Creditor and debtor relationship in contract law

For an agreement to become binding, the parties must show that they suppliedconsideration; Currie v. Misa (1875)[1], and such consideration may exist of " either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other". In simple terms, it means that each party must do or give something in return, for what is acquired from the other party. Thus, if a party wishes to sue upon an agreement, it must first show that they themselves provided some form of consideration to the other; Tweddle v Atkinson(1861)[2]. Hence, consideration is an integral component for the implementation of contracts. Pollack, provides a simpler explanation; that it is " an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable"[3]. And, it is this very definition which Lord Dunedin embraced in the House of Lords (HOL), in Pneumatic Tyre Co Ltd v Selfridge and Co Ltd (1915)[4], a seminal case on the issue of consideration.

Consequently, it begs to reason that a promise to forbear part of your consideration, as final settlement, does not make much sense in light of Mr. Pollack's definition. Yet, Sir Edward Coke, created a common law exception in Pinnel's Case (1602)[5]that where a debtor promises to provide, as final settlement of the debt, a lower sum which the creditor accepts, will only be binding, provided that the creditor accrues some extra benefit, for the loss suffered. This case was affirmed by Baron Alderson in Sibree v Tripp (1846) [6], on the basis that only where the debtor is bound to do something more than what he was already bound to do, in the original contract, can his part payment be considered acceptable. These extra elements, ranged from

providing the debt at an earlier date, to providing chattel instead of money and lastly, providing the debt at another location[7], then the one prescribed in the original agreement. The rule in Pinnel was later applied by the HOL in Foakes v. Beer (1884)[8], where the court upheld the claim of the debtor for the remaining balance of the sum owed, despite, the existence of a promise by the debtor to forgo the balance. The court reiterated that a promise to forgo part of a debt owed cannot itself form enough consideration, to withhold the debtor form exercising his strict legal right. This approach was recently adopted in Re Selectmove Ltd (1995)[9], where the COA held that a reiterated promises to do the same, which you are already bound to do, can only amount to valid consideration if the other party was to receive a “ practical benefit”.

These cases opened the gates on the issue of the creditor and debtor relationship and how the law of contract gradually eased its restrictions on debtors. Slowly, yet gradually, equity came to the rescue of the debtors, thus, in the process creating exception to the principles founded in Pinnel. But for the time being where a debtor does not provide an added benefit for his part payment, and the creditor accepts the lesser sum; surely common law, as per the decision in Pinnel & Foakes; would not bar the creditor from enforcing his strict legal right, post acceptance of the lesser sum. This very question was the focus of the case, Hughes v Metropolitan Railway Co (1877) [10]; where the equitable doctrine of promissory estoppel came into existence; and subsequently revived, some 70 years later, in the Dicta of Lord Denning as a recognized principle of equity; Central London Property Trust Ltd v High Trees House Ltd (1947)[11].

Hughes involved a tenant, who under contractual obligation, was obliged to keep the premises, in his possession “ in good repair”. The landlord, served the tenant a notice 6 months prior to the termination of the lease; but nearing the end of the lease, negotiations took place between the parties and the tenant informed the landlord that they will not carry out the repair, in the meantime. By the end of the lease, the landlord, claiming that the tenant had not carried out to repair the premises, forfeited the lease. The HOL, applying the principles of equity, held that the landlord’s behavior implied a promise for the tenants to halt repair till the time the negotiation finished. Thus, the HOL, saw that the time of the 6 months’ notice ran from the date when the negotiations between the parties finished. Lord Cairns explained that the decision stood for the proposition that where parties, bound by contractual obligation, enter negotiations, their strict legal rights would be “ held in abeyance”[12]; thus, any party reverting to their strict legal rights would be estoppeled from doing so.

This equitable principle saw new heights, in the hand of Lord Denning, often criticized for expanding the principle out of its conventional limits; inCentral London Property Trust Ltd v High Trees House Ltd(1947)[13]. The claimant, a landlord, leased part of his property to the defendant; however, war broke out, thus, both parties renegotiated the contract’s rent, on temporary basis, till the war lasted. However, once the war ended, the claimant, brought an action against the defendant for the balance of the payment; as agreed upon in the original lease and the reversion to the original rent for the future. Lord Denning, allowed the claimants plea that the rent should revert back to as originally negotiated between the parties, as before the war. He found that,

although for the time of suspension, i. e. the time of the war; there existed no consideration for the debtor to accepted the reduced sum. But, he said that the debtor would be obliged due to the equitable principle, which states that “ a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply”[14]. In fact, what Denning had done was expand the limits which Hughes had set. Hughes only talk about the suspension of rights, but in High Trees, Denning takes this a bit further, relying on equity, that once a debtor accepts part payment and the creditor relies on the promise; this act destroys the debtor’s right to recover the rest. Nonetheless, Lord Denning distinguished the decision in High Trees with Foakes on the grounds that a plea of estoppel needs to be specially raised, which was never done in Foakes.

Irrespectively, in essence the real implication of this decision was that it was in direct contradiction with Foakes, which restricted part payment of a debt as bad consideration; & Hughes, which held that estoppel could not be used to variate the terms of the contract, unless there existed some new consideration to support such variation. In reality, Lord Denning was, often criticized for his expansion of the doctrine, although which remains to be the law. Elizabeth Cooke, claims that Lord Denning’s notion of promissory estoppel, single handedly, tries to abolish the debtor’s strict legal right to recover[15]. Secondly, Denning in High Trees, was also disliked for ignoring the rule in Jorden v. Money (1845)[16]which held that grounds for an estoppel can only be assumed for current or preceding facts, not to those facts which relate to some future conduct. Although, the decision of Jorden is subject to many exceptions; the rule in Hughes being one as well; Lord

Denning maintained that High Tress could also be views as an exception to Jorden; thereby beckoning equity as to disallow a party to revert on a promise, once the other party relies on that promise.

A few years after the decision in High Trees, Coombe v Coombe [1951] [17]illuminated that the doctrine can only be used as a defense to a claim, not the other way around, as the basis for a claim; thus limiting its scope, in equity. However, Lord Denning, in Coombe, did reiterate the position he maintained in High Trees and said that " a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in reliance[18]" of the creditor's promise. This case illuminated the factor of reliance as a decider in case of promissory estoppel.

Consequently, HOL in Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1955) acknowledged Denning's estoppel, and encouraged the view that the doctrine could establish rights, without consideration, based on reliance. The issue involved a manufacturer, who under license of a Patent, produced a certain number of goods. During the war, both parties agreed in letting go of their rights to compensation and awaited new negotiation, at the conclusion of the war. Once, the war settled, the patent owners, on breaking down of negotiations, claimed for the compensation which would have been due from the time that the war finished. The HOL held that the assurance to suspend rights was binding during the period of the war and the owners could, on giving reasonable notice to the manufacture, revert to their old legal regime. Thus, the court established that promissory estoppel merely suspends the rights of the debtor; and only, if the creditor can establish that

he could not resume his previous position; then only can, promissory estoppel suspends that right, completely. Thus, Lord Denning MR, inD & C Builders v Rees(1965)[19]dismissing the appeal of the defendants stated that " it is worth noticing that the principle may be applied not only so as to suspend strict legal rights but also so as to preclude the enforcement of them", thus reinforcing the idea that promissory estoppel may in certain circumstance extinguish rights all together.

He added that, consequently, a creditor may only be restricted from enforcing his strict legal right where it " would be inequitable for him to insist upon them"[20]. Similarly, Lord Denning, expanding the purview of the doctrine, was reported inAlan Co. Ltd V El Nasr & Import Co,[21]stating that the only requisite for the establishment of the doctrine was the fact that one was induced in believing that the other party would not revert back to their strict legal rights. Nonetheless, it must be noted that the HOL has still, yet to date, to give their approval on the doctrine of promissory estoppel. However, in a recent case, Collier v P & MJ Wright (Holdings) Ltd [2007][22]; Arden LJ makes a number of points, enforcing the views established by Lord Denning. She said that where a creditor settles in accepting part payment as full sum, and the debtor pay the part payment, in reliance of the creditor's promise; the creditor will be estoppeled from reverting to his strict legal right. However, interestingly, vindicating the Dicta's of Lord Denning in High Trees[23], she stated that because reversion by the creditor would be inequitable; such a move on his part would have the effect of extinguishing his right to the remainder of the debt. Although, it seems that part payment of a debt has became an exception to the rule of consideration, it remains to

be seen what stance the HOL would take on the matter. Interestingly, Alexander Trukhtanov[24], argues that Arden's approach is flawed, as it portray the idea that the creditor must establish real reliance, before equity helps, by way of promissory estoppel. He claims that the doctrine of promissory estoppel developed as an answer to the harshness of the rule in Foakes, and the application of this equitable doctrine is not the solution; because any modification to these rules, according to him, requires the legislatures intervention.

As far, as the Australian legal system is concerned; they aptly adopted promissory estoppel within their legal system; Waltons Stores v Maher[25], to the extent of recognizing " detrimental reliance"; where the debtor's reliance on the creditor's promise causes him to suffer a detriment, it obliges as enough evidence to restrict the creditor from enforcing his strict legal rights. It remains to be seen how the UK legislature views and adopts or either reject, this doctrine. Nevertheless, the legislature must remember the importance of such principles, as correctly stated in Crabb V. Arun DC (1976) [26]that " equity comes in ... to mitigate the rigours of strict law...". Practically speaking, the doctrine of promisor estoppel, is no more than a blessing for debtor's, entrapped under debt to their creditor. In conclusion, it seems hard to imagine that, what started as an exception in Hughes, by the help of Lord Denning approach, became a whole new exception to the fact of consideration, and its effects on the enforceability of contracts.

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