

4.1.3.5 Motive and other consideration valueless at law

Page 141, at end of (c) **Un-induced performance by the promisee, insert –**

This burden was not displaced in *Pitt v Jones* ([2007] EWCA Civ 1301. A majority shareholder (J) sought an emergency shareholders' meeting to approve the sale of his shares. This could only be done with the consent of P, minority shareholders and employees of the company, who also had to agree to a waiver of their right of pre-emption. P were informed by J's solicitor that J would negotiate with the purchaser to buy P's shares at the same price but only in six months' time and that if the purchaser became insolvent in that period, they would have no security. In response to P's unease, J undertook to pay for P's shares if the prospective purchaser did not. When B duly became insolvent, P sought to enforce J's promise to buy the shares. In the lower court, the promise was held to be unenforceable because, *inter alia*, P provided no consideration since P never considered refusing to sign the waiver. Lady Justice Smith of the Court of Appeal held at [18] that:

[A]s a rule, a party to a contract will be consciously aware of what consideration he is giving for the promise he is accepting. But here... the course of events was such that ... the appellants gave consideration even though they did not consciously work out exactly what it was that they had given... [T]here was so clear a chronological link between the respondent's offer of the undertaking and the appellants' willingness to sign the documents that the natural inference to draw was that the two were directly connected. I would hold that the appellants' cooperation was given in return for the respondent's undertaking. I would also hold that that was good consideration notwithstanding the fact that the appellants' did not consciously realize that by signing the documents they were subjecting themselves to a detriment and were giving consideration for the respondent's undertaking. For those reasons I would hold that the respondent's undertaking was supported by consideration and was therefore a contractual agreement.

4.1.5.3 'The same for more': pre-existing contractual duty owed to the other party

Page 153 after **(vii) The current status of *Stilk*, insert-**

In *WRN Ltd v Ayris* [2008] EWHC 1080, A had been sent an employment contract by WRN, which contained covenants restricting his ability to deal with its customers should he leave the company. When A wished to leave and go elsewhere, WRN agreed a termination agreement with A varying the original agreement by (i) bringing forward the termination date to save WRN from paying A's salary thereafter, and (ii) extending the relevant period of the restrictive covenant from six months to 12 months. Thus, A effectively promised both to (i) accept less and to (ii) perform more. Without reference to *Williams v Roffey*, Judge Richard Seymour QC found (at [46]) the variation to be unenforceable simply on the basis that:

[T]he only consideration passing from WRN which could be said to support the Leaving Contract was a promise to perform an existing contract. It is well-established that such will not, in law, constitute consideration.... Consequently I find that the Leaving Contract was not valid and binding in law.

4.1.5.4 'Less for the same': part-performance

Page 156 before **(iv), add-**

This was expressly recognized in *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643. At [3] Arden LJ said:

[T]he rule in *Pinnel's Case* 5 Co Rep 117a has proved very controversial. The effect of the rule is that it is not enough to give a creditor some only of the money to which he is already entitled. While that may sound like a good result in terms of creditor protection, the consequence is also that, where a compromise has been made, the expectations of the parties are frustrated. Thus the rule makes it difficult to enter into compromises of claims, which it can often be commercially beneficial for both parties to do.

Her Ladyship continued at [5]:

In 1937 the Law Revision Committee, chaired by Lord Wright MR, recommended the reversal of the rule in *Pinnel's Case* by statute but its recommendation has not been implemented (*Sixth Interim Report on the Statute of Frauds and the Doctrine of Consideration*, Cmd 5449, paras 33—35). The committee said, at paras 34—35:

34. In *Foakes v Beer* Lord Blackburn was evidently disposed to hold that it was still open to the House of Lords to reconsider the rule based on the dictum, but in deference to his colleagues who were of a different opinion he did not press his views. In a few words, at p 622, he summed up what appears to us to be a powerful argument for the abolition of the rule. He said:

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.

35. In our opinion this view is as valid as it was 50 years ago, and we have no hesitation in recommending that legislation should be passed to give effect to it. This legislation would have the additional value of removing the logical difficulty involved in finding a consideration for the creditors' promises in a composition with creditors when not under seal.

The Court of Appeal effectively achieved this reform (overriding *Foakes v Beer*) via the doctrine of promissory estoppel (see below at 4.3.2.2. and 4.3.2.3).

Page 157 After (v), add-

This problem is recognized by the *Sixth Interim Report on the Statute of Frauds and the Doctrine of Consideration*, Cmd 5449, para 35 where the committee said:

It would be possible to enact only that actual payment of the lesser sum should discharge the obligation to pay the greater, but we consider that it is more logical and more convenient to recommend that the greater obligation can be discharged either by a promise to pay a lesser sum or by actual payment of it, but that if the new agreement is not performed then the original obligation shall revive.

4.1.5.5 The roles of consideration and promissory estoppel in modifications

Page 158, before 'Pause for reflection', insert –

However, the Court of Appeal's decision in *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643 appears to have reduced the extent of this flexibility by widening the circumstances in which promissory estoppel would be established, effectively dispensing with the requirement that any reliance should be detrimental and accepting reliance as of itself sufficient to make it inequitable for the promisor to resile (see below at 4.3.2.2. and 4.3.2.3).

4.2.2 The requirement of formalities in addition to consideration

Page 169 before 4.3 Promissory estoppel, add-

Pitt v Jones (2007) provides another example of the potential injustice of a formalities requirement. The facts are set out above (under 4.1.3.5). Since the agreement was a contract of guarantee, section 4 of the Statute of Frauds 1677 required it to be, when it

was not, in writing. The agreement was therefore unenforceable. Lady Justice Smith said at [39]:

I reach that conclusion with some reluctance as it appears to me that there is much general merit in the appellants' case. They were unrepresented on 7 January, having been quite unaware prior to that day that any important events were to take place. They extracted an undertaking from the respondent and asked for it to be put in writing. For reasons which were not explained to this Court, Mr Forster [the respondent's solicitor] advised against that course. On the face of it, the respondent's stance was most unattractive.

4.3.2.2 Reliance: change of position

4.3.2.3 Inequitable to go back on the promise

Page 174-75

In *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643, C and his two former business partners were jointly liable to W for a debt of £46,800. Following the bankruptcy of C's former partners, W sought payment of the whole sum from C. C resisted W's claim on two bases. *Foakes v Beer* stood in the way of his first argument that there was a compromise made with the creditor that his liability would be limited to 1/3 share if he paid it. However, the Court of Appeal found a triable issue on promissory estoppel. Arden LJ (at [19]) referred to the lower court judgment of Mr Roger Kaye QC who found it:

'difficult to see any sufficient relevant alteration of position on the part of Mr Collier, rendering it inequitable for the creditor now to resile from its alleged promise. C's continuing to make the monthly instalment payments that he was already making was not 'a sufficient alteration of position'. C's claim that he relied on W's promise in not pursuing the other judgment debtors was not backed up by evidence and even if proved, would not have improved C's position given W's 'inability to recover a single penny from them, despite being in possession of a judgment debt'. C's claim 'that, had Mr Wright not reassured him as to his position, he might well have been able to agree to some accommodation with them in the two years between his

conversation with Mr Wright and the first of the bankruptcies' struck the judge as 'wild speculation, incapable of amounting to anything rendering it unconscionable on the part of the creditor now to pursue Mr Collier for the full amount of the debt.'

Arden LJ agreed at [36] that:

there is no evidence that Mr Collier's position now is in any material respect different from that immediately before the agreement was made. For instance, there is no evidence that he entered into any business venture or made any substantial investment on the strength of the agreement. Nor is there any evidence that he could not raise the money now to meet Wright's claim.

Nevertheless, her Ladyship, was clear on the basis of Lord Denning MR's dicta in the *D & C Builders* case [1966] 2 QB 617 that C' part payment in reliance of W's promise is enough, in itself, to make it inequitable for Wrights in those circumstances to pursue him for the balance. She concluded at [42]:

The facts of this case demonstrate that, if (1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt. For him to resile will of itself be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguishing the creditor's right to the balance of the debt. This part of our law originated in the brilliant obiter dictum of Denning J in the *High Trees* case [1947] KB 130. To a significant degree it achieves in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937.

Longmore LJ was less than enthusiastic in his endorsement of this position. Firstly, at [45] he expressed doubt that W's statement (that he would look to the other two co-debtors for their share and not to C if C continued to pay £200 per month) amounted to a promise by W to permanently forego his right to sue C for the whole debt. He added that 'The fact that

it is impossible to see any benefit to Mr Wright, or detriment to Mr Collier, makes it all the more difficult to construe the agreement as a permanent surrender of Mr Wright's Company's right to sue for the balance. '

Secondly, he rejected C's argument of reliance based on his loss of opportunity to chase his co-debtors but conceded at [47] that 'it seems that on the authority of *D & C Builders Ltd v Rees* [1966] 2 QB 617 it can be a sufficient reliance for the purpose of promissory estoppel if a lesser payment is made as agreed.' Thirdly, he agreed that it is arguably inequitable for the company to resile from its promise. But thought there was 'much to be said on the other side.' He warmed at [48] that:

If, as Arden LJ puts it, the "brilliant obiter dictum" of Denning J in the *High Trees* case [1947] KB 130 did indeed substantially achieve in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937, it is perhaps all the more important that agreements which are said to forgo a creditor's rights on a permanent basis should not be too benevolently construed.

Pause for reflection:

1. Arden LJ's judgment signifies a break with precedent. It undermines *Foakes v Beer* in the same way that *Williams v Roffey Brothers* undermined *Stilk v Myrick*; namely, in all but name. *Foakes v Beer* is authority that part payment does not discharge the whole debt because of a lack of consideration, even if the payment is induced by the creditor's agreement that it would. Yet, Arden LJ's judgment indicates that part payment *will* discharge the whole debt if made in response to the creditor's agreement that it would. In place of equity's usual flexible and discretionary approach in weighing the parties' conduct and the potential gains and losses to each, Arden LJ substitutes what appears to amount to an absolute rule.
2. The idea that a promise lacking in consideration can be enforced, to the extent required by justice, if the additional requirements of promissory estoppel are satisfied is undermined by a significant dilution of these requirements. Namely:

- reliance (in the sense at least of a change of position so that the promisee cannot resume his position),
- that it be inequitable for the promisor to resile from his promise (as something over and above the promisee's reliance),
- that the promise only suspends, rather than extinguishes the promisor's rights.

On Arden LJ's judgment, part payment in itself amounts to reliance, makes it inequitable for the promisor to resile, and extinguishes the promisor's original rights. This makes the requirement of promisor unconscionability redundant and departs from the reliance basis of the doctrine. It represents such a substantial dilution of the equitable jurisdiction as to cut the doctrine adrift from its justification.

3. *D & C Builders Ltd v Rees* [1966] 2 QB 617 is rather weak precedent for the proposition applied in *Collier v Wright*. The doctrine was found not to apply on the facts and the greater part of Lord Denning MR's judgement simply applied *Foakes v Beer*. Similarly, Danckwert LJ's judgment spent just 14 lines rejecting the applicability of any equitable principles (there was no true accord and *no detrimental change of position*, at 627). Winn LJ, giving the longest judgement, did not mention promissory estoppel. It is paradoxical then that *D & C Builders*, a case which applies *Foakes v Beer*, should be interpreted as a direct contradiction of it. All three judges agreed that the modification was unenforceable because there was no accord and satisfaction where: 'The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative' (*Chitty on Contracts*, 29th Edition, 2004, Volume 1 *General Principles*, para. 22-012). Arden LJ's appeal to Lord Denning's terminology of 'accord and satisfaction' in her application of promissory estoppel (at [33], [39], [42]) is therefore incongruous and apt to confuse. Indeed, according to the Weekly Law Reports [2008] 1 WLR 643, 644, *Collier v Wright* held, inter alia, that Collier had raised a triable issue "that there had been an accord and satisfaction in that he had paid his share of the debt and the company had voluntarily agreed to accept the payments on that basis".

4. Technically the Court of Appeal only held that there was a *triable issue* on promissory estoppel; it remains to be seen what facts are found in full trial to support Arden LJ's approach.

4.3.2.4 The extent of enforcement: suspensory or extinctive?

Page 176 before **4.3.2.5, insert-**

In *Royal Bank of Scotland v Ludlum* (2008) CA (Civ Div) 15/5/2008 RBS agreed to give L a three-month period to bring his overdraft back within an agreed limit, after which time RBS would reconsider its position on whether to seek possession of the property on which L's overdraft was secured. The Court of Appeal set aside the possession order obtained by RBS within the three-month period because L had altered his position by borrowing money from friends and family to reduce the overdraft. RBS was estopped from seeking possession within the three-month period although it was free to do so thereafter.