Two lines of authority:

First – the performance or promise of a performance of an existence duty cannot constitute good consideration for a new promise by the promisor.

> This is where there is where there is a promise of extra remuneration for doing something that the party was already obliged to do. That promise is not supported by consideration.

Second – partial performance of a duty/payment of a debt cannot constitute consideration for a promise to discharge an obligation towards the performance/payment of the whole.

> This is where one party pays off part of their debt, and the other accepts it as payment of the whole. That acceptance will not, as a default, be binding, for want of consideration.

The distinction between the two:

There is no principled or logical reason that the rule differs in the two situations.

It is simply a matter of precedent from *Foakes v Beer* being both clear and authoritative (HL) and meaning that cases surrounding the discharge of debt cannot meaningfully or explicitly depart from it.

By contrast, *Roffey Bros Ltd* was sufficiently factually different that could be distinguished by the courts, though that distinction was "forced" (*MWB v Rock Advertising* (HL)).

First – the performance or promise of a performance of an existence duty cannot constitute good consideration for a new promise by the promisor unless it is accompanied by a practical benefit.

This is where there is where there is a promise of extra remuneration for doing something that the party was already obliged to do. That promise is not supported by consideration.

This is the line that starts with *Stilk v Myrick* (1809).

It includes:

> *Williams v Roffey Bros Ltd* [1991] 1 QB 1 (CA)

The default position from *Stilk v Myrick* was that "the offer to perform an already existing contractual duty cannot constitute consideration for another promise".

It has since been developed such that "the offer to perform an already existing contractual duty can constitute consideration for another promise in the event of it providing a practical benefit to the other party".

Second – partial performance of a duty/payment of a debt cannot constitute consideration for a promise to discharge an obligation towards the performance/payment of the whole.

> This is where one party pays off part of their debt, and the other accepts it as payment of the whole. That acceptance will not, as a default, be binding, for want of consideration.

This is the line that starts with *Pinnel's Case*, and *Foakes v Beer* (1884) 9 App Cas 605 (HL).

It includes:

> *D & C Builders v Rees* [1966] 2 QB 617 (CA)

Homeguard Products v Kiwi Packaging [1981] 2 NZLR (HC)

H B F Dalgety v Morton [1987] 1 NZLR 41 (HC)

Magnum Photo Supplies v Viko NZ [1999] 1 NZLR 396 (CA)

Re Selectmove [1995] 2 All ER 531 (CA)

Collier v Wright [2008] 1 WLR 643 (CA)

MWB Rock Advertising [2017] QB 604 (CA) and [2019] AC 119 (SC).

The initial position from *Foakes v Beer* and *Pinnel's Case* was that "the payment of a lesser sum on the day cannot discharge a debt for a greater sum".

It has since been qualified, narrowed, and at times effectively artificially disregarded.

Applying the rule in *Foakes v Beer* and *Pinnel's Case*:

Starting Proposition

If there is an accord to the effect that it will be taken in full satisfaction, that will be a gratuitous promise unsupported by consideration.

"Payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility a lesser sum can be satisfaction to the plaintiff for the greater sum" – *Foakes v Beer; Pinnel's Case*.

Ways around the rule:

1. **Introduction of new elements as consideration**
    a. **Payment earlier at the request of the creditor may be good consideration.** Unilateral action to this effect will not be sufficient; it must be requested by the creditor.

    b. **Payment in some other form than that agreed to, as otherwise agreed to.** This is the introduction of some "other element", recognised by *Foakes v Beer* as "a horse, hawk, or robe".

        The payment of a lesser sum of money on its own will not be good consideration, however, if there is an introduction of another element (whatever it is worth), it will be good consideration.

        This stems from the refusal of the Courts to measure consideration – it is possible to construct a legal fiction that that particular thing, to that creditor, in that situation, was worth the full amount.

        Note: this still requires both accord and satisfaction.

    c. **No longer: where the payment was by negotiable instrument.** It used to be that payment be a negotiable instrument (such as a cheque, but anything that is transferable to the third parties), then it will suffice.

        - Payment of a lesser sum by cheque is not taken as satisfaction for a debt of a larger sum – it is not different to paying in cash – *D & C Builders v Rees* (UKCA), per Lord Denning; Dankwerts and Winn LJJ.
            There is not "benefit or legal possibility of benefit … which might derive from the receipt of cheque … instead of the same amount of cash" – Winn LJ

> *No sensible distinction can be drawn between a lesser sum by cash and payment by cheque. The cheque when given is conditional payment, when honoured, it is actual payment. Then it is just the same as cash. If a creditor is not bound when receiving payment by cash, he should not be bound when receiving payment by cheque.*

2. **Where the claim is for an unliquidated sum of money or the debt is genuinely disputed?**

   This limb applies where there is a genuine dispute as to either liability to pay, at all, or genuine dispute as to the amount of the debt. It must be a dispute as the existence of the debt.

   a. The debt must genuinely be disputed, with the debtor genuinely believing that they are not required to pay that amount, or that the creditor has right to ask them to pay.
   b. It does not matter whether that dispute is subsequently shown to be correct or incorrect, only that it was genuinely believed.

   Contract of Compromise

   If the parties agree to settle the debt by the debtor paying a lesser sum than that alleged, then a "contract of compromise arises". The consideration passing is the loss of the possibility that they actually paid less, and the avoidance of litigation risk.

3. **Where there has been a composition with creditors, or a compromise with creditors**

   This applies where there is an agreement made with more than one creditor, more than one debt, and the debtor does not have enough to pay them all.

   If the debtor comes to a composition with all of the creditors, they all agree, then they may divide that lesser amount than the total sum among them and consider the debts satisfied.

   > *There is not principled reason why* Foakes v Beer *shouldn't apply in this situation – it is still a payment of a lesser sum in satisfaction of a greater sum – and the fact that there are multiple creditors does not change that.*
   >
   > *The reason of this rule is not principled, but simply, expediency. It is often commercially more convenient than going through the process of claiming the full debt and dealing around bankruptcy.*

4. **Where there is a statutory exception.**

   Homeguard Products v Kiwi Packaging [1981] 2 NZLR (HC)

   > This is a balance between the principled criticisms of *Pinnel's Case* that consider it is unjust, and the pragmatic recognition that to allow verbal versions of this would bring significant evidential difficulties – *Homeguard Products v Kiwi Packaging.*

   Property Law Act 2017, s 27A (originally Judicature Act 1908, s 92).

   > (1) An acknowledgement in writing by a creditor, or by any person authorised by the creditor in writing, of the receipt of a part of the creditor's debt in satisfaction of the whole debt operates as a discharge of the debt.
   > (2) This section applies despite anything to the contrary in any rule of law.

   This requires:

   a. Acknowledgement in writing by the creditor or any agent authorised on his behalf;
   b. Of the receipt of part of the debt;

There must be acknowledgement of receipt; not a prospective agreement to accept it.

c. And that the part of the debt is taken in satisfaction of the whole debt.
There must be acknowledgement that this is part of the debt in satisfaction of the whole debt.
It must indicate that it satisfies the whole debt (not just that it is a final payment).

5. The payment by a third party of the debt, in satisfaction of the whole debt, will extinguish the whole debt – *D & C Builders v Rees* (UKCA) (Obiter – per Dankwerts LJ.)

If A owes B a debt.
C enters into an arrangement with B to pay part of that debt, on the condition that it discharges the debt fully.

“"Where a cheque for a smaller sum than the amount due is drawn by a person other than the debtor and delivered in satisfaction in that debt, it is clear that the debt is discharged if the cheque is accepted on that ground and then paid" – *D & C Builders v Rees*, per Dankwerts LJ.

6. Where equitable or promissory estoppel applies – See Equitable Estoppel as a section.
The exact elements of this remain contested, a bit controversial, and unsettled – as of yet.

High Trees
D & C Builders
Homeguard

“If parties who have entered into definite and distinct terms involving certain legal results afterwards, by their own act or with their own consent enter upon a course of negotiation which has the effect of eladign on the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable, having regard to the dealings which have taken place between the parties” – *Hughes v Metropolitan Railway,* per Lord Cairns.

"When a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of a lesser sum, the creditor will not enforce payment of the balance, an on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction; then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so"

Requirements:

a. The parties must enter into an agreement as stipulated
b. That agreement must lead the debtor to believe that the creditor will not enforce all of their rights;
c. Based on that understanding, the debtor pays a partial sum and the creditor accepts;
d. It would be inequitable for the creditor to then enforce the payment of the balance (or the other rights).

e. (Sometimes wrapped up within “inequitably”) – there must be detrimental reliance on the creditor’s promise.

Accord and Satisfaction

Requirements:

a. There must be an offer
b. There must be acceptance
c. There must be consideration moving (satisfaction).

It is “the purchase of release from an obligation”. “The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative” - Halsury's Laws of England (4th ed) para 585.

> "In that it involves the acceptance of something less than the carrying out of the contract itself, it differs from a discharge by performance."
> "It is a new agreement under which the party in default is relieved from his former liability by a promise to do something other than what he was obliged to do by the former contract".
> "It is the essence of an accord that there must be an agreement. Whether or not there is an agreement is a question of fact, not law, to be determined from the circumstances in each case".
> *James Wallace Pty Ltd v William Cable Ltd* [1980] 2 NZLR 187 (HC), per McMullin J.

All of the rules around what constitutes “good consideration” are the rules that govern “satisfaction”.

A question of fact in each case, to be assessed in light of the whole:

> It is a question of fact, with each situation to be assessed on “its own factual matrix” – *Magnum Photo Supplies v Viko* (CA); *H B F Dalgety Ltd v Morton* (HC).
>
> > “Whether or not there is an agreement is a question of fact, not law, to be determined from the circumstances of each case” – *James Wallace Pty Ltd v William Cable Ltd*.
> >
> > “As a matter of principle as well as authority, the question whether there is an accord and satisfaction is one of fact” – *Day v McLea.*

Judged objectively:

> “There will be an accord and satisfaction only if there is a meeting of two minds, or if one of the persons involved acts in such a way as to induce the other to think that the money is taken in satisfaction of the claim” – *Dalgety v Morton* (HC), drawing on *McLauchlin;*
>
> Accord is a question of whether both minds are agreeing, or whether one party is acting in such a way as to induce the other to think that there is an acceptance and agreement” – *Magnum Photo Supplies* (CA), citing *Day v McLae* and *Smith v Hughes*.
>
> "Whether there is accord and satisfaction is a question of fact objectively assessed, and carried the same test applicable to the formation of a contract" - *Magnum Photo Supplies* (CA)
>
> "Whether or not there is an agreement is a question of fact, not law, to be determined from the circumstances in each case" - *James Wallace Pty Ltd v William Cable Ltd* [1980] 2 NZLR 187 (HC), approved in *Magnum Photo Supplies* (CA) and *H B F Dalgety v Morton* (HC)

Offer

> An offer can impose conditions as to how it must be accepted, however, it cannot impose conditions such that the doing of an act will necessarily mean that acceptance will be inferred - *Magnum Photo Supplies* (CA)
>
> If payment of a lesser sum is being offered in full and final satisfaction of a larger debt, then there must be a high degree of clarity as to the fact that it is being offered only in “full and final payment” – *Dalgety v Morton* (HC)

Acceptance

It is judged according to the objective principle: "did the behaviour lead them reasonably to believe that it was accepted in full and final satisfaction?" – *Dalgety v Morton* (HC)
An offer will only be accepted if the party has actual or ostensible authority to bind another party – *In re Selectmove*.

Under Pressure/Economic Duress

> An accord under undue pressure or intimidation is no true accord and is not binding at law – *D & C Builders v Rees* (UKCA) Lord Denning; Dankwerts LJ.

Of Offer where stipulated that certain behaviours constitute acceptance:

> "The performance of the conditions of the offer is not in all cases conclusive, for they may been performed by one who never hears of the offer or who never intends to accept it" – *R v Clarke* (1927); approved in *Magnum Photo Supplies* (CA).
>
> Mere coincidental conduct that fulfils the condition cannot be taken as meaningful acceptance - *Magnum Photo Supplies* (CA).
>
> Hand-in-hand with the assessment being made "in all the circumstances", "if the creditor makes it clear that, even has he accepts it, he is not doing so in full and final satisfaction, then there will be no clear accord" – *Dalgety v Morton* (HC)
>
> Note: In *Homeguard v Kiwi Packaging* (HC), it was held that the banking of a cheque sent in full and final satisfaction of a debt would be taken as acceptance. This was has been departed from in *Dalgety v Morton* (HC) and then overturned as a point of law in *Magnum Photo Supplies v Viko* (CA).

Assessing Acceptance in light of delay:

- "Of course, where an offeree presents the offeror's cheque, draws the funds and appropriates them without promptly notifying any demur from the terms on which it is offered, he or she is unlikely to be heard to claim any different intention than that logically to be inferred" – *Magnum Photo Supplies* (CA)
- "Even in a case such as that, however, the lapse of time would be only a factor to be assessed in determining whether agreement is to be inferred". – *Magnum Photo Supplies* (CA)

> Note: *Homeguard* said that where a cheque is sent clearly in full and final satisfaction, if it is banked, it will always constitute acceptance.

Acceptance by silence:

- As a general rule, where the offeror says that silence will be taken as acceptance, silence will not necessarily constitute acceptance – *In re Selectmove* (UKCA).
- Obiter: where the offeree themselves indicates that they will revert if they do not accept the offer, and they do not get back to the offeror, then in principle, there is no reason that it should not be an exceptional circumstances to where silence is not acceptance – *In re Selectmove* (UKCA)

Satisfaction: Practical Benefits vs Legal Entitlements

"A promise to simply pay what is already owed is not good consideration" – *Collier v Wright* (UKCA)

a. Payment earlier at the request of the creditor may be good consideration.

Unilateral action to this effect will not be sufficient; it must be requested by the creditor.

b. Payment in some other form than that agreed to, as otherwise agreed to. This is the introduction of some "other element", recognised by *Foakes v Beer* as "a horse, hawk, or robe".

The payment of a lesser sum of money on its own will not be good consideration, however, if there is an introduction of another element (whatever it is worth), it will be good consideration.

This stems from the refusal of the Courts to measure consideration – it is possible to construct a legal fiction that that particular thing, to that creditor, in that situation, was worth the full amount.

Two Strands: *Stilk v Myrick* and *Pinnel's Case*

Stilk v Myrick – Practical Benefits will Suffice

In *Williams v Roffey Bros* (UKCA) – practical benefits will provide good consideration for a promise to pay extra remuneration in exchange for the same thing being done.

Benefits in *Williams v Roffey Bros*—ensures that the plaintiff continued work; ensures that the party does not incur a penalty for a delay in not meeting their deadline; avoids the trouble and expense of engaging other people to complete the work.

[this is not principally in line with the idea that consideration must move *from* the party)

Pinnel's Case – there must be an introduction of a new legal entitlement

Where there is partial payment of debts, practical benefits will not suffice to provide good consideration for a promise to accept partial payment in full satisfaction.

In a *Foakes v Beer* situation, the gaining of a practical benefit will not constitute good consideration. The law in *Roffey Bros* will not extend. – *In re Selectmove* (UKCA).

The practical benefit in that it is more likely that they would receive full payment than if they enforce was not sufficient to constitute good consideration – *In re Selectmove* (UKCA)

However…

MWB v Rock Advertising Ltd (UKCA) – there were practical benefits to that situation that would support the variation as consideration.

MWB v Rock Advertising (UKSC) – that consideration would be a difficult issue, it was not argued, and so there would not be a decision on it. Lord Sumption JSC notes that the only things that could be said to constitute consideration were of a practical value and neither was a contractual entitlement, which was not enough in *Foakes v Beer.*

Unliquidated Sum of Money or Disputed Debt

If the debt is not liquid, then the rule in *Foakes v Beer* will not apply.

- A sum is not liquid if it is yet to be confirmed what the actual amount of the debt is.
- A sum will be liquid even if "it is not yet determined, but it is readily determined by arithmetic or formula" as agreed in the contract – *H B F Dalgety v Morton* (HC).

Disputed Debt

If there is a dispute as to the existence or amount of the debt, then the rule in *Foakes v Beer* will not apply – *H B F Dalgety v Morton* (HC);

Instead, "if there is a genuine dispute as to the amount owing, or as to whether it is owing, then an agreement to accept a lesser amount, coupled with payment of that lesser amount may be accord and satisfaction" – *H B F Dalgety v Morton* (HC);

Requirements:

c. The debt must genuinely be disputed, with the debtor genuinely believing that they are not required to pay that amount, or that the creditor has right to ask them to pay.
d. It does not matter whether that dispute is subsequently shown to be correct or incorrect, only that it was genuinely believed.

Genuine Disputes:

A debt will only be genuinely disputed if:

"If there is a genuine dispute as to the amount owing, or as to whether any amount is owing" – *H B F Dalgety v Morton* (HC);

There is "prima facie a question to be tried" – *H B F Dalgety v Morton* (HC), citing B*ateman Television Ltd v Coleridge Finance Co Ltd*.

It will not be disputed if:

- There is simply a reluctance to pay because they no longer feel it is worth it – *Dalgety v Morton* (HC)
- It is simply yet to be determined as to the exact amount, but the process or formula is agreed upon such that it is a fixed sum – *Dalgety v Morton* (HC)

Principle

The principle for this is that, alongside the amount that is being paid or accepted, parties are forgoing litigation rights and consequently avoiding litigation risk, as a detriment and a benefit respectively, and as such, this can be seen in line with the other requirement for "additional thing".

Where there is a statutory exception.

Homeguard Products v Kiwi Packaging [1981] 2 NZLR (HC)

This is a balance between the principled criticisms of *Pinnel's Case* that consider it is unjust, and the pragmatic recognition that to allow verbal versions of this would bring significant evidential difficulties – *Homeguard Products v Kiwi Packaging.*

Property Law Act 2017, s 27A (originally Judicature Act 1908, s 92).

(1) An acknowledgement in writing by a creditor, or by any person authorised by the creditor in writing, of the receipt of a part of the creditor's debt in satisfaction of the whole debt operates as a discharge of the debt.
(2) This section applies despite anything to the contrary in any rule of law.

This requires:

d. Acknowledgement in writing by the creditor or any agent authorised on his behalf;
e. Of the receipt of part of the debt;
   There must be acknowledgement of receipt; not a prospective agreement to accept it.
f. And that the part of the debt is taken in satisfaction of the whole debt.

There must be acknowledgement that this is part of the debt in satisfaction of the whole debt.
It must indicate that it satisfies the whole debt (not just that it is a final payment).

Payment by Third Party

The payment by a third party of the debt, in satisfaction of the whole debt, will extinguish the whole debt – *D & C Builders v Rees* (UKCA) (Obiter – per Dankwerts LJ.)

If A owes B a debt.
C enters into an arrangement with B to pay part of that debt, on the condition that it discharges the debt fully.

“"Where a cheque for a smaller sum than the amount due is drawn by a person other than the debtor and delivered in satisfaction in that debt, it is clear that the debt is discharged if the cheque is accepted on that ground and then paid" – *D & C Builders v Rees*, per Dankwerts LJ.

Equitable Estoppel:

The exact elements of this remain contested, a bit controversial, and unsettled.

"When a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of a lesser sum, the creditor will not enforce payment of the balance, an on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction; then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so" – *Hughes v Metropolitan Railway,* citing *High Trees House Ltd*, per Lord Cairns.

Requirements: *D & C Builders v Rees* (UKCA) (per Lord Denning, Dankwerts LJ); *In re Selectmove* (UKCA)

i. The parties must enter into an agreement (as stipulated) – come to an accord.
ii. That agreement must lead the debtor to believe that the creditor will not enforce all of their rights;
iii. Relying on that understanding/agreement, the debtor pays a partial sum and the creditor accepts;
iv. It would be inequitable for the creditor to then enforce the payment of the balance (or the other rights).

v. There must be detrimental reliance on the creditor’s promise – in New Zealand, *Homeguard Products v Kiwi Packaging*.
(Also mentioned by Dankwerts LJ in *D & C Builders v Rees* – he found no estoppel as no detriment)

Homeguard Products v Kiwi Packaging [1981] 2 NZLR 322 (HC) – means that in New Zealand, there is a detrimental reliance requirement.

It is uncertain based on a couple of factors: given that *Foakes v Beer* is a rule approved by the HL, only the HL should really be able to constrain it; other authority (*High Trees*) was a case where *Foakes v Beer* didn’t really apply as the amount had not yet become owing.
In any instance, “there must be a detriment”.

Inequitable:

In New Zealand, since *Homeguard*, it is not just an "inequitable requirement" but instead there must have been a detrimental reliance.

- If a party fails to adhere to the new terms proposed, then it will not be inequitable to revert back to the original agreement and no longer abide by the new accord – *In re Selectmove* (UKCA).

- If there is an agreement, and the party relies on that agreement and makes that payment, then there is no need for detrimental reliance. The mere act in reliance will make it inequitable to go back on that agreement – *Collier v Wright* (UKCA)

  VS

- "It cannot be said that in every case where a creditor agrees to accept payment of a debt by instalments, and the debtor acts upon that agreement by paying one of the instalments, that it will necessarily be inequitable for the creditor later to go back on that agreement All will depend on the circumstances" – *MWB v Rock Advertising Limited* (UKCA).