Contract Law Case Law Update

St John's CHAMBERS

Welcome to the second update in a new series of contract law case law updates produced by St John's Chambers' Company and Commercial team.

In this issue…

A busy summer for contract lawyers…

We hope you enjoyed the first edition of our contract law case law update in June. In this second edition we look at the landmark judgment of the Supreme Court on illegality in *Patel v Mirza*, the ECJ's significant judgment on unfair contract terms in the latest *Amazon* case, the Court of Appeal's recent observations on the effects of repudiatory breach in *MSC v Cottonex Anstalt*, and the High Court's latest statements on the subject of good faith in the exercise of termination rights in *Monde Petroleum v Westernzagros*, before revisiting the subject of oral variations in the face of anti-oral variation clauses following the Court of Appeal's latest decision on the subject in *MWB v Rock Advertising*.

As before, our aim is to select a combination of the most ground-breaking contract law cases together with those which helpfully restate existing principles or contain useful clarifications in areas of practical importance.

Each case discussed features an "In brief…" summary panel, designed to allow those in a hurry to take the most useful points from each case. No case will occupy more than two pages of the update in total. Although authored by a litigator, attempts will be made where possible to identify useful points for the non-contentious practitioner too.

Nicholas Pointon (2010 call) is ranked as a leading junior in commercial dispute resolution by Chambers and Partners 2015 and 2016. He has taught the subject of contract law at both undergraduate and postgraduate level at the University of Bristol. He regularly gives seminars and in-house training on issues of contract law and will happily discuss requests to do so.

Nicholas Pointon
nicholas.pointon@stjohnschambers.co.uk

St John's CHAMBERS

A new mess for the old one? A new era for illegality

***Patel v Mirza* [2016] UKSC 42**

> ***"The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."***
>
> *Patel v Mirza* [2016] UKSC 42, per Lord Toulson at [120]

In *Patel v Mirza* [2016] UKSC 42 the Supreme Court finally took the opportunity to revisit the law of illegality. The outcome of the appeal marks a "new era" for the defence of illegality (per Lord Mance at [206]), replacing the plethora of maxims and miscellaneous rules with a policy focused discretion.

Facts and lower court judgments

The facts involved a plan to commit insider trading. Patel paid £620,000 to Mirza in order for Mirza to bet on the movement of RBS shares on the basis of inside information. In the event that inside information was not forthcoming and Patel brought this claim seeking the repayment of his money.

Mirza did not plead illegality, but David Donaldson QC (sitting as Deputy High Court Judge) took the point of his own motion and dismissed Patel's claim on the basis that it was founded upon an illegal agreement which contravened s.52 of the Criminal Justice Act 1993.

The Court of Appeal disagreed and overturned that judgment, on the basis that Patel had withdrawn from the illegal agreement before it had been carried into effect (the locus poenitentiae doctrine). Gloster LJ took a different approach to the majority, focusing on the policy implications underlying the defence of illegality. In the event, that broader policy based analysis was to form the basis of the judgments of the majority in the Supreme Court.

Supreme Court

A difference of opinion had already begun to emerge in a series of Supreme Court cases in which the defence of illegality had been engaged.

In *ParkingEye v Somerfield Stores* [2013] QB 840 Lord Toulson had first championed a policy based approach to each case, but found himself in a minority. In *Hounga v Allen* [2014] 1 WLR 2889 Lord Wilson took up the charge in support of a policy focused approach, but again was overpowered by the orthodoxy of the majority. *In Les Laboratoires Servier v Apotex* [2015] AC 430 that orthodoxy was out in force, with notable criticism for the policy based approach advocated by Etherton LJ in the Court of Appeal. Finally in *Bilta v Nazir* (No 2) [2016] AC 1 the differences had become too much to

bear and Lord Neuberger proposed that this issue ought to be addressed as soon as possible by a court of seven or nine Justices in order to resolve the clear divergence of views.

So it was that a panel of nine sat to hear *Patel v Mirza*. In the outcome of the appeal all agreed, but their reasoning disclosed a polarity rarely seen in the top appellate court.

Lord Toulson, with whom Lady Hale, Lord err, Lord Wilson and Lord Hodge all agreed, resented the reasoning of the majority which supported a policy based approach by which the court is to weigh various factors in determining whether enforcing a claim would be harmful to the integrity of the legal system.

Lords Mance, Clarke and Sumption presented the more orthodox, rule-based view of the minority, eschewing the discretionary approach advocated by the majority and advocating a more principled analysis.

Lord Neuberger concurred with certain of the minority's views as to the utility of a restitionary remedy in this particular case, but also suggested that, in broader circumstances, Lord Toulson's approach represented the most reliable and helpful guidance that it was possible to give.

The majority

The effect of the majority judgment was to replace the plethora of conflicting rules, maxims and presumptions with a unifying enquiry as to whether the enforcement of a claim would be harmful to the integrity of the legal system. Lord Toulson has swept away the many confusing and often conflicting rules, in favour of vesting aprincipled discretion in the judge, capable of meeting the enormous variety of circumstances in which the defence of illegality can arise.

In identifying the factors to be considered in the exercise of that discretion Lord Toulson has drawn heavily upon the academic work of Professor Andrew Burrows, in his recent *Restatement of the English Law of Contract* (OUP, 2016). Lord Toulson adopted the following nonexhaustive list of factors identified by Professor Burrows:

"(a) how seriously illegal or contrary to public policy the conduct was;
(b) whether the party seeking enforcement knew of, or intended, the conduct;
(c) how central to the contract or its performance the conduct was;
(d) how serious a sanction the denial of enforcement is for the party seeking enforcement;
(e) whether denying enforcement will further the purpose of the rule which the conduct has infringed;
(f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
(g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;
(h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system."

To that Lord Toulson added *"the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."*

The minority

The minority marked their disagreement with the *"wholesale abandonment of a clear cut test"* in strong terms (Lord Mance, at [207]). Their crucial objection to the majority's approach was that it is "far too vague and potentially far too wide to serve as the basis upon which a person may be denied his legal rights." For the minority, the starting point was that a litigant has enforceable legal rights unless and until the defence of illegality is invoked to defeat their enforcement. As such its operation should be narrowly and predictably defined.

"We would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one."

Patel v Mirza [2016] UKSC 42, per Lord Sumption at [265]

Summary

There can be no doubt that the law of illegality was a mess and that something had to be done about it. The key question is whether Lord Toulson's approach clears up that mess or just replaces it with a new one. There is sure to be an anxious period of litigation in which the bounds of this newfound discretion are tested.

In a more detailed article on the decision I have suggested that the most important factor of all may prove to be the particular judge who hears a plea of illegality (that article can be read at the link below). In the meantime practitioners can expect to see an increase in the number and variety of circumstances in which arguments of illegality survive to trial, with both sides adamant that at least some of Lord Toulson's factors support their position.

In brief…

- **The law of illegality has been revolutionized by replacing the myriad of existing tests and rules with a unifying enquiry as to whether enforcing a claim would harm the integrity of the legal system.**
- **The court will consider:**

  (a) the underlying purpose of the prohibition transgressed;
  (b) any other relevant public policy;
  (c) whether denying the claim would be a proportionate response to the illegality.

- **Within that framework a wide range of factors may be relevant.**

St John's CHAMBERS

Hiding choice of law in the small print…

Verein für Konsumenteninformation v Amazon EU Sarl **(Case C-191/15)**

In *Verein für Konsumenteninformation v Amazon EU Sarl* (Case C-191/15) the Court of Justice held that a governing law clause contained within Amazon's standard terms and conditions was unfair within the meaning of the Unfair Terms in Consumer Contracts Directive (93/13/EEC).

The case was brought by an Austrian consumer organisation which sought injunctive relief from the Austrian national courts to restrain Amazon from relying on certain terms. The case caused difficulties for the national court because Amazon has its registered office in Luxembourg but obviously transacts all over the world. One issue arising was whether a claim for an injunction in relation to the enforcement of a contractual term engaged Rome I (on the law applicable to contractual obligations) or Rome II (on the law applicable to noncontractual obligations). As a result the Oberster Gerichtshof (Austrian Supreme Court) referred several questions to the Court of Justice.

> ***"Where the effects of a term are specified by mandatory statutory provisions, it is essential that the seller or supplier informs the consumer of those provisions…"***
> *Amazon* (Case C-191/15), at [69]

The clause in question provided that Amazon's contract with its consumer was to be governed by the law of the state in which the supplier was established. It was contained within Amazon's standard terms and conditions applicable to certain contracts concluded electronically.

The Court of Justice held that the clause was unfair under the Directive because it failed to inform the consumer that he also enjoys the protection of the mandatory provisions of the law that would otherwise be applicable. In private international law 'mandatory provisions' are those provisions of national law which are deemed sufficiently important to override any choice of law which would otherwise prevent their application. They continue to apply to a consumer contract, notwithstanding any contrary choice of law, by virtue of Article 6(2) of the Rome I Regulation.

The Court also made some interesting remarks about the roles to be played by Rome I and Rome II in respect of an application for an injunction in these circumstances. Curiously the Court held that the law governing the claim for an injunction should be determined by Rome II, whereas the law used to test the fairness of the clause in question should be determined by Rome I. Ironically, at least at first blush, the Court's reasoning centres around the need to maintain systemic coherence.

The Court also went out of its way to emphasise that the starting point effected by Article 6(1) of Rome II (that the law of the country where competitive relations or the collective interests of consumers are affected applies) will not lightly be displaced by Article 4(3) of Rome II (by which the trader can argue that there is a manifestly closer connection with the law of his country).

The decision is likely to see traders revisit their standard terms and conditions to ensure that adequate reference is made to mandatory provisions. Insofar as relations are governed by terms which fail to make this clear, consumers are able to knock out the trader's choice of law clause altogether.

In brief…

- Governing law clauses in B2C contracts must inform consumers that they remain protected by overriding mandatory provisions of law, failing which the governing law clause will be unfair under the Unfair Terms in Consumer Contracts Directive (93/13/EEC)

St John's CHAMBERS

The right to affirm in the face of repudiatory breach

***MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789**

In *MSC v Cottonex Anstalt* [2016] EWCA CIv 789 the Court of Appeal considered the circumstances in which an innocent party was entitled to affirm a contract in the fact of repudiatory breach in order to insist upon its performance.

Facts

MSC agreed to ship 35 containers of Cottonex's cotton to Bangladesh. Once on shore, Cottonex had 14 days to return the containers to MSC, failing which the contract imposed daily demurrage charges. In transit the market price of cotton collapsed and Cottonex's buyer refused to collect the cotton on arrival (although he did pay for it). The port authority then refused to allow anyone to access the containers without a court order, preventing Cottonex from returning them to MSC. On 27 September 2011 Cottonex told MSC that it did not have legal title to the cotton, but MSC continued to levy demurrage charges. On 2 February 2012 MSC offered to sell the containers to Cottonex in order to put an end to the rising demurrage charges, but the sale never took place.

MSC claimed demurrage from the expiry of 14 days from delivery until the return of the containers.

High Court

At first instance it was held that MSC were entitled to demurrage from the expiration of 14 days until 27 September 2011, on the basis that Cottonex had repudiated the contract by their message of that date. The Court also held that the choice whether to terminate in response to a repudiatory breach should be exercised in good faith, and that MSC should not be permitted to keep the contract afoot simply to claim more demurrage.

Court of Appeal

The Court of Appeal held that MSC were entitled to demurrage from the expiration of 14 days until 2 February 2012 (the date when MSC offered to sell the containers to Cottonex).

Although the Court of Appeal agreed that it would be wholly unreasonable for MSC to hold the contract open for further performance (and demurrage), it held that MSC did not even have that option to affirm in the first place.

Instead the Court of Appeal held that by 2 February 2012 the commercial adventure envisaged by the contract had become frustrated, terminating the contract without giving MSC any option to affirm it. As such the question of whether or not MSC had any legitimate interest in holding the contract open for performance did not even arise for consideration.

"This may be somewhat arbitrary but it is pragmatic. Whether or not delay is such as to bring about frustration calls for a pragmatic judgment."

MSC v Cottonex Anstalt [2016] EWCA Civ 789, per Tomlinson LJ at [58]

St John's CHAMBERS

Analysis

The case touches upon the principle in *White v Carter*, in which Lord Reid famously said, at 432:

> *"It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself."*

However the Court of Appeal held that principle to be inapplicable on the basis that it only operated in circumstances where the party in breach was refusing to perform continuing obligations or obligations that fell due for performance at a future date (at [42]). By contrast, in this case the adventure had become frustrated because further performance had become impossible, a situation best evidenced by the offer by MSC to sell the containers on 2 February 2012.

The greatest difficulty in this case is the interface between repudiatory breach and frustration. Traditionally the circumstances in which a contract might be held to be frustrated were rare and extreme. The test, although formulated in various ways, demands that performance has either become impossible or something "radically different" from that envisaged by the parties. Further, whereas repudiatory breach would create an option to affirm or terminate, the consequences of frustration are automatic (save for the discretionary statutory powers arising under the Law Reform (Frustrated Contracts) Act 1943).

"There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."

MSC v Cottonex Anstalt [2016] EWCA Civ 789, per Moore-Bick LJ at [45]

In this case the 2 February 2012 offer to sell the containers was taken as evidence that the contractual adventure had become frustrated, but logically the point of frustration itself must be something extraneous and independent of the parties. Put another way, whatever it was that ultimately prevented the return of the containers, it was not MSC's offer to sell them on 2 February 2012. Indeed as Tomlinson LJ conceded, fixing the date at this point is somewhat arbitrary but pragmatic (at [58]).

Ultimately it is difficult to see why the Court felt the need to distinguish *White v Carter*. Logically if the nature of the adventure has changed so radically as to engage the doctrine of frustration, then there will be no legitimate interest in performance because the parties' legitimate interests lie in the performance of the contractual bargain they made (and not something radically different).

Nevertheless, the case makes clear that where a repudiatory breach continues for so long as to radically change the contractual adventure, it will operate to frustrate the contract and remove from the innocent party any right to affirm.

Good faith

The High Court and Court of Appeal each made some interesting contributions to the subtle but continuing evolution of good faith in English contract law.

At first instance the Court drew from various strands of jurisprudence in which the notion of good faith has gathered traction, before holding that the election to terminate or affirm in the face of repudiatory breach should be exercised in good faith for the purpose for which it was conferred.

On appeal the Court of Appeal poured a little cold water on the Judge's enthusiasm for the development of good faith, holding that it was better *"for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organising principle" drawn from cases of disparate kinds."* (at [45]). Moore-Bick LJ added that developing a general principle of good faith would create danger not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619.

These remarks are the latest in a series of cases in which the courts have drawn back slightly from the development of good faith in English contract law. They were unnecessary for the disposal of the case and as such can only be seen as a warning from this Court of Appeal that the activism of first instance judges on the topic needs to be kept in check – a warning apparently heeded by the Deputy High Court Judge who heard the next case to be discussed: *Monde Petroleum SA v Westernzagros* [2016] EWHC 1472 (Comm).

In brief…

- Where a repudiatory breach persists for so long as to radically change the nature of the parties' contractual adventure, the contract will be frustrated and the innocent party will have no right to affirm.
- The Court of Appeal disapproved of the enthusiasm for the development of good faith shown at first instance.

St John's CHAMBERS

No implied obligation to exercise contractual right to terminate in good faith

***Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm)**

In *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) the High Court held that an express right to terminate a contract did not need to be exercised in good faith.

Facts

Westernzagros was negotiating with the Kurdistan government to search for oil in Kurdistan. Monde were assisting Westernzagros in those negotiations pursuant to a consulting contract (Monde was run by the son of a prominent Iraqi politician, giving it an advantage in such negotiations). Monde's remuneration comprised monthly fees and the prospect of acquiring an option to take a 3% interest in the oil project itself, subject to certain conditions being satisfied.

In the event an agreement was reached with the Kurdistan government but the conditions for Monde's 3% interest to arise were unlikely to be satisfied. Westernzagros then served notice to terminate the consulting contract pursuant to an express contractual power to do so. Monde argued that in doing so Westernzagros was acting in bad faith by depriving Monde of the chance to share in the profits of Westernzagros' deal with the Kurdistan government.

Decision

The court held that there was no implied term of the consulting contract to the effect that Westnerzagros would not terminate it in bad faith. Richard Salter QC, sitting as a Deputy High Court Judge, held that the simple fact that a contract was long-term or "relational" was not sufficient to imply a duty of good faith. Further, he doubted whether an express contractual power to terminate would ever be subject to an implied restriction on its exercise in this manner. Provided that any conditions are satisfied, the exercising party is entitled to exercise that power without having to justify its actions.

In any event the judge found that Westernzagros had not acted in bad faith by terminating the consulting contract. Monde had very little prospect of triggering their 3% interest in the oil project itself. If Westernzagros could not terminate then they would have to keep paying Monde for little or nothing, while Monde's chances of triggering that 3% interest would be slight.

Analysis

This is the latest of a series of recent decisions which apply the brakes to the gradual development of good faith in English contract law. The Court made clear that a duty of good faith is implied in certain categories of contract characterized by a fiduciary relationship, but would otherwise only arise where the contract would lack commercial or practical coherence without it. A distinction was also drawn between implied terms to act in good faith in the performance of a contract and a term concerned

with termination. In the latter case a contractual right to terminate can be exercised irrespective of the reasons for doing so (applying *Lomas v JFB Firth Rixon* [2012] EWCA Civ 419).

"…a contractual right to terminate is a right which may be exercised irrespective of the exercising party's reasons for doing so."

Monde Petroleum SA v Westernzagros Ltd [2016] EWHC 1472 (Comm), per Richard Salter QC at [261]

In brief…

- A duty to act in good faith will only be implied in certain categories of contract characterized by a fiduciary relationship, or where the contract would lack commercial or practical coherence without it.
- An express contractual right to terminate can be exercised regardless of the exercising party's reasons for doing so.

St John's CHAMBERS

Oral variation in the face of anti-oral variation clauses… again, but with "practical benefits"

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

In the last edition of this Case Update we reviewed the decision in *Global Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, in which the Court of Appeal addressed (albeit obiter) the effectiveness of an oral variation of a written contract in the face of an express anti-oral variation clause.

In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 the Court of Appeal had addressed the same point for the second time in as many months, but on this occasion its remarks form part of the ratio and are therefore binding. The Court also developed the concept of "practical benefit' developed in *Williams v Roffey Bros* [1991] 1 QB 1, a case familiar to all first year law students.

Facts

MWB operated managed office space in central London. Rock provided marketing services and occupied as licensee premises managed by MWD. Over time Rock fell into arrears of licence fees and on 30 March 2012 MWB exercised its right to lock Rock out of the premises.

MWB sued for arrears of licence fees. Rock counterclaimed for wrongful exclusion from the premises.

Rock's case was that on 27 February 2012 an oral agreement was made to reschedule the licence fee payments in such a way that for the first few months Rock would pay less, but thereafter it would pay more, such that by the end of the year the arrears would have been cleared (in effect an agreement to give Rock some breathing space). On that understanding Rock paid £3,500 to MWB (being a sum already due).

MWB denied reaching such an agreement, but argued that even if it had it would be unenforceable because (1) there was no consideration for it; and (2) it contravened an anti-oral variation clause in the written licence agreement.

Decision

MWB succeed at first instance but lost in the Court of Appeal.

On the oral variation point the Court of Appeal deliberately postponed judgment pending the outcome of *Global Motors*. Kitchin LJ discusses Beaton LJ's judgment in that case at length before expressing his agreement with the conclusions reached (discussed in detail in the previous edition of this Case Updater). For Kitchin LJ the guiding principle was party autonomy.

Unhelpfully no further guidance was offered as to the standard of evidence needed to establish an oral variation in the face of an anti-oral variation clause. One can only assume that this Court of Appeal agreed with Beatson LJ that the question fell to be determined on the balance of probabilities, with no need to surpass a "very high evidential burden".

As to consideration, the Court of Appeal agreed with the trial judge's view that Rock provided good consideration because its payment of £3,500 and promise to comply with the revised payment schedule conferred a practical benefit on MWB.

On appeal MWB relied upon the rule in *Foakes v Beer* (1884) 9 App Cas 605 (which in turn applied the rule in *Pinnel's Case* (1602) 5 Co Rep 117a) to argue that the payment of a lesser sum cannot be satisfaction for the whole.

The Court of Appeal upheld the trial judge's findings that Rock provided a practical benefit to MWB, capable of amounting to good consideration under the rule in *Williams v Roffey*. As Kitchin LJ observed at [47]:

> *"First, MWB would recover some of the arrears immediately and would have some hope of recovering them all in due course. But secondly and importantly, Rock would remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB."*

"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived… You may put it out by the door, it is back through the window."

Alfred C Beatty v Guggenheim Exploration Company (1919) 225 NY 380, per Cardozo J at 387-388.

Finally the Court of Appeal held that Rock's case in promissory estoppel failed because it could not demonstrate that it had acted to its detriment in reliance upon WMB's promise. Nevertheless, all members of the Court appeared willing to hold that, in appropriate circumstances, the doctrine of promissory estoppel could operate to suspend or even extinguish a creditor's rights (see Kitchin LJ at [61] et seq).

Analysis

The apparent readiness of the Court to find practical benefit in these two forms poses some difficulties.

As to the first form of practical benefit identified by Kitchin LJ, the payment of £3,500 cannot possibly escape the rule in *Foakes v Beer*, being a straightforward payment of something already due. Further, the "hope" of recovering the balance of the arrears in due course is surely something which every

creditor has whenever they permit a debtor some breathing space. If these alone sufficed to create "practical benefit" then it is difficult to conceive of a situation in which the rule in *Foakes v Beer* could ever apply.

The second form of practical benefit identified by Kitchin LJ has more substance. Arguably having a tenant or licensee (even one who is struggling to pay) is better than having no tenant at all while MWB seek to re-let the premises. Whether or not that is so will depend upon a number of factors, including the behaviour of the tenant, the prospect that he will clear the arrears, and the difficulty in finding new tenants. Of course the court cannot be expected to evaluate these factors in order to determine whether keeping the tenant benefits the landlord on each occasion. To do so would be inconsistent with the basic principle that the law is not concerned with the adequacy of consideration. Arguably the best judge of the merits of keeping a tenant is the landlord himself. Yet by that argument whenever a creditor agrees to allow a debtor some breathing space he will be taken to perceive some benefit to himself in that course. In other words, the simple fact that the creditor enters into the variation will stand as evidence that the variation conferred a practical benefit upon him. Such logic, if taken to its ultimate conclusion, defeats the requirement for consideration at all, at least in the context of variations if not in the formation of contracts itself.

Undoubtedly the Court of Appeal reached a commercially sensible outcome. The rule in *Foakes v Beer* has been under attack even since it was created (notably by Lord Blackburn's speech in the case itself). But to evade and curtail its application by simply expanding the forms of "practical benefit" to be recognized serves only to distort the rule and leave this significant area of jurisprudence in a mess. Far better that the Supreme Court hear an appeal on the point and overturn the rule in *Foakes v Beer* itself.

Finally, to employ promissory estoppel to the same end is arguably no better than bending the notion of "practical benefit" out of shape. If the doctrine of consideration is truly so firmly established as to be incapable of being blown over by the "side wind" of promissory estoppel (per Lord Denning in *Combe v Combe* [1951] 2 KB 215) then estoppel ought to be incapable of circumventing the rule in *Foakes v Beer*.

The remarks of the Court of Appeal in *MWB v Rock* are obiter on the point of estoppel, but certainly give traction to Arden LJ's famous judgment in *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329. In that case she drew on the "brilliant obiter dictum" of Denning J in *High Trees* [1947] KB 130 in holding that it was arguable (for the purposes of setting aside a statutory demand) that promissory estoppel could extinguish a creditor's right o recover the balance of the debt, thereby ircumventing the rule in *Foakes v Beer*.

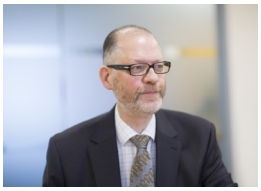
The very fact that Lord Denning's infamous resurrection of promissory estoppel in *High Trees* could be deployed as a powerful side wind capable of displacing the rule in *Foakes v Beer*, notwithstanding that same judge's observations only four years later in *Combe v Combe*, illustrates the absurdity of the position which the common law has reached in respect of promises to accept less.

The Court of Appeal's decision in *WMB* achieves the correct result from a practical perspective, but inflicts further damage on the integrity of the law in this respect by bending "practical benefit" out of shape.

In brief…

- The Court of Appeal's obiter remarks in Globe Motors on oral variation in the face of an anti-oral variation clause were approved and applied.
- Consideration subsisted in the "practical benefit" to a land owner of keeping a licensee in the hope that he can pay, rather than leaving the property vacant while he seeks a new tenant.

Company and Commercial Team



Leslie Blohm QC
Year of call: 1982, QC 2006

David Fletcher
Year of call: 1971

John Blackmore
Year of call: 1983

Richard Stead
Year of call: 1979

Robin Neill
Year of call: 1979

Charles Auld
Year of call: 1980

Martha Maher
Year of call: 1987

Guy Adams
Year of call: 1989

Andrew Kearney
Year of call: 2007

James Pearce-Smith
Year of call: 2002

John Dickinson
Year of call: 1995

Christopher Jones
Year of call: 2004

George Rowell
Year of call: 2004

Richard Gold
Year of call: 2006

Michael Clarke
Year of call: 2009

Oliver Wooding
Year of call: 2009

Nicholas Pointon
Year of call: 2010

Charlie Newington-Bridges
Year of call: 2011

Adam Boyle
Year of call: 2012

Joss Knight
Year of call: 2014

"St John's Chambers is a go-to set in the South West for commercial disputes." **Legal 500 (2015)**

St John's
CHAMBERS

Contact us:

101 Victoria Street, Bristol BS1 6PU **Tel:** 0117 923 4740 **Fax:** 0117 929 4821
DX: 743350 Bristol 36 **Email:** chancerycommercialclerks@stjohnschambers.co.uk
Web: www.stjohnschambers.co.uk