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Forgoing an Unmeritorious Defence held to be Good Consideration by Court of Appeal

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The Court of Appeal in *Simantob v Shavleyan* [2019] EWCA Civ 1105 has held that an unmeritorious defence was good consideration for the variation of a settlement agreement, which resulted in payment to the creditor of a lesser sum than the debt due.

Facts

The Appellant, Dan Simantob and the Respondent, Yacob Shavleyan are both dealers in Islamic antiques. Following a dispute, certain sums became due from Mr Shavleyan to Mr Simantob.

On 1 May 2010, a settlement agreement was entered into under which Mr Shavleyan agreed to pay Mr Simantob US$1.5 million in full and final settlement of all claims between the parties ("**2010 Agreement**"). In the event of non-payment by 21 May 2010, the 2010 Agreement stipulated that Mr Shavleyan would pay US$1,000 per day to Mr Simantob as a penalty ("**Interest Clause**").

Between 2010 and 2016, Mr Shavleyan made some payments towards the settlement sum. However, these payments did not affect the interest, which had been accruing daily since 22 May 2010 under the Interest Clause.

In 2014, a discussion resulted in Mr Shavleyan agreeing to pay US$800,000 to Mr Simantob ("**2014 Agreement**"). Mr Simantob argued that any such payment was made on account of sums due under the 2010 Agreement. However, Mr Shavleyan claimed that the 2014 Agreement modified the 2010 Agreement, discharging his outstanding liabilities.

In April 2016, Mr Simantob issued proceedings, demanding payment of US$2,378,000 under the 2010 Agreement, of which all but US$200,000 represented interest under the Interest Clause. In response, Mr Shavleyan said that the Interest Clause was void as a penalty and that the 2014 Agreement modified the 2010 Agreement, so he could not have liability for any sums in excess of the 2014 Agreement.

On Mr Simantob's application for summary judgment, Master McCloud rejected the penalty defence

and gave summary judgment in favour of Mr Simantob, however this was limited to sums due under the 2014 Agreement. The remaining issues were heard by Kerr J in the High Court.

High Court Decision

The Judge relied on witness evidence to conclude that the 2014 Agreement had resulted in a variation to the 2010 Agreement.

The Judge reviewed key authorities e.g. *Foakes v Beer* (1884) and determined that "…*the payment of a lesser sum than the amount of debt due cannot be a satisfaction of the debt unless there is some added benefit to the creditor*." The Judge found that there was a benefit to Mr Simantob, in the form of Mr Shavleyan's forgoing the defence that the Interest Clause was a penalty. It did not matter that on Mr Simantob's application for summary judgment, the Master had rejected Mr Shavleyan's penalty defence, as it might have succeeded or at least been found to be arguable.

Mr Shavleyan's liability was therefore limited to sums due to Mr Simantob under the 2014 Agreement.

Mr Simantob appealed on the basis that as a matter of public policy, a promise not to pursue a defence that is later held to have no real prospect of success, cannot amount to good consideration.

Court of Appeal Decision

Dismissing the appeal, the Court concluded that by entering into the 2014 Agreement, "…[Mr Shavleyan] *agreed that he would no longer be able to raise* [the penalty clause defence] *and the debt would be consolidated*". Simon LJ said that it was immaterial whether the Master was correct in rejecting Mr Shavleyan's penalty defence, as the question of the validity of the consideration for the 2014 Agreement must be looked at the time that it was made. The Court held that "[t]*here cannot be any sensible public policy against encouraging parties to raise…defences that they reasonably believe may succeed, even if they eventually turn out to fail*."

The Court drew a distinction between a defence or claim in which the person advancing it had no confidence at all, and a claim or defence, which a person was prepared to pursue in court even though its merits were doubtful. Simon LJ went on to add that, "*…there is another countervailing public policy that also must be taken into account…namely, the public policy in favour of holding people to their commercial bargains*."

Comment

This case provides useful guidance regarding what will constitute good consideration to a creditor who is accepting payment of a lesser sum than the debt due, in return for the full discharge of the debtor's liability.

It is also notable that the Court distinguished the uncertainty alluded to in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24 regarding the re-examination of the rule in *Foakes*. This was because the consideration alleged here was the promise not to pursue the penalty defence, not the expectation of some commercial advantage as a result of accepting a less advantageous series of payments.

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