Neutral Citation Number: [2019] EWCA Civ 1105

Case No: A2/2018/2038

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
The Hon Mr Justice Kerr

Date: 28/06/2019

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE SIMON
and
LORD JUSTICE HENDERSON

- -

Between:

DAN SIMANTOB	**Appellant**
and	
YACOB SHAVLEYAN	**Respondent**

- -

James Ramsden QC (instructed by **Devonshires**) for the appellant, Mr Simantob

Keith Knight (instructed by **Greenwood & Co**) for the respondent, Mr Shavleyan

Hearing date: 23 May 2019

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Approved Judgment

Lord Justice Simon:

1. This the judgment of the Court.

Introduction

2. This appeal from the decision of Kerr J ('the Judge'), turns on the extent to which a forbearance to raise a defence later found to be without legal merit can constitute sufficient consideration to support an agreement between the parties.

3. The facts giving rise to this issue are complex, and are fully set out in the Judge's judgment, [2018] EWHC 2005 (QB). For present purposes, a summary will suffice.

4. Both parties were in business as dealers in Islamic antiquities. The appellant is based in Los Angeles and the respondent in London. Difficulties arose in the course of their association and sums became due from the respondent to the appellant.

5. On 1 May 2010, a Settlement Agreement was reached between them by which the respondent agreed to pay the sum of US$1,500,000 in full and final settlement of all claims between the parties. Payment in full was due two days after the net proceeds became available from an auction sale which was due to take place on 19 May 2010. The Settlement Agreement also stipulated that in the event of non-payment by that date, the respondent would pay to the appellant, '1,000 dollars… for each extra day as a penalty'.

6. It was common ground that the sale proceeds were paid to the respondent on 19 May and that the sum of $1,500,000 became payable to the appellant by 21 May, that no such payment was made on that date, and that the '$1,000 per day clause' became operative from 22 May 2010.

7. As the Judge noted, on the first day on which the principal was not paid, the $1,000 per day clause represented an annual rate of interest of 24.333%. He regarded this as a high rate of interest, but accepted evidence that it was not particularly unusual in the market in which the appellant and respondent operated.

8. The respondent made a part payment of $500,000 under the Settlement Agreement on 9 August 2010. However, the effect of the '$1,000 per day clause' was that interest continued to accrue at the same rate, without any abatement to take into account that one third of the principal sum had been paid.

9. In the course of his judgment the Judge noted, at [24]:

> … the effect of the clause is that the 'rate' of 'interest' - if that is the right phrase - increases in inverse ratio to the amount of principal remaining outstanding. Thus, if $100,000 remains outstanding, the $1,000 a day clause represents a rate of 1 per cent per day or 365 per cent per annum. And if only $1 of the principal remains outstanding, 'interest' remains payable at $1,000 a day, a 'rate' which is one thousand times the principal amount due.

10. The Judge accepted the respondent's evidence that he always regarded the agreement as unfair and unconscionable, and that it was not binding on him until a decision of Master McCloud on 17 October 2017, in which she found that the respondent had no arguable defence to a claim based on the $1,000 per day clause. We will return later to this decision.

11. On 1 June 2011, the respondent made a further payment of $500,000 on account of the sums due under the Settlement Agreement. In 2012, he gave the appellant a post-dated cheque dated 30 March 2013 (expiring 6 months later on 29 September 2013) for $800,000. As the Judge noted, the amount of the cheque represented a full payment of the principal sum of $1,500,000 plus $300,000 by way of interest. However, on what he described as a 'literal' interpretation of the '$1,000 per day clause' as at the date of the cheque 1,026 days of interest had accrued and not 300 days.

12. Following this, the respondent gave the appellant two further post-dated cheques for $100,000 and $800,000 (dated respectively 16 August and 26 November 2013), which were intended to replace the earlier $800,000 post-dated cheque with interest. The August 2013 cheque was presented and cleared two days later. By this time the respondent had therefore paid $1,100,000 of the principal, leaving a balance of $400,000. However, the interest accrued under the $1,000 per day clause was now $1,540,000.

13. On 21 January 2014, the parties entered into what was the first of a number of agreements in relation to what were referred to as 'the woods' (13-14th century beams and two wooden screens); and which were acknowledged as being self-standing agreements.

14. Following this, at a meeting which the Judge concluded occurred at some time between 11 April and 24 May 2014, the respondent provided the appellant with 8 post-dated cheques for $100,000: one for each month from June 2014 to January 2015. The appellant's case was that these represented payments on account of sums due under the Settlement Agreement. The respondent's case was that they represented a modified agreement whereby the sum of $800,000 would be accepted in full and final settlement of his liabilities under the Settlement Agreement. The Judge found that the cheques were presented in the presence of two witnesses, who gave evidence that the appellant and the respondent had kissed and shaken hands on a deal at that meeting. At [68] of the judgment, the Judge explained why the appellant had accepted the 8 cheques when he had a claim under the Settlement Agreement which, if the $1,000 per day clause were enforceable and enforced, would have entitled him to $3,063,000, notwithstanding $1,100,000 of the principal sum of $1,500,000 had been paid. The reasons included social pressure from the local Persian business community to reconcile his differences with the respondent. It is convenient to refer to this as 'the April/May 2014 variation agreement', without at this stage forming any view as to whether it constituted a legally enforceable agreement. That is the issue which arises on the appeal.

15. The commercial relationship between the parties continued, although the detail does not bear on the present dispute. It is sufficient to say that the appellant was expressing justifiable concern that the respondent did not have sufficient funds to cover the 8 cheques he had signed.

16. By late 2014, none of the 8 cheques had been presented by the appellant for payment; and at a meeting at the respondent's gallery, he provided 4 further post-dated cheques in substitution for the 8 cheques for an overall sum of $860,000. The respondent regarded the increase of $60,000 over the previous amount as a reward for past forbearance and an encouragement to exercise patience for a while longer.

17. In the event the appellant did not present the 4 new cheques for payment; and these were replaced by 4 substitute post-dated cheques in mid-2015 in the overall sum of $900,000.

18. The Judge summarised the position as follows:

> 78. The use of post-dated cheques as a form of currency combined with an element of security and comfort became an agreed method of doing business between these two men. The increases by way of 'interest' rewarded the creditor's forbearance and reduced the threat that he would deposit cheques and trigger dishonour of a cheque. That could mean court proceedings, which neither party wanted, and which are regarded with disfavour by the Persian art dealing community in London. It prefers its disputes to be settled in-house.
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> 79. A rupture in their business relations would deprive Mr Simantob of access to Mr Shavleyan's expertise, which he valued as shown by his willingness to deal in the woods and, subsequently, the Judeo Persian documents even though Mr Shavleyan owed him a lot of money. On the latter's side, access to Mr Simantob's funds and the antiques he owned was a useful source of business to Mr Shavleyan.

19. In October 2015, the appellant presented the first of the 4 substituted post-dated cheques (in the sum of $220,000) for payment, which was dishonoured. However, on 16 February 2016, the respondent transferred $200,000 to the appellant. In March 2016, the respondent asked the appellant not to present the other three of the most recent post-dated cheques.

20. On 7 April 2016, close to the sixth anniversary of the Settlement Agreement, the appellant's solicitor sent a letter before claim demanding payment of the full sum due under the terms of the Settlement Agreement. Of the total claim for $2,378,000, $2,178,000 (all but $200,000) represented interest under the $1,000 per day clause. In its response, the respondent's solicitors rejected the claim for interest at $1,000 per day as a penalty.

21. The appellant's Claim Form was issued on 29 April 2016, shortly before the expiry of the limitation period. The claim had increased to $2,454,000, together with continuing interest at the rate of $1,000 per day.

22. In response the respondent pleaded that the $1,000 clause was void as a penalty, that he had been the subject of duress when he signed the Settlement Agreement and that the Settlement Agreement had been 'revised' in the April/May 2014 variation agreement, see [14] above.

23. The appellant applied for summary judgment under Part 24 of the Civil Procedure Rules.

24. In his witness statement of 9 February 2017, the respondent contended that after paying $1,100,000 towards the $1,500,000 referred to in the Settlement Agreement, the appellant had pressed him for payment of the shortfall of $400,000 and a further $400,000 for 'interest'. He emphasised that the validity of the Settlement Agreement had been 'questioned from the outset'. On this basis, and having then paid a further $200,000, he argued that he could not on any view be liable for more than a principal sum of $600,000.

25. In the event, it was for this amount that Master McCloud gave summary judgment in favour of the appellant on 17 October 2017, based on the acknowledgment of indebtedness of $800,000 in the April/May 2014 agreement less the $200,000 paid thereafter.

26. The material part of the order was in these terms:

> 1. There be summary judgment for the claimant on the issues of the enforceability of the Settlement Agreement and the validity of the term requiring payment of $1,000 per day.
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> 2. Judgment for the Claimant in the sum of $600,000 together with interest in the sum of $171,999 …

27. Notwithstanding that it was described as such, the Master rejected the defence argument that the $1,000 per day clause was a penalty. Although this is not clear from the transcript of her judgment, it is clear from the court order; and Mr Knight accepts that the Master rejected the respondent's contentions in the course of argument, as sometimes happens in interlocutory proceedings.

28. The $171,999 interest calculation was apparently based on 8% for 3.5833125 years and not on the basis of the $1,000 per day clause. Directions were given for the trial of the remaining issues which came on for hearing before the Judge.

The Judge's decision

29. The Judge approached the issues by posing three questions: first, whether there was a variation which provided for a full discharge of the respondent's obligations under the Settlement Agreement; second, whether that variation was supported by good consideration; and third, whether the respondent repudiated the varied agreement and, if so, what were the consequences?

30. As to the first question, the Judge set out his conclusion about the April/May 2014 variation agreement:

> 103. I accept the convincing and unchallenged evidence of Mr Abayahoudayan and Mr Nili that Mr Simantob and Mr Shavleyan kissed and shook hands on a deal at the meeting in the spring of 2014. I do not think it would make commercial sense for the parties' business community to broker a deal with

> no legal effect. It is true that, unlike the [S]ettlement [A]greement, it was not put in writing and signed. But it did become evidenced in writing, albeit as part of a different contract dealing with specific antiquities, namely the woods.
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> …
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> 107. In my judgment, Mr Simantob was plainly, and realistically, willing to accept a reasonable accommodation with Mr Shavleyan instead of standing on his rights under the settlement agreement. The $1,000 a day clause had the potential to drive Mr Shavleyan towards ever increasing indebtedness which he could never satisfy. For that reason, its rigorous enforcement would endanger Mr Simantob's standing in his business community and among his compatriots.
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> 108. The objective intention that Mr Shavleyan's liability should be capped at $800,000 is also supported by the thrice recurring amount of $800,000, representing an excess of $400,000 over the principal payable under the settlement agreement ($1.1 million of the $1.5 million having been paid under it at the relevant times), which did not come close to correlating with the amount that would be due applying the $1,000 a day clause.
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> …
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> 116. … I find that Mr Shavleyan has proved on the balance of probabilities that the settlement agreement was orally varied and that the variation was intended (in the objective sense) to be legally binding. The principal balance outstanding of $400,000 remained due but became payable in four monthly instalments of $100,000 each. The $1,000 a day clause was replaced by an obligation to pay a further $400,000 in four further and subsequent monthly instalments of $100,000 each.

31. The second question was addressed in the judgment from [119]. The Judge reviewed a number of authorities, including *Foakes v. Beer* (1884) 9 App Cas 605; *Williams v. Roffey Bros* [1991] 1 QB 1 (CA); *In Re Selectmove Ltd* [1995] 1 WLR 474 and the recent decision of the Supreme Court in *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2018] UKSC 24. He accepted that he was bound by authority to conclude that the payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt unless there is some added benefit to the creditor. At [129], the Judge asked himself whether the appellant stood to gain from the variation of the Settlement Agreement in some other way than the agreement to provide the $800,000 in cheques.

32. He then considered three suggested ways in which consideration was given. First, he rejected the argument that the appellant's gain in prestige and standing within the local business community by reaching a compromise was sufficient to constitute consideration in the present state of the law. Secondly, he rejected the argument that

the potential practical benefit of holding 8 cheques for specific sums as a form (albeit a weak form) of security was by itself good consideration. Thirdly, he rejected the argument that the general benefit to the appellant of continued access to the respondent's expertise and contacts qualified as consideration; since it was not related to the varied agreement but was the product of the cultural and business ties that enabled the two men to continue to do business throughout the dispute.

33. However, the Judge found that the respondent had provided consideration for the appellant's agreement to accept $800,000 in full and final settlement of the respondent's liability to him. It was not simply a promise to pay part of a pre-existing debt. It was a promise to pay a debt which was largely constituted by $1,000 per day clause which the respondent had disputed since 2011. The challenge to the principal debt founded on the alleged duress was obviously weak in view of the part payments that had been made. However, the argument based on the $1,000 per day clause being a penalty, i.e. 'a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation' (per Lord Neuberger PSC at [32] in *Cavendish Square Holding BV v. Makdessi, ParkingEye Ltd v. Beavis* [2016] AC 1172) was much stronger. Although the argument had subsequently failed before the Master, it might have succeeded or at least have been found to be arguable.

34. The Judge had earlier referred to a passage from the speech of Lord Blackburn in *Foakes v. Beer* in which had referred to the judgment of Lord Coke CJ in *Pinnel's case* (1601) 5 Coke Reports 117a, 77ER 237 at 238:

> 'payment of a less sum on the day in satisfaction of a greater, cannot be any satis-faction for the whole'; though '[t]he gift of a horse, hawk, robe, &c. in satisfaction, is good'; and that 'payment of part at a different place' may be 'in satisfaction of the whole.'

35. At [142], the Judge summarised his conclusion in this way:

> I therefore conclude that this was not a case of a promise to pay part only of a pre-existing debt. There was a 'a horse, hawk, robe, &c' given in return, in the form of forbearance to run the defences that were subsequently unsuccessfully run in the summary judgment proceedings. The case is one of valid compromise involving consideration on both sides. Put another way, there was an accord and satisfaction in respect of the mutual claims and cross-claims under and arising from the settlement agreement.

36. As to the third question, the Judge rejected the submission that advancing the argument that the $1,000 per day clause before the Master was a breach of the April/May variation agreement such as to entitle the appellant to sue for the full amount under the Settlement Agreement. The argument was not pursued on the appeal, at least in this form, and we need say nothing further about it.

The argument on the appeal

37. Mr Ramsden QC advanced three points. First, he submitted that the consideration argument on which the respondent had succeeded had not been his case at trial. It had not been pleaded, nor advanced in evidence nor argued before the Judge; and the appellant had therefore never had an opportunity properly to address the point at the trial. Secondly, he argued that the respondent had not in fact performed his alleged promise not to take the penalty defence. On the contrary, in breach of his alleged promise he had raised the argument in the proceedings. Thirdly, Mr Ramsden submitted that the alleged consideration was of no value in law because it was found by the Master to have no real prospect of success and therefore had no objective value at the date of the April/May variation agreement. It was in respect of this third argument that he posed the question: how could forbearance to raise the contention that the $1,000 per day clause was a penalty amount to good consideration when Master McCloud held that such a contention was unarguable? The Master's order was decisive and binding. The respondent had not given up anything of value which could be characterised as consideration.

38. He acknowledged that the adequacy of consideration given or received was not ordinarily open to question, but he submitted that it must be 'real'. While forbearance from raising a defence could amount to good consideration such as to make an agreement enforceable, agreement to forgo a potential defence that was devoid of merit could not. Such consideration was 'illusory', to adopt the expression used by Peter Gibson LJ in *Stabilad Ltd v. Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651 at 660C.

39. Mr Knight submitted that the Judge's finding that the respondent had provided valuable consideration was correct, essentially for the reasons he gave.

Decision

40. The key legal question in this appeal is whether the Judge was right to hold at [139]-[142] of his judgment that the respondent had provided good consideration for the April/May 2014 variation agreement, by which the appellant agreed to accept $800,000 in full discharge of the respondent's liability under the Settlement Agreement. The Judge held that the consideration was the respondent's agreement to give up his argument that the $1,000 per day clause was a penalty and, that although the argument subsequently failed before the Master, it might have succeeded or at least been found to be arguable.

41. So far as Mr Ramsden's first point is concerned, the forbearance point was pleaded, at least inferentially, before the trial at §35A of the Re-amended Defence, in which reference was made to the respondent 'giving up complaints' about the Settlement Agreement 'in return for an agreed sum significantly lower than that being claimed' by the appellant. In addition, it was put forward in §16 of the respondent's opening trial skeleton argument and was referred to by reference in §4 of the response to the Judge's request for post-trial submissions. It is true that the appellant was only cross-examined on the basis that he had agreed to the April/May 2014 variation agreement 'for what [he then] thought were very good business reasons', but the Judge was entitled to find that this was sufficient to encompass the argument that the appellant had settled for a capped sum of $800,000 to avoid the challenges that the respondent was making to the validity of the Settlement Agreement.

42. Mr Ramsden's second point, to the effect that the respondent had taken the penalty defence when sued, cannot succeed because the question of whether or not there was, in law, consideration for a concluded contract has to be asked and answered as at the date of the contract, and not by reference to later actual or alleged breaches of that contract.

43. It is his third point that is the most substantial. Mr Ramsden argued that, as a matter of public policy, the forbearance of a defence that is later held to have no real prospect of success under the test in *Swain v. Hillman* [2001] 1 All ER 91, cannot amount to good consideration 'in the eye of the law'. He referred the court to the judgment of the Queen's Bench in *Cook v. Wright* (1861) 1 B & S 559 (Blackburn J giving the judgment of the Court, Sir Alexander Cockburn CJ, Wightman and Blackburn JJ) where it was held that, 'unless there was a reasonable claim on the one side, which it was *bona fide* intended to pursue' (page 569) there would be no consideration provided by the forbearance of such a claim. The position in that case was, as found by the trial judge (Wightman J), that the plaintiffs honestly believed that the defendant was liable and really intended to sue him, whilst the defendant never believed he was liable but paid a settlement sum in order to 'avoid the expense and trouble of legal proceedings against himself', see page 567.

44. The appellant's points are said to be supported by the three passages in the 33rd edition of Chitty on Contracts:

45. First, paragraph 4-051:

> A compromise of a claim which is legally invalid and which is either known by the party asserting it to be invalid or not believed by that party to be valid is not contractually binding. This rule can be explained either on the ground that merely making or performing a promise to give up a worthless claim cannot constitute consideration for the counter-promise, or (preferably) on grounds of public policy. As Tindal C.J. said in *Wade v. Simeon* [(1846) 2 C.B. 548, 564]: 'It is almost *contra bonos mores* and certainly contrary to all the principles of natural justice that a man should institute proceedings against another when he is conscious that he has no good cause of action'.

46. Second, paragraph 4-052:

> The compromise of a claim which is doubtful in law is binding as a contract. Making or performing a promise to give up a doubtful claim can constitute consideration for a counter-promise since it involves the possibility of detriment to the person to whom the latter promise is made and that of benefit to the person making it [see *Haigh v. Brooks* (1839) 10 A.& E. 309, 334] …

47. Third, paragraph 4-053:

> The rule stated in para. 4-052 above applies also if the forbearing party's claim is *clearly invalid* in law, so long as it was a 'reasonable claim' [see *Cook v. Wright supra*] (i.e. one made on reasonable grounds) which was in good faith believed by the party forbearing to have at any rate a fair chance of success …

48. The current editions of Treitel, the Law of Contract, 14th edition (ed. Professor Peel) at §§3-034 to 038; and Cheshire, Fifoot and Furmston, 11th edition (ed. Professor Furmston) pp.113-121 also provide a helpful background and analysis of this area of the law.

49. Mr Ramsden's public policy point was somewhat different from that suggested by *Chitty*. It is one thing for a person to threaten a claim or defence in which that person has no confidence at all. It is a quite different thing for a person to intimate a claim or defence which, whilst the person recognises that it raises a doubtful or undecided point, he or she also believes in and intends to pursue it in court if necessary. On the Judge's findings, this case fell squarely into the second category. The respondent had raised his concerns about the $1,000 per day clause, had intimated the penalty defence and plainly intended to raise it in any proceedings brought by the appellant. By entering into the April/May 2014 variation agreement, he agreed that he would no longer be able to raise that defence and the debt would be consolidated at $800,000. The fact that the appellant subsequently sued for the whole amount allegedly due under the Settlement Agreement, denying the existence of the April/May 2014 variation agreement in the process, can have no effect on the legal position at the time that when that agreement was made in April/May 2014; and the fact that the respondent then pleaded and relied on the penalty defence, having agreed to compromise the point is equally irrelevant.

50. Furthermore, there is another countervailing public policy that must also be taken into account in this context: namely, the public policy in favour of holding people to their commercial bargains. This element of public policy provides a limitation on the public policy discouraging parties from threatening unreasonable claims or defences. There cannot be any sensible public policy against encouraging parties to raise claims or defences that they reasonably believe may succeed, even if they eventually turn out to fail. It may be noted that the suggestion that the $1,000 per day clause was a penalty was made at a time when there was considerable uncertainty in the law, and before the Supreme Court ruled in *Cavendish Square Holding BV v. Makdessi*, *ParkingEye Ltd v. Beavis* (see above).

51. See also, Cheshire, Fifoot and Furmston (above) at p.115:

> In the modern law, the consideration in [cases where the promise is not to pursue a claim or defence] is said to be the surrender, not of a legal right, which may or may not exist and whose existence, at the time of the compromise remains untested, but of the *claim* to such a right.
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> This attitude is sensible. It is true that if the claim is baseless, the claimant may appear to have got something for nothing, or that contrariwise, if a claimant settles a good claim for less than

> its true value, he may appear to have given up something for nothing but this is to ignore the cost, both monetary and psychic, of litigation. It is in the public interest to encourage reasonable settlements.

52. It is in the light of these considerations that the decision of Master McCloud must be seen. In our view, whether she was right or wrong is immaterial. The question of the validity of the consideration for the April/May 2014 variation agreement must be judged at the time that it was made.

53. Finally, the uncertainty alluded to by Lord Sumption in *MWB Business Exchange Centres Ltd v. Rock Advertising* Ltd [2018] UKSC 24 at [18] is not engaged on the facts of this case. The consideration alleged here was the forbearance to rely on a penalty defence, not the expectation of some commercial advantage as a result of accepting a less advantageous series of payments. As Chitty makes clear '[t]he compromise of a claim which is doubtful in law is binding as a contract' (paragraph 4-052 above). It cannot seriously be suggested that there was not genuine doubt as to whether the $1,000 per day clause was or was not a penalty, when that clause could have resulted in the respondent paying $1,000 per day in interest, even if only $1 remained outstanding by way of principal. This case has little to do with the correctness or otherwise of the decision in *Foakes v. Beer* (1884) 9 App Cas 605, which may arise in another case.

54. For these reasons the appeal must be dismissed.