

“If you owe your bank a hundred pounds, you have a problem. But if you owe a million, it has.”

— John Maynard Keynes

Part-payment of debt: a variation on a theme?

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Introduction

The courts have evinced an almost totemic prescience in their approach to both individual and commercial indebtedness, shifting according to the prevailing social philosophy and the need to discourage internecine risk-taking by banks and other financial institutions. More specifically, and in keeping with the legislative mood of recent times, the courts have evinced a generous welfarist interpretation of consumer credit legislation, for example, in seeking to ameliorate the worst excesses of credit provision, and thereby providing some relief to the over-burdened individual.¹ In terms of judicial interference with commercial agreements, a key consideration will inevitably be the relative bargaining power of the parties – with equality of such supporting the view that the parties themselves are better placed to ensure an appropriate allocation of risk through contractual terms.² This having been said, the courts have, historically, been more enthusiastic in refusing to enforce certain forms of mercantile variation, irrespective of any compelling commercial reasons for a creditor having initially agreeing to accept a reduced amount. As such, and absent a formal deed of variation,³ valid consideration or estoppel, any agreement to forego an element of debt could well be of temporary effect, with creditors being able to claim the full amount owed at a later point. This at once highlights the broader tension between an interventionist approach to contractual interpretation, rooted in the need for certainty, and market individualism- based on a philosophy that the function of contract law is to facilitate commercial transactions and the courts should intervene only minimally. In other words, it ensures that ‘men of full age and competent understanding shall have the utmost liberty in contracting and ...their contracts, when entered into freely and voluntarily shall be held

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¹ The Long Title to the Consumer Credit Act 1974 describes the legislation as existing ‘for the protection of consumers’. In *Southern Pacific Personal Loans Ltd v Walker* [2009] EWCA Civ 1218, [2010] 1 All E.R. (Comm) 854 at [23], Mummery LJ suggested ‘the 1974 Act was passed to protect consumers of credit, an aim which accounts for its substantive content and conditions its judicial interpretation’. In *Rankine v American Express Services Europe Ltd* (2008) CTLG 195, Simon Brown J commented (at [9]) on the need for the legislation to ‘protect the individual unsophisticated in financial affairs in contracts with unscrupulous and sophisticated financial institutions’. The Consumer Credit Act 2006 has further reinforced this emphasis in a number of areas, most notably the introduction of the “Unfair Relationship”.

² In *Office of Fair Trading v Lloyds TSB Bank plc* [2007] UKHL 48, [2008] 1 AC 316, Lord Brown notably emphasized the importance of ‘a fair balance between the creditor and the debtor’ in credit transactions (at [19]). Also note the comments of Lord Sumption in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222 [10] in this regard when considering the Unfair Relationship provisions of the Consumer Credit Act.

³ The execution of a document under seal (or deed) is treated as a solemn act, and precludes the parties from denying what they have stated in the deed. It enables the enforcement of a gratuitous promise. Early examples of such include *Shubrick v Salmond* 3 Burr 1639; *Rann v Hughes* (1778) 7 TR 350.

sacred'.⁴ The following expose of the law and its recent evolution endeavours to highlight the embryonic shift away from interventionism in part-payment cases, enabled by a more generous judicial interpretation of both 'practical benefit' and, to some lesser extent, promissory estoppel.

Part-payment: an evolutionary perspective

This rationale for the courts' refusal to sanction the extinguishment of debt by payment of a smaller sum, had been predicated upon an allegiance to early authority and the quasi-doctrinal requirement for the debtor to perform an additional act (to arguably involve an element of legal detriment), when determining the existence or otherwise of consideration. This conservatism had until recently prevented the courts from modernizing the principle famously espoused in *Pinnel's Case*⁵ in order to more suitably reflect and facilitate the commercially expedient restructuring of debt. So, whilst the dictum that 'payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole',⁶ offered considerable public policy benefits in the early 17th century, this now appears anachronistic in the face of commercial reality. So, with his typical sagacity and immutable appreciation of the mercantile imperative for due allocation of transactional risk, Lord Blackburn, in *Foakes v Beer*⁷ (having in his judgment indicated some discernible reservation about the lauded status of *Pinnel's Case*⁸), stated-

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that 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. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question.⁹

Lord Blackburn's dissenting view on this particular point had only a limited influence on a House of Lords (also comprising Earl of Selborne L.C., Lord Watson and Lord Fitzgerald). It upheld the Court of Appeal decision finding in favour of a Mrs Beer who, having 'accepted' a sum of £2090 19s- being the original debt due from Dr Foakes, but paid in instalments, subsequently sought the interest on this sum. Essentially, and in keeping with *Pinnel's Case*, the appellant, Dr Foakes, has not provided consideration for her promise to forego said interest; he had not, to cite Lord Coke's earlier aphorism, endured a further detriment by 'the gift of a horse, hawk, or robe', which 'might be more beneficial to the plaintiff than the money'.¹⁰ Nor had he paid the creditor, Mrs Beer, a reduced sum earlier than the contractual debt had been due, such being 'more beneficial to him than the whole at the day'.¹¹ The principle would appear clear: part payment of a debt is not good consideration for the complete extinguishment of the full amount outstanding. When set in

⁴ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 (Lord Jessel MR).

⁵ *Pinnel's Case* Trin 44 Eliz Rot 501.

⁶ *Ibid* 238 (Lord Coke).

⁷ *Foakes v Beer* (1884) 9 App Cas 605

⁸ *Ibid* 617.

⁹ *Ibid* 622.

¹⁰ *Pinnel's Case* (n5) at 237.

¹¹ *Ibid* 239.

a broader commercial context, the strict application of this rule may clearly frustrate those legitimate commercial expectations that may arise upon a contractual variation. However, it has nonetheless been applied consistently as the lower courts have been bound to defer to what was a decision of the House of Lords¹² - this was most notably evident when attempts to apply the significant ratio of *Williams v Roffey Bros. & Nicholls (Contractors) Ltd*¹³ to part-payment cases, initially floundered.

In that case, the Court of Appeal (Glidewell, Purchas and Russell LJ) provided a commercially sensitive approach to (and reinterpretation of) the meaning and role of consideration in the variation of commercial contracts, but only those variations where a party was promised additional funds to perform an existing contractual duty. Put simply (and resisting the compulsion to recite the well-worn and largely unexceptional factual matrix of this case), Glidewell LJ offered the following proposition of law:

(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.¹⁴

Essentially, a renewed promise to perform one's existing contractual duty *will* provide sufficient consideration for a promisor's offer of additional sums where this party receives a practical benefit from this renegotiation or variation. Whilst such practical benefits were relatively clear in *Williams v Roffey*, and included the avoidance of castigatory penalty charges in the contract with the main contractor; being spared the trouble and expense of engaging other people to complete the work; and the replacement of a haphazard method of payment with a 'more formalised scheme involving the payment of specified sum at the completion of each flat',¹⁵ such may not always be apparent.¹⁶ Whilst such flexibility was doubtless facilitated by the incremental 'development of economic duress as a method of controlling improper pressure',¹⁷ this approach evinces considerable conceptual difficulties: for example, Purchas LJ, expressed a concern that, 'in normal circumstances the suggestion that a contracting party can rely upon his own breach

¹² Notably in *Vanbergen v St. Edmunds Properties Ltd.* [1933] 2 KB 223 (Lord Hanworth MR); *D & C Builders Ltd. v Rees* [1966] 2 QB 617 (Danckwerts LJ) with more recent tacit approval in *R v Gotts* [1991] 1 QB 660, 664 (Lord Lane LCJ). However, note Lord Wright's criticism of the principle in the Law Revision Committee, Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration*, (1937) Cmd 5449, paras 33-35.

¹³ *Williams v Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 QB 1.

¹⁴ *Ibid* [15]-[16]. This formulation was not novel and reflected the views of the courts in *Ward v Byham* [1956] 1 WLR 496 and *Williams v Williams* [1957] 1 WLR 148; but relied upon, rather dubiously, *Pao On v Lau Yiu Long* [1980] AC 614 (PC), a case involving a tripartite (not bipartite) contractual relationship.

¹⁵ *Ibid* [19] (Russell LJ).

¹⁶ See Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn, OUP 2012) 123, who comments on the difficulties in its practical application.

¹⁷ J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (30th edn, OUP 2016), 115. A comprehensive definition of economic duress was provided in *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] BLR 530, where Dyson J proposed (at [131]) that 'there must be pressure, (a) whose practical effect is that there is compulsion on, or lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract'.

to establish consideration is distinctly unattractive'.¹⁸ It would also appear to ignore the accepted view that the promisee should do something that he was not already legally obliged to do in order to enforce the variation promise or that consideration is 'to move from the promisee'.¹⁹ Whilst the Court of Appeal was satisfied that such was met by an accrual of a practical benefit to the promisor, this has not been universally accepted- Donaldson J in *Adam Opel GmbH, Renault S.A. v Mitras Automotive (UK) Limited*,²⁰ for example, claimed that he was 'bound to apply the decision accordingly, whatever view I might take of its logical coherence'.²¹ However, this notwithstanding, *Williams* did raise the tantalizing prospect of such practical benefit principles being applied to part-payment of debt cases: in other words, could a practical benefit accruing to the creditor constitute sufficient consideration for his accepting a lower sum in settlement of a debt? An early opportunity for this to be considered arose in *Re Selectmove Ltd*.²²

In this case, the Inland Revenue had secured a winding-up petition against Selectmove on the ground of considerable PAYE tax arrears. Selectmove sought to have this set aside, claiming they had reached an agreement with the Inland Revenue, which enabled the payment of tax arrears in monthly instalments with future liability settled as it fell due. The Court of Appeal (Balcombe, Stuart-Smith and Peter Gibson LJ) found there to be no valid agreement, as the tax collector involved had no actual or ostensible authority to conclude such a restructuring agreement. Secondly, it was determined that any such variation would fail for want of consideration. Attempts to transpose the concept of practical benefit were unsuccessful, and despite the court having some sympathy with the suggestion that a commercial benefit did accrue to the Revenue in the form of avoiding putting the firm into liquidation and potentially receiving less than promised under the variation, it was bound by *Foakes v Beer*, with Peter Gibson LJ stating:

If the principle of *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v. Beer* without any application (...) for this court to extend the principle of *Williams's* case to any circumstances governed by the principle of *Foakes v. Beer*. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.²³

¹⁸ *Williams* (n10) at 23.

¹⁹ *Ibid* 16. A significant issue is whether the promisee must suffer an additional detriment. Chitty on Contracts (n15) at para. 4.006 argues that 'the promisee may provide consideration by doing anything that he was not legally bound to do, *whether or not* it occasions a detriment to him' (emphasis added) and indeed that the insistence in the earlier cases on the stricter requirement of legal benefit or detriment is no longer justified' (at para 4.070). See also Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 116.

²⁰ *Adam Opel GmbH, Renault S.A. v Mitras Automotive (UK) Limited* [2007] EWHC 3481 (QB).

²¹ *Ibid* [42]. Further reservations were expressed in *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 [108]-[109] (Colman J) (see Ewan McKendrick, *Contract Law* (7th edn, OUP 2016) 184 for an analysis of this critique). In the Singapore case of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594, Rajah JC claimed: 'The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration. (See for example the approach in *Williams v Roffey Brothers Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512)'. See also Brian Coote, 'Consideration and Benefit in Fact and in Law' (1990) 3 JCL 23, 24. However, an alternative interpretation of such cases is offered in M Chen-Wishart, 'A Bird in the Hand: Consideration and Contract Modifications' in A Burrows and E Peel (eds) *Contract Formation and Parties* (OUP 2010), 89, in which she suggests that the promisor is paying the extra amount for performance of the pre-existing duty.

²² *Re Selectmove Ltd* [1995] 1 WLR 474

²³ *Ibid* 481.

Although often cited as a clear application of *Pinnel* and *Foakes v Beer*, it is tempting to suggest that this was not a typical part-payment case. Indeed, the substance of the variation was that all indebtedness would be settled, albeit over an extended period, meaning the key issue was arguably a later and not a lesser payment. Propitiously, this issue and part-payment more generally were recently considered by a different Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (Arden, Kitchin and McCombe LJ)²⁴ where, in addition to offering a fuller analysis of the substratum of restructuring arrangements, the court disavowed any servility to *Pinnel*, but arguably compromised on certainty in transactional interpretation.

The facts were that Rock Advertising had been a licensee of premises managed by MWB Business Exchange for a number of years. In August 2011, Rock decided to expand its business, and so entered into a written agreement with MWB for larger premises (at a considerably higher rate) for 12 months to run from 1 November 2011. The licence fee was £3,500 per month for the first three months, increasing to £4,433.34 from February 2012. Unfortunately, by late February 2012, Rock had incurred arrears of over £12,000 to include licence fees and associated charges. MWB sought to claim this amount, and following the submission of a counterclaim by Rock, the parties agreed to reschedule the licence fee payments. Essentially, Rock would pay less than the originally agreed amount for the first few months, but after that would pay more with the result that the arrears would have been settled by the end of the year. Rock paid £3,500 to MWB, being the first instalment due in accordance with the revised payment schedule. Soon afterwards, MWB changed its mind and sued for the arrears, claiming, inter alia, that pursuant to *Foakes v Beer*, the alleged variation was not supported by consideration.²⁵ Firstly, and in respect of whether such restructuring agreements were indeed pure part-payment scenarios, Arden LJ acknowledged the point that:

The variation agreement was a promise to pay a smaller amount than originally agreed in that the time value of money has the effect that an agreement to defer payment of a due debt is in effect an agreement to pay a smaller sum. MWB invokes the well-known rule in *Pinnel's* case for the proposition that in those circumstances there is no good conclusion in law.²⁶

As regards there having been a lack of consideration for the promise to accept less, the court stated:

The principle that a benefit can in law be consideration for a promise must logically apply whatever the nature of the contract. It must also apply whether the promisee has at the same time agreed to render the same performance as he originally promised or to render a lesser performance, and whether the promisor has renewed his original promise or, as in the *Roffey Bros & Nicholls* case, agreed to pay more.²⁷

This clearly suggests that practical benefit is relevant 'whatever the nature of the contract' (be that a promise to pay more (*Roffey*), or a promise to accept less (*Pinnel*)). As such, a debtor need not furnish the creditor with anything additional to the part-payment in order to enforce an alteration promise by a creditor

²⁴ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2016] 3 WLR 1519

²⁵ MWB also claimed that such a variation was prohibited by an anti-oral variation term in the contract. However, in following the obiter of the earlier Court of Appeal in *Globe Motors Inc. v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, it concluded that a contract can be varied orally despite the existence of such a term should this be the intention of the parties. Such was based on the principle of "party autonomy" (at [119] per Lord Justice Moore-Bick).

²⁶ *Ibid* [82].

²⁷ *Ibid* [79] (Arden LJ).

to accept a lesser sum, provided the creditor secures a practical benefit from this arrangement. This ostensibly aligns such cases with the position as espoused by same court in *Williams v Roffey Brothers & Nicholls (Contractors) Ltd*, that merely performing one's existing contractual duties to provide goods or services will constitute sufficient consideration for an additional promise by the promisor where the latter receives a practical benefit from such. Indeed, Arden LJ stated 'there can be no coherent distinction between agreements to pay debts and agreements to do work in this context'.²⁸ But how did the court reconcile this with *Pinnel*, which is clearly suggestive of the need for the debtor to do something he is not already obliged to do in order to be able to rely upon the creditor's promise to accept less than is contractually due? On this, Arden LJ suggested that far from being an interloping concept, in addition to the lesser sum paid, 'the gift of the horse, hawk or robe is no different in principle from the conferral of a benefit or advantage... In accepting that a practical benefit can be good consideration for part-payment of a debt, all I am doing is replacing the words "the gift of a horse, hawk or robe" with a more modern equivalent'.²⁹ Kitchin LJ, in highlighting the commercial benefits of rescheduling the debt in this case, stated that practical benefits would accrue as:

MWB would recover some of the arrears immediately and would have some hope of recovering them all in due course. But secondly and importantly, Rock would remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB.³⁰

So, when taken together or severally, these provided sufficient consideration to support the variation.³¹ Along with this careful transposition of practical benefit into part-payment cases (no doubt mindful of the House of Lords precedent in *Foakes v Beer*), we are left with an indication of its likely application, namely where there exists the prospect of a continuing commercial relationship with the debtor. Such a touchstone should serve to restrict any potential arbitrariness in its use and development. Furthermore, Arden LJ offered additional and important guidance on what would *not* qualify, more specifically, 'accommodating the debtor and not having to enforce the debt'.³² Peter Gibson LJ in *Re Selectmove*³³ had similarly excluded such as being a valid form of consideration and indeed, it is this that distinguishes *Re Selectmove*, where there was no benefit beyond the obviation of the need for the Inland Revenue to take legal action to enforce payment, whereas in *MWB*, Rock was retained as an occupier and licensee.

Equitable intervention

In addition to the provision of consideration to support a promise to accept less, circumvention of *Foakes v Beer* may be by way of promissory estoppel, a key equitable doctrine which 'gives relief where justice

²⁸ *Ibid* [84].

²⁹ *Ibid* [84].

³⁰ *Ibid* [47]. Also Arden LJ at [89].

³¹ *Ibid* [89].

³² *Ibid* [87].

³³ *Re Selectmove Ltd* (n17) at 481.

requires relief to be given but none can be obtained under the common law'.³⁴ This principle has evolved from its modern inception in *Central London Properties Trust Ltd v High Trees House Ltd*,³⁵ to one defined as:

When a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so.³⁶

Likewise, in *BP Exploration (Libya) v Hunt (No.2)*,³⁷ Goff J stated that an estoppel would arise where there existed a:

A legal relationship between the parties... a representation, express or implied, by one party that he will not enforce his strict rights against the other; and (...) reliance by the representee (whether by action or by omission to act) on the representation, which renders it inequitable, in all the circumstances, for the representor to enforce his strict rights, or at least to do so until the representee is restored to his former position.³⁸

Perhaps none too surprisingly, the final element in this enumeration- when would it be inequitable to resile from a promise to accept a lesser sum? – is of the greater opacity. Lord Denning in *D & C Builders* suggested that such an inequity would arise only where there had been 'true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction'.³⁹ In that case, the claimant, D & C Builders, had carried out considerable repair work on the defendant's shop, with the final account (when deducting monies paid on account) being £482. Under pressure from the defendant's wife, the claimant reluctantly accepted a reduced sum in the form of a cheque for £300 'in completion of the account'. Evidence indicated that she knew of the claimant's financial difficulties and exiguous resources. In an action by the claimant for the remaining £182, the Court of Appeal (Lord Denning MR, Danckwerts and Winn LJ) held that the pressure applied by the defendant's wife had prevented any true accord and, as such, it was clearly equitable for the creditor to resile from his promise to accept less. Absent such pressure, the estoppel would seemingly have operated to extinguish the shortfall of £182 due it having been 'inequitable for the creditor afterwards to insist on the balance'.⁴⁰ This particular element, and promissory estoppel more generally, were recently considered by the Court of Appeal in *Collier v P & M J Wright (Holdings) Ltd*,⁴¹ which presented an altogether less restrained approach to the establishment of an inequity. Despite this being an appeal against striking out and not a full trial of the issues, its findings are prescient.

The applicant, together with his two commercial partners, took out a loan with the creditor company, P & M J Wright (Holdings) Ltd. In 1999, Wright's had obtained a judgment by consent against the three partners, the terms of which were that they pay the firm's £46,800 debt to Wright's by way of monthly instalments of

³⁴ Alexander Trukhtanov, 'Foakes v Beer: reform of common law at the expense of equity' (2008) 124 LQR 364, 368.

³⁵ *Central London Properties Trust Ltd v High Trees House Ltd* [1947] KB 130.

³⁶ *D & C Builders v Rees* [1966] 2 QB 617, 624 (Lord Denning).

³⁷ *BP Exploration (Libya) v Hunt (No.2)* [1979] 1 WLR 783.

³⁸ *Ibid* 786 (Lord Goff), as cited by Kitchin LJ in *MWB* (n19) at [53].

³⁹ *D & C Builders* (n29) at 625.

⁴⁰ *Ibid* 625 (Lord Denning).

⁴¹ *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643.

£200 each, totalling £15,600 per partner. Their liability was joint so although Mr Collier had paid his third of the balance, the bankruptcy of his erstwhile partners prompted Wright's to serve him with a statutory demand for the balance of the judgment debt. Mr Collier applied to set aside the demand relying on the alleged agreement with Wright that he would be severally liable for one-third of the debt only, provided he continued to pay his share of the judgment, which he subsequently did. The Court of Appeal (Mummery, Arden and Longmore LJ) decided (1) pursuant to *Foakes v Beer*, the agreement between the parties was not binding as Mr Collier had not provided any consideration for Wright's agreement to accept this lesser sum. There existed joint liability for £48,600; but (2) there was a realistic prospect of success on promissory estoppel. In doing so, Arden LJ highlighted what were, in her view, the requirements for a successful defence on this particular ground:

The facts of this case demonstrate that, if (1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt. For him to resile will of itself be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguishing the creditor's right to the balance of the debt.⁴²

This would clearly appear to suggest that the equity is formed upon the voluntarily acceptance by the creditor of the debtor's offer of part-payment of the debt; it is this that creates the necessary reliance to prevent the creditor resiling from his promise and to do so would of itself be inequitable. This would appear to constitute a significant liberalization of estoppel: it establishes a simple formulaic approach ostensibly based upon an offer (to accept a lesser amount), and acceptance of this offer by performance, without any fact-specific forensic analysis of whether it would be inequitable to resile from the promise. However, Longmore LJ appeared to sound a rather more circumspect note, suggesting that reliance would not inevitably create an inequity, and much would turn on the circumstances of the case and the intentions of the parties. Essentially therefore, the courts were to consider whether there was a true 'accord', by analysing 'the true construction of the promise or representation'.⁴³ In *MWB*, Kitchin LJ broadly agreed when suggesting that:

I do not for my part think that it can be said, consistently with the authorities, including, in particular, the decisions of the House of Lords in *Foakes v Beer* (...) and this court in *In re Selectmove* (...), that in every case where a creditor agrees to accept payment of a debt by instalments, and the debtor acts upon that agreement by paying one of the instalments, and the creditor accepts that instalment, then it will necessarily be inequitable for the creditor later to go back upon the agreement and insist on payment of the balance. Again, all will depend upon the circumstances.⁴⁴

In that case, Rock had not suffered a detriment, or, more specifically, it had merely paid an amount 'it was in any event bound to pay' and it was not inequitable for MWB to resile⁴⁵ (although the estoppel point was of lesser significance in this case, as there was consideration for the oral variation). (Interestingly, the court was

⁴² *Ibid* [42].

⁴³ *Ibid* [47]-[48].

⁴⁴ *MWB* (n21) at [61].

⁴⁵ *Ibid* [63]. This would tend to require the promisee to be given reasonable notice of such a resumption of position: *Tool Metal Manufacturing v Tungsten Electric Co Ltd* [1955] 1 WLR 761.

also addressed on proprietary estoppel, which was emphatically dismissed by Kitchin LJ who stated that the lack of any detriment suffered by Rock meant that ‘in the context of this appeal the contention that the circumstances gave rise to some kind of proprietary estoppel would have added nothing to the case based upon promissory estoppel’.⁴⁶)

So, whilst *Collier* suggests a more flexible model, it is at least likely that any hopes of an evolutionary impact are overly optimistic, with the courts adopting a default position rooted in case context and the conduct of the debtor. However, what now appears clear is that *Foakes v Beer* is no longer inviolate, and promissory estoppel may yet offer a significant counterweight, with the Court of Appeal having acknowledged its potential to obviate any potential injustice accruing through the application of common law principles in part-payment cases. This would be effected through the imposition of an equity in favour of the debtor with the potential to extinguish, and not merely suspend the indebtedness where ‘it would be inequitable to allow the promisor to go back on his promise at all’.⁴⁷ The ultimate extent of any such equity will turn on the nature of the accord between the parties. It is suggested that this must be correct, as it does little more than confirm earlier dicta that espoused the ability of promissory estoppel to fully extinguish an element of debt in both instalment and lump-sum cases.⁴⁸

In conclusion, the recognition of ‘practical benefit’ as sufficient consideration for a promise to accept less is welcome and offers a bulwark to the inflexibility of *Pinnel*. The Court of Appeal has provided guidance as to its criteria, thereby limiting the risk of future haphazard application and the need for the courts to search for ‘artificial consideration’ in order to uphold the sanctity of the purported variation.⁴⁹ However, practical benefit is not a legal panacea, and its precise composition and sustainability in law remains unclear. With this in mind, parties would be well advised to formalize any variation to avoid later disavowal on grounds of lack of consideration. Clearly, this will not always be a practical option: variations may be hastily conceived, with little thought given to the ramifications of a change of heart on the part of the creditor, but without such formality, a debtor would need to evince the existence of additional consideration (including by way of “practical benefit”) or promissory estoppel. In the absence of either, it is ineluctable, that a variation would not be legally binding, as the principle of “party autonomy”⁵⁰ does not yet extend to the overlooking of such a fundamental contractual ingredient irrespective of the commercial balance of convenience.

⁴⁶ *Ibid* [65].

⁴⁷ *Ibid* [61] (Longmore LJ).

⁴⁸ For example, in *High Trees* (n35) at 134-5, Denning J, suggested obiter, that the plaintiff landlord would not have been able to claim for those rent arrears which had accrued during the earlier war period. For lump sum contracts, see previous reference to *D & C Builders* (n36) at 624, where Lord Denning MR stated that ‘the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so’.

⁴⁹ *Foakes v Beer* (n6) at 630 (Lord Fitzgerald).

⁵⁰ *Globe Motors* (n25).