A Kiss and Handshake Promise to Pay Part of a Pre-Existing Debt Needs Careful Consideration

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PRACTICES Private Clients and Estate Planning, Family Wealth and Estate Planning, Litigation

English High Court considers whether there was good consideration for an oral variation of a settlement agreement related to sale of valuable antique textiles.

Sometime in the spring of 2014 two Iranian businessmen and antiquities dealers, London based Mr. Shavleyan and LA resident Mr. Simantob, kissed and shook hands on a deal about the payment of the balance of a debt due under a 2010 settlement agreement. This unfortunately did not resolve their long running dispute about the proceeds of sale of valuable antique textiles sold at Sotheby's in London. Their relations became more difficult, and they subsequently disagreed about the legal effect of this kiss and handshake deal, which was not put in writing and signed.

Mr. Shavleyan, who owed monies to Mr. Simantob, contended that they had agreed an oral variation capping his payment obligations under the settlement agreement. Mr. Simantob said that they had only agreed an instalment payment plan on account of outstanding but unchanged obligations. If it was the former the legal effectiveness of the oral variation was in doubt because an agreement to pay only part of a pre-existing debt must be supported by good consideration in English law. The dispute came before London's High Court (*Dan Simantob v Yacob Shavleyan t/a Yacob's Gallery* [2018] EWHC 2005 QB).

Was there an oral variation intended to discharge the obligations under the settlement agreement?

In assessing different versions of events contended for by the parties, the English courts will consider whether they are supported by the documents and other evidence, and satisfy the balance of probabilities test. In ascertaining what the parties intended, the court is concerned with the objective not actual intentions of each party. In this case, for those operating in the art market, it is interesting to note that the objective facts which provided the context in which these two dealers conducted their business lead the court to examine the influence of business, family and community ties in the London and in particular Farsi speaking art business community.

In the first place, it was important to understand the 2010 settlement agreement, which obliged Mr. Shavleyan to pay Mr. Simantob the sum of US$1.5 million but also included a potentially crippling $1,000 per day interest clause payable for each day on which the debt was not paid in full. Mr. Shavleyan made it known to Mr. Simantob afterwards that he considered the settlement agreement unconscionable and unfair. Notwithstanding that, Mr. Simantob did make a series of part payments at various times over the intervening years but not all that he owed so that interest continued to accrue rapidly on the principal having, as the court expressed it, the potential to drive Mr. Shavleyan towards ever increasing indebtedness which he could never satisfy. Indeed, when Mr. Simantob commenced proceedings in April 2016, although Mr. Shavleyan had paid US$1.3 million of the principal, the interest claimed was in excess of US$2 million. However, Mr. Shavleyan contended that, having paid US$1.1 million of the principal before the 2014 deal, the oral variation capped his liability at US$800,000 (comprising the balance of the principal in the sum of

US$400,000 payable on an instalment basis, and an obligation to pay a further US$400,000 substituted for the original interest obligation).

A notable feature of their business dealings was that Mr. Shavleyan had given a series of post-dated cheques to Mr. Simantob, most of which were not presented at the risk of being dishonoured and were replaced by further cheques. Before they expired they were substituted with new post-dated cheques with a modest uplift by way of "interest." The parties continued other business dealings and entered into three separate consignment agreements each expressly stating that they had nothing to do with the settlement agreement, apart from the third consignment agreement which stated that there was an unfulfilled obligation under the settlement agreement as at June 2014 of US$800,000 to be paid in eight cheques of US$100,000 each to be deposited each month until paid in full. Subsequent communications indicated that the parties treated the US$800,000 figure as the extent of the outstanding indebtedness. In late 2015, Mr. Shavleyan provided four new post-dated cheques for a total of US$900,000 (inclusive of modest interest) of which one in the sum of US$220,000 was presented and dishonoured. He subsequently paid US$200,000 to Mr. Simantob, while Mr. Simantob obtained summary judgment in his favour in October 2017 for US$600,000, based on the acknowledgement of debt in the third consignment agreement.

In short, the High Court's decision on the oral variation would determine whether or not Mr. Shavleyan had any further outstanding obligation beyond the amount awarded under the summary judgement. In deciding what, objectively ascertained, their obligations were, the court situated this dispute in the context in which the parties conducted their business including their longstanding business, family and community ties, the common practices of those engaged in the antiquities trade in London, the culture of fostering and preserving good business relations between those involved in the London antiquities market, in particular the Farsi speaking community in that market, which had led to the 2010 settlement agreement but also, in the court's finding, lead Mr. Simantob to forgo the financial benefit of the interest clause and accept weak security in the form of post-dated cheques to avoid causing financial damage to his business associate.

The court was therefore satisfied that on the balance of probabilities the deal sealed by the kiss and handshake had varied the settlement as to the amount of Mr. Shavleyan's outstanding liability, which was capped at US$800,000, and the timing of payments by instalments, and also that it was intended on the objective facts to be legally binding.

Was there good consideration? Give me a horse, a hawk, or a robe etc!

The question then for the court was whether the variation was supported by good consideration so as to be legally effective. It needed to be supported by good consideration if it was intended to vary the obligation to pay the money due under the settlement agreement by substituting an obligation to pay less money of that same debt later. Under English law, based on extremely old case law (*Foakes v Beer* (1884) 9 App Cas 605 citing *Pinnel*'s case from 1601), an offer to pay part of a debt cannot satisfy the obligation to pay the whole debt because good consideration cannot be found in the performance of an existing contractual duty. There needs to be some benefit of substance to the creditor added, and not merely a practical benefit, for there to be accord and satisfaction. The guidance offered by Lord Coke in *Pinnel*'s case, archaic but no less apt today, was that the gift of a horse, hawk, robe etc. in satisfaction is good for part payment of the whole and part payment at a different place may also be in satisfaction of the whole.

In the present case, the court noted that by concluding a sensible variation of the settlement agreement Mr. Simantob would no doubt have gained the approval of his peers given the prevailing culture of his business community but rejected such a cultural benefit as being too close to the

expectation of a practical benefit. The court also rejected the potential practical benefit to Mr. Simantob to hold the eight cheques in his hand as a form of security, albeit weak security, as that did not add anything of substance to the promise pay in instalments. There was also the benefit of continued access to Mr. Shavleyan's business and expertise for other business dealings during the dispute but the court considered that did not constitute an added benefit as such continued access was mainly a product of their cultural, community, family and business ties not a direct *quid pro quo* for the variation. The terms of the three consignment agreements did not constitute good consideration for the oral variation of the settlement agreement, since these were separate self-contained transactions which had nothing to do with the variation of the settlement agreement, although the third consignment agreement evidenced the oral variation.

The court however concluded that, in circumstances where Mr. Shavleyan had always disputed the validity of the settlement agreement, this was not a case of a promise to pay part only of the pre-existing debt but of a compromise of potential claims as well as cross-claims related to the disputed debt under the settlement agreement involving consideration on both sides. It did not matter that the defences to the validity of the settlement raised by Mr. Shavleyan (duress and an argument that the interest was penal) subsequently failed in the summary judgment proceedings, since they might have succeeded or at least have been found arguable. In English law, the compromise of potential claims to avoid the settlement agreement would be good consideration. The court therefore held that the oral variation of the settlement agreement was supported by good consideration and binding.

A final word on consideration

This case did not create new law but highlights that the issue of consideration for part payment of a debt may not be straightforward. Like waiting ages for a London bus, and then two turn up at the same time, this issue came up in another case this year which went all the way to the Supreme Court (*Rock Advertising Ltd. v MWB Business Exchange Centres Ltd* [2018] UKSC 24). However, that appeal turned on the issue of the effectiveness of a no oral modification clause and the court did not have to address the issue of consideration for part payment of a debt and refrained from doing so obiter. Lord Sumption JSC in that case acknowledged that the issue was a difficult one and, while the position under the old case law was ripe for re-examination, it was preferable that such a re-examination should happen when the issue comes before an enlarged panel of the court and in a case when the decision would not be obiter, in case the position was to be overruled or its effect substantially modified. The issue of consideration for a part payment of a debt is one to watch in the future.

For those operating in the art world, there are some other key takeaways from this case. The art world has a legacy of oral agreements but these business practices can unfortunately be a rich vein of disputes that arise in the art sector. If relations become difficult, and the dispute comes before the English courts, there will need to be a detailed examination of all the evidence in order for the court to decide what evidence supports one party's account rather than the other. Contemporaneous documentary proof, oral evidence such as the recollections of the parties and any other persons present when alleged events took place, which unsurprisingly may to a greater or lesser degree diverge on crucial points, will all be extensively examined. When weighing up the oral evidence, the court will also be guided by its overall impression of the reliability and motivations of witnesses, and other evidence, such as here the nature of the market and community in which the dealers were operating, all of which may persuade the court to prefer one case over another. Parties have an interest in ensuring that relations are on the right footing and agreements put in writing in sufficient form and signed may avoid difficult questions about what has been agreed

arising at a later stage. Take extra care with a kiss and handshake deal on a part payment of an existing debt if you don’t want an unwelcome and costly surprise!