Eidie Vab Breukelen v. Koh Cheng Seah & Ors.

District Court Summons No. 3006 of 1977

The plaintiff[1] was the owner of 2 horses called Jaguar and Ontario. They were trained by one T, from 1973 to 1975, who was also responsible for taking out the insurance policies on the horses. In March, 1975, the plaintiff entered into an agreement with the defendant,[2] a horse trainer. Under this agreement, the defendant was to be in charge of the keeping, feeding, grooming, training, running, attending and other incidental matters with regard to the said horses. The plaintiff then instructed the defendant to collect the insurance policies in respect of the horses from the former trainer, and requested him to renew them upon expiry for the sum of $10,000/- each.

After the defendant had taken over the training of the 2 horses, the plaintiff met him on one or two occasions at the Singapore Turf Club. On these occasions, the plaintiff asked the defendant about the condition of his horses and whether the defendant had collected the insurance policies from *T.* He reminded the defendant to renew them upon expiry. The defendant "assured him not to worry as everything was well taken care of."[3] The plaintiff had also on 3 separate occasions written letters to the defendant reminding him to collect and attend to the renewal of the insurance policies.

The horse, Ontario, ran on 23 August 1975, met with an accident and was subsequently put to sleep. The plaintiff was then informed by the defendant that the horse was not insured as the insurance policy had expired about 3 weeks before the accident. In an action that the defendant brought against the plaintiff and others, the plaintiff counterclaimed against him a sum of $10,000/- for failing and neglecting to insure his horse.

The defendant maintained that insuring the horses was not the duty of the trainer[4] *i.e.* it was not a term of the contract under which he took charge of the horses. He further denied that the plaintiff had requested him to insure the 2 horses nor that he had agreed to the request *i.e.* there was no promise on his part to insure the horses. Finally, the defendant maintained that even had there been a promise, it was not enforceable for want of consideration.

Held: (1) Renewing the insurance policy on the 2 horses was not a term of the agreement. It was merely a request by the plaintiff to the defendant. Thus, the defendant was under no (contractual) duty to insure the horses upon expiry of the policies.

(2) Even assuming there had been a promise to renew the insurance policies, the defendant would not be liable because there was no

[1] The first defendant in the action, but called the plaintiff for the purposes of this counter claim. See Grounds of Decision, D.C. Summons No. 3006 of 1977 at 1C.

[2] The plaintiff in the action.

[3] Grounds of Decision, *supra.,* n. 1 at 4C.

[4] He did concede, however, that the trainer might obliged if requested to do so. See Grounds of Decision, *supra.,* n. 1 at 2D.

consideration for the promise. To allow the plaintiff to succeed upon such a promise is simply to ignore the necessity of consideration. (3) The request to renew the insurance policies was made after the agreement for the training of the horses had been made. Therefore, there is no merit in the submission that there is a collateral agreement in that the contract for the training of the horses was made in consideration of the defendant agreeing to renew the insurance policies.[5]

[Summary by T. Shue]

Commentary: The most notable feature of this decision is clearly its reinforcement of the 'orthodoxy' of the doctrine of consideration.[6] It is conventional wisdom that "no legal system has ever enforced all promises and no legal system ever will."[7] We are all agreed that there should be a way of separating promises that are to be enforced by the law from those that are not. But can we all agree that the doctrine of consideration, in its purest form, is the only way, or even the best way?[8]

Here we have a promise by the defendant to the plaintiff that he would, upon their expiry, renew the insurance policies on the plaintiff's 2 horses.[9] The Court found that nothing had been given in return for this promise and "to allow the plaintiff to succeed upon

[5] In this regard, attention must be drawn to some ambiguous statement in the Grounds of Decision, *supra.,* n. 1 at 2B/C: "The defendant agreed and it was on that basis that the contract was executed."; and at 3D: "He then requested the defendant to insure the horses for him upon expiry. To which the defendant agreed." It is not clear whether, by these statements, the Court was (a) making a finding of fact (i) that the contract was made on the understanding that the defendant was to renew the insurance policies, thus making it a term of the contract; or (ii) that the agreement to hire the defendant as the trainer was made in return for the agreement by the defendant to renew the insurance policies, thus giving support to the submission of a collateral agreement; or (b) merely restating the plaintiff's allegations.

[6] In "Courts, Consideration, And Common Sense" (1977) 27 Univ. of Toronto L.J. 439, 440, B.J. Reiter refers to as the "orthodox view" the use of "consideration" as "the major premise of a proposition prima facie directing enforcement (of a promise) when present, and certainly denying enforcement when absent." Of course, nowhere is the formal structure of this orthodox view more sacredly enshrined than in the doctrinaire expositions that are to be found in traditional English texts on Contract. See, *e.g.* Furmston, Cheshire and Fifoot's *Law of Contract* (9th Ed. 1976) at Chapter 2; Treitel, *The Law of Contract* (4th Ed. 1975) at Chapter 3; Guest, Anson's *Law of Contract* (24th Ed. 1975) at Chapter 3.

[7] Reiter, *supra.,* n. 6 at 439. See also, Eisenberg, "Donative Promises" [1979] 47 Univ. of Chicago L. Rev. 1. For an interesting perspective on traditional contract rules and its congruence with optimal enforcement of promises, see Goetz and Scott, "Enforcing Promises: An Examination of the Basis of Contract" 89 Yale L.J. 1261 (1980).

[8] For an excellent article on the inadequacies of using consideration doctrine as an all-purpose total and the mindlessness that often characterises its application, see John Swan, "Consideration and the Reasons for Enforcing Contract" (1976) Univ. of West Ontario L. Rev. 83.

[9] As much as the defendant had denied that the plaintiff had ever made a request, the Court was satisfied, from the evidence adduced, that the latter had made such a request and the defendant had in fact received the 3 letters reminding him to renew the policies. See Grounds of Decision, *supra,* n. 1 at 6B. There is no finding of fact that the defendant had refused the request. At paragraphs 2B/C and 3D of the decision, there were statements that the defendant had agreed. See *supra.,* n. 5. The assumption is that the defendant had thus made a promise to renew the insurance policies.

such a promise is to ignore the necessity of consideration."[10] It is apparent from the tenor of this statement that "the proposition that consideration was necessary was accepted as axiomatic"[11] and any suggestion otherwise smacks of heresy. Therefore, the absence of consideration is necessarily fatal to the plaintiff's claim, never mind that he had relied, and reasonably too one might add, on the promise and suffered loss.

Are gratuitous promises, promises for which the promisee has given nothing in return, never enforceable? In at least one common law jurisdiction, the U.S., gratuitous promises have been enforced on the basis that the promisee's *reliance is sufficient to constitute consideration.*[12] The fact that enforcement is possible only after characterising the promisee's reliance as consideration, of course, reflects bondage to the classical doctrine.[13] It was only after section 90 of the Restatement of Contracts was conceived that reliance came to be regarded as an independent basis, in its own right, for the enforcement of promises.[14] This principle of reliance "customarily referred to as the principle of promissory estoppel" and "now an accepted part of American Contract Law"[15] have revolutionised the treatment of relied-upon gratuitous promises.[16]

What of the status of these same relied-upon gratuitous promises across the Atlantic? We are, after all, concerned primarily with the English position.[17] It has been observed that the English species of promissory estoppel, *a la High Trees House,*[18] arose from the "de-

[10] Grounds of Decision, *supra.,* n. 1 at 8A.

[11] As in the cases that Swan discusses in relation to "going transactions adjustments", *supra.,* n. 8 at 85.

[12] See the American cases of *Kirksey* v. *Kirksey* 8 Ala. 131 (1845); *Brawn* v. *Lyford* 103 Me. 632, 69A, 544 (1907); *Thome* v. *Deas* 4 Johns 84 (NY 1809). See also Fuller & Eisenberg, *Basic Contract Law* (1972) Chapter *6,* "Reliance on a promise as consideration".

[13] Eisenberg, *supra.,* n. 7 at 19 notes that the American courts "would not enforce relied-upon donative promises as such, but instead provided relief only when the underlying transaction could be artificially construed as a bargain." He sees such judicial contrivance as "the product of a conceptual problem — specifically, the dogma that the category consideration is generally co-extensive with the category bargain, and that a donative promise was therefore without consideration and unenforceable whether relied upon or not." See also Henderson, "Promissory Estoppel and Traditional Contract Doctrine" 78 Yale L.J. 343 at 376-380 (1969).

[14] Eisenberg, *supra.,* n. 7 at 19.

[15] *Ibid.*

[16] Away from the American scene, it has been argued that "it is erroneous to suggest that the only promises enforced are contracts supported by consideration." See Reiter, *supra.,* n. 6 at 442 *et seq.* As an example of enforcement of such promises, Reiter refers to the liability of persons who make gratuitous promises, and having undertaken performance, fail to perform the job. For authority, he cites the case of *Baxter* v. *Jones* (1903) 6 O.L.R. 360 (C.A. Ont.) where "liability was, imposed on an insurance agent who had gratuitously undertaken to give notices to an insurer and had failed to do so, with consequent loss to the Plaintiff," facts closely similar to those in the instant case.

[17] The conventional wisdom is that contract law being the paradigm of "mercantile law", the Singapore position must necessarily be governed by the English position by virtue of s. 5, Civil Law Act, Cap. 30, Singapore Statutes, Rev. Ed. 1970, since amended by Civil Law (Amendment No. 2) Act 1979 (No. 24).

[18] *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130 (K.B.D.).

ficiencies of the doctrine of consideration" and "the fact that the device has been found useful and necessary is a reflection of the feeling that some promises should be enforced without consideration."[19]

Can the plaintiff in this case avail himself of the doctrine of promissory estoppel as developed in the English courts after *High Trees House?* He must show a promise, either by words or by conduct, and that its effect must be clear and unambiguous.[20] It is clear from the evidence adduced before the Court that the defendant had by conduct, if not by words, made the plaintiff a promise.[21] It is equally undisputed that this promise was clear and unambiguous: the defendant would renew the insurance policies upon expiry. There is some doubt as to whether a gratuitous promisee must have acted to his detriment in reliance of the gratuitous promise.[22] However, even if we reject the more liberal position adopted by Lord Denning that the gratuitous promisee need not show detrimental reliance,[23] the strength of the plaintiff's claim is undiminished. He has clearly relied on the promise to his detriment: it cannot seriously be argued that had the defendant refused his request, the plaintiff would have allowed the insurance policies on his horses to lapse.

The only obstacle that might possibly be in the way of the plaintiff's claim now seems to be the notorious *Coombe* v. *Coombe*[24] limitation. No self-respecting student of English contract law goes through law school without intoning, at least once, that the principle of promissory estoppel can only be "used as a shield and not as sword" *i.e.* the principle "does not create new causes of action where none existed before."[25] It has been suggested that the *Coombe* v. *Coombe* limitation is necessary to reconcile an illegitimate extension of the principle of estoppel with orthodox doctrine.[26] But can the limitation as expounded in *Coombe* v. *Coombe* be applied equally to all relied-upon gratuitous promises? An affirmative answer to this question has been castigated as "one of the best examples of the pernicious consequences that flow from the unitary concept of consideration."[27] The arguments against are too convincing to ignore. The limitation must be evaluated against the facts of the case in which it was propounded: the contract alleged by the wife in *Coombe*

[19] Swan, *supra.,* n. 8 at 91-94.

[20] *Woodhouse A.C. Israel Cocoa, Ltd., S.A.* v. *Nigerian Produce Marketing Co., Ltd.* [1972] A.C. 741. See also Cheshire & Fifoot, *supra.,* n. 6 at 91-93.

[21] This is the inescapable conclusion from the Court's findings that plaintiff had made the request on more than one occasion, and over a period of time, had sent the defendant 3 letters reminding him of his undertaking. All this, without any sign of refusal or rejection by the defendant. See Grounds of Decision, *supra.,* n. 1 at 2-6.

[22] Cheshire & Fifoot, *supra.,* n. 6 at 95-96.

[23] See *W.J. Alan & Co., Ltd. v. El Nasr Export and Import Co.* [1972] 2 Q.B. 189 at 221.

[24] [1951] 1 All E.R. 767 (C.A.).

[25] *Ibid., per* Lord Denning. The American position is not thus limited: s. 90, Restatement of Contracts, allows promissory estoppel as a cause of action. See also Gilmore, *Death of Contract* (1974) at Parts III & IV in relation to the saga of drafting s. 90.

[26] Cheshire & Fifoot, *supra.,* n. 6 at 72. These attempts at reconciliation have raised practical and logical difficulties in the Canadian Courts, see Reiter, *supra.,* n. 6 at 479-482.

[27] Swan, *supra.,* n. 8 at 92-94.

v. *Coombe* was one the court would not have enforced in any case, for social policy reasons quite independent of consideration doctrine.[28]

Here, it must be remembered that the plaintiff and defendant are already in a contractual relationship. Unlike the family setting of *Coombe* v. *Coombe,* the parties here were at arms-length and in this kind of "commercial context", a promise even if gratuitous should not be lightly treated, especially when the promisor knows, or reasonably should know, that it will be relied on by the promisee. The existence of consideration is only one of a number of reasons for enforcing promises, and reliance on the promise by the promisee is another good reason for enforcement.[29] Or as have been argued very convincingly, the enforceability of any kind of promise should depend on both substantive and administrative criteria: "the intensity of injury resulting from breach, the presence of independent social policies favouring enforcement, and the extent to which failure to provide remedy will result in unjust enrichment" being the substantive criteria; "whether the conditions for enforcement can be reliably, readily, and suitably determined in the relevant forum" being the administrative criteria.[30] Applying these criteria to gratuitous promises, such as the one in the instant case, a relied-upon promise should be enforced to the extent of reliance.[31] In this case, the plaintiff's damages would be the face value of the insurance policy on Ontario, $10,000/-, less the amount that he would have incurred as premiums (up to the date of the accident) had the policy been renewed as promised.[32]

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[28] *Ibid.*

[29] Swan, *supra.,* n. 8 at 120-121.

[30] Eisenberg, *supra.,* n. 8 at 32.

[31] *Ibid.*

[32] In a hypothetical which is, in fact, on all fours with the instant case, Eisenberg, *supra.,* n. 8 at 30, demonstrates how the injured promisee should be compensated: "A makes a donative promise to buy on B's behalf fire insurance covering B's goods, B accordingly forbears from insuring the goods himself, A does not buy the policy, and the goods are destroyed by fire. If the goods had been insured, the premium would have been $50/- and the insurance company would have paid $2000/- to make good B's loss. B's damages against A should be, not S2000/-, but S1950/-, his net proceeds had he insured the goods himself."