

# Common law rule

Law



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Auto Beverage limited borrows £100, 000. 00 from Sykes & Pickavant, Merchant Bankers in order to extend the productivity of their manufacturing operation. The loan is taken out for a period of 5 years of which £20, 000 is to be repaid each year with interest at 40% on the capital outstanding. This clearly shows that a legally binding contract is in force. There has been an offer, an acceptance and the intention to be legally binding. In addition to this consideration is an essential element in the formation of any contract.

The question raises the following legal issues; consideration, variation of contract, promissory estoppels and waiver.

English Law will not enforce a gratuitous promise as in this case £100, 000 is being borrowed and if it was returned without anything given in return then it could not have taken consideration into concept. Thus the promisee has to give something in return for the promise of the promiser in order to convert a bare promise made in his favour into a binding contract. Therefore the interest at 40% is the consideration as it is the benefit to the promiser.

In Currie V Misa (1875)<sup>1</sup> consideration can be defined as " A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit occurring to one party..."

Consideration is called " executory" where there is an exchange of promises to perform acts in the future. Alternatively consideration is referred to as " executed" where one party performs an act in fulfilment of a promise made by the other. Past consideration unlike the other two is said to be past when it consists of some service or benefit previously rendered to the promiser as

in the case of *Re McArdale* [1951]2 it was held that she could not recover the sum promised as her consideration was past.

After the initial repayment of £20, 000 Auto Beverage Limited suffers a loss due to a fire and cannot make repayments. They speak to Sykes & Pickavent who eventually agree to postpone for a year and the repayment of the interest is waived. It can be argued that this cannot be legally binding as no consideration has taken place. This shows that one party borrows the money and returning it without giving any thing in return. This kind of scenario is known as the Common Law Rule.

The Common Law Rule is where the law considers the consideration to be insufficient. Hence there is nothing wrong here since the debtor is attempting to show consideration by performing only part of what he is already contractually bound to do so.

The general Common Law Rule is that all debts are payable in full and that any creditor is not bound to accept part of a debt in satisfaction of the whole amount owed. This is known as the rule in *Pinnels Case* (1602)3. However it was held in *Pinnels case* that the agreement to accept part payment would be binding if the debtor at the creditors request provided some fresh consideration. Such as that the creditor accepts part payment on an earlier date than the due date as in the *Pinnels case* itself. Or if the creditor agrees to accept a chattel instead of money or if the creditor agrees to accept part payment in a different place to that originally specified. This factor is required to protect the creditor against a debtor who attempts to use some financial weakness of the creditor for his or her own purposes. Such is a case

of *D & C Builders Limited V Rees* [1966]4. It was held that they were able to retrieve all the monies owed based on the decision of the *Pinnels Case*.

Hence with the development of economic duress it can be argued whether the rule of *Pinnels Case* continues to serve any useful purpose especially when it can occur in unfair decisions. Such a situation occurred in *Foakes V Beer* (1884)5. In this case it has been stated that the common law rule produces a harsh and unfair decision where as with *D & C Builders Ltd V Rees* it is the opposite.

There are two exceptions to this rule, which are composition agreements. Here a group of creditors who are owed money agree to accept a sum in absolute discharge, despite the absence of consideration as in *Wood V Roberts* (1818)6 and part payment of the debt by a third party as in *Welby V Roberts* (1825)7.

A further exception to the rule in *Pinnels Case* is to be found in the equitable doctrine of promissory estoppels. This doctrine provides a means of making a promise binding in certain circumstances in the absence of consideration. In *Central London Property Trust Ltd V High Trees House Ltd* [1947]8. The plaintiffs during discussion had promised to accept a lesser sum as payment for a greater sum, no consideration having been given by the defendants to support this promise. Lord Denning concluded, obiter dicta that the plaintiffs would fail in such an action relying on promissory estoppels.

Again this was expressed in *Hughes V Metropolitan Railway Co. Ltd* (1877)9. On examining *Hughes* case Lord Denning stated that he preferred to apply the principal that a promise intended to be binding.

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In *Combe V Combe* [1951]<sup>10</sup> Lord Denning stated that where one party makes a promise, which intended to effect the legal relations between them, and when the other party has taken him at his word and acted on it, the one who made the promise couldn't afterwards be allowed to revert to the previous legal contract.

This notion supports *Auto Beverage Ltd* against *Sykes & Pickavents* claim for the money plus interest would be void.

However promissory estoppels have certain aspects, which emerge from the basic notion of the doctrine and can give rise to problems. First is the nature of the promise as stated in *High Trees*, it must be clear & unequivocal. Thus the promise must be intended to affect legal relations and not to a gratuitous privilege given to the promisee, as expressed both *Woodhouse Isreal Cocoa Ltd V Nigerian Produce Marketing Co Ltd* [1972]<sup>11</sup> and *Scandinavian Trading Tanker Co. AB V Flota Petrolera Eduatonana, The Scoptrade* [1983]<sup>12</sup>.

The doctrine is " a shield not a sword" <sup>13</sup> It is argued that promissory estoppels may only be used as a defence and not as a course of action as illustrated in *Combe V Combe* [1951]<sup>14</sup>. It also takes the view of whether suspensory is in operation as in case of *Tool Metal Manufacturing Co Ltd V Tungsten Electric Co Ltd* [1955]<sup>15</sup> Except in cases where the promisee cannot resume his position as stated in *Emmanuel Ayodeji Ajay V RT Briscoe (Nigeria) Ltd.* [1964]<sup>16</sup>.

It is clear from *High Trees*, *RT Briscoe* and *Tool Metal Cases* that to invoke promissory estoppels, the promisee must have either acted on the promise of the promiser or at least altered his position in relevance on the promise.

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Although 3 months later Sykes & Pickavant also experience severe financial problems and request Auto Beverage Ltd to pay the outstanding instalment plus interest owing without further delay, it can be argued that although no consideration took place in the second proposal it was never the less agreed by the creditor.

Auto Beverages can use Combe V Combe as their shield in the promissory estoppels doctrine as Sykes & Pickavant make a promise which is intended to effect legal relations between themselves and when Auto Beverage have taken them at their word and acted on it. Sykes & Pickavant can no longer revert to the previous legal contract.

However if we take the view in Pinnels case then there is no consideration and that Auto Beverages are liable to pay moneys outstanding. This will be in the interest of Sykes & Pickavant to argue the case using the Pinnel theory.

Sykes & Pickavant should not take the £15, 000 offered by Auto Beverages but take back their promise and give them sufficient time to pay back the money owed. They can use the case of Rose & Frank Co V Crompton Bros Ltd(1925). 17as their shield. But if they decide to take the money then they can later claim that economic duress has forced them to accept the £15, 000 as this has been shown in the case of D &C Builders Ltd v Rees [1966].