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REFINING CONSIDERATION: RIP FOAKES v BEER?

MWB v Rock

Those with an interest in English contract law are well aware of the significance of the Court of Appeal’s landmark ruling in Williams v Roffey Bros & Nicholls (Contractors) Ltd.\(^1\) There, the court established the principle that the conferral of a practical benefit could be good consideration in relation to a promise of extra payments for no additional performance. Nevertheless, Williams v Roffey left open the question whether this principle could be extended beyond so-called “pay more” cases, to those instances where there has been a relaxation of the initial obligation to make payment (so-called “pay less” cases). In Re Selectmove Ltd,\(^2\) although Peter Gibson LJ saw “the force of the argument” in favour of such an extension, he was nevertheless emphatic in ruling that, it was not possible, as a matter of law, since it “would … leave the principle in Foakes v Beer\(^3\) without any application”.\(^4\) Indeed, according to his Lordship, if such an extension were to be made, “it must be by the [Supreme Court] or, perhaps even more appropriately, by Parliament after consideration by the Law Commission”.\(^5\)

However, in MWB Business Exchange Centres Ltd v Rock Advertising Ltd,\(^6\) a unanimous Court of Appeal felt no such qualms. In a decision that is likely to generate much academic debate in England and across the common law world, the court both cleverly affirmed the general principle in Foakes v Beer, and its troublesome progeny, yet simultaneously outflanked it by extending the principle in Williams v Roffey into new territory. The end result is a tidier picture overall, albeit that this consistency may have been achieved by what some might regard as a judicial sleight of hand. In doing so, the position arrived at by the Court of Appeal encroaches upon much of the ground formerly occupied by the modern doctrine of promissory estoppel, since what can be achieved by that uncertain doctrine can now be more easily realised by way of consideration. MWB is, therefore, of some considerable importance to contract law scholars.

The facts and issues

MWB (the respondent) and Rock (the appellant) entered into an agreement whereby Rock would occupy, as a licensee, premises managed by MWB and would make certain monthly payments as they fell due. This agreement contained a so-called “anti-oral variation” clause. These clauses are widely used in written contracts to help promote certainty, and to avoid evidential problems associated with one party claiming that the agreement has in fact been varied by subsequent oral discussion. In the instant case, the relevant clause provided that “[a]ll variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.”

Shortly after entering the agreement, Rock encountered financial difficulties and could not keep up the agreed payments. Subsequently, representatives of Rock and MWB held discussions, resulting in the introduction of a revised payment schedule. By virtue of this modified agreement, Rock initially undertook to pay a sum which was less than the agreed amount under the original agreement, and to pay more at a later point. In practical terms,

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\(^1\) [1991] 1 QB 1.
\(^2\) [1995] 1 WLR 474.
\(^3\) (1884) 9 App Cas 605.
\(^4\) [1995] 1 WLR 474, 481A-B.
\(^5\) Ibid, 481D.
\(^6\) [2016] EWCA Civ 553 (Arden, Kitchin, and McCombe LJ).
Rock’s debt to MWB would have been discharged in its entirety by the end of the licence period. On the same day that the revised agreement was entered into, Rock paid the first instalment under it.

On these facts, three key issues arose for adjudication. First, was the original agreement between the parties capable of amendment in a manner which was not in keeping with what was stipulated in the anti-oral variation clause—in this case, by way of the introduction of an orally agreed revised payment plan? If so, secondly, was the variation supported by consideration, such as to make it enforceable by the promisee (Rock) and, thus, binding on the promisor (MWB)? Thirdly, and in the alternative, did Rock’s payment of the first instalment under the revised payment schedule renders it inequitable for MWB to resile from its variation promise because of the operation of the doctrine of promissory estoppel? The Court of Appeal’s ruling on all three of these issues is of significance to contract law scholars and practitioners.

The decision

(i) The validity of the anti-oral variation clause

On the first issue, regarding the validity of the anti-oral variation clause, the Court of Appeal held that the contract could indeed be modified in a manner other than that which had been prescribed under the anti-oral variation clause. Authority was found in the recent Court of Appeal decision in *Globe Motor Inc v TRW Lucas Varity Electric Steering Ltd*,7 where the court was confronted with two inconsistent Court of Appeal decisions regarding whether revisions to the original contract must necessarily be effected in accordance with the terms specified in the anti-oral variation clause.8 In *Globe Motor*, the court held that “the fact that the parties’ contract contains [an anti-oral variation] clause … does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct”.9 In *MWB*, the Court of Appeal had little hesitation in endorsing the line favoured in *Globe Motor*. In doing so, the court acknowledged that the previously agreed anti-oral variation clause in the contract between MWB and Rock “did not preclude any variation of the original agreement other than one in writing and in accordance with its terms”.10 It was this finding which rendered pertinent the discussion of consideration and, within that, the true scope of the principle in *Williams v Roffey*.

(ii) Was the variation promise supported by consideration?

On this second issue, the Court of Appeal held that consideration had been provided by the promisee, and that the promise under the revised agreement was, therefore, enforceable. According to the court, the facts in *MWB* made it distinguishable from the leading authorities of *Foakes v Beer, Pinnel’s Case*,11 and *Re Selectmove*. In this respect, the court regarded MWB’s willingness to alter, or modify, the original agreement, not just as a simple accommodation of Rock’s financial difficulties, but rather as a shift which resulted in demonstrable commercial advantage to MWB. Moreover, the commercial advantage was not

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7 [2016] EWCA Civ 396 (Moore-Bick, Beatson, and Underhill LJJ).
8 United Bank Ltd v Asif (11 February 2000) Unreported, which stated that any alteration to the original agreement must happen in accordance with the anti-oral variation clause; and World Online Telecom Ltd v I-Way Ltd [2002] EWCA Civ 413, where the opposite conclusion was arrived at.
9 [2016] EWCA Civ 396, [100] (Beatson LJ).
10 MWB, [36] (Kitchin LJ).
11 (1602) 5 Co Rep.
just that MWB would receive an immediate lump-sum payment, but that, by way of the revised plan, “it would be likely to recover more from Rock than it would by enforcing the terms of the original agreement and it would also retain Rock as a licensee”. According to Kitchin LJ, this was not a case “in which the only benefits conferred on MWB by the oral variation agreement were benefits of a kind contemplated by Lord Blackburn in *Foakes v Beer* and by [Peter Gibson LJ] in *Re Selectmove.*” In those two cases, although both judges accepted that part payment of a debt might prove more beneficial to the debtor than to insist on the full sum owed, ultimately they concluded that this was not sufficient to amount to good consideration. Instead, in Kitchin LJ’s opinion, the practical benefit enjoyed by MWB was of the type that:

> “went beyond the advantage of receiving a prompt payment of a part of the arrears and a promise that it would be paid the balance of the arrears and any deferred licence fees over the course of the forthcoming months.”

In this regard, Kitchin LJ, seems to come close to drawing a distinction between, on the one hand, a mere practical benefit (ie, a simple accommodation of the debtor—something which the promisor would, presumably, reject unless it envisaged *some* advantage from acquiescing to it) and, on the other, a practical benefit which confers a clear commercial advantage on the promisor (ie, the type of benefit present in *Williams v Roffey*). Under this view, the former is not good consideration for a modification or variation promise, whereas the latter is.

Likewise, Arden LJ was of the opinion that, on the facts of the case, there existed “consideration over and above that of simply accommodating Rock”. Her Ladyship was influenced, in particular, by the “commercial benefit of having Rock continue in occupation [of the premises]”. Moreover, whether the case was a pay more case, or a pay less case was, in Arden LJ’s view, wholly irrelevant. According to her Ladyship:

> “[t]he principle that a benefit can in law be consideration for a promise must logically apply whatever the nature of the contract. It must also apply whether the promisee has at the same time agreed to render the same performance as he originally promised or to render a lesser performance”.

Arden LJ went on to state that there could be “no coherent distinction between [an] agreement to pay debts and [an] agreement to do work”, and it was “the strength of [this] general principle [that] may well explain why in *Roffey* this Court did not refer to *Foakes v Beer*”. According to Arden LJ, in the context of pay less or debt cases, demonstrating that a practical benefit which confers a commercial advantage is good consideration was not to be regarded as a departure from the general rule in *Pinnel’s Case*, but merely to come within one of its the exceptions. As her Ladyship was at pains to point out in reference to *Foakes v Beer*:

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12 MWB, [48] (Kitchin LJ).
13 Ibid.
14 Ibid, (emphasis added).
15 Ibid, [74] (emphasis added).
16 Ibid.
17 Ibid, [79].
18 Ibid, [84].
19 Ibid, [84-85].
“After stating that ‘payment of a lesser sum … in satisfaction of a greater, cannot be any satisfaction for the whole’, Lord Coke … added a rider that ‘the gift of a horse, hawk or robe, etc in satisfaction is good for it shall be intended that a horse, hawk, or robe, etc might be more beneficial to the plaintiff than the money’. The House of Lords in Foakes v Beer approved both the statement of general rule and the rider. As the law of consideration now stands, the gift of the horse, hawk or robe is no different in principle from the conferral of an [sic] benefit or advantage …. In accepting that a practical benefit can be good consideration for part payment of a debt, all I am doing is replacing the words ‘the gift of a horse, hawk or robe’ with a more modern equivalent in line with the responsibility which Glidewell LJ in Roffey[20] described as refining and limiting the common law but leaving the principle (the actual Rule in Pinnel’s case) unscathed.”

It was, then, in much the same way that the Court of Appeal in Williams v Roffey sought to “refine, and limit the application of [the] principle [in Silk v Myrick21], but [to] leave [that] principle unscathed”,22 that the Court of Appeal in MWB sought to do something similar to Foakes v Beer.

(iii) Was MWB prevented from resiling from its variation promise by virtue of the doctrine of promissory estoppel?

On the third, and alternative, issue of whether the doctrine of promissory estoppel prevented MWB from acting inconsistently with its promise to vary the payment schedule under the original contract, the Court of Appeal’s pronouncements were, strictly speaking, obiter, since in the light of its finding that the variation promise was supported by consideration, a determination on the estoppel point was not, in fact, necessary. Nevertheless, since full argument on the point had been heard, the court felt inclined to proffer a view on the applicability or otherwise of an argument rooted in estoppel.23 Kitchin LJ began with an approach which echoed the oft-quoted dictum of Lord Cairns LC in Hughes v Metropolitan Railways,24 to which he had previously referred, namely, that:25

“if one party to a contract makes a promise to the other that his legal rights under the contract will not be enforced or will be suspended and the other party in some way relies on that promise, whether by altering his position or in any other way, then the party who might otherwise have enforced those rights will not be permitted to do so where it would be inequitable having regard to all of the circumstances.”

On the facts before him, the key issue for his Lordship revolved around whether “it was inequitable for MWB to assert its strict legal rights under the original contract against Rock” by going back on its promise to vary the original agreement.26 Although Kitchin LJ recognised that the doctrine had previously been applied “in cases where the representee has suffered no detriment”,27 he was much taken by the approach adopted by Peter Gibson LJ in

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20 [1991] 1 QB 1, 16.
21 (1809) 2 Camp 317.
22 Ibid, 16B.
23 In this context, the Court of Appeal also considered, but rejected, arguments based on: waiver (“the defence of waiver would have added nothing to that of promissory estoppel”: [64], per Kitchin LJ); and proprietary estoppel (this was “not such a case” and in any event there was no evidence that Rock had suffered a detriment: [65]).
24 (1877) 2 App Cas 439.
25 Ibid, 448.
26 MWB, [62].
27 MWB, [54].
Emery v UCB Corporate Services Ltd. In that case, Peter Gibson LJ emphasised that “the fact that the promisee has not altered his position to his detriment is … material in determining whether it would be inequitable for the promisee to be permitted to act inconsistently with his promise”. In following this approach, Kitchin LJ was keen to underscore the open textured nature of the doctrine:

“I do not for my part think that it can be said, consistently with the authorities, including, in particular, the decisions of the House of Lords in Foakes v Beer and this court in Re Selectmove, 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, and the creditor accepts that instalment, then it will necessarily be inequitable for the creditor later to go back upon the agreement and insist on payment of the balance …. [A]ll will depend upon the circumstances.”

Thus, in the case before him, his Lordship was of the view that MWB had not agreed to accept a smaller sum in satisfaction of the whole debt, nor had it agreed to forgo any part of the ongoing licence fee. Accordingly, Kitchin LJ found that, when Rock paid the first instalment under the revised agreement, it had suffered no detriment, since “this was a sum [Rock] was in any event bound to pay”. In these circumstances, his Lordship concluded that it would not have been inequitable for MWB to resile from its variation promise and revert to its strict legal rights, and that, accordingly, the “doctrine of promissory estoppel [did not preclude it] from taking the action it did”.

Comment

At one level, the impact of the decision in MWB is to cast serious doubt on the effectiveness of anti-oral variation clauses—a result which is liable to cause a great deal of consternation in commercial circles. But perhaps, more importantly, the decision does away with the idea that practical benefit (as long as it amounts to good consideration) is confined to additional payments for goods and services (ie pay more cases) and does not extend to cases where there is some relaxation of the original obligation to make payment (ie pay less cases). On this point, the decision in MWB may well be regarded as intuitively just, since it results in the enforcement of seriously, and freely, made commercial promises. However, in arriving at this outcome, the Court of Appeal’s ruling does seem to treat authority of greater precedential value in a somewhat high-handed way. And, in breaking new ground, MWB introduces yet more uncertainty as to what sorts of practical benefit really do constitute good consideration.

Without doubt, MWB is an important contract law decision. It represents a further liberalisation of our understanding of the doctrine of consideration. Although the Court of Appeal’s ruling in this case enables Foakes v Beer to live on to fight another day, it nevertheless seems to limit that leading authority to cases of debt where there is no evidence of consideration over and above that of simply accommodating the debtor. What is more, in expanding the role of practical benefit, MWB has serious implications for the ongoing significance of promissory estoppel.

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29 Ibid, [28].
30 MWB, [61] (emphasis added).
31 Ibid, [63].
32 Ibid.
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