

MWB Business Exchange Centres Ltd v Rock Advertising Ltd  
[2016] EWCA Civ 553

## Summary

Rock occupied premises managed by MWB, under a contract entered into in 1 November 2011. The contract was due to last for 12 months, and provided that Rock should pay MWB £3,500 per month in the first three months of the contract, rising to £4,433 per month from February 2012. Unfortunately, Rock soon got into financial difficulties and by February 2012 it owed MWB £12,000. On 27 February 2012, MWB's credit controller and Rock's managing director met to discuss what to do about Rock's owing MWB so much money and it was agreed that for the first few months between February 2012 and October 2012, Rock would only have to pay MWB £3,500 per month (less than the £4,333 that it was originally due to pay), but after those first few months, Rock would pay MWB more than the £4,333 per month that it was supposed to pay MWB, with the aim of Rock completely clearing all of its debts to MWB by the end of October. Having reached this agreement, Rock paid MWB £3,500, this being the first instalment due under the agreement.

Unfortunately, Rock and MWB's relationship deteriorated soon after, and on 30 March 2012, MWB locked Rock out of the premises and gave Rock notice (as it was entitled to do under its original contract with Rock) that it was terminating the contract between them with effect from 4 May 2012. MWB also sued Rock for the immediate payment of all of the money that Rock owed MWB. Rock argued in defence that MWB was bound by its agreement on 27 February that it would wait to be paid the money that Rock owed it, and would allow Rock to pay that money in instalments. MWB counter-argued that the 27 February agreement was not binding on it because (1) the original contract between MWB and Rock stipulated that 'All variations to this [contract] must be agreed, set out in writing and signed on behalf of both parties before they take effect' – and the 27 February agreement was never put down in writing or signed; (2) Rock provided no consideration for MWB's agreement to wait for Rock to fully pay off its debts to MWB as £3,500 paid to MWB on 27 February was money that Rock owed MWB anyway; (3) MWB was not estopped from going back on its agreement on 27 February to wait for payment from Rock as Rock could not say that it had relied on MWB's agreement to wait for payment merely by paying MWB £3,500 as that was money Rock was legally required to pay MWB anyway.

When the case came to the Court of Appeal, the Court of Appeal ruled (at [61] and [63] (per Kitchin LJ)) that while MWB's argument on point (3) was correct (if you owe me £10,000 and I agree that if you pay me £3,000, I will forget the rest, you simply cannot argue that in paying me the £3,000 you were relying on my promise to forget the rest because that involves in you arguing that had I not agreed to forget the rest of your debt, you would have paid me *nothing*), MWB's arguments on points (1) and (2) did not succeed. On point (1), the Court of Appeal ruled (at [34]) that 'party autonomy' demanded that the parties to a contract be free to change any clause in their deal, including a 'manner and form' clause specifying how those changes should be made. On point (2), the Court of Appeal ruled (at [47]-[48] (per Kitchin LJ), and [84]-[85] (per Arden LJ)) held that MWB had obtained a sufficient practical benefit from its agreement to wait for payment from Rock for Rock to be able to argue that it had provided consideration for that agreement, with the result that it was contractually binding on MWB. The two cases that might have been thought to stand in the way of that conclusion – *Foakes v Beer* (1884) 9 App Cas 605 and *In re Selectmove Ltd* [1995] 1 WLR 474 – were distinguished on the basis that (i) those cases establish 'the advantage of receiving a prompt payment of a part of the arrears' owed to a creditor cannot amount to consideration

for a promise not to sue for the remainder of the arrears, or to wait for the remainder of the arrears and that MWB obtained advantages that beyond this by entering into its revised agreement with Rock – ‘it would be likely to recover more from Rock than it would be enforcing the terms of the original agreement and it would also retain Rock as a licensee’ ([48], per Kitchin LJ); and (ii) those cases establish that ‘a debtor’s promise to pay part of his existing debt’ ([85], per Arden LJ) cannot be consideration for a promise to forgo, or wait for, the rest, but in this case MWB received a practical benefit from its agreement with Rock in terms of ‘continuing occupation by Rock and thus of “avoiding a void”’ ([72], per Arden LJ).

## Comments

Let’s take each of the points raised by the *MWB* case in turn, before finishing up with some guidance to students faced with a problem question involving the variation of a contract.

(1) *The anti-oral variation clause.* Anti-oral variation clauses actually make a lot of sense. They perform the same function as ‘entire contract clauses’ in a written document, which make it clear that the document is intended to be the exclusive guide to what the terms of the contract between two parties is. Such clauses help avoid ‘he said, she said’ disputes about what was said in the course of negotiations between two parties, and anti-oral variation clauses perform the same function – they avoid ‘he said, she said’ arguments about what the parties agreed by way of varying the terms of their contract after the contract was entered into. However, useful though they may be, the Court of Appeal’s decision in *MWB* confirms that they simply don’t work – and not just for the reason given by the Court of Appeal. An anti-oral variation clause attempts to set up a mini Statute of Frauds for the parties to a contract – where the original Statute of Frauds (now in s 53 of the Law of Property Act 1925) was intended to protect people from fraudulent claims that ‘You gave me your land!’ or ‘You declared you held your land on trust for me!’ by holding that such claims would be automatically invalid if they were not supported by any signed writing. But it is established that ‘you cannot use a statute as an instrument of fraud’, and the same precept would apply if A attempted to rely on an anti-oral variation clause to argue that he was not bound by an oral variation in his contract with B where that variation was supported by some consideration supplied by B. And, by definition, any variation in a contract between A and B will be supported by consideration. So A will *always* be prevented from relying on the anti-oral variation clause to resist B’s claims that A and B orally agreed to vary their contract.

(2) *The consideration point.* The Court of Appeal’s reasoning on this point is bewilderingly bad. It is so bad, the only possible conclusion is that it was intended to provoke an appeal to the UKSC, with the aim of getting *Foakes v Beer* overruled. First of all, the treatment of authority is reckless, to say the least. In *Foakes v Beer*, the House of Lords was well aware of the practical benefits from making arrangements with your debtors – but they held that was irrelevant. What was relevant was *what you got* from your debtor – and if what you got was what you were already entitled to, and not something else (such as ‘a horse, hawk or robe’ (per Lord Coke in *Pinnel’s Case* (1602) 5 Co Rep 117)), then no consideration was supplied for any promise you made to your debtor. It was *Williams v Roffey Bros & Nicholls* [1991] 1 QB 1 which broke new ground by saying that a promise to pay more for a performance that you were already entitled to would be supported by consideration if it was in your self-interest to make that promise, thus taking the courts’ eye off the ball of what you actually got from the promisee in return for that promise. The decision in *MWB* involves the Court of Appeal saying that they want to take their eye off the ball in the field of promises to your

debtors – something which *Foakes v Beer* was supposed to stand in the way of under our existing system of precedent. So when Arden LJ says that ‘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...[and thereby] leaving the principle...in *Pinnels* case...unscathed’ she is being disingenuous. She is not replacing like for like in doing this, and fundamentally changing the law as stated in *Foakes v Beer*. But the Court of Appeal cannot do that within our system of precedent. So *MWB* might simply be dismissed on the consideration point as *per incuriam*. But even if you accept that a practical benefit should be enough to amount to consideration for a promise to your debtors, doesn’t that practical benefit actually *have to be received* to amount to consideration? What practical benefit did *MWB* actually receive from entering into the 27 February agreement with *Rock*? The only benefit pointed to by the Court of Appeal is the continuation of the *MWB-Rock* relationship – but that relationship broke down soon after 27 February. Could the *chance* of the *MWB-Rock* relationship continuing be enough to amount to consideration for *MWB*’s agreeing to wait for full payment from *Rock*? Surely not – surely for something to count as a practical benefit it has to amount to something more substantial than a mere chance of having something good happen in the future. So even if we take seriously the Court of Appeal’s position on practical benefit, *MWB* should have been free to depart from its 27 February agreement with *Rock* until it became clear that that agreement had actually secured the continuation of the *MWB-Rock* relationship on a stable basis. That was not at all clear when *MWB* broke off relations on 30 March, and so *MWB* should have been free at that point to sue *Rock* for all of the money that *Rock* still owed it.

(3) *The estoppel point*. Much better was the Court of Appeal’s treatment of the estoppel argument, though unfortunately its discussion of that point was *obiter* given its finding on the consideration point. The Court of Appeal makes it clear that merely paying money that you owe your creditor cannot amount to the kind of reliance on a creditor’s promise to wait for or forego payment of the rest that would make it inequitable for the creditor to go back on that promise. This is directly contrary to what was said by the Court of Appeal in *Collier v Wright* [2008] 1 WLR 643, courtesy of Arden LJ – who was also one of the judges in *MWB*. Arden LJ may have been happy to surrender on the estoppel point, having mounted a more full-frontal assault on *Foakes v Beer* by redefining the doctrine of consideration, but there is a very unconvincing attempt by Arden LJ at [92] to argue that there was no ‘inconsistency’ between Kitchin LJ’s judgment on the estoppel point at [61] and her judgment in *Collier v Wright*. But it looks like *Collier v Wright* is dead – and quite right too.

(4) *Guidance to students*. The decision in *MWB* certainly gives students a lot to talk about in doing problem questions involving the variation of a contract between a creditor and debtor, and requires very careful handling. In the simple case where B owes A £12,000, and A promises not to sue B for the balance if B pays A £3,000, even after *MWB* we would say that there is no consideration for A’s promise not to sue B, and after *MWB* we would say that A is not estopped from enforcing his right to sue B for the remaining £9,000 that B owes him merely by virtue of the fact that he has been paid £3,000 by B. (If B relied in some way on her belief that she was off the hook with A, then that is different.) In the case where B owes A £12,000, and A agrees with B that if B pays him £3,000, then B can pay the remainder at £750 a month over 12 months, and B pays A £3,000 and shortly afterwards A sues B demanding repayment of the full £9,000 at once, after *MWB* there is a nice issue as to whether A’s promise to wait for the balance is supported by consideration – both as to whether any practical benefits A obtains from promising to wait for payment of the remaining £9,000 *can* count as consideration for A’s promise given the authority of *Foakes v Beer*, and

as to whether A has actually obtained any practical benefits from making his promise if he goes back on it quickly enough after making it to B. If – contrary to what was said in *MWB* – there is no consideration for A's promise to wait for payment, the next issue is whether A is estopped from going back on his promise and enforcing his strict legal right to full payment of the £9,000 that B still owes him. The mere fact that B paid A £3,000 will not be enough to establish that A is estopped from enforcing his strict legal rights, but B may well have done something else to rely on her belief that she had more time to pay A that would make it inequitable for A to go back on his promise to wait for full payment.

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