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Kenny CHNG
Singapore Management University, kennychng@smu.edu.sg

Yihan GOH
Singapore Management University, yihangoh@smu.edu.sg

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A renewed consideration of consideration: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA CIV 553

Kenny Chng and Yihan Goh

School of Law, Singapore Management University, Singapore

ABSTRACT
This note argues that the English Court of Appeal decision of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* is a significant modification of the present understanding of consideration with respect to agreements to accept part-payments of a debt and to perform pre-existing duties, and that the preferred way forward for the development of the law should be judicial intervention by the Supreme Court to reconcile the logical inconsistencies between *Foakes v Beer and Williams v Roffey Bros & Nicholls (Contractors) Ltd.*

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1. Introduction

The English Court of Appeal decision of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*[1] ('*MWB Business*') is a significant case on the doctrine of consideration. In this case, the Court of Appeal re-examined important principles in the law with regards to the relationship between the controversial rule in *Pinnel's Case*[2] and the principle of 'practical benefit' set out in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[3] ('*Williams v Roffey*'). This note will argue that the Court of Appeal's analysis in *MWB Business* is a significant modification of the present understanding of consideration with respect to agreements to accept part-payments of a debt and to perform pre-existing duties, and that the preferred way forward for the development of the law is decisive intervention by the Supreme Court rather than the mangling of the existing rules. It should also be mentioned that although the case touches on the area of promissory estoppel, this

CONTACT Kenny Chng kennychng@smu.edu.sg School of Law, Singapore Management University, 60 Stamford Road, Singapore 178900, Singapore
[1][2016] EWCA Civ 553 (England and Wales Court of Appeal, Civil Division).
[2](1602) 5 Co Rep 117a, (1602) 77 ER 237.
[3][1991] 1 QB 1.

note will not discuss that aspect of the case and will instead concentrate on the consideration point.

2. Facts and decision

For present purposes, the facts of this case can be stated simply. The claimant, MWB, managed office space in central London, while the defendant, Rock Advertising, provided marketing services. MWB owned premises that were occupied for several years by Rock Advertising as a licensee. In August 2011, Rock Advertising entered into an agreement with MWB for larger premises at increased fees. Unfortunately, Rock Advertising's business expansion plans were not as successful as it hoped. Rock Advertising eventually encountered financial difficulties and accrued unpaid arrears of over £12,000.

Consequently, in March 2012, MWB locked Rock Advertising out of the premises and gave notice of its intention to terminate the licence agreement to Rock Advertising. MWB then commenced proceedings to recover the arrears. In response, Rock Advertising argued that the parties had orally varied the licensing agreement, such that Rock Advertising would pay reduced licence fees for the first few months and subsequently pay more to make up for the outstanding arrears. In the alternative, Rock Advertising argued that MWB was estopped from denying the oral variation of the licence agreement, since Rock Advertising had paid the first instalment of £3,500 under the revised payment schedule to MWB on the same day that the oral variation was made. As expected, MWB argued that the oral variation was in essence an agreement for the partial repayment of an existing debt and hence unsupported by consideration. MWB also argued that, in any event, Clause 7.6 of the licensing agreement—which provided that 'all variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect'—precluded the oral variation of a key term of that agreement, of which the payment schedule was certainly one.

In relation to the consideration issue, the trial judge held that MWB had received a 'commercial benefit' in retaining Rock Advertising as a tenant. This was because, had MWB removed Rock Advertising as a tenant, it would almost certainly have forfeited its chances of ever recovering arrears. It would also have led to MWB's premises being empty for some time. The trial judge held that this commercial benefit constituted valid consideration that made the oral variation agreement enforceable. However, the trial judge eventually held that the oral variation to revise the payment schedule was not valid because Clause 7.6 of the licensing agreement precluded any oral variation of the core terms of the agreement. Put another way, even though the oral variation of the payment schedule was supported by consideration, this was not permitted due to Clause 7.6. Finally, with respect to the argument on promissory estoppel, the trial judge held that the

payment of £3,500 did not constitute detrimental reliance on Rock Advertising's part, since this was an amount that it was already bound to pay. As such, the trial judge found in favour of MWB. Rock Advertising appealed the decision to the Court of Appeal.

In the Court of Appeal, both Kitchin and Arden LJJ devoted much of their judgments to the issue of consideration. Indeed, this was after both judges had found that Clause 7.6 did not preclude an oral variation of the licensing agreement, including the payment schedule, if the parties had waived it. In coming to this decision, Kitchin LJ relied on the recent English Court of Appeal decision of *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*,[4] which Kitchin LJ regarded as authoritative and premised on the overarching reason of party autonomy. Accordingly, having decided that Clause 7.6 did not preclude the oral variation of the licensing agreement, the main issue on appeal turned out to be whether the oral variation was supported by consideration.

Both Kitchin and Arden LJJ acknowledged that the question of whether there was valid consideration had to be decided in the light of the House of Lords decision of *Foakes v Beer*[5] and that of the Court of Appeal in *In re Selectmove Ltd*.[6] It is well accepted that the House in *Foakes v Beer* approved the rule in *Pinnel's Case* that 'payment of a lesser sum … in satisfaction of a greater, cannot be any satisfaction for the whole'. Thus, MWB argued that the principal benefit conferred by the agreement, comprising of MWB being able to receive part-payment of the arrears promptly, was the kind of practical benefit rejected in previous cases as ever capable of constituting sufficient consideration. This argument was, however, rejected by both Kitchin and Arden LJJ. Kitchin LJ said that the rule in *Pinnel's Case* was qualified: for example, it is well established that 'the performance by the debtor of some other act he was not bound by the contract to perform may constitute good consideration'.[7] Kitchin LJ drew attention to the trial judge's finding that the oral variation agreement 'would have a number of beneficial consequences' for MWB, principally that MWB would not suffer losses arising from empty premises which would have been incurred if Rock Advertising had left. As such, because MWB derived a practical benefit 'which went far beyond the advantage of receiving a prompt payment of a part of the arrears', this was really a case like *Williams v Roffey*. The agreement between MWB and Rock Advertising was thus supported by consideration.

Arden LJ commenced her analysis by referring to the general principle that consideration will be shown if 'the promisee shows that his renewed promise to perform an existing obligation results in the promisor receiving a benefit

[4][2016] EWCA Civ 396.
[5](1884) 9 App Cas 605.
[6][1995] 1 WLR 474.
[7]*MWB Business* (n 1) [41].

which he requested or at least indicated he wanted from the renegotiation'.[8] Arden LJ then held that *In re Selectmove Ltd* only decided that 'the benefit which a creditor obtains from a promise to pay an existing debt by instalments is not good consideration in law'.[9] It was *that* kind of practical benefit which Arden LJ regarded Peter Gibson LJ as having rejected as good consideration in *In re Selectmove Ltd*. However, Arden LJ did not think that Peter Gibson LJ rejected the 'general principle', which is that if there were *other* benefits, those could constitute practical benefits of the kind recognised to be sufficient consideration in *Williams v Roffey*. Arden LJ regarded her view of *In re Selectmove Ltd* as consistent with Lord Coke's dictum in *Pinnel's Case* that gifts in addition to the payment of a lesser sum can amount to good consideration. This is because the modern law has substituted those physical gifts with 'practical benefits', which are sufficient to constitute good consideration.

3. A change in the current understanding of consideration

In spite of what they say, the fact is that Kitchin and Arden LJJ have both changed the current understanding of consideration, at least in relation to the restriction *Foakes v Beer* placed on the *Williams v Roffey* understanding of practical benefit as consideration. Firstly, their reasoning has shifted the relevant inquiry to the nature of the practical benefit, rather than the type of transaction that should attract the application of the principle in *Williams v Roffey*. The ambit of the rule in *Pinnel's Case* and *Foakes v Beer*, as Peter Gibson LJ in *In re Selectmove Ltd* understood it, is that a promise by a debtor to repay his creditor in part for the settlement for the full debt can never amount to good consideration. This is regardless of whether, as Peter Gibson LJ put it, 'the creditor will no doubt always see a practical benefit to himself'.[10] The extent of the restriction imposed by *Foakes v Beer* is thus concerned with the *nature* of the promise, rather than that of the so-called practical benefit. Peter Gibson LJ in *In re Selectmove Ltd* recognised this. His Lordship stated that the principle in *Williams v Roffey* was not to be extended to 'any *circumstances* governed by the principle of *Foakes v Beer*'[11]. The emphasis on 'circumstances' evidently excluded the *Williams v Roffey* principle from transactions like the one arising in *Foakes v Beer*, that is, partial payments of debts. Furthermore, Peter Gibson LJ was also alive to the fact that the creditor can derive practical benefit *beyond* that of receiving prompt repayment of part of the debt, but felt constrained by authority not to extend the *Williams v*

[8]ibid [78].
[9]ibid [84].
[10]*In re Selectmove Ltd* (n 6) 481.
[11]ibid 481 (emphasis added).

Roffey principle to 'an obligation to make payment'.[12] In the end, his Lordship's primary concern was evidently about leaving the principle in *Foakes v Beer* with sufficient room for practical application.

In contrast, the reasoning employed by Kitchin and Arden LJJ, which shifts the focus of the inquiry to the nature of the practical benefit rather than that of the transaction, would strip that very principle of any real application. Even in circumstances previously covered by the rule in *Foakes v Beer*, it is surely very possible to find a practical benefit which 'went beyond the advantage of receiving a prompt payment of part of the arrears'.[13] For example, on the facts of *In re Selectmove Ltd*, which concerned an arrangement for a company to repay part of its arrears to the Revenue, it is surely possible to say that the Revenue derived the practical benefit of not having to expend resources on the collection of the arrears, in addition to receiving prompt repayment of part of the debt. This cannot be the kind of practical benefit that Peter Gibson LJ would have permitted to upset the central restriction occasioned by *Foakes v Beer*, which would rob it of all practical effect by a side-wind.

Secondly, Kitchin and Arden LJJ's reasoning leaves a curious inconsistency within the restriction imposed by *Foakes v Beer*. It is true that there is a logical inconsistency with recognising practical benefits in situations governed by *Williams v Roffey* and not doing so for situations covered by *Foakes v Beer*, but there is nonetheless internal consistency within each half of the law. It is this —albeit unsatisfactory—consistency that has supported the restriction imposed by *Foakes v Beer* without throwing the entire law of consideration into disarray. Yet, by purporting to recognise a practical benefit that went beyond the prompt repayment of part of a debt, the effect of Kitchin and Arden LJJ's reasoning is to do precisely that. There is no principled reason why the law should single out, within the rubric of the part payment of a debt, the prompt repayment of part of an existing debt as *the* practical benefit that is insufficient to constitute consideration. Arden LJ's view was that this distinction is supported by the substitution of the words 'the gift of a horse, hawk or robe' in Lord Coke's rider in *Pinnel's Case* with the concept of practical benefit as 'a more modern equivalent'.[14] However, this view is almost certainly wrong. The essence of *Pinnel's Case*, and how it was understood in *Foakes v Beer*, is that all forms of practical benefits can never amount to good consideration within that paradigm. Lord Coke's rider referred to an additional obligation over and beyond an existing promise; that part of *Pinnel's Case* remains to the present day and cannot be substituted by grafting onto it the practical benefit principle recognised by *Williams v Roffey*.

[12]ibid.
[13]*MWB Business* (n 1) [48].
[14]ibid [85].

4. Broader implications for consideration

Quite apart from introducing further inconsistencies into the law in this regard, *MWB Business* has broader implications for the doctrine of consideration as well. As highlighted above, this decision shifts the relevant inquiry to the nature of the practical benefit, and calls for the courts to identify that the practical benefit involved is *not* the prompt repayment of part of an existing debt. However, such an inquiry has the potential to shade into, and is indeed not conceptually far removed from, a general assessment of the type of practical benefit that would amount to adequate consideration in each case. This is because, if a court can prefer some practical benefits to others (such as by rejecting the practical benefit of prompt repayment but accepting others), then it must surely be possible, even necessary, for a court to assess whether these other practical benefits are indeed adequate. Such an assessment would not sit easily with the long-standing principle that consideration must be sufficient but need not be adequate. That principle is a reflection of the free market philosophy in contract law—that the adequacy of consideration in transactions between parties is best left to be valued by the parties themselves, rather than by the courts—and is also an important contributor to certainty in contract law's regulation of commercial relationships. However, should the courts be required to make a general assessment of the adequacy of practical benefit, it would be up to them to make a value judgment of each promise to determine if it constitutes fair or adequate practical benefit to serve as valid consideration. This assessment may differ depending on individual judges' views on best commercial practices or notions of fairness and justice, leading to different conclusions in similar cases. For example, in *MWB Business* itself, the Court of Appeal would have had difficulty justifying any disagreement with the trial judge's reasoning, if a different trial judge had concluded instead that MWB did not receive any practical benefit from the agreement, after conducting a detailed study of prevailing market conditions and assessing that MWB would be financially better off by suing for arrears under the original agreement and mitigating its losses by entering the market to get another licensee to occupy its premises. The point being made, therefore, is that Kitchin and Arden LJJ's reasoning in *MWB Business* may be utilised as an inroad to upsetting the cherished principle that consideration need only be sufficient, but not adequate.

Even more broadly, Kitchin and Arden LJJ's attempt to read down the restriction imposed by *Foakes v Beer* is reflective of how the modern law of contract has tended to view the doctrine of consideration as an inconvenient relic of the past that very often threatens to upset commercial bargains reached between honest business people. Modern courts therefore find consideration very easily and, as demonstrated by *MWB Business*, may even be

willing to reinterpret the existing law creatively to achieve what they perceive to be substantive fairness. However, if it is indeed the concern that a strict adherence to consideration will upset commercial bargains, then surely the solution is not to mangle the existing law but to rationalise the doctrine of consideration at a more fundamental level and resolve the existing tensions within the law. In this regard, it will be instructive to consider how foreign jurisdictions have sought to resolve the uncertainty surrounding the doctrine of consideration. It will be seen that there are principally three approaches that have been taken.

The first approach is simply to preserve the position taken by English law before the decision in *MWB Business*. For example, Singapore and Hong Kong continue to adopt the previous common law position, ie maintaining a clear distinction between the *Foakes v Beer* and *Williams v Roffey* situations. The key advantage of this approach would be to uphold the internal consistency within the law governing each type of situation, although admittedly at the expense of logical consistency between them. Nonetheless, it is worth noting that this approach may soon be rejected even in Singapore and Hong Kong. The courts in both jurisdictions have evinced a preference for flexibility in the doctrine of consideration in order to align the law with commercial realities.[15] In particular, the Singapore courts have demonstrated some degree of dissatisfaction with the dissonance between *Foakes v Beer* and *Williams v Roffey*.[16] Indeed, the law in Singapore in this regard appears to be on the cusp of a new development: the Singapore Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter*[17] suggested that it would only be logical to extend the principle in *Williams v Roffey* to a *Foakes v Beer*[18] situation, although the Court of Appeal stopped short of deciding the point as it was not argued before the court.

The second approach adopted by some jurisdictions is to expand the types of transactions in which practical benefit may be regarded as valid consideration. This can be seen in some Australian jurisdictions. For example, in *Musumeci v Winadell Pty Ltd*,[19] the Supreme Court of New South Wales incrementally extended the principle in *Williams v Roffey* to cover cases where the promisor agrees to accept a reduction of obligations. The key distinction between this approach and the approach taken by the Court of Appeal in *MWB Business* is that this approach retains the focus on the types

[15]In the Singapore context, see *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 (Singapore High Court (SGHC)) [139] (affirmed on appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2 (Singapore Court of Appeal)). In the Hong Kong context, see *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd* [2010] HKEC 1748 (Hong Kong Court of Appeal (HKCA)) [50]–[51].
[16]*Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2006] SGHC 222 [29].
[17][2009] SGCA 3.
[18]ibid [103].
[19](1994) 34 NSWLR 723.

of *transactions* which are amenable to the practical benefit principle in *Williams v Roffey*, rather than the types of *practical benefit* which are capable of constituting good consideration. Notably, however, the decision in *Musumeci v Winadell Pty Ltd* has been interpreted to apply only to executory contracts, that is, where the promisee still has an outstanding contractual obligation to perform. Thus, in the specific context of the Australian jurisdictions which have adopted the reasoning in *Musumeci v Winadell Pty Ltd*, the rule in *Foakes v Beer* continues to be applicable in cases where the relevant transaction is a repayment of a debt owed to the promisor.[20] Considering the merits of this approach at a more general level, it is suggested that it has two principal advantages. The first advantage of this approach is that an incremental expansion of the types of transactions to which the practical benefit principle applies minimises the possibility that a determination of whether there is valid consideration will eventually shade into a judicial value judgment of the adequacy of practical benefit. Secondly, this approach, if applied broadly to extend the practical benefit principle in *Williams v Roffey* to *Foakes v Beer* situations, resolves the existing logical inconsistency between the *Williams v Roffey* and *Foakes v Beer* situations, without the need to resort to a strained interpretation of the old authorities.

The third approach is to remove the requirement of consideration for contract modifications altogether. For example, in Canada, the New Brunswick Court of Appeal in *Greater Fredericton Airport Authority Inc v NAV Canada*[21] decided to avoid the rigid application of the rule in *Foakes v Beer* by holding that contract modifications are enforceable even if unsupported by consideration, as long as they are not procured under economic duress. A few provinces and territories in Canada have achieved a similar effect through statutory reform.[22] The rule in *Foakes v Beer* has been subject to revision via codification in the United States as well. Section 2-209 of the US Uniform Commercial Code[23] provides that modifications to a contract are valid even without consideration, as long as the modification meets the test of good faith. A similar view is also reflected in section 89(a) of the Restatement (Second) of Contracts.[24] Although these codification attempts are not

[20]See, eg, *Amos v Citibank Ltd* [1996] QCA 129 (Queensland Court of Appeal).
[21](2008) NBCA 28.
[22]See John D McCamus, *The Law of Contracts*, (2nd edn, Irwin Law 2012) 262–63. See also *Judicature Act*, RSA (Revised Statutes of Alberta) 2000, c J-2, s 13(1) (Canada); *Law and Equity Act*, RSBC (Revised Statutes of British Columbia) 1996, c 253, s 43 (Canada); *Mercantile Law Amendment Act*, CCSM (Continuing Consolidation of the Statutes of Manitoba), c M120, s 6(1) (Canada); *Mercantile Law Amendment Act*, RSO (Revised Statutes of Ontario) 1990, c M10, s 16 (Canada); *Queen's Bench Act*, RSS (Revised Statutes of Saskatchewan) 1998, c Q-1.01, s 64 (Canada); *Judicature Act*, RSNWT (Revised Statutes of the Northwest Territories) 1998, c J-1, s 40 (Canada); *Judicature Act*, RSY (Revised Statutes of the Yukon) 2002, c 128, s 25 (Canada).
[23]Uniform Commercial Code s 2-209 (2002).
[24]Restatement (Second) of Contracts s 89(a) (1981).

without their own problems of implementation, their key advantage is that they preserve what is commonly perceived as the underlying rationale behind the rule in *Pinnel's Case*, ie to render contract modifications procured under duress unenforceable, while decisively resolving the uncertainties of the common law position by doing away with the requirement of consideration entirely in such situations. However, given the lack of practical difficulties posed by consideration due to the ease by which courts find it satisfied, it is unlikely that a reform of consideration will be seen as an issue pressing enough to merit codification by Parliament in most jurisdictions in the Commonwealth.

What then should be the preferred approach for the development of the law in this regard? It is suggested that under English law, *authority*, rather than principle, has led to the current unsatisfactory state of affairs. Indeed, since the rule in *Pinnel's Case* was upheld by the House of Lords in *Foakes v Beer*, the lower English courts have been unable to overrule it. Thus, when faced with the unsettling prospect of the rule's application, these courts have been forced to either apply the rule with some hesitation, or draw curious distinctions and boundaries that lead to ever-increasing logical inconsistencies in the law. Indeed, such judicial attitudes are readily apparent in the Court of Appeal decisions of *In re Selectmove Ltd*, *Williams v Roffey* and *MWB Business*. As such, the most direct approach would be for the Supreme Court to reconcile *Foakes v Beer* and *Williams v Roffey* decisively in an appropriate case to bring logical consistency to the law's treatment of promises to accept less and promises to pay more for pre-existing duties. This can be effected by a pronouncement that the rule in *Pinnel's Case*, upheld in *Foakes v Beer*, is best explained via the doctrine of economic duress. At the same time, the Supreme Court could extend the *Williams v Roffey* 'practical benefit' principle to cover *Foakes v Beer* situations. This solution would effectively strike the relevant balance that the law in this regard is concerned with, which as perceptively pointed out by Arden LJ, is between 'enabling debtors to rely on their creditors' promises' and 'protecting creditors from debtors who seek unfairly to gain an advantage from their creditors'.[25] The added doctrinal advantage of this solution is that the applicable rule, ie, the rule in *Pinnel's Case*, would be rightly situated within the realm of the doctrine of duress, rather than remaining as a curious inconsistency within the doctrine of consideration sitting uneasily with its other rules. Once the Supreme Court has taken the lead on this issue, it is expected that other common law jurisdictions would follow suit.

[25] *MWB Business* (n 1) [87].

5. Conclusion

To the extent that the *MWB Business* decision reflects an approach more grounded in commercial realities, it should be welcomed. However, one wonders whether these benefits have been achieved at the cost of introducing uncertainty in the applicable rules, as well as the distortion of the doctrine of consideration beyond all recognition. The decision in *MWB Business* represents an admirable if doctrinally unsatisfactory judicial attempt at dealing with one of the most intractable and puzzling issues in the doctrine of consideration, but the difficulties which continue to ensue from this latest crack at the problem point towards the need for a decisive solution in the form of a judicial pronouncement from the Supreme Court. Even more broadly, serious questions must be asked about the continuing utility of consideration. If its existence serves only to prompt inconsistencies like those introduced in *MWB Business*, then perhaps its problems have far exceeded its original purposes, and the way forward is its outright abolition.

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Notes on contributors

Kenny Chng is Lecturer of Law at Singapore Management University

Yihan Goh is Associate Professor of Law at Singapore Management University.