Something for Nothing: Explaining Single-Sided Contract Variations

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INTRODUCTION

Explaining single-sided contract variations is troublesome. This article addresses the situation where one party varies its obligations under a contract, either by increasing its rights or reducing its duties, whilst the other party maintains the same obligations. The modern case law holds that, in certain circumstances, such variations are valid, but that in others, they are not. Focusing on these cases, this article has two objectives. One is to present a negative argument, that the prevailing theories cannot explain the patterns of validity and invalidity which the case law has developed, and that those theories are, in any case, problematic. The other is to offer a positive argument, that such variations can be understood through an implied terms analysis.

I will call the situation which this article considers a 'single-sided variation' to a contract. There are two variants. First, one party to a contract may request additional performance from the other party in return for no additional performance from itself (a 'more for the same' scenario).[1] Second, one party may request that it should render less performance in discharge of its contractual duty in return for the same performance from the other party (a 'less for the same'). *Stilk v Myrick*[2] and *Williams v Roffey Bros*[3] govern 'more for the same' scenarios, and *Foakes v Beer*[4] and *Re Selectmove*[5] govern 'less for the same' scenarios. These authorities are discussed in Section I.

Single-sided variations are problematic because of the doctrine of consideration. Consideration is something of value (either a benefit or detriment) given or promised by the promisee in return for the promisor's promise.[6] Only promises backed by valid consideration from both sides are enforceable. This is critical for present purposes because, when a party requires a single-sided variation to a contract, it is promised more or it reduces its own obligation. However, it seemingly fails to offer any consideration in return for this beneficial alteration in its own rights/duties. Therefore, the contract variation seems to lack consideration from one party, and hence be invalid.

Section II will consider why simply distinguishing the relevant cases is an untenable suggestion. Sections III to V will then consider three existing theories which attempt to explain single-sided variations: Unilateral Variation Contracts, Duress and Promissory Estoppel. They will be the subject of my negative argument, that these theories cannot explain the operation of single-sided variations given the present state of the case law.

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[1] The 'more for the same' and 'less for the same' terminology are adapted from Chen-Wishart, Contract Law (4th edn, OUP 2010) 125

[2] (1809) 2 Camp 317 (KB).

[3] [1991] 1 QB 1 (CA).

[4] (1884) 9 App Cas 605 (HL).

[5] [1995] 1 W.L.R. 474 (CA).

[6] *Currie v Misa* (1875) LR 10 Ex 153 (HL).

Instead, the positive argument of this article is that a solution can be found in the modern law of implication of terms. I will argue that implying a Variation Term, under the approach to implication most recently stated by Lord Hoffmann in *Attorney General of Belize v Belize Telecom,*[7] facilitates single-sided variations and explains the case law. This argument is set out in Section VI.

I. THE CASE LAW

First, we will consider the relevant case law which provides the foundation to the theories. The 'more for the same' and 'less for the same' scenarios are considered in turn.

First, however, it is useful to define the scope of the single-sided variation situation. Many contract variations are unquestionably valid. If both sides offer fresh consideration, then the contract is valid. The two parties could agree to end their previous contract and form a new one. A deed would also suffice to make a gratuitous promise (to give more/accept less in satisfaction of the contract). Therefore, these situations do not conflict with the doctrine of consideration, and so are beyond the reach of this article.

A. 'MORE FOR THE SAME' SCENARIOS'

Stilk v Myrick

Stilk is the foundational case for the modern law on single-sided contract variations. Stilk was one of eleven crew members on a ship serving under Myrick. His contract said that he would be paid £5 per month in return for doing everything that was needed in the voyage. Midway through the voyage, two of the crew deserted. Myrick therefore promised the remaining crew that, if he could not find two more crewmen (which he could not), he would divide the two deserters' wages amongst the rest of the crew so that they should take on the roles of the deserters as well as their own for the return voyage. The nine remaining crew members sailed the ship home. Myrick then only paid them their original wages. The crew members brought an action on the contract for the additional wages they had been promised, being one-ninth shares of the two deserters' wages. The court found for Myrick, denying the extra payments.

Campbell's report[8] says that the varied contract was invalid because of lack of consideration[9]. Lord Ellenborough explains that the sailors had already undertaken to do everything necessary, which included, if need be, taking on the roles of any deserters. Therefore, they had given nothing in return for the promise to increase their wages, so the agreement was void for want of consideration.[10] To state this conclusion in a different manner, the promise of more rights (wages) in return for the same performance was held to be invalid.

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[7] [2009] UKPC 10, [2009] 1 WLR 1988.
[8] *Stilk* (n 2).
[9] The basis of the decision is evidentially problematic. Espinasse, 6 Exp 129, reports that the decision was based on grounds of public policy, following *Harris v Watson* Peak. Cas. 72, that it was undesirable to allow sailors to demand pay rises in return for seeing the ship home. Espinasse's reported reasons therefore directly contradict those given by Campbell. The weight of modern authority, such as exists, rests behind Campbell's report. *North Ocean Shipping v Hyundai Construction* [1979] QB 705 (HC) approved Campbell's report for its better reputation and the Court of Appeal in *Williams* accepted Campbell's report.
[10] *Stilk* (n 2) 319.

Williams v Roffey Bros

The second 'more for the same' case is *Williams*. Shepherds Bush Housing Association contracted with Roffey to refurbish 27 flats. Roffey sub-contracted carpentry work to Williams, agreeing to pay them £20,000 in instalments. When Williams had one task still to complete in 18 of the flats, he informed Roffey that he was in financial difficulty. Therefore, he might be unable to complete the remaining work unless he received more money. At that time, Roffey had paid Williams £16,200. Roffey was subject to penalties under the main contract with Shepherds Bush Housing Association, so it needed prompt completion of the services. Therefore, Roffey offered to pay Williams £10,300 in addition to the original £20,000, at £575 for each of the remaining 18 flats. However, Roffey only paid another £1,500 over the next two months. This caused Williams to cease work on the flats. The work in eight of the 18 flats had been substantially completed.

Williams brought an action on the contract claiming the original sum owed plus the £10,300 under the variation. The Court of Appeal dismissed Roffey's appeal. The damages awarded to Williams at first instance, £4,600 (to represent the completion of eight flats minus costs, plus a reasonable sum due under the original contract), were upheld. Glidewell LJ summarised the law thus:

> ...the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) *as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit*; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) *the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.*[11] (emphasis added)

Thus, the consideration which Williams had given under the variation contract was providing Roffey with practical benefits, or obviating practical disbenefits. The Court identified four such benefits: (1) continued performance; (2) avoiding the difficulties of finding an alternative carpenter; (3) avoiding liability under the penalty clauses in the main contract; and (4) performing the work in a more orderly manner. Thus, both sides to the variation contract had provided consideration, and so the variation contract was valid.

The Court of Appeal recognised the potential conflict between *Stilk* and the decision that they were making. The following passage from Russell LJ encapsulates the general tenor of the distinction drawn:

> ...I do not base my judgment upon any reservation as to the correctness of the law long ago enunciated in *Stilk v. Myrick*. A gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.[12]

[11] *Stilk* (n 2) 15-16.
[12] ibid 19.

The principle that may be drawn from these findings is that the existence of a practical benefit is good consideration.[13] When the legal obligations under the contract are not altered, a party still provides adequate consideration by offering a practical benefit, or obviating a practical disbenefit, in fact. By contrast, the principle in *Stilk v Myrick* is that a single-sided variation, where the other party received no benefit, is invalid for want of consideration. While this may have increased the economic efficiency of the transaction on the facts, Section II will explain, in light of the analysis of the 'less for the same' scenarios, why the acceptance of 'practical benefits' is unconvincing.

B. 'LESS FOR THE SAME' SCENARIOS

Foakes v Beer

The reverse of the 'more for the same' scenario is the 'less for the same' scenario. Here one party will *reduce*, rather than increase, their rights or duties. *Foakes*[14] is the principal case. Dr Foakes owed Mrs Beer a sum of money after a court judgment. When Foakes complained that he could not afford full payments immediately, he and Beer made a written agreement that he could pay in instalments. The agreement made no mention of the need to pay any interest. Foakes paid the original sum as agreed, but no interest. Beer brought an action on the contract to claim the interest payments. Foakes argued that the variation meant that she could not enforce the sum. Beer argued that the single-sided variation was invalid because Foakes had not provided any consideration.

The House of Lords found for Beer. Their Lordships held that an agreement whereby one party agrees to accept less performance in return for the other party accepting the same performance was invalid for want of consideration.[15] As Lord Fitzgerald observed, a bare agreement arises when one party fails to give consideration, and it is a rule that a bare agreement does not give rise to a legal obligation.[16]

In re Selectmove

The second 'less for the same' case is *Re Selectmove*. Selectmove owed outstanding tax and national insurance payments. The company director agreed with the Inland Revenue that Selectmove would only have to pay future tax and national insurance contributions, and that these could be made at an agreed rate. The director had pointed out to the collector that the company was in financial difficulties, so it was better to implement a reduced payment plan than to issue a winding up order on Selectmove, which would mean that none of the outstanding payments would be recovered. Later, having received insufficient payment from Selectmove, the Inland Revenue brought an action for all the outstanding payments owed.

Selectmove argued that the agreement had reduced the debt which it owed. The main issue argued by counsel for the Inland Revenue was the seeming want of consideration. The court faced two apparently contradictory authorities: *Foakes* said that an agreement to accept part-payment of a debt in discharge of a whole was invalid for want of consideration. However, *Williams* said that obtaining a practical benefit was good consideration. Selectmove argued that the agreement entailed a practical benefit because the reduced rate made it feasible for the company to make payments.

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[13] *Adam Opel v Mitras Automotive* [2008] EWHC 3205, [2008] CILL 2561.
[14] *Foakes* (n 4)
[15] See Earl of Selborne LC at 611, 613 – 614 and Lord Blackburn at 615-616, 621-623. Lord Watson dissented on the grounds of the construction of the document in question, and did not consider the issue of consideration. There were other reservations, notably expressed by Lord Blackburn, but all of their Lordships ultimately agreed on the issue of law relating to consideration raised by the case.
[16] ibid 629-630.

The Court of Appeal found for the Inland Revenue. The variation, the agreement to accept part-payment of the debt in discharge of the whole, was invalid for want of consideration. The court took *Foakes v Beer* as their binding authority, and rejected the practical benefit argument from *Williams*, distinguishing it. Peter Gibson LJ explained that, if they were to accept *Williams,* it would leave *Foakes* without any application, so *Williams* could not be extended.[17] Thus, the Court of Appeal rejected the application of practical benefits in the context of 'less for the same' variations.

II. STATE OF THE PRESENT LAW

A. SUMMARY

One way of explaining the present law, based on the practical benefit view, is that these four cases might be distinguished from one another. This would cause us to state the 'law' in the following terms. In the context of 'more for the same' variations, for a variation to be valid, fresh and valid consideration must be given by both parties, not just the promisor (*Stilk*). However, a practical benefit is sufficient consideration in such circumstances (*Williams*). In the context of 'less for the same' variations, for the variation to be valid, fresh and valid consideration must be given by both parties, not just the promisor (*Foakes*). A practical benefit does not amount to valid consideration; some new legal benefit must be promised (*Re Selectmove*).

B. THE LOGICAL PROBLEM

There is a logical problem in this explanation. The distinction is arbitrary. Agreeing to increase one's duties in return for nothing ('more for the same') or agreeing to reduce one's rights in return for nothing ('less for the same') are simply the reverse of each other. In both cases, one party suffers a legal detriment either in losing rights or gaining duties, and the other party thereby receives a benefit in either losing duties or gaining rights. Therefore, there is no principled reason why practical benefits should only be applicable in one of these scenarios, because they can be given equally in return for a loss of rights (for which they are currently not allowed) or an increase in duties (for which they currently are allowed). Thus, in principle, practical benefits should apply to both or to neither.[18]

C. THE PRECEDENTIAL PROBLEM

It was, as a matter of potential interpretation, not even open to the Court of Appeal to conclude that a practical benefit is adequate consideration in *Williams*. We can observe this by re-examining *Stilk v Myrick.* We have already established that *Stilk* stands for the proposition that, when only one side receives a benefit or undertakes a detriment under a contract-variation, that variation is invalid. As a matter of interpretation *Stilk* seems to stand for a second proposition, that practical benefits are not valid consideration. To observe this, we must run the concept of practical benefits back through *Stilk*.

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[17] *Re Selectmove* (n 5) 481.

[18] It is noted that the same distinction is drawn by the law of promissory estoppel. However, consideration of the distinction in that context is beyond the scope of this article. It suffices to note, for present purposes, that it seems unsatisfactory to justify an arbitrary distinction in one area of the law by pointing to an equally arbitrary (and contentious) distinction drawn elsewhere, and thus an analogy with promissory estoppel would be unhelpful.

In *Stilk*, there was no legal benefit to the ship's master, because his rights remained the same. There was a legal benefit to the crew, because their rights were increased by the promise of additional pay. The court, therefore, declined to recognise the variation contract, because only one side received a new legal benefit, and neither side undertook a new legal detriment. However, there were two practical benefits to the ship's master, because he (1) got the ship home and (2) did not have to expend effort into finding replacement crew members. Indeed, these mirror the first two practical benefits in *Williams* ((1) continued performance and (2) avoiding the difficulty of finding a replacement contractor). There was also practical detriment to the crew, because they had to work proportionately harder to make up for the two missing sailors. Therefore, the crew members each received a legal benefit – increased pay. The ship's master received a practical benefit – he got the ship home safely – and obviated a practical disbenefit – he did not have to find replacement crew. Therefore, under the rule from *Williams*, adequate consideration was provided by both sides in *Stilk*. Hence, accepting *Williams*, *Stilk* would have been decided differently today.[19]

Before reflecting on what this says of *Williams*, we must reflect on what we learn of *Stilk*. The court in *Stilk* refused to recognise any valid consideration in the practical benefits obtained and disbenefits obviated. Therefore, *Stilk* can be seen to stand for a second proposition, that only a *legal* benefit/detriment is sufficient consideration; a practical benefit will not suffice.

The revised reading of *Stilk* seemingly places it in direct conflict with *Williams*. Looking once again at *Foakes*, we see that it also is in conflict, for it also rejected a practical benefit as insufficient. Although Beer received a practical benefit in actually securing payments from Foakes, the court denied that Foakes had given any consideration and, thereby, rejected the adequacy of practical benefits once again. Indeed, their Lordships were acutely aware of the commercial benefit obtained by single-sided variations in certain situations, yet this could not overcome the fact that there was no variation in Foakes' obligations so as to amount to valid consideration.[20] Given that *Re Selectmove* was also decided after *Williams*, so the 'more for the same'/'less for the same' distinction had yet to be made, the Court of Appeal in *Williams* was not only following *Stilk* but also the House of Lords in *Foakes*. While referring to *Stilk*, the judgments in *Williams* make no mention of *Foakes*, and it was not cited by council. Thus, the court in *Williams* appears to have been bound to reject practical benefits, and thus fell into error by failing to do so.

D. CONCLUSION ON THE DISTINCTION

Therefore, given the logical problem and the precedential problem, we must reject the suggestion that our difficulties may be resolved by distinguishing 'more for the same' and 'less for the same' cases, and applying practical benefits in the former but not the latter.

III. UNILATERAL VARIATION CONTRACTS

Thus far, we have examined the legal propositions which the cases establish, and have seen that simply drawing a distinction between them is an unsatisfactory solution. With this established, this article's negative argument can be made. Thus, in this section and the following two, three prominent explanations offered for the cases – Unilateral Variation Contracts, Duress and Promissory Estoppel – are examined and rejected.

[19] Treitel, *The Law of Contract*, (13th edn Sweet & Maxwell, 2011) 99.
[20] See, for example, Lord Blackburn at 622-623

A. THE THEORY

Chen-Wishart has proposed that a double contract analysis is necessary.[21] The original contract is an ordinary bilateral contract. The variation forms a second, unilateral contract. Consideration in the original contract consists of the *promise* to perform the service, in return for the promise of payment. Consideration in the unilateral contract consists of the *performance* of the services, in return for the increase in payment.[22] In Williams, the bilateral contract was to perform three services on the 27 flats for £20,000. Williams *promised* those carpentry services, in return for Roffey's *promise* to pay. The unilateral variation contract was Roffey's *promise* to pay the additional £10,300 at £575 for each completed flat, in return for Williams *actually completing* the remaining 18 flats. This view explains *Williams* in terms of legal benefits alone, because legally different consideration is provided in both contracts; the first is the promise to perform (the necessary consideration in a bilateral contract), and the second is actual performance (the necessary consideration in a unilateral contract). Furthermore, there would be no issue of conflict between the two contracts, because terms of a valid unilateral contract formed later would prevail over contradictory ones in an earlier bilateral contract.[23]

This approach also explains the damages award in *Williams*. Recall that the damages awarded were not the full varied price which Roffey had offered, but rather a sum which roughly reflected the fact that eight flats had been completed, but another 10 remained outstanding. Chen-Wishart proposes two alternative ways of conceptualising the variation contract.[24] First, the variation actually involves 18 separate unilateral contracts, one per flat. Acceptance and consideration in unilateral contracts constitutes full performance.[25] Thus, when Williams only serviced eight flats, he only accepted and gave consideration for eight contracts, and hence could only claim the sums due under those contracts, £575 each. However, it may have well surprised the parties in *Williams* to know that they potentially had 19 operative contracts, not just one.

B. PROBLEMS WITH THE SINGLE UNILATERAL CONTRACT ALTERNATIVE

Chen-Wishart's second proposal consists of only a single unilateral contract. Acceptance and consideration would be completing performance on the 18 flats. However, when the dispute re-arose and performance ceased, Williams had not completed their acceptance of the contract. Therefore, the unilateral contract had not been fully accepted, and hence had yet to form.

As a result, the law on prevention of revocations after partly-performed acceptance in unilateral contracts must be applied. To prevent a revocation of the offer once the acceptor's performance has begun, the part performance can constitute the acceptance so long as it is later followed by full completion of performance.[26] The effect of this rule is to retrospectively render the unilateral contract valid once performance has commenced, subject to due completion of performance at a later time, when the validity of the contract is challenged by an attempted revocation. However, this would not work on the facts of *Williams v Roffey*, as Williams never completed performance, and hence the unilateral contract between Williams and Roffey would never have been valid.

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[21] Chen-Wishart, 'A Bird in the Hand: Consideration and Promissory Estoppel' in A Burrows and E Peel (eds), *Contract Formation and Parties*, (OUP 2010) 89-113, at 92-102.
[22] Service and payment here are used by analogy with *Williams v Roffey*, but of course the principle is not limited to services and payments in this order, or indeed to cases with mixture of services and payments (see, e.g., *Vanbergen v St Edmund Properties* [1933] 2 KB 223 (CA)).
[23] *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 (HC).
[24] Chen-Wishart (n 21).
[25] *Errington v Errington and Woods* [1952] 1 KB 290 (CA), 295.
[26] *Errington* (n 25); *Soulsbury v Soulsbury* [2007] EWCA Civ 969, [2008] Fam 1.

Instead, dictum by Goff LJ in *Daulia v Four Millbank Nominees*[27] must be relied on. He tells us that there is an implied obligation, arising when performance commences, on the offeror not to prevent the performance in acceptance of the contract. This dictum is susceptible to two separate analyses. First, it could be said that the implied obligation is actually an implied condition of the offer. So, A offers to pay £X to B if B walks from London to York, or performs this task to the extent he is not prevented by A from performing. Applying this to *Williams*, one would say that Roffey offered to pay the additional £10,300 in return for Williams completing the remaining 18 flats, or completing them to the extent that he was not prevented from doing so by Roffey. This cannot work. Roffey did not *prevent* Williams from completing the flats. Williams voluntarily ceased performance when Roffey did not pay adequate sums. He ceased to accept, and thus impliedly rejected, Roffey's offer. Only then did Roffey expel Williams from the site. Furthermore, since the unilateral contract had yet to form, Roffey's obligation to pay had not yet crystallised, and thus Roffey had done everything which he was obliged to do, so he had not 'prevented' performance by failing to fulfil his own legal obligations. Thus, *Daulia* cannot be successfully analysed as implying a condition into the offer on the facts of *Williams*.

The alternative is to hold that the implied obligation requires a two-contract analysis of the unilateral contract. Under this analysis, the dictum maintains the rule that a unilateral contract is only formed once full performance has been rendered. Instead, the implied obligation to allow performance without hindrance must arise from a collateral contract which is validly formed by the commencement of performance by the promisee in the unilateral contract.[28] Therefore, Roffey was subject to an implied duty not to prevent Williams' acceptance by performance. This analysis, once again, collides with the difficulty that it was Williams who ceased performance, and only then did Roffey make performance impossible by expelling him from the site. Therefore, Roffey did not appear to breach the collateral contract. It might be objected that the collateral contract should take no account of Williams' desistance from performance, and it only imposed an absolute obligation on Roffey not to prevent performance. This is incredibly artificial, because it verges on the irrational to impose an absolute obligation on one party to permit performance, regardless of the actions of the other. However, it is perhaps theoretically possible. Thus, we would say, by expelling Williams from the site, Roffey breached this collateral contract. However, the main unilateral contract still never came into existence for want of Williams' full performance. Therefore, the damages arose not through breach of the variation contract, but through breach of the collateral contract to the proposed variation contract.

The standard rule for damages is the performance, often called the expectation, measure.[29] What is the performance measure in the collateral contract? The answer will be the answer to the question "Where would Williams have been had the collateral contract been performed by Roffey?" However, this hypothetical contains a crucial uncertainty. If the collateral contract had been performed, Williams would have been able to perform. However, this was not the end. If Williams *had then gone on to perform*, he could also have expected the additional payments under the unilateral contract. However, Williams might have *refused to perform*, in whole or in part. This would mean that he had no expectation under the unilateral contract, and indeed that he may be liable for breach of the main bilateral contract. In between these two extremes, there are all manner of potential part-performance outcomes. Therefore, we cannot say what the performance measure was, because we cannot know where exactly, 'but for' Roffey's breach, the situation would have ended.

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[27] [1978] Ch 231 (CA), 239.

[28] Examining the apparent issues of consideration and communication of acceptance for this collateral contract are beyond the scope of this article. We will assume this collateral contract is validly formed.

[29] Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628. See also *Robinson v Harman* (1848) 1 Ex Rep 850, especially 855.

Such hypothetical uncertainty is not, however, unknown to the courts. In the Court of Appeal in *Walford v Miles*, Bingham LJ tells us that, when dealing with such uncertainty of hypothetical outcome, the minimum expectation formed is that which is most favourable to the innocent party (i.e. the party who is not in breach).[30] The most favourable outcome for Williams was, therefore, that he fully performed all the services, because that would have entitled him to payment under the unilateral variation contract, and not left him in breach of the bilateral contract. The performance measure under the unilateral contract was £10,300. Therefore, that was also the performance measure under the collateral contract. However, Williams was not awarded the performance measure, but rather seemingly a reliance measure. Therefore, unless we conclude that the court was in error in awarding damages, *Daulia* cannot explain *Williams* by a collateral contract analysis either. Thus, both of *Daulia*'s explanations have failed on the facts of Williams, so we have no workable explanation of how the variation in *Williams* can be conceptualised as a single unilateral contract.

There is a further oddity with the single unilateral contract explanation too. The Court awarded damages to Williams because they held that Roffey was in breach. Roffey was in breach because they declined to pay the variation payments in addition to the normal instalments which they owed. To owe the variation payments, Roffey must be bound by the variation contract. Although they were bound to allow the variation contract to be formed, it does not follow that the variation contract was already valid. Because the unilateral contract was only valid once Williams' rendered full performance, Roffey was not yet subject to the duty to pay the variation payments. Therefore, Roffey was not in breach of any existing contractual obligation when they failed to pay the variation payments. Thus, the court should have rejected Williams' case for want of breach. Therefore, the single unilateral contract proposal seems to fail on the facts, so *Williams* must be construed as consisting of 18 separate unilateral variation contracts.

C. PROBLEMS WITH APPLICATION TO OTHER CASES

Whichever approach is taken in respect of *Williams* itself - whether one variation contract or 18 - the unilateral variation contract view is flawed because it is incapable of wider application. Quite simply, the application of the principle to *Stilk, Foakes* and *Re Selectmove* would have led to the opposite conclusion in those cases.

In *Stilk*, the bilateral contract was the original employment contract between Stilk and Myrick. The unilateral variation was the promise to pay more in return for *actually* working harder to fill in for the missing men, and hence getting the ship home. The performance was given in full (because the remaining crew put in the additional work for the rest of the voyage), so acceptance and consideration for the unilateral contract was given, making it valid. Therefore, the Unilateral Variation Contract theory says the variation in *Stilk* should have been legally valid.

The same issue arises in *Foakes*. The original 'bilateral contract' was the court ordered payment. The unilateral contract was the promise to accept payment in instalments without interest in consideration for *actually* receiving payment. Foakes duly paid the amount owed under the variation in full, so he gave valid acceptance and consideration, making the unilateral contract validly formed. Hence, again, the Unilateral Variation Contract theory suggests the variation should have been valid, where the House of Lords said it was not.

[30] See, e.g. Bingham LJ in *Walford v Miles* (1991) 62 P. & C.R. 410 (CA) at 422 – 423. Bingham LJ was forced to dissent for other reasons (specifically that he held that a non-time-limited lock-out agreement could be enforceable). The House of Lords ([1992] 2 AC 128) decided the case on the same basis as the majority, but did not consider this damages point.

Finally, *Re Selectmove* would also have been differently decided. The original 'bilateral contract' was to make the contributions as required by law. The unilateral variation contract was the promise to set a new, later date from when contributions would be outstanding and to reduce the monthly payments in consideration for *actually* attaining payment. Selectmove had begun, but not completed, payment when the Inland Revenue served the action and issued the winding up order. Therefore, although the unilateral contract itself was not valid for want of full acceptance and consideration, following the *Daulia* reasoning which also had to be applied to *Williams*, there was an implied condition or an implied collateral duty upon the Inland Revenue to allow Selectmove to make payments in accordance with the new agreement. Therefore, it should have been the Inland Revenue, not Selectmove, who were in breach.

D. PROBLEMS WITH FRUSTRATION

There is a further problem with the Unilateral Variation Contract theory, which arises if the performance in acceptance of the variation is frustrated. Although *Errington* and *Daulia* prevent the promisee from denying the variation by preventing performance, they do not apply when a frustrating event prevents performance. *Errington* assumes that the unilateral contract is not valid unless the performance is eventually completed. *Daulia* assumes that it is not valid until either performance is completed or performance is completed to the extent which the promisor permits. A frustrating event, not caused by either of the parties, may intervene, making full performance impossible. That will rule out the *Errington* rule, and the first alternative from *Daulia*. Since the promisor did not cause the frustration, the second ground of *Daulia* is also unavailable. Therefore, there is no valid unilateral contract, and no assistance from either *Errington* or *Daulia*. Hence, when, in applying the Law Reform (Frustrated Contracts) Act 1943, the court asks what was frustrated, the answer can only be the original bilateral contract, because that is the only valid contract between the parties. Therefore, valuations will be based on the original contract, taking no account of the fact that it was necessary to vary the price. This may lead to parties detrimentally relying on the offer of the unilateral variation, only to receive less than the expected remuneration in the event of frustration. To avoid such losses being incurred through detrimental reliance, we ought to reject the unilateral variation contract theory.

E. CONCLUSION ON THE UNILATERAL CONTRACT VARIATION THEORY

The unilateral variation contract theory cannot rescue *Williams*. The single unilateral contract analysis fails to explain *Williams* itself, and both potential analyses fail to explain the other main cases, and are problematic in instances of frustration. We should, therefore, reject it.

IV. DURESS

A. THE THEORY

A second theory sets out to distinguish the cases based on duress. The New Zealand Court of Appeal, in *Antons Trawling v Smith*,[31] stated:

[31] [2003] 2 N.Z.L.R. 23 (CA (NZ)).

> We are satisfied that *Stilk v Myrick* can no longer be taken to control such cases as *Roffey Bros* ... where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected.[32]

The theory is that the absence of variation in *Stilk* can be explained because the variation was vitiated by duress, whereas the existence of variation in *Williams* occurs through the absence of duress. Such thinking has been acknowledged, though not supported, academically.[33]

The theory looks to economic duress. *Universe Tankships of Monrovia v International Transport Workers Federation*[34] has set out the basic principle, which the subsequent cases have refined.[35] It requires an illegitimate threat (normally being satisfied by the unlawful action of threatening to breach a contract),[36] which is a 'but for' cause of the 'victim' entering the agreement, where the victim had no practicable alternative but to enter the agreement.[37]

B. PROBLEMS WITH APPLICATION TO THE CASES

The duress theory cannot explain the result in *Stilk v Myrick*. A finding of duress would not be made in *Stilk* under the modern definition. There was no threat by Stilk, or anyone else. The increased wages arose from Myrick's own suggestion and voluntary undertaking. The other crew do not appear to have threatened to breach their contracts with Myrick. Any pressure arose circumstantially. The 'duress' identified in *Stilk*, presuming we look to Espinasse rather than Campbell (which, of course, is not associated with a duress-based explanation), is really a policy consideration, designed to deter extortion through the *potential* for economic duress being used by crews against captains during voyages, which was created by Lord Kenyon in *Harris v Watson*.[38] It is not a true case of duress, as counsel for the sailors pointed out that 'it was made under no coercion, from the apprehension of danger, nor extorted from the captain; but a voluntary offer on his part for extraordinary service.'[39] Lord Ellenborough did not seek to dissent from this. The rule applied is described as one of policy. Any references which might invoke duress are phrased as referring to the hypothetical potential for duress, not any actual accusation on the facts. Therefore, while the result in *Stilk* can be attributed to the application of a specialist policy, it cannot be attributed to duress either under the law at the time or which we recognise today.

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[32] *Antons Trawling* (n 31) 93.
[33] See, e.g., O'Sullivan, 'In Defence of *Foakes v Beer*' [1996] CLJ 219, 227-28, or Coote, 'Consideration and variations, a different solution' [2004] LQR 19, 21.
[34] [1983] 1 AC 366 (HL).
[35] See Lord Diplock at 383-384, and also the similar explanation in the dissenting judgment of Lord Scarman at 400.
[36] A threat to breach a contract is *generally* illegitimate (see *Kolmar Group v Traxpo Enterprises* [2010] EWHC 113 (Comm), [2011] 1 All ER (Comm) 46, [92]), as it is a threat to commit unlawful action as required by Lord Diplock in *Universe Tankships*. In addition to this being accepted in *Atlas Express v Kafko* [1989] QB 833 (HC) and *Adam Opel*, this was also found in *B & S Contracts and Design Ltd v Victor Green Publications* [1984] ICR 419 (CA). As Kerr LJ explains (at 428), the primary limiting factor on economic duress was that the 'victim' had no practicable alternative to enter the contract, not any narrowing of the illegitimacy requirement.
[37] *Huyton v Cremer* [1999] 1 Lloyd's Rep 620 (HC).
[38] (1791) Peake 102.
[39] *Stilk* (n 2), 318-19.

It is conceded that a duress theory explains the result in *Williams*. Regardless of attempting to draw a line to decide whether Williams' actions constituted legitimate 'commercial pressure' or an illegitimate threat, it was Roffey, not Williams, who suggested the increase in pay. Hence, Roffey voluntarily accepted the rise, rather than being threatened into it. Thus, Williams mirrors *Stilk* in that it was the offerens of the variation who was also the potential victim of the 'duress'.

Nonetheless, we are still left with an unworkable mismatch between theory and practice. The duress theory says that both *Stilk* and *Williams* ought to be valid. It is only by resort to referencing policy considerations, which were raised in a report which is not even accepted as accurately describing the basis of the decision, that we get an explanation for the result in *Stilk*. Therefore, the duress theory in and of itself fails to explain the cases.

C. PROBLEMS WITH OFFERENS BEING DETERMINATIVE

The duress theory would create arbitrary distinctions based on who the offerens of the variation is. Accepting what is said about *Williams* above, the variation was valid because it was suggested by the 'victim' of the alleged duress, not the 'oppressor'. This contrasts to the pre-*Williams* case of *Atlas Express v Kafco*[40] and the post-*Williams* case of *Adam Opel v Mitras Automotive.*[41] In both these cases, a higher payment than originally agreed was demanded against a party who was subject to circumstantial pressure to ensure that the contract was maintained, and who thus agreed to increase their payments under the contract in a single-sided variation. Under these conditions, economic duress was found in both cases.[42]

What is important to note here is that, in both cases, the 'oppressor' had demanded the variation from the 'victim' of the duress. This contrasts to *Williams*, where the 'victim' of the duress was offerens of the variation. Thus, findings of duress are heavily influenced by which party is offerens. If the 'oppressor' requires a one-sided variation in his favour, the contract should be voidable for duress, as in *Atlas Express* and *Adam Opel*. However, if the 'victim' suggests the single-sided variation, the variation is valid, as in *Williams*. Ordinarily, such a distinction would seem valid, because, one might legitimately conclude, duress is designed to protect the 'victim' from being forced to accept terms which he would otherwise not agree to. But to see the special issue in these cases, one must consider the specific fact pattern. Take a basic example. Adam is performing some work on contract for Bob, which Bob is under pressure to see completed. Adam comes to Bob and says, "I am running out of money, I will not be able to finish the work." Now, here is the distinction. In Situation 1, Bob replies, "okay, how about I pay you an additional £X for it." Alternatively, in Situation 2, Bob replies, "okay, how can we resolve this?" Adam responds, "I could finish it for an extra £X." Bob says, "alright, I will pay you £X more as you suggest." Situation 1 is a *Williams* situation: the offerens is the 'victim'. Situation 2 matches *Atlas Express* and *Adam Opel*: the offerens is the 'oppressor'. Subject to finding Adam's threat to breach the contract to be illegitimate, duress would be found in Situation 2, but not Situation 1, based on the pattern of the conversation. If anything, Bob, by being more proactive in Situation 1, has denied himself the chance to have the variation made voidable by duress. Such a distinction, therefore, appears arbitrary. Hence, such arbitrariness means duress is a poor way to regulate single-sided variations.

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[40] [1989] QB 833 (HC).

[41] *Adam Opel* (n 13)

[42] Unlike Tucker J in *Atlas Express* (1989), David Donaldson QC in *Adam Opel* (2007) found himself bound by *Williams* (1990) on the issue of consideration: although Mitras had given nothing more than they were entitled to give, Opel obtained a 'practical benefit' of actually being able to maintain production. Therefore, if it were not for the duress issue deciding the case, the results in *Atlas Express* and *Adam Opel* would have been different, despite their materially similar facts, because of *Williams*.

D. LACK OF CONSIDERATION

Critically, the duress theory is invalid in law. The logic is fallacious. It rests on two premises: (1) duress makes a contract voidable and (2) there was no duress. From these, it reaches the conclusion that the contract was therefore valid. This is erroneous reasoning. Just because an agreement is not defeasible does not necessarily mean that it is a valid contract. Even in the absence of duress, the contract may have failed to validly form, and hence be invalid. That, indeed, is the present issue. The duress theory fails to provide any explanation about the issue of consideration in *Williams*, or any other single-sided variation. It holds that, as long as there is no duress, the variation is valid. Legally, that is necessary but insufficient reasoning. In addition to the absence of duress, there must be consideration (amongst other elements). The duress theory, therefore, simply does not work as a matter of law.

E. CONCLUSION ON THE DURESS THEORY

We must, therefore, reject the duress theory too. It is unworkable in law, struggles by itself to explain the cases which it claims to reconcile, and tends to an undesirable distinction.

V. PROMISSORY ESTOPPEL

A. THE THEORY

Some theorists[43] have allowed equity to intervene where the common law has apparently fallen down. The equitable doctrine of promissory estoppel has co-existed alongside the common law of contract formation in rendering a select category[44] of modifications which are not backed by consideration enforceable. Thus, it seems only natural that attempts have been made to explain an issue centred on an apparent absence of consideration by invoking promissory estoppel.

Promissory estoppel operates as follows. Where there has been a clear and unequivocal promise, express or implied,[45] of the promisor's intention to vary his strict legal rights against the promisee,[46] and the promisee has acted in (detrimental) reliance upon this,[47] and where it would be inequitable for the promisor to resile from his promise,[48] the court may invoke promissory estoppel to suspend[49] the promisor's strict legal rights under the contract in favour of the variation until such time as the inequity from resiling has ceased, so long as the modification consisted of the variation of existing rights rather than the creations of new ones.[50] This is said subject to the Court of Appeal's decision in *Collier v Wright Holdings,*[51] which has denied the need for detriment when assessing reliance,[52] and suggests promissory estoppel can be extinctive rather than suspensory.

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[43] This theory has been put forward by a number of academics. It is Chen-Wishart's exposition, from 'A Bird in the Hand: Consideration and Promissory Estoppel' in A Burrows and E Peel (eds), *Contract Formation and Parties*, (OUP 2010) 89-113, at 102-105 which is being used here, as there are material differences between the different expositions

[44] See *Combe v Combe* [1951] 2 KB 215 (CA).

[45] E.g. *Hughes v Metropolitan Railway* (1877) 2 App Cas 439 (HL).

[46] *Woodhouse AC Ltd v Nigerian Produce Lrd* [1972] AC 741 (HL).

[47] See, e.g., *Hughes* (n 45); *Societe Italo-Belge v Palm Oils, (The Post Chaser)* [1982] 1 All ER 19 (HC); *Collier v Wright Holdings* [2007] EWCA Civ 1329, [2008] 1 WLR 643 (CA).

[48] See, e.g. *The Post Chaser* (n 47)*; D&C Builders v Rees* [1965] 3 All ER 837 (CA).

[49] *Tool Metal v Tungsten Electric* [1955] 1 WLR 761 (HL); cf *Ajayi v RT Briscoe (Nigeria)* [1964] 1 WLR 1326 (PC).

[50] *Combe* (n 44), *Baird Textile Holdings Ltd v Marks and Spencer Plc* [2002] 1 All ER (Comm) 737 (CA).

[51] *Collier* (n 47).

[52] Though insistence on detrimental reliance had never been too strict. Detriment is hard to locate, for instance, in the foundational case of *Central London Property v High Trees House* [1947] KB 130 (HC), and Lord Hodson in *Ajayi v Briscoe* (n 48) tells us that reliance is sufficiently satisfied by a change of position

B. PROBLEM WITH APPLICATION TO THE OTHER CASES

Bearing the operation of promissory estoppel in mind, we must apply it to the cases. It can explain the result in *Re Selectmove*. The Court of Appeal, indeed, briefly considered and declined an estoppel argument. There was a clear promise to modify existing rights. As to reliance, Selectmove made some payments, albeit not full. Making some payments is, nonetheless, a change of position, so that should be sufficient to satisfy the reliance element. However, the court rejected estoppel for two reasons. First, as a matter of offer and acceptance, the tax inspector had no authority to make promises on behalf of the Revenue. Second, the court felt that Selectmove's failure to make full payments in line with the new promise ousted any issue of inequity. Therefore, Selectmove could not seek to rely on estoppel, and thus estoppel could not support the variation, consistent with the final decision.

However, promissory estoppel circumvents the rule from *Foakes v Beer*. It was not argued in *Foakes*, despite *Hughes v Metropolitan Railway*[53] having arisen less than a decade before, and the Earl of Selborne LC and Lord Blackburn having presided over both cases. Foakes agreed to pay only part of what he owed. Beer accepted that voluntarily. Foakes paid in reliance on the promise, which is sufficient to constituted reliance under the understanding adopted in *Collier v Wright*. Therefore, Beer's right to the interest under the original contract should have been suspended. Thus, the promissory estoppel theory, rather than explaining this foundational case, overhauls it. It might be objected that estoppel would not be granted on the facts of *Foakes* because there was no inequity in resiling. However, as noted, change of position has normally been sufficient to satisfy the inequity requirement. Therefore, estoppel would still seem to reverse the finding in *Foakes*.

The problem becomes greater when applying promissory estoppel to the 'more for the same' cases. *Combe v Combe*[54] (confirmed in *Baird Textile Holdings v Marks and Spencer*)[55] tells us that promissory estoppel can only be invoked in variation (i.e. reduction) of existing rights, and not creation of new ones. This is because '[t]he doctrine of consideration is too firmly fixed to be overthrown by a side-wind.'[56] The sentiment is that estoppel may not be used in place of consideration. This is not strictly the case, because it can be used (as in *Collier v Wright*) to reduce a promisor's existing rights without the promisee giving anything in return. This is the idea of promissory estoppel as a shield: it can be used to defend a promisee from the promisor seeking to assert his strict legal entitlement to more rights. However, the distinction still remains that promissory estoppel may not be invoked where the promisor has promised new rights to the promisee. This is the idea of promissory estoppel not being used as a sword: it cannot be used by the promisee to enforce more rights on the promisor than his strict legal entitlement. Thus, promissory estoppel cannot apply to the 'more for the same' cases, which involve the creation of additional rights.[57] In *Stilk*, the promisee, Stilk, gained a new right to the extra pay. In *Williams*, the promisee, Williams, gained a new right to the extra pay. In both instances, therefore, the rule from *Combe* prevents estoppel being invoked, and therefore the original contract would have to have stood. While this explains the result in *Stilk*, it conflicts with the result in *Williams*.

On reflection, therefore, the promissory estoppel explanation is unsatisfactory. It only succeeds in applying to *Stilk* and *Re Selectmove*. That result is all the more surprising when it is recalled that, of the four principal cases, *Stilk* alone predates the Judicature Acts and was argued before the common law courts, so its 'explanation' by a non-applicable body of law is questionable. Therefore, promissory estoppel is not a satisfactory explanation for the law in single-sided contract variations by reason, once again, of conflict with significant authorities.

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[53] *Hughes* (n 45).
[54] *Combe* (n 44).
[55] *Baird* (n 50).
[56] *Combe* (n 44), 220.
[57] *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189 (HC).

VI. A NEW THEORY: IMPLIED VARIATION TERMS

The negative argument is now complete. We have considered the Unilateral Variation Contracts, Duress and Promissory Estoppel theories and we have examined the reasons why they are unsatisfactory. Now commences this article's second purpose, to establish a positive argument which offers a solution to the problem of single-sided variations.

A. MY ARGUMENT

The rules of contractual interpretation, specifically the law of the implication of terms, offer a solution. The argument may be outlined in these terms. The court may imply a term from the existing contract which allows for necessary variations of the performance, normally the remuneration. To work within the law governing implied terms, the implication of such a term will be subject to narrow limits, and guiding principles are suggested to ensure these limits adhered to, which will be expanded upon below.

This will solve the apparent conflict with the doctrine of consideration which made single-sided variations problematic in the first place. Since the variation will be construed as nothing more than an option implied into the original contract, the original consideration is all that is necessary. This approach also reconciles the present cases so as to explain the existing pattern of validity or invalidity. This will be demonstrated below.

B. THE LAW OF IMPLICATION OF TERMS

Implication of terms is a rule of construction. Prima facie, this claim may seem odd, because interpretation would seem to imply that there are already some express terms to interpret. Indeed, certain judges, such as Sir Thomas Bingham MR,[58] have envisaged a strict separation between the two. However, when we recall that what we are construing is the contract *as a whole*,[59] it should become clear that construction covers both the express and the implied fields, because contracts can include both express and implied terms. Thus, the rules for implication of a term are most easily regarded as a sub-doctrine of construction, specially adapted for dealing with the constructive process of reading words and terms into the pre-existing express terms.

Therefore, it is first useful to understand the general power, and limits of power, of the process of construction. It is an error to think that interpretation is limited to a set of available meanings which can be read from the express terms.[60] Such restraint was famously rejected by the House of Lords in *Investors Compensation Scheme v West Bromwich Building Society.*[61] Lord Hoffmann, in his five point summary of the rules of interpretation, reminds us that interpretation aims to ascertain the meaning 'which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'. The reasonable man, looking at all the surrounding facts, may not

[58] [1995] EMLR 472 (CA), 481. "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision."

[59] Hooley, 'Implied terms after *Belize Telecom*' (2014) LQR 315, 334

[60] A mistake made by Leggatt LJ, amongst many examples, in the Court of Appeal in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 B.C.L.C. 521 (CA).

[61] [1998] 1 WLR 896 (HL).

only interpret ambiguity in the express terms, but might also conclude that there is an error in the words or syntax.[62] As his Lordship subsequently said in *Chartbook v Persimmon Homes*, 'there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed'.[63] Thus, the general constructive processes are not limited to understanding the express terms of the agreement, but extend to permit courts to read words and terms in and out. There is, therefore, a power to correct erroneous additions or omissions.

Implication of terms must be isolated from the general law of interpretation. If we were to impose a rough taxonomy[64] on the law of interpretation, the primary division would be between interpretation of express terms and implication.[65] The purpose of drawing this taxonomy is to understand that the power of the process of construction may well vary between the two primary branches. In the express branch, the courts may understandably be more conservative, because they are working within the confines of express words which they must accord sufficient respect to. The argument presented here looks, however, to the second category, implication, specifically implication in fact.

Implication in fact is subject to prima facie strict, if ill-defined, limits. The general principle for such implications was restated by Lord Hoffmann in *Attorney General of Belize v Belize Telecom.*[66] Three basic rules emerge from his speech. First, the implied term must be consistent with 'the meaning that the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument was addressed'.[67] This reminds us, therefore, that we are undertaking a process of construction. The heart of the process is in the second rule. The proposed term must be necessary[68] 'to spell out what the contract actually means'.[69] This has, in the past, been stated in various ways, such as a business efficacy test[70] (that the term must be necessary to give business efficacy to the transaction) and a officious bystander test[71] (that, had the officious bystander asked the parties whether they meant to include the term, they would have quickly replied in the affirmative). The third rule is a slight repetition on the first, in reminding us that the proposed term must be consistent with the express terms of the contract when subject to a contextual interpretation in line with *Investors Compensation Scheme.*[72]

From this, therefore, we must define the power and the limits of implication by fact. The primary limit is the second rule: any implied term must be necessary to, in effect, make the contract work. It is worth pausing for a moment to consider the meaning of 'necessary'. Traditionally, it has not been used in this context to mean 'essential'. In *The Moorcock,*[73] it was not essential that the wharf-owners should guarantee that they had taken reasonable care to check the safety of the mooring. The basic function of the transaction, to give a ship a place to dock, could still occur without such a promise. All the implication did was to increase the business sense of the transaction, by adding a term which would seem sensible to reasonable people on both sides, because it provided a reasonable degree

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[62] *ICS* (n 61) 912-913.
[63] [2009] UKHL 38, [2009] 1 AC 1101 [25].
[64] This division has been adapted from Lord Grabiner, 'The iterative process of contractual interpretation' (2012) LQR 41.
[65] It is recognised that there are deeper issues with the express/implied term distinction. However, space precludes an analysis, which is in any case fairly unnecessary, because this taxonomy is only a superficial means of introducing powers of interpretation, and is not relevant to the argument later put forward
[66] *Belize* (n 7)
[67] ibid [16].
[68] Confirmed in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531, [2010] 1 All E.R. (Comm) 1.
[69] ibid [27].
[70] *The Moorcock* (1889) 14 PD 64 (CA); *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA).
[71] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA).
[72] *ICS* (n 60).
[73] *The Moorcock* (n 70).

of confidence to ship-owners, who would have no practical means of inspecting the mooring themselves, and avoided imposing too great a burden on the wharf-owners, because it was only an obligation to take reasonable care to inspect the mooring. Take also *Liverpool City Council v Irwin.*[74] Their Lordships rejected Lord Denning MR's approach from the Court of Appeal that the term only needs to be reasonable. However, they reach the same conclusion on the facts. Moreover, as Atiyah points out:

> It is not *necessary* to have lifts in blocks of flats 10 stories high (indeed high-rise buildings existed long before lifts were invented), though it would no doubt be exceedingly inconvenient not to have them. So "necessary" really seems to mean "reasonably necessary", and that must mean, "reasonably necessary having regard to the context and the price". So in the end there does not seem to be much difference between what is necessary and what is reasonable.[75]

Thus, the term implied in *Liverpool City Council v Irwin*, while 'reasonable' (spelling out what the contract might reasonably have meant), it was not 'essential' (it did not spell out what the contract *must* have meant). *Belize* itself professes this same use of 'necessary'. It was not essential that, if no-one had the power to remove the two directors, a term must be implied to allow their removal. Article 112 stipulated workable terms of office for them. The only issue arose if it became desirable to remove the directors for a reason other than those stipulated in Article 112. Thus, while the implied term was 'reasonable', it was not 'essential'.[76] Therefore, when considering necessity, we should remember that its real meaning imports a lower standard than a literal interpretation might suggest.

Beyond demonstrating 'necessity', there is the interpretive caveat imposed by Lord Hoffmann in *Belize*:

> 'The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.'[77]

Discovering what the instrument means does not, however, limit the court to the literal or express wording of the contractual document. In *Belize* itself, the contract said that directors held office "subject only to Article 112". However, given the outcome, "subject only" cannot be understood literally, because the court determined that they also held office subject to the term which they implied.[78] His Lordship must have had his *Chartbrook* red pen to hand. Furthermore, we cannot take Lord Hoffmann's own statement literally. Implying a term, even in the simplest case, is *necessarily* an improvement on the instrument, because it corrects some fault within it. Thus, the implication necessarily makes the instrument fairer and/or more reasonable.[79] Because the instrument is silent on the matter, it cannot be a simple process of 'discovery', as there is no content to discover. The court attributes the term to the contract. Thus, 'necessary interpretation' is understood to be somewhat wider than the words 'necessary interpretation' themselves suggest.

Two more rules must be remembered. First, there is the default position of no implied term.[80] Second, when implying a term, the courts are not limited to subjective intentions. In accordance with

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[74] [1977] AC 239 (HL).
[75] Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th edn, 1995) 207
[76] For a potentially even wider meaning, see *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm), especially [65].
[77] *Belize* (n 7) [16].
[78] Law and Loi 'The Many "Tests" for Terms Implied in Fact: Welcome Clarity' (2009) 125 LQR 561, 564.
[79] Davies, 'Recent Developments in the Law of Implied Terms' [2010] LMCLQ 140, 144.
[80] *Belize* (n 7) [17].

the general rules of interpretation, the law of implication looks to the objective meaning of the instrument,[81] though this meaning need not be 'immediately apparent'.[82]

Therefore, the power and limits of implication by fact may be stated thus. It will be rare for a proposed term to be legitimately implied. The default position is that no term will be added. To overcome this, the term must be necessary (viz. 'reasonable') for the contract to 'work' and result from a reasonable (though not necessarily literal or even entirely faithful) interpretation of the contract and the background facts. We do not have to be constrained by the parties' reading of the contract and understanding of the background facts (though, of course, their opinions may be a very helpful contribution to the interpretive process). The issue which the proposed term seeks to resolve need not be expressly mentioned by the contract, or even alluded to.[83] It can be entirely absent. Nor need it be obvious from either the contract or the background facts. Implication in fact is not, therefore, an impotent doctrine.

C. THE PROPOSED TERM

In light of this examination of the law, the following term is proposed. It is phrased as if it were implied in *Williams v Roffey Bros*. 'The remuneration offered to Williams under the contract will at least be sufficient to facilitate performance by ensuring that it is economically viable. The initial price recorded in this document is not conclusive, but may be subject, if necessary, to increase in accordance with an independent valuation of the performance cost'. This need not be the exact wording; this example is only meant to establish the approximate nature of the term.

How would this work in practice? The default position is that no such term will be implied, and only rarely will it succeed. The price variation must be necessary to make the transaction work, given the purpose of the transaction as understood from the contractual document and the background facts. To emphasise this, the implied term is subject to a 'necessity' caveat. When looking for necessity in our context, it will be highly relevant to consider whether performance has become actually financially unfeasible. This is because, if the contract is financially unfeasible, it cannot 'work', as performance will be unobtainable. Therefore, implying the term will make the contract 'work'. As a matter of construction, it must also be reasonable to imply the term. Two principles are relevant here. The first flows from the 'necessity' criteria: the original, 'ball-park' price must be less than the performance cost in 'more for the same' scenarios or greater than the value of the consideration given by the promisor in 'less for the same' scenarios (as valued by an impartial, objective source – this provides a mechanism for making any performance measure objectively ascertainable, so the term is not too vague). This principle is needed to control the manner in which the work becomes financially unfeasible; it would only be reasonable to imply a term to remedy the work being financially unfeasible if the unfeasibility were attributable to the terms of the initial agreement, rather than any external factor. The second principle limits the frequency of implication, and explains why it is reasonable to imply this term: obtaining the primary performance, over and above any secondary remedies or recourse to the courts, must have been so important to the promisor that the parties must have meant to permit variations of the remuneration agreed under the contract in the conditions of unfeasibility described above. The term could not, of course, be reasonably implied if the risk of financial hardship is expressly allocated to one party, or variations are expressly prohibited. However, if the contract does no more than provide a figure for the remuneration, there may yet be room for reasonable implication

[81] ibid [16].
[82] ibid [25].
[83] ibid [18].

of the proposed term. In addition to these principles, the other rules stated by Lord Hoffmann about implied terms apply.

As a preliminary point, this Implied Variation Terms approach addresses a couple of the issues which afflicted the theories discussed in Sections II-V. It explains the damages award. The reasonable increase is objectively verifiable by reference to an independent third party (and therefore is not too vague to be enforceable).[84] Such a term, therefore, would also explain why the damages awarded to Williams were approximately equal to the estimation by the surveyor, not the total amount Williams requested in the variation. It also addresses the frustration issue. Since the implication of the term is objectively verifiable by the court, and would arise ab initio or never at all, the court can always determine whether or not the term must be borne in mind when considering cases of frustration.

D. APPLICATION TO THE CASES

The strength of this term must now be assessed on the facts of *Williams*. Was such a term necessary to make the contract work? As said above, it would be highly relevant to bear in mind financial unfeasibility, which is the case in *Williams*. Quite simply, without the variation, Williams was not going to be able to perform the carpentry, and therefore the extra remuneration through the variation was needed to make the contract work. Is it reasonable to imply a term? On its face, the document was a simple commercial agreement. Therefore, there was nothing in it to absolutely preclude implication, but nothing to strongly support it (although it may be noted that, at first instance, another term was implied into the contract, suggesting that it was not complete). The background facts are, however, crucial. Recall the two principles relevant to reasonable interpretation suggested above. First, in *Williams*, the price agreed was less than the independent surveyor's approximation of the performance cost. Thus, the financial unfeasibility, and hence the 'necessity' issue, was attributable to the terms of the agreement. Second, because Roffey was subject to penalties under the main contract, he had strong reason to desire primary performance. Therefore, it is reasonable to infer that Roffey would have meant to allow a variation in the remuneration if it turned out that performance was financially unfeasible for Williams, in order that he was able to secure Williams' continued performance. We can also factor into the process of the interpretation the fact that both parties actually consented to the variation when they turned their minds to it, and so it is more likely to be reasonable. Thus, *Williams* appears to be a (rare) case where the implication of an Implied Variation Term would succeed.

Williams having been explained, the theory needs to be applied to the three cases where no variation was found. Such a term as in *Williams* could not be implied in *Stilk v Myrick* because it was not necessary to make Stilk's performance possible. The variation was financial. Stilk's performance was not, however, financially unfeasible without the variation: he was just as able to sail the ship for his normal remuneration as for the increase. Therefore, the implied term was not necessary, and so could not be implied.

The explanation of *Foakes v Beer* and *Re Selectmove* is even simpler. The original agreements were not contracts, but were imposed by the general law – in *Foakes* as the result of the court judgment, and in *Selectmove* by statute. Therefore, there was no contract to imply a term into. While it might be pointed out that statutory construction involves the same interpretive process, this is a formal observation, and ignores the substantive difference made by the source of the obligations when undertaking the interpretive process. The factual background of a contract is filled by the interactions and desires of the specific parties concerned in the case. The background of a statute is different. The courts look to, inter alia, Parliament's intent. They do not, however, concern themselves with specific

[84] *May and Butcher v R* [1934] 2 KB 17 (HL).

cases when interpreting a general statute. Therefore, the factual matrix is different between the different sources, and hence, without the relevant background, establishing a claim for Implied Variation Terms would be implausible. Hence, quite simple explanations can be given to reconcile *Stilk, Foakes* and *Selectmove*, in addition to *Williams*, with an implied terms theory.

VII. POTENTIAL OBJECTIONS

It is now pertinent to dismiss a few objections which might arise against Implied Variation Terms.

A. THE THEORY ENCOURAGES RECKLESS UNDERCUTTING

A brief glance at the Implied Variation Terms theory might suggest that it would encourage parties to bid purposefully low, far below the performance cost, in order to secure a contract. They would then seek an implied term at a later date to cover their costs, which would be commercially disruptive.

Such concerns need not arise. Through the rules for the implication of terms, looking to both (a malleable) 'necessity' and 'reasonableness' requirement, the courts have a measure of discretion. Therefore, they may refuse to imply a term, or at least alter the nature of the term, if they concluded on the evidence that the bids were purposefully low, because it may be 'unreasonable' to allow the variation in these circumstances.

B. THE THEORY RELIEVES PARTIES FROM BAD BARGAINS

It might be objected that the theory relieves parties from bad bargains. Williams, by asking for insufficient remuneration, entered a bad bargain, but was reprieved by being granted the variation. In *Pink Floyd Music Ltd v EMI Records Ltd*,[85] Lord Neuberger MR cautioned that the fact that the literal meaning produces a 'bad bargain' for one of the parties should not, in and of itself, suggest something has gone wrong and therefore that interpretation can be used to 'fix' the contract.[86] Thus, implied terms cannot be used to grant such relief.

This criticism does not stand for two reasons. First, at no stage have I claimed that a bad bargain would be sufficient to trigger an implied variation term. I have laboured the point that implication will be rare and subject to narrow constraints, and I have provided guiding principles to this effect. In any case, it is worth considering whom the contract is a bad bargain for. Traditionally, 'bad bargain' is assessed narrowly, on purely financial grounds: a party enters a bad bargain if he stands to make an economic loss by it. However, in the fact situation where an implied variation term could arise, the detriment would not only be to the party who stands to make an economic loss, for the term will only be found if the other party had good reason to desire primary performance. Thus he, too, stood to suffer a detriment through the contract should the primary performance not be given, so it would have been a bad bargain for him as well. Therefore, even if relief is given for a 'bad bargain', this is not the sort contemplated by Lord Neuberger. It is a bad bargain for both parties, so relief may well be desirable.

[85] [2010] EWCA Civ 1429.
[86] ibid [20].

C. THE THEORY CAUSES COMMERCIAL UNCERTAINTY

Implying terms to vary the remuneration in commercial contracts would cause commercial uncertainty, says this argument, as the price would vary from that appearing on the face of the document. How could commercial parties, therefore, have any certainty that the express wording of their agreement will be adhered to?

In reply to this, one must remember that the confines for implying terms are narrow. Since they must be necessary to make the contract 'work', it follows that, if they were not implied, the contract would not have been performed anyway. They are, therefore, limited to situations in which commercial certainty would otherwise have been violated by failure of performance. Beyond these situations, the rules of construction would prevent a term being implied, and therefore parties should not be concerned that the remuneration would be unpredictably altered.

CONCLUSION

Two arguments have now been made. In my negative argument, I have sought to demonstrate that three analyses applied to single-sided variations are unsupportable. Having seen why a simple distinction drawn between the present cases could not amount to a satisfactory solution, we first examined the Unilateral Variation Contracts theory. It had to be envisaged in the form of multiple unilateral contracts to work on the facts of *Williams*, could not explain the results in *Stilk, Foakes* or *Selectmove* and caused difficulties when a frustrating event intervenes. The Duress theory could not even explain the cases – *Williams* and *Stilk* – which it was proposed to reconcile, and also caused the issue of arbitrariness on the basis of offerens, and was anyway invalid in law for want of consideration. The Promissory Estoppel theory fared no better, failing to explain *Foakes* and *Williams*, and being entirely inapplicable to a 'more for the same' scenario.

My positive argument then sought to establish an explanation for single-sided variations based on Implied Variation Terms. Subject to strict limits, and bearing in mind certain guiding principles, a term can be implied, when necessary, to permit a variation. Given the narrow requirements, this will be a rare occurrence, and thus such a term could not be implied in *Stilk*. *Foakes* and *Selectmove* were not in any case susceptible to an implied term. On the other hand, *Williams* was a rare example of the correct conditions manifesting, and hence a term could be implied. The Implied Variation Terms theory can, therefore, offer a suitable method of analysing single-sided contract variations without demanding fresh consideration, keeping them within the bounds permitted by our law as it presently stands.