ENFORCING PROMISES
Consideration and Intention in the Law of Contract

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“It is thus clear that even at common law, consideration cannot be regarded as the conclusive test of a deliberate mind to contract: whether there is such a mind must always be the decisive and overriding question. In any system of law, consideration may be introduced as evidence of that deliberate mind; but it cannot, even under the common law, be decisive: the only question is whether it can be put on a pedestal as the “sole” test.”

– Lord Wright.¹

¹ Lord Wright “Ought the Doctrine of Consideration to be Abolished from the Common Law ?” (1936) 49 Harv LR 1225 at 1229.
Introduction

The doctrine of consideration is one of the most fiercely debated aspects of the law of contract in Common Law jurisdictions. Consideration emerged during the sixteenth century as an element of actions in assumpsit (breach of promise or undertaking).\(^1\) It has suffered criticism from judges,\(^2\) academics\(^3\) and the English Law Revision Committee\(^4\) alike. But despite its controversial status, it remains an essential requirement for the formation of contracts not in deed form.\(^5\) Through the doctrine of consideration, contract is largely restricted to the realm of bargains involving an exchange of value between two parties. This is not the only possible approach to contract; in fact, it is unique to Common Law systems. Civil law jurisdictions and the mixed legal systems of Scotland and South Africa do not require consideration for contract formation.

The debate surrounding the doctrine of consideration is part of a larger and more fundamental question: which promises should the law enforce? The answer to that question depends on one’s view as to why the law of contract exists, and what it should aim to achieve. An understanding of contract theory is therefore crucial to any evaluation of the consideration requirement. The purpose of contract law generally and, more specifically, the doctrine of consideration, is discussed in chapter one of this paper.

Chapter two addresses the practical implications of the consideration requirement. Perhaps the most easily discernable consequence of the requirement is that purely gratuitous promises are unenforceable unless contained in a deed. This in itself is hugely controversial; some academics argue that all seriously intended undertakings should be legally binding.\(^6\) However, the effects of the doctrine of consideration are not confined to promises ordinarily understood as gratuitous. Some promises commonly made in commercial situations, such as promises to keep an offer open, or to unilaterally alter one’s rights or obligations under an existing contract, do not usually involve consideration in the traditional sense.

\(^1\) Val D Ricks “The Sophisticated Doctrine of Consideration” (2000) 9 GMLR 99 at 102.
\(^2\) E.g. Lord Mansfield (see Pillans & Rose v Van Mierop & Hopkins (1765) 3 Burr 1663) and Lord Wright (see “Ought the Doctrine of Consideration to be Abolished from the Common Law?” (1936) 49 Harv LR 1225).
\(^5\) In New Zealand, the requirements for a deed are set out in s 9 of the Property Law Act 2007. See Chapter Two, Part I(2) for further detail.
\(^6\) E.g. Fried, above n 3.
In order to understand the true impact of the consideration requirement, it is necessary to place consideration in its wider legal context. To that end, chapter two discusses the use of deeds to render gratuitous promises enforceable, and the application of equitable estoppel to provide relief to promisees who have relied on non-binding promises. Chapter three then evaluates the Scottish approach to enforcing promises, in order to demonstrate the feasibility of having a framework of voluntary obligations which does not include a consideration requirement.

The final chapter of this paper recommends the enforcement of all promises made in a manner evidencing intention to be legally bound, regardless of the presence or absence of consideration, on the basis that such promises induce the promisee to reasonably expect performance or legal redress. A strict consideration requirement unjustifiably limits the law of contract to promises given for value, which can frustrate the legitimate intentions and expectations of the parties. Whether a theoretical or a pragmatic analysis is adopted, the Common Law’s insistence on consideration as a pre-requisite for contract formation requires reform.
Chapter One: Consideration and Contract Theory

PART I: A THEORY OF CONTRACT

Because any evaluation of which promises ought to be enforced is influenced by one’s assumptions about the purpose of contract law, it is necessary to briefly explain the theory of contract on which the remainder of this paper will proceed. It must be emphasised that the following discussion is not intended to be a comprehensive analysis of contract theories.

1. Promise

A promise is the communication of an intention to undertake or assume an obligation.¹ This paper will analyse contract in terms of promise.² That is not to say that all promises should be legally enforceable. A contract involves a promise or promises made in a manner which the law recognises as sufficient to undertake a legally binding obligation.³ It must also be stressed that it is not suggested contracts ought to be enforced simply because they involve promises. The mere act of promising may create a moral obligation to keep the promise,⁴ but some further justification is required for why the promise ought to be enforceable as a contract.⁵

2. Reasonable Expectation

One theory, propounded by Adam Smith and endorsed by many commentators and judges, is that contracts should be enforced because they induce reasonable expectations.⁶ This theory is consistent with the remedies for breach of contract. The

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² It is important to note that the view that contract is based on promise, while being the orthodox approach (Smith, ibid, at 56), is by no means universally accepted. It has been suggested that contractual obligations are imposed to prevent us from harming others whom we induce to rely on us (see, for example, Lon Fuller and William Perdue “The Reliance Interest in Contract Damages” (1936) 46 Yale L J 52), or that a contract is a transfer of rights (Peter Benson, “The Unity of Contract Law” in Peter Benson (ed) The Theory of Contract Law: New Essays (Cambridge University Press, Cambridge, 2001)).
³ Coote “The Essence of Contract: Part II”, above n 1, at 195. This is the approach adopted in the Restatement (Second) of Contracts, § 1, which defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”
⁴ Because the promisor chooses to invoke a social convention the function of which is to give the promisee an expectation of performance (Charles Fried Contract as Promise: A Theory of Contractual Obligation (Harvard University Press, Cambridge, 1981) at 16).
ordinary remedy is damages calculated according to the expectation measure, or specific performance if monetary damages are inadequate. Essentially, the promisor must perform the promise or compensate the promisee by paying the monetary equivalent of performance. Thus contract law protects the promisee’s reasonable expectation of performance. Expectation is objectively assessed. The court will consider what a reasonable person in the promisee’s position would have expected to obtain as a result of the promise. A promisor is not required to fulfill unreasonable expectations.

One possible justification for protecting reasonable expectations is psychological. The promisor, by making the promise, gives the promisee hope that it will be performed. If the promisor fails to perform, it causes a sense of injury or deprivation in the promisee. While this reasoning may be consistent with our sense of morality, it provides no basis for turning a moral obligation to perform into a legal one. There are many circumstances in which someone causes disappointment to another, but the law does not (and should not) intervene. For example, if I promise to meet you for coffee, you may have a reasonable expectation that I will do so. My failure to show up may cause you a sense of deprivation or injury. But it would be absurd if casual, social promises of this nature were legally binding.

The better view is that the loss caused to the promisee by the promisor’s breach is not merely psychological. When the promisor undertakes a legal obligation, this confers on the promisee a right to have the promise performed. In economic terms, the promisee has gained an asset in the form of a guarantee of performance or legal redress. If the promise is not performed, the promisee is deprived of a real right and should be compensated for that loss. However, this proposition begs the question of how to determine when a promisor undertakes a legal obligation, as opposed to a moral one. A promise which is only morally binding cannot give the promisee a legally enforceable right to performance or compensation.

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7 *Coxhead v Newmans Tours* (1993) 6 TCLR 1 at 13 (CA).

8 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 at [94].

9 Smith, above n 1, at 59-60.

10 Steyn, above n 6, at 434.

11 Fuller and Perdue, above n 2, at 57.


13 Smith, above n 1, at 72.

14 Note that this is different to the transfer theory advanced by Benson (above n 2, at 132-137), which asserts that when a contract is made the promisor transfers to the promisee a proprietary right in the actual thing promised. This theory has been convincingly refuted by Smith (above n 1, at 101-102). Except in cases of transfers of specific objects, the contracting party does not own the ‘thing’ to be transferred prior to contracting.
Lord Steyn, writing extra-judicially, has remarked that giving effect to the reasonable expectations of the parties is “the central objective of the law of contract.”15 While protecting the promisee’s reasonable expectations is an important objective, the mere fact that a promise produces corresponding expectations does not explain why it should be enforceable as a contract. If reasonable expectation was the sole basis of contract, then virtually all promises would be contracts. To the contrary, many promises give rise to a reasonable expectation of performance, but neither party expects or intends that they should be legally binding.

3. Intention

Fried argues that it is necessary to enforce promises because “respect for others as free and rational requires taking seriously their capacity to determine their own values.”16 If promisors are permitted to go back on their promises without being held accountable, their choice to invoke the social convention of promising is not taken seriously. As autonomous individuals, we should be entitled to undertake binding obligations if we desire. This is a variation on the will theory, which holds that contracts are inherently worthy of respect because they are an expression of human will or intention.17

There are several problems with this theory. First, it still fails to explain why only some promises are legally binding. If promises were enforced simply because they reflect the free and rational choices of autonomous individuals, then all promises made free of duress or undue influence would be enforceable. What distinguishes contractual obligations from mere promises is that the parties intend not only that the promise be performed, but that if it is not, the promisee can obtain legal redress. Thus, to form a contract, the promisor must intend to undertake a legal obligation.18 It would generally be unfair to force a promisor to perform or compensate the promisee for a casual promise which was never intended or understood to be legally binding.

However, a theory which justifies contractual obligation solely on the basis that it reflects the intention of the promisor to enter into a legal obligation is also

15 Steyn, above n 6, at 434.
16 Fried, above n 4, at 20.
18 See Balfour v Balfour [1919] 2 KB 571, where the English Court of Appeal held that the mere existence of an agreement between husband and wife, in the form of a promise supported by consideration, will not ordinarily create a contract because the parties “did not intend that [the promise] should be attended by legal consequences” (per Atkin LJ at 578-579).
inadequate, as it entails a subjective theory of intent.\textsuperscript{19} The result would be an entirely one-sided theory of individual autonomy.\textsuperscript{20} The promisor could outwardly manifest an intention to be legally bound, thereby inducing the promisee to reasonably expect performance or a legal remedy, but the promisor would not be bound if that was not his subjective intention. The promisee would have no way of knowing whether he had a right to performance or not. This is why intention to be legally bound must be ascertained objectively from conduct of the parties.\textsuperscript{21} Whether a promisor subjectively intended to be bound is not pertinent, just as it is irrelevant whether the promisee subjectively expected the promisor to perform.

4. Intention and Corresponding Expectation

The preceding discussion has shown that contract cannot be justified solely on the basis of the promisor’s exercise of will, nor solely on basis of the promisee’s reasonable expectations. It is submitted that the interaction of the intention of the promisor and the expectation of the promisee converts a promise into a contractual obligation. Both must relate to the legal enforceability of the promise as opposed to its moral force. The promisor must conduct himself in a manner that would lead a reasonable person in the promisee’s position to believe that he intended to be legally bound. The promise will then have contractual force because it would induce a reasonable promisee to expect performance or equivalent compensation. In such circumstances, it would be unfair to permit the promisor to renege. So, while the central objective of contract law is to protect the reasonable expectations of the promisee, the promisee’s expectations will only be ‘reasonable’ if the promisor has induced the promisee to believe that he is undertaking a legal obligation. The promisor’s objectively manifested intention corresponds with the promisee’s reasonable expectation.

In an executory bilateral contract, each party will both intend to undertake a legal obligation and reasonably expect that the other party will perform his obligation. But this theory of contractual obligations is equally applicable to unilateral and gratuitous promises.\textsuperscript{22} In such cases only the promisor will have an intention to

\textsuperscript{20}Ibid.
\textsuperscript{22}At present such promises are not generally enforceable at Common Law (unless contained in a deed or amounting to a unilateral contract), because of the consideration requirement, which is discussed in Part II of this chapter.
undertake a legal obligation, and only the promisee will have a reasonable expectation of performance. Those promises which are currently enforced as unilateral contracts would also fall within this category.

This theory explains why only promises intended to be legally binding are enforced, while also accounting for the fact that intention must be objectively assessed. It achieves the optimum balance between the interests of the parties, by ensuring that promisees are not deprived of reasonably expected benefits, while also protecting promisors from liability to compensate for illegitimate expectations.

5. Conclusion

The law should recognise a promise as a contract when a reasonable person in the promisee’s position would expect performance or equivalent compensation. This will be so when the promisor has outwardly manifested an intention to undertake a legal obligation. To the extent that the law imposes further restrictions on the enforceability of promises, the freedom of autonomous individuals to contract is restricted. The intentions of the parties will be frustrated if what they perceive to be a legally binding obligation is unenforceable. The imposition of any additional requirement for contract formation must therefore have a strong justification to outweigh its potentially adverse effects.

PART II: THE DOCTRINE OF CONSIDERATION

1. Defining Consideration

For a promise to be enforceable as a contract in Common Law jurisdictions, it must either be contained in a deed or supported by consideration. Lord Dunedin defined consideration in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*:

An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

This notion of consideration as the price paid for a promise has been adopted in New Zealand. Consideration may take the form of a benefit conferred on the promisor, a detriment incurred by the promisee at the promisor’s request, or a promise

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23 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 346.
24 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 855.
25 *Rothmans of Paul Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 523 at 328; *Attorney-General for England and Wales v R*, above n 8, at [39].
to confer a benefit or suffer a detriment.\textsuperscript{26} For example, in an ordinary contract of sale, the consideration given for the promise to transfer title to the property can be either a promise to pay the purchase price, or actual payment. The consideration must be given in response to the promise,\textsuperscript{27} or, if given prior to the promise, at the promisor’s request and in such a manner that it can be reasonably understood as forming part of the same transaction.\textsuperscript{28} A new promise that is not supported by new consideration is unenforceable; past consideration is insufficient.\textsuperscript{29}

Through the doctrine of consideration, the Common Law purportedly requires a “mutual exchange”\textsuperscript{30} to form a contract. This reflects the fact that the Common Law models its concept of contract on commercial transactions, in contrast to legal systems such as France and Scotland, which have a broader understanding of the place of contract in society.\textsuperscript{31} The Common Law courts will not, however, inquire into the adequacy of the consideration.\textsuperscript{32} The ‘exchange’ need not be of equivalents. In Mountford v Scott,\textsuperscript{33} an option to purchase land granted in return for payment of £1 was held to be binding, although “the £1 consideration for Mr. Scott's option was merely a token payment to clinch the bargain and did not in any real sense represent a purchase price for the grant of the option.”\textsuperscript{34} The New Zealand Court of Appeal in Melmerley Investments Ltd v McGarry confirmed that “a Court is concerned only with the presence of consideration and does not make an assessment of the comparative value of the acts or promises of the parties towards one another.”\textsuperscript{35} Nominal consideration is sufficient.\textsuperscript{36}

2. The Purpose of Consideration

a) The Bargain Theory

The orthodox view is that the consideration requirement recognises that the law of contract in Common Law jurisdictions is only concerned with bargains.\textsuperscript{37} The
bargain theory is particularly prevalent in the United States, where the Restatement (Second) of Contracts specifies that consideration must be “bargained for”, that is, “sought by the promisor in exchange for his promise and… given by the promisee in exchange for that promise.” The consideration and the promise must be mutually inducing.

Prima facie, it might appear that the bargain theory is an accurate description of our current law. But closer inspection reveals that our law of contract is not concerned only with bargains. Some contracts that are generally accepted as enforceable do not involve any true exchange or mutual inducement. This point is illustrated by several examples. The first is the unilateral contract. Although the act which constitutes consideration is requested by the promisor, the promise is made with no guarantee that the requested act will be performed. It cannot be said that the promise is made in exchange for the act or is induced by it. The promise is made in the hope that the act will be performed, but this is different to being induced by the performance of the act itself.

Second, the sufficiency of nominal consideration is also inconsistent with the bargain theory. In a strict sense, something is still given for the promise. But again, the promise is not induced by the exchange of nominal consideration. If the law permitted it, the promise would be made without any consideration being given in return. The consideration is not ‘bargained for’ in any substantive sense; it is simply a token payment by the promisee to make what is essentially a gratuitous promise enforceable. Benson argues that the nominal consideration rule is a natural consequence of the reluctance of the courts to inquire into the adequacy of consideration. That may be true, but the practical result of the sufficiency of nominal consideration is that the courts do not insist on a substantive bargain. If the basis of contract is bargain, it is artificial to include in that category an otherwise gratuitous promise made enforceable by the payment of nominal consideration. Consequently, any potential justification for restricting contract to bargains is watered down by the difficulty of adhering to the bargain theory in practice.

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38 Restatement (Second) of Contracts, § 71.
39 Ibid, § 71, comment b.
40 Smith, above n 1, at 229.
43 Benson, above n 2, at 167.
Third, the fact that gratuitous promises are enforceable in New Zealand if executed in deed form further demonstrates the inadequacy of the bargain theory.\textsuperscript{44} If the law of contract was only concerned with bargains, gratuitous promises would never be enforceable. The recognition of binding gratuitous promises in deed form suggests that the concern with gratuitous promises is not that they involve no exchange, but that they require certain safeguards to ensure deliberation and intention to be bound.

Accordingly, the bargain theory is inconsistent with the current law of contract in New Zealand. But the more important question for present purposes is whether the law of contract \textit{should} be restricted to bargains. What, then, are the possible justifications for the bargain theory? One argument is that, in economic terms, promises which do not involve any exchange are not worth enforcing. Gratuitous promises simply redistribute the wealth of society rather than increasing it.\textsuperscript{45} Fuller states, “[w]hile an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is, in Bufnoir's words, a 'sterile transmission.'”\textsuperscript{46} Most commentators now agree that this is not the case.\textsuperscript{47} When someone makes a gratuitous promise, they must value what they are getting (the satisfaction of benefiting another) more than what they are giving up. Otherwise they would not make the promise.\textsuperscript{48} Therefore gratuitous promises, like bargains, cause a net increase in social welfare.\textsuperscript{49} Both parties are better off after the promise is made.\textsuperscript{50} But the transaction is not a bargain, because the benefit to the promisor is not conferred on him by the promisee in exchange for the promise.

This conclusion is reinforced by the fact that if a promise to make a future gift is binding, it is more valuable to the promisee and facilitates beneficial reliance.\textsuperscript{51} Imagine, for example, that a grandfather promises to pay his grandson a $200 allowance per week while he studies at university. If the promise is unenforceable, the grandson has no guarantee that he will actually receive the money. He may be reluctant to enrol at university in case the payments should cease and he should end up in economic strife. If the grandfather can make his promise legally binding, it will be worth more to the grandson. He will not hesitate to go to university, because his

\textsuperscript{44} Property Law Act 2007, s 9.
\textsuperscript{45} Smith, above n 1, at 222.
\textsuperscript{46} Lon Fuller “Consideration and Form” 41 Colum L Rev 799 (1941) at 815.
\textsuperscript{47} Smith, above n 1, at 222-223; Melvin Aron Eisenberg “The Principles of Consideration” in Richard Craswell & Alan Schwartz (eds) \textit{Foundations of Contract Law} (Oxford University Press, Oxford, 1994) at 230; Fried, above n 4, at 37; Perillo and Hadjiyannakis Bender, above n 6, at 16-17.
\textsuperscript{49} Perillo and Hadjiyannakis Bender, above n 6, at 16-17; \textit{Ibid}.
\textsuperscript{50} Smith, above n 1, at 222-223; Eisenberg, above n 47, at 230.
\textsuperscript{51} Posner, above n 48, at 412.
grandfather is more likely to continue making payments, and, if he does not, the grandson will be entitled to legal redress. Permitting promisors to make binding gratuitous promises therefore facilitates future planning. The objection that gratuitous promises are economically ‘sterile’ is unmeritorious.

Another possible argument in favour of the bargain theory is that gratuitous promises are usually trivial and made in social or domestic contexts. It would not be economically viable for the courts to determine small scale disputes, and family relations may deteriorate if arrangements previously based on trust and mutual benefit were able to be sued upon. However, there are promises not involving bargains which are not trivial and not social or domestic in nature. Conversely, bargains may involve such trivial values that it is not economically beneficial for the courts to enforce them, or may be made in social or family situations.

In any case, where a gratuitous promise is trivial in nature, the promisee is unlikely to seek to enforce it given the high costs of litigation. In addition, it is doubtful that in such cases the promisor will have manifested an intention to be legally bound. The second point is also true of social and domestic arrangements. Even without any consideration requirement, gratuitous promises would only be enforceable if the promisee could show that the promisor manifested an intention to undertake a legal obligation. In light of this, there is no justification for refusing to enforce promises made in a social or domestic setting simply because they do not involve bargains. The argument that enforcing such agreements will diminish their inherent value as arrangements based on trust and shared interest does not apply where it is clear that the parties never viewed the agreement that way in the first place.

Given that gratuitous promises are not economically ‘sterile’, and trivial or social promises would only be enforceable upon proof of intention to be bound, the bargain theory is inadequate not only to describe our current law, but also as a theory to explain which promises should be enforced as contracts.

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52 Posner, above n 48, at 417.
53 Ibid at 416-417.
54 Smith, above n 1, at 214.
55 See Chapter Two, Part I(1) for some examples.
56 Posner, above n 48, at 417.
57 See Chapter 4, Part II(3), for a discussion of how intention to create legal relations can be proved.
58 Smith, above n 1, at 214-215.
b) Consideration as a Formality

In 1765, Lord Mansfield already viewed consideration as no more than evidence that the parties intended to be bound, and thought it was not necessary in contracts reduced to writing or commercial in nature.\(^{59}\) This approach was overruled by the House of Lords in *Rann v Hughes*.\(^{60}\) However, two recent New Zealand Court of Appeal cases suggest a similar view of consideration as a formal requirement. In *Antons Trawling Co Ltd v Smith*, it was stated, “[t]he importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself.”\(^{61}\) Similarly, in *Melmerley Investments v McGarry*,\(^{62}\) the Court reproduced the following passage from *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC (The “Alev”)* with apparent approval:\(^{63}\)

> Ultimately the question of consideration is a formality as is the use of a seal or the agreement to give a peppercorn. Now that there is a properly developed doctrine of the avoidance of contracts on the grounds of economic duress, there is no warrant for the Court to fail to recognize the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.

The Court referred to this quote in the context of finding that nominal consideration is sufficient to support a contract. As discussed above, the sufficiency of nominal consideration (which does not reflect a substantive bargain) indicates that the purpose of consideration is not to ensure that only bargains are enforced as contracts. Nominal consideration is simply a formality.\(^{64}\) Since the courts do not distinguish between nominal consideration and ‘real’ consideration (except in the United States),\(^{65}\) this suggests that the function of consideration generally is simply to act as evidence of intention to be bound. In New Zealand, the enforceability of gratuitous promises contained in a deed under s 9 of the Property Law Act 2007 supports this conclusion. Neither nominal consideration nor deeds fulfill any substantive function,\(^{66}\) yet both are evidently viewed by the courts and legislature as adequate substitutes for a substantive exchange of value.

\(^{59}\) *Pillans v Van Mierop* (1765) 3 Burr 1663 at 1669.

\(^{60}\) *Rann v Hughes* (1778) 7 TR 350.

\(^{61}\) *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 at [93].

\(^{62}\) *Melmerley Investments v McGarry*, above n 35, at [21].

\(^{63}\) *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC (The “Alev”)* [1989] 1 Lloyd’s LR 139 at 147 per Hobhouse J.

\(^{64}\) MacDougall, above n 41, at 267-268.

\(^{65}\) Restatement (Second) of Contracts, § 71, comment b.

\(^{66}\) Smith, above n 1, at 217.
It must be asked, however, whether consideration actually fulfills a formal function. Legal formalities can serve three functions. First, they may provide evidence of the content of an agreement or promise (the evidentiary function). Second, a formality can act as a cautionary measure. If a promisor is required to do something more than simply make an oral promise (such as signing a document) before he will be bound, it is more likely that he will understand the seriousness of the obligation he is about to undertake. Finally, a formal requirement fulfills a channeling function, by showing that the parties intended the promise or agreement to have legal consequences. In other words, it evidences the intention of the parties to be bound.

Consideration does fulfill the channeling and cautionary functions in some situations. For example, where nominal consideration is provided to make an otherwise gratuitous promise a contract, it shows that the parties intend the promise to be binding. It may also to be cautionary; if the parties have gone through the effort of providing for nominal consideration, they have probably thought about the arrangement more than would be the case if the promise was made impulsively. However, for a number of reasons, the current approach of the courts is incompatible with the theory that the purpose of consideration is entirely formal. First, consideration does not always fulfill a formal function. It does not provide conclusive evidence of intention to be bound; people often exchange informal promises or acts impulsively or without intending to enter into a contract.

Second, consideration is required for all contracts not under seal. But it is not clear that all promises require the protection afforded by formalities. Some already satisfy the functions of form to some extent due to the nature of the promise. For example, a promise made by one commercial party to another is likely to be made with deliberation, often after some negotiation between the parties. In such cases the disadvantages of having a formal requirement, namely the frustration of the parties’ intention to be bound if the formal requirement is not complied with (because the parties are not aware of the formal requirements, or an error is made), may outweigh any benefits.

67 Fuller, above n 46, at 800-801; Smith, above n 1, at 210.
68 Fuller, above n 46, at 800; Smith, above n 1, at 210.
69 Ibid.
70 Fuller, above n 46, at 801; Smith, above n 1, at 210.
71 Mindy Chen-Wishart “Consideration and Serious Intention” [2009] SJLS 434 at 441. See, for example, Jones v Padavation [1969] 1 WLR 328.
72 Smith, above n 1, at 211.
73 Smith, above n 1, at 211.
Finally, if consideration is only relevant as evidence of intention to be bound, other forms of evidence should also suffice. This was recognised by the English Law Revision Committee in its 1937 report, where it recommended that consideration should not be required if the promise is in writing and that amounts to adequate evidence of intent.\textsuperscript{74} But this is not reflected in our current law. Contracts for the sale of land are required by statute to be recorded in writing,\textsuperscript{75} and yet there is no authority to the effect that they do not require consideration. It would be appropriate, if consideration is abolished as a separate requirement for contract formation, to retain it as one form of evidence that the parties intended to be bound. But any formal function that consideration fulfills cannot explain its application as a necessary requirement for all contracts.

c) The Realist Interpretation

Atiyah suggests that consideration originally developed, and is still best understood, as a requirement that there be a ‘reason’ to enforce a contract.\textsuperscript{76} The problem with this view is that it provides no guidance as to what ‘reasons’ suffice to enforce a contract, a matter on which judges’ opinions legitimately differ. As Smith points out, “[t]he rule’s ultimate purpose, in the realist view, is to function as a residual category; it allows judges to rely on reasons that have not been, and in some cases, arguably cannot be, incorporated explicitly into the law.”\textsuperscript{77} If judges were permitted to enforce whichever promises they deemed worthy of enforcement, the result would be a complete lack of certainty.

In any case, while historically it may be true that consideration developed as a mechanism for requiring a good reason for enforcement,\textsuperscript{78} it has now existed for so long that judges are not free to enforce a contract whenever they feel there is good reason to do so. Precedent will often dictate a particular result. If it can be shown that the consideration requirement as currently applied does not produce fair results, then it can no longer be defended on the basis that it allows the courts to enforce contracts where there is good reason to do so. Whether this is the case will be assessed in chapter two.

\textsuperscript{74} English Law Revision Committee, above n 42, at [29] – [30].
\textsuperscript{75} Property Law Act 2007, s 24.
\textsuperscript{77} Smith, above n 1, at 231.
\textsuperscript{78} See Val D Ricks “The Sophisticated Doctrine of Consideration” (2001) 9 GMLR 99 for an analysis of the doctrine of consideration’s historical development from assumpsit. Ricks argues that consideration was simply one reason to enforce a promise; a sufficient but not always a necessary ground for an action on a promise (at 141-142).
PART III: CONCLUSION

In this chapter it has been argued that the law of contract aims to protect the reasonable expectations of promisees, insofar as they correspond with the objectively manifested intention of the promisor to be legally bound. If this is true, there must be a strong justification for any additional requirement for contract formation beyond intention to be bound. The consideration requirement does not have a strong justification. Neither the bargain theory nor the formal function of consideration provide an adequate basis for its continued application as an essential requirement for contract formation. The next step is to consider whether the consideration requirement produces unfair results in practice. If it does, given its lack of principled basis, it should be abolished as a necessary element of a valid contract.
Chapter Two: Promises in New Zealand Law

PART I: ENFORCING PROMISES AS CONTRACTS

1. Consideration in Practice

The previous chapter discussed the theoretical implications of the doctrine of consideration. This section will examine how the courts currently apply the doctrine, to determine whether its continued existence, though theoretically incoherent, can be justified on the basis that the courts reach fair results in practice. The following discussion focuses on gratuitous promises, firm offers and contract modifications. These are just some examples of promises which may lack consideration, but should give the reader some idea of the practical problems presented by the doctrine.

a) Gratuitous Promises

One consequence of the consideration requirement is that gratuitous promises are unenforceable unless contained in a deed. In some sense, all promises which are not supported by consideration may be viewed as gratuitous. However, here ‘gratuitous’ will be used to refer to promises made for purely altruistic motives, such as a promise to make a gift. Unlike in French law, where a donor’s intention to make a gift is sufficient ‘cause’ to support a contract, at Common Law the promisor’s altruistic motives are not consideration.

This point is illustrated by \textit{Chambers v Commissioner of Stamp Duties}. The plaintiff’s mother held a mortgage over his property. She attempted to forgive some of the interest owing over a number of years, recording each forgiveness in writing. Blair J held that, although the mother had clearly intended to forgive the debt, that intention had not been carried out in law. A gift can only be made by deed or actual delivery. Though the forgiveness was recorded in writing, it was not a deed, and the

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1 Some other examples which are not discussed here include guarantees of existing debt (see \textit{Astley Industrial Trust Ltd v Grimston Electric Tools Ltd} (1965) 109 SJ 149), requirements contracts and promises made in return for past consideration.

2 This is in contrast to promises which are not supported by consideration but are collateral to an exchange (e.g. a firm offer or variation of one party’s rights or obligations under an existing contract). Such promises are not ‘gratuitous’ in the sense of being made for altruistic motives. They are generally made in the hope of self-benefit. For example, a firm offer is made in the hope of eventually securing a contract.


4 \textit{Thomas v Thomas} (1842) 114 ER 330 at 334.

5 \textit{Chambers v Commissioner of Stamp Duties} [1943] NZLR 504.

6 \textit{Ibid}, at 521.
thing being gifted (a chose in action) was not capable of delivery. Blair J’s finding was upheld in the Court of Appeal. There was no evidence of any “bargain” for good consideration between the mother and son. The Court confirmed that “a mere intention to forgive, which remains in an unperfected state, is, in itself, of no effect either at law or in equity.”  

There are few recent examples of promisees seeking to enforce gratuitous promises as contracts. This is not surprising, given that consideration has been required to render a promise enforceable as a contract since the sixteenth century. Lawyers realise that there is little point in making a claim in contract where the promise is purely gratuitous, so if the matter is taken to court at all, equitable estoppel is pleaded. But it is clear that purely gratuitous promises remain unenforceable in contract unless contained in a deed.

In chapter one, it was established that there is no good reason, in economic terms, not to enforce gratuitous promises. In addition, if contract is based on the objectively manifested intention of the promisor to be bound and the reasonable expectations induced by the promise, then gratuitous promises are as deserving of enforcement as onerous promises. The effect of the consideration requirement in Chambers was to defeat both the intention of the promisor and the expectation of the promisee. Provided the court is satisfied a promisor did intend to be bound, that intention should be upheld. To the extent that the doctrine of consideration prevents this from occurring, it runs contrary to the theory of contract set out in chapter one.

b) Firm Offers

In addition to gratuitous promises made for purely altruistic motives, there are a number of commercially valuable arrangements which are collateral to an exchange, but do not ordinarily involve consideration. One example is a promise to keep an offer open for a specified period. Although the promisee may spend considerable

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7 Chambers v Commissioner of Stamp Duties, above n 5, at 521.
8 Ibid, at 527.
9 Ibid, at 530.
11 See Part II of this chapter.
12 Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1 at 19: “A gratuitous promise, pure and simple, remains unenforceable unless given under seal.”
13 See Chapter One, Part II(2)(a).
14 See Chapter One, Part I(4).
15 This aspect of consideration is alleviated to some extent by the availability of relief through the doctrine of equitable estoppel (discussed in Part II of this chapter). However, as will be seen, any such relief differs from the contractual enforcement of promises in material respects.
16 Others include contract variations (discussed below in Part I(1)(c)), requirements contracts, and guarantees of existing debt.
time and expense in reliance on the promise, unless some consideration is given by
the promisee or the promise is contained in a deed, it will not be enforceable. 17

In Dickinson v Dodds, Mr Dodds promised to keep an offer to sell property to
Mr Dickinson open until Friday at 9 am. He proceeded to sell the property to a third
party before the offer had expired. The Court held that the promise was
unenforceable because Mr Dickinson gave no consideration for it. 18 While both
parties probably thought that the offer could not be withdrawn, it was “one of the
clearest principles of law, that this promise, being a mere nudum pactum, was not
binding, and that at any moment before a complete acceptance by Dickinson of the
offer, Dodds was as free as Dickinson himself.” 19 In New Zealand, the Court of
Appeal 20 has cited with approval a similar passage from Issacs J’s judgment in
Goldsbrough, Mort and Co Ltd v Quinn, 21 to the effect that an offer to sell on certain
terms within a certain time is nudum pactum if not supported by valuable
consideration, and can be withdrawn at any time.

Recent case law does not reveal any real problem with the unenforceability of
bare promises to keep offers open. In order to create an enforceable option, the
offeror makes a promise “framed as a contract, supported by consideration, to keep
the offer open until the date prescribed.” 22 Several recent New Zealand cases
involved binding options supported by nominal consideration of $1. 23 While the
unenforceability of bare promises to keep an offer open no longer features
significantly in case law, it is still undesirable. One can easily imagine circumstances
in which a promisor might wish to bind himself to an offer, but fails to do so because
neither party is aware that consideration is required to create an enforceable option
contract. It will not be until something goes wrong, and legal advice is sought, that
the parties will discover the firm offer was not binding. Any possibility that the
intentions of the parties will be defeated in this manner should be eliminated.

The value of enforcing firm offers is made clear by the fact that, although they
do not directly involve any exchange, even some proponents of the bargain theory
support their enforceability. In the United States, despite the general emphasis on

17 English Law Revision Committee, The Statute of Frauds and the Doctrine of Consideration
(Cmd 5449, 1937) at [24], as published in (1937) 15 Can Bar Rev 585.
18 Dickinson v Dodds (1875-76) LR 2 Ch D 463 at 472. See also Bristol Cardiff & Swansea Aerated
Bread Co v Maggs (1890) LR 44 Ch D 616 at 625 to similar effect.
19 Dickinson v Dodds, above n 18, at 472.
20 Reporoa Stores Ltd v Treloar [1958] NZLR 177 at 207.
21 Goldsborough, Mort and Co Ltd v Quinn (1910) 10 CLR 674.
22 Attorney-General v Whangarei District Council (2005) 6 NZCPR 561 at [6].
23 Ibid; Gulf Corporation Ltd v Gulf Harbour Investments Ltd [2006] 1 NZLR 21.
bargains, the Uniform Commercial Code provides that a written, signed offer by a merchant to buy or sell goods stated to be open for a specified period is enforceable without consideration. Because a promise to keep an offer open encourages the promisee to consider the offer, it increases the likelihood that an exchange will eventually result. Thus even if it is argued that purely gratuitous promises are economically "sterile", the same cannot be said of firm offers. In this context at least, the only useful function of the consideration requirement is to provide evidence that the promisor intended to be bound by the promise.

c) Contract Modifications and the Pre-Existing Duty Rule

Another example of a promise collateral to an exchange is a modification of one party’s rights or obligations under an existing contract. Such promises do not involve any consideration in the traditional sense, and until relatively recently were unenforceable. The English case of Stilk v Myrick concerned a voyage from London to the Baltic, during which two crew members deserted. The captain promised the remaining crew that he would split the wages of the deserters between them if they would work the ship back to London. Upon return to London the extra wages were not paid, and the crew sued to recover them. Lord Ellenborough held that the captain’s promise was unenforceable, as the crew members were already bound under their employment contract to do all that they could to bring the ship safely back to London. No new consideration was given for the promise. Stilk v Myrick was applied in New Zealand in Cook Islands Shipping Co Ltd v Colson Builders.

The same rationale underlies the rule (which originated in Pinnel’s Case and was confirmed in Foakes v Beer) that the acceptance by a creditor of a lesser sum in satisfaction of a whole debt is unenforceable. The debtor has simply partially performed his existing obligation to pay the debt, so there is no new legal benefit to the debtor. This principle has also been accepted in New Zealand. However, the

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25 Uniform Commercial Code (US), § 2-205.
26 Eisenberg, above n 24, at 227.
27 For reasons explained in Chapter One, Part II(2)(a), this argument is unconvincing.
28 Stilk v Myrick (1809) 2 Campbell 317.
29 Ibid at 319-320.
31 Pinnel’s Case (1602) 5 Co Rep 117.
32 Foakes v Beer (1883-84) LR 9 App Cas 605.
33 Ibid at 612-613, 630.
34 Ibid at 629.
harshness of the rule is reduced to some extent by s 92 of the Judicature Act 1908, which provides that receipt of part payment of a debt in satisfaction of the whole will be valid if acknowledged by the creditor in writing. In addition to the statutory exception, Foakes v Beer does not apply if there is a genuine dispute as to the amount owed, if the part payment is made early, or if something other than money is given in addition to the part payment.

The position regarding contract modifications was altered by the decision of the English Court of Appeal in Williams v Roffey Bros & Nicholls (Contractors) Ltd. The defendant engaged the plaintiff as a subcontractor to undertake carpentry work. The original price agreed on was too low, and the plaintiff ran into financial difficulty before the job was finished. In an effort to avoid incurring a penalty for late completion under the main contract, the defendant agreed to pay the plaintiff an additional sum to complete the work. Under the pre-existing duty rule in Stilk v Myrick, the promise would not have been binding; the subcontractor was not agreeing to do anything more in exchange for the additional payment than he was already required to do. But the Court held that if the promisor in practice obtains a benefit or obviates a disbenefit, that will be sufficient consideration. While the Court maintained that Stilk v Myrick is still good law where a promise is wholly gratuitous, it concluded that a more flexible approach to consideration is now appropriate.

In New Zealand, a number of High Court decisions have applied the practical benefit approach, and it has been endorsed by the Court of Appeal and Privy Council in Attorney-General for England and Wales v R. However, there are still instances of contract variations being held unenforceable for lack of consideration. In Tupe v Tupe, the vendor under an agreement for sale and purchase agreed in writing to allow the purchasers additional time to obtain finance. Before the additional period had expired, the vendor terminated the agreement on the basis that the purchaser had failed to satisfy the finance condition. Associate Judge Dooge held that the variation

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36 Homeguard Products (NZ) Ltd v Kiwi Packaging Ltd [1981] 2 NZLR 322 at 327; H B F Dalgety Ltd v Morton, above n 35, at 413.
37 Homeguard Products (NZ) Ltd v Kiwi Packaging Ltd, above n 36, at 326; Foakes v Beer, above n 32, at 615.
38 Ibid.
39 Williams v Roffey Bros, above n 12.
40 Ibid, at 15-16.
41 Ibid, at 13-14, 18-19.
43 Attorney-General for England and Wales v R [2002] 2 NZLR 91 at [51].
44 R v Attorney-General for England and Wales [2004] 2 NZLR 577 at [32].
was unenforceable, because the purchasers gave no consideration for the vendor’s promise to extend the time for fulfillment of the condition. His Honour did not consider whether there was any practical benefit accruing to the vendor from the grant of additional time.

Notwithstanding the decision in Williams v Roffey Bros, the English courts still adhere to the rule in Foakes v Beer, despite the fact that the creditor may receive a practical benefit from accepting part payment in satisfaction of a whole debt. In Re Selectmove, although the creditor did receive a practical benefit by recovering more than he would have by insisting on full payment, the Court of Appeal felt bound to apply Foakes v Beer. If Williams v Roffey Bros was extended to cover promises to accept less in satisfaction of a whole debt, it would leave the decision of the House of Lords in Foakes v Beer, which has not been overruled, without application.

In New Zealand, the application of Foakes v Beer is now extremely limited. In Machirus Properties Ltd v Power Sports World (1987) Ltd, Gendall J did not suggest that Re Selectmove was wrongly decided, but found that if there is some additional practical benefit to the creditor beyond the possibility of recovering more by accepting part payment, the promise is binding. The lessor, by accepting half of the rent and $8000 per month toward the accumulated arrears, increased the likelihood that the lessee would stay on for the remainder of the lease. Although the lessee’s continued occupation was an existing legal obligation, its performance benefitted the lessor by sparing him from having to find new tenants. Thus, while the rule in Foakes v Beer still appears to be good law in New Zealand, it will not apply if the promisee can point to any practical benefit accruing to the promisor aside from the receipt of part payment.

Some of the comments made in Williams v Roffey Bros and subsequent practical benefit cases reflect a shift in how judges view the purpose of the consideration requirement. In Williams v Roffey Bros, Russell LJ stated:

Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect [sic] the true intention of the parties.

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46 Tupe v Tupe, above n 45, at [8].
48 Ibid, at 481.
49 Machirus Properties, above n 42, at 193,076.
50 Ibid.
51 Williams v Roffey Bros, above n 12, at 18.
The New Zealand Court of Appeal further developed this reasoning in *Antons Trawling Co Ltd v Smith*. After referring to the decision in *Williams v Roffey Bros*, the Court also considered the writings of Professor Coote, who has argued that the mere repetition of a promise already made cannot be new consideration, but that it may still be open for a court to hold that consideration is unnecessary for a contract variation. On the facts, the Court held that whether the approach in *Williams v Roffey Bros* or that suggested by Professor Coote was adopted, the result would be the same. The Court’s view as to which approach is more suitable was thus left somewhat ambiguous. However, Baragwanath J (delivering the judgment of the Court) continued:

> The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement.

The statements of Russell LJ and Baragwanath J suggest that there is some truth to the realist interpretation of consideration endorsed by Atiyah. Both appear to take the view that the intention of the parties to be bound should be given effect to, unless there are clear policy reasons (such as unequal bargaining power) telling against enforcement. This, surely, is simply another way of saying that a promise should be enforced if there is good reason for doing so. Prima facie, intention to be bound will be a ‘good reason’.

This attitude is, in the author’s opinion, a positive development in practical terms. If, as was argued in chapter one, contract is based on the objectively manifested intention of the promisor to be bound and the corresponding reasonable expectations induced in the promisee, those intentions and expectations should be respected unless there are strong countervailing policy considerations. The main practical function of the pre-existing duty rule was to prevent extortion through threats to breach a contract unless more money is paid. However, the need for the doctrine of consideration to act as a general weapon against unfairness has now been diminished with the development of the doctrines of economic duress, fraud, undue

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52 *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23.
53 Ibid, at [92].
54 Brian Coote “Consideration and Benefit in Fact and in Law” (1990) 3 JCL 23 at 27.
55 Ibid, at 28.
56 *Antons Trawling Co Ltd v Smith*, above n 52, at [93].
57 See Chapter One, Part II(2)(c).
58 See Chapter One, Part I(4).
59 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 741.
influence and unconscionable bargains.⁶⁰ The English Court of Appeal in *Williams v Roffey Bros* suggested that duress was the real basis of the decision in *Stilk v Myrick*.⁶¹ It seems likely that if similar facts arose now they would be dealt with under that head.

Although it is arguable whether doctrines such as duress and undue influence are fully functional in preventing unfairness, it would be more appropriate to develop them further than to rely on the consideration requirement to perform that role. There are two reasons for this. First, the doctrine of consideration is unsatisfactory as a tool to protect against unfairly induced promises.⁶² The presence of consideration does not mean that a contract is fair.⁶³ The courts do not inquire into the adequacy of consideration. Nominal consideration can be provided to render an unfair and otherwise unilateral promise enforceable. Second, not every promise lacking consideration in the traditional sense is unfair.⁶⁴ For example, parties on an equal footing might legitimately wish to alter one party’s rights or obligations under a contract due to changed circumstances. The consideration requirement in its traditional form provided a disincentive for parties to enter into mutually beneficial arrangements. Discrete doctrines such as undue influence, economic duress, fraud and unconscionable bargains are therefore more appropriate to address policy concerns.⁶⁵ In this sense, the practical benefit extension is a positive development.

However, the current position is unsatisfactory because it is theoretically incoherent. When judges allow a ‘practical benefit’ to the promisor to suffice as consideration, they essentially deny that the promise really requires consideration to be enforceable. Performance of an existing obligation, or a promise to perform, cannot amount to consideration. The promisor already has a right to performance; the promisee has not undertaken any new obligation.⁶⁶ The real consideration is the original promise to perform, which is past and therefore inadequate to meet the consideration requirement. Thus Rajah VC of the Singapore High Court has referred to *Williams v Roffey Bros* as an example of the courts going to “extraordinary lengths to conjure up consideration.”⁶⁷

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⁶⁰ Musumeci v Winadell Pty Ltd, above n 59, at 743; Williams v Roffey Bros, above n 12, at 21.
⁶¹ Williams v Roffey Bros, above n 12, at 13-14.
⁶² Musumeci v Winadell Pty Ltd, above n 59, at 742.
⁶³ Ibid.
⁶⁵ Gay Choon Ing v Loh Sze Ti Terence Peter [2009] SGCA 3 at [112]-[113]
⁶⁶ Coote, above n 54, at 27.
In addition, it is difficult to see why a practical benefit to the promisor is sufficient consideration in some situations, but not in others. As discussed above, the rule in *Foakes v Beer* has not been overruled, but the advantage obtained by a debtor who accepts part payment where he might otherwise receive nothing is just as valid a ‘practical benefit’ as the potential benefit to the defendant in *Williams v Roffey Bros* of avoiding a penalty. Going beyond contract modifications, it may be argued that virtually every promise results in some form of benefit to the promisor, or it would not be made. Firm offers, for example, result in a practical benefit to the offeror by increasing the chance that a contract will eventually result. Karen Scott observes that “if practical benefit is defined so as to include merely the perception of an increased or better chance of performance, then this amounts to little more than sentimental value which traditionally, does not constitute good consideration.” The practical benefit extension therefore gives judges little guidance as to which promises should be enforceable and which should not. It would be preferable to acknowledge that consideration is not required, and instead focus directly on whether the promisor intended to be bound.

2. Deeds

A promise is binding in New Zealand without consideration if contained in a deed. Thus, in *Aluminium Systems (NZ) Ltd v Hodgson*, the submission that a guarantee of existing debt was void for lack of consideration failed because the guarantee met the requirements for a deed set out in s 9 of the Property Law Act 2007. The recognition of deeds in New Zealand law is beneficial in that it provides promisors with the means to carry out their intention to be bound without requiring the promisee to provide consideration for the promise. Deeds also go some way to ensuring deliberation in making a promise.

However, the practical value of deeds is limited by the strict nature of the statutory requirements. Section 9 requires the promise to be in writing, signed by the promisor, and witnessed by someone who is not a party. The witness must sign the deed and record his or her place of residence and occupation. The witnessing requirements limit the usefulness of s 9 in two respects. First, a document is extremely unlikely to meet the statutory definition of a deed unless the promisor has received legal advice so as to be aware of the formalities required. In such cases the

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68 Karen Scott “From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-Existing Duty Rule in New Zealand” (2005) 11 Canta LR 201 at 205.
70 *Aluminium Systems (NZ) Ltd v Hodgson & Anor*, above n 69, at [20].
71 Property Law Act 2007, s 9(7).
device of nominal consideration might also be used to make the promise binding. But neither deeds nor nominal consideration accord with the general expectations of laypeople. Many people without any special knowledge of the law would think that recording a promise in writing and signing it is sufficient to make it enforceable.\textsuperscript{72} It is not practical, or economically viable, to expect parties to visit a solicitor every time they wish to undertake a binding obligation. But presently if they do not, a promise lacking consideration is unlikely to be enforceable.

The second problem with the witnessing requirements is that, even where the promisor is aware of them, any minor discrepancy will render the deed invalid. In \textit{Mish-Wills v Burton}, a document was not a valid deed because the witness failed to record his place of residence or occupation.\textsuperscript{73} The witnessing requirements therefore create a risk that the clear intention of the promisor to be bound will be defeated due to minor non-compliance with s 9. Similar problems in regard to wills has led to the inclusion of a provision in the Wills Act 2007 which permits courts to validate a will that does not comply the formal requirements, if satisfied that the document reflects the testator’s intentions.\textsuperscript{74} No power of validation exists in relation to deeds. Even if a written promise was clearly intended to be legally binding, it will not be a valid deed if there is any failure to comply with s 9.\textsuperscript{75} So in practical terms, s 9 is of limited value as a general tool to render promises which are intended to be binding enforceable.

\textbf{PART II: EQUITABLE ESTOPPEL}

\textbf{1. Elements of Estoppel}

Establishing a claim in contract is not the only way for a promisee to obtain relief if the promisor fails to perform. The doctrine of promissory or equitable estoppel may apply if it would be unconscionable for the promisor to renge.\textsuperscript{76} In recent years the courts have progressed away from discrete doctrines of estoppel (such as promissory, proprietary and estoppel by convention) and strict criteria toward a more general doctrine of equitable estoppel based on unconscionability.\textsuperscript{77}

\textsuperscript{72} See, for example, \textit{Chambers v Commissioner of Stamp Duties}, above n 5; \textit{Powell v Public Trustee} [2003] 1 NZLR 381 at [3].
\textsuperscript{73} \textit{Mish-Wills v Burton} HC Wellington CP783 89, 11 December 1989 at 7.
\textsuperscript{74} Wills Act 2007, s 14. See \textit{Re Rejouis (deceased)} HC Nelson CIV-2010-442-156, 21 June 2010 for an example of its application.
\textsuperscript{75} \textit{Re Peter Barnett Ltd}, above n 69, at [12].
\textsuperscript{77} See the decisions of the HCA in \textit{Waltons Stores (Interstate) Ltd v Maher}, above n 76, at 404, 420-422; \textit{The Commonwealth v Verwayen} (1990) 170 CLR 394 (HCA) at 409, 410-411, 413. New Zealand
Unconscionability or unfairness is not, however, a test in itself. Nor will simply failing to fulfill a promise be unconscionable. In the context of promises, several elements must be established.

First, the promisor must have made an objectively clear and unequivocal promise, intending that the promisee will rely on it, so as to induce the promisee to expect that the promise will be performed. Second, the promisee must act (or refrain from acting) in reliance on the promise, in circumstances that it is reasonable for him to do so. Third, it must be established that the promisee will suffer detriment as a result of his reliance if the promise is not fulfilled. The relevant detriment is that occasioned by the promisee’s action or inaction on the faith that the promise will be performed; non-fulfillment of the promise is not in itself sufficient detriment. Finally, even if these requirements are met, the circumstances must be such that it would be unconscionable for the promisor to renge.

Originally estoppel could only be raised as a defence, but in New Zealand it can now be used to found an action. This increases the value of estoppel to promisees who cannot establish a claim in contract because they gave no consideration for the promise. There is also no longer any requirement that the parties


78 Gillies v Keogh, above n 77, at 346, 346.


80 In Stratulatos v Stratulatos, above n 77, at 436, McGechan J suggested that under the modern, more flexible approach to estoppel these elements “have become more indicators than prerequisites, providing some guidance towards a modern and a more generalised test simply of unconscionability.” It is, however, clear that there must at least be some promise or representation which causes the promisee to suffer loss: Gold Star Insurance Co Ltd v Gaunt [1998] 3 NZLR 80 (CA) at 86.


82 Lim v Ward McCulloch, above n 77, at [20]; Waltons Stores (Interstate) Ltd v Maher, above n 76, at 423; Krukziener v Hanover Finance Ltd, above n 79, at [38]; Gillies v Keogh, above n 77, at 345.

83 Welch v Fraser HC Hamilton CIV-2003-419-000491, 9 September 2003 at [22]; Waltons Stores (Interstate) Ltd v Maher, above n 76, at 406, 428-429; Boys v Calderwood, above n 77, at [71].

84 Welch v Fraser, above n 83, at [22]; Waltons Stores (Interstate) Ltd v Maher, above n 76, at 429; Boys v Calderwood, above n 78, at [71].

85 Waltons Stores (Interstate) Ltd v Maher, above n 76, at 429; Welch v Fraser, above n 83, at [22]; Lim v Ward McCulloch, above n 77, at [20].

86 The Commonwealth v Verwayen, above n 77, at 429; Welch v Fraser, above n 83, at [22], [30].

87 Welch v Fraser, above n 83, at [22].


89 Gold Star Insurance v Gaunt, above n 80, at 86; McDonald v Attorney-General HC Invercargill CP13/86, 20 June 1991 at 33; Welch v Fraser, above n 83, at [22].
have a pre-existing contractual relationship; it is sufficient if they have an interest in the same subject matter.  

2. Relationship to Contract

a) Intention to be Legally Bound

It has been suggested that in order for estoppel to arise, the promise must have been intended by the promisor and understood by the promisee to affect their legal relationship. If this were true then, if the theory of contract set out in chapter one were adopted, all promises forming the basis of a successful estoppel claim would be enforceable as contracts. However, this proposition is not consistent with how the New Zealand courts apply estoppel. For example, in Dowell v Tower Corporation, the lessor clearly did not intend to be legally bound by its representation that a new lease would be granted, or it would have agreed to include a right of renewal as requested. In McDonald v Attorney-General, Holland J expressly found that the Wheat Board did not intend to enter into a contractual relationship to purchase wheat from Mr McDonald until it was actually delivered. Yet, in both of these cases, estoppel was established.

Consequently, if consideration ceased to be required for contract formation, estoppel could still apply in regard to promises which are not intended to be legally binding, where it would be unconscionable for the promisor to rescind. However, it should be noted that in Welch v Fraser, Young J found that because the Welchs knew that Mrs Fraser was not legally bound to continue making gifts, their reliance on the assumption that she would do so was not reasonable. So, while promisor’s intention to be legally bound and the promisee’s understanding to that effect is not a strict requirement, it will be a relevant consideration in determining whether the promisee’s reliance on the promise was reasonable.

90 Burberry Mortgage Finance, above n 81, at 359, 361; Kruziener v Hanover Finance Ltd, above n 79, at [38].
91 Waltons Stores (Interstate) Ltd v Maher, above n 76, at 420-423; Kruziener v Hanover Finance Ltd, above n 79, at [38]; Henri v Public Trustee, above n 81, at 37.
92 See Chapter One, Part I(4): a promise should be enforceable as a contract if the promisor manifests an intention to be legally bound and this induces the promisee to expect performance or a legal remedy.
94 McDonald v Attorney-General, above n 89, at 21.
95 Welch v Fraser, above n 83, at [27].
b) Application to Failed Contracts

The courts have applied estoppel to provide relief to promisees in circumstances where the promise would not be enforceable as a contract because the promisee gave no consideration for it. For example, estoppel claims have succeeded in cases regarding purely gratuitous promises. In *Stratulatos v Stratulatos*, the defendant, the plaintiff’s mother-in-law, made a gratuitous promise to give her house to her son (the plaintiff’s husband) and the plaintiff. They would have exclusive possession of the house until the defendant’s death, upon which title would pass to her son.96 The plaintiff and her husband carried out extensive renovations on the house in reliance on the promise. Her husband then died, and the defendant denied that the plaintiff had any right to the house. McGechan J accepted the plaintiff’s estoppel claim.97 It has been suggested that estoppel could also apply in regard to promises to keep an offer open, or post-contractual promises to pay more or accept less.98

Some judges have shown reluctance to apply estoppel in cases involving purely gratuitous promises. In *Waltons Stores v Maher*, Mason CJ was of the opinion that, “generally speaking, a plaintiff cannot enforce a voluntary promise because the promisee may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract.”99 This sentiment is mirrored in *Welch v Fraser*.100 However, a promise would not be enforceable as a contract in any case if the promisor did not manifest any intention to be bound by the promise. In the context of promises not enforceable as contracts solely because they lack consideration, Mason CJ’s observation is therefore of little relevance.

The application of estoppel in such cases is, however, limited in other respects. Even if the elements of estoppel are established, whether a claim succeeds in any given case still depends on the court’s assessment of whether the promisor’s withdrawal from the promise would be unconscionable. That assessment necessarily involves a value judgment.101 The ability of estoppel to provide relief where there is no consideration for a promise is also restricted by the requirement of detriment. In *Tupe v Tupe*, a contract variation which was not supported by consideration did not give rise to a claim in estoppel. The purchaser would have been unlikely to obtain finance within the extended time for fulfillment anyway, so no detriment was suffered.

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96 *Stratulatos v Stratulatos*, above n 77, at 432.
97 Ibid at 441.
99 *Waltons Stores (Interstate) Ltd v Maher*, above n 76, at 403.
100 *Welch v Fraser*, above n 83, at [27].
101 *The Commonwealth v Verwayen*, above n 77, at 441.
as a result of the vendor’s early termination.\textsuperscript{102} Because estoppel only operates when detriment is suffered as a result of the promisor’s unconscionability, it is not a substitute for contractual enforcement.

c) Remedies

The aim of estoppel is not to enforce the promise and fulfill the promisee’s reasonable expectations, but to prevent detriment to the promisee caused by the promisor’s unconscionability.\textsuperscript{103} In exercising its equitable jurisdiction, the courts take a flexible approach to remedies.\textsuperscript{104} The relief should be enough to avoid unconscionability, but no more.\textsuperscript{105} What is required to achieve this will depend on the circumstances.\textsuperscript{106} In some cases the court will consider it necessary to order specific performance\textsuperscript{107} or award damages based on the promisee’s expectation of performance.\textsuperscript{108} In others, the promisee will only receive compensation for loss incurred in reliance on the promise.\textsuperscript{109}

The discretionary nature of relief is further reason why estoppel does not function as an alternative method for enforcing promises that are not supported by consideration or contained in a deed. In estoppel cases, it is appropriate to have flexible remedies due to the wide variety of circumstances in which estoppel might arise. It is not always clear that the promisor intended to be legally bound, and in such situations it might be unconscionable to force him to compensate the promisee for the loss of the expected performance. But where, as in contract, the promisor displays a clear intention to be bound and thereby induces the promisee to reasonably expect performance or equivalent compensation, the remedy should reflect that expectation.

Given that the doctrine of estoppel will not always provide relief where a contract fails for want of consideration, and that the remedies available where estoppel is established are not primarily directed at compensating for the loss of performance, estoppel does not provide an answer to the objections raised to the

\textsuperscript{102} \textit{Tupe v Tupe}, above n 45, at [20].
\textsuperscript{103} \textit{Waltons Stores (Interstate) Ltd v Maher}, above n 76, at 423; \textit{Krukziener v Hanover Finance Ltd}, above n 79, at [38]; \textit{The Commonwealth v Verwayen}, above n 77, at 501.
\textsuperscript{104} \textit{Stratulatos v Stratulatos}, above n 77, at 438; \textit{Dowell v Tower Corp}, above n 93, at 22-23; \textit{Waltons Stores (Interstate) Ltd v Maher}, above n 76, at 419.
\textsuperscript{105} \textit{Stratulatos v Stratulatos}, above n 77, at 438 (endorsed in \textit{Boys v Calderwood}, above n 77, at [78]); \textit{The Commonwealth v Verwayen}, above n 77, at 412; \textit{Waltons Stores (Interstate) Ltd v Maher}, above n 76, at 427.
\textsuperscript{106} \textit{Waltons Stores (Interstate) Ltd v Maher}, above n 76, at 419; \textit{The Commonwealth v Verwayen}, above n 77, at 501; \textit{Stratulatos v Stratulatos}, above n 77, at 438.
\textsuperscript{107} E.g. \textit{Juzwa v Hill}, above n 76.
\textsuperscript{108} E.g. \textit{Dowell v Tower Corp}, above n 93, at 23.
\textsuperscript{109} E.g. \textit{McDonald v Attorney-General}, above n 89, at 35.
consideration requirement. While estoppel is a valuable tool in reducing the harsh effects of the requirement, it does not act as an effective substitute for contractual enforcement.

PART III: CONCLUSION

In the first part of this chapter it was shown that, given the more flexible approach to the consideration requirement now adopted by the courts, there are few cases in which an agreement is unenforceable solely on the grounds that it lacks consideration. However, this is probably a reflection of how ingrained the doctrine is in our legal system rather than of its utility. Every law student learns that consideration is an essential requirement for contract formation, and that contract law is only concerned with mutual exchanges. Consequently, lawyers do not seek to enforce gratuitous promises as contracts.

Instead, if a promisee seeks relief for the promisor’s failure to perform a gratuitous promise, it will usually be under the guise of equitable estoppel. But, as was shown in part two, estoppel is not an effective substitute for contractual enforcement. It does not seek to uphold the promisor’s intention to be bound, or protect the promisee’s reasonable expectations. The current New Zealand approach to enforcing promises is thus unsatisfactory. It fails to achieve the desired goal of enforcing those promises which are made in circumstances showing an intention to be bound, and thereby induce the promisee to reasonably expect performance or legal redress.
Chapter Three: Promises in Scottish Law

PART I: THE SCOTTISH LAW OF VOLUNTARY OBLIGATIONS

1. Introduction

The purpose of this chapter is to examine how a legal system might function without the requirement of consideration. The Scottish law of voluntary obligations serves as a useful comparison, because although it is similar to contract at Common Law in many respects, the doctrine of consideration has never been adopted. A promise can form a binding contract without any consideration, provided there is agreement (offer and acceptance),¹ and the parties intend to be legally bound.² In addition, a separate class of enforceable unilateral obligations (also referred to as promises) is recognised. A promisor can bind himself unilaterally without the need for acceptance by the offeree.³ So the starting point is that any undertaking which the promisor intends to be legally binding is enforceable. There are, however, certain formal requirements for gratuitous unilateral promises.

2. History and Theory

If contract at Common Law can be reduced to the proposition that, generally speaking, only exchanges are enforceable,⁴ the basis of the Scottish law of voluntary obligations is that agreements and promises must be kept.⁵ The Scottish courts have enforced promises (as distinct from contracts or agreements) since 1551.⁶ The 17th century philosopher Viscount Stair was the first to set out a comprehensive Scottish law of obligations.⁷ He considered that contracts should be enforced because they are a manifestation of human will, and a person’s rational choices should command the respect of the law.⁸ The will theory has, to a large degree, been followed by later Scottish writers.⁹ An exception is Adam Smith, who argued that the reason for

¹ Morton’s Trustees v Aged Christian Friend Society of Scotland (1899) 7 SLT 220 (IH (1 Div)) at 221.
² Ibid; Robertson v Anderson 2003 SLT 235 (IH (E Div)) at 240.
⁴ It was shown in Chapter One, Part II(2)(a) there are exceptions to this proposition. However, at present it is the most widely accepted view.
⁵ Martin Hogg “Perspectives on Contract Law from a Mixed Legal System” (2009) 29 OJLS 643 at 646.
⁷ McBryde, above n 6, at 54.
⁸ Hogg “Perspectives”, above n 5, at 649 – 650. The merits of a theory of contract based on the will or intention of the promisor were discussed in Chapter One, Part I(3).
⁹ Hogg “Perspectives”, above n 5, at 660; McBryde, above n 6, at 56.
enforcing promises is the expectation of the promisee.\textsuperscript{10} There is no support for the bargain theory in Scotland.\textsuperscript{11}

3. Types of Voluntary Obligations

Scottish law recognises three types of voluntary obligations. First, there are onerous contracts, which involve an exchange of promises or actions between the parties. Second, gratuitous contracts are also enforceable.\textsuperscript{12} A gratuitous contract is an agreement which lacks consideration. There is still an offer by one party which must be accepted by the other, but only the offeror comes under any obligation. The offeree does nothing in return. Finally, the Scottish courts recognise a separate class of unilateral obligations.\textsuperscript{13} No agreement is required; a unilateral obligation is binding on the promisor without acceptance by the promisee (though the promisee can, of course, refuse to accept performance of the promise).\textsuperscript{14} Unilateral obligations must be in writing to be enforceable, unless the doctrine of personal bar applies.\textsuperscript{15}

4. Intention to be Legally Bound

For a promise to become a binding obligation within any of the above categories, the promisor must intend to be legally bound.\textsuperscript{16} There does not appear to be any presumption that intention to be bound is present in commercial situations, or absent in social situations.\textsuperscript{17} In every case, the court must be satisfied that the particular facts reveal that the promisor (if the promise is unilateral) or the parties (if there is an agreement) intended to undertake a binding obligation.\textsuperscript{18} However, it is

\textsuperscript{10} McBryde, above n 6, at 58, citing Adam Smith, Lectures on Jurisprudence (R L Meek, D D Raphael & P G Stein (Eds), 1978) at 12.
\textsuperscript{11} David M Walker The Law of Contracts and related Obligations in Scotland (3\textsuperscript{rd} ed, T&T Clarke, Edinburgh, 1995) at 9.
\textsuperscript{12} Hector L MacQueen & Joe Thomson Contract Law in Scotland (Butterworths, Edinburgh, 2000) at 69; See Morton's Trustees v Aged Christian Friend Society of Scotland, above n 1, for an example of a gratuitous contract.
\textsuperscript{13} Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor), above n 3, at 290; Mortons Trustees v Aged Christian Friend Society of Scotland, above n 1, at 221. For an example of a unilateral obligation, see Reid's Executrix v Reid 1944 SC (HL) 25, in which a father’s promise to pay his son an annuity during his lifetime, motivated purely by love and affection, was enforceable.
\textsuperscript{14} Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor), above n 3, at 290; William Beardmore & Co Ltd v Park's Executrix 1928 SC 101 (IH (2 Div)) at 104; MacQueen & Thomson, above n 12, at 69; Walker Contracts and related Obligations, above n 11, at 19.
\textsuperscript{15} See Part I(6)(b) and (c) below.
\textsuperscript{16} Robertson v Anderson, above n 2, at 240; Morton's Trustees v Aged Christian Friend Society of Scotland, above n 1, at 221.
\textsuperscript{17} Note that MacQueen & Thomson, above n 12, at 69, state that there is such a presumption. However, the Court of Session has suggested otherwise in both Dawson International Plc v Coats Paton Plc 1993 SLT 80 (OH) at 95 and Robertson v Anderson, above n 2, at 240.
\textsuperscript{18} Dawson International Plc v Coats Paton Plc, above n 17, at 95; Robertson v Anderson, above n 2, at 240.
still the case that most promises made in social contexts will not be legally binding, while most promises or agreements which have commercial significance will be construed as obligatory.

Consideration, while not operating as an independent requirement for validity in Scottish law, is relevant as evidence that the promisor intended to be bound. The fact that an alleged contract or obligation is entirely gratuitous may suggest that no such intention existed. If a promisor does intend to be bound by a gratuitous promise, that intention must be clearly expressed. The Court of Session has endorsed Viscount Stair’s theory that there are three acts of will: desire, resolution and engagement. Only the third is obligatory. A mere expression of desire or resolution to do something is not binding. Thus in Countess of Cawdor v Earl of Cawdor, a decision by trustees to comply with a transfer request was unenforceable. The trustees had resolved to transfer the property, but had not undertaken an obligation to do so. It must also be established that the intention to be bound relates to a promise or undertaking. A failed attempt to make an outright transfer will not be sufficient to create an obligation to actually carry out the transfer. A promise or an offer requiring acceptance is forward looking.

5. Distinguishing between Contracts and Unilateral Obligations

Where it is clear that the promisor intended to undertake a legal obligation, the existence of consideration is relevant in distinguishing between contracts and unilateral obligations. In Chapman v Aberdeen Construction Group Plc the Court of Session found that the grant of an option in return for payment of £1 by the option holder was a contract. Lord McDonald stated, “[a]lthough the English doctrine of consideration does not apply to Scotland the presence of this provision is a clear indication of the bilateral nature of the relationship.” So even where the consideration is nominal, it will act as evidence of an agreement between the parties.

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19 Robertson v Anderson, above n 2, at 240.
20 Dawson International Plc v Coats Paton Plc, above n 17, at 95 (cited with approval in Robertson v Anderson, above n 2, at 240).
21 See Macandrew v Gilhooley 1911 SC 448 (IH (2 Div)); Nairn's Trustees v R Stewart & Sons 1910 2 SLT 432 (OH) at 436.
22 Morton's Trustees v Aged Christian Friend Society of Scotland, above n 1, at 221. See also Van Klaveren v Servisair (UK) Ltd 2009 SLT 576 at [9].
23 Hona (Countess of Cawdor) v Vaughan (Earl of Cawdor), above n 3, at 290.
24 Ibid. See also Van Klaveren v Servisair (UK) Ltd, above n 22, in which a statement by an insurer that “We accept that our Insured is liable for the purposes of this claim, and will pay damages…” was held to be only an admission of liability, not an undertaking to pay.
25 Anderson v Anderson 1961 SC 59 (IH (2 Div)) at 65.
26 Ibid, at 66.
27 Chapman v Aberdeen Construction Group Plc 1993 SLT 1205 (IH (2 Div)).
28 Ibid, at 1216. See also Ross LJC at 1213 to similar effect.
However, the absence of consideration does not necessarily mean that the promise is not a contract. A gratuitous contract does not involve consideration. It is not always clear whether a statement amounts to an offer, requiring acceptance, or a promise, effective immediately. Use of the words “I promise” or “we agree” will not be determinative; it is the overall practical effect of the statement that must be considered.  

In *Morton's Trustees v Aged Christian Friend Society of Scotland*, a promise to donate £1000 toward the establishment of the society was analysed as a gratuitous contract, because it was subject to certain conditions. The money would be paid “provided a properly constituted committee can be found and a fair amount subscribed in proportion to the above subscription offered by myself.” The promise therefore amounted to an offer requiring acceptance, not a unilateral obligation binding immediately. Upon the Society’s acceptance of the offer, it gave rise to a contract.  

6. Formation and Enforcement of Unilateral Obligations

a) Communication to the Promisee

Case authority conflicts as to whether a promise must be communicated to the promisee before it becomes a binding unilateral obligation. In *Burr v Bo'ness Police Commissioners*, a resolution to increase the plaintiff’s salary was unenforceable because it had not been officially intimated to the plaintiff. However, in the earlier case of *Smeaton v Magistrates of St Andrews*, the House of Lords had found that a resolution to affirm a proposed agreement “bound the Commissioners without any formal communication of their proceedings to the Appellant.” The latter view is supported by the recent decision of the Court of Session in *Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor)*. The Court was of the opinion that a promise is obligatory without the need for delivery, although the presence or absence of communication may assist in determining whether there was any intention to be bound. However, that statement was only obiter. The alleged obligation was not binding in any case, because it was

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29 *Macfarlane v Johnston* (1864) 2 M 1210 at 1213.
30 *Morton's Trustees v Aged Christian Friend Society of Scotland*, above n 1, at 221.
Ibid, at 221 – 222.
32 In Scotland the parties are referred to as pursuer and defender. This chapter will use the New Zealand terms, plaintiff and defendant.
33 *Burr v Bo'ness Police Commissioners* (1896) 4 SLT 149 (IH (2 Div)).
34 *Smeaton v Magistrates of St Andrews* (1870-75) LR 2 Sc 107, per Lord Chelmsford at 110. The other Lords did not expressly address the matter, but the resolution was found to be enforceable, so the lack of authority on the part of the clerk who communicated the promise was clearly not considered fatal.
35 *Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor)*, above n 3, at 290.
Ibid.
an expression of intention to actually effect a transfer, not a promise to do so.\textsuperscript{37} So it is currently unclear whether a unilateral promise must be communicated to the promisee to become a binding obligation.

\textit{b) Writing Requirements}

Sections 1(2)(a)(ii) and 2 of the Requirements of Writing (Scotland) Act 1995 (RWSA) require a “gratuitous unilateral obligation” to be constituted in writing and signed by the promisor, unless undertaken in the course of business.\textsuperscript{38} Prior to the enactment of the RWSA, although a unilateral obligation did not need to be constituted in writing, it could only be \textit{proved} by writ or the oath of the promisor.\textsuperscript{39} So in practical terms, writing was necessary. There was no “course of business” exception, so even unilateral obligations undertaken in a commercial context could only be proved by writ or oath. Under the RWSA, unilateral obligations undertaken in the course of business, including firm offers, requirements contracts, and promises to pay more or accept less than originally agreed, are enforceable without writing.\textsuperscript{40}

The Scottish Law Commission decided a writing requirement was desirable for gratuitous unilateral obligations, because writing would provide evidence of intention to be bound and act as a protective measure against impulsive promises.\textsuperscript{41} Given that the same problems in establishing intention would seem to apply to gratuitous contracts, it is strange that the RWSA does not require them to be in writing.\textsuperscript{42} Whether a gratuitous promise requires acceptance or not, its content is of the same essential character. This may in fact have been the intention of the Law Commission, as its report refers throughout to “gratuitous obligations”, which would seem to include gratuitous contracts. It seems likely that lawyers will argue for a contractual interpretation of gratuitous promises in an attempt to circumvent the writing requirements. It would be preferable not to distinguish between gratuitous contracts and gratuitous unilateral obligations.

The Law Commission considered whether attestation by a witness (as required for a deed in New Zealand)\textsuperscript{43} should be required for gratuitous unilateral obligations not undertaken in the course of business. This suggestion was rejected, as witnessing requirements would increase the likelihood of legitimate promises being avoided due

\footnotesize{\textsuperscript{37} Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor), above n 3, at 290.  
\textsuperscript{38} Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(ii).  
\textsuperscript{39} Miller v Tremamondo (1771) Mor 12395; Smith v Oliver [1911] SC 103 (IH (1 Div)).  
\textsuperscript{41} Ibid, at [2.21].  
\textsuperscript{42} MacQueen & Thomson, above n 12, at 69.  
\textsuperscript{43} Property Law Act (NZ) 2007, s 9.}
to inadvertent non-compliance.\textsuperscript{44} At the same time, it would not provide any substantial protection for promisors, as “[a]nyone who can be duped into signing something can be duped into doing so before witnesses…”\textsuperscript{45} While execution before a notary (as is required in France)\textsuperscript{46} would offer better protection, the expense and inconvenience caused by such a requirement would be disproportionate to the benefits.\textsuperscript{47} The Law Commission concluded that nothing more than subscription was necessary. Most people realise that signing their name to a document can commit them.\textsuperscript{48} Subscription was therefore considered sufficient both as evidence of intention to be bound, and as a cautionary measure. Because proof of intention to be bound is still required in addition to writing, there is no danger that casual, written social commitments (such as a signed letter promising to attend a dinner party) will be enforceable.\textsuperscript{49}

Commentators disagree as to whether there is a separate class of non-gratuitous unilateral promises which are not required to be in writing. There is no case law on the issue. One view is that “gratuitous” simply means that there is no legal obligation on the other party,\textsuperscript{50} in which case all unilateral obligations would be gratuitous. Professor Thomson argues that there is a class of non-gratuitous unilateral obligations.\textsuperscript{51} For example, promises to keep an offer open or to pay a reward to the finder of lost property are made in the hope of receiving a benefit, so are not “gratuitous” in the sense of being given for nothing.\textsuperscript{52} In support of Thomson’s view, it is strange that s 1(2)(a)(ii) includes the word “gratuitous”, rather than simply saying “unilateral obligations”, if all unilateral obligations are gratuitous. In addition, in the recent case of \textit{Van Klaveren v Servisair (UK) Ltd} the Court of Session stated that “a unilateral obligation is normally gratuitous”.\textsuperscript{53} However, as the Court was not specifically addressing the interpretation of s 1(2)(a)(ii), it would be unwise to place too much weight on that comment as an indication of how the courts will approach the issue.

The Law Commission’s report suggests that the writing requirement was intended to apply to all unilateral obligations not entered into in the course of business. While discussing promises to keep an offer open for a certain period (which in Thomson’s view are non-gratuitous), the Law Commission stated that such offers

\textsuperscript{44} Scottish Law Commission, above n 40, at [4.15].
\textsuperscript{45} Ibid.
\textsuperscript{46} Code Civil (France) art. 931.
\textsuperscript{47} Scottish Law Commission, above n 40, at [4.13].
\textsuperscript{48} Ibid, at [4.19].
\textsuperscript{49} Ibid, at [4.27].
\textsuperscript{50} Martin Hogg “A few tricky problems surrounding unilateral promises” (1998) SLT 25, at 25.
\textsuperscript{51} Joe M Thomson ‘Promises and the requirements of writing’ (1997) SLT 284.
\textsuperscript{52} Ibid at 285.
\textsuperscript{53} \textit{Van Klaveren v Servisair (UK) Ltd}, above n 22, at [9].
in non-commercial contexts would need to be constituted in writing.\textsuperscript{54} In addition, the course of business exception was considered necessary in order to protect those “gratuitous obligations” frequently entered into in commercial contexts, such as firm offers and requirements contracts.\textsuperscript{55} So at least some examples of non-gratuitous obligations given by Thomson were considered gratuitous by the Law Commission. Indeed, if such obligations were not gratuitous, there would be no need for a course of business exception, as s 1(2)(a)(ii) would not apply in any case. In light of these considerations, the Scottish courts are likely to hold that s 1(2)(a)(ii) encompasses all unilateral obligations not undertaken in the course of business.

c) Personal Bar

A unilateral obligation which is not in writing is still enforceable if the statutory form of personal bar set out in ss 1(3) and 1(4) of the RWSA applies. The promisee must have acted or refrained from acting in reliance on the promise, with the knowledge and acquiescence of the promisor.\textsuperscript{56} The promisee must also satisfy the court that he would be adversely affected to a material extent if the promisor was permitted to withdraw from the obligation.\textsuperscript{57} If these requirements are satisfied, the obligation will be enforceable as if it had been validly executed.\textsuperscript{58}

Personal bar is similar to equitable estoppel, but rather than granting equitable relief to prevent detriment, the court enforces the obligation. There is also no requirement that it would be unconscionable for the promisor not to perform. In this sense, personal bar under the RWSA is less flexible than estoppel. Because estoppel is based on unconscionability, even if the promisor makes a clear an unequivocal promise which the promisee relies on to his detriment, the court may decline to grant a remedy. By contrast, if the requirements of s 1(3) of the RWSA are satisfied, there is no discretionary element in deciding whether to enforce the obligation and, if so, what remedy to grant.

7. Remedies

The remedies granted by the Scottish courts for breach of contract and breach of a unilateral obligation are the same. In *William Beardmore & Co Ltd v Park's Executrix*, the Court of Session explained that the presumptive remedy for breach of

\textsuperscript{54} Scottish Law Commission, above n 40, at [2.25].  
\textsuperscript{56} Requirements of Writing (Scotland) Act 1995, s 1(3).  
\textsuperscript{57} Ibid, s 1(4).  
\textsuperscript{58} Ibid, s 1(3).
contract is specific performance.\textsuperscript{59} Damages will be awarded if an order for specific performance would be unjust, impossible to comply with, or if the plaintiff chooses to claim damages instead.\textsuperscript{60} The Court applied the same principles in respect of a unilateral obligation. There were no “special facts and circumstances” excluding the plaintiff’s prima facie right to specific performance,\textsuperscript{61} so the defendant’s gratuitous promise to purchase 48,000 shares in the plaintiff’s company was enforced against the defendant’s executrix. The remedies for breach of contract and unilateral obligation thus uphold the reasonable expectations of the promisee.

\textbf{PART II: EVALUATION}

\textit{1. Advantages of the Scottish approach to Enforcing Promises}

The Scottish law of voluntary obligations comes closer than the Common Law to achieving the goal set out in chapter one (to protect the promisee’s reasonable expectations induced by the promisor’s manifestation of intention to be bound). All promises made in the course of business, whether unilateral or part of an agreement, will be enforceable if intended to be binding. This overcomes some of the difficulties discussed in chapter two with regard to arrangements collateral to an exchange, such as firm offers and contract modifications. Promises made in non-commercial contexts will be enforceable if they are intended to be binding, and either form part of an agreement or, if unilateral, are recorded in writing and signed. The ability to make unilateral promises binding through simple writing and subscription avoids some of the problems associated with deeds.\textsuperscript{62} The absence of witnessing requirements means there are fewer grounds on which legitimate promises may be invalidated as a result of minor errors or lack of awareness of the requirements. The Scottish law of obligations therefore permits enforcement of a greater number of promises intended to be binding, which give rise to legitimate expectations of performance or legal redress.

The statutory form of personal bar in ss 1(3) and 1(4) of the RWSA is more appropriate than equitable estoppel in the context of promises intended to be binding, due to absence of any need to inquire into underlying unconscionability. Because estoppel applies to some promises which are \textit{not} intended to be binding,\textsuperscript{63} flexibility in deciding whether to grant relief and, if so, the form of that relief, is appropriate.\textsuperscript{64}

\textsuperscript{59}William Beardmore & Co Ltd v Park's Executrix, above n 14, at 108-109, 112-113. Note: in Scotland specific performance is often referred to as specific implement. The New Zealand term will be used in this paper to avoid confusion.

\textsuperscript{60}Ibid.

\textsuperscript{61}Ibid., at 109.

\textsuperscript{62}See Chapter Two, Part I(2).

\textsuperscript{63}See Chapter Two, Part II(2)(a).

\textsuperscript{64}See Chapter Two, Part II(2)(c).
But it is submitted that, where the circumstances show that the promisor did intend to be bound, that intention should, as a general rule, be upheld. Section 1(3) will only ever apply where the promise was intended to be binding, as it only covers the “gratuitous unilateral obligations” referred to in s 1(2)(a)(ii). As noted above, a promise must be intended to be binding before it will become a unilateral obligation.\(^{65}\) Thus the approach taken in the RWSA is suitable.

2. Some Problems with the Scottish approach to Enforcing Promises

Although personal bar is preferable to estoppel in the context of promises intended to be binding, it still presents a difficulty. As discussed in chapter one, if a promise is made in a manner showing an intention to be bound, this gives rise to a reasonable expectation of performance or a legal remedy. The promise should therefore be enforceable regardless of whether the promisee has detrimentally relied upon it. The Scottish law of obligations seems to accept that the promisor’s intention to be bound and the promisee’s reasonable expectations should be protected, given that gratuitous unilateral obligations are enforceable (even to the extent of performance being ordered), provided they are in writing. Whether the promisee has relied on the promise and will suffer detriment if it is not performed should be irrelevant. The problem is caused by the writing requirement. If all promises intended to be binding were enforceable without writing, the fallback claim of personal bar would be unnecessary.

The Scottish Law Commission gave the following explanation for why writing should be required for gratuitous unilateral obligations:\(^{66}\)

As one group of commentators on our earlier memorandum pointed out, there might otherwise be a danger of rash or frivolous promises being made the subject of litigation. Gratuitous undertakings are often made in the context of friendship, or family relationship, and it can be particularly difficult in such circumstances to determine whether there was an intention to undertake a legal, as opposed to a moral, obligation.

One function of the requirement, then, is to provide evidence of intention to be bound. However, as discussed above, the promisee must always prove that the promise was intended to be legally binding (even if it is in writing). Granted, if a promise is gratuitous and not made in writing, it may be difficult to establish the necessary intention. But if there is clear evidence of intention to be bound on the

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\(^{65}\) See Part I(4) of this chapter.

\(^{66}\) Scottish Law Commission, above n 40, at [2.21].
facts of a particular case, why should the promise also have to be in writing or detrimentally relied upon? Any formal requirement only increases the potential for the intention of the promisor and the reasonable expectations of the promisee to be defeated.

It may be that the writing requirement also fulfills a cautionary function. The reference to rash or frivolous promises in the passage above, and the Law Commission’s conclusion that “people realise their signature may commit them”, suggests this is so. However, there are two reasons why a cautionary function cannot justify the writing requirement. First, while it is desirable to ensure people consider the consequences before making a promise, a writing requirement does not have that effect. The promise might still be made orally before it is put in writing (and hence before any cautionary effect occurs). A writing requirement only prevents the promise from being enforceable by the promisee before the requirement is complied with. But unless the promisee is aware of the statutory requirements, as soon as the promise is made in a manner showing an intention to be bound, it gives rise to a reasonable expectation of a legally enforceable right. It is therefore appropriate that the promisor should be bound from that moment.

Second, it is not clear that a simple writing requirement provides any real protection against impulsive or unwise promises. As the Law Commission acknowledged when considering whether a heavier requirement should be imposed, it is not clear that anything less than subscription before a notary would provide effective protection. It takes little time to write a promise down and sign it. During that time it is doubtful whether the promisor will give any more meaningful consideration to what he is doing. The writing requirement is therefore more likely to adversely affect people who legitimately wish to be bound but are not aware of the requirements than to provide any real protection against impulsive promises.

There is a further aspect of the Scottish law of obligations which may be inconsistent with the theory of contract set out in chapter one, depending on how the courts approach the issue in the future. As discussed previously, it is unclear in Scottish law whether a unilateral obligation must be communicated to the promisee to become binding. A decision to undertake a binding obligation which has not been communicated to the promisee will not usually induce any corresponding reasonable expectation. In such circumstances there would be no unfairness in permitting the

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67 See Chapter Four, Part II(3) for some examples of how intention to be bound might be proved.
68 Scottish Law Commission, above n 40, at [4.19].
69 Scottish Law Commission, above n 40, at [4.13].
70 See Part I(6)(a) of this chapter.
promisor to withdraw the promise. This would certainly be the case where the promisee does not become aware of the promise until after it is withdrawn.

A more difficult situation might arise if the promisee becomes aware of a promise before it is withdrawn, without communication to him by the promisor. In principle, such promises could give rise to an expectation of performance or legal redress. However, it is likely to be very difficult to prove that a statement not communicated to the promisee was intended to create a binding obligation to the promisee, as opposed to being simply an expression of intention to do the thing promised. Theoretically, however, if the promisee becomes aware of the promise and intention could be proved, there is no reason why the promise should not be enforceable. The Court of Session’s suggestion in *Countess of Cawdor v Earl of Cawdor* that communication is not required\(^71\) should be restricted such circumstances.

3. Conclusion

The Scottish law of obligations provides a valuable insight into how a legal system can function without a consideration requirement. Rather than searching for an ‘exchange’, which is sometimes artificial, the Scottish courts focus on whether the parties showed an intention to be bound. Commercial arrangements collateral to an exchange, which present some difficulty in New Zealand, are treated the same as contracts in Scotland. In this respect, the Scottish approach is preferable to the current Common Law position. What is less clear is whether, if New Zealand were to abolish the consideration requirement, a writing requirement for gratuitous promises would be helpful. The practical implications of enforcing promises without consideration will be discussed further in chapter four.

\(^71\) *Ilona (Countess of Cawdor) v Vaughan (Earl of Cawdor)*, above n 3, at 290.
Chapter Four: Suggestions for Reform

PART I: SUMMARY

In chapter one, it was concluded that our law of contract should seek to give effect to a promisee’s reasonable expectation of performance or equivalent compensation. That reasonable expectation will arise where the promisor’s words or the circumstances in which the promise was made suggest that he intended the promise to be legally binding. It was also shown that the doctrine of consideration has no principled basis. A strict consideration requirement cannot be justified as a mechanism for restricting contract to bargains; the current law does not reflect that goal, and there is no good reason for refusing to enforce promises that are not part of a bargain. Nor is consideration satisfactory as a formal requirement. Although it may fulfill functions of form in some situations, particularly where nominal consideration is provided, it often does not. People may exchange promises or acts informally, impulsively and without any intention to be bound. So even if some formality is desirable, consideration is inadequate to perform that role.

Chapter two examined how the New Zealand courts enforce promises. It was shown that, while in theory the consideration requirement presents a difficulty for some common commercial arrangements, case law does not reveal a huge practical problem in this regard. Firm offers are often converted into binding option contracts through the provision of nominal consideration, and modifications of one party’s rights or obligations under an existing contract are now enforced if there is some practical benefit to the promisor. Issues regarding unfairly induced promises are primarily addressed by doctrines such as duress, undue influence, fraud and unconscionable bargains rather than the consideration requirement, which is inadequate to perform that role.

However, the position in regard to promises collateral to exchanges is still undesirable. Although unenforceable firm offers do not feature prominently in recent cases, that does not mean that problems do not, or will not, arise. Similarly, there is still a small category of contract modifications, namely promises to accept part payment in satisfaction of a debt, which are unenforceable unless some additional benefit beyond receipt of payment is established. In addition, the practical benefit extension creates uncertainty as to which promises should be enforceable and which should not. Any possibility that the legitimate intentions of the parties will be defeated as a result of these problems should be eliminated.
The most significant impact of the doctrine of consideration is that gratuitous promises remain unenforceable unless contained in a deed. In practical terms, deeds are unlikely to be used by parties who have not obtained legal advice, and may be invalid due to inadvertent non-compliance with witnessing requirements. Promisees can also seek relief through equitable estoppel. However, estoppel requires detrimental reliance and unconscionability before any remedy will be granted, and the nature of relief is discretionary. Consequently, estoppel does not always protect the reasonable expectations of the promisee induced by the promisor’s manifestation of intention to be bound. It is therefore not a satisfactory alternative to contractual relief for breach of promises intended to be binding.

Finally, chapter three assessed the Scottish approach to enforcing promises. Scottish law comes closer than ours to upholding the promisor’s intention to be bound, and protecting the promisee’s corresponding reasonable expectations. All agreements intended to be binding are enforceable as contracts, and unilateral promises are binding if executed in writing. Potential problems in regard to commercial arrangements are avoided through a course of business exception. However, some difficulties remain. The writing requirement for unilateral gratuitous promises (though, strangely, not gratuitous contracts) unnecessarily restricts the manner in which intention to be bound may be established. Like deeds in New Zealand, a writing requirement increases the chance that legitimate promises intended to be binding and giving rise to reasonable expectations will be defeated. Any reform in New Zealand will need to address this issue.

PART II: THE FUTURE OF CONTRACT LAW IN NEW ZEALAND

1. Abolishing Consideration as a Requirement for Contract Formation

It should be clear by this point that the continued application of consideration as a necessary requirement for contract formation cannot be justified. To the extent that the consideration requirement restricts contract to bargains, that result is undesirable. Enforcing unilateral promises is economically beneficial, and reflects the reasonable expectations of the promisee induced by the promisor’s manifestation of intention to be bound. Consideration is valuable as one form of evidence that the parties intend to be bound, but that intention can be expressed in other ways (as discussed below).

If consideration is abolished as an absolute requirement for contract formation, a fundamental change in our understanding of the nature of contract will result. Any promise made in a manner showing an intention to be bound will be enforceable,
provided some clear evidence of that intention can be produced. Despite the dramatic appearance of this change, it would not be unprompted. Judges have been calling for the abolition of the consideration requirement for centuries.\(^1\) More recently, the courts in New Zealand,\(^2\) England,\(^3\) Australia\(^4\) and Singapore\(^5\) have placed increasing emphasis on the intention of the parties to be bound, and less on technicalities and form. The time has come to overturn the unhelpful and outdated rule that consideration is essential for a valid contract.

2. Is a Formal Requirement Desirable?

Many legal systems which enforce gratuitous promises require them to be made in a particular form. Scotland requires gratuitous unilateral promises to be recorded in writing and signed.\(^6\) In France, gifts of assets and promises to gift assets must be executed before a notary.\(^7\) In New Zealand, gratuitous promises are enforceable if contained in a deed.\(^8\) Witnessing and notarial requirements, and, to a lesser extent, bare subscription requirements, may provide some measure of protection against impulsive and unwise gratuitous promises. But the extent of any such protection is limited; anyone who can be persuaded to make an unwise promise will probably be willing to do so in writing or before a witness. While requiring independent advice would address this problem, it would also be extremely impractical and expensive. The few cases in which it would have a positive effect are likely to be outweighed by the number of seriously intended promises rendered unenforceable. As with most deeds at present, the benefit of being able to undertake binding unilateral obligations would only extend to parties involved in transactions of such a large value that they consider it necessary to seek legal advice.

Any formal requirement creates a risk that the parties will fail to comply due to lack of awareness of the legal rules. The promisee’s reasonable expectation and the promisor’s intention to be bound will then be defeated. The courts should simply require clear evidence of intention, regardless of its form. In the vast majority of cases, that evidence will take the form of consideration (whether substantive or

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\(^1\) E.g. Lord Mansfield (see *Pillans & Rose v Van Mierop & Hopkins* (1765) 3 Burr 1663) and Lord Wright (see “Ought the Doctrine of Consideration to be Abolished from the Common Law?” (1936) 49 Harv LR 1225).

\(^2\) *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 at [93].

\(^3\) *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 18.

\(^4\) *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 740.

\(^5\) *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at [139]; *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] SGCA 3 at [92]-[113].

\(^6\) Requirements of Writing (Scotland) Act 1995, ss 1(2)(a)(ii) and 2.


\(^8\) Property Law Act 2007, s 9.
nominal) or writing. But the law should be capable of accommodating those rare cases where, although consideration and writing are absent, the court is satisfied that the promisor intended to undertake a binding obligation.

There is always a risk that people will make unwise decisions. This is not only true of gratuitous promises, but of onerous contracts as well. But no one is obliged to make a promise. Even less so is anyone obliged to make a promise expressed in a manner or made in circumstances showing an intention to be legally bound. If he chooses to do so, he should be aware that his actions will induce the promisee to reasonably expect performance or equivalent compensation. If the promisee is the cause of the promisor’s unwise decision, the doctrines of undue influence, duress or fraud may apply. Failing that, the promisor should not be permitted to deny the promisee’s right to performance by withdrawing from his deliberately assumed obligation.\(^9\)

3. Proving Intention to be Legally Bound

The courts already assess whether the parties to a contract intended to be legally bound. The presence of consideration is not conclusive evidence.\(^10\) In recent years there has been a shift away from presuming intention to be legally bound in commercial cases, or the absence of any such intention in family situations; the modern approach is to examine each case on its facts.\(^11\) The party seeking to enforce a promise must satisfy the court that it was intended to create legal relationship.\(^12\) It will still, however, be easier to satisfy the court that intention should be inferred where the parties are commercial and dealing at arms length.\(^13\)

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\(^9\) If New Zealand were to enforce entirely gratuitous promises made for altruistic motives, it may be necessary to recognise some circumstances in which the promisor can revoke the promise. For example, in France a promise to make a gift is revocable if the promisee acts with extreme ingratitude by seeking to kill the promisor, seriously harming him, acting cruelly toward him, wronging him unlawfully or refusing him support in case of need: Code Civil, art 955 (§ 530 of the German Civil Code provides a similar right of revocation). In such circumstances it may cease to be reasonable for the promisee to expect performance or a legal remedy. A reasonable person would realise that by acting in such a manner he would forfeit any such right.

\(^10\) See, for example, Jones v Padavatton [1969] 1 WLR 328, in which a mother promised to pay her daughter a weekly allowance if she would quit her job and study for admission to the Bar. It was clear that the daughter gave consideration for the mother’s promise, but the English Court of Appeal held that the parties had not intended the arrangement to be legally binding.


\(^12\) Fleming v Beever, above n 11, at 390.

\(^13\) Chas S Luney Ltd v State Bank of South Australia HC Christchurch CP 49-93, 9 November 1994 at 12 at 13.
If consideration were no longer necessary, the courts would not be facing a new inquiry. In cases where consideration and writing were both absent, the courts would require convincing evidence that the promisor intended to be bound. In making that assessment, the court would “take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances.”

The kind of evidence which might be sufficient is not capable of precise definition, as the facts of each case vary widely. However, some examples may be given.

If the parties are in a pre-existing contractual relationship, this may indicate intention to be bound. Contract variations would generally be binding without the need to artificially find consideration in the form of a practical benefit. Likewise, evidence of concurrent legal arrangements may indicate intention to be bound. For example, in Fleming v Beevers, the Court of Appeal held that the deceased’s promise to leave the plaintiff half of the property they were purchasing as tenants in common in equal shares was intended to be binding. The promise was part of a composite arrangement for the purchase of the house, which was clearly intended to have legal effect.

In addition, if the promisor took steps to perform the promise, that might also act as evidence that he intended to be bound. If, for example, the promisor undertook to gift real property to the promisee, and subsequently consulted a lawyer to arrange the transfer but died before it was completed, the lawyer’s evidence that the promisor intended to carry out the promise in law could indicate that the promise was intended to be binding. A situation similar to Chambers v Commissioner of Stamp Duties would also fall under this head. The promisor recorded the remission of interest owed under the mortgage in her books, but did not record the actual promise in writing and subscribed. The Court of Appeal found that both parties thought the forgiveness was effective in law, but it was unenforceable for want of consideration. If consideration was not necessary, the ‘write offs’ recorded in the promisor’s books could have provided evidence that the promisor intended her promise to remit the interest to have legal force.

The examples given above would be factors in determining whether the promisor intended to be bound, but would not necessarily be conclusive. There may

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14 Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8, 209 CLR 95 at [25].
15 Ibid.
16 Parties named in Schedule A v Dresdner Kleinwort Ltd [2010] EWHC 1249 (QB) at [50].
17 Fleming v Beevers, above n 11, at 390.
18 Chambers v Commissioner of Stamp Duties [1943] NZLR 504 at 511.
19 Ibid, at 527.
also be other factual elements suggesting intention to be bound; in the words of the High Court of Australia, “the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules.”

PART III: CONCLUSION

The doctrine of consideration has a long, though by no means uncontroversial, history in the Common Law. The continued existence of the requirement is a result of its embedded status, combined with the relative lack of unjust results produced by the doctrine in the courts. The latter aspect is primarily attributable to the increasingly flexible approach of judges, who ‘find’ consideration in the form of a practical benefit to the promisor, and the recognition by lawyers that there is little point in seeking to enforce gratuitous promises as contracts.

However, the fact remains that the consideration requirement has undesirable consequences. This is true in practice, due to the unenforceability of gratuitous promises unless in deed form, and the potential for valuable arrangements collateral to exchanges to be defeated. It is even more true in theory; consideration is unjustified both as a tool for restricting contract to the realm of bargains, and as a formal requirement. It is capable of defeating the legitimate intentions of parties who wish to undertake legally binding obligations. Consideration should be relegated to the status of one form of evidence that a promisor intended to be bound. The court’s foremost inquiry should be into the objectively manifested intention of the promisor, however that intention is substantiated.

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20 Ermogenous v Greek Orthodox Community of SA Inc, above n 14, at [25].
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Uniform Commercial Code (United States of America), § 2-205.

Scotland
Requirements of Writing (Scotland) Act 1995, ss 1 & 2.

France
Code Civil (France), arts 931, 955.
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Smeaton v Magistrates of St Andrews (1870-75) LR 2 Sc 107.

Singapore
Appendix: Relevant Legislation

**Judicature Act 1908, s 92**

*Discharge of debt by acceptance of part in satisfaction.*

An acknowledgement in writing by a creditor, or by any person authorised by him in writing in that behalf, of the receipt of a part of his debt in satisfaction of the whole debt shall operate as a discharge of the debt, any rule of law notwithstanding.

**Property Law Act 2007, s 9**

*Deed must be in writing, executed, and delivered.*

1. A deed must be—
   - (a) in writing; and
   - (b) executed in accordance with this section; and
   - (c) delivered in accordance with this section.

2. An individual executes a deed if—
   - (a) he or she signs the deed; and
   - (b) his or her signature is witnessed in accordance with subsection (7).

3. A body corporate executes a deed if—
   - (a) the deed is signed in the name of the body corporate by—
     - (i) the director of the body corporate if it has only 1 director; or
     - (ii) not fewer than 2 directors of the body corporate if it has 2 or more directors; or
     - (iii) 1 director or other person or member of a specified class of person if the body corporate’s constitution authorises a deed to be signed in that way; and
   - (b) in the case of a deed signed under paragraph (a)(i) or (iii), the signature is witnessed in accordance with subsection (7).

4. A body corporate executes a deed if it executes the deed as provided in any other enactment relating to the execution of a deed by the body corporate.

5. A body corporate not incorporated by or under the law of New Zealand may execute a deed other than in accordance with subsections (3) and (4) if the mode of execution would be authorised by the law of the place in which the body corporate is incorporated were the deed executed in that place and governed by that law.

6. The Crown executes a deed if—
   - (a) it is signed on behalf of the Crown by 1 or more Ministers of the Crown or other officers or employees of the Crown of Her Majesty the Queen in right of New Zealand having express or implied authority to sign the deed on behalf of the Crown; and
(b) in the case of a deed signed by only 1 person under paragraph (a), the signature is witnessed in accordance with subsection (7).

(7) A witness—
(a) must not be a party to the deed; and
(b) must sign the deed; and
(c) if signing in New Zealand, must add—
   (i) the name of the city, town, or locality where he or she ordinarily resides; and
   (ii) his or her occupation or description.

(8) No particular form of words is required for the purposes of subsection (7)(c).

(9) A deed is binding when—
(a) delivered by—
   (i) the person to be bound by it; or
   (ii) another person having express or implied authority to deliver it on behalf of the person intended to be bound by it; and
(b) either—
   (i) it is apparent from the circumstances that the person to be bound by the deed intended to be bound by it; or
   (ii) if the binding force of the deed is subject to the fulfilment of 1 or more conditions, when each condition is fulfilled.

Requirements of Writing (Scotland) Act 1995, ss 1 & 2

1.—(l) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.

(2) Subject to subsection (3) below, a written document complying with section 2 of this Act shall be required for-
(a) the constitution of—
   (i) a contract or unilateral obligation for the creation, transfer, variation or extinction of an interest in land;
   (ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and
   (iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;
(b) the creation, transfer, variation or extinction of an interest in land otherwise than by the operation of a court decree, enactment or rule of law; and
(c) the making of any will, testamentary trust disposition and settlement or codicil.

(3) Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a written document complying with section 2 of this Act, but one of
the parties to the contract, a creditor in the obligation or a beneficiary under the trust ("the first person") has acted or refrained from acting in on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster ("the second person")—

(a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and

(b) the contract, obligation or trust shall not be regarded as invalid, on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied.

(4) The condition referred to in subsection (3) above is that the position of the first person—

(a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and

(b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.

(5) In relation to the constitution of any contract, obligation or trust mentioned in subsection (2)(a) above, subsections (3) and (4) above replace the rules of law known as rei interventus and homologation.

(6) This section shall apply to the variation of a contract, obligation or trust as it applies to the constitution thereof but as if in subsections (3) and (4) for the references to acting or refraining from acting in reliance on the contract, obligation or trust and withdrawing therefrom there were substituted respectively references to acting or refraining from acting in reliance on the variation of the contract, obligation or trust and withdrawing from the variation.

…

2.—(1) No document required by section 1(2) of this Act shall be valid in respect of the formalities of execution unless it is subscribed by the granter of it or, if there is more than one granter, by each granter, but nothing apart from such subscription shall be required for the document to be valid as aforesaid.