Contract Modifications: Reflections on Two Commonwealth Cases

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The pre-existing duty rule is said to have done the most in giving the doctrine of consideration a bad name. It stands for the orthodoxy that a promise to perform a pre-existing contractual duty is no consideration, but sits uneasily with other aspects of the consideration doctrine, and is routinely circumvented through a number of ‘avoidance techniques’. Since the English Court of Appeal’s decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, the rule appears to have been all but emaciated, prompting not only calls for the abolition of consideration in the context of contract modifications, but also in the more general context of contract formation. Indeed, two Commonwealth cases, namely, *Antons Trawling Co Ltd v Smith* and *NAV Canada v Greater Frederiction Airport Authority Inc*, have since taken a definitive step in that direction by holding that a promise to pay more for...
the performance of a pre-existing duty was enforceable even if unsupported by fresh consideration. At first sight, this is a distinctly positive development. It would spare the courts of the agony and embarrassment of having to invent consideration when there was none. It would also give effect to the reasonable expectations of commercial parties and restore certainty to the law. But in what follows, I will argue that such a view may be overly optimistic. Despite its breadth, the post-Williams v Roffey conception of consideration continues to serve a useful role. It draws attention to the exchange of value that gives promises contractual force in the first place, and the attainment of such value as the primary justification for facilitating contract modifications. Abandoning consideration is also unsatisfactory because the alternative concepts of ‘intention’, ‘consent’ or other manifestations of private autonomy are, without more, insufficient justifications for enforcing agreements to modify.

B Antons Trawling Co Ltd v Smith

The defendant (‘ATCL’) was a fishing company that held fishing quota rights allocated by the New Zealand government. As they confer upon the holder the exclusive right to engage in commercial fishing in a designated territory, these fishing rights were highly valuable, the very ‘lifeblood’ of fishing companies. In the early 1990s, the defendant embarked on exploratory fishing with a view to obtaining more fishing quota. It engaged the plaintiff (‘Smith’) as the master of one of its fishing trawlers on the understanding that Smith would be paid a percentage of the value of the catch and fish in areas where commercial fisheries for orange roughy (a deep-sea fish) had yet to be established. After several promising trips, ATCL also promised Smith a percentage share of the increased quota that would be issued should the commercial fishery for orange roughy be proven. In the event, ATCL was in fact issued with additional fishing quota and Smith claimed a share of that quota. ATCL resisted the claim, arguing, inter alia, that the subsequent promise was unenforceable for want of consideration. The Court of Appeal rejected this argument. ATCL was bound by its promise even if it was unsupported by consideration. In reaching this conclusion, Baragwanath J noted the approach taken in Williams v Roffey Bros & Nicholls (Contractors) Ltd but alluded to its

10 Antons (n 8) [5].
11 This latter understanding was not explicit on the facts but appeared to have been assumed by Baragwanath J. Without this crucial assumption, it would be difficult to see why there was even a variation of contract. See G Ulyatt, ‘The Demise of Consideration for Contract Variations’ (2003) 9 Auckland University Law Review 1386, 1392.
12 ATCL also unsuccessfully challenged the scope of its promise and alleged that Smith had not met the conditions that would entitle him to the promised reward. Antons (n 8) [59]–[85].
13 Williams v Roffey (n 5).
problematic nature\textsuperscript{14} and preferred the more direct solution of simply dispensing with consideration in this context:

We are satisfied that \textit{Stilk v Myrick} can no longer be taken to control such cases as \textit{Roffey Bros, Attorney-General for England and Wales} and the present case where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr Smith of the benefit of what Antons promised he should receive would be inconsistent with the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties have already made such intention clear by entering legal relations and have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement.\textsuperscript{15}

On this analysis, consideration is no longer required for contract modification because: first, an agreement to modify a contract that is duly performed should be enforced because the objective of contract law is ‘to give effect to freely accepted reciprocal undertakings’; second, consideration is not needed because it serves no distinct purpose except as a ‘valuable signal’ of parties’ intention to be bound; and third, legal consequences should only be denied if the agreement were procured by duress or offends ‘other policy factor’. For Baragwanath J, contract modifications may be distinguished from contract formation because the former are typically made ‘in the context of on-going, arms-length, commercial transactions where it is utterly fictional to describe what is being conceded as a gift, and in which there ought to be a strong presumption that good commercial considerations underlie any seemingly detrimental modification’.\textsuperscript{16}

\textbf{C NAV Canada v Greater Fredericton Airport Authority Inc}

NAV Canada (‘NAV’) is a company statutorily charged with the responsibility of supplying aviation services and equipment and supplied such services to the Greater Fredericton Airport Authority Inc (‘GFAA’) under an Aviation and Services Facilities Agreement (‘ASF Agreement’). Sometime in 2001, GFAA decided to lengthen one of its runways and requested NAV to relocate its Instrument Landing System (‘ILS’) to the extended runway. However, instead of relocating the existing system, NAV decided to acquire a new component (DME)

\textsuperscript{14} By reference to Professor Brian Coote’s criticisms of that case, which the learned judge restated as ‘the mere performance of a duty already owed to the promisee under a contract cannot constitute consideration and that the only principled way to such a result is to decide that consideration should not be necessary for the variation of contract.’ \textit{Antons} (n 8)\textsuperscript{[92]}.  
\textsuperscript{15} \textit{Antons} (n 8)\textsuperscript{[93]}.  
\textsuperscript{16} \textit{Antons} (n 8)\textsuperscript{[92]}, citing Reiter (n 4) 507.
for the system. While it accepted liability for the cost of purchasing the ILS under the AFS Agreement, NAV refused to pay for the new DME on the ground that the equipment was not part of the ILS. It further indicated that it would not make provision for the cost of the DME in its fiscal budget unless GFAA agreed to bear its cost. GFAA consistently denied responsibility for the capital expense but eventually capitulated ‘under protest’. By the time the dispute came before the New Brunswick Court of Appeal, it was established that the DME was an integral component of the ILS. It was also found that under the ASF Agreement, NAV had the contractual authority to decide whether to purchase the new DME or relocate the old equipment. Having exercised its authority, NAV could not then offload its contractual responsibility to GFAA. In deciding whether the contract had been varied by GAAFs subsequent promise to pay, Robertson JA took the view that the better approach was to ‘accept that a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress.’

This meant that the issue before the court was not one of consideration, but of duress. Robertson JA cited a number of reasons for this departure from orthodoxy, the essence of which is the need to respect parties’ expectation: since contracting parties who renegotiate generally expect their agreements to be binding, the law should protect such expectation. The only exception arises where the agreement is induced by duress. By insisting on ‘fresh’ consideration as a condition for enforcement, the rule in *Stilk v Myrick* defeats contracting parties’ legitimate expectations and occasions injustice. This unhappy state of the law is exacerbated by the fact that the doctrine of promissory estoppel only protects a party’s detrimental reliance in circumstances where he is not asserting a new cause of action. But in Robertson JAs view, such defects may be remedied by the straightforward recognition that the law enforces promises other than bargains when there are ‘sound reasons’ to do so. In the context of contract variations, such reasons reside in the need to promote commercial efficacy and certainty:

The reality is that existing contracts are frequently varied and modified by tacit agreement in order to respond to contingencies not anticipated or identified at the time the initial contract was negotiated. As a matter of commercial efficacy, it becomes necessary at times to adjust the parties’ respective contractual obligations and the law must then protect their legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable.

Interestingly, Robertson JA was anxious to defend this reform as an ‘incremental change’ that merely builds upon the English Court of Appeal’s decision in

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17 *NAV Canada* (n 9) [31].
18 *NAV Canada* (n 9) [28]–[30].
19 *NAV Canada* (n 9) [29].
20 *NAV Canada* (n 9) [28].
21 *NAV Canada* (n 9) [32].
Williams v Roffey Bros & Nicolls (Contractors) Ltd. According to the learned judge, it does not abrogate the rule in Stilk v Myrick but simply clarifies that ‘the rule should not be regarded as determinative as to whether a gratuitous promise is enforceable.’ However, it is difficult to see what purpose remains for the rule to serve once the requirement for consideration is abandoned. It may be true, as the learned judge proceeded to observe, that the concept of consideration could still be relevant in identifying variations made under duress, but such an attenuated role is surely a departure from the classic understanding of the rule as an appurtenance to the doctrine of consideration.

Turning to the doctrine of economic duress, Robertson JA vigorously criticised the modern conception of the doctrine as one that involves the use of ‘illegitimate pressure’. In his view, this criterion provides no useful guidance since it encompasses not only unlawful threats (such as those involving tortious or criminal conduct) but extends also to lawful threats. In the context of contract variations, the search for ‘illegitimate pressure’ will often prove elusive since ‘a threatened breach of contract is not only lawful but in fact constitutes a right which can be exercised subject to the obligation to pay damages and possibly to an order for specific performance’. Likewise, no illegitimacy is inherent in a demand for more payment or service. That being the case, the ‘illegitimate pressure’ test invariably starts on the supposition that threatened breaches of contracts constitute legitimate commercial pressure and does not provide a template for distinguishing between legitimate and illegitimate pressure.

For Robertson JA, a contractual variation is enforceable if it is the product of a consensual agreement, and a party has not consented if he acted under duress. That being the case, the correct test for economic duress must be one that is directed at establishing the absence of consent. To this end, Robertson JA identified two threshold conditions: first, the promise must have been procured by the exercise of pressure in the form of a demand or threat, and second, the coerced party must have had no practical alternative but to agree to the coercer’s demand. If either threshold condition is not met, the plea of economic duress must fail. In particular, the victim’s lack of practical alternatives is critical because it is good evidence that he did not in fact consent. But the absence of alternatives,
whilst a necessary condition to establish lack of consent, is not by itself sufficient; other factors including whether the promise was supported by consideration, whether the victim made the promise ‘under protest’ or ‘without prejudice’, and whether he had taken reasonable and timely steps to rescind the agreement must be assessed to determine the reality of the victim’s consent.  

Crucially, this analytical framework does not include other factors, such as whether the victim had access to independent legal advice or whether the coercer acted in good faith, as integral components of the doctrine. A party with access to independent legal advice may still have been coerced if the effect of the pressure was to leave him with no other practical option. Likewise, the coercer’s lack of bad faith is not a defence if the evidence on the whole pointed to the lack of true consent. Ultimately, it is not the legitimacy of the pressure but its impact on the victim that is decisive.

Applying these principles to the facts, Robertson JA found that GFAA had acted under economic duress. NAV had threatened to withhold performance the effect of which was to leave GFAA with no workable alternative but to concede since NAV held an effective monopoly over the provision of the relevant aviation services. The variation was not supported by fresh consideration, the agreement was made under protest, and no payment was in fact made by GFAA. All these considerations pointed to the lack of true consent.

D Practical Benefits

In Antons, Baragwanath J endorsed Williams v Raffey as an alternative means of upholding contract modifications that is not dissimilar in effect to the dispensation of consideration. Likewise, Robertson JA in NAV Canada viewed Williams as a decisive step taken by English law to relax the strict tenets of the consideration doctrine. Williams was seen to have heralded the demise of consideration in contract modifications. In that case, the defendant had engaged the plaintiff as subcontractors to carry out carpentry work on a block of 27 flats. Before the works could be completed, the plaintiff got into financial difficulties. Anxious to avoid a time penalty under the main contract, the defendant promised to pay the plaintiff an additional sum of £10,300 at the rate of £575 for each refurbished

31 NAV Canada (n 9) [53].
32 NAV Canada (n 9) [60].
33 NAV Canada (n 9) [47]–[48] and [61]–[63].
34 NAV Canada (n 9) [50], [63], endorsing the arguments of M H Ogilvie in ‘Forbearance and Economic Duress: Three Strikes and You’re Still Out at the Ontario Court of Appeal’ (2004) 29 Queen’s Law Journal 809, 821.
35 NAV Canada (n 9) [64]–[67].
36 Antons (n 8) [92]–[93].
37 NAV Canada (n 9) [26].
The plaintiff then went on to substantially complete the works on eight more flats but received only one further payment of £1,500 from the defendant. The plaintiff then sued and recovered the promised additional payments in respect of the completed flats. The English Court of Appeal held that the defendant’s promise did not fail for want of consideration because it stood to enjoy ‘practical benefits’, viz. ensuring the continuance of the work, avoiding the trouble and expense of having to engage another subcontractor, avoiding liability for delay damages to the owners under the main contract, and replacing a haphazard scheme of payment with a more structured one involving the payment of a fixed sum upon completion of each flat. The ‘practical benefits’ so identified are thus the factual or incidental advantages that a contracting party would derive from the counter-party’s performance over his breach of an existing contractual obligation. It also appears there is no requirement for such benefits to materialise, so long as they were probable at the time of the variation.

‘Practical benefits’ as elicited from Williams v Roffey Bros are widely thought to be illusory. For example, Professor Coote has argued that because a bilateral contract is formed by an exchange of consideration at the point of formation, actual performance and the advantages which result from it come too late to qualify as consideration. ‘Practical benefits’ cannot therefore be found in actual performance or the advantages resulting therefrom. In an earlier work, Professor Chen-Wishart likewise criticised ‘practical benefits’ as a concept that comprises nothing more than what was already promised, that introduces unacceptable uncertainty in the law, and that may lead to the collapse of the doctrine of consideration by blurring the line between consideration and mere subjective motive. Indeed, at its broadest, ‘practical benefits’ could include any matter that is subjectively valued by the promisor. On this view, the term is void of content and vulnerable to abuse as a guise under which courts choose to give effect to contract modifications unsupported by (legal) consideration. For these reasons, Williams v Roffey has come to be viewed as an authority that flatly contradicts the

Williams (n 5) 10–11 (Glidewell LJ), 19 (Russell LJ).


pre-existing duty rule in *Stilk v Myrick,* and which has the practical effect of jettisoning consideration in the context of contract modifications. A recent iterance of this view was made by Coote in support of the outcome in both *Antons* and *NAV Canada:*

In the real world, no one in a position like that of the head contractor in *Roffey Bros* would, in his or her right mind, and in a commercial context, promise additional payment without the hope or expectation of receiving at least some practical benefit in return, whether covenanted or not, and even if a main motive were no more than the self-satisfaction of having given assistance to a party who was under obligation to him or her. So it is inconceivable that, on the reasoning in *Roffey Bros,* any agreement to vary a contract, intended to be binding in law, could ever fail merely for want of consideration. For practical purposes therefore, the result was (and is) effectively the same as dispensing altogether with any such requirement.

But one may object that this was not what *Williams v Roffey* decided. *Williams v Roffey* did not discard consideration but affirmed its place in contract modifications by enlarging its scope to include more factual benefits. In practice, the performance of an obligation is often of more economic value than the mere right to seek redress for breach because a successful plaintiff is rarely adequately compensated in full. This ‘bird-in-hand’ line of reasoning has long been urged and is consistent with the rule that the law does not assess the adequacy of consideration. Further, it is not the case that a promisor would stand to enjoy factual benefits in every contract modification, as there will be instances where the benefits are too *de minimis* to be real. So while ‘practical benefits’ is a broad concept, it is not limitless. The receipt of performance is thus of more value than a mere promise to perform.

Moreover, ‘practical benefits’ may be distinguished from mere motive. A persuasive instance of that was undertaken by Chen-Wishart in a recent article.

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44 See Halson (n 6) and Phang (n 6).
47 As Chen-Wishart put it, ‘[w]e bargain for performance, but what we get is a more fragile right in remedial terms. The unpalatable truth is that there is no straightforward equivalence between the two.’ Chen-Wishart, ‘A Bird in the Hand’ (n 42) 93.
49 Dawson (n 45) 156.
50 This may be the case where, for instance, the contract is already very near its end. In the Singaporean Court of Appeal decision in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631 (SCA) 635, it was found that an employer who had promised enhanced severance payment to a retrenched employee had derived no factual benefit from the latter’s work in the last month of his employment since a company would only retrench employees who were no longer essential to its operations.
51 Chen-Wishart, ‘A Bird in the Hand’ (n 42).
Building on the ‘bird-in-hand’ principle, the learned author rationalised *Williams v Roffey* as a case where the contract to modify took effect as a unilateral contract. In other words, the main contractor’s offer to pay more was a unilateral offer (or a series of unilateral offers) that would be accepted as and when the carpentry work on each flat was completed. Consideration thus resides in the performance rather than the promise. Since a unilateral contract is formed only upon the receipt of performance, this approach avoids the conceptual difficulty associated with that based on bilateral contracting, where performance is said to arrive too late to qualify as consideration. It also explains why, if the sub-contractor (promisee) fails to perform, the underlying contract is revived and damages are assessed on the terms of the original contract rather than the terms of the failed modification. Accordingly, on the facts of *Williams v Roffey*, the sub-contractor was awarded the higher sums only in respect of the flats that were substantially completed but not the remaining unfurnished flats.

This unilateral contract device has the obvious advantage of placing a logical and objective limit on the concept of practical benefits. But if one accepts as a starting premise that actual performance is more valuable than a mere right to performance, then might not a more straightforward explanation of *Williams v Roffey* lie in the recognition that a re-promise does confer additional value on the counter-party if the re-promise represents an increased chance of performance? If actual performance is an end that a contracting party may rationally acquire, why could he not similarly give good value in exchange for an increased chance of performance? The law regularly gives effect to bargains struck for the acquisition of a chance. A contract for (lawful) wagers is the classic example. More pertinently, a person who has already purchased a lottery ticket may also improve his chance of winning by purchasing more tickets of the same series. No one would sensibly

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52 Chen-Wishart, ‘A Bird in the Hand’ (n 42) 96.
53 Chen-Wishart, ‘A Bird in the Hand’ (n 42) 97.
54 But the remedies awarded in the case are also consistent with an analysis based on bilateral contracting since both the trial judge and the Court of Appeal had accepted that the obligation to pay the increased amount was conditional upon the completion (or substantial completion) of work in respect of each flat. See *Williams v Roffey* (n 5) 8.
55 But it has been observed that this mechanism is somewhat complex, and the supposition that all contract modifications are effected by way of unilateral contracts may in many cases run counter to parties’ intention. See Ewan McKendrick, *Contract Law* (9th edn, Palgrave Macmillan 2011) 83. It may be reasonable to surmise, for example, that Roffey Bros (the defendants) would not have agreed to the variation if it had known at the time that the new agreement did not oblige Williams (the plaintiff) to perform but merely gave him an option to do so. Of course, this may be of little practical significance if Williams was still bound to perform under the original contract. But the remedial consequences of bilateral and unilateral contracting may differ depending on the precise time at which the contract is said to have been formed, and this difference may sometimes be crucial.
56 Chen-Wishart (n 39) 128. At first sight, this proposition may appear to contradict Chen-Wishart’s main thesis in her more recent work (Chen-Wishart, ‘A Bird in the Hand’ (n 42)) which contends that it is the critical distinction between receipt of performance and the mere right to perform that renders it necessary to resort to the unilateral contract device. But this is not necessarily so. To acknowledge that performance is worth more than a mere promise does not necessarily preclude the possibility that the same promise cannot confer different values in different circumstances.
suggest that the subsequent purchase is void for want of consideration since the value of the increased chance is one that can be statistically proven. In the same vein, it may be argued that Roffey Bros had by promising more payment acquired a real chance of improved performance. It will be recalled that in that case, it was the subcontractor’s financial difficulties—caused in part by the under-pricing of the original sub-contract—that were threatening to impede performance. It must thus have been clear that any additional payment received by the subcontractor would go towards alleviating the impediment he was facing and correspondingly improve the chance of completion.\textsuperscript{57} That such increased payments were common practice in the construction industry,\textsuperscript{58} further attested to the objective value of the advantage that would accrue to the main contractor.\textsuperscript{59} So understood, the consideration or ‘practical benefits’ found in Williams v Roffey were not merely the promisor’s subjective hope or motive but a fact objectively identified in the same way that the likelihood of any other factual occurrence is assessed. On this view, the benefits that a contracting party derives from a re-promise are not illusory. They are valuable not only in the eyes of the parties but also in the eyes of the law. It is true, of course, that this interpretation of Williams v Roffey would still severely undermine the pre-existing duty rule and may well approach the dispensation-route in effect, i.e., by validating the vast majority of contractual variations. But the precise analytical technique, in emphasising the need to locate an exchange of value, diverges sharply from an approach that altogether side-steps that enquiry. As the discussion below will demonstrate, this divergence may have more than theoretical significance.

\textbf{E Modifications, Intention and Policy}

In Antons, the court placed considerable weight on the importance of giving effect to agreements where the parties had expressed the unequivocal intention to be bound.\textsuperscript{60} Indeed, it appeared to have regarded the parties’ intention as sufficient and paramount, such that the only function of consideration, if it remained relevant

\textsuperscript{57} Reynolds and Treitel have also argued that the fact of under-price is a consideration that favours enforcement: ‘The conduct of the promisor might, again, be relevant if in the original contract he secured some harsh or unfair advantage over the promisee— if, for example, he employed the promisee at rates of pay well below the current ones. The suggestion here is not that the court should reopen the transaction for inadequacy of consideration. But where the parties themselves have reopened it on this ground, the court should enforce their new agreement.’ Francis Reynolds and Guenter Treitel, ‘Consideration for the Modification of Contracts’ (1965) 7 Malaya Law Review 1, [20] (emphasis added).

\textsuperscript{58} A point raised by counsel for the subcontractor in argument, see Williams v Roffey (n 5) 4.

\textsuperscript{59} Indeed, it is significant that counsel for the main contractor had conceded that his client had secured benefits from promising to pay more notwithstanding that complete performance was not eventually rendered. See Williams v Roffey (n 5) 16.

\textsuperscript{60} Antons (n 8) [93].
at all, was as a ‘valuable signal that the parties intend to be bound by their agreement’. The main difficulty with this line of argument is that it does not explain why consideration should only be dispensed with in cases involving modifications. If the parties’ intention were the only relevant criterion, surely it must follow that all agreements (including ‘fresh’ agreements) should be enforced on that ground. That would, in effect, spell the complete demise of the doctrine of consideration. To suggest that the doctrine of intention is a more useful mark of legal enforceability also overlooks the fact that the intention to create legal relations is presumed in the vast majority of cases involving commercial cases or arms-length bargains. In practice, that will have the effect of presumptively validating all contract variations, thus rendering the search for ‘intention’ a hollow exercise. More worryingly, the language of intention together with the operation of the presumption would, by appealing to the notion of private autonomy, tend to mask the public policies that are at work in judicial decision-making.

By way of contrast, a more compelling case for consideration-free modifications was put forward in *NAV Canada* when the court explicitly based its decision on ‘policy reasons’. These reasons were the need to protect parties’ reliance, to improve certainty in the law, and most crucially, to facilitate commercially efficacious one-sided modifications. They underscored the belief that contractual modifications are beneficial and hence ought to be enabled by the law. To the extent that the doctrine of consideration hinders this policy, it has to give way. All that is needed to establish a valid modification is the parties’ true agreement or consent.

On this view, the formation and modification of contracts are distinct phenomena. But this is hardly a novel observation. As Karl Llewellyn had observed in 1931:

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61 ibid.
64 Thus, Hedley concludes that no intention to create legal relations is really required in these cases. See Steve Hedley, ‘Keeping Contract in its Place—Balfour v Balfour and the Enforceability of Informal Agreements’ (1983) 5 Oxford Journal of Legal Studies 391, 412.
66 *NAV Canada* (n 9) [27].
67 ibid [26].
Law and logic go astray whenever [additional or modifying business promises] are regarded as truly comparable to new agreements. They are not. No business man regards them so. They are going-transaction adjustments, as different from agreement-formation as are corporate organization and corporate management; and the line of legal dealing with them which runs over waiver and estoppel is based on sound intuition.68

Contract modifications are thus the usual incidents in the life of a contract. They are needed to fill gaps and cure defects discoverable only in the course of performance. Generally, the immediate aim of a party who agrees to a concession is not to acquire ‘fresh’ benefits, but to preserve the benefits of the original bargain. That being the case, it is not relevant to insist on additional consideration.69 Contracting parties would benefit from the outright recognition of modifications sans consideration as prima facie valid because that would facilitate the achievement of the objective that motivated the formation of the contract in the first place.70 At the same time, the function of contracts as the essential legal and social machinery for rearranging productive energy71 is better served.

It may be pointed out that this policy concern is not, in substance, too different from the notion of value or practical benefits discussed in the previous section. Indeed, both analyses are built upon the benefits of modifications with a view to enabling performance so it is unsurprising that both would, in the overwhelming majority of cases, uphold contract modifications as validly formed. Nevertheless, the technique employed by each approach is distinct and this distinction may well affect the analysis of a contractual modification in other ways. By recognising that even an ostensibly one-sided modification may involve an exchange, Williams v Raffey preserves the conception of contractual promises as bargains.72 For it is not the mere phenomenon of agreement, but an agreement for the exchange of values recognised as sufficient by the law, that gives the modification its legal force. On the other hand, a broad-brush dispensation, even if similarly motivated by the desire to facilitate performance of the original contract, strips the promise of its reciprocal quality and leaves the element of consent—manifested by offer, acceptance and intention—as its core constituent. In turn, this may (though it is not an inevitable consequence) engender the misconception that since it is consent alone that validates the modification, the only reasons for invalidation are those that negate consent.73 As the discussion below will seek to demonstrate, this was the erroneous assumption that led the court in NAV Canada to embrace ‘consent’

70 Tan Cheng Han, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17 SACLJ 566, 578.
71 Llewellyn (n 68) 717.
72 Which still provides the most compelling explanation for contractual liability because ‘[the] conceptual core of contract is the self-interested exchange’. Chen-Wishart (n 7) 451.
73 ibid 446.
in place of ‘illegitimacy’ as the conceptual substratum of the doctrine of economic duress.

**F Economic Duress**

In *NAV Canada*, Robertson JA took the view that genuinely agreed contract modifications though unsupported by consideration should be enforceable unless procured by duress. The lack of consent is therefore the ‘true cornerstone’ of the doctrine of duress. This conception of duress also led the learned judge to reject ‘illegitimate pressure’ and adopt the absence of practical alternatives as the key diagnostic concept. In his view, the notion of illegitimacy is unhelpful because it says nothing about the reality of the coercee’s consent. The existence or lack of adequate alternatives, on the other hand, is direct evidence of the impact of the pressure exerted on the coercee. On this approach, the questions whether a contractual modification has been formed, and whether it is voidable for duress, are collapsed as a single enquiry centering on the notion of consent.

If ‘consent’ connotes an intentional or voluntary act, this analysis is problematic and retrogressive. The point is now trite that a person being coerced does succumb, so that ‘the more extreme the pressure, the more real is the consent of the victim.’ Hence, a contract procured by coercion is not vitiated because consent is absent but because it is procured in circumstances the law regards as objectionable. As Professor Aityah had warned, the language of ‘consent’ is bound to mislead because it could be understood literally to require only a finding of fact concerning the victim’s subjective will.

It may be that by ‘lack of consent’ Robertson JA really had in mind defective rather than un-willed consent. Consent procured under pressure is defective or ‘unfree’ when the coerced party had no choice in the decision, and choice is absent when ‘the only alternatives to entering into the contract, including doing nothing, are undesirable alternatives.’ This interpretation is consistent with the emphasis that Robertson JA placed on the availability of practical alternatives as the (non-conclusive) hallmark of consent. This leaves unanswered the question: how is a

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74 *NAV Canada* (n 9) [7].
75 An approach commended for its ‘considerable simplicity and elegance’: see Margaret Ogilvie, ‘Economic Duress: an Elegant and Practical Solution’ (2011) 3 Journal of Business Law 229, 242
77 Thus rendering the contract ‘defeasible’: see Chen-Wishart (n 7) 446.
78 Aityah (n 76) 202.
practical alternative to be identified? Specifically, should a subjective (i.e. ‘practical’ as determined by the coercee) or an objective standard (i.e. ‘practical’ as determined by the law) be applied to discover such alternatives? In NAV Canada, Robertson JA gave short shrift to this aspect of the analysis by alluding to it as a question of judgment as well as evidence. Bearing in mind that the learned judge had already rejected the objective limits inherent in ‘illegitimate pressure’, applying a subjective standard would lead to the alarming result that a contractual modification may be rescinded for duress so long as the victim adduces satisfactory evidence of an honest belief that there was no practical alternative. This would dramatically enlarge the scope of the doctrine of economic duress and destabilise contract modifications. It would also undermine the policy for eliminating consideration in the first place, which is to facilitate contract variations and promote performance. In the light of that, an objective determination of ‘practical alternative’ should be preferred. So a practical alternative is not merely a possible course of conduct but also one that the coercee ought to have taken in the circumstances, as assessed by the court. A significant normative dimension is thus implicit in the test—it requires the court to assess the practicability of the alternatives as well as the reasonableness of the coercee’s decision in bypassing them. Despite its subjective facade, ‘consent’, like ‘illegitimacy’, is a value-laden concept. Without identifying the values and policies that ought to guide the court in evaluating the victim’s post-threat options, ‘consent’ and ‘practical alternatives’ are mere apppellations that provide scant guidance in their application. Consequently, the uncertainty that Robertson JA regards as objectionable in ‘illegitimacy’ is also present in ‘consent’. A consent based analysis centering on the absence of choice is also flawed because it obscures the reality that contractual autonomy is never absolute. In the commercial context, such autonomy is principally constrained by limited access to resources. It is further curtailed every time a decision is made to commit resources to particular activities. The very act of contracting is, therefore, itself a cause of the ‘no choice’ phenomenon. For that reason, a complete solution cannot be found in an exclusive focus on the absence of choice. Applying the ‘no-option’ criterion bluntly results in circularity.

80 This must be distinguished from the question of causation, i.e. whether the coercee succumbed because he had no reasonable alternative. In this context, there is clearly a need to establish subjective inducement. See Hayton SA v Peter Cremers GmbH & Co [1999] 1 Lloyd’s Rep 620 (England and Wales High Court (Commercial Division) (EWHC (Comm))) 638 (Mance J).
81 NAV Canada (n 9) [55] (Robertson JA).
83 Bigwood (n 26) 275–76. Cf M H Ogilvie, ‘Economic Duress in Contract: Departure, Detour or Dead End?’ (2001) 94 Canadian Business Law Journal 194, 223 (Argued that the absence of practical alternatives is the more appropriate test for economic duress because it is ‘externally and factually verifiable’).
84 See MacDonald (n 79) 467.
By contrast, the concept of ‘illegitimacy’ explicitly reflects the moral basis on which the doctrine of economic duress is founded. The doctrine is not so much concerned with protecting a victim’s choices per se, as it is with protecting a victim’s vulnerability to exploitative behaviour that undermines that victim’s choices. Contrary to Robertson JA’s assertion, there is no unfettered ‘right’ to break a contract.

A breach (and, by the same token, a threatened breach) of contract may not involve the same degree of moral infraction that is typical of common law crimes, yet it may in certain circumstances fall short of prevailing ethical expectations. Thus, illegitimacy or exploitation is to be identified by examining the entire interaction between the parties rather than a one-sided focus on the coercee’s reactions. An account of the doctrine that evaluates the conduct of both parties to the transaction provides a more convincing justification for excusing the coercee from their obligations and depriving the coercer of their rights.

Of course, a moralised account of the doctrine is open to criticism on account of its susceptibility to indeterminacy. Nevertheless, the test laid down in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*, has been favourably received in a number of Commonwealth jurisdictions, including Canada. There is, therefore, significant support for the concept as a workable criterion, even though its precise content seems to vary from society to society.

Crucially, ‘illegitimacy’, not being a monolithic concept, is not reducible to a single test or an exhaustive list of determinants. Rather, it encapsulates all of the

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86 *NAV Canada* (n 9) [46] (Robertson JA).
87 The term ‘right’ is clearly not intended as a Hohfeldian claim-right but is more accurately a liberty to breach subject to the liability to pay damages. This draws from the Holmesian view that a contracting party may choose either to perform or breach on payment of damages but suffers from the fundamental weakness that it seeks to equate a contractual right with the remedy that vindicates it. See eg Daniel Friedman, ‘The Efficient Breach Fallacy’ (1989) 18 Journal of Legal Studies 1, 1.
92 Three cases decided by the Ontario Court of Appeal are commonly cited: *Stott v Merit Investment Corp* (1988) 63 OR (2d) 545 (Ontario Supreme Court, Court of Appeal (OSCA)); *Gordon v Roebuck reflex* (1992) 9 OR (3d) 1 (Ontario Court of Appeal (OCA)); *Techform Products Ltd v Wolda* (2001) 56 OR (3d) 1 (OCA). These authorities were criticised by Robertson JA as unthinking reception of the ‘illegitimacy’ test into Canadian law. See *NAV Canada* (n 9) [44].
93 See Bigwood (n 85) 229. So illegitimacy has been equated with the doctrine of unconscionability in equity in Australia: see Ross McKean, ‘Economic Duress—Wearing the Clothes of Unconscionable Conduct’ (2001) 17 Journal of Contract Law 1.
94 Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell 2006) [3-004].
factors that are relevant to the assessment of the parties’ conduct at the time of renegotiation. Under this analytical framework, the absence of practical alternatives is a weighty factor as it sheds light on both the reasonableness of the coercee’s conduct as well as the causal link between the threat and the concession. However, it cannot be the exclusive determinant of illegitimacy. Contrary to Robertson JA’s view in *NAV Canada* the coercer’s motivation or state of mind is an important factor. An intention to profit from another’s vulnerability in the absence of any justification (such as the need to respond to an unanticipated change in circumstance) is an indisputable instance of ‘illegitimacy’. Conversely, the threatening party’s ‘good faith’ (ie an honest belief that they are entitled to make the threat) may legitimise a threat to breach a contract. However, this does not (contrary to Robertson JA’s approach in *NAV Canada*) mean that ‘good faith’ will always negate duress because the threatening party’s state of mind is just one of the various factors in the assessment of legitimacy. So even if the coercer honestly believed it had the right to threaten non-performance, the threat would be illegitimate if it was found to be an attempt to avoid a circumstance that the coercer had himself created or to reallocate a risk that he had previously assumed. Indeed, the outcome in *NAV Canada* is better explained on this ground. By threatening non-performance, NAV was clearly attempting to relieve itself of a contractual risk it had previously assumed. This constituted illegitimate pressure even if NAV honestly thought it had the right to do so.

In *NAV Canada*, Robertson JA was eager to restore certainty to the law by stripping it of value assessments. To that end, an assent-centred approach was selected as it has the impression of a generally fact-based enquiry shorn of value judgment. Such an approach is fundamentally misconceived. It wrongly assumes that consent is all that is required for contract formation and the absence of consent is what it takes to vitiate the agreement. As we have seen, however, the doctrine of duress requires a normative evaluation of the propriety and

95 The classic example is *D&C Builders v Rees* [1966] 2 QB 617 (EWHC (Comm)). Notably, this was also a point conceded by Robertson JA in *NAV Canada* in spite of his preference for a victim-centred approach, see *NAV Canada* (n 9) [48]. The relevance of the coercer’s state of mind has also been accepted in other Commonwealth jurisdictions. In *McIntyre v Nemesis DNK Ltd* [2009] NZCA 329 [35], a decision of the New Zealand Court of Appeal, the finding that the alleged coercer did not set out to deliberately harm the contractual relationship was thought to be significant in negating illegitimate pressure. See also *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233, [30] (SHC).

96 See *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] EWHC 185 (TCC) (England and Wales High Court (Technology and Construction Court)) and *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1 (EWHC).

97 *Enonchong* (n 94) [3-012]. Moreover, little or no weight will be attached to a party’s ‘good faith’ if it is founded on a wholly unreasonable belief: *Adam Opel GmbH and another v Mitras Automotive UK Ltd* [2007] EWHC 3252, [34] (QB) (David Donaldson QC (sitting as a Deputy Judge of the High Court)).

98 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] 1 QB 705 (EWHC (Comm)). For a more recent example, see *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] All ER (D) 122 (EWHC).
reasonableness of the parties’ conduct and it cannot meaningfully be reduced to a factual enquiry on ‘consent’. It is true, of course, that the normative criteria of ‘illegitimacy’ would invite the exercise of judicial discretion and thereby generate uncertainty. However the exercise of discretion to discriminate between factual situations in order to decide what is just and fair is the very essence of the courts’ function.99

G Conclusion

The questions of whether a contractual modification has been formed, and of whether a modification be set aside despite the outward coincidence of offer and acceptance, raise complex policy issues and questions of value. The solutions devised in both Antons and NAV Canada have the appeal of simplicity and avoid the awkwardness of stretching the concept of consideration beyond its traditional boundaries. However, a close inspection of the reasoning employed in both cases reveals the risk that the abandonment of consideration may reduce the issues surrounding contract modifications to one of mere ‘intention’ or ‘consent’, or other like expressions of private autonomy. At worst, such reductionism may threaten to exclude pertinent policy considerations, including the policy that prompted removal of consideration in the first place.

The same risk may, of course, inhere in the patchwork approach that is currently found in English law, especially if the ‘practical benefits’ considered in Williams v Roffey are no more than illusory. What this article has sought to do is to persuade the reader that an alternative view is both possible and plausible. ‘Practical benefits’ constitute real consideration if the law recognises the reality that commercial parties are prepared to purchase an increased chance of performance. On this view, Williams v Roffey reinforces the orthodoxy that contractual promises are more than agreements.100 Likewise, the doctrine of duress is not predicated on the absence of agreements but on the need to delineate minimum standards of ethical behaviour in renegotiating contracts. There is, admittedly, no simple means of framing those standards but the notion of ‘illegitimacy’ underscores the need to identify a material degree of impropriety. The practicality of the coercer’s options, or their absence, may shed light on the quality of the coercer’s conduct but it does not displace the broader appraisal of the parties’ interaction.

100 Hamson (n 48) 234 (‘Consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain.’).