Comm) at [17].

¹⁶ *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.1)* [2001] EWCA Civ 406, [2001] 2 All E.R. (Comm) 193 at [67]; *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch) at [65].

faith negotiating provision.¹⁷ That apart, there is generally no recovery for expenses incurred in the negotiation process in English law,¹⁸ so the process could result in increased costs for no apparent gain.

English law and no negotiation or failed negotiation

Where no negotiation takes place, there is no obvious solution to the difficulties of performing in changed circumstances and the inevitable outcome may be the inability to perform and thus repudiatory breach. It may, however, be important to the assessment of damages and principles of mitigation that appropriate negotiations were attempted where this is considered a reasonable step in the circumstances.¹⁹ Moreover, the conduct of one party in changed circumstances can sometimes provoke a reaction of the other, with the consequence that the latter finds itself in repudiatory breach.²⁰ Indeed, it is not uncommon in situations of changed conditions where there has been no renegotiation of terms for the party which feels it has now made a bad bargain to attempt to escape from that contract by searching for a repudiatory breach committed by the other,²¹ or some other contractual escape route.²²

A preferable solution might thus be to seek a renegotiation on the terms to reflect the changed market conditions. It follows that where parties do take the time and incur the costs of renegotiating, they ought reasonably to be able to rely on the enforceability of a contract with renegotiated terms, assuming that renegotiation was freely entered into.

¹⁷ The remedy would not, of course, be able to force the parties to agree a renegotiation and any damages would appear to be limited to reliance loss (wasted expenditure) or possibly damages for loss of a chance.

¹⁸ *British Steel Corporation v Cleveland Bridge & Engineering Ltd* [1984] 1 All E.R. 504; *Regalian Properties plc v London Dockland Development Corp* [1995] 1 W.L.R. 212; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] C.L.C. 324.

¹⁹ *Sotiros Shipping Inc v Sameiet Solholt, The Solholt* [1983] 1 Lloyd's Rep. 605 CA.

²⁰ *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1979] A.C. 757 HL.

²¹ *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 Q.B. 164 CA (confirming a breach may be cited as the legal ground to justify termination when that party's reasons for seeking termination are wholly unrelated to that breach). For an example of an attempt, albeit unsuccessful, to escape from a bad bargain citing a technical breach as repudiatory, see *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 W.L.R. 989 HL. This decision may reinforce an argument in favour of the need to establish good reasons why a party should be able to terminate for the other's breach, as opposed to permitting reliance on bad reasons, since had this in fact been a breach of condition it would necessarily have been repudiatory: see R. Brownsword "Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract" (1992) 5 J.C.L. 83.

²² *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277 HL.

Unfortunately, as will be seen, the law governing the enforceability of renegotiated contracts is complicated, full of anomalies, and has been hindered by judicial statement of principle that is apt to confuse.

C. Enforcing renegotiations: the relationship between the consideration requirement and the doctrine of duress

If the parties have reached agreement on revised terms, is that agreement legally binding? The answer is potentially “no” if the alteration is not supported by valid consideration. Even if it appears consideration can be found, a party will be able to resist enforceability if it can establish the existence of economic duress applied by the other party. Unfortunately, the statement of applicable principle is not so simple: the remedy of rescission for duress is subject to the bars on rescission,²³ so that, for example, affirmation or inability to make restitution may mean the remedy is lost. Moreover, the relationship between consideration and duress in the context of alteration promises (that is, promises purporting to alter strict rights under a contract) in English law is far from clear. The following discussion will attempt to clarify the applicable principles governing the enforceability of alteration promises.

Consideration as an enforceability criterion in the alteration context

Traditionally, a promise by one party to alter its contractual obligations must be a contractual bargain in the sense the other party must give something of value in exchange.²⁴ It follows that if each party makes a reciprocal promise, the alteration will constitute a new binding contract on the revised terms, subject only to any argument relating to economic duress. Hence, it is relatively easy for those with legal advice to ensure each party to the proposed alteration agrees that in consideration of the other agreeing to treat the original contract as discharged, they will enter into a new contract on

²³ *North Ocean Shipping Co Ltd v Hyundai Construction Co, The Atlantic Baron* [1979] Q.B. 705; *Halpern v Halpern* [2007] EWCA Civ 291, [2008] Q.B. 195.

²⁴ The courts have found it notoriously easy to identify or “invent” consideration in the context of alteration promises. See B. Reiter, “Courts, Consideration, and Common Sense” (1977) U.T.L.J. 439; J.W. Carter, A. Phang, and J. Poole, “Reactions to *Williams v Roffey*” (1995) 8 J.C.L. 248, 248.

the same terms as the old except for the altered term, e.g. an increased price. The new contract on the revised terms is then binding, with the old contract discharged.²⁵

The following scenario illustrates the point. A agrees to sell to B ten boxes of biscuits, ten packets of tea, and ten loaves of bread for £20. Before either party has performed, B asks A to substitute five jars of coffee for five of the packets of tea. A agrees, saying the price will remain the same. Is the variation enforceable? It might seem to lack consideration, since A is to perform something other than what was first agreed while B is only to pay what was originally asked. If, however, the variation is seen as a two-stage process, it is possible to identify consideration for the change. The first stage is B's agreeing not to receive five packets of tea, in return for A's agreeing not to receive whatever proportion of the total price is represented by the five packets. That stage represents one contract. Then A agrees to supply five jars of coffee, in return for which B agrees to pay whatever balance brings the total price back to £20. This is a second contract, and the variation is enforceable.²⁶ The problem in practice, however, is that this stratagem is not generally known to businessmen.

If the reciprocity requirement is not appreciated, it is traditionally considered that, in the context of promises altering existing contracts, a party that either does or promises to do what it is already bound to do is not providing any fresh value (or consideration) so that the renegotiation promise cannot be binding.²⁷ Again, the use of a lawyer will assist in drafting the renegotiation in a way that will satisfy the consideration requirement,²⁸ since the courts have been ingenious in identifying instances where a party can be said to have gone beyond its existing contractual obligations, and thus provided consideration for the

²⁵ *Compagnie Noga D'Importation et D'Exportation v Abacha (No.4)* [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915 at [57].

²⁶ Example in J. Poole, *Textbook on Contract Law* (Oxford: Oxford University Press, 2016, 13th edition), pp.143-44.

²⁷ This applies to alteration promises to pay more (*Stilk v Myrick* (1809) 2 Camp. 317, 170 E.R. 1168; 6 Esp. 129, 170 E.R. 851) or do more, and alteration promises to accept less than is originally contractually due (*Foakes v Beer* (1884) 9 App. Cas. 605 HL).

²⁸ M.P. Furmston, "Commentary on 'The Renegotiation of Contracts' [by J.W. Carter]" (1998) 13 J.C.L. 210, 210 ("Consideration presents no serious problem in the field to anyone who employs a reasonably competent lawyer. The concepts are sufficiently flexible that nearly all transactions can be fitted within them and in any case where they cannot nominal consideration will come to the rescue").

alteration promise.²⁹ This turns on the interpretation of the scope of the contractual duty in the existing contract. If it is narrowly construed, it need not be difficult to identify instances of exceeding performance. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron*³⁰ (“*The Atlantic Baron*”) provides a clear example. A devaluation of the US dollar had made a fixed price contract to build a tanker for the owners far less profitable. The price term was renegotiated to allow for a 10 percent increase but this was stated to be “in consideration” of the shipbuilder increasing the amount of the letter of credit, securing repayment of the price if the shipbuilder defaulted, by an equivalent amount. Mocatta J held there was consideration for the alteration promise.

If this also fails, *Williams v Roffey Bros & Nicholls (Contractors) Ltd*³¹ (“*Roffey*”) supports a pragmatic approach to finding the necessary consideration in the context of alteration promises. In *Roffey*, the main contractor had contracted with the plaintiff sub-contractor to carry out carpentry work in a block of flats for a fixed price of £20,000 and to a fixed deadline. The main contractor realised the carpenter was in financial difficulty having underpriced the contract, which would presumably have been done with the aim of securing the award of the sub-contract. The main contractor was itself subject to a penalty clause in the event of delayed completion and therefore agreed to pay the plaintiff an additional £10,300, at the rate of £575 per flat completed. Eight more flats were completed. The carpenter then stopped work and sought to recover the additional sum promised. The Court of Appeal concluded this promise to pay more was supported by consideration in the form of the practical benefits of avoiding the disruption of having to find an alternative sub-contractor to finish the carpentry work and the avoidance of the penalty clause in the main contract. *Roffey* thus shows that consideration can be found in

²⁹ *Hartley v Ponsonby* (1857) 7 El. & Bl. 872, 119 E.R. 1471; *North Ocean Shipping v Hyundai Construction, The Atlantic Baron* [1979] Q.B. 705.

³⁰ *The Atlantic Baron* [1979] 1 Q.B. 705. See B. Coote, “Duress by Threatened Breach of Contract” (1980) 39 C.L.J. 40.

³¹ [1991] 1 Q.B. 1 CA. See B. Coote, “Consideration and Benefit in Fact and in Law” (1990) 3 J.C.L. 23; J. Adams and R. Brownsword, “Contract, Consideration and the Critical Path” (1990) 53 M.L.R. 536; R. Hooley, “Consideration and the Existing Duty” [1991] J.B.L. 19; D. Halyk, “Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification in the Light of *Williams v Roffey Brothers*” (1991) 55 Saskatchewan L. Rev. 393; A. Phang, “Consideration at the Crossroads” (1991) 107 L.Q.R. 21.

the existence of practical benefits, or the avoidance of a disbenefit, to the promisor arising from the subsequent promise, even if in law the promisee has done no more than perform its contractual obligation.

Roffey has been welcomed as “more flexible, less formalistic, and closer to modern commercial practice where there is a need for fluidity to take account of changing market conditions”.³² Indeed, the court accepted counsel’s argument that it was in the interests of commercial reality for parties to a contract, where the price was acknowledged to be too low, to be able to agree an increase. It was recognised that there may be less justification for the imposition of restrictive bargaining principles in the alteration context, given the existence of the initial bargain,³³ with a clear desire to hold the promisor to its promise,³⁴ assuming it was freely given.

The consequence of *Roffey* appeared to be an anomalous difference in treatment between promises to pay more (a practical benefit was valid consideration) and promises to accept less.³⁵ In the latter scenario, the fact a practical benefit could not be valid consideration had been understood to be the position following the rejection of such a proposition in that context by House of Lords in *Foakes v Beer*³⁶ (“*Foakes*”). It was for that reason an

³² S. Wilken and K. Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford: Oxford University Press, 2012, 3rd edition), para 2.24. What may be surprising in *Roffey* is that greater emphasis was not placed on finding consideration in the revised payment terms. Russell LJ refers ([1991] 1 Q.B. 1 CA at 19) to the agreement as replacing a “hitherto...haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat”. That should present sufficient evidence to identify, or at least “invent”, consideration.

³³ Furmston has noted it “was arguably a mistake to have ever required consideration for a change in the contract terms”: Furmston (1998) 13 J.C.L. 210, 210.

³⁴ A desire to give effect to promises intentionally made also underpins promissory estoppel: *Central London Property Trust v High Trees House Ltd* [1947] K.B. 130; A. Denning, “Recent Developments in the Doctrine of Consideration” (1952) 15 M.L.R. 1; and Lord Denning, *The Discipline of Law* (London: Butterworths, 1979), p.223. Russell LJ in *Roffey* also stated ([1991] 1 Q.B. 1 CA at 17) it would be unconscionable if the defendants could escape liability having been quite prepared to make payment.

³⁵ *Re Selectmove Ltd* [1995] 1 W.L.R. 474 CA; *Re C (A Debtor)*, *The Times*, 11 May 1994; Carter, Phang, and Poole (1995) 8 J.C.L. 248; N.J. Hird and A. Blair, “Minding Your Own Business – *Williams v Roffey* Re-Visited: Consideration Re-Considered” [1996] J.B.L. 254; E. Peel, “Part Payment of a Debt is No Consideration” (1994) 110 LQR 335.

³⁶ *Foakes v Beer* (1884) 9 App. Cas. 605 HL.

attempt to extend the *Roffey* principle to promises to accept less was rejected in *Re Selectmove Ltd*.³⁷

An attempt to square the position as a matter of principle was made in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*³⁸ (“*MWB*”). *MWB* managed office space, of which *Rock* was a licensee. When *Rock* ran into financial difficulties, the parties came to a revised payment arrangement, to the effect that *Rock* would initially pay less than it was due to pay, and later make up the balance. The Court of Appeal applied *Roffey* and concluded *MWB*’s promise to initially accept less was enforceable because of practical benefits to be obtained through that promise. Two particular benefits were identified. First, *MWB* would, by not exercising its right to require *Rock* leave the property, avoid having “unoccupied and therefore unproductive property, which may cause losses in the form of loss of rent and in other ways”.³⁹ Second, *MWB* would receive immediate payment and would then be “likely to recover more” than it would via a strict enforcement of the original agreement.⁴⁰ The Court of Appeal considered these benefits represented a “commercial advantage” and thus went beyond a mere instance of *MWB*’s financially “accommodating” *Rock*.⁴¹ *Foakes* and *Re Selectmove* were distinguished as cases where the only “benefit” had been the creditor’s financial accommodation of the debtor via the receipt of payment itself; there being no collateral practical benefits of the kind identified in *MWB*.⁴²

While *MWB* can be defended in pragmatic terms for the desire to give effect to the parties’ freely agreed renegotiation, the court’s reasoning is difficult to accept. First, the analysis of *Re Selectmove* appears at odds with what was actually said in that case, where Peter Gibson LJ seemed to regard *Foakes* as precluding the extension of the *Roffey*

³⁷ *Re Selectmove Ltd* [1995] 1 W.L.R. 474 CA at 481. For potential policy arguments justifying the difference in treatment, see Furmston (1998) 13 J.C.L 210, 211 (pointing to arguments of scale that might make it easier to employ the doctrine of duress in the context of the enforceability of the relatively few promises to pay more than in the case of promises to accept part payment of debts).

³⁸ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553; [2017] Q.B. 604.

³⁹ *MWB* [2016] EWCA Civ 553 at [47]-[49] per Kitchin LJ and at [72] per Arden LJ.

⁴⁰ *MWB* [2016] EWCA Civ 553 at [47] per Kitchin LJ and at [75] per Arden LJ.

⁴¹ *MWB* [2016] EWCA Civ 553 at [48] per Kitchin LJ and at [74]-[75] and [86]-[87] per Arden LJ.

⁴² *MWB* [2016] EWCA Civ 553 at [48] per Kitchin LJ and at [74] and [85]-[87] per Arden LJ.

principle in general terms in the context of promises to accept less, without drawing any distinction between the mere accommodation of a debtor and collateral practical benefits.⁴³

Second, it is not easy to see how the second benefit, namely MWB's receipt of immediate payment followed by an increased chance of recovering the balance, is in substantive terms different to what was recognised by Lord Blackburn in *Foakes* but rejected by the majority in that case. There, Lord Blackburn, in what was effectively a dissenting speech, had observed that commercial parties "do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial" than insisting on their strict rights, and that was all the more so where the debtor's solvency was in doubt.⁴⁴

The principal difficulty, however, is that, in rejecting the proposition that a practical benefit could only support a promise to pay more money under a contract, the court's characterisation of the "practical benefit" effectively substitutes one arbitrary limitation for another. It is entirely possible that a creditor might, following an assessment of the commercial benefit and risk, prefer as a matter of fact the certainty of immediate payment as opposed to gambling on the debtor's solvency or embarking on litigation to recover the debt (as reflected in Lord Blackburn's observations in *Foakes*). The conclusion from *MWB*, however, is that such a course, however practically beneficial to the promisor, will not suffice as a practical benefit to support enforceability. The net effect is to treat differently cases of part payment where there is no benefit other than the receipt of payment and cases where some other, additional, benefit can be identified. While such an analysis might have allowed the court to carve out an exception to *Foakes* that led to a pragmatic result in *MWB*, the new-fangled conceptualisation of "practical benefit" creates unnecessary and unhelpful distinctions as to what *qualities* of practical benefit equate to valid consideration. That much appears out of line with judicial recognition that English

⁴³ *Re Selectmove Ltd* [1995] 1 W.L.R. 474 CA at 481. See A. Shaw-Mellors, "Contractual Variations and Promises to Accept Less: Pragmatism in the Court of Appeal" (2016) 8 J.B.L. 696, 704.

⁴⁴ *Foakes v Beer* (1884) 9 App. Cas. 605 HL at 622.

law “in application takes a practical approach” to identifying consideration,⁴⁵ and will reject a “rigid approach” that fails to “reflect the intention of the parties”.⁴⁶

What tends to trigger objection to the *Roffey* principle and the treatment of practical benefits as consideration is that the alteration promise returns, in performance terms, no more than the promisor’s initial contractual entitlement.⁴⁷ The most that can seemingly be said is that the promisor increases its chances of actually obtaining that performance.⁴⁸ An alternative formulation, adopted by Arden LJ in *MWB*, is to recognise the parties’ original bilateral contract as supplemented by a collateral unilateral contract.⁴⁹ Thus, taking the example of a revised payment schedule pursuant to which the promisor agrees to accept less (as in *MWB*), the promisor here promises to give up its right to full payment if the promisee produces the required part performance (i.e. making payments in accordance with the revised arrangement). This thereby gives the promisor the practical benefit of *actual performance*, as distinct from the right to sue for non-performance and claim damages it would otherwise have without the alteration promise. On this analysis, the true practical benefit is the promisor’s securing performance (that is, part payment

⁴⁵ *New Zealand Shipping Co Ltd v A. M. Satterthwaite & Co Ltd* [1975] A.C. 154 PC (New Zealand) at 167.

⁴⁶ *Roffey* [1991] 1 Q.B. 1 CA at 18 per Russell LJ. See also *Pao on v Lau Yiu Long* [1980] A.C. 614 PC (Hong Kong) at 634-35. *MWB* is also difficult to reconcile with the trite principle that a court will not inquire as to the adequacy of consideration (*Chappell & Co Ltd v Nestlé Co Ltd* [1960] A.C. 87 HL).

⁴⁷ M. Chen-Wishart, “Consideration: Practical Benefit and the Emperor’s New Clothes”, in *Good Faith and Fault in Contract Law*, edited by J. Beatson and D. Friedmann (Oxford: Oxford University Press, 1999); M. Chen-Wishart, “A Bird in the Hand: Consideration and Contract Modifications”, in *Contract Formation and Parties*, edited by A. Burrows and E. Peel (Oxford: Oxford University Press, 2010), pp. 90, 92; M. Roberts, “*MWB Business Exchange Centres Ltd*: The Practical Benefit Doctrine Marches On” (2017) 80 M.L.R. 339, 346. For other criticisms of *Roffey* see: *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (QB), [2005] 1 Lloyd’s Rep. 128 at [107]-[109]; *Adam Opel GmbH v Mitras Automotive Ltd* [2007] EWHC 3205 (QB) at [41]-[42]; *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 S.L.R. 631 at 635; B. Coote, “Consideration and the Variation of Contracts” [2003] N.Z.L.R. 361; J. O’Sullivan, “In Defence of *Foakes v. Beer*” (1996) 55 C.L.J. 219.

⁴⁸ P. Lee, “Contract Modifications – Reflections on Two Commonwealth Cases” (2012) 12 O.U.C.L.J. 189, 197-98; Roberts (2017) 80 M.L.R. 339, 345-46.

⁴⁹ *MWB* [2016] EWCA Civ 553 at [88]-[90], citing M. Chen-Wishart, “Reforming Consideration: No Greener Pastures”, in *Contract in Commercial Law*, edited by S. Degeling, J. Edelman, and J. Goudkamp (Sydney: Thomson Reuters, 2016). cf *MWB* [2016] EWCA Civ 553 at [49] per Kitchin LJ and at [67] per McCombe LJ.

over the right to sue); and, if no such performance is rendered, the original obligations revive and the promisor can sue on its strict rights.⁵⁰

Emphasising the promisor's securing performance arguably does less violence to the traditional understanding of consideration than the expansive characterisation of consideration via the "practical benefit" concept as encouraged in *Roffey*. Even on this analysis, however, the promisor in the result gains no more than its prior entitlement.⁵¹ Moreover, if such an analysis is to be accepted, it ought logically to extend to the facts of *Foakes*, but the House of Lords in that case denied the enforceability of the promise to accept part payment.⁵² In practical terms, strong arguments remain as to the reversal of *Foakes* in favour of the position advocated by Lord Blackburn in that case.⁵³ Such a solution is open only to the Supreme Court,⁵⁴ but has the merits of simplicity, promotes commercial certainty, and avoids technical and strained distinctions as to what amounts to a practical benefit. The consequence of this would make it a rare scenario in which the alteration promise was truly gratuitous in the sense no practical benefit could be identified.⁵⁵ That must, however, be assessed against the practical backdrop and the

⁵⁰ Chen-Wishart, "Reforming Consideration: No Greener Pastures", pp. 98-99. Similarly, in *Roffey*, the promise to pay more was motivated by the practical benefit of the promisor's obtaining actual performance, as opposed to exercising its right to sue for non-performance; the enforceability of such a promise thus being conditional on the promisee's actual performance of its initial obligations: see Chen-Wishart, "Reforming Consideration: No Greener Pastures", pp. 96-97 and Chen-Wishart, "Consideration and Contract Modifications", pp. 96-97.

⁵¹ Coote [2003] N.Z.L.R. 361, 372.

⁵² Nor would such an analysis deal adequately with the situation where a creditor agrees to forgo all rights to any balance owed, even where a practical benefit might be identified in so doing (such as the promisor's enhancing its commercial reputation, or enhancing its relationship with the debtor). Unless any other consideration can be identified (see, e.g., *Pinnel's Case* 77 E.R. 237; (1602) 5 Co. Rep. 117a) the enforceability of such a promise will be left to arguments based, for example, on promissory estoppel or waiver.

⁵³ Law Revision Committee, *Sixth Interim Report on the Statute of Frauds and the Doctrine of Consideration* (1937, Cmd 5449) at paras [34]-[35]; Adams and Brownsword, "Contract, Consideration and the Critical Path", 540.

⁵⁴ The Supreme Court is, at the time of writing, due to hear an appeal in *MWB*.

⁵⁵ As Coote has pointed out, no one would throw good money after bad and thus if factual benefit is judged subjectively, establishing consideration will be straightforward: Coote, "Consideration and Benefit in Fact and in Law" (1990) 3 J.C.L. 23, 25-26. See also *Re Selectmove Ltd* [1995] 1 W.L.R. 474 CA at 481 ("When 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"). In relation to the subjective assessment of factual benefit, see Chen-Wishart, "Consideration: Practical benefit and the Emperor's New Clothes". For the position where no practical benefit would arise, see *Roffey* [1991] 1 Q.B. 1 at 16 per Glidewell LJ (noting *Stilk v Myrick* would still govern the position where no benefit was obtained); at 18-19 per Russell LJ; and at 21 per Purchas LJ (recognised in Adams and

reality that changes in the economic climate or market conditions can put in doubt the promisee's strict performance, making real the possibility that the occasion for renegotiation will arise. It was earlier seen that the courts are increasingly willing to defer to party autonomy for the purpose of upholding express agreements to (re)negotiate. Thus, the law would be more consistent in approach by extending such deference to circumstances where the parties have exercised autonomy and pragmatism in preferring to keep a contract alive and embarking on a renegotiation, albeit without the direction of such an express clause.⁵⁶

Economic duress

The court in *Roffey* did not expressly comment on alteration promises to accept less. Nonetheless, their Lordships were clear that the principal rationale for the relaxation of the strict definition of consideration in the alteration context was the existence of the doctrine of economic duress as the policing tool, to thereby deny the enforceability of renegotiations obtained as a result of duress.⁵⁷ The similar rationale can be seen in *MWB*.⁵⁸

The possibility of economic duress may arise in the renegotiation context where A threatens not to perform its contractual obligations unless B pays more money,⁵⁹ or unless B agrees to forgo payment on all or part of a debt, for example, because A knows of B's cash flow problems.⁶⁰ Renegotiations that are the result of duress will be voidable. The threat, assuming it is illegitimate, may also constitute a repudiatory breach of the

Brownsword, "Contract, Consideration and the Critical Path", 541); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2011] 1 All E.R. (Comm) 46 at [118].

⁵⁶ See also A. Mills and R. Loveridge, "The Uncertain Future of *Walford v. Miles*" [2011] L.M.C.L.Q. 528, 531-33.

⁵⁷ *Roffey* [1991] 1 Q.B. 1 at 13-15 per Glidewell LJ (relying on the speech of Lord Scarman in *Pao On v Lau Yiu Long* [1980] A.C. 614 PC (Hong Kong) at 632), at 18 per Russell LJ, and at 21 per Purchas LJ. *Stilk v Myrick* (1809) 2 Camp. 317, 170 E.R. 1168; 6 Esp. 129, 170 E.R. 851, is therefore explicable as involving a restrictive definition of consideration to prevent extortion at a time when there was no alternative doctrine of duress.

⁵⁸ *MWB* [2016] EWCA Civ 553 at [81] per Arden LJ. See also H.G. Beale (ed), *Chitty on Contracts* (London: Sweet & Maxwell 2015, 32nd edn), para 4-119.

⁵⁹ See, e.g., *The Atlantic Baron* [1979] Q.B. 705 (albeit duress argument defeated by affirmation); *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 A.C. 366 HL; *B & S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419 CA; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] Q.B. 833.

⁶⁰ *D & C Builders Ltd v Rees* [1966] 2 Q.B. 617 CA.

underlying contract so that B would, in theory at least, have the option to terminate and claim damages or claim the full debt. In reality, however, B may have no realistic choice other than to agree to A's proposal, and this is a central ingredient of establishing duress.⁶¹

Interaction of these principles

Difficulties of application and analysis arise when we examine the interaction of these legal principles in the context of renegotiations. *The Atlantic Baron*, it will be recalled, was a decision involving an alteration promise to pay more where consideration was found in the action of increasing the letter of credit. Mocatta J accepted that the renegotiation was the product of economic duress since when the shipbuilders threatened to terminate the contract if the payments were not increased by 10 percent, the owners had been negotiating a very lucrative contract for the charter of the vessel once built.⁶² The increased instalments were paid, but nine months after delivery of the tanker the owners claimed the return of the additional amount. The argument that the alteration was unenforceable due to an absence of consideration failed due to the increase in the letter of credit, but the judge accepted the separate argument that the alteration was obtained as a result of economic duress. He nevertheless held the delay in seeking to avoid the alteration and reclaim the additional sums following delivery amounted to affirmation of the alteration. The alteration was thus enforceable, the owner could not recover the additional payment, and the shipbuilder's duress had no operative consequences.

Two separate hurdles to overcome?

The Atlantic Baron suggests, in general, there are two separate hurdles to overcome, namely consideration and economic duress. If there is no consideration, the alteration will not be enforceable. In addition, enforceability can still be denied if duress is established, but not if the remedy of rescission has been lost. It is important to consider how this will arise in practice.

⁶¹ See, e.g., *DSND Subsea Ltd v Petroleum GeoServices ASA* [2000] B.L.R. 530 at [131].

⁶² Interestingly, there was no evidence that the shipbuilders knew about the negotiations for the lucrative charter contract. In fact, the contract was not made until after the threat. There was thus no obvious taking advantage of circumstances (compare *D & C Builders Ltd v Rees* [1966] 2 Q.B. 617 CA).

Scenario one: B promises to pay more money to A following A's making a threat not to perform unless payment is increased. Here, A will seek to enforce that promise to pay more, and A has the burden of establishing that the promise is supported by consideration. It is not, generally, for A to prove the absence of duress on its part; it will fall to B to argue that the promise was only made because of the threat and pressure exerted on it. This may seem relevant only after the existence of consideration is established.

Scenario two: B promises to pay more money to A as a result of A's making a threat not to perform unless payment is increased. B makes the payment but then, as soon as practicable to do so, seeks to recover the money. Here, B is seeking to recover a payment it alleges has been made under an unenforceable alteration. B can do this by establishing *either* (i) there was no consideration to support the promise, or (ii) even if there is consideration, that contract can be set aside for duress and the additional payment recovered.⁶³

This was the scenario in *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*⁶⁴ (decided pre-*Roffey*). The facts concerned a contract for carriage of B's products by A at a fixed rate. The products were being supplied to C, a major client of B, and the survival of B's business depended on the performance of its contract with C. Less than a month into the contract term, A threatened not to deliver any further loads unless the rate for carriage was increased. It was found to be impossible for B to arrange alternative carriage in time to meet the delivery dates to C and B therefore had no choice other than to pay the increased rate for carriage. As soon as practicable thereafter, B sought to recover the sums overpaid, alleging economic duress. Tucker J held there was duress and also concluded that the alteration promise was not supported by consideration since A had done no more than contractually bound to do in carrying the goods.

⁶³ As in *The Atlantic Baron* [1979] Q.B. 705.

⁶⁴ *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] Q.B. 833.

The *Roffey* analysis is quite different in that Glidewell LJ adopted what can be termed an “integrated analysis” to determine whether the alteration promise is binding. This poses a number of questions that require resolution; it being far from clear that this “integration”, and its consequences are fully understood and appreciated.

D. Integration or Rationalisation?

Duress as the first step?

Glidewell LJ’s statement of principle in *Roffey* is frequently cited, but rarely fully understood. It is tempting to interpret it as requiring a two-step process whereby the first requirement is to look for duress. If duress is established, that is assumed to be the end of the matter. If it is absent, as found as a fact in *Roffey*, the next step would be to identify the necessary practical benefit(s) to support a finding of consideration. The fact that, on this analysis, there are two steps raises the question as to the order in which they are to be assessed. It could, for example, be argued that consideration must first be established prior to any possibility of avoiding the alteration for duress. If there is no consideration, there is no alteration to set aside. That appears to be a logical conclusion, but does not sit, for example, with *Atlas Express v Kafco* where the finding of duress is the ratio of the case, and the observation that there was no consideration an apparent afterthought comprising a single paragraph seemingly intended for completeness.

Could it be argued that duress is a vitiating factor that deprives an apparent “agreement” of its very status as an “agreement”, so that it is the agreement that can be avoided? This would enable duress to be seen as a logical first step when determining the nature of the alteration. There is support for duress as the first step in Purchas LJ’s judgment in *Roffey*, in adopting the statement made by counsel that the “modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement”.⁶⁵

⁶⁵ *Roffey* [1991] 1 Q.B. 1 at 21. *Pao On v Lau Yiu Long* is cited as an example (inappropriately, since on the facts in that case there was consideration but no duress).

In any event, is it the finding of duress that is pivotal or a finding that the contract can be rescinded for duress? *The Atlantic Baron* shows affirmation can be fatal to an argument that an alteration is not binding. Although there may be few sympathies with a party's failure to take prompt action when alleging duress, it is possible that affirmation will not be the responsibility of the innocent party, but arises from the duress itself. Such a scenario would, for example, include where an employer insists that a contractor execute onerous collateral contracts before the employer will consider the contractor's extension of time claims under the original construction contract. Although the illegitimate pressures may cease, it may by then be too late to stop the collateral contracts due to commitments made in relation to sub-contracts and supply agreements.⁶⁶

In the context of alteration promises to accept less, matters will, in practice, turn on the way in which the claim arises. If the creditor seeks to recover the balance on the original debt, a likely argument will be to plead an absence of consideration to support the alteration, which, if successful, would possibly leave it for the debtor to plead promissory estoppel. Otherwise, the creditor might allege the promise to accept less is voidable for duress; and in *D & C Builders Ltd v Rees*⁶⁷ this was treated as an issue of agreement and aligned with the ability to demonstrate a true "accord" to achieve "accord and satisfaction". In that case, Lord Denning MR explained how the duress argument (or absence of accord) might also be relevant in the context of promissory estoppel, namely to refute the requirement that it is inequitable to go back on the promise to accept less and not sue for the balance, since the promise in question was not freely given. On the other hand, promissory estoppel might operate if there is a genuine accord which was intended to be relied upon and has been acted upon by the debtor. To the extent a more liberal approach to consideration in support of alteration promises, as advocated earlier, is adopted, the need to rely on promissory estoppel will be much reduced. It would, however, retain purpose where any promise was not supported by consideration, or where

⁶⁶ Example given in H. Lal, "Commercial Exploitation in Construction Contracts: The Role of Economic Duress and Unjust Enrichment" (2005) 21 Const. L.J. 590, at 590 and 597.

⁶⁷ *D & C Builders Ltd v Rees* [1966] 2 Q.B. 617 CA.

the nature and scope of the promise equates to a temporary indulgence.⁶⁸ Therefore, if the creditor can establish an absence of consideration, the next logical argument would be for the debtor to plead promissory estoppel, so it is sensible for the creditor to plead both the lack of genuine accord and, in turn, the right to go back on the promise.

Consideration as the first (possibly the only) step?

Should the starting point be the question whether consideration can be established, particularly as rescission appears to be key rather than the existence of duress?⁶⁹ John Carter appears to assume there are two separate concepts and consideration is found first – presumably on the logic that, without consideration, there is no binding alteration to rescind for economic duress.⁷⁰ Similarly, Stephen Waddams observes that Glidewell LJ treats economic duress as a proviso, that is, the renegotiation may be supported by consideration but is liable to be set aside if duress can be established.⁷¹

The integrated principle in Roffey

The Atlantic Baron highlights the fact a finding of duress would not necessarily provide the protection against extortion that the court in *Roffey* needed to identify to conclude that duress had taken over from consideration as the policing tool (and thereby justify a more relaxed approach to consideration). This represented a potential difficulty for the Court of Appeal and, if we assume Glidewell LJ was aware of this, it may explain the integrated approach to principle his Lordship adopted. This (“the Glidewell LJ integrated principle”) can be summarised as follows:

- (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

⁶⁸ *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB); [2015] 1 All E.R. (Comm) 204 at [141].

⁶⁹ This was the approach of Mocatta J in *The Atlantic Baron* [1979] Q.B. 705.

⁷⁰ J.W. Carter, “The Renegotiation of Contracts” (1998) 13 J.C.L. 185, 188.

⁷¹ S. Waddams, “Principle in Contract Law: the Doctrine of Consideration”, in *Exploring Contract Law*, edited by J.W. Neyers, R. Bronaugh, and S.G.A. Pitel (Oxford: Hart Publishing, 2009), p. 60.

- (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 his promise, B obtains in practice a benefit, or obviates a disbenefit; and
- (v) *B's promise is not given as a result of economic duress or fraud on the part of A*; then
- (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.⁷²

This formulation, stated as a single proposition, requires only one “integrated” hurdle, namely the identification of consideration as a practical benefit or avoidance of disbenefit to the promisor. Given the word “then” in point (v), establishing the absence of duress is simply an ingredient in the process of reaching a *conclusion* that there is consideration. Lord Scarman in *Pao On v Lau Yiu Long*⁷³ also treated duress as an integral part of determining whether the alteration promise was supported by consideration, that is, duress would prevent a finding that the promise was supported by consideration. His Lordship stated: “Unless, therefore, the guarantee was...voidable on the ground of economic duress, the extrinsic evidence establishes that it was supported by valid consideration”.⁷⁴

Superficially, this appears attractive since it avoids the awkward possibility that, if there are separate requirements, and there is duress on the facts but the right to rescind has been lost, there might nevertheless be a need to identify consideration and enforce the alteration. It would then have to be conceded that the rationale for the *Roffey* approach, i.e. the general *existence* of the doctrine of economic duress (as opposed to remedies for

⁷² *Roffey* [1991] 1 Q.B. 1 at 15-16 (emphasis added).

⁷³ *Pao On* [1980] A.C. 614 PC (Hong Kong). A. Phang “Whither Economic Duress? Reflections on Two Recent Cases” (1990) 53 M.L.R. 107.

⁷⁴ *Pao On* [1980] A.C. 614 PC (Hong Kong) at 632. This statement is incorporated into Glidewell LJ’s judgment in *Roffey* [1991] 1 Q.B. 1 at 14.

duress), could not be sustained. The doctrine of duress would not otherwise necessarily provide the required protection against the enforceability of extortionate promises.⁷⁵

Quite apart, however, from the fact the Glidewell LJ integrated principle is expressed only in terms of *Roffey* consideration, in the *Roffey* context it also requires closer scrutiny. Thus, *Roffey* can be criticised “for linking the *presence* of consideration with the *absence* of economic duress”.⁷⁶ In other words, principle now imposes a burden of proof that would not apply if the consideration is to be established in any other way (such as by going beyond the contractual duty⁷⁷). Stage (v) of the Glidewell LJ integrated principle requires that the party seeking to establish consideration and enforce the alteration promise demonstrate it *did not* exercise economic duress in extracting the promise. It, therefore, involves proof of a negative which seems to involve a change in previous understanding that has hitherto not been subject to detailed scrutiny. Indeed, it is clear Purchas LJ considered duress, if available, a defence for the *defendants* to argue.⁷⁸

A re-examination of the two scenarios discussed earlier in the light of the Glidewell LJ integrated principle highlights the differences.

Scenario one: B promises to pay more money to A following A’s making a threat not to perform unless payment is increased. Here, it is A who will seek to enforce that promise to pay more, and A will have the burden of establishing the promise is supported by consideration. Whereas generally it is for B to argue that it only made the promise because of the threat or pressure exerted on it, under the Glidewell LJ integrated principle, the burden falls on A to plead and establish “B’s promise was not given as a result of economic duress or fraud” by A.

⁷⁵ This, of course, assumes the basis of the Glidewell LJ integrated principle is that the existence of duress will rule out a conclusion that consideration exists, rather than requiring both duress and the availability of rescission.

⁷⁶ M. Lobban, “Foakes v Beer”, in *Landmark Cases in the Law of Contract*, edited by C. Mitchell and P. Mitchell (Oxford: Hart Publishing, 2008), p.266 (emphasis added).

⁷⁷ *The Atlantic Baron* [1979] Q.B. 705.

⁷⁸ *Roffey* [1991] 1 Q.B. 1 at 21.

Scenario two: B promises to pay more money to A as a result of A's making a threat not to perform unless payment is increased. B makes the payment but then, as soon as practicable to do so, seeks to recover the money. Here, B is seeking to recover a payment allegedly made under an unenforceable alteration. B can surely still do this by establishing *either* (i) there was no consideration to support the promise, or (ii) even if there is consideration, the alteration can be set aside for economic duress and the additional payment recovered. Establishing the absence of consideration in (i) should not involve having to establish that B's promise was given as a result of economic duress or fraud; this is a separate pleading and argument. In this context, the integrated approach falls apart.

The subsequent decision of *Adam Opel GmbH v Mitras Automotive Ltd*⁷⁹ is indicative of the general confusion of principle. The facts concerned a supply arrangement. When B gave six months' contractual notice of its intention to bring the agreement to an end, A threatened to cease all immediate supplies unless B agreed to pay more money. Facing considerable commercial consequences if immediate supplies were lost, B reluctantly agreed to make the increased payments. The facts establish a clear case of economic duress. Shortly after the notice period ended, B sought repayment arguing both the promise to pay more was unenforceable as it was made under duress and there was no consideration (i.e. scenario two, above). The judge focused on the duress argument and concluded B had no realistic choice other than to agree to the increased payment to secure supplies. B was, therefore, entitled to a declaration that the agreement was voidable and had been rescinded, enabling the increased payment to be recovered. The judge commented:

“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”.⁸⁰

⁷⁹ *Adam Opel GmbH v Mitras Automotive Ltd* [2007] EWHC 3205 (QB).

⁸⁰ *Adam Opel* [2007] EWHC 3205 (QB) at [42].

Thus, the absence of economic duress (or fraud) was treated as a qualifying criterion and, having identified duress, the judge considered *Roffey* “to permit any variation of a contract” and concluded without more that it necessarily followed that B “cannot rely on absence of consideration, whether as a supplement or an alternative to economic duress”.⁸¹ In other words, without identifying the practical benefits arising to B, the judge concludes he is bound by *Roffey* but does not make it clear whether (i) he finds that duress prevents *Roffey* consideration on the integrated analysis, or (ii) there is in fact *Roffey* consideration for the alteration promise, which does not matter given the finding of duress.

If duress is the central concept, it is difficult to reconcile with Glidewell LJ’s single test of consideration with an integrated requirement of *absence* of duress. Duress should have a separate and identifiable existence. The burden of proof accepted in *Adam Opel* was that the burden of establishing duress fell squarely on B, the party seeking to avoid the alteration. This is as it should be. It leaves open the question of how the judge would have reconciled principle had B not acted promptly in pursuing recovery of the advance payment and so lost the right to rescind. Would he have been quite so keen to conclude there was *Roffey* consideration, leading to a conclusion of no recovery of the overpayment despite the causal link with the illegitimate threats?

Despite these comments relevant to scenario two, can we nevertheless conclude that the Glidewell LJ integrated principle will be the test in a scenario one situation? In this scenario, similar to *Roffey*, it is the promisee who is seeking to enforce the promise to pay more. Clearly the promisee (A) has to establish the existence of consideration but should this involve having to prove the absence of duress on his own part, or should A have to establish consideration and it then fall to B to show the alteration is nevertheless unenforceable due to duress? Clearly further clarification is required if *Roffey* is to retain any integrity as a principle.

The identification of duress

⁸¹ *Adam Opel* [2007] EWHC 3205 (QB) at [42]-[43].

If we accept *Roffey* as moving the scrutiny of alteration promises from the concept of consideration to “duress”, it is imperative that duress be clearly defined and delineated. It has not been. As Stephen Waddams observes:

“Many have welcomed the demise of consideration in this context, but it is not easy to say precisely what has replaced it. What exactly, in the court’s view, was the governing concept of enforceability and how did it apply in practice to contractual renegotiations? These questions are not very easily answered.”⁸²

In particular, although it was held there was no duress in *Roffey*, what is so special about the facts in that case? We are told that the imperative for the renegotiation came from the main contractor, or more specifically the main contractor’s surveyor, so are we to conclude that the carpenter did not raise his problems in any discussions? Indeed, Glidewell LJ identified duress in this context as the sub-contractor declining to continue with work unless the contractor agreed to pay more.⁸³ The facts are undoubtedly unusual since the “agreement” to pay more appears in the defendants’ pleadings but not those of the plaintiff sub-contractor. If implicit threats or factual background are sufficient, what are we to make of the fact it was clear that the carpenter had received 80 percent of the sum due under the contract at the date of the renegotiation meeting but had not completed anywhere close to that percentage of the work?

We must be able to draw the line between threats which constitute duress and simple offers to renegotiate,⁸⁴ but “commercial pressure exists with or without a threat”⁸⁵ and “illegitimate pressure” must be distinguished from “the rough and tumble of the pressures of normal commercial bargaining”.⁸⁶ Where would factual statements of financial

⁸² Waddams, “Principle in Contract Law: the Doctrine of Consideration”, in *Exploring Contract Law*, at pp. 60-61.

⁸³ *Roffey* [1991] 1 Q.B. 1 at 13; although concluding there was no duress on the facts.

⁸⁴ See S.A. Smith, “Contracting under Pressure: A Theory of Duress” (1997) 56 C.L.J. 343, 347.

⁸⁵ Furmston (1998) 13 J.C.L. 210, 212, adding: “The most dangerous and most sophisticated contractors are those who make threats without saying anything”.

⁸⁶ *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] B.L.R. 530 at [131].

position without any additional explicit threat lie? Are implicit threats sufficient?⁸⁷ Stephen Waddams spelt out the problems in noting this cannot turn on whether “the subcontractor speaks in terms of inability to perform rather than unwillingness. Usually an expression of inability to do the work at the contract price is a slightly softened form of a declaration of unwillingness to do it”.⁸⁸

That these fundamental questions remain unanswered highlights the lack of certainty and clarity facing those who renegotiate contractual terms. What must be apparent is that if “the threat” to breach a contract were to be relied upon as constituting a repudiatory breach, and so justifying the option to terminate or affirm, the threat would have to be clear and unequivocal to constitute a renunciation of the contract. If, however, this test is to be applied in the context of economic duress to identify the necessary threat and distinguish normal commercial pressure, it would only encourage simple statements of inability to perform. The threat will then be implicit in the mind of the party that feels compelled to pay more. This cannot be a satisfactory resolution. One possibility is to look at a party’s good faith to determine whether at the root of the renegotiation there is unconscionable conduct by one party in seeking to making a gain⁸⁹ (or to use the language of Glidewell LJ in *Roffey*, “taking an unfair advantage”) at the other’s expense, rather than a set of circumstances that has arisen, largely as a result of incompetence.⁹⁰ The difficulty, of course, is that accepting that incompetence is less problematic may send the wrong message when it comes to pricing tenders for work.

⁸⁷ Waddams argues (“Principle in Contract Law: the Doctrine of Consideration” at p. 61) that implicit threats should be included in the category of threats since it may be clear from the circumstances, without having to say or do anything explicitly, that a party cannot continue to perform. Waddams considers there must have been an implicit threat to break the contract in *Roffey*. Clearly, therefore, opinions differ but given the drastically different consequences of these findings, clearer guidance is vital.

⁸⁸ S. Waddams, “Commentary on ‘The Renegotiation of Contracts’ [by J.W. Carter]” (1998) 13 J.C.L. 199, 201.

⁸⁹ See R. McKeand, “Economic Duress – Wearing the Clothes of Unconscionable Conduct” (2001) 17 J.C.L. 1, 10; P. Koh, “Economic Duress and a Drop of Fairness – a Singapore Perspective” [2003] J.B.L. 572 (discussing the decision of the High Court of Singapore in *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 3 S.L.R. 368).

⁹⁰ It is clear in the judgments that the Court of Appeal in *Roffey* is motivated to rescue this sub-contractor from having agreed a bad bargain at the outset. The sub-contractor had also compounded this problem by failing to supervise its workmen adequately.

These technicalities, uncertainties, and anomalies do little for commercial certainty and practical advising. Stephen Waddams summarised the inadequacies by commenting it is “very difficult to state what principles govern modification of contracts” and observing:

“Consideration is still necessary; however, performance of a pre-existing duty may amount to consideration (but does not always do so); however, again, even if there is consideration the modification will not be enforceable if there is economic duress; however, yet again, it is not explained why the quite severe pressure on the head contractor in ... *Roffey* (the threat of the penalty clause) did not amount to duress.”⁹¹

E. Hardship issues: possible solutions?

Three issues of law and practice with regard to changes in circumstances and terms renegotiated to keep the contract alive can be identified. First, both parties must want to attempt renegotiation. Second, renegotiation must result in a new agreement on revised terms by those parties, there being no effective mechanism to compel parties to attempt renegotiation. Third, it is far from clear what criteria, and in what order, will be applied when determining whether the renegotiation is enforceable (including an absence of clarity regarding what constitutes illegitimate threats rendering an alteration voidable). There is, however, a potential mechanism that could be accepted as a principle of law to address the first of these issues: an obligation to attempt renegotiation and provide a solution in the event of failure to achieve agreement (and which would possibly leave the second and third issues redundant).

Such a mechanism is found in the *UNIDROIT Principles of International Commercial Contracts*.⁹² These principles, while recognising the fundamental requirement to perform

⁹¹ Waddams, “Principle in Contract Law: the Doctrine of Consideration”, pp. 61-62. Presumably, the threat of the penalty clause was not considered to constitute duress in *Roffey* because it did not emanate directly from the sub-contractor but was a product of the contract freely entered into by the main contractor with the building employer.

⁹² The focus of the discussion is on the *UNIDROIT Principles of International Commercial Contracts* (4th edition, 2016). Similar “hardship” provisions can be found in PECL Art 6:111 (O. Lando and H. Beale

in accordance with the contract terms,⁹³ exceptionally recognise a contract may be affected by post-contract “hardship” which “fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished”.⁹⁴ Such “hardship” entitles “the disadvantaged party...to request renegotiations”.⁹⁵ If the parties fail to reach agreement within a reasonable time, either party may refer the matter to the court for a resolution.⁹⁶

Certain conditions must be met before the “hardship” duty to renegotiate arises.⁹⁷ The change in circumstances must occur or become known to the disadvantaged party *after* the conclusion of the contract, they must be outside that party’s control, and that party must not have assumed (expressly or impliedly) the risk of the change in circumstances, as would be the case for a speculative transaction. Of particular interest in the context of a major recession or economic downturn is the requirement “the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract”. This is similar to “events foreseen” in the context of the frustration doctrine and the question whether the party who foresees an event necessarily takes the risk of it occurring.⁹⁸ This raises difficult questions, including how optimistic or pessimistic is it reasonable to be when contracting, what ought reasonably to have been taken into account, and, in a “boom or bust” cycle of economic activity, whether a downturn ought to be anticipated.

(eds), *Principles of European Contract Law* (The Hague: Kluwer Law, 2000)) and DCFR III-1:110 (C. von Barr and E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* Volumes I-VI (Oxford: Oxford University Press, 2010)).

⁹³ Art. 6.2.1 UNIDROIT Principles 2016.

⁹⁴ Art. 6.2.2 UNIDROIT Principles 2016.

⁹⁵ Art. 6.2.3(1) UNIDROIT Principles 2016, unless the contract already contains an express renegotiation clause covering this event or otherwise specifies what is to happen (e.g. a price indexation clause).

⁹⁶ Art. 6.2.3(3)-(4) UNIDROIT Principles 2016. If a court finds hardship it can if reasonable (a) terminate the contract, or (b) adapt the contract with a view to restoring its equilibrium (which may include a price adaptation).

⁹⁷ Art. 6.2.2 UNIDROIT Principles 2016.

⁹⁸ As to the significance of the foreseeability of events with the doctrine of frustration, see *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696 HL; *Ocean Tramp Tankers Corporation v V/O Sovfracht, The Eugenia* [1964] 2 Q.B. 226 CA; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93 HL; *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage & Towing) Ltd, The Sea Angel* [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 (foreseeability as an aid to construction); *CTI Group Inc v Transclear SA* [2008] EWCA Civ 856, [2008] Bus. LR.

Such a regime would raise real issues of principle for English contract law, since the fundamental premise is the courts do not make parties' bargains for them without some evidence of their intentions,⁹⁹ and it cannot be assumed both parties' intentions necessarily coincide with "a fair distribution of the losses".¹⁰⁰ It would, however, provide a legal framework to encourage contractual adaptation in changed circumstances, with a court-imposed solution if the parties cannot reach agreement on amended terms. Such judicial intervention would remove any need to establish that the renegotiation was supported by consideration and would help avoid one-sided variations that might result from unequal bargaining power, thereby heading-off arguments based on economic duress (although consideration and duress would potentially remain live issues if the parties did reach agreement on renegotiated terms). Indeed, a fall-back of judicial involvement would doubtless provide an incentive to active negotiation.

F. Conclusion

The principles governing contractual renegotiations in English law require greater clarity. A recessionary economic climate or market downturn, particularly when its extent has not been anticipated, merely serves to highlight these deficiencies.

Broadly, this article has demonstrated two clear issues relating to renegotiations in English law. The first concerns the absence of any duty or compulsion to renegotiate when circumstances change. English law recognises only the duty to perform or renounce, leaving the other party to terminate the contract for repudiatory breach. Even if the parties had the presence of mind to include a contractual renegotiation clause, there are risks in relying on its efficacy; only precise and careful drafting is likely to result in a clause that is enforceable.

⁹⁹ *Scammell & Nephew Ltd v Ouston* [1941] AC 251 HL; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 HL.

¹⁰⁰ There is generally no such conclusion in English law. Even in the context of the Law Reform (Frustrated Contracts) Act 1943, the aim is the avoidance of unjust enrichment rather than the apportionment of losses: *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783. See also *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226.

Second, there is a problematic existence of anomaly and technicality governing the enforceability of renegotiations in the context of the consideration requirement and duress. The type of consideration, and indeed the type of alteration promise (whether to pay more or to accept less), may make a difference to the approach to be taken to legal principle, i.e. consideration that results from going beyond a legal duty can be separated from a defence of duress, whereas consideration that results from practical benefits arising to the promisor may well depend on the promisee first establishing a negative, i.e. that duress was not exercised in order to secure that alteration promise. Moreover, while it has been seen that the Court of Appeal's decision in *MWB* has, in part, eased the tension between the different types of alteration promises, the decision comes with its own set of difficulties that require resolution.

As has been mooted here, a potential solution might be found via the uniform principles, that is, to compel attempts to renegotiate and impose a loss-distributing adjustment of the contract terms if the parties fail to reach agreement. This should encourage party attempts to agree. Such agreement, if secured, should be treated as enforceable, and, if the taking of an unfair advantage is established, the court could set the renegotiation aside and impose a loss-distributing adaptation, or other appropriate remedial relief. The difficulty, of course, is in working out the details of any such mechanisms, especially as such an approach would be highly interventional, in a way that English law has hitherto resisted.