Paymoreorleavethebarber'swithyourhairhalf-cut:

why*Williams v Roffey Bros* shouldbereversedbyParliament

Introduction

It is just as well that few English barbers have law degrees. A barber who has studied *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[1] might always decide to stop work mid-haircut and explain to the customer, the latter looking at him bemusedly through half-cut curls, that he has just realised that the prices advertised outside the shop are too low and do not allow him to operate at a profit, given high costs of electricity and hair product. The customer must, then, content himself with just half his hair cut today, because what is the poor barber to do?

An adventurous man may then venture out to the streets as he is. A self-asserting one will insist on his right to a full haircut, but what will he do if the barber is unmoved by his pleas?

And what of those who do not wish to argue and will simply offer an extra £10 if the barber agrees to resume, firmly deciding to never patronise that shop again? Could they later insist on paying the advertised price only, refusing to hand over the agreed £10 surcharge? The contract was, after all, for a haircut in exchange for a fixed price. Any five-year-old would think downright preposterous the proposition that, after trading a blue marble for a red one the other party could come back and demand a second, additional marble in exchange for the one given. They would ask for something new in return. Surely once the deal is done, the barber offers no consideration in exchange for the £10 uplift? So would logic dictate, and for

1 [1991] 1 QB 1 (CA)

a long time logic and law were in perfect harmony on that issue. Thus in *Stilk v Myrick*[2] a sailor who had undertaken to complete a voyage for agreed wages but then, in the middle of the voyage, was offered extra wages by the master, was not entitled to the bonus as in promising to continue serving he promised to do no more than what he already had been legally bound to do.

Such had been the legal position until the regrettable divergence of logic and law in 1991, when the Court of Appeal decided *Williams*. The defendants in *Williams* were under a contract to renovate a block of flats. They subcontracted carpentry work to the plaintiff, who completed some of it but found himself in financial difficulties because he had agreed too low a price for the work and failed to supervise his men properly. The defendants, wishing to avoid liability for delays under the main contract, promised Mr Williams additional payment in return for his promise to finish the carpentry work on time. He then continued working but soon stopped, whereupon the defendants engaged other carpenters to complete the work but did not manage to avoid a delay penalty under the main contract. Meanwhile, Mr Williams claimed for the balance of the original price and for the bonus. The Court of Appeal held that the defendants' promise to pay extra did not fail for lack of consideration.

The contract in *Williams* was, of course, a business one, but in principle there is no reason why the position would be different in a consumer contract, such as at the barber's. Section 51 of the Consumer Rights Act 2015 certainly does not help. After all, the price is actually fixed in the contract in both cases; the problem is not that the price had not been agreed, but rather that the party to be paid becomes dissatisfied with the bargain he had struck halfway through performance.

It is submitted that in *Williams* the law took the wrong turn. As it cannot be predicted when a suitable case will come before the Supreme Court to enable it to overrule the decision, it is

2[1809] 2 Camp 317

suggested that in the interests of commercial certainty Parliament should step in and reverse the common law itself. It will be shown that the case for such a reform is all the stronger for the simplicity and brevity of legislation required to accomplish it.

How did this happen? In search for the ratio of *Williams*

The reasons for the Court of Appeal's decision in *Williams* are not the easiest to distil from reports. Although Glidewell, Russell and Purchas LJJ all agreed that the appeal should be dismissed, there was no single judgment of the court. Lord Glidewell's judgment is the leading one and the other two judges refer to it in their own judgments, but at the same time they reach their conclusions through slightly different routes and with varying degrees of hesitation.

One could argue that multiple ways of reaching the same result should only serve to reinforce confidence in correctness of a decision, and thus plurality judgments are generally to be welcomed. However, it could equally be said that if argumentation of any one judge were compelling enough for the others to support it without reservation, there would not be separate judgments. Writing extrajudicially, Baroness Hale described such situations (referring to the Supreme Court, but her point is equally valid in relation to the Court of Appeal) as balancing exercises between the principle of individual responsibility of judges for their decisions on the one hand, and, on the other, the need for clarity of law.[3] It is submitted that the latter should take precedence over the former when the court is seeking to introduce a radical change or exception to established law, and the more radical such change or exception, the greater the importance of unity and clarity. The rule of law requires that businesses (and private citizens) be able to regulate their relations in accordance with the law, and it is basic economics that unclear laws hamper economic growth as businesses have to take into account that they may be contracting on different terms than both parties

3 Brenda Hale, 'Judgment Writing in the Supreme Court' (*UK Supreme Court Blog*, 25 October 2010) <http://ukscblog.com/judgment-writing-in-the-supreme-court-brenda-hale/> accessed 4 September 2016

are assuming they are.

It is therefore regrettable that the ratio of *Williams* is not absolutely uniform. The three judgments shall now be considered in turn.

ThejudgmentofGlidewellLJ

In the leading judgment, Glidewell LJ founded his reasoning on the Privy Council's decision in *Pao On v Lau Yiu Long.*[4] In *Pao On*, the Committee applied its own earlier decision in *The Eurymedon,*[5] where it had been held that performance of (or a promise to perform) an existing obligation to a third party can provide sufficient consideration in a contract. Glidewell LJ acknowledged that the relationship in *Pao On* was a tripartite one but thought that the principle could equally be applied to a promise made by one of the original two parties to a contract.[6] It is submitted that in so holding his Lordship erred in law by ignoring the true ratio of the decision in *The Eurymedon*, which was that by obtaining a promise to perform an obligation to a third party, the promisee received the legal benefit of a directly enforceable obligation to himself.[7] This is plainly not the case in a bipartite relationship: he who is twice promised the same thing cannot sue twice when he does not get it, and nor can he sue for double damages.

His Lordship quoted[8] a passage from *Pao On* where Scarman LJ remarks, *inter alia*, that "justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress".[9] But this surely is a two-way argument: if it can be used to hold a man to his promise to pay more, it can equally be used to hold the other to his original price.

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4 [1980] AC 614 (PC)
5 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 (PC)
6 *Williams* (n 1) 15F
7 *The Eurymedon* (n 5) 168E (Wilberforce LJ)
8 *Williams* (n 1) 14H
9 *Pao On* (n 4) 634D

According to his Lordship, in consideration for the defendants' promise to pay Mr Williams more than originally agreed they "obtained in practice a benefit, or obviated a disbenefit".[10] This somewhat cryptic phrase seems to refer to three supposed benefits accruing to the defendants: ensuring that the plaintiff continued work, avoiding the penalty for delay under the main contract, and avoiding the trouble and expense of seeking out other carpenters to finish the work for Mr Williams.[11]

His Lordship treats as insignificant the fact that the defendants did not, in fact, obtain these benefits as the plaintiff did stop, they incurred the penalty and they had to find other carpenters. At first glance this indeed seems irrelevant: the actual utility, or lack thereof, of consideration should not matter for its legal validity. If one buys a tennis racquet in the hope of competing at Wimbledon and only then realises that he does not know how to play tennis, the racquet remains good consideration in law for the price he had paid therefor. However, it cannot be so in this case. His Lordship seeks to differentiate between "practical benefit" and "legal benefit", and argues that practicality of benefit can render it good in law when it would not be legally sufficient otherwise. If "obtaining in practice a benefit" is to be more than an empty phrase, it must mean that such benefit has in fact materialised. As it has been famously put, "a peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn",[12] but it surely ceases to be of any *practical* benefit to him.

<u>ThejudgmentofRussellLJ</u>

Lord Russell emphasised the need to achieve practical justice. His Lordship pointed out that the defendants were quite ready to make the extra payment when they offered it, and he opined that it would be unconscionable to allow them to renege on their promise.[13] It is respectfully submitted that this is a most dangerous reasoning. Over time, following a clear

10 *Williams* (n 1) 16A
11 ibid 11A
12 *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87 (HL) 114
13 *Williams* (n 1) 17F

and fair rule without hesitation would surely serve justice better than introducing a doubtful exception in order to avert perceived injustice of one case. Mitigating the harshness of law is a function of equity, and the best any legal system can do is strive to develop principles which achieve justice in the greatest majority of cases possible. Otherwise the result will be an all too familiar "patchwork quilt of distinctions which are difficult to justify"[14] which experience shows to be a wholly impractical solution.

His Lordship did acknowledge that equity would have been better placed to deal with the issue at hand and lamented the counsel's failure to advance the argument that the defendants were estopped from reneging on the offer of extra payment.[15] In the absence of such argument, his Lordship was ready to find consideration in the defendants' ability to retain services of the plaintiff and in replacing the "hitherto haphazard" method of payment with fixed instalments on completion of each flat.[16] His reasoning was therefore similar to the leading judgment: although his Lordship did not use the phrase "practical benefit", he was ready to accept as valid consideration similar "practical benefits" to those accepted by Glidewell LJ.

ThejudgmentofPurchasLJ

Purchas LJ agreed with the other two judges that there was good consideration, although he did so with "some hesitation".[17] In his Lordship's view, the doctrine of duress offers enough protection against undue pressure, and "as a result of the agreement, the defendants secured their position commercially".[18] As suggested above, this is a questionable argument as the concept of practical benefit can only have meaning if such benefit in fact materialises.

Additionally, his Lordship suggested that it had been open to the plaintiff to deliberately

14 *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) 500A (Steyn LJ)
15 *Williams* (n 1) 17G-18G
16 ibid 19A-B
17 ibid 23C
18 ibid 23A

breach the contract in order to mitigate his losses, and his forbearance to do so provided consideration. It is submitted that this argument cannot be sustained.

First, delay penalties are a standard feature of construction contracts and such liability of the defendants must have been in contemplation of both parties when entering into the subcontract. Therefore, if the defendants incurred such a penalty because of the time needed to find and engage a new contractor in Mr Williams' place, it would have been recoverable from him under the rules in *Hadley v Baxendale*.[19] It is unlikely that this would have been a commercially sensible course of action for Mr Williams, and in any event, the defendants would have not suffered as they would have had their losses compensated.

Secondly, and more importantly, it had been decided long before *Williams* that forbearing to do that which one has no right to do cannot be good consideration.[20]

Uncertaintyincommercialrelations

The Court firmly stated that *Stilk v Myrick* remained good law. Glidewell LJ stated that his decision did not contravene it, but rather refined it and limited it to cases where the no additional benefit accrued from the repeated promise.[21] Similarly, Russell LJ accepted it "without reservation" as still good authority on gratuitous promises, but insisted that in *Williams* the promisor secured "an advantage" for his promise.[22] Purchas LJ also accepted *Stilk v Myrick* as good law.[23]

Commentators have opined that any "practical benefit" accruing to Mr Myrick who got the ship to her destined port is materially indistinguishable from that supposedly received by the defendants in *Williams*.[24] This must be correct, but what is more, if it were distinguishable at

19 [1854] 23 LJ Ex 179
20 *White v Bluett* [1853] 23 LJ Ex 36
21 *Williams* (n 1) 16B
22 ibid 19D
23 ibid 21A
24 See eg Hugh Beale and others, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2016) 4-070; or

all, it would doubtlessly be greater than that in *Williams*. As suggested above, a benefit is not practical if it does not in fact accrue; therefore, if any promisor in these two cases received practical benefit it would be Mr Myrick.

The authors of *Chitty on Contracts* echo Lord Purchas' attempts to explain the incompatibility of the two decisions as steady development of law: as the expanding concept of duress now protects parties from undue pressure, courts are now able to treat the concept of consideration less strictly.[25] But this is unsatisfactory as it will necessarily be for the party who promised to pay extra to argue duress, and that party is not in the wrong. This surely must be putting the cart before the horse: if such promise is to be enforceable, the least the law could do for the promisor is to put the onus firmly on the promisee to demonstrate sufficient consideration. It is also not without significance that a threat to breach a contract will not necessarily amount to duress.

The result of *Williams* is unwelcome uncertainty in commercial relations. Parties never know whether a unilateral promise is enforceable unless the issue is litigated. Subcontractors have no incentive to give careful consideration to quotes they provide and tenders they submit. On the contrary, it seems a viable course of action to knowingly underprice work in order to secure a contract, only to claim economic hardship mid-way through performance, knowing full well that additional payment will likely be offered as the lesser of two evils.

Whatcanbedone?Adraftbill

The Supreme Court can overrule *Williams* if an opportunity arises, but so far no suitable case has come before the highest court. It is therefore submitted that Parliament should intervene. Reversing the effects of *Williams* does not require lengthy or complicated legislation, as demonstrated by the draft bill below.

David Campbell, 'Good Faith and the Ubiquity of the "Relational" Contract' [2014] 77(3) MLR 475, 478

25 *Chitty on Contracts* (n 24) 4-070

Draft

Law Reform (Consideration) Bill

An Act to amend the law relating to consideration in contracts.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Performance of, or a promise to perform, an existing contractual obligation to the other party to no longer constitute valid consideration

(1) Performance of, or a promise to perform, an existing contractual obligation to the other party of a contract cannot in any circumstances constitute valid consideration for a new promise by that other party, or for that other party's agreement to vary the contract imposing this obligation.

(2) For the avoidance of doubt, the law shall not recognise as benefit (or as avoidance of detriment) to a party to a contract (A) a promise by the other party (B) to perform his existing contractual obligations to A, and such promise by B shall not provide consideration for (a promise of) additional payment by A.

2 Extent

This Act extends to England and Wales only.

3 Short title

This Act may be cited as Law Reform (Consideration) Act 2016.

Conclusions

Reversing the harmful effect of *Williams* on commercial contracting is an easy task for Parliament. Slight decrease in insurance premiums for building contractors may be a welcome side-effect.

The occasional subcontractor being exposed to the full harshness of common law is a small price to pay for commercial certainty. In any event, the prudent subcontractor who makes the effort to price his work adequately has nothing to fear. Such reform is therefore not only practical and useful, but also desirable in principle as the law should promote prudence and enforce fair bargains.

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