Wigley & Company
BARRISTERS and SOLICITORS

HERESY: CONSIDERATION NOT NEEDED IN CONTRACTS

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Historically, consideration generally had to pass between parties before there could be a binding contract (eg: a sum of money had to be paid for purchase of the car, even if that sum of money was much less than the true value of the car). A 2002 case has turned this on its head, particularly in the context of variation of contracts. This can have implications in the IT sector such as in relation to post-contract amendments, change control and so on.

It's early days with these new cases. So prudent parties should still create legal consideration where possible (of course this does not have to equate in value to the additional or changed services being rendered). But what is clear is that looser variations in contracts will be enforced even if there is no strictly *legal* consideration.

Contract law lecturers drummed into law students the need for consideration to pass between contracting parties. Otherwise there's no binding contract. But in December, our Court of Appeal in *Antons Trawling*[1] tossed out even this requirement in some situations particularly relevant in commercial deals.

The new regime could be important for variations of contract, which are frequent in commercial and technology deals.

This change largely started in the early 90s. The English Court of Appeal[2] expanded what the Courts would treat as adequate consideration to allow a contract to be enforced.

As summarised in a 2002 stepping stone case in New Zealand[3], in the English case:

> "*Owners promised a building contractor in financial trouble more money to complete the contract on time. They would otherwise have been required to engage another contractor. The additional money was promised in return for a promise by the contractor to do no more than it was already bound to do. Nevertheless, the practical benefit to the owners of obtaining completion on time, rather than having to deal with another contractor, was found to be consideration moving from the building contractor to the owners … [Such] practical benefit will qualify as consideration as well as the legal benefit of an enforceable promise.*"

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1 Unreported; CA 14/02 and CA 220/02, Anderson, Baragwanath and Paterson JJ, 18 December 2002.

2 *Williams v. Roffi* [1991] 1 QB 1.

3 *Attorney-General for England v. R* [2002] 2 NZLR 91, 109 (Court of Appeal).

Such an approach is commercially pragmatic. Even though the owner ended up paying more for the same service it had already contracted for, it was getting a practical and real benefit. So the Court accepted and talked in terms of the adequacy of *practical* consideration in addition to *legal* consideration (such as money being paid for the services performed).

Like the stepping stone case noted above, the Court of Appeal in *Antons Trawling* also accepted that such *practical* consideration would be enough to save a commercial contract.

But the Court went even further. There are conceptual criticisms of this "practical consideration" approach. One academic view is that the true answer is:

> "*mere performance of a duty already owed to the promisee under a contract cannot constitute consideration and that the only principled way to such a result is to decide that consideration should not be necessary for the variation of contract*".

Academic comment pointed out (in a way apparently accepted by the Court of Appeal) that there is an illogicality in equating - in an on-going arms-length commercial context - *modifying promises* (ie: contract variations) with *originating promises* (ie: promises in the original contract).

In those sorts of circumstances, the Court of Appeal accepted that contract variation could be justified where there is no underlying consideration (whether *practical* or *legal*).

There is one important exception to this conclusion. Take the example of the English building contract. If the additional payment had been obtained by some sort of fraud or duress, a claim for the additional payment would not have been enforceable.

Many commercial contracts change shape during their lifetime. This happens even more with complex technology contracts. Generally there will be clear-cut *legal* consideration justifying that variation. For example standard change control procedures in technology contracts provide for altered payment arrangements. So there won't be a consideration issue. It's early days with these new cases. So prudent parties should still create legal consideration where possible (of course this does not have to equate in value to the additional or changed services being rendered). But what is clear is that looser variations in contracts will be enforced even if there is no strictly *legal* consideration.

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While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

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