

Has the Supreme Court condemned the rule from Pinnel's Case to irrelevancy? An Examination of Rock Advertising v MWB Business Exchange Centres and its effect on the Part Payment of Debt Rule, Promissory Estoppel, and No Oral Modification Clauses.

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Introduction

Varying a contract in English law has many unclear aspects. The law has developed in a way where one principle is pitted against another. Whether it is the practical benefit rule or promissory estoppel against the part-payment of debt rule, or No Oral Modification (“NOM”) clauses against promissory estoppel. *Rock Advertising v MWB Business Exchange Centres*¹ considered all of these issues. The part-payment rule receives greater focus in this dissertation. The law is more unclear when compared to the position of NOM clauses, both before and after this decision. Further, promissory estoppel receives more attention as it affects both the part-payment rule and NOM clauses. This dissertation evaluates the state of promissory estoppel and the part-payment rule before this decision and it will reveal that *Rock* has left them ambiguous. It also examines the position of NOM clauses following *Rock*.

Chapter 1 explains the origin of promissory estoppel and how it became significant. Its importance was enhanced when it was first used to undermine the part-payment rule. It will then be explored how its effect on the rights of promisors remains ambiguous. Its alleged extinctive nature undermines the part-payment rule, but it provides insight on why it is regarded as important. In chapter 2, the position of the part-payment rule before *Rock* will be analysed. Whilst the rule was preserved, the validity of the part-payment rule was severely undermined by the practical benefit rule and promissory estoppel. Chapter 3 will explore the reasoning of each court leading up to the Supreme Court in *Rock*, before evaluating the academic response. Interestingly, whilst the Supreme Court overruled the decision on NOM clauses, it appears to leave the Court of Appeal judgment on consideration intact. Its indication that the part-payment rule needs re-examining, combined with the Court of Appeal judgment, significantly doubts it. It will also be seen the Supreme Court’s ruling on NOM clauses contains some ambiguity. Chapter 4 will explore the effect this ruling had on the part-payment rule; chapter 5 will explore its effect on NOM clauses. Promissory estoppel is addressed in both chapters 4 and 5.

Chapter 4 has three main arguments: The part-payment rule is not good law; the law is trying to evolve towards the practical benefit rule; and promissory estoppel should be relied upon until this evolution. It concludes that the law underpinning the part-payment rule should be

¹ [2018] UKSC 24 (SC) (*Rock*).

overruled. Chapter 5 will explore the arguments against the Supreme Court. It will be seen, however, that despite the Court of Appeal's ruling, many still favoured and recommended using NOM clauses. The arguments for NOM clauses are then explored, before evaluating if Briggs' approach should be preferred over Sumption's. A key aspect to this analysis is the practicality of NOM clauses, therefore, this chapter draws on the opinions of legal practitioners alongside academics.

Methodology

Rock was decided in May 2018 and I commenced this dissertation the following June. Much of the academic discussion on the case was not released until late 2018. This impacted my research approach. First, I gained an overview of the law on promissory estoppel and the part-payment rule, using textbooks *Chitty on Contracts*² and *Cheshire, Fifoot and Furmston's Law of Contract*.³ It should be noted this is not the newest edition of *Chitty*, as the newest was published 24 October 2018 but did not become available to me until January 2019. However, the newest edition did not substantially change my research findings and only added to my discussion in chapter 3. These books provided key cases and issues to examine for chapters 1 and 2. Using Lexis Nexis, I was able to access a list of cases that had considered these key cases. This expanded my parameters providing a firm notion of the law to write chapters 1 and 2. However, I researched academic debate for chapter 2. Databases Westlaw and Lexis Nexis provided many journal articles, alongside the textbooks *Furmston* and *Great Debates in Contract Law*.⁴ Whilst writing these chapters, some articles on *Rock* started to release. Some were already in the *New Law Journal*, but now I had more substantive pieces to inform my writing at the end of chapter 3. My research developed as more articles were released at the end of 2018. These articles informed my analysis in chapters 4 and 5. Finally, I reference economic points, but these arguments are supported by legal scholars.

² H G Beale (ed), *Chitty on Contracts Volume 1, General Principles* (31st edn, Sweet & Maxwell 2012) (*Chitty*).

³ M Furmston, *Cheshire, Fifoot, & Furmston's Law of Contract* (17th edn, OUP 2017) (*Furmston*).

⁴ J Morgan, *Great debates in contract law* (2nd edn, Basingstoke 2015).

Chapter 1

When forming contracts in English law, there are three important aspects: An agreement,⁵ consideration, and an intention to create legal relations. A key component of English contract law is consideration. Consideration is not only required for forming contracts however. Variations of a contract also require consideration. Without it, any agreement to vary a contract would be unenforceable.⁶ Yet, some contractual variations are not supported by consideration, but can still have legal effects. Under the common law, such variations without consideration may 'arise because the promise by a party to relinquish... his rights under a contract amounts to a "waiver".'⁷ This approach of waiver under the common law is said to be less satisfactory than the approach developed in equity.⁸

Equity is a concept that can be traced back to the Court of Chancery.⁹ This court is known for developing the doctrines of equity,¹⁰ it being a court of equity itself¹¹ some of which still exist.¹² The Court of Chancery, however, was dissolved and its function became part of the Chancery Division of the High Court by way of the Supreme Court of Judicature Acts 1873 and 1875.¹³ High Court judges could now rule on what was equitable. Their decisions, however,

⁵ Of which consists of a legally valid offer and acceptance.

⁶ Consideration is one of the requirements for a validly held contract: The others being offer and acceptance, an intention to create legal relations, capacity, and legality. For further discussion of the need for consideration to vary a contract see, *Chitty* (n 2) 342-345.

⁷ *Chitty* (n 2) 345 at 3-081: Waiver can refer to variations supported by consideration however; for further discussion as to the nature of variations under the common law, see *Chitty* (n 2), 345-347.

⁸ *Ibid* 347 at 3-085; the reason for the unsatisfactory common law approach is due to the distinction between waiver and forbearance: *Chitty* (n 2), 345-346 particularly the discussion at 3-084; although, there is an argument made to the contrary, see A J Phillips, 'Resurrecting the doctrine of common law forbearance' (2007) 123 LQR 286, 313.

⁹ A H Marsh, *History of the Court of Chancery and of the Rise and Development of the Doctrines of Equity* (accessible via HeinOnline, Carswell & Co 1890) 12 (Marsh); for a discussion on how the Court of Chancery first originated see also 6-17.

¹⁰ Courts and Tribunals Judiciary, 'The Chancery Division: History' (Courts and Tribunals Judiciary website) <<https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/the-chancery-division/history-cd/>> last accessed 14 December 2018. The constituent doctrines being: Estoppel by representation, see S Bower and Turner, *Estoppel by Representation* (3rd edn, LexisNexis 1977) (Bower and Turner); estoppel by convention, see *Chitty* (n 2) 367-371 at 3-107; and proprietary estoppel see *Chitty* (n 2) 391ff starting at 3-137.

¹¹ This is somewhat self-explanatory as the Court of Chancery was set up alongside the Courts of Common Law, see Marsh (n 9) 12-13; for reference to it as such, see also The Editors of Encyclopaedia Britannica, 'Encyclopaedia Britannica' (Last updated 19 October 2018) <<https://www.britannica.com/topic/Chancery-Division>> last accessed 14 December 2018 (Editors of Britannica).

¹² See Editors of Britannica (n 11). Although they are limited to commonwealth jurisdictions.

¹³ These Acts have been repealed since. The legislation repealing the 1873 Act: the Statute Law Revision (No. 2) Act 1893 (repealed); the Supreme Court of Judicature (Consolidation) Act 1925, s.226 and sch. 6 (repealed in part); the Limitation Act 1939, s. 34(2) and (4) (repealed in part); the Administration of Justice Act 1965, s. 34(1) (repealed in part); the Rules of the Supreme Court (Revision) SI 1962/2145, sch. 5 (repealed); and the Rules of

were subject to the higher courts. The satisfactory approach that equity provides on contractual variations is promissory estoppel.

Promissory Estoppel

There is debate on what the true naming of this doctrine should be.¹⁴ It was first referred to as a 'principle of Equity' or a 'relief in Equity'.¹⁵ Reference to it as an estoppel was not seen until *Central London Property Trust v High Trees House*.¹⁶ It was subsequently referred to as 'quasi-estoppel' or 'equitable estoppel'¹⁷ and it had various names in *Tool Metal Manufacturing Co v Tungsten Electric Co*.¹⁸ It was first called promissory estoppel in *Dean v Bruce*,¹⁹ by Lord Denning. Judicial support exists for calling it promissory estoppel, because "equitable" may refer to two different estoppels.²⁰ However, its naming is still potentially misleading given its analogy with estoppel by representation.²¹ Nevertheless, this dissertation will call it promissory estoppel.²²

Promissory estoppel centres on the notions of fairness and equity in the context of contractual variations. The courts look to the conduct of one party and whether its effect on the position of the other party is inequitable. Such conduct concerns the rights and duties of

the Supreme Court (Revision) SI 1965/1776, sch. 2. The 1875 Act was repealed by the Supreme Court of Judicature (Consolidation) Act 1925, s. 226 and sch. 6 (repealed in part).

¹⁴ Furmston (n 3) 135.

¹⁵ *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL) 447 (Lord Cairns LC) and 452 (Lord Selborne) respectively (*Hughes*).

¹⁶ [1956] 1 All ER 256 (KBD) 258 and 259 (*High Trees*).

¹⁷ See *Combe v Combe* [1951] 1 All ER 767 (CA) (*Combe*); also see *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1982] 1 All ER 19 (QBD) 25 (Goff J) (*The Post Chaser*).

¹⁸ [1955] 2 All ER 657 (HL) 661-662 (Viscount Simonds) (*Tool Metal*): equitable arrangement; equitable principle and an equitable doctrine; see also *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 (PC) 559 (Lord Hodson) (*Briscoe*): '[T]he principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel'.

¹⁹ [1951] 2 All ER 926 (CA) 928 (Lord Denning): 'I ought perhaps to explain that I was there only considering what is sometimes called a promissory or equitable estoppel'; see also, *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839 (QBD) 847 (Donaldson J): 'In my judgment the principle of equity upon which the promissory estoppel cases are based'; further evidence can be seen in *Brikom Investments Ltd v Carr* [1979] QB 467 (CA) 471 at 472, 477, 478 (Lord Denning), and 489-490 (Roskill LJ) (*Brikom*).

²⁰ See, *Re Vandervell's Trusts, White v Vandervell Trustees Ltd (No 2)* [1974] 1 All ER 47 (ChD) 73-74 (Megarry J).

²¹ *Chitty* (n 2) 361-363 at 3-103.

²² Following many academics, for example see Bower and Turner (n 10) 383-384: 'Lord Denning... canvassed... the doctrine of promissory estoppel'; see *Chitty* (n 2) 347 at 3-086: 'referred to as "promissory" ... estoppel'.

a relationship arising from a contract.²³ The leading case is *Hughes v Metropolitan Railway Co.*²⁴

[If one party leads the other] to suppose that the... rights arising under the contract will not be enforced... the person who... might have enforced those rights will not be allowed to enforce them where it would be inequitable.²⁵

Hughes provides a foundation for promissory estoppel. The key function is that resorting back to the previous contractual terms would be “inequitable” given the promisee’s reliance on the new promise. The doctrine hinges on this requirement for a reliance.²⁶

Whilst the requirements for the doctrine to apply were yet to be set in stone, what was clear was that where one party promised another that they would refrain from doing something, the promisor is prevented from reverting back to the original promise, because it would be inequitable given the promisee’s reliance.²⁷ Promissory estoppel is best explained as an equitable ‘forbearance’²⁸ or ‘relief’²⁹ from the enforcing of an original promise, because of the inequitable circumstances it would put the promisee in for relying on the new promise.

The History of Promissory Estoppel

Promissory estoppel gained much attention when the *obiter* of Denning J,³⁰ in *Central London Property Trust v High Trees House*,³¹ appeared to question the part-payment of debt rule.³² Controversy stemmed from the fact that this rule came from the House of Lords. Its notoriety for questioning the highest court in the land is clear from subsequent reaction to it. It was

²³ E Peel, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 119, para. 3-077 (*Treitel*).

²⁴ *Hughes* (n 15).

²⁵ *Ibid* 448.

²⁶ See chapter 4 of this dissertation argues the requirement for reliance should necessitate the existence of a detriment.

²⁷ The common example is, of course, not to enforce their existing contractual agreement, however there are other instances of this doctrine in effect. See the example given in J Glister, ‘Twinsectra v Yardley: trusts, powers and contractual obligations’ (2002) 4 TL 223, 229: ‘If a borrower relies to his detriment on a lender’s contractual promise not to revoke the borrower’s licence, and the lender does so revoke, then a promissory estoppel may arise.’

²⁸ As per the sub-heading title choice of words in *Chitty* (n 2) 347 at 3-085.

²⁹ As per the submissions of Mr Southgate QC and Mr Bowen, on behalf of the appellant, in *Hughes* (n 15).

³⁰ As he then was; he later became a Lord Justice of Appeal and then the Master of the Rolls.

³¹ *High Trees* (n 16).

³² This principle is discussed at length in chapter two. It is not this chapter’s scope to analyse the principle.

named amongst the fifteen most important cases in the last 150 years.³³ It was described as a 'ground-breaking ruling'.³⁴ However, its validity is open to debate.

In *Combe v Combe*,³⁵ Asquith LJ thought '[i]t... unnecessary to express any view as to [its] correctness.'³⁶ He remained neutral on whether it was good law.³⁷ However, overall *Combe* seemed to regard *High Trees* as good law, albeit, most of this treatment came from Denning.³⁸ It has been applied in many cases since,³⁹ most notably in *The Post Chaser*.⁴⁰ Denning was described as 'breath[ing] new life into... [promissory] estoppel.'⁴¹ His *obiter* was welcomed and, arguably, became good law in *Collier v P & MJ Wright*.⁴² It was described as 'brilliant' by Arden LJ.⁴³ Clearly, what began as no more than a mere principle of equity now has a firm basis in contract law. Yet, much is to be said about it still. Lord Hailsham LC stated:

The time may soon come when the whole sequence of cases... on promissory estoppel..., beginning with *High Trees*, may need to be review[ed]... I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored.⁴⁴

³³ As of 2015. See, Lord Neuberger, 'Reflections on the ICLR Top Fifteen Cases: A Talk to Commemorate the ICLR's 150th Anniversary' (6 October 2015), para. 9, available at <<https://www.supremecourt.uk/docs/speech-151006.pdf>>.

³⁴ G Bindman, 'A Rare Judge' (2018) 168 *New Law Journal* 22; he may, however, have drawn inspiration from earlier case law indicating he was not as bold and controversial as would seem, see M Hughes, 'Contracts, Consideration and Third Parties' 3 *JIBFL* 79 where Hughes indicated Denning may have drawn inspiration from *Hirachand Punamchand v Temple* [1911] 2 KB 330 (CA): '[it was a] short step from [this case] to the concept of promissory estoppel in *High Trees*.'

³⁵ *Combe* (n 17).

³⁶ *Ibid* 225.

³⁷ See also his subsequent remarks that the case does not help the plaintiff at *ibid*: 'But assuming, without deciding, that it is good law, I do not think, however, that it helps the plaintiff at all.'

³⁸ Who, of course, also presided over *High Trees*; see, *Combe* (n 24) 769 (Denning LJ): '... I am inclined to favour the principle stated in the *High Trees* case...'

³⁹ See: *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 (Ch); *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785 (QBD); *Brikom* (n 19); *Syros Shipping Co SA v Elaghill Trading Co (The Proodos)* [1981] 3 All ER 189 (QBD); *Smith v Lawson* [1997] NPC 87 (CA); it also received application outside England and Wales, see the case of the India Supreme Court *State of Arunachal Pradesh v Nezone Law House* [2008] INSC 553 (SC of India); and, most recently *Dunbar Assets plc v Butler* [2015] EWHC 2546 (Ch).

⁴⁰ *The Post Chaser* (n 17).

⁴¹ *Ibid* 27 (Goff J).

⁴² [2008] 1 WLR 643 (CA) (*Collier*).

⁴³ *Ibid*, para. 42.

⁴⁴ *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 758; the validity of these words is even more apparent after the discussion in chapter 5.

The appraisal of *High Trees* come from no higher than the Court of Appeal; whereas, the principle *High Trees* doubted has authority in the House of Lords.⁴⁵ Hailsham provides valuable insight to the standing of *High Trees*. No doubt it is a doctrine to be welcomed, but its expansion has introduced uncertainty to other areas of law,⁴⁶ alongside casting uncertainty on its own effect.

The Effect of Promissory Estoppel

It could be questioned whether promissory estoppel prevents the promisor from reviving their original rights forever, or whether it merely prevents them for a conditional period of time. The importance of this question is seen if it is forever, meaning the doctrine is extinctive. If it *extinguishes* rights and does not *suspend* them, it potentially undermines the part-payment rule.⁴⁷

Denning thought promissory estoppel extinguished rights.⁴⁸ Whilst holding this belief, it was clear from *High Trees* that the doctrine only suspended the landlord's right to rent. It was suspensory because the conditions on which the promise was made, those which estopped the landlord,⁴⁹ had ceased to exist. The parties found themselves in the same position before the promise was made. Similar was stated long before *High Trees* by Bowen LJ in *Birmingham and District Land Co. v London and North Western Railway Co.*⁵⁰

The truth is that the proposition [in *Hughes*] is wider than cases of forfeiture... [I]f persons [meet *Hughes*] those persons will not be allowed... to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.⁵¹

When a new promise is made in light of events placing the promisee in a different position, if they cease to exist, then the right to rely on the new promise ceases too. Denning appears to mean the doctrine is extinctive if certain circumstances prevail. This is simply another way of saying the doctrine is suspensory. The doctrine can suspend indefinitely, if the circumstances

⁴⁵ Discussion as to which way the law ought to reflect is seen in chapter two.

⁴⁶ As seen in chapter 2 and 5.

⁴⁷ That which is already mentioned in the above discussion on *High Trees* (n 16).

⁴⁸ *High Trees* (n 16) 259; he repeated this view, in *D&C Builders Ltd v Rees* [1966] 2 QB 617 (CA).

⁴⁹ I.e., the war-time conditions, see *High Trees* (n 16) 259.

⁵⁰ (1888) All ER 620 (CA).

⁵¹ *Ibid*, at pg. 268.

prevail indefinitely. *Ogilvy v Hope-Davies*,⁵² however, supports the extinctive side to promissory estoppel in which it was held that ‘withdrawal of the waiver was impossible’.⁵³ The same is clear in *Brikom Investments v Carr*.⁵⁴ Treitel argues that the right in this case was extinguished because the variation prevented the landlord’s right to compel the tenants to contribute to the costs of repairs.⁵⁵ It is submitted these decisions are irrelevant, as they are cases of waiver.⁵⁶ Arden made it clear that ‘[it] has the effect of extinguishing’.⁵⁷ However, it is submitted the rights would and should only be extinguished to the extent that the inequitable circumstances prevail.

The case for it being suspensory has greater backing from the House of Lords. In *Tool Metal*,⁵⁸ it was seen that the original rights could be resumed given that a reasonable notice was provided.⁵⁹ Similar was held in *Banning v Wright*.⁶⁰ The doctrine was stated as suspensory when the promisee can resume their original position.⁶¹ This fits perfectly with Denning’s judgment, as if the parties cannot resume their original position arguably the inequitable conditions prevail. *Snell’s Equity* provides insight:

The effect of the doctrine of promissory estoppel can be either [suspensory] or [extinctive]. But it is usually [suspensory]. [T]he promise will only become final and irrevocable if [the promisee] cannot resume his... former position. In this sense... promissory estoppel has much in common with the principle of waiver... which permits a party to revoke any waiver upon reasonable notice to the other party.⁶²

Attempts have been made to construe the doctrine in a flexible manner. Promissory estoppel, at the least, suspends rights from being enforced where the promisee cannot resort back to their original position. Conditions creating this position are the inequitable circumstances to

⁵² [1976] 1 All ER 683 (ChD).

⁵³ *Ibid*, 689.

⁵⁴ *Brikom* (n 19).

⁵⁵ *Treitel* (n 23), 150-151, see his discussion at 3-115 on pgs 150-151.

⁵⁶ *Ibid*; see also, *Brikom* (n 19) 48: ‘there was a plain waiver by the landlords...’ where Roskill LJ considers as such and he does not resort to the doctrine of promissory estoppel, see *Brikom* (n 19).

⁵⁷ *Ibid*, para. 42.

⁵⁸ *Tool Metal* (n 18).

⁵⁹ As per *Tungsten Electric Co Ltd and Tungsten Industrial Products Ltd v Tool Metal Manufacturing Co Ltd* (1954) 71 RPC 273 (QBD) (Delvin J), which Lord Cohen refers to, see *Tool Metal* (n 18) 681.

⁶⁰ [1972] 2 All ER 987 (HL) 991ff.

⁶¹ See, *Briscoe* (n 18); in other words, the doctrine is effective until the inequitable conditions no longer persist.

⁶² J McGhee (ed), *Snell’s Equity* (32nd edn, Sweet & Maxwell 2010), para. 12-014.

which promissory estoppel applies.⁶³ However, it is submitted the law should distance promissory estoppel from cases of waiver, so it avoids the decisions of *Ogilvy* and *Brikom*. After all, promissory estoppel was developed as a more satisfactory approach than that of waiver to contractual variations. Despite the suggestion in *Snell's Equity* and the ruling of *Collier*, the law should simply resolve that promissory estoppel is suspensory. It can be suspensory for a long time thus achieving the extinctive aspect. Describing it as extinctive, however, has only led to confusion. This is desirable because, ironically, it introduces an equitable outcome to the promisor by allowing the restoration of the original agreement when the new one is too favourable to the promisee. An extinctive effect would open promissory estoppel to exploitation.

The Significance of Promissory Estoppel

One significant aspect is that it is a shield and not a sword:⁶⁴ It is a defence only. The other aspect is its effect. The significance arises from the shifted focus of the doctrine on to the part-payment rule; of which *High Trees* questioned. Contrary to the position taken in this dissertation, Arden stated the doctrine extinguished the creditor's right and cited the *obiter* of Denning.⁶⁵ If it can be taken to extinguish a creditor's right to the full debt, this potentially undermines *Pinnel's Case*⁶⁶ and *Foakes v Beer*.⁶⁷

⁶³ *Ibid*: The prevailing war-time conditions made it inequitable to revert back to the original agreement.

⁶⁴ *Combe* (n 17) 772.

⁶⁵ *Ibid*, 659 at para. 42.

⁶⁶ *Pinnel's Case, sub nom Penny v Core* [1558-1774] All ER Rep 612 (Court of Common Pleas) (*Pinnel's*).

⁶⁷ (1884) 9 App Cas 605 (HL) (*Foakes*).

Chapter 2

The part-payment of debt rule may seem like an ordinary legal principle, justifying its transition to becoming obsolete as a mere part of legal evolution.⁶⁸ It was seen how *Central London Property Trust v High Trees House*⁶⁹ may facilitate this. However, the year of *Collier v P & MJ Wright (Holdings)*,⁷⁰ frames the part-payment rule in greater importance and attaches more weighting to it over other legal principles. In 2008, western economies faced financial crisis. If a decision in *Collier* favoured debtors, undermining the part-payment rule, it would attract controversy and attention because it would discourage creditors from lending. Creditors would lose the full amount owed when accepting any lesser amount; which during the crisis would have been appropriate for commercial reasons.⁷¹ Any decision impacting creditors and the economy during economic recession would therefore follow the part-payment rule, as *Collier* did. The part-payment rule is more important than the average legal principle. However, it will be seen that its economic role has led to the adoption of a harsh principle, alongside the oversight of the reasoning behind it in *Pinnel's Case*.⁷²

In *Pinnel's*, an action of debt was brought by Pinnel against Cole. The debt was on a bond of £16, which was conditional for the payment of £8. Cole argued Pinnel had accepted payment of £5 in full satisfaction of the £8. When faced with the proposition that the payment of smaller sum can be satisfactory to a creditor for the whole debt, Lord Coke created the part-payment rule: '[P]ayment of a lesser sum... cannot be a satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction... for a greater sum.'⁷³ However, the reasoning behind this can be questioned, as will be seen. There are three exceptions to this rule. The gifting of a 'horse, hawk, or robe [can be satisfactory]',⁷⁴ the

⁶⁸ This is prevalent in other disciplines. Consider the concept of mens rea in criminal law. Its evolution has gone from considering the subjective standpoint of the defendant to disregarding this and considering the objective standards of society. See the overruling of *R v Ghosh* [1982] QB 1053 (CA) (which concerns subjectivity) in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 (SC) (*Ivey*).

⁶⁹ *High Trees* (n 16) 258 and 259.

⁷⁰ *Collier* (n 42).

⁷¹ Those reasons being that it is commercially viable, at least in the housing context, to accept a lesser payment of rent than to forfeit a tenant and seek a new one; see also M Byrne 'Estoppel and Rent Reductions: What are the implications of rent reductions in order to retain valued tenants during the economic downturn? – Issues to Consider' (2014) 19(1) CPLJ 9.

⁷² *Pinnel's* (n 66).

⁷³ *Pinnel's* (n 66).

⁷⁴ *Pinnel's* (n 66).

reasoning being anything other than money 'might be more beneficial'.⁷⁵ A smaller payment made before the day it is due can be satisfactory and payment at a different location than that initially agreed upon is also satisfactory.⁷⁶ The latter has not aged well however. During the 1600s, it was common for debt payments to be made at a specified location, however, now for obvious reasons this is obsolete.

Cole had merely claimed he made a smaller payment in general and that Pinnel had accepted it as satisfactory. Irrespective of whether Pinnel had done that, this did not prevent him from claiming for the remaining amount, because Cole did not fall within any of the exceptions. Therefore, Pinnel was entitled to recover the entire amount. Two centuries later this principle was enshrined in the law.

The House of Lords, in *Foakes v Beer*,⁷⁷ affirmed *Pinnel's*. Foakes owed Beer approximately £2090. Foakes requested that Beer give him time to pay the debt and it was agreed that Foakes would pay £500 as part-satisfaction of the £2090⁷⁸ and Beer undertook to not take proceedings. Beer, however, claimed interest on the debt. The court of first instance found in favour of Foakes, finding that by reason of the agreement Beer was not entitled to claim interest. The Court of Appeal overruled this due to the lack of consideration. Beer was free to claim interest. However, the initial £500 could have constituted consideration and, in the House of Lords, Lord Blackburn recognised this because a 'prompt payment... may be more beneficial to them than... enforc[ing] payment of the whole.'⁷⁹ Despite this, he upheld the Court of Appeal's decision. The £500 was not sufficient consideration. *Foakes* affirmed that a part-payment cannot be satisfactory of a whole debt. But it is worth examining its reasoning.

The Validity of *Foakes v Beer*

Through critique of *Foakes*, there is critique of *Pinnel's*. The most prominent issue is that the rule is harsh. This is clear when comparing the position of a creditor to a debtor in the context of a leasing; the creditor clearly has the advantageous position. A debtor has two options.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* 612: 'So if I am bound in 20 pounds to pay you 10 pounds at Westminster and you request me to pay you 5 pounds at the day at York, and you will accept it in full satisfaction of the whole 10 pounds it is a good satisfaction for the whole for the expense to pay it at York, is sufficient satisfaction.'

⁷⁷ *Foakes* (n 67).

⁷⁸ Alongside paying £150 twice a year until the remaining debt was paid.

⁷⁹ *Foakes* (n 67).

They can make a part-payment, but risk the creditor asking for the rest. Or they can incur arrears and risk falling behind on future payments. They also risk losing their occupational rights. It is potentially a lose-lose situation. On the other hand, the creditor can profit from both scenarios. If the debtor makes a part-payment, the creditor, knowing they cannot pay the rest without financial setbacks elsewhere, can profit by pursuing arrears on the amount outstanding. They could go a step further and seek reoccupation. Even if a part-payment is not made, they still benefit since they can pursue arrears and reoccupation. Ferson argues '[*Foakes*] is not only... absurd but it is inconvenient in commercial dealings, and... distasteful to the courts.'⁸⁰ This explains why Roberts believes 'many may be uncomfortable... follow[ing] *Foakes*'.⁸¹ This uncomfortableness exists beyond English law too. US law has a rule similar to *Foakes*.⁸² US case law has expressed the rule as unjust and oppressive.⁸³ Further, Ames states that the rule adopts a narrow definition of consideration.⁸⁴ It is no wonder why Blackburn recognised a 'prompt payment may be more beneficial'.⁸⁵ The problematic nature of the rule can be traced back to *Pinnel's*.

Coke's reasoning for the part-payment rule was that 'it appears to the Judges that by no possibility, a lesser sum can be [satisfactory for]... a greater sum.'⁸⁶ Coke might be indicating that it cannot be satisfactory for a particular reason. But it appears instead that he is stating the law is a particular way, because it appears to be so. Simply stating the law is a certain way, because it appears 'by no possibility'⁸⁷ that it could not be any other way is not convincing. It would be similar to a judge claiming a defendant should be acquitted for his crime, because it appears to be the case to the judge without giving specific reasons. The reasoning is based on subjectivity, rather than objectivity and public policy consideration. Therefore, whilst Coke likely had the issue of debt satisfaction in mind, it can only be assumed with certainty that his

⁸⁰ M L Ferson, 'The Rule In *Foakes v Beer*' (1921) 31(1) Yale Law Journal 15 (Ferson).

⁸¹ M Roberts, 'Foakes v Beer: Bloodied, Bowed, But Still Binding Authority?' (2018) 29 King's Law Journal 344, 354 (Bloodied).

⁸² *Ludington v Bell* (1879) 77 NY 138 (NYCA) 143: 'The doctrine that payment by the debtor of a less sum than the whole amount of the debt will not extinguish the debt... is well established by abundant authority. It is beyond the scope of this dissertation to consider the US law in detail; however, it supports that the part-payment rule is problematic since it is in other jurisdictions. Nevertheless, for further discussion of the US law see Ferson, (n 80).

⁸³ *Seymour v Goodrich* [1885] 80 Va. 303 (SC of Pennsylvania) 304: 'This rule, being highly technical in its character, seemingly unjust, and often oppressive in its -operation, has been gradually falling into disfavour.'

⁸⁴ J B Ames, 'Two Theories of Consideration' (1899) 12 Harvard Law Review 515, 521.

⁸⁵ *Foakes* (n 67) 622.

⁸⁶ *Pinnel's* (n 66) 613.

⁸⁷ *Ibid*.

reasoning is that a part-payment is not satisfactory because it seems to be so. Perhaps Coke thought no benefit could be derived. Blackburn, however, states that 'Coke made a mistake of fact'⁸⁸ and refers to a situation where the creditor does stand to benefit from a part-payment. The Lords in *Foakes*, appear to only follow Coke's reasoning out of respect.

Coke is no doubt an esteemed judge, but this renders the reasoning of *Foakes* potentially fallacious. Lord Watson states 'I do not think it... open to this House... to overrule *Pinnel's*, because I am not prepared to disturb that doctrine.'⁸⁹ Lord Fitzgerald admits 'it would have been wiser... if the resolution in *Pinnel's* had never been come to',⁹⁰ but because it has been 'accepted... for a great length of time... it is not now within our province to overturn it.'⁹¹ Blackburn considered dissenting, but did not because it 'was not satisfactory to the other noble and learned Lords'.⁹² The majority of the Lords' reasoning to follow *Pinnel's* is based on the fact they did not wish to disturb the rule or because it has been accepted for a long time. In Blackburn's case, it is because his fellow Lords think these things. These two reasons are founded on respect for Coke, but this simply means it is an appeal to authority fallacy. *Pinnel's* is only affirmed because it was devised by Coke, despite its unconvincing nature. Many cases, of course, are settled by appealing to an authority. This is the nature of case law; however, other reasons exist alongside it. The Lords rely on Coke's reasoning alone. Coke's reasoning is not convincing and the Lords in *Foakes* knew this, evident in the hesitancy of Blackburn and the fact Fitzgerald thought it was wiser it had not been come to. Nevertheless, out of respect for Coke, they followed it. Even the academic Burton, who supports *Foakes*, recognises this: 'the core argument was that... *Pinnel's* ought not to be disturbed due to its history'.⁹³ This legal principle is undesirable. Not only is it harsh, but its initial reasoning is unconvincing and its affirmation is based on a fallacy.

It makes sense then why the unanimous reasoning in *Foakes* was ignored in *Williams v Roffey Bros*⁹⁴ and why it did not prevent Denning from curtailing its authority in *High Trees*.⁹⁵

⁸⁸ *Foakes* (n 67) 617.

⁸⁹ *Foakes* (n 67) 623-624.

⁹⁰ *Foakes* (n 67) 630.

⁹¹ *Foakes* (n 67) 630; Fitzgerald refers to the fact it has been adopted for 282 years, *Foakes* 629.

⁹² *Foakes* (n 67) 623.

⁹³ M Burton, 'Practical benefit rides again: MWB business exchange in comparative perspective' (2017) 46(1) *Common Law World Review* 69, 73 (Burton).

⁹⁴ [1991] 1 QB 1 (CA) (*Williams*).

⁹⁵ See chapter 1 on the discussion of *High Trees*.

The Practical Benefit Rule

Performance of an existing contractual duty is generally insufficient consideration for a promise. *Stilk v Myrick*⁹⁶ held that a promise to pay sailors extra wages for the performance of their 'ordinary [duty] in navigating the ship' cannot be enforced.⁹⁷ Making it enforceable would allow a promisee in any situation to underperform their role to the promisor's detriment, unless they agreed to pay them more. Such performance was sufficient in *Hartley v Ponsonby*.⁹⁸ Performance was dangerous to their lives, thus exceeding their original contractual duty and constituting consideration.⁹⁹ *Williams v Roffey Bros*¹⁰⁰ introduces the concept of a practical benefit.

Glidewell LJ stated consideration can exist for the promise of an additional payment to perform existing contractual duties, where a practical benefit is obtained by the promisor or they avoid a detriment.¹⁰¹ Where the promisor has received any form of benefit from the completion of the contract, consideration exists for the new promise to pay more. Completion of the contract may seem insufficient and problematic, given that the promisee could simply underperform to ransom for more money, as warned in *Stilk*. Glidewell rebuts this possibility by requiring the absence of economic duress.¹⁰² He considered that *Stilk* and its tie to the Napoleonic wars necessitated its refinement and limitation via the practical benefit rule.¹⁰³ Russel LJ added that the rigidity found in *Stilk* is no longer necessary or desirable.¹⁰⁴ Knight is critical of the practical benefit rule, however, because of its consideration of *Stilk*. He claims there is a real danger this rule imports an intention that simply was not there.¹⁰⁵ In particular, the practical difference between *Williams* and *Stilk* is negligible. In *Williams*, it was the performance of a contract, which is exactly what happened in *Stilk*.¹⁰⁶ Such performance was allowed in *Harris v Watson*,¹⁰⁷ but Knight states the seaman in *Harris* were not performing

⁹⁶ (1809) 2 Camp 317 (NP) (*Stilk*).

⁹⁷ *Ibid*, 318.

⁹⁸ (1857) 7 E & B 872 (pre1874).

⁹⁹ *Ibid* 877; see also, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 (QB) 714.

¹⁰⁰ *Williams* (n 101).

¹⁰¹ The precise words used were to 'obviate a disbenefit', *ibid* 16.

¹⁰² *Williams* (n 101) 16: 'B's promise is not given as a result of economic duress or fraud on the part of A'.

¹⁰³ *Ibid* 16.

¹⁰⁴ *Ibid* (n 101) 18.

¹⁰⁵ C Knight, 'A plea for (re)consideration' (2006) Cambridge Student Law Review 17, 18 (Knight).

¹⁰⁶ *Ibid*.

¹⁰⁷ [1775-1802] All ER Rep 493 (Ct of KB).

what they were contracted to do, hence why it distinguished from *Stilk*.¹⁰⁸ Nevertheless, it was within the remit of *Williams* to limit its application.¹⁰⁹ This criticism is weaker than Knight's other point.

The most powerful argument against the practical benefit rule, Knight argues, is that it damages the fundamental idea of contract. One should perform what they agreed or be made to pay for it. Being awarded something for doing what was already agreed runs contrary to the bargain principle, Knight argues.¹¹⁰ However, Knight is missing the fact that another fundamental idea of contract is that parties are free to renegotiate their contracts. This aspect is more desirable, because circumstances can change quickly. Kane convincingly states there are economic reasons for settling a debt for less than its face value.¹¹¹ It enables the avoidance of statutory proceedings.¹¹² Whilst this is important, Kane argues it is not economically optimal, as it leads to companies going into administration which decreases productivity.¹¹³ He continues that the law should accommodate transactions that are mutually beneficial, because it accords to an important economic principle.¹¹⁴ This argument makes commercial sense. Kane's alternative undermines Knight. A practical benefit should apply to a part-payment of a debt, enabling consideration to be found. The courts have done this, indirectly, at the expense of casting more doubt on *Foakes*.¹¹⁵ The law should depart from *Foakes* completely, as opposed to casting more doubt on it.

There is support for *Williams*. *Furmston* welcomes the decision, arguing there are good commercial reasons to promise more money to ensure performance; finding a new, reliable party is harder and less sensible than maintaining a current one.¹¹⁶ Yet, equally it seems *Foakes* prevails. A High Court case¹¹⁷ suggested *Williams* is inconsistent with the principle that consideration must move from the promisee.¹¹⁸ Further, *Williams* did not refer to *Foakes*. It

¹⁰⁸ Knight (n 105) 18.

¹⁰⁹ *Stilk* (n 97) was decided in the King's Bench Court, its modern-day equivalent being the High Court.

¹¹⁰ Knight (n 105) 18.

¹¹¹ J Kane, 'The rule in Pinnel's Case: the case for repeal, a mistaken preponderance and finding consideration in debt renegotiations' (2014) *Dublin University Law Journal* 79, 82 (Kane).

¹¹² Kane (n 111), 82.

¹¹³ *Ibid*.

¹¹⁴ The Pareto Optimality principle. It is beyond the scope of this dissertation to explain the Pareto Optimality principle, but nonetheless see Kane (n 111), 82.

¹¹⁵ As to be seen in chapters 3 and 4.

¹¹⁶ *Furmston* (n 3) 125.

¹¹⁷ *South Caribbean Trading Ltd v Trafigura Beheever BV* [2004] EWHC 2676 (CommCt).

¹¹⁸ *Tweddle v Atkinson* (1861) 25 JP 517 (Ct of QB).

can be argued it would be unconvincing to extend the practical benefit rule to the part-payment rule. To do so is directly contrary to *Foakes*. It is no surprise then, that in *Re Selectmove*¹¹⁹ a differently constituted Court of Appeal held that it is 'impossible to extend... *Williams* to any circumstances governed by [*Foakes*].' ¹²⁰ 'It would in effect leave the principle... without any application.'¹²¹ Whilst *Williams* has been held to not concern the part-payment of debts, it extremely doubts *Foakes*. The fact a Court of Appeal decision can undermine a House of Lords ruling, albeit indirectly,¹²² indicates problems with *Foakes* like those explored. Until 2018, the part-payment rule remained perfectly intact through *Selectmove*.

Promissory Estoppel

In *High Trees*, Denning notes how *Foakes* had not considered *Hughes v Metropolitan Railway Co.*¹²³ This is also recognised in *Collier*.¹²⁴ It could be argued *Foakes* is per incuriam for this reason. However, it concerned debts whilst *Hughes* concerned house repairs. Further, this argument is difficult, because Lord Selborne and Blackburn both sat on *Hughes* and *Foakes*. These decisions can exist side by side as expressed in *Collier*; promissory estoppel would be an exception.¹²⁵ The promissory estoppel cases instead show that *Foakes* is undesirable. The rule was created in the 1602 and, in 1937, the Sixth Interim Report of the Law Revision Committee expressed the principle must be reconsidered.¹²⁶ This was recognised by Denning 10 years later in *High Trees*¹²⁷ where its effect was considered. It was submitted it only suspends rights.¹²⁸ Promissory estoppel therefore is only a partial answer. However, it does 'provide a way out of the cul-de-sac created by *Foakes*.'¹²⁹

¹¹⁹ [1995] 2 All ER 531 (*Selectmove*).

¹²⁰ *Ibid* 538.

¹²¹ *Ibid* 538.

¹²² *Pinnel's* and *Foakes* were never mentioned in *Williams*.

¹²³ *Hughes* (n 15); *High Trees* (n 16) 135.

¹²⁴ *Collier* (n 42), 656.

¹²⁵ *Ibid* 655.

¹²⁶ Lord Wright MR, 'Sixth Interim Report on The Statute of Frauds and the Doctrine of Consideration' (1937) Cmnd 5449, paras 33 to 35.

¹²⁷ *High Trees* (n16) 135.

¹²⁸ *Tool Metal* (n 18); W Swain, 'Contract as promise: the role of promising in the law of contract. An historical account' (2013) *Edinburgh Law Review* 1, 21 (Swain).

¹²⁹ Swain (n 128) 20.

The Position Now

The effect of promissory estoppel makes the part-payment rule seem like an ordinary legal principle and this should be welcomed. *Foakes* has faced similar testing in *Williams*, but it appears intact through *Selectmove*. Perhaps the ambiguity surrounding it is its last armour. An opportunity to remove this ambiguity was presented to the Supreme Court in *Rock Advertising v MWB Business Exchange Centres*.¹³⁰

¹³⁰ *Rock* (n 1)

Chapter 3

*Rock Advertising v MWB Business Exchange Centres*¹³¹ ruled on two fundamental issues of contract law.¹³² It considered No Oral Modification (“NOM”) clauses and the tension between the part-payment of debt rule and the practical benefit rule. The practical benefit rule had never reached the Supreme Court until *Rock*.¹³³ ‘The decision was... eagerly awaited [as] it... provide[d] the opportunity for the law to be clarified... [however,] the Court decided the case on other grounds.’¹³⁴ These other grounds being on NOM clauses. Interestingly, the consideration point was discussed at length by the Court of Appeal in *MWB Business Exchange Centres v Rock Advertising*.¹³⁵ These two issues are complicated. However, ironically, the facts of the case ‘are straightforward.’¹³⁶

MWB¹³⁷ had an office space and rented a suite to Rock.¹³⁸ The terms of the licence gave Rock occupation for a fixed term of 12 months starting on 1 November 2011 and Rock was to pay a fee of £3500 per month for the first three months. After that, they were to pay £4,333.44 for the remaining months. By February 2012, Rock had accumulated arrears exceeding £12,000. Rock proposed to MWB a revised schedule of payments, which meant MWB received payment that would be worth slightly less: It would be a part-payment of a debt. Rock and MWB had further telephone discussions. Rock claimed MWB had agreed to vary the licence according to its proposal during these discussions. MWB rejected this and stated they treated it as ‘a proposal in a continuing negotiation’.¹³⁹ Higher management in MWB later rejected the proposal. The key issue is that the alleged agreement took place orally. Clause 7.6 of the licence agreement contained a NOM clause.¹⁴⁰

¹³¹ *Rock* (n 1).

¹³² *Rock* (n 1) para. 1.

¹³³ *Bloodied* (n 81) 350.

¹³⁴ S Foster and A Reilly, ‘Show a little consideration: the Supreme Court’s refusal to address the rule on part payment of a debt’ (2018) *Coventry Law Journal* 1. (Show a little).

¹³⁵ [2016] EWCA Civ 553 (CA). (*MWB*).

¹³⁶ *MWB* (n 135) 555.

¹³⁷ The proposal was made to a credit controller employed by MWB, Natasha Evans.

¹³⁸ Which was represented by the company’s sole director, Mr Idehen.

¹³⁹ *Rock* (n 1), para 3.

¹⁴⁰ *Rock* (n 1), para. 2: ‘This Licence sets out all of the terms as agreed between MWB and [Rock]... All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.’

It required that any changes to the licence must be made in writing and signed by both parties. Its purpose is to prevent any changes being made orally. MWB contended no valid oral variation had been made, because of clause 7.6. MWB later locked Rock out of the premises due to its arrears. Subsequently, it terminated the licence and pursued the arrears, but Rock counterclaimed for wrongful exclusion.¹⁴¹ Both claims depended on whether the agreement was legally effective,¹⁴² which depended on three issues.

The first concerned NOM clauses. Rock relied on the principle of party autonomy.¹⁴³ Despite the NOM clause, parties are free to vary orally with each other's consent. They relied on the judgment that courts are not always required to give effect to a contractual term which specifies a particular format of variation, as in *World Online Telecom v I-Way*.¹⁴⁴ MWB relied on *United Bank v Asif*.¹⁴⁵ The parties must have shown that the oral agreement was inconsistent with the original licence and that they also agreed to waive the requirement for a variation to be in writing. This second aspect was missing.¹⁴⁶ They made further arguments against *Globe Motors Inc v TRW LucasVarity Electric Steering*,¹⁴⁷ which favoured Rock's case.

The second was the consideration point. Rock argued that the new agreement brought practical advantages to MWB, therefore it was supported by consideration.¹⁴⁸ On the other hand, MWB contended there could be no consideration, because of the rule in *Foakes v Beer*.¹⁴⁹

Arguments were also made in relation to promissory estoppel.¹⁵⁰ These arguments attach onto both the first and second issues. It was used as a defence to the assertion of a NOM clause and the part-payment rule. However, each court found that Rock could not claim this defence as they took only 'minimal steps'¹⁵¹ and Rock could not say it 'suffered any prejudice

¹⁴¹ *Rock* (n 1), 3.

¹⁴² *Rock* (n 1), 3.

¹⁴³ *MWB* (n 135), 607 at G.

¹⁴⁴ [2002] EWCA Civ 413 (CA). See also, *Spring Finance Ltd v HS Real Co LLC* [2011] EWHC 57 (Comm); *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) (*Malabu Oil*); *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) and *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396 (CA) (*Globe*).

¹⁴⁵ (unreported) 11 February 2000 (United).

¹⁴⁶ *MWB* (n 135) 607 at A.

¹⁴⁷ *Globe* (n 144).

¹⁴⁸ *MWB* (n 135) 608; *Williams* (n 94).

¹⁴⁹ *Foakes* (n 67).

¹⁵⁰ See *MWB* (n 135) 607-608.

¹⁵¹ *Rock* (n 1), 16.

by relying [on the agreement].¹⁵² This doctrine formed a more integral part of the two lower courts' discussions; the Supreme Court's ruling depended on NOM clauses and small discussion was given to consideration and estoppel.¹⁵³

County Court

Judge Moloney found in favour of MWB. Interestingly, he ruled the variation agreement was supported by consideration, as MWB had the practical benefit of the increased prospect of eventually being paid.¹⁵⁴ This goes against *Foakes* and favours Rock, as the oral agreement was legally effective. However, Moloney also ruled that the NOM clause was effective. Therefore, the variation was ineffective, because it was not recorded in writing.¹⁵⁵ Whilst there was consideration, there was also a legally effective NOM clause.

Court of Appeal

On appeal, the case was decided in Rock's favour. Kitchin LJ gave the leading judgment on the NOM clause issue. Kitchin, with whom McCombe LJ agrees, and Arden LJ led the discussion in relation to the consideration point.

NOM Clauses

Kitchin states how the law on NOM clauses is uncertain.¹⁵⁶ It was caused by the opposing cases *United Bank* and *World Online*. *United Bank* found that NOM clauses were effective;¹⁵⁷ *World Online* found the law was unsettled, but nevertheless was against NOM clauses.¹⁵⁸ Both of these cases, Kitchin notes, were considered in *Globe Motors*. At first instance, it was decided that it was possible to orally vary the agreement in that case, despite the existence of a NOM clause.¹⁵⁹ Party autonomy enabled this. On appeal, *Globe Motors* found that the issue surrounding the NOM clause was unnecessary to the case due to an error from the trial

¹⁵² *MWB* (n 135) 63.

¹⁵³ See *Rock* (n 1) 16 and 18.

¹⁵⁴ *Rock* (n 1) 4.

¹⁵⁵ *Rock* (n 1) 4.

¹⁵⁶ *MWB* (n 135) 611.

¹⁵⁷ *United* (n 145).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Globe* (n 144).

judge.¹⁶⁰ Nevertheless, the Court of Appeal expressed their views on it and favoured party autonomy over NOM clauses.

Beatson LJ main reason focused on the existing authorities, namely *United Bank* and *World Online*. Drawing on Australian authority, Beatson considered *World Online* good law for oral variations despite NOM clauses.¹⁶¹ However, in *World Online* there was room for debate and it did not consider *United Bank*. The fact *United Bank* was unreported might explain this however. Beatson acknowledges this in his third reason concerning precedent, that he was not bound by either case. Although they were inconsistent with each other, he preferred *World Online*.¹⁶² Underhill LJ appeared hesitant on this issue, but nevertheless agreed with Beatson's reasons.¹⁶³ Moore-Bick LJ also agreed, but likened the principle of freedom of contract to Parliament being unable to bind its successors.¹⁶⁴ This analogy is problematic. It is true Parliament cannot bind its successors, but the way it departs from them follows a set procedure: One analogous with NOM clauses. Generally, Parliament must undo an Act in the same way it made it, through creating a repealing Act. NOM clauses achieve the same thing. They recognise the agreement does not bind the parties' future selves, but to depart from an aspect of the contract they have to follow a set procedure like Parliament.

Globe Motors influenced Kitchin¹⁶⁵ and held *World Online* to be the correct statement of the law. Party autonomy was cited in a New York case¹⁶⁶ and this reinforced Kitchin's decision that the NOM clause was not effective. Arden agreed. The reasons of Kitchin are logical, but his reliance on *Globe Motors*, which relied on *World Online*, is dubious. *World Online* overlooked *United Bank*; if it had not, it may have decided in favour of NOM clauses which would have reversed the decisions of *Globe Motors* and consequently Kitchin in *MWB*.

Consideration

Kitchin and Arden agree on this point too. Kitchin argued there was 'a commercial advantage to both *MWB* and *Rock*'.¹⁶⁷ *MWB* received several practical benefits: They would recover

¹⁶⁰ *MWB* (n 135) 611; *Globe* (n 144).

¹⁶¹ *Globe* (n 144) 629.

¹⁶² *Ibid* 630.

¹⁶³ *Ibid* 632.

¹⁶⁴ *Ibid* 632.

¹⁶⁵ Despite being urged by counsel for *MWB*, they did not accept his submissions.

¹⁶⁶ *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 (NYCA) (*Beatty*).

¹⁶⁷ *MWB* (n 135) 620.

£3500 immediately; Rock would remain as a licensee, so they would not need to seek a new one;¹⁶⁸ and, it would be likely to recover more from Rock than if it enforced the terms of the agreement.¹⁶⁹ Kitchin stated the benefits ‘conferred on MWB... were [not all] benefits of a kind contemplated... in *Foakes* and in *Re Selectmove*.’¹⁷⁰ Therefore, it was a case where *Williams v Roffey Bros*¹⁷¹ applied. Kitchin held the immediate payment of £3500 and the agreement to perform its future obligations conferred this benefit. Arden also found the agreement to perform the existing obligation constituted consideration. This seems contrary to *Stilk v Myrick*,¹⁷² which found performance of an existing contractual obligation does not constitute valid consideration. However, they applied *Williams*, which limited and refined *Stilk*.¹⁷³ Arden continues by drawing support from other cases considered in *Williams*¹⁷⁴ and also draws support from *Chitty*.¹⁷⁵ However, the newest edition states *Foakes* is binding on the lower courts.¹⁷⁶

Arden reasoned MWB did not have to find a new occupant, which meant they were ‘avoiding the void’¹⁷⁷ of an unoccupied property. Her second reason was more unexpected however. It should be noted this is not the first time Arden has addressed the part-payment issue. She also addressed it in *Collier v Wright*.¹⁷⁸ In *MWB*, Arden follows the part-payment rule, but tweaks it slightly. In chapter 2, it was seen that an exception to it is ‘a gift of a horse, hawk or robe’.¹⁷⁹ *Corpn of Drogheda v Fairclough*,¹⁸⁰ stated a hawk ‘is no different from the conferral of an [sic] benefit or advantage’.¹⁸¹ Arden notes how *Foakes* approves *Drogheda*.¹⁸² Arden therefore ‘replac[ed] the words “the gift of a horse, hawk or robe” with a more modern equivalent in line with [*Williams*]’.¹⁸³ This refined and limited the common law but left ‘the

¹⁶⁸ This can be likened to ‘obviating a disbenefit’: *Williams* (n 94) 10.

¹⁶⁹ *MWB* (n 135) 620.

¹⁷⁰ *Ibid*.

¹⁷¹ *Williams* (n 94).

¹⁷² *Stilk* (n 96).

¹⁷³ *Williams* (n 94) 10.

¹⁷⁴ *Ward v Byham* [1956] 2 All ER 318 (CA); *Pao On v Lau Yiu Long* [1980] AC 614 (PC).

¹⁷⁵ *Chitty* (n 2) para. 4-070; see *MWB* (n 135), 628.

¹⁷⁶ H G Beale (ed), *Chitty on Contract Volume 1, General Principles* (33rd edn Sweet & Maxwell 2018) para. 4-070.

¹⁷⁷ *MWB* (n 135) 627.

¹⁷⁸ *Collier* (n 42).

¹⁷⁹ *Pinnel’s* (n 66) 613.

¹⁸⁰ (1858) 8 Ireland CLR 98 (Ireland).

¹⁸¹ *Ibid* (Lefroy CJ) 110 and 114.

¹⁸² *MWB* (n 135) 85; *Foakes* (n 64) 629.

¹⁸³ *MWB* (n 135) 85.

principle... in *Pinnel's* unscathed.’¹⁸⁴ She stated her judgment may create a satisfactory balance between creditors and debtors.¹⁸⁵ However, both of her reasons could be inflicted with bias against the part-payment rule. She was very favourable of Denning,¹⁸⁶ whose *obiter* she described as ‘brilliant’.¹⁸⁷ Also, as will be seen in chapter 4, her tweaking of *Pinnel's* seems forced. Perhaps the reason for Arden’s bias relates to her previous writings. The part-payment rule is traditional and Arden has written on how the law should keep up with social change.¹⁸⁸ Evidently, she would view the part-payment rule unfavourably. This is not to say her background detracts from her given reasons, but it does explain why her judgment in *MWB* is influenced by Denning. The Court of Appeal found there was consideration and no legally effective NOM clause. The Supreme Court, however, did not decide the case on the consideration point.

Supreme Court

The Supreme Court found, in favour of *MWB*, that the NOM clause was legally effective, overruling the Court of Appeal on this point. Whether or not they overruled the Court of Appeal’s decision on the consideration point is unclear, as they did not deal with consideration.¹⁸⁹

NOM Clauses

Lord Sumption states there is longstanding support for NOM clauses in other jurisdictions, such as New York,¹⁹⁰ Australia,¹⁹¹ and Canada.¹⁹² However, he recognised how English law is ‘equivocal’.¹⁹³ In addition to *World Online*, other cases indicated ‘that such clauses were ineffective.’¹⁹⁴ Sumption referred to only *United Bank* as case law in support of NOM clauses.

¹⁸⁴ *MWB* (n 135) 85.

¹⁸⁵ *MWB* (n 135) 87.

¹⁸⁶ See *High Trees* (n 16).

¹⁸⁷ *Collier* (n 42).

¹⁸⁸ See The Supreme Court, ‘Biographies of the Justices’ (Supreme Court UK, 2019) <www.supremecourt.uk/about/biographies-of-the-justices.html> last accessed 12 May 2019; see also M Arden, *Common Law and Modern Society: Keeping Pace with Change (Shaping Tomorrow’s Law)* (1st edn OUP, 2015).

¹⁸⁹ See discussion in *Bloodied* (n 81) 6-7.

¹⁹⁰ *Beatty* (n 166).

¹⁹¹ *Liebe v Molloy* (1906) 4 CLR 347 (High Court); *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 54 FLR 439, 447; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 (Aus).

¹⁹² *Shelanu Inc v Print Three Franchising Corp* [2003] 173 OAC 78 (Ontario Court of Appeal).

¹⁹³ *Rock* (n 1) 9.

¹⁹⁴ *Rock* (n 1) 9; see: *Malabu Oil* (n 144) and *Globe* (n 144).

He combined this unreported case with the cases from alternative jurisdictions and ‘the substantial body of... academic writing in support[ing] [NOM] clauses.’¹⁹⁵ Sumption stated ‘the law... does give effect to [NOM clauses].’¹⁹⁶ The counter-argument of party autonomy is a fallacy.¹⁹⁷ True party autonomy is to decide how they bind themselves; trying to assert party autonomy is the real offence to that principle.¹⁹⁸ Sumption states NOM clauses are logical and he disregards the argument that NOM clauses are conceptually impossible.¹⁹⁹

The position that NOM clauses are conceptually impossible puts forward that parties agreeing to not vary their contract orally is impossible, because such an agreement would automatically be destroyed upon agreeing as such.²⁰⁰ This is not the case Sumption argues, as apparent in international law and opinions.²⁰¹ Further, this argument overlooks the fact that the agreement to not orally vary the contract could have been made in writing, thus agreeing upon it would not destroy itself. It is logical to have NOM clauses, because it prevents any attempt to undermine a written agreement by raising a defence of a summary judgment; further, oral discussions can easily give rise to misunderstandings.²⁰² For example, *Rock* believed MWB had agreed to his schedule, whereas MWB claimed they had not accepted it. Oral variations are not alone. Oral formations also have issues in contract law. Denning, in *Entores v Miles Far East Corporation*,²⁰³ highlights the ambiguity in forming a contract orally. It might not be known when the contract was formed, since an aircraft flying overhead might drown the person’s acceptance to form the contract.²⁰⁴ It is clear why Sumption states ‘oral discussions can easily give rise to misunderstandings’.²⁰⁵ NOM clauses also allow corporations to better police its internal rules on who can make such variations, as they would be recorded

¹⁹⁵ *Rock* (n 1) 9.

¹⁹⁶ *Ibid* 10.

¹⁹⁷ *Ibid* 11.

¹⁹⁸ *Ibid* 11.

¹⁹⁹ *Ibid* 13.

²⁰⁰ *Ibid* 13.

²⁰¹ The United Nations Convention on Contracts for the International Sale of Goods 1980, article 29(2) (Vienna Convention); Unidroit Principles of International Commercial Contracts 2010 (Unidroit); *Rock* (n 1) 13.

²⁰² *Ibid* 12.

²⁰³ [1955] 2 QB 327.

²⁰⁴ *Ibid* 332.

²⁰⁵ *Rock* (n 1) 12.

in writing.²⁰⁶ All of these are clearly logical and are also ‘legitimate commercial reasons’²⁰⁷ for upholding NOM clauses.

Sumption continues that the assertion the oral variation intended to dispense with the NOM clause does not seem to follow.²⁰⁸ The first logical inference to be drawn is that the parties simply overlooked it,²⁰⁹ which makes sense given the usual density of contractual agreements. Further, in practice, parties rarely consult the contract prior to making a business move. They may consult a lawyer, if they thought an issue was apparent. No doubt this case will make future lawyers emphasise the meaning of NOM clauses to their clients. The second inference is that the parties who did know about the NOM clause ‘court[ed] invalidity with... open eyes.’²¹⁰ This makes sense, because ‘it is not difficult to record a variation in writing’²¹¹ therefore it does not inhibit commercial practice. However, Lord Briggs differs and argues that NOM clauses can be orally dispensed with if the parties acknowledge it. Nevertheless, Sumption’s view is the law.

NOM clauses could result in a party acting on an invalid variation and Sumption notes how estoppel is a safeguard against this.²¹² However, estoppel did not require any further discussion, as *Rock* did not meet the minimal requirements to rely on an estoppel defence.²¹³ Sumption gave a similar length of discussion to consideration, but it had greater ramifications.

Consideration

This forms the controversial part of the Supreme Court’s judgment. ‘[T]he decision was... eagerly awaited’,²¹⁴ as it was the opportune moment to provide overdue clarity. However, Sumption stated his ruling on NOM clauses ‘ma[d]e it unnecessary to deal with consideration.’²¹⁵ He continued that it was undesirable, because the ‘issue was a difficult one.’²¹⁶ Sumption states *MWB* might have received practical benefits pursuant to *Williams*,

²⁰⁶ *Ibid* 12.

²⁰⁷ *Ibid* 12.

²⁰⁸ *Rock* (n 1) 15.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid*.

²¹¹ *Ibid*.

²¹² *Ibid* 16.

²¹³ *MWB* (n 135) 620.

²¹⁴ *Show a little* (n 134) 2.

²¹⁵ *Rock* (n 1) 18.

²¹⁶ *Ibid*.

but these benefits are the very thing *Foakes* prevented.²¹⁷ He does not expand on this or provide any further guidance. He simply notes that *Foakes* 'is probably ripe for re-examination.'²¹⁸ The Supreme Court did not re-examine *Foakes*, because it would require a larger panel and the decision must be more than *obiter*.

Roberts states the Supreme Court missed an opportunity to clarify law.²¹⁹ This is the first time the tension between *Williams* and *Foakes* has been put before the Supreme Court.²²⁰ Roberts is correct to identify the missed opportunity. Any re-examination of *Foakes* will indeed require the Supreme Court. However, it seems unlikely this type of issue will reach the Supreme Court soon. It had been 27 years since *Williams* and *Sumption* said 'modern litigation rarely raises truly fundamental issues in the law of contract.'²²¹ The attempts of the lower courts to distinguish from the part-payment rule might encourage appeals; however, in situations concerning debt, creditors are unlikely to chase a bad debt and debtors are unlikely to pursue litigation given their bad financial circumstances. The Supreme Court could have given some guidance.²²² Roberts claims despite the discussion being *obiter* it would be useful for the lower courts,²²³ but Davies considers that any guidance²²³ may have created more confusion.²²⁴ However, it is submitted some guidance would have been more constructive than what it did.²²⁵ Fisher correctly states the Supreme Court has departed from pre-existing law through *obiter* remarks before in *Ivey v Genting Casinos*.²²⁶ Further, in *Ivey* and *R v Jogee*,²²⁷ the Supreme Court changed the law with a panel of five judges:²²⁸ The same as *Rock*. It was within the Court's capacity to re-examine *Foakes*, therefore 'it is odd that it did not decide to sit in an enlarged panel'.²²⁹

²¹⁷ *Ibid*.

²¹⁸ *Rock* (n 1) 18.

²¹⁹ *Bloodied* (n 81) 5.

²²⁰ *Ibid* 6.

²²¹ *Ibid* 7; *Rock* (n 1) 1.

²²² *Show a little* (n 134) 8.

²²³ *Bloodied* (n 81) 7.

²²⁴ P S Davies, 'Varying Contracts in the Supreme Court' (2016) 75(3) *Cambridge Law Journal* 455, 456-457 (Varying).

²²⁵ J C Fisher, 'Contract variation in the common law: A critical response to *Rock Advertising v MWB Business Exchange*' (2018) 47(3) *Common Law World Review* 196, 202. (Critical Response).

²²⁶ *Ivey* (n 68) para. 35; *Varying* (n 224) 202.

²²⁷ [2013] EWCA Crim 1433 (CA).

²²⁸ *Critical Response* (n 225) 201.

²²⁹ *Ibid* 202.

The Supreme Court appeared to not overrule the Court of Appeal on the consideration point.²³⁰ If *Foakes* was clearly the correct law, Sumption should have overruled *Williams*. Fisher identifies a subtle point. By indicating *Foakes* is ripe for re-examination, ‘perhaps [it is] intimating that it will ultimately side with the preponderance of academic opinion and restore coherence by consigning *Foakes*, rather than [*Williams*], to legal history.’²³¹ Parliamentary intervention could be necessary, since the next case on this issue may take a long time to arise. However, the next case to deal with the consideration issue will likely reach the Supreme Court rendering Parliamentary intervention unessential. The academic opinion has flown once again following *Rock*, in relation to both the consideration point and NOM clauses.

²³⁰ See discussion in *Bloodied* (n 81) 6-7.

²³¹ *Critical Response* (n 225).

Chapter 4

*Foakes v Beer*²³² may well be ripe for re-examination,²³³ but the fact the Supreme Court did not address the part-payment of debt rule in *Rock Advertising v MWB Business Exchange Centres*²³⁴ (the Supreme Court hearing is referred to as “*Rock*”) has reignited the academic debate surrounding it. This chapter will consider the position of *Foakes*, and consequently that of *Pinnel’s case*,²³⁵ following the Supreme Court’s remarks on the part-payment rule. The arguments both for and against the validity of this rule will be evaluated. These arguments will be addressed throughout the following points. First, how *Foakes* is valid law, but it is not necessarily good law. Second, that the law is trying to move forward and that the practical benefit rule is the first step to this. Third, that the doctrine of promissory estoppel is often overlooked in academic debate, however, it is the most legally valid way future lower courts can avoid *Foakes*. Finally, alternative models of what the law could look like are considered. The most suitable will be suggested, alongside the assertion that *Foakes* should be overruled.

Foakes Is Not Necessarily Good Law

Foakes continues to be challenged, albeit indirectly, by the Court of Appeal. The Supreme Court in *Rock* did not resolve the case via the consideration point. Whilst it did throw doubt on the reasoning behind it,²³⁶ it did not overrule it; therefore, the Court of Appeal decision still has some weighting against *Foakes*. Nevertheless, there is plenty academic support for *Foakes*. Many argue it is still valid law that “should” be followed, but what is required in theory does not always follow in practice. Therefore, whilst in theory *Foakes* should be followed, in practice it is not. The main reason it is not adhered to is the practical benefit rule from *Williams v Roffey Bros*.²³⁷ Academic support for *Foakes* depends on critique of *Williams*.

Roberts provides that *Williams* is not secure in the common law landscape, one reason being because it has not yet been given ‘a reasoned endorsement in a final court of appeal.’²³⁸ Aside from a lack of endorsement in the Supreme Court, he refers to the fact the Canadian Supreme

²³² *Foakes* (n 67).

²³³ *Rock* (n 1) 1

²³⁴ *Ibid*.

²³⁵ *Pinnel’s* (n 66).

²³⁶ See *Chitty* (n 2), 4-125, pg. 504: ‘dicta in the Supreme Court... throw doubt on the reasoning in the cases’.

²³⁷ *Williams* (n 94).

²³⁸ *Bloodied* (n 81) 4.

Court has not yet spoken of the appropriate place of *Williams* in the law of Canada. This has led to a disparity of views in its jurisdictional provinces.²³⁹ The High Court of Australia has not considered it in detail either, as well as the Supreme Court of New Zealand; further, the Supreme Court of Singapore did discuss the potential role of *Williams*, but reached no conclusion since it was only *obiter*.²⁴⁰ Until the case of *Rock*, however, *Williams* had never reached the Supreme Court.²⁴¹ This could explain why none of the other mentioned final courts of appeal have addressed *Williams*, as Australia, Canada, and Singapore are all Commonwealth countries. UK law is very persuasive in their decision-making and they look to the UK Supreme Court for guidance. It makes sense, then, why they have not addressed *Williams*: Neither has the UK Supreme Court. Roberts is correct to note, however, that the reach of the practical benefit test is unclear. Its extension to situations concerning a part-payment of debt could not sit alongside *Foakes*, hence *Re Selectmove*.²⁴² A part-payment cannot be both capable and not capable of consideration. Roberts notes how the lower courts in Australia and New Zealand have extended *Williams* at the earliest opportunity, because they believed *Foakes* could be distinguished or ignored.²⁴³ These Commonwealth cases do illustrate that the practical benefit rule and part-payment rule are unlikely to sit well together, given lower court cases appear to ignore *Foakes*. This theme is more apparent than ever following *Rock*, since it did not overrule the Court of Appeal's decision on the consideration point. Therefore, arguably the Court of Appeal in *MWB Business Exchange Centres v Rock Advertising*²⁴⁴ (the Court of Appeal hearing is referred to as *MWB*) is mirroring the Commonwealth courts by ignoring *Foakes*. However, a subsequent case does not follow suit of the Court of Appeal, vouching instead for the validity of *Foakes*.

In *Simantob v Shavleyan*,²⁴⁵ a High Court decision following *Rock*, Kerr J stated the practical benefit rule does not provide consideration in cases involving a part-payment of a debt by way of *Selectmove*. It is a matter of precedent. *Williams* gave its ruling, which *Selectmove* limited. One Court of Appeal can overrule or limit the ruling of a previous Court of Appeal.

²³⁹ *Bloodied* (n 81) 4.

²⁴⁰ *Ibid* 4.

²⁴¹ *Ibid* 6.

²⁴² *Selectmove* (n 119) 127.

²⁴³ *Bloodied* (n 81) 5; see *Musumeci v Winadell* (1994) 34 NSWLR 723 (NSWSC) and *Machirus Properties Ltd v Power Sport World (1987) Ltd* (1999) NZ ConvC 193,066 (NZ).

²⁴⁴ *MWB* (n 135).

²⁴⁵ [2018] EWHC 2005 (QB) (*Simantob*).

Therefore, *MWB* arguably had some effect on *Selectmove*, like *Selectmove* did on *Williams*. It is unclear if this is the case, since it only distinguished from it, but Davies notes how Kerr avoids the tension between *Selectmove* and *MWB*²⁴⁶ perhaps for this reason. The tension in the law remains. Davies argues Kerr's reiteration of *Selectmove* was done with reluctance.²⁴⁷ Kerr, being the first to rule on this area of law since *Rock*, might have been unsure of the standing of *MWB*. Kerr notes how after the hearing before him, he was only just informed of the decision in *Rock*;²⁴⁸ whilst he did invite brief written submissions on this,²⁴⁹ the submissions likely assumed the consideration point in *MWB* bore no relevancy. They did not have time to consider the effect the ruling in *MWB* had on *Selectmove*. It could be argued *MWB* removes the limits place on *Williams* by *Selectmove*. In *Simantob*, focus was solely on the Supreme Court's ruling, which through its refusal to address the consideration point, preserved the current state of the law.²⁵⁰ I would agree with Kerr's decision that *Foakes* is still the correct approach, however, it is submitted the reasoning in *MWB* on the consideration point stands strong and that the doubt it casts is relevant. The Supreme Court could have clarified *Foakes*, but instead by leaving the reasoning of *MWB* intact, it hinted it had some validity to it. After all, Sumption said *Foakes* is 'ripe for re-examination'²⁵¹ and not *Williams*. This reflects that the law is trying to change but cannot due to *Foakes*. In other words, *Foakes* is no longer good law, but must be adhered to by way of stare decisis. In accordance with that principle, it is no surprise that the methods used in *MWB* to distinguish from *Foakes* are creative and, unfortunately, as a consequence appear 'untenable'.²⁵²

Lord Sumption, in *Rock*, identifies how the rule in *Williams* is the very thing *Foakes* provided was not adequate consideration.²⁵³ This was the concern of Gibson LJ in *Selectmove*. If *Williams* or (as Roberts notes)²⁵⁴ *MWB* is followed, then it is difficult to see when *Foakes* would apply.²⁵⁵ Roberts considers Gibson to be correct and argues the attempts to distinguish

²⁴⁶ Varying (n 224) 4.

²⁴⁷ Ibid.

²⁴⁸ *Simantob* (n 245) 124.

²⁴⁹ *Ibid* 125.

²⁵⁰ Cf. to the discussion in Chitty (n 2) 4-125, pg. 504: '[the] dicta in the Supreme Court... throws doubt on the reasoning in the [*MWB*]'.

²⁵¹ *Rock* (n 1) 18.

²⁵² *Bloodied* (n 81) 350.

²⁵³ *Rock* (n 1) 18; *Foakes* (n 67) 622 (Blackburn).

²⁵⁴ *Bloodied* (n 81) 351.

²⁵⁵ *Selectmove* (n 119).

from *Foakes* and *Selectmove* are 'untenable'.²⁵⁶ As seen, Arden LJ argues one of the practical benefits obtained was 'avoiding the void'²⁵⁷ of having no licensee. Roberts states that the Court of Appeal's logic means that the 'promise to release a debt [is] binding if it is given in return for practical benefits which have not yet eventuated, but are hoped to arise due to a promise of part-payment.'²⁵⁸ He makes the following convincing argument. If *Foakes* is problematic because it is better to have the certainty of a small thing than to risk it for something greater, i.e., it is better to accept a part-payment than risk receiving it by waiting for the whole debt, then it is much less problematic than *MWB*, which provides it is better to have the certainty of a "promised" small thing than to risk it for something greater.²⁵⁹ This logic reveals that the law cannot have such two decisions side by side. Roberts explains that the law would be incoherent if actually paying a part of a debt is not worthy of consideration, but promising to pay part of a debt is. The current uncertainty in the law provides all the needed of evidence to support this. Further support comes from Roberts on the way *MWB* distinguished from *Foakes* and *Selectmove*. He argues the benefits Arden and Kitchin LJ identify are 'less distinctive than they appear.'²⁶⁰ The distinction is one without difference to *Foakes*, where Lord Blackburn rejected the practical benefit of receiving more money than adhering to the original contract. This would be the case when deciding to accept £50 as satisfaction of £100, the creditor receives £50 more than they would otherwise. Roberts unravels the blurred nature of the Court of Appeal's distinction. *MWB* gained more money from the fact they retained a licensee; in other words, they obtained a practical benefit of more money.²⁶¹ Roberts argues this is exactly what *Foakes* rejected as good consideration.²⁶² However, gaining more money from retaining a licensee is not payment of a debt. It is likely to be received alongside a part-payment, but Roberts combines it with a part-payment itself which is not the case. Nevertheless, the obscurity he unravels is indicative of a need for the law to evolve.

²⁵⁶ *Bloodied* (n 81) 350.

²⁵⁷ *MWB* (n 135) 627.

²⁵⁸ *Bloodied* (n 81) 351.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

Roberts is supported by Burton. Burton similarly argues the reasons for distinguishing from *Selectmove* are 'narrow and unconvincing'.²⁶³ The first purported benefit of an upfront payment is clearly rejected by *Foakes*.²⁶⁴ Secondly, keeping a licensee, or in the words of Glidewell obviating a disbenefit,²⁶⁵ was also considered to provide a practical benefit; however, Burton argues there was reasonable doubt Rock would have been able to pay future payments.²⁶⁶ Therefore, there is no real practical benefit, as MWB would eventually lose a licensee. The final purported benefit of recovering some of the arrears, again similar to the first benefit, is rejected in *Selectmove*. Burton and Roberts support one another and clearly have a similar train of thought. Roberts also notes how if such benefits were allowed, it would be easy to argue a creditor received a practical benefit in most situations. One could simply claim, for example, that the agreement to accept a part-payment enhanced the creditor's reputation as a reasonable creditor. Another example, in *Selectmove*, is that the new agreement encouraged other debtors to come forward voluntarily with repayment proposals, which meant it increased the Revenue's efficient use of limited time and resources. Examining the practical benefit rule from this perspective shows how it exposes creditors. There is always business sense in accepting a smaller payment on a debt, because it is better to receive something and retain a licensee/tenant, than to pursue arrears and sue for the outstanding amount. Roberts states that on the basis of *Williams* and *MWB* there is a low bar to claim such a benefit; all a party need do is argue there is some benefit to the creditor over and above the part-payment, which essentially can be achieved by rewording the fact that they will get more money.²⁶⁷ Yet, equally debtors are significantly exposed because of this rule. A creditor could easily accept a part-payment, and with the debtor in a weak position, decide to pursue the remaining amount. Clearly, the part-payment rule is unbalanced.

Fisher follows a logical argument in his support for *Foakes*. He asserts that *Foakes* precludes *Williams*, which means *Williams* is wrongly decided, thus per incuriam and explains why *Selectmove* distinguished from it. Fisher presents three options that a future Supreme Court can do to restore clarity to English law. One is to abolish consideration; the other to declare contract variations different to contract formations, so they do not require consideration;

²⁶³ Burton (n 93) 74-76.

²⁶⁴ Burton (n 93) 6.

²⁶⁵ *Williams* (n 94) 16.

²⁶⁶ Burton (n 93) 7.

²⁶⁷ *Bloodied* (n 81) 352.

lastly, they could overrule *Williams*. It is wrong to think these are the only options available. The Supreme Court can depart from its own decision if it appears right to do so. This includes *Foakes*. The above are convincing arguments and it is agreed that the practical benefits found in *MWB* were forced to an extent. Foster and Reilly consider that it must be the case that *Foakes* continues to be followed below the Supreme Court and, for that reason, the Court of Appeal in *MWB* must be considered trumped by *Selectmove*.²⁶⁸ It is clear in theory that *Foakes* is the law to be followed. Yet, it seldom is in practice. Foster and Reilly indicate that the triumph of *Selectmove* is subject to *Foakes* being overruled.²⁶⁹ They seem to be suggesting it could be overruled in the future. Given its practical notoriety compared to its theoretical standing, this is not far-fetched and it is submitted to be desirable.

The 'Supreme Court's failure to clarify the law... will not... end speculation or deter academic analysis.'²⁷⁰ From the above arguments, it is abundantly clear that *Foakes* should be followed. It is recognised in *Chitty* that:

until the decision in *Foakes v Beer* is... reversed by the Supreme Court, a promise... to accept part-payment... is to be treated as made without consideration, even if the creditor gets a practical benefit. In the meantime, its operation is mitigated... at common law and in equity.²⁷¹

Yet, it is peculiar that a House of Lords decision can be so easily undermined by the Court of Appeal in *Williams* and *MWB*. The law surrounding *Foakes* stabilised following the ruling of *Selectmove*, but its stability was rocked again in *MWB*. One might expect that the Supreme Court would clarify and re-assert *Foakes*, quashing the rebellion of the practical benefit rule. But, it did not. It said it is ripe for re-examination.²⁷² Clearly there is something appealing about *Williams*. Perhaps it is a preferred rule to the harshness of *Foakes* and the lower courts think the existing law needs changing. Gibson in *Selectmove* appears to show sympathy towards *Williams*. Similarly, Blackburn in *Foakes* showed unease with his ruling, because his alternative was 'not satisfactory to the other noble and learned Lords'.²⁷³ It is submitted that

²⁶⁸ Show a little (n 134) 4.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ *Chitty* (n 2) 4-119, pg. 501.

²⁷² *Rock* (n 1) 18.

²⁷³ *Foakes* (n 67) 115-116.

whilst *Foakes* is still valid in theory, its treatment demonstrates it is not good law. Hence, why it has little been followed in practice²⁷⁴ irrespective of its binding nature on the lower courts. Ignoring *Foakes* would be, as explored through Roberts, contrary to stare decisis. However, a part of stare decisis is distinguishing cases. This is why *MWB* tried to distinguish in the way it did. Whether the benefits found were valid is irrelevant. What matters is that it is a symptom that the law is trying to evolve, but it cannot because of *Foakes*. There are numerous reasons for this.

The Law Is Moving Forward

With the critique in chapter 2 in mind, it is obvious then why *MWB* sought to distinguish from *Foakes*. Perhaps the lower courts are trying to encourage litigants to appeal to the Supreme Court by distinguishing.²⁷⁵ They are indirectly suggesting to the Supreme Court *Foakes* needs overruling. Gibson in *Selectmove* recognises it may need reconsidering, despite following it.²⁷⁶ Nevertheless, as Roberts correctly states, in line with stare decisis, until the Supreme Court actually overturns or substantially modifies *Foakes*, the lower courts are bound to follow it.²⁷⁷ Undoubtedly, like in *MWB*, the lower courts will continue to find ways to distinguish it. This is in accordance with stare decisis. Arden and Kitchin have been promoted to the Supreme Court; Roberts speculates they may now make attempts to overturn *Foakes*.²⁷⁸ Whilst ‘modern litigation rarely raises truly fundamental issues in the law of contract’, the awaited discussion and likely overruling of *Foakes* is on the horizon.

Williams and *MWB* are attempts to move the law away from the harshness of *Foakes*. In addition to the chapter 2 arguments against *Foakes*, Shaw-Mellors and Poole argue English law develops inadequate principles in relation to the renegotiation of contracts. For example, they argue ‘the relationship between consideration and duress in the context of [variation] promises... is far from clear.’²⁷⁹ These unclear principles are created, because of the law’s

²⁷⁴ It was followed in *Simantob* (n 245), but the reasons for this have already been discussed.

²⁷⁵ This would work, since the creditors would have to appeal and they are more likely to do so than a debtor because of their stronger financial position.

²⁷⁶ *Selectmove* (n 119) 537: ‘Mr Nugee submitted that although Glidewell LJ in terms confined his remarks to a case where B is to do the work for or supply goods or services to A, the same principle must apply where B’s obligation is to pay A, and he referred to an... which suggests that *Foakes v Beer* might need reconsideration.’

²⁷⁷ *Bloodied* (n 81) 353.

²⁷⁸ *Bloodied* (n 81) 353 in footnote 43.

²⁷⁹ A Shaw-Mellors and J Poole, ‘Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law’ (2018) 2 *Journal of Business Law* 101, 103 (Recession).

response to the enforceability of contracts that were varied due to dramatic circumstances.²⁸⁰ Such circumstances might be an economic recession, or a sub-contractor no longer being able to meet a performance deadline, as was the case in *Williams*.²⁸¹ A point of interest are economic recessions. The law's response to contracts changed because of this event is argued to be inadequate, but I take this one step further. The law's response to variation contracts has been influenced by economic recessions, whether or not the contract was changed because of such circumstances. Consider the year of *Foakes*. In 1884, the UK was still in a period of depression and economic turmoil. It was decided 11 years after the Panic of 1873 financial crisis.²⁸² During economic recession, one way to stimulate economic activity is through the borrowing of money. It seems likely, therefore, that a legal decision affecting creditors and consequently the economy, would be decided in a manner that encourages them to lend. The part-payment rule ensures they will lend, as they do not stand to lose anything upon accepting a smaller repayment. Whilst this was not the only influence on the House of Lords in *Foakes*, it is likely the economic climate factored into favouring the decision of *Pinnel's Case*.²⁸³ It might explain too how they oversaw *Hughes v Metropolitan Railway Co*.²⁸⁴

The Overlooked Doctrine

Following *Rock*, there is some consensus that the application of *Williams* to part-payment of debt situations is wrong. Doing so would result in forced arguments of distinction. The academics against accepting *Williams* argue it would mean abandoning *Foakes*.²⁸⁵ Interestingly, Foster and Reilly argue this would also mean abandoning 'the exceptions to it created by promissory estoppel.'²⁸⁶ Clearly, there are other ways to avoid the harshness of the rule in *Foakes*, but it is an overlooked aspect in academic debate. Indeed, the primary focus of the debate is the relationship between *Williams* as an exception to *Foakes*, but the real purpose of the debate is the practicality of *Foakes*. It may be interesting to debate how

²⁸⁰ Recession (n 279) 101.

²⁸¹ Ibid 101.

²⁸² For some discussion around this see A E Musson, 'The Great Depression in Britain, 1873-1896: A Reappraisal' (1959) 19(2) *The Journal of Economic History* 199.

²⁸³ *Pinnel's* (n 66).

²⁸⁴ *Hughes* (n 15); see chapter 2 for further discussion on this point.

²⁸⁵ See the above arguments in Bloodied (n 81), Burton (n 93), and Critical Response (225).

²⁸⁶ Show a little (134) 5.

Williams does, or does not, sit well with *Foakes*, but the central issue is should it be departing from this House of Lords decision and will the law work. The real overlooked purpose of the debate is to uncover how the law can move on from the part-payment rule. In *Collier v Wright*,²⁸⁷ Arden states how ‘the doctrine of promissory estoppel... was developed to meet the hardship created by the rule in *Pinnel’s* case.’²⁸⁸ She made it clear that it can be used in situations of part-payment as a defence: ‘promissory estoppel has the effect of extinguishing the creditor’s right to... the debt.’²⁸⁹ This appears to render *Foakes* inapplicable, but other cases state it merely suspends such rights²⁹⁰ and it was submitted in chapter 2 these cases are correct. *Collier* was unusual in that it applied both *Pinnel’s* and promissory estoppel. No consideration was found, but estoppel could be relied upon. Despite its cautionary treatment, it demonstrates promissory estoppel can be used as an exception to *Foakes*.

MWB, in seeking to distinguish from *Foakes*, ironically curtails the attempts of promissory estoppel to achieve a similar thing. Burton argues *MWB* reignited the debate around the prerequisite of a detriment.²⁹¹ He submits it ‘has taken the wind of the sails of... *High Trees*, leaving it in a state of limited application.’²⁹² This is because if there was a detrimental reliance, i.e. taking on extra obligations, there would be no need to consider *Foakes*. But, as Burton notes, these conclusions are *obiter* and it is unclear if the Court of Appeal was unanimous on this.²⁹³ It is submitted the requirement of a detriment would provide some protection to creditors, as it limits the situations where the defence can apply to those where the debtor suffers a detriment. However, it is hard to conceptualise when the debtor would not be putting themselves at a detriment. Much of what this doctrine could cover, Arzandeh and McVea argue is more easily covered by the practical benefit rule.²⁹⁴ For now, however, promissory estoppel is the best answer the law has to avoiding *Foakes* without resorting to a forced application of *Williams*, especially since its usage remains unclear. Collins convincingly

²⁸⁷ *Collier* (n 42).

²⁸⁸ *Ibid* 655.

²⁸⁹ *Ibid* 659 at 42.

²⁹⁰ *Tool Metal* (n 18).

²⁹¹ Burton (n 93) 9.

²⁹² *Ibid*.

²⁹³ *Ibid*, 10

²⁹⁴ A Arzandeh and H McVea, ‘Refining Consideration: RIP *Foakes v Beer*?’ (2017) 1 *Lloyd’s Maritime and Commercial Law Quarterly* 7, 12 (RIP *Foakes*).

states ‘what appears clear is that [*Foakes*] is no longer inviolate, and promissory estoppel... offer[s] a significant counterweight’.²⁹⁵

Alternative Models

It is clear the law is trying to move away from *Foakes*, but what is not so clear is what it is striving to. The earlier arguments of Roberts explored the treatment of *Williams* and *Foakes* in Commonwealth countries. Although concluding in favour of *Foakes* in English law, he notes:

there is... a wide divergence of views between the Canadian provinces. The positions range from upholding the pre-existing duty rule for variations as it stood prior to *Roffey*... to doing away with the requirement for consideration for variation contracts entirely.²⁹⁶

The Canadian Court of Appeal in British Columbia followed the latter, more radical approach. The remainder of this chapter will explore this alternative model and another that the law should use to replace *Foakes*.

The Radical Model

The Court of Appeal’s radical approach was taken in *Rosas v Toca*.²⁹⁷ Rosas won the lottery and loaned Toca \$600,000. Rosas requested they pay it back after one year. When that time came, Toca said they can pay it back the next year and Rosas agreed to not file a claim. This request for a deferred payment by Toca repeated for several years and eventually Rosas claimed. At first instance, it was held the promise to repay was unenforceable, due to a lack of consideration, and because the original loan term expired thus the claim was statute barred. However, Rosas’ appeal was allowed. The Court of Appeal stated *Williams* shows ‘support for an evolution in the law’.²⁹⁸ The scenario in *Rosas* is of course different to the one explored here, since no part-payment was made. Nevertheless, the Court of Appeal modified what was required in the variation of contracts: ‘the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns’.²⁹⁹ It is unlikely English law will do away with consideration, hence the case’s radical nature.

²⁹⁵ D M Collins, ‘Part-payment of debt: a variation on a theme?’ (2018) (forthcoming), 9 (On a theme).

²⁹⁶ *Bloodied* (n 81) 346.

²⁹⁷ [2018] BCCA 191 (CA of British Columbia) (*Rosas*).

²⁹⁸ *Ibid* 121.

²⁹⁹ *Ibid* 183.

Consideration is what makes it unique. But there are parallels between this remark and the English common law. It is submitted it reflects the model I argue the law should take.

An Alternative

Debtors should have two avenues of protection to avoid being taken advantage of when paying a lower amount as satisfaction of a debt. Both ways, however, should be subject to a proviso that equally protects creditor from also being taken advantage of. The first avenue is that consideration can be found if there is a practical benefit. This entails extending *Williams* to part-payment situations. Shaw-Mellors and Poole think *Williams* is a two-way process. The first question to be asked should be is there any sign of economic duress, like in *Rosas*; if not, then steps should be taken to identify practical benefit(s) for consideration.³⁰⁰ The requirement for economic duress is the proviso. This protects both parties and ensures a fair outcome. If a debtor tries to coerce a creditor into accepting less, the creditor is protected by duress; on the other hand, if a creditor knows a debtor can only pay so much and accepts this, but tries to pursue the rest subsequently, the debtor is also protected. The practical benefit rule is not unfair on the creditor, because they can still pursue the standard procedure of filing a claim or charging arrears. The preferred option of accepting less, which arguably makes commercial sense, is still available but can no longer be exploited. The law is nearly in this position. Clarification of what constitutes a practical benefit is needed. The test is too vague,³⁰¹ hence the conflict between *Selectmove* and *MWB. Williams* may be able to sit next to *Foakes* as an exception, like Arden argued. However, *Foakes* no doubt would apply in only limited circumstances. It may only apply 'where there is no evidence of consideration over and above that of simply accommodating the debtor.'³⁰² It might be desirable of future Supreme Court justices to preserve it out of respect for Coke, but nevertheless the rule is a harsh one and this clarification of the practical benefit rule might condemn *Foakes* to irrelevancy.³⁰³ The alternative is to depart from *Foakes*, because it seems right. *Foakes* may

³⁰⁰ *Recession* (n 279) 107-108.

³⁰¹ *Show a little* (n 134) 6.

³⁰² *RIP Foakes* (n 294) 12.

³⁰³ Roberts argued the Supreme Court's refusal to address might have done this, *Bloodied* (n 81) 352.

have been per incuriam, via overlooking *Hughes*.³⁰⁴ It is submitted it should be overruled. It is the better option than to render it irrelevant through neglect³⁰⁵ and not clarify the law.

The second avenue for debtors is promissory estoppel. Its current use already enhances the irrelevancy of *Foakes*. The small margin of situations not covered by *Williams* would be swept up by this doctrine. This only serves to strengthen the case for overruling *Foakes*, as more than one aspect of the law conflicts with it. Promissory estoppel may sweep up the remains, but creditors should still have a protection. By insisting on the prerequisite of a detriment, this serves to balance the law. A debtor could not simply claim this defence, because they relied on the fact the creditor said they would accept less. They must have suffered a detriment. Clarity would exist for judges, who could decide on a balance of facts. Faced with a part-payment situation, a judge can determine if there is a practical benefit obtained by the creditor absent of economic duress. If there is no benefit, they can look to promissory estoppel and apply the defence assuming a detriment exists. It gives them, and the law, space to breath. The practical benefit rule is the sword to the shield of promissory estoppel.

A future Supreme Court reaching any decision will be difficult, as Lord Sumption says it is ‘truly a fundamental issue’.³⁰⁶ Chief Justice Bauman, of British Columbia’s highest court, stated:

It has been famously said that “hard cases make bad law”; sometimes, however, hard cases make new law. Or, at least, they very much encourage the court to do so lest we give credence to Mr. Bumble’s lament in *Oliver Twist*: “If the law supposes that...the law is a ass”.³⁰⁷

Sumption’s indication that *Foakes* is ripe for re-examination, as seen in chapter 3, is ‘intimating that [the Supreme Court] will ultimately side with the preponderance of academic opinion and restore coherence by consigning *Foakes*, rather than [*Williams*], to legal history.’³⁰⁸ Nevertheless, when the issue next reaches the Supreme Court, the case will be a hard one. The overruling of a principle that has existed since 1602 will no doubt be difficult, but it cannot come soon enough.

³⁰⁴ As explored in chapter 2, but this argument comes with some flaws.

³⁰⁵ Bloodied (n 81).

³⁰⁶ *Rock* (n 1) 1.

³⁰⁷ *Rosas* (n 297) 1.

³⁰⁸ Critical Response (n 225) 202.

Chapter 5

Much of the focus throughout this piece has been on the part-payment of debt rule and how promissory estoppel relates to it. In *Rock Advertising v MWB Business Exchange Centres*,³⁰⁹ however, Lord Sumption said the case raised two fundamental issues of contract law.³¹⁰ The other is that of No Oral Modification (“NOM”) clauses. This is a term that specifies an agreement cannot be amended orally and usually can only be amended if it is done in writing. It was unclear if NOM clauses were legally effective if parties had orally agreed to vary the contract contrary to it, because of the principle of party autonomy. Further, it was unclear what bearing promissory estoppel had on the validity of such clauses. It was seen in chapter 3, that the Supreme Court held NOM clauses to be legally effective where the parties tried to orally vary a contract. However, some degree of ambiguity remained in situations where parties orally agreed to dispense of the NOM clause. Sumption said they could not; Lord Briggs stated *obiter* that the parties could potentially dispense of a NOM clause orally but, like Sumption stated, they cannot orally vary the contract in any other way. The law is settled nonetheless, as Briggs’ view was only *obiter*. But this has not prevented academic debate over which perspective is to be preferred. Despite the clarity, there may be a possibility that the lower courts adopt Briggs’ *obiter*. The academic debate also rages against the Supreme Court ruling, although it is little in volume.

Little Critique of NOM Clauses

Those against the legal effectiveness of NOM clauses cite party autonomy. This argument was dispelled in the Supreme Court. Nevertheless, academics and practitioners have raised other arguments against NOM clauses. Calnan argues NOM clauses are disadvantageous, because it can allow a party to escape an oral variation since it does not comply with the underlying contract.³¹¹ He continues that a fundamental part of English law is that effect is given to agreements with consideration.³¹² Therefore, it cannot be assumed NOM clauses will work in every situation, because such formalities will eventually lead to problems as in the case of

³⁰⁹ *Rock* (n 1).

³¹⁰ *Ibid* 1; As explored the first was whether there can be consideration for the part-payment of a debt.

³¹¹ R Calnan, ‘Contractual Variation Clauses’ (2018) *Butterworths Journal of International Banking and Financial Law* 487, 489 (Calnan).

³¹² *Ibid*.

Actionstrength v International Glass Engineering.³¹³ However, Calnan does recognise estoppel helps mitigate this situation. Calnan also argues there will still be a great deal of pressure on the courts to enforce oral variations, where parties have agreed and acted upon an oral variation: *Rock* welcomes litigation as opposed to welcoming certainty.³¹⁴ However, this dissertation contends the alternative is equally likely to welcome litigation. The whole purpose of NOM clauses is to prevent false assertions of oral variations. *Rock* is a perfect example of this. Parties are equally likely to litigate over alleged oral variations of a contract, rather than just the fact a party went back on an oral variation. NOM clauses instead introduce certainty. Parties now know they cannot orally vary the contract where such clauses exist. Instead the cause for future litigation is not NOM clauses, it is the chance of promissory estoppel. Consider a situation similar to *Rock*. If the parties, whose contract contains a NOM clause, orally agree to a lower payment of a debt and the creditor goes back on this promise and demands the full debt, under the Supreme Court ruling the debtor is unlikely to succeed in a claim. Notwithstanding that there may be consideration under the practical benefit rule, they know this because of the certainty of NOM clauses. However, they could refuse to pay the remaining debt, in which case the creditor will likely sue. In these circumstances, the debtor can now rely on promissory estoppel. This is not certain however, because the applicability of promissory estoppel in the context of NOM clauses remains vague.³¹⁵

Waal argues the ‘certainty [of a NOM clause] would [mean] certain injustice’.³¹⁶ He states that ‘the [Court of Appeal] decision reflects the flexibility of the common law and is to be applauded.’³¹⁷ It can be said Waal’s thinking mirrors the Court of Appeal’s, because he does not give his own reasons against the legal effectiveness of NOM clauses. Whilst this does not detract from his assertion, his view is subject to the same criticisms on the Court of Appeal. The main problem with its ruling is that it did not translate to practice. Many practitioners still recommended the use of NOM clauses. Some recognised that NOM clauses still had obvious benefits, as it encourages parties to have a written record of changes to a contract and this helps ‘avoid future disputes about any subsequent variations.’³¹⁸ Using NOM clauses is

³¹³ [2003] AC 541 (HL) (*Actionstrength*); this case is explained below, at pg. 52; also see *ibid*.

³¹⁴ Calnan (n 311) 489.

³¹⁵ This is analysed in greater detail below, see pg. 51.

³¹⁶ J Waal, ‘Mind What You Say’ (2016) 160(40) *Solicitors Journal* 160(40) 15, 17.

³¹⁷ *Ibid*, 17.

³¹⁸ Baker & McKenzie, ‘Anti-oral variation clauses’ (2016) 27(7) *PLC Mag.* 46.

regarded 'as a matter of good practice'.³¹⁹ They are also more in line with how the construction industry traditionally operates, according to legal experts in that sector.³²⁰ Mather states the Court of Appeal ruling was useful for property lawyers, as property-related contracts can be altered orally, but the decision increased the prospect of false or frivolous claims of oral variations.³²¹ This is dangerous given the 'widespread use [of NOM clauses] in commercial practice'.³²² Clearly its commercial use is desirable, because it will help avoid litigation on allegations of oral variations. *Rock* is an example contrary to this, but this case resolved the issue. Moving forward it is apparent that future attempts to litigate over NOM clauses will be heavily discouraged, unless one party can vouch for promissory estoppel, in which case they may deliberately hope a claim arises to rely on the defence as discussed. Many considered that the Court of Appeal stance 'cause[d] a great deal of consternation in commercial circles.'³²³ Foster and Reilly also argued great confusion would persist in the commercial world, if parties could abandon the express terms of a contract by merely agreeing to the contrary.³²⁴ Purkis and Callaway, however, correctly recognised that the Supreme Court has now laid to rest the confusion created by the Court of Appeal.³²⁵ Evidently, the critique of NOM clauses is heavily outweighed by practical considerations.³²⁶ The arguments in favour of such clauses are more convincing and greater in number.

The Supreme Court Is Right

Before the Supreme Court case, Morgan recognised the error the Court of Appeal made.³²⁷ His arguments were convincing enough for Sumption to cite in his judgment.³²⁸ Morgan argued the controversy of formality requirements subsides when 'the parties tie their own

³¹⁹ S Underhill and A Sandiforth, 'Contracting out of waiver? Court of Appeal provides guidance on "no variation" and "anti-oral variation" clauses', (2016) F. & C.L. 7.

³²⁰ J Starr, 'Mods and Rockers' (2018) Property Law Journal 363 (Mods).

³²¹ K Mather, 'You have my word' (2016) 166(7718) New Law Journal 12.

³²² E McKendrick, 'The legal effect of an anti-oral variation clause' (2017) 32(10) Journal of International Banking Law and Regulation 439 (McKendrick).

³²³ RIP Foakes (n 294) 5.

³²⁴ Show a Little (134) 3.

³²⁵ S Purkis and L Callaway, 'Be careful what you say no longer' (2018) 168(7801) New Law Journal 13 (Be careful).

³²⁶ In addition to the criticisms explored, the only other academic against NOM clauses is Stuart Pemble, 'Why the Supreme Court is wrong on NOM' (2018) 63 Estates Gazette. However, due to licencing restraints, his article cannot be accessed.

³²⁷ J Morgan, 'Contracting for self-denial: on enforcing "no oral modification" clauses' (2017) 76 Cambridge Law Journal 589 (Morgan).

³²⁸ *Rock* (n 1) 9.

hands.’³²⁹ He likened NOM clauses to a dilemma presented to Ulysses’ crew.³³⁰ Having tied their captain to the ship before sailing past an island, the captain urgently wished to be untied. However, earlier the captain had told them to ignore his later wishes to be released. ‘[C]ontracting parties may sensibly wish to limit their later freedom and insert a term requiring the court to enforce that restraint.’³³¹ Not enforcing NOM clauses would be inconsistent with other formality rules like entire agreement clauses,³³² therefore, it suggests the Court of Appeal decision against the effectiveness of NOM clauses erred. Morgan continues that the fact English does not usually require formalities for contractual variations is irrelevant. If parties want to depart from the default position of the law and make variations more onerous, then so be it; they have demonstrated the unsuitability of the law for their situation.³³³ In addition, Morgan argues it is difficult to see how it can be reasonable to rely on an informal variation when parties have agreed to a NOM clause.³³⁴ It is clear from Christou’s *Boilerplate: Practical Clauses*,³³⁵ that the rationale of NOM clauses is to prevent variations being made informally or by accident.³³⁶ Parties who do not want their relationship to be governed by contractual agreements, Morgan argues, should simply not include NOM clauses.³³⁷ The only exception to this are consumers and potentially less sophisticated commercial parties, who can override NOM clauses via unfair terms legislation.³³⁸ Big commercial players should be held to their word, as preventing an oral variation where a NOM clause exists beneficially extends freedom of contract.³³⁹

Morgan’s view, which influenced Sumption, makes sense. A true argument of freedom of contract would not validate oral variations, it would instead see that the parties initially agreed to bind themselves in a particular way. Like Ulysses’ crew, at the time of the initial agreement the parties had reason to bind their future conduct. For whatever reason held to them, they considered oral variations to be undesirable. A change in circumstances might

³²⁹ Morgan (n 327) 590.

³³⁰ From the famous western literature Homer, *The Odyssey* (Translated by E V Rieu, Penguin Books 1946).

³³¹ Morgan (n 327) 590.

³³² Rock (n 1) 14.

³³³ *Ibid*, 590-591.

³³⁴ *Ibid*, 612.

³³⁵ R. Christou, *Boilerplate: Practical Clauses* (7th edn, London 2015).

³³⁶ *Ibid* 10-072.

³³⁷ Morgan (n 327) 614.

³³⁸ *Ibid* 615.

³³⁹ *Ibid* 615.

make them overlook this, like it did for the captain. It is the role of the courts to enforce what the parties' original clear intentions are. Subsequent oral variations could later be distasteful to the parties. If the variation was truly desirable by the parties, then they would seek to follow the formalities prescribed in the NOM clause. It could be argued they would not if the desired variation was minimal, but the formalities to follow were onerous. Onerous formalities are rare however. Yet, Briggs' approach would allow the possibility of defeating NOM clauses. Understandably some parties might overlook the clause, however, as Morgan states these situations should not receive sympathy for big commercial players. Other users of NOM clauses might receive sympathy via unfair terms legislation. Another avenue potentially available is the defence of promissory estoppel. This provides insight on Briggs' approach. Perhaps the enforceability of NOM clauses should depend on its users, when they know and orally agree to dispense of the clause. Big commercial players should be held to the clause, but it could be reasonable to think smaller commercial parties might believe they can orally dispense of the NOM clause and subsequently act on their variation. They might operate on the assumption that they can change their contract in any way they want, because it is their contract. To enforce otherwise would inhibit their commercial practice. However, the disadvantage of requiring parties to comply with a minor formality requiring variations to be in writing, is better than the disadvantage of false allegations of oral variations and the uncertainty surrounding the contractual document. If a dispute did arise, clear evidential barriers exist as to the actual state of the contract since variations were not recorded in writing.

Sumption's reasoning was also influenced by McKendrick, who discusses the Vienna Convention³⁴⁰ and the UNIDROIT principles,³⁴¹ which Sumption refers to in his judgment.³⁴² McKendrick states these international laws offer a better balance of the parties' interests than the Court of Appeal judgment, since it gave too little weight to NOM clauses.³⁴³ All that would be required to effect an oral variation under the Court of Appeal ruling is proof on a balance of probabilities that the agreement was made and it was intended to be binding.³⁴⁴ However, it has been seen that NOM clauses are undoubtedly the preferred option. The crucial issue

³⁴⁰ Vienna Convention (n 201).

³⁴¹ Unidroit (n 201).

³⁴² Rock (n 1).

³⁴³ McKendrick (n 322) 446.

³⁴⁴ Ibid.

that McKendrick recognised even before the Supreme Court ruling, is what are the steps parties can take to depart from NOM clauses.³⁴⁵ Logically, one step is to depart in writing, as there would be no inconsistency with the NOM clause.³⁴⁶ This is what Sumption finds.³⁴⁷ Whether or not the parties can agree orally to depart from a NOM clause is one of the issues that separates Sumption and Briggs.³⁴⁸

Departing from NOM Clauses

In addition to departing from NOM clauses in writing, McKendrick presents two alternatives. One entails parties orally dispensing of the NOM clause and they expressly addressed its existence. The other scenario is where parties enter into an oral variation without knowledge of it, but this is analysed under the next heading concerning promissory estoppel. Although he notes dispensing of a NOM clause orally is inconsistent with the clause itself, he states it can be argued that effect should be given to it assuming the parties expressly addressed it is there and have agreed to delete it.³⁴⁹ Of course, this is contrary to what Sumption stated thus arguably contrary to the law. But there is the *obiter* of Briggs of which Harris supports strongly for similar reasons to McKendrick. Harris argues doing away with NOM clauses orally is the more cautious and desirable approach, as it ensures a balance between the parties.³⁵⁰ It also preserves party autonomy as it allows parties to release themselves from the inhibition.³⁵¹ Harris considers that Sumption's view would 'amount to an absurd restriction of party autonomy', especially since the directors of the contracting parties often change.³⁵² However, if the directors often change, then it would be better to keep a written record. This way the future directors of the business would know when, and perhaps why, the NOM clause was dispensed with. Not only does this introduce certainty within businesses, but it may have been the intention of the original directors. This method upholds party autonomy for the old directors and the new ones of each party. The claim that Sumption's view leads to an absurd

³⁴⁵ McKendrick (n 322) 446.

³⁴⁶ *Ibid* 446-447.

³⁴⁷ *Rock* (n 1) 15.

³⁴⁸ The other is the analogies they use to liken NOM clauses to other formalities in contracts. Sumption refers to entire agreement clauses, as discussed, see also *Rock* (n 1) 14; Briggs refers to negotiations subject to contract, *Rock* (n 1) 29.

³⁴⁹ McKendrick (n 322) 437.

³⁵⁰ R Harris, 'MWB: Modifications, Wrangles, and Bypassing' (2018) *Lloyd's Maritime and Commercial Law Quarterly* 441 (*Wrangles*) 445.

³⁵¹ *Ibid*.

³⁵² *Ibid*.

restriction rests on Harris' argument in relation to onerous conditions. He questions what the courts would do when faced with more stringent requirements under a NOM clause.³⁵³ Some stringent requirements could be mitigated by public policy considerations, if for example a variation was required to be signed in blood.³⁵⁴ However, some might require extremely difficult formalities; Harris gives the examples of signing the variation on top of Mount Snowdon, that it be approved by 95 per cent of the parties' shareholders, or that it must be signed on goatskin vellum.³⁵⁵ Nothing could mitigate these requirements, therefore Sumption's view is only persuasive if the formalities required are to be in writing and signed; any other formalities rendered his perspective defective, according to Harris.³⁵⁶ There are issues with this argument.

The examples given are indeed onerous, and even if the original directors had good reason for including them, it would be unreasonable to expect any new directors to follow them too. Departing from it would be extremely difficult and it would greatly inhibit freedom of contract. However, it is unusual for businesses to require such formalities other than for it to be in writing and signed by both parties. This aspect dominates contractual agreements in both formation and variation.³⁵⁷ Harris openly admits Sumption's view would work if not for the onerous conditions that can exist. The better approach for the law then is not to side with Briggs, but instead to adopt a proviso that allows the departure from NOM clauses where its conditions are clearly, and objectively, onerous. This upholds the flexibility of NOM clauses, because the courts can decide on a factual basis what conditions are and are not onerous. It allows the courts to give effect to the genuine and sensible intentions of the parties by assessing what makes business sense. Calnan also recognises that more elaborate conditions, other than the simple one that variations must be in writing and signed, are likely to cause more problems than it solves.³⁵⁸ A court, therefore, should be able to find that a NOM clause can be departed from orally if the written conditions are onerous. Contrary to Harris' critique, Sumption actually recognises this. He states recording a variation in writing is not difficult,

³⁵³ Wrangles (n 350).

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Consider deeds in property contracts, where it is a necessity: Law of Property (Miscellaneous Provisions) Act 1989, s. 2.

³⁵⁸ Calnan (n 311) 489.

except 'in cases where the variation is so complex that no sensible businessman would do anything else.'³⁵⁹ Sumption's approach is best, as Reid-Thomas and Myles recognise the safest approach is to record variations in writing.³⁶⁰

However, it arguably needs clarifying that parties can depart orally if the written conditions are onerous, since Sumption recognised the need for this but did not elaborate on it. That does not merit departing from the current position of the law and siding with Briggs as Harris would suggest. Future lower courts are likely to recognise this in Sumption's judgment. The proviso set out is not the current law, as Sumption did not elaborate on this point: Hence the academic debate. Future courts will perhaps use Briggs' *obiter* to refine the law as suggested. When adopting his *obiter* however, it is submitted that they should emphasise that NOM clauses can only be departed from orally where the conditions are onerous. This keeps the law in line with Sumption's reasoning and avoids re-introducing ambiguity. However, Starr argues this is the final word on NOM clauses.³⁶¹ Even if the courts decide against this and choose to assert NOM clauses with onerous conditions, the law is better off this way since it reaffirms the certainty of them. After all, Sumption states party autonomy justifies them.³⁶² Instead, in these onerous circumstances, parties could rely on promissory estoppel. Thompson captures the crux of the debate. She states that contractual certainty is desirable, but so is a world where oral promises given for consideration cannot be avoided.³⁶³ It is very common for parties to agree to minor variations 'to oil the wheels of commerce'.³⁶⁴ But, ultimately she notes that where two principles collide, certainty will win unless there are rare grounds for estoppel.³⁶⁵ It is submitted any reaffirmation of NOM clauses, or polishing of it to allow departure in face of onerous conditions, upholds certainty. This is why NOM clauses prevailed.

³⁵⁹ *Rock* (n 1) 15.

³⁶⁰ D Reid-Thomas and D Myles, 'Contract variation: does it need to be in writing?' (2018) 29(5) PLC Mag 4-5.

³⁶¹ *Mods* (320) 5-7.

³⁶² *Rock* (n 1) 11.

³⁶³ E Thompson, 'Supreme Court favours certainty over flexibility (and honour?)' (Irwin Mitchell Solicitors, 2018) accessible at <<https://imbusiness.passle.net/post/102exdj/supreme-court-favours-certainty-over-flexibility-and-honour>> last accessed 13 May 2019.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

Promissory Estoppel

It has been seen that NOM clauses can only be removed in writing. However, where parties expressly address its onerous existence, there is scope for it to be removed orally. These are two of the situations in which a NOM clause may be removed. The other concerns where parties make an oral variation unaware of a NOM clause. In this instance, McKendrick argues the NOM clause still applies, because the parties have not exercised their contractual freedoms to remove it.³⁶⁶ Merely acting inconsistently with their contract is not enough to remove the NOM clause agreed to.³⁶⁷ However, McKendrick notes that in some circumstances the parties reliance on the non-compliant oral variation should be legally effective in spite of the NOM clause. 'To refuse to do so would give rise to an unacceptable degree of unfairness'.³⁶⁸ Whilst reliance on estoppel may generate uncertainty, he states there is a balance to be struck between the competing policies of NOM clauses and estoppel.³⁶⁹ Although McKendrick does not refer to a specific estoppel, it is submitted promissory estoppel is the most appropriate; further, it is presumed Sumption is referring to promissory estoppel or estoppel by conduct.³⁷⁰ McKendrick argues the balance struck under the Vienna Convention and UNIDROIT principles is optimal, as it is designed with limits that give effect to parties' reliance on their non-compliant variation.³⁷¹ However, whether promissory estoppel could prevent resorting to a NOM clause was left open by the Supreme Court,³⁷² despite Sumption following what McKendrick states on international law. Sumption only made reference to *Actionstrength* and its stipulations.

In *Actionstrength*, Actionstrength agreed to do work for the first defendant Inglen. When Inglen started to make late payments, Actionstrength threatened to remove its workforce. However, the second defendant, St-Gobain, promised them if they did not remove their workforce, they would ensure Inglen paid the amount due. This agreement was made orally

³⁶⁶ McKendrick (n 322) 447.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ See *MWB* (n 135) and also *Rock* (n 1); see D Sedghi, 'The Supreme Court's decision in *Rock Advertising* is a mixed blessing' (Macfarlanes LLP) accessible at <<https://www.lexology.com/library/detail.aspx?g=482e18dd-d3d5-4894-bb38-11e70002ac3a>> last accessed 12 May 2019.

³⁷¹ McKendrick (n 322) 447.

³⁷² As noted in Farrand and Clarke, *Emmet and Farrand on Title* (Bulletin 2018, 19th edn, Sweet and Maxwell 2018).

and invoked the Statute of Frauds 1677, which required any such variations to be made in writing. For that reason, the House of Lords held estoppel could not be raised, unless two circumstances persisted. The first was that St-Gobain must have been led by the words or conduct of Actionstrength that the promise would be honoured; secondly, ‘there must be something more, such as additional encouragement, inducement or assurance.’³⁷³ This mirrors the typical requirements for promissory estoppel, but it beats around the bush on the need for a detriment. The circumstances they detail seem to indicate the defence succeeds if the relying party was deceived. The requirement for the promise to be believed to be honoured, and for something more like an encouragement, suggests a deliberate attempt by the other party to entice an agreement but to later go against it. St Gobain, however, had done nothing which would foster either of these things.³⁷⁴

Morgan argues the courts should be cautious of estoppel, as its full acceptance would mean many informal variations would be enforced.³⁷⁵ He notes in particular how relying on estoppel through analogy of the *Actionstrength* case should fail, as in that case its use would have been contrary to what was required in statute, therefore the same would be contrary to NOM clauses.³⁷⁶ Morgan notes if estoppel was allowed in a generous manner, many drafters would try to prevent any variation via estoppel.³⁷⁷ It is key then, as Sumption says, that ‘the scope of estoppel cannot be so broad as to destroy the whole advantage of [the] certainty [that comes with NOM clauses.]’³⁷⁸ However, the concern over estoppel might be for naught. Future cases concerning NOM clauses and alleged oral variations will likely contain one party that was severely disadvantaged by relying on the oral variation, whereas the other party’s position would be relatively intact. It follows that the disadvantaged party will most often be the one filing a claim. Assuming most cases pertain to this example, the party who is disadvantaged, due to their reliance on the oral variation, cannot rely on promissory estoppel

³⁷³ *Actionstrength* (n 313) para. 35.

³⁷⁴ *Ibid.*

³⁷⁵ Morgan (n 327) 611

³⁷⁶ *Ibid* 611-612.

³⁷⁷ *Ibid* 612; he provides an example of this, the italics being newly inserted wording: ‘No variation of this Agreement shall be valid or effective, *whether by contract, estoppel, or otherwise*, unless made by instruments in writing signed by the parties to this Agreement, and *action in reliance on any such informal variation shall not estop either party from resiling from it*’.

³⁷⁸ *Rock* (n 1) 16.

for the very fact that they are the one filing a claim. Promissory estoppel can only be used as a defence.³⁷⁹ To get rid of this aspect, is to get rid of the doctrine of consideration.

It seems promissory estoppel will remain as a safeguard according to Purkis and Callaway.³⁸⁰ This is a sensible perspective. They argue there will still be circumstances where English law recognises the commercial need to make decisions quickly and will therefore provide protections via estoppel; however, only if there is the requisite degree of reliance.³⁸¹ The ramifications estoppel could have on NOM clauses undermines it significantly, hence why many treat estoppel with caution. Sumption's reference to *Actionstrength* is unsatisfactory. Harris is correct to state his using of it as a safety valve is unsatisfactory, because it is difficult to see what might suffice for his borrowing of 'something more'³⁸² from *Actionstrength*. What is required for estoppel to trump a NOM clause needs clarification. The first point from *Actionstrength* is a good start, as it pertains to the principle of party autonomy. Sumption leaves the second point wide open. It is submitted, to fill the gap, clarity is required on what degree of reliance is needed. As argued in chapter 4, the doctrine should require the promisee suffers a detriment. *Actionstrength* appears to allude to this requirement, but whether or not it is a definitive requirement is obscure. It is not surprising its effect on NOM clauses is ambiguous: The doctrine itself is filled with ambiguity. Clarity on promissory estoppel is required to fully settle the effectiveness of NOM clauses, however, overall their enforceability is clear.

³⁷⁹ *Combe* (n 17).

³⁸⁰ *Be careful* (n 325) 13.

³⁸¹ *Ibid.*

³⁸² *Rock* (n 1) 16.

Conclusion

*Rock Advertising v MWB Business Exchange Centres*³⁸³ considerably doubts *Foakes v Beer*.³⁸⁴ It was appropriate for it to do so, as clearly there are fundamental issues in the part-payment of debt rule. The Supreme Court felt it was unnecessary and undesirable to deal with *Foakes*, unless it is before an enlarged panel and the decision would be more than *obiter*. Deciphering the conflicting aspects of the law reveals it is moving away from *Foakes* and will settle instead on the practical benefit rule. For *Foakes* to have any future application, the practical benefit rule would have to be overruled, as it is used too often to distinguish from it and *Re Selectmove*.³⁸⁵ It would have been easy for the Supreme Court to overrule the practical benefit rule and the doubt it places on *Foakes*, but it did not. Clearly, the overruling of *Foakes* is preferable. The Supreme Court, understandably, was not comfortable with taking a decision to overrule *Foakes* when it would only have been *obiter*. Perhaps the law is not ready to move on, after all common law decisions seem to be affected by economic considerations and the last recession was in 2008. In the eyes of the law, this is not that far away considering only 10 years had passed since economic crisis in *Foakes*. In *Rock*, only 10 years had passed too. However, since Arden and Kitchin LJ were promoted to Supreme Court judges, the overruling of *Foakes* appears inevitable.³⁸⁶ The next time a case reaches the Supreme Court, with the central issue being a part-payment of a debt, *Foakes* will either be substantially modified and limited or overruled. It is only a matter of when, but the latter is preferred.

Want for the practical benefit rule is evident throughout the law. The concerns of Lord Blackburn and the *obiter* of Denning are prime examples.³⁸⁷ Preference for something other than the part-payment rule was apparent before *Foakes* in *Hughes v Metropolitan Railway Co.*³⁸⁸ Further, Denning stated the fusion of law and equity existed before *Foakes*.³⁸⁹ Whilst the concept of ruling on equity was relatively new to the judges in *Foakes*, since its fusion only came about 10 years earlier in the Supreme Court of Judicature Acts 1873 and 1875, Denning suggests if equity was considered in *Foakes* it would have been decided differently and more

³⁸³ *Rock* (n 1).

³⁸⁴ *Foakes* (n 67).

³⁸⁵ *Selectmove* (n 119).

³⁸⁶ As recognised by Roberts in *Bloodied* (n 81).

³⁸⁷ See *Foakes* (n 67) and *High Trees* (n 16).

³⁸⁸ *Hughes* (n 15).

³⁸⁹ *High Trees* (n 16) 135.

akin to *Hughes*.³⁹⁰ Perhaps Denning is right to hint that *Foakes* was per incuriam through oversight of *Hughes*, but this is mitigated by the fact that the cases had two of the same judges.³⁹¹ Further, *Hughes* concerned house repairs and not debts. *Foakes* might have enshrined the part-payment rule in the law due to its economic desirability at the time. A court ruling favouring debtors in a time of economic recession is unlikely. It could never be challenged directly afterwards, because debtors would be extremely unwilling to go to the Supreme Court, given they are already in bad financial circumstances. *Foakes* only served to discourage them further. Hence, the law has seen several indirect attempts of the lower courts to cast doubt or distinguish from it.³⁹²

Foakes' replacement needs to be much more tenable. *Foakes* should be overruled and contract variations should be valid through the practical benefit rule. To achieve this stability, the courts must balance the interests of debtors and creditors. Debtors should be able to resort to the practical benefit rule, but protection from exploitation will exist for creditors via economic duress. For debtors not rich enough to pursue a (counter-)claim, the courts must provide an extra layer of protection through promissory estoppel. However, to ensure it is not exploited against creditors too, they should assert the need for a detriment that results in inequitable circumstances. They must allow the lower courts room to breathe, by stressing the factual dependency of what constitutes such a detriment and inequity. A future Supreme Court should clarify the practical benefit rule and promissory estoppel would protect debtors and the exploitation of these principles is mitigated by economic duress and the need for a detrimental inequity. The practical benefit rule is the much-needed sword to the shield of promissory estoppel.

Clarity should not stop here. Promissory estoppel and its place next to NOM clauses requires clarification. Academic debate might exist over which approach is to be preferred, but Briggs' perspective was only *obiter* and Sumption's view is the law.³⁹³ There is scope for NOM clauses to be removed orally if its formalities are onerous. He leaves the scope of promissory estoppel unclear. However, by saying it should not be so wide as to destroy the certainty of NOM

³⁹⁰ *Ibid.*

³⁹¹ Lord Blackburn and Lord Selbourne, as he then was.

³⁹² Perfect examples are that of *High Trees* (n 16) and *MWB* (n 135).

³⁹³ His points were agreed to by the other judges.

clauses,³⁹⁴ he paves the way for future cases to explore the circumstances in which estoppel can be relied upon.³⁹⁵ However, this is likely the last we will hear from the Supreme Court on NOM clauses³⁹⁶ and, at least for a long time, on the part-payment rule too. With any luck a future case might be paired with both issues, but it would be one where the consideration point formed the central matter of the case. Then, the Supreme Court can finally resolve the ambiguity surrounding the variation of contracts.

³⁹⁴ *Rock* (n 1).

³⁹⁵ McDonald et al, 'No oral modification clause held to be legally effective' (Mayer Brown, Legal Update 2018) accessible at < https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2018/05/no-oral-modification-clause-legally-effective-uk-s/files/update_no-oral-modification_may18/fileattachment/update_no-oral-modification_may18.pdf> last accessed 13 May 2019, see pg. 2.

³⁹⁶ *Mods* (n 320).

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