Can't get no satisfaction

Duncan Adam examines the Insolvency Rules and applications to set aside statutory demands

In *Collier v P&MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2007] All ER(D) 233 (Dec), the Court of Appeal examined the rule in *Pinnel's case* (1603) 5 Coke's Rep 117a ('the rule'), in the context of contemporary commercial considerations.

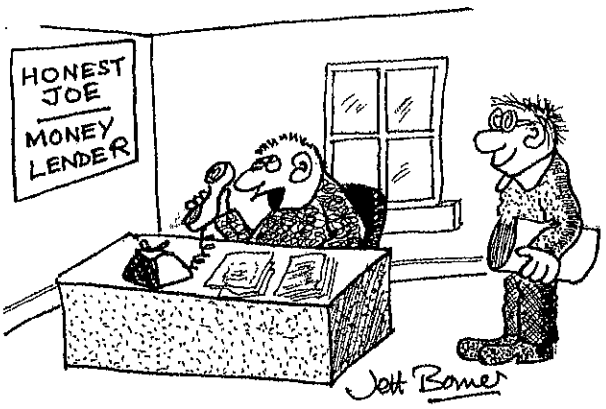
Readers will remember that the rule is based on the decision of Sir Edward Coke that 'payment of a lesser sum on the [due] day in the satisfaction of a greater cannot be any satisfaction of the whole'. The House of Lords in *Foakes v Beer* (1883-4) LR 9 App Cas 605, confirmed the link between the rule and consideration, holding that consideration was necessary for the debtor's discharge. If he were obliged to pay £100, he would not be discharged by paying £50, even if the creditor agreed to accept that sum in full satisfaction.

Thus the rule makes it difficult to enter into commercial compromises of claims. As long ago as 1937, the Law Commission recommended the rule's abolition. The courts have developed exceptions to it including:

- (the first, created by Coke himself): Although payment of a lesser sum could not discharge a greater debt, 'the gift of a horse, hawk, robe etc in satisfaction is good';
- The Denning doctrine of promissory estoppel;
- Where the debt arises from the provision of services (when it is possible for a promise to perform an existing obligation to amount to good consideration – *Williams v Roffey* [1990] 1 All ER 512). But in *Re Selectmove Ltd* [1995] 2 All ER 531, the appeal court considered *Williams*, and confirmed, applying *Foakes v Beer*, that a promise merely to pay part of the money to which the creditor is already entitled is not good consideration.

The facts in *Collier*

Mr Collier was one of three partners. A creditor obtained judgment against the partners for repayment of a loan. They were ordered to pay off the debt, at the rate of £600 per month. Mr Collier regularly paid £200 per month; the other two paid less and then stopped paying altogether, and soon became bankrupt. Mr Collier asserted an agreement with the creditor that if he continued to pay £200 per month, he would only be liable for a third of the debt. When he had paid a third, the creditor went back on the alleged agreement and issued a statutory demand for the whole of the outstanding balance. Mr Collier applied to have the statutory demand set aside. Judge Hodge QC refused the application.



Bert – there's a bloke here what says by law he can give us a horse, a hawk, or a robe instead of repaying in cash

The three legal issues are:

1. What is the standard of proof required to justify the setting aside of a statutory demand?

2. Was there consideration to support Mr Collier's contention that his part payment operated to discharge him from further liability?

3. If not, could the principle of promissory estoppel be a ground for setting aside the statutory demand?

The standard of proof

The court may set aside a statutory demand if 'the debt is disputed on grounds which appear to the court to be substantial' – rule 6.5(4)(b) of the Insolvency Rules 1986.

The burden of proof is on the applicant. Judge Hodge in *Collier* (correctly – see *Howard De Walden Estates v Aggio* [2007] EWCA Civ 499) felt himself bound by comments made by Roger Kaye QC, sitting as a deputy judge of the *Chancery Division in Kellar v BBR Graphic Engineers (Yorks)* Ltd [2001] 1 All ER(D) 416.

Roger Kaye QC held that the required standard was lower than the 'real prospects of success' test, required for part 24 (application for summary judgment) of the Civil Procedure Rules, and it would be sufficient if the debtor could show a 'genuine triable issue'.

In *Collier*, the court disapproved of this distinction. It ignored the word 'genuine' in the practice direction and gave no weight to the word 'substantial' in the Insolvency Rules. Thus, the standard of proof required on an application to set aside a statutory demand under rule 6.5(4)(b) is the existence of real prospects of success.

Was there consideration for the part payment?

Mr Collier argued that, by moving from a joint to a several debtor, he had suffered detriment. For example, he had lost the chance of being discharged from liability, if he had predeceased his partners, or if the creditor had released the other partners, without reserving rights against Collier. However, there was no evidence that these matters formed part of the agreement.

There could have been consideration if Mr Collier had said that he would not petition for his own bankruptcy if the creditor limited his liability to a third of the debt. Again, there was no evidence of any such statement.

Accordingly, the mere fact of an agreement to convert a partner's liability from joint to several did not create a firm exception to the rule.

Promissory estoppel

Lady Justice Arden, giving the lead judgment, referred to 'the doctrine of promissory estoppel, which... in particular Lord Denning developed to meet the hardship created by the rule', starting with *Central London Property Trust v High Trees House Ltd* [1947] 1KB 130.

She considered that Mr Justice Denning's 'brilliant obiter dictum' to a significant degree achieved, in practical terms, the recommendation of the Law Commission in 1937.

Promissory estoppel will only apply if these conditions are satisfied:

- A representation by one party that he will not insist on his strict legal rights;
- An intention by that party that the other party will act on that representation;
- Actual reliance by that other party, and an overriding condition; and
- The circumstances make it inequitable for the representor to resile from the representation.

The appeal court held that Mr Collier had established a triable issue and allowed the appeal.

Where are we now?

Applications to set aside statutory demands are governed by the Insolvency Rules. By equating the standard of proof for such applications with the CPR standard for resisting summary judgment, the appeal court has raised the bar for success for often unrepresented debtors. It is apparent that they will now need to produce clear evidence in support of an assertion that they have a defence to ensure they surmount this hurdle.

The application of the doctrine of promissory estoppel to contemporary compromises is welcome, against a background of the encouragement of mediation and alternative dispute resolution.

This should benefit both realistic creditors and debtors. Practitioners should, however, ensure that any negotiated compromise gives the creditor a benefit which he would not otherwise obtain.

District Judge Duncan Adam sits at Swindon County Court