REVISITING *FOAKES V BEER:*

What role for practical benefit in a world recovering from a pandemic?

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INTRODUCTION

Consideration is a fundamental and deep-rooted concept which lies at the heart of contract law in England and Wales. Enforceable contracts (not contained in a Deed) rely on valuable consideration passing between the parties to the contract. What amounts to "consideration" is a legal fiction, which the courts have struggled to define. The long-standing question of whether a promise to make part payment of an existing debt amounts to good consideration for a creditor's promise to accept a lesser sum in full settlement of that debt reveals a pressure point in the law. As it stands, the law suggests that such an agreement is unenforceable for lack of consideration. Yet the commercial reality is that part payment is often a practical benefit and a desirable outcome (or perhaps the least worst option) for the creditor.

Could the current world health crisis provide the catalyst for change? Economic predictions change by the day. The Office for National Statistics estimates that gross domestic product fell by 5.8% in March 2020 compared to February and by 2% in the first quarter compared with the previous quarter (according to figures released on 13 May 2020). The extent and timing of any recovery are entirely unknown. It is plain that many businesses will struggle to pay debts due under contracts. Creditors may, as is often the case in a time of economic turmoil, need to consider whether the part payment of a debt and the preservation and development of a commercial relationship outweighs the benefit of seeking to insist on the payment of the full debt. This issue is far from new, but the current crisis throws the unsatisfactory state of the law into sharp relief.

In this short article, we consider some of the key and recent authorities and offer our views on the likely future development of the law. In summary, we suggest that the common law will evolve to reflect the commercial reality of the 21st Century; *Foakes v Beer* is likely to be, and should be, overturned.

THE FOUNDATIONS

Our starting point is two cases from the 19th century: (i) *Stilk v Myrick* and; (ii) *Foakes v Beer*.

In *Stilk v Myrick* (1809) 170 ER 1168, the parties were the captain and crewmates of a ship on a voyage to and from Russia. During the voyage, two seamen deserted. The captain tried and failed to hire replacements in Russia. He was faced with a tricky situation. The remaining crew were contracted to navigate the ship, including in emergencies. Death and desertion were features of maritime life, and the crew were contractually obliged to pick up the slack. But the remaining crew were being asked to bear an additional load without extra pay - the risk of dissent and further desertions was obvious. As a compromise, the captain promised to divide the two deserters' salaries between the remaining crew if they worked the ship back to London.

On arrival in London, the captain refused to pay the extra wages he had promised. Lord Ellenborough agreed with the captain. The Judge found that the agreement to pay extra wages was void for want of consideration. The crew were already contracted to work the boat back to London; they provided no consideration.

In *Foakes v Beer* (1884) 9 App. Cas. 605, Ms Beer was owed a substantial sum of money by Mr Foakes following a Judgment which she had obtained in the High Court. Mr Foakes said he needed more time to pay. Ms Beer's issue was and is a familiar one. Should she insist on her strict legal rights and risk pushing the debtor into bankruptcy, or allow more time for payment of the full sum in return for a smaller upfront payment? Ultimately, Ms Beer agreed to allow Mr Foakes more time to pay the debt and the parties entered into an agreement with an adjusted timetable for repayment.

Mr Foakes paid in full in accordance with the revised timetable. Ms Beer then brought a claim for the interest due on the late payment, and claimed that the agreement to delay payment was void for want of consideration. The House of Lords agreed, concluding that a promise to pay a lesser sum sooner was not valid consideration for the creditor's promise to accept late payment. The House of Lords felt bound by authority – in particular, *Pinnel's Case* (1602) 5 Rep 117 – but that was not without a degree of hesitancy. Lord Blackburn stated:

"*[A]ll men of business, whether merchants or tradesmen, do every day recognise 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.*"

Both Judgments protect the fundamental principle of certainty in commercial contracts and, of course, protect parties from economic pressure. Nonetheless, there are strong arguments that they fail to grasp the practical reality of the situations faced. In *Stilk v Myrick*, the captain gained a real practical advantage in paying more – he reduced the risk of desertion and mutiny. In *Foakes v Beer*, Ms Beer availed herself of the old adage: a bird in the hand is better than two in the bush.

A (LIMITED) ROLE FOR PRACTICAL BENEFIT

Just shy of 30 years ago the Court of Appeal sought to soften the harsh edge of *Stilk v Myrick* in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

Mr Williams subcontracted with Roffey Bros to carry out carpentry in a block of flats for £20,000. It became apparent that the price agreed was too low. To avoid Mr Williams leaving the job unfinished, which would have caused Roffey Bros problems further up the contractual chain, Roffey Bros agreed to pay Mr Williams an extra £10,300 (£575 for every completed flat). Mr Williams carried on with the work but Roffey Bros failed to pay the extra money promised. Mr Williams issued proceedings and the case worked its way up to the Court of Appeal. The crucial question was whether valid consideration existed where a party promised to pay more in return for the other party's promise to perform his existing contractual obligations.

The Court of Appeal concluded that it did. The Court held that Mr Williams had provided valuable consideration, even though he was agreeing to perform the carpentry which he was already contractually required to perform. The Court of Appeal was careful to recognise *Stilk v Myrick* but, in our view (and contrary to the Court's express statements), was keen to depart from the precedent.

a. Glidewell LJ felt that he had done no damage to *Stilk v Myrick*, although he accepted that his Judgment may have refined and limited a principle enunciated in *"the rigours of seafaring life during the Napoleonic wars"* (p16).

b. The speech of Purchas LJ contains the clearest statement of how consideration was viewed. He felt that consideration had passed because *"there was clearly a commercial advantage to both sides from a pragmatic point of view"* (p22) (our emphasis).

c. The language of pragmatism was reflected in Russell LJ's speech, albeit that he rooted the finding of valuable consideration in the intentions of the parties (pp18-19).

The position reached is, arguably at least, unsatisfactory. *Stilk v Myrick* seemingly remains good authority, yet the courts may find consideration where a commercial advantage to both sides can be identified, from a pragmatic point of view. If one were to ask the captain of the ship if he secured a commercial advantage by paying his crew more money, the answer is obvious.

The *ratio* of *Williams* has not been adopted for part payment cases.

In *Re Selectmove Ltd* [1995] 1 WLR 474, a company owed several thousand pounds in unpaid taxes. It alleged that it had agreed to pay the unpaid taxes in instalments, rather than upfront. In the Court of Appeal Peter Gibson LJ noted that he saw the force of the argument that a contract should be enforceable when an agreement by instalments to accommodate the debtor is reached, as the creditor accrues a practical benefit (p481). Nonetheless, he held that there was no consideration. *Foakes v Beer* was binding and the court declined to follow the 'practical benefit' approach of *Williams v Roffey Bros* (pp480-481). Peter Gibson LJ suggested that an extension of the 'practical benefit' approach could only be made by the House of Lords or Parliament after consideration by the Law Commission (p481).

THE WINDS OF CHANGE

There are, therefore, two separate lines of authority relevant to the law of consideration. The 'part payment of debt' cases governed by *Foakes v Beer*, and the 'promises to pay more' cases subject to the practical benefit approach of *Williams*. Two more recent cases highlight the conceptual tension in the dividing line between the two.

In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, the defendant ("Rock") occupied premises managed by the claimant ("MWB") under a licence agreement. Rock fell into arrears, so MWB locked Rock out of the premises. In subsequent proceedings, Rock alleged that the parties had entered an oral agreement to reschedule its licence payments, which included an upfront payment of part of the debt. The licence agreement contained a clause which required that the contract could only be varied in writing. Nevertheless, the Court of Appeal found that the oral

variation was effective. The Court of Appeal also held that the variation was, in fact, supported by good consideration and thus binding.

Kitchin LJ concluded that two benefits accrued to MWB: [47]. First, it would recover some of the arrears immediately. Second, Rock remained a licensee so the property was not left standing empty. Accordingly, he held that the benefits received by the variation went beyond those relevant to the Judgments in *Foakes v Beer* and *Selectmove*: *"MWB derived a practical benefit which went beyond the advantage of receiving a prompt payment of a part of the arrears"*: [48]. Kitchin LJ thus adopted the language and approach of the Court in *Williams*.

Arden LJ approached the issue from a similar perspective, emphasising the distinction in debt cases of providing an "*extra benefit*" beyond the promise to pay part of a debt. She distinguished *Selectmove* on the basis that there was no finding in *Selectmove* that any "*extra benefit*" had accrued to HMRC: [84]. She noted (still at [84]) that in *Selectmove "Peter Gibson LJ could not reject the general principle that, where there was other consideration, which the law recognised was sufficient to support a contract, that was good consideration for a promise*." She continued that there was no "*coherent distinction between agreement to pay debts and agreements to do work in this context*" and concluded that the "*strength of that general principle may well explain why*" the Court of Appeal in *Williams* did not refer to *Foakes v Beer.*

Ultimately, she held that agreements to pay a lesser sum that was due under a previous contract will "*be enforceable because there has been shown to have been consideration in the form of a practical benefit to the creditor which he sought and which is an identifiable benefit over and above the mere fact of accommodating the debtor and not having to enforce payment of the debt*": [87] (emphasis added).

The Judgments suggest that there is no radical departure being made from *Foakes v Beer* and *Selectmove* but it is, at the very least, arguable that the Judgments extended the 'practical benefit' test of *Williams* to cases involving part payment of a debt. Valiant efforts have been made to rationalise the distinction – see, for example, O'Sullivan, 'In Defence of Foakes v Beer' [1996] CLJ 219 at p224 – but in our view (and with respect) such forced rationalisations inhibit the effective development of the

common law. The fundamental point is that part payment of a debt may be the best option (or the least worst option) available to the creditor. Where *other consideration* is present, any attempt to draw a distinction between agreement to pay debts cases and agreements to do work cases risks incoherence.

MWB generated much academic debate; even more so when permission was granted to appeal to the Supreme Court. Ultimately the Supreme Court ([2019] AC 119) overturned the Court of Appeal's decision on the basis that the "no oral modification" clause was valid and binding, such that the oral variation was ineffective. As such, it was unnecessary to decide the consideration issue. Accordingly, Lord Sumption's observations on consideration (at [18]) were *obiter*:

> "*The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In Williams v Roffey Bras & Nicholls (Contractors) Ltd [1991] 1 QB 1 the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in Foakes v Beer (1884) 9 App Cas 605: see, in particular, p 622, per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in In re Selectmove Ltd [1995] 1 WLR 474, and declined to follow Williams v Roffey Bras & Nicholls (Contractors} Ltd. The reality is that any decision on this point is likely to involve a re-examination of the decision in Foakes v Beer. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.*"

If the distinction between the two lines of authority are, as Sumption JSC said, "*forced*" then the rationale underpinning one or both of them is plainly ripe for re-examination.

In passing we note that, notwithstanding the Supreme Court's reversal of the Court of Appeal decision, *MWB* remains, on the issue of consideration, persuasive: *R v Secretary of State for the Home*

Department, Ex p Al-Mehdawi [1990] 1 AC 876 (at 882) and *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874.

More recently the challenge of reconciling the various lines of authority fell to Kerr J in *Simantob v Shavleyan* [2018] EWHC 2005 (QB).

The claimants were businessmen and dealers in antiquities. They were both part of the "*close-knit Persian business community in London*". Their dispute originated in Mr Simantob's acquisition of 10 pieces of tiraz (inscribed medieval Islamic textiles) and five pieces of Savafid (17th century Persian) and Turkish textiles. Mr Simantob placed them with Mr Shavleyan. Mr Shavleyan auctioned them for £1.4 million. A dispute ensued over who was entitled to the proceeds. At a mediation in 2010, they agreed that Mr Shavleyan would pay $1.5 million to Mr Simantob within 20 days after which $1,000 per day would be added to the principal "*as penalty*". Mr Shavleyan later argued that this agreement was invalid through lack of consideration and duress. The Judge accepted Mr Shavleyan'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 (somewhat surprisingly) found that the respondent had no arguable defence to a claim based on the $1,000 per day clause.

Despite the 2010 settlement, Mr Shavleyan failed to pay. By August 2013, $400,000 was due for the principal debt, but the "*interest*" for late payment stood at $1.54 million (and was continuing to accrue). The parties continued to have business dealings with each other in other matters, and pressure was exerted by the local community to resolve the dispute.

In spring 2014, Mr Shavleyan provided eight post-dated cheques to Mr Simantob totalling $800,000. Mr Justice Kerr found that the parties kissed and shook hands on the deal, and that they intended that the 2010 settlement would be varied such that the outstanding debt was capped at $800,000. When the matter came before the court, Mr Simantob argued that the 2014 variation was not binding as no consideration had been provided by Mr Shavleyan.

After a comprehensive review of the authorities, Kerr J concluded that he was bound by both *Williams v Roffey Bros* and by Peter Gibson LJ's narrow reading of *Williams* in *Selectmove*. He thus posed the question at [129] as to whether there was *"some benefit to Mr Simantob added, over and above*

expected receipt of the $800,000" (emphasis added). Kerr J considered four potential "*over and above*" benefits:

a. The prestige and standing which Mr Simantob gained from his peers in the local business community. Kerr J was inclined to regard this as good consideration but decided against it as the cultural benefit was "*uncomfortably close"* to the concept of 'practical benefit' contained in *Williams*: [131].

b. The receipt of eight post-dated cheques as security. Kerr J considered this was not good consideration, as it did not add anything of substance to the promise to pay monthly instalments of $800,000: [133].

c. The commercial benefit of continued access to Mr Shavleyan's expertise and contacts in the marketplace. Again, this was not good consideration, as it was not a *quid pro quo* for the variation because it was mainly a product of their cultural, community, family and business ties: [138].

d. Forbearance to dispute the 2010 settlement on the basis of duress, lack of consideration and on the basis that the interest clause was, in fact, a penalty clause. A complicating twist was that Mr Shavleyan has pursued these arguments before Master McCloud and was given seemingly short shrift – Mr Simantob's application for Summary Judgment had succeeded. Nevertheless, Kerr J found that the forbearance amounted to good consideration. The arguments might have succeeded or at least might have been found arguable (viewed at the time of the variation, rather than in retrospect after the Summary Judgment), so Kerr J was satisfied that there was valid compromise with consideration on both sides: [140 - 142].

Mr Simantob's appeal was rejected by the Court of Appeal ([2019] EWCA Civ 1105). The majority of the argument in the Court of Appeal focused on the relevance of a previous Summary Judgment. The arguments concerning consideration were not considered relevant (at [52]):

> "*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… 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."

THE FUTURE

Looking forwards, we anticipate that a future Supreme Court will overturn the rule in *Pinnel's Case* and *Foakes v Beer* and apply the 'practical benefit' approach enunciated by the court in *Williams*, and refined by the Court of Appeal in *MWB*, to all contractual variations.

First, the distinction between the two strands of cases is very difficult to justify: see Arden LJ in the Court of Appeal and Sumption JSC in the Supreme Court in *MWB.* With such eminent judges having doubted the distinction, it is hard to see a way back for *Foakes v Beer*.

Second, while we accept that the 'practical benefit' approach to consideration provides less certainty than the strict approach of *Foakes v Beer*, we consider that the law is in danger of allowing the tail to wag the dog. If England and Wales is to remain a jurisdiction of choice for commercial disputes the law must evolve; commercial reality must be reflected in the common law. Lord Blackburn recognised in *Foakes v Beer,* 125 years ago, that the law did not reflect business reality. The problem has only become more acute. It must now be resolved.

Third, the current hybrid – where courts strive to find some form of "*over and above*" consideration – provides less certainty than if the practical benefit approach was adopted across the board.

Fourth, the current Justices of the Supreme Court are likely to be supportive of such a move. The two judges who delivered judgments in *MWB* in the Court of Appeal - Lady Arden and Lord Kitchen - are now Justices of the Supreme Court. Although they did not, in circumstances where they were bound by precedent, venture the view that *Foakes v Beer* was wrong, the substance of their judgments shows that inclination.

In addition, Lord Leggatt, a recent appointee to the Supreme Court, may be sympathetic to a change in the law of consideration. His judgments on the issue of good faith in commercial contracts have emphasised the importance of contract law reflecting business reality (and the need to give effect to commercial transactions), rather than focusing unduly on certainty: see, for example, *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111. In the Jill Poole Memorial Lecture in 2018, Lord Leggatt (then a Court of Appeal judge) stated at [70] while discussing contractual terms to negotiate in good faith that:

> "*It is often said that a virtue of English commercial law is its certainty, and there is much truth in that. But equally vital is its flexibility. Because it is driven by the facts of individual cases and involves a continual conversation with other judges, including those in other jurisdictions with a shared legal heritage, as well as the arguments made by advocates and jurists, the common law has the capacity to respond to the changing realities and needs of commerce. The example that I have discussed shows that the stream of the common law does not always run smoothly. The doctrine of precedent, which gives the law its coherence, can also act as an obstruction. Sometimes only legislation can unblock the channel. But very often, through the ability to reinterpret and occasionally to depart from past decisions, the common law has the flexibility to overcome or work its way around an obstacle to its development, even where – as in my example – the obstacle is a decision at the highest level.*"

Consistent with that view of the flexibility inherent in the common law, Lord Leggatt has already re-shaped the legal test for rectification (*FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361 (when still a member of the Court of Appeal)). In circumstances where the origin of the 'part payment of debt' line of authority is the 400-year old rule in *Pinnel's Case*, we consider that reinterpreting or departing from that case (which did not reflect commercial reality in *Foakes v Beer* over 130 years ago) may prove less of a challenge than departing from Lord Hoffman's (obiter) observations on rectification in *Chartbook v Persimmon Homes Ltd* [2009] UKHL 38.

CONCLUSION

Where does that leave the law of consideration? Whilst the exigencies of the current pandemic understandably take priority over conceptual debates about consideration in the law of contract, we consider the distinction between the two strands of cases is no longer tenable. It is only a matter of

time (and the right case) until the Supreme Court brings the two lines of cases together by departing from, or reinterpreting, *Foakes v Beer* and the rule in *Pinnel's Case*. The Judgment in *MWB v Rock Advertising* was a missed opportunity, but the current health and economic crisis may provide fertile ground for disputes of this nature to emerge. Finally, from a practical perspective, any relevant contractual variations at this stage should, for safety, be made by Deed.

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