

***Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA)**

(a) Identify the arguments put on behalf of the plaintiff to support the enforceability of the alteration promise. What difficulty did counsel for the plaintiff face in establishing the argument that the promise was supported by consideration?

- (i) It was argued for the plaintiff that renegotiated prices for contracts should be enforceable where the renegotiated price had been freely agreed to by the parties and was regarded by them as being mutually beneficial. Such a position would recognise the commercial realities of what happened in practice, especially as between main contractors and subcontractors where the original price had been fixed too low.
- (ii) Counsel for the plaintiff argued that there was consideration in the sense of benefit and detriment to both parties; the main contractor obtained a benefit in avoiding penalties or reducing the penalty amount that would otherwise be payable if the subcontractor walked off the job, and the subcontractor might be better off paying damages for the breach and obtaining more lucrative work elsewhere to replace this contract. This is an argument in favour of recognition of practical benefits.
- (iii) Counsel faced a difficulty in establishing the existence of consideration to support the promise to pay more money since the decision in *Stilk v Myrick* (1809), which had stood the test of time, stated that performance of an existing duty (in this case the carpentry work) could not be a sufficient consideration to support a fresh promise because there was no additional legal benefit to the promisor and no additional detriment suffered by the promisee. Counsel argued that
 - *Stilk v Myrick* did not apply to variations in the construction context and/or could be explained by the special conditions on the high seas at the time it was decided;
 - Since the development of duress, it was no longer necessary to adopt the strict approach to the definition of consideration which had been adopted in *Stilk v Myrick* in order to prevent promises obtained by extortion from being enforceable.

(b) Why was there no argument based on promissory estoppel? What, if anything, did each member of the Court of Appeal have to say concerning the scope of that doctrine and its application to facts such as these?

- (i) Although this was an alteration promise, the doctrine of promissory estoppel has been limited to a defensive role in English law and cannot be used to found a cause of action (*Combe v Combe* (1951)). The plaintiff would have needed to rely on promissory estoppel to enable him to enforce the promise to pay more (i.e. using the estoppel as a cause of action). Counsel clearly considered that there was more chance of success through arguing for a more relaxed approach to the definition of consideration than in seeking to remove this limitation on the doctrine of promissory estoppel.
- (ii) There is no reference to this matter in the judgment of Purchas LJ as he takes a general pragmatic approach to enforceability. However, Glidewell LJ noted the possibility of this promissory estoppel argument but stated that it had not been argued before the Court of Appeal in this case and, more generally, the argument “had not yet been fully developed”. He concluded that “interesting, though it is, no reliance can in my view be placed on this concept in the present case”. Russell LJ went further and stated that he “would have welcomed the development of argument...on the basis that there was here an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding”.

For subsequent argument see *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, *Casebook* (7th) 168, and the argument based on the Australian case, *Waltons Stores (Interstate) Ltd v Maher* (1988).

In *Walton Stores* the High Court of Australia permitted an estoppel to create a cause of action on the basis of avoiding detriment to the representee resulting from the representor’s “unconscionable” conduct. However, in *Baird* the English Court of Appeal rejected an argument to establish a contractual commitment based on promissory estoppel on the ground that English law (e.g. *Combe v Combe*) could not create a cause of action based on such an estoppel. The Court of Appeal specifically rejected an argument based on *Walton Stores* in favour of cross-fertilisation of the scope of all estoppels so as to enable the alleged estoppel (based on a representation of future conduct) to give rise to a cause of

action. It was considered that dicta in *Walton Stores* and *Commonwealth of Australia v Verwayen* did not enable the English courts to refuse to apply the principle in *Combe v Combe*. It was accepted, however, that the House of Lords might choose to follow the *Walton Stores* approach in a future case although Judge LJ noted that this would amount to imposing liability in equity where there could be no liability in contract and that this would amount to “a revolutionary development of the legal principles governing the enforcement of private obligations”. In any event, the *Walton Stores* argument was doomed to failure on these facts because of the deficiencies in the representation relied upon (i.e. too uncertain to be relied upon).

(c) What did the Court of Appeal decide in relation to consideration to support the promise and what did it decide in relation to the defendants’ argument that, if there was a binding promise, the terms were that payment was to be on complete performance of the carpentry work for each flat and this had not occurred when the plaintiff left the site?

- (i) The Court of Appeal decided that where one party promises to pay more money to secure the original contractual performance by the other party and the result of the promise was that the promisor secured a benefit or avoided a detriment, then provided that the promise was not obtained by duress or fraud, the advantage thereby obtained as a result of the promise could be a good consideration. In other words, the practical benefits to the main contractor (defendants) arising from making the promise would render the promise enforceable. These practical benefits were identified as avoiding the penalty for delay and avoiding the trouble and expense of having to secure a replacement subcontractor if this subcontractor walked off site.
- (ii) The defendants had argued that the plaintiff was not entitled to any part of the additional £10,300 promised because although the remaining flats had been substantially completed, none had in fact been completed. In other words, the defendants argued that the obligation to pay the additional sum of £575 for each flat was an entire obligation and that since there had not been complete performance of that obligation, there was no obligation to pay. However, the Court of Appeal rejected this argument and held that there had been substantial completion of the eight flats (*Hoenig v Isaacs* [1952] 2 All ER 176, *Casebook* (7th) 260).

(d) On what basis did the Court of Appeal justify not applying *Stilk v Myrick* (page 144)?

The development of economic duress (which had not occurred until the late 1960s/1970s) was used to justify a more relaxed approach to identification of consideration. Both reports of *Stilk v Myrick* had made reference to the need to prevent sea captains being held to ransom on the high seas. Campbell's Report suggests that this was the policy motivation for the restrictive definition of consideration, whereas Espinasse's Report suggests that this was the actual ratio in the case. The Court of Appeal considered that since the development of economic duress it was no longer necessary to adopt such a restrictive approach and consideration need no longer be restricted to instances of legal benefit and detriment.

(e) On what basis was it argued that the principles in *Williams v Roffey* do not contravene the principle in *Stilk v Myrick*?

Glidewell LJ concluded that *Williams v Roffey* merely refined and limited the application of the principle in *Stilk*, leaving it unscathed. *Williams v Roffey* does not challenge the need to identify consideration to support an alteration promise to pay more and, in instances where there is no practical benefit arising to the promisor from making the promise, the principle in *Stilk* will be applicable. Despite these protestations there can be little doubt that *Williams v Roffey* does represent an attack on the principle in *Stilk* in the interests of recognising the commercial position regarding alteration promises since there were clearly practical benefits to the sea captain in *Stilk v Myrick* in ensuring that the ship reached home short-handed.

[Note that the Court of Appeal of New Zealand in *Antons Trawling Co Ltd v Smith*, Casebook (7th ed), 171, considered that in general terms (i.e. in the absence of policy reasons to the contrary) an alteration promise should be enforceable in all cases where there was an intention to be legally bound and reliance despite the absence of any consideration to support the representation or promise. The Court considered 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 expected to have taken". This is justified on the basis that any other conclusion would undermine "the

essential principle underlying the law of contract, that the law will seek to give effect to freely accepted *reciprocal* undertakings” but, in the absence of traditional consideration the only element of reciprocity must be the reliance. Is this decision tantamount to concluding that reliance replaces consideration as the enforceability criterion in the alteration context?]

(f) Consider the nature of the consideration which the Court of Appeal held supported the defendants’ promise. What did the Court of Appeal decide constituted the factual benefit? How is this consideration generated and how did the Court of Appeal purport to avoid the potential technical difficulties associated with this?

- (i) The emphasis is placed on benefit to the defendants arising from making the promise to pay more, i.e. avoiding the penalty and the expense and inconvenience of having to find another subcontractor to finish the carpentry work. Perhaps more controversially, Glidewell LJ also suggests that merely seeking to ensure the plaintiff continues work and does not stop in breach of contract can constitute a factual benefit. (See Chen-Wishart “Consideration: Practical benefit and the Emperor’s New Clothes” in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law*, 1995, for further discussion of identification of the factual benefit). The scope of *Williams v Roffey* (taking account of the limitation recognised in *Re Selectmove*) will depend upon how “practical benefit” is defined.
- (ii) The perceived technical difficulty with this is that the plaintiff carpenter does not appear to suffer any detriment (indeed, quite the opposite) and the principle in *Tweddle v Atkinson* was traditionally thought to mean that the consideration had to be provided by the promisee. The Court of Appeal considered that it was sufficient that the consideration arose out of the contractual relationship with the promisor so that it was not necessary for the promisee to suffer a detriment where both parties had obtained benefits. The fact that the promisee need not suffer any detriment as long as there is benefit to the promisor from making the promise can also be seen in the decision of the Court of Appeal in *Edmonds v Lawson* (see note 4 of the Casebook (7th) at 139).