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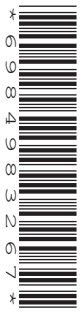
A2 GCE LAW

G156/01/RM Law of Contract Special Study

SPECIAL STUDY MATERIAL



Duration: 1 hour 30 minutes

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G156 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extract from *Keeping Contract In Its Place – Balfour v Balfour and the Enforceability of Informal Agreements*. Stephen Hedley. 5 Oxford Journal of Legal Studies 3, 391–415. 1985. Pp391–396

Balfour v Balfour sounds a simple case. A civil servant posted to Ceylon returned to England on leave with his wife. When his leave was up, his wife (who suffered from arthritis) stayed behind on medical advice. The husband assessed the sum she would need for maintenance at £30 per month, and promised to pay that sum regularly until he returned. However, soon after his return to Ceylon he wrote to say it would be better if their separation was permanent. The wife sued on the promise of maintenance. Sargant J decided in her favour, but the Court of Appeal (Warrington, Duke and Atkin LJ) reversed his decision.

[The Court of Appeal] was unanimous in refusing to find a contract. They had no real answer to Sargant J's argument for the presence of consideration; and Duke and Atkin LJ at least were prepared to assume that if normal principles were applied, Mrs Balfour must win. What was needed, then, was an excuse *not* to apply normal principle. All three judges found it in the mere fact that the parties were husband and wife, saying that this factor alone displaced the inference of a contract. …

… while the courts had previously refused to enforce agreements where the parties had deliberately *excluded* legal sanctions, this was the first time they had denied liability simply because the plaintiff could not prove that legal sanctions were intended. *Balfour v Balfour* introduced a new obstacle for plaintiffs, which had not been there before.

… the tests ostensibly aimed at discovering the parties' intentions almost invariably lead the courts to *impose* their view of a fair solution to the dispute. …

In cases where there was no intention either way, this insistence that the parties must have had some intention or other forces the courts to *invent* an intention. Not unnaturally, they invent the one that leads to the most reasonable result, on the ground that the parties must be taken to be 'reasonable people' unless the contrary is shown. In *Parker v Clark*, for example, the Parkers sold their house and moved in with the Clarks, Devlin J found that the Clarks' promise to leave the house to the Parkers in their wills was intended to bind them legally: 'I cannot believe … that the defendant really thought the law would leave him at liberty, if he so chose, to tell the Parkers when they arrived that he had changed his mind, that they could take their furniture away, and that he was indifferent whether they found anywhere else to live or not.' The opposite happened in *Coward v Motor Insurers' Bureau,* where the Court of Appeal were considering an agreement between construction workers that one should drive the other to work on his motorcycle in return for a contribution to the cost of the petrol; they were not prepared to hold this agreement enforceable. Upjohn LJ's judgement is another example of a judge explaining precisely why he thinks liability inappropriate, but claiming that he is only spelling out what the parties intended, not his own opinion: 'The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or of different hours of overtime, or incompatibility arising, make it most unlikely that either contemplated that the one was legally bound to carry and the other to be carried to work.' …

Moreover, when there *are* indications whether the parties intended liability, it is all too easy for the courts to ignore them. Two main techniques are used to ignore these indications where they conflict with the view the court wishes to come to. Firstly, the court can arbitrarily narrow the issue, to make the indications appear irrelevant. …

The second technique for ignoring actual manifestations of intention is the 'principle of objectivity', which states that if the parties have 'to all outward appearances' contracted, then neither can escape by proving a subjective lack of intention. This is a useful device for a court that wishes to exclude evidence of an intention inconsistent with the one it wishes to find. But this, too, is a rule the judge can ignore when it proves inconvenient.

[In *Balfour v Balfour* was Atkin LJ] talking about the *actual* intentions or about what the law *should regard those intentions as being*? Was he talking, in other words, about facts or about policy?

In my view, he was plainly talking about policy. … Certainly, legal remedies are the last thing the parties to a family arrangement think of as a way of dealing with breaches of the arrangement; … *But the situation is not very different in business.* Studies of business practice show that many business executives are indifferent whether their agreements constitute binding contracts; that business dealings are regulated more by mutual trust and shared conventions on what constitutes civilized behaviour than by what parties are legally entitled to… ;

SOURCE 2

Extract adapted from *Balfour v Balfour* [1919] 2 KB 571 (CA)

Lord Justice Atkin:

The defence to this action ... is that the defendant, the husband, entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. … To my mind, those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. ... they are not contracts because the parties did not intend that they should be attended by legal consequences.

To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations that could be enforced in the Courts. … All I can say is the small Courts of this country would have to be multiplied one hundred fold if these obligations were held to result in legal obligations. ... Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is the natural love and affection that counts for so little in these cold courts.

SOURCE 3

Extract from *Great Debates in Contract Law*. 2nd Edition. Jonathan Morgan. Palgrave. 2015. Pp43–46

'Intention to create legal relations' is arguably a 'misnomer' as it has little to do with intention! Rather, it is an instrument used to draw the boundaries of contractual obligation. …

Save when the parties have (exceptionally) made them explicitly clear, there is very little evidence of actual intentions about legal enforceability. For commercial parties as much as for lovers or families, litigation is literally the last thing on their minds when making an agreement, since few relationships survive a court case. Therefore courts trying to uncover intention are 'inevitably driven to impose their own view of whether the agreement *ought* to be enforced.' … This was the very point of the synthesis of the doctrine by Atkin LJ in *Balfour v Balfour*. The courts wished to control the novel invocation of contract law in domestic litigation (e.g. between separated spouses). The idea of 'intention' could be used to keep contract in its place. … Consideration could not be used as the control device since some domestic promises are unquestionably bilateral, but the courts still hold them to be based on trust and unenforceable. …

Hedley identifies positive rules laid down by the courts that bear no relation to any parties' actual intentions. … Business contracts are nearly always enforceable. Conversely, parties not 'at arm's length' do *not* enter into legally enforceable commitments except where one party has performed. That other party will be required to shoulder the burden of performance having received the benefit of the consideration. Purely executory social arrangements will be unenforceable. But none of this truly depends on intention, save where it is *express*.

It is one thing to 'keep contract in its place', but what *is* its proper place? Atiyah notes the everyday observation that the market has no place in social relations, citing the abolition of liability for breach of promise of marriage, and the unenforceability of surrogate motherhood agreements. On the other hand, Fried objects to the idea that legal contracts should be the exclusive preserve of some 'separate merchant class'. Michael Freeman argues that the boundaries of the 'private' in family life have shifted so that the presumption against contractual obligation should be removed: this would allow greater autonomy in regulating the incidence of marriage and relationships. But this is a highly controversial proposition. When the Supreme Court recently decided to enforce pre-nuptial agreements Baroness Hale vigorously dissented. She argued that giving such effect to freedom of contract disadvantages economically weaker spouses, usually (although not *in casu*) wives, and such a socially important change should be made by Parliament rather than the (male-dominated) judiciary. Hugh Collins warns, more generally, that enforcing contracts between cohabiting partners forces relationships into the currency of exchange rather than 'more open-ended commitments of sharing, reciprocity and loyalty'. …

The strong presumption that commercial agreements are legally enforceable may be rebutted by clear words to that effect. This is generally accepted in Western legal systems. However, Rudden notes 'dark suspicion' from many jurists who cannot understand why anyone would prefer '*vacuum juris* to *vinculum juris*'. In fact there may be various good reasons for this. Scrutton LJ suggests in the leading English case [*Rose and Frank v Crompton* [1923] 2 KB 261] that parties may prefer settling disputes among themselves to avoid the 'necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean'. … Given the presence of effective social sanctions, rational parties might well prefer an 'honourable obligation' to the costs and delays of the law. … Sometimes indeed, the courts have recognised that the very nature of an agreement is to be unenforceable, as with 'letters of comfort'. The consequences of the 'comforter' refusing to honour its 'moral obligation' under the letter are not the court's concern. [*Kleinwort Benson Ltd v Malaysia Mining Corp* [1989] 1 All ER 78] … On the other hand, to the extent that the legal obligations in contract have a protective (paternalist) function, such clauses may see weaker parties bargaining away their protection. So some limit may, in these cases, be necessary.

SOURCE 4

Extract from *Merritt v Merritt* [1970] EWCA Civ 6

Husband and wife married as long ago as 1941. After the War in 1949 they got a building plot and built a house. …

But, unfortunately, … the husband formed an attachment for another woman. He left the house and went to live with her. The wife then pressed the husband for some arrangement to be made for the future. On 25th May they talked it over in the husband's car. …

Before she left the car she insisted that he put down in writing a further agreement. It forms the subject of the present action. He wrote these words on a piece of paper:-

> "In consideration of the fact that you will pay all charges in connection with the house at 133 Clayton Road, Chessington, Surrey, until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property into your sole ownership.
> Signed, John Merritt. 25th May, 1966."

The wife took that paper away with her. She did, in fact, over the ensuing months pay off the balance of the mortgage …

The wife asked the husband to transfer the house into her sole ownership. He refused to do so. …

The first point taken on his behalf by Mr. Thompson is that the agreement was not intended to have legal relations. It was, he says, a family arrangement such as was considered by the Court in *Balfour v Balfour* … so the wife could not sue upon it.

I do not think those cases have any application here. The parties there were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations. …

"when husband and wife, at arm's length, decide to separate, and the husband promises to pay a sum as maintenance to the wife during the separation, the Court does, as a rule, impute to them an intention to create legal relations."

In all these cases the Court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people regard the agreement as intended to be binding?

SOURCE 5

Extract from *Contract Law Text Cases and Materials*. 7th Edition. Ewan McKendrick. Oxford University Press. 2016. Pp 278, 282–3, 285–6

The presumption that the parties to domestic agreements do not intend to create legal relations can be rebutted in a number of different ways. … the cases in which the presumption has been rebutted exhibit some common features. In the first place the context in which the agreement was concluded has often been a factor. … The presumption is more likely to be rebutted in the case where the relationship between the parties is approaching the point of break-down (see *Merritt v Merritt*). Similarly, where the context in which the agreement is reached is a commercial one, as in the example of an agreement made in connection with the running of a family business, a court is more likely to conclude that the presumption has been rebutted.

Secondly, the presumption may be rebutted where the parties have acted to their detrimental reliance upon the agreement that has been concluded between the parties.

A similar presumption operates in the context of social agreements, where the courts presume that the parties did not intend to create legal relations. In *Lens v Devonshire Social Club* (The Times, 4 December 1914) it was held that the winner of a golf competition was not entitled to sue in order to recover the prize (although many competitions, for example those in national newspapers, do now give rise to legal relations between the competitors and organizers of the competition…)

In the case of commercial transactions the courts presume that the parties did intend to create legal relations and that presumption is not an easy one to displace. … The strength of the presumption is such that the issue does not arise frequently in commercial litigation. One case in which it did arise, and which produced a division of judicial opinion, is the decision of the House of Lords in *Esso Petroleum Ltd v Commissioners of Customs and Excise* (1976, 1 WLR 1). Esso devised a sales promotion scheme for its petrol under which it offered to give away a World Cup coin to every motorist who purchased four gallons of Esso petrol. … By a bare majority, [the House of Lords] concluded that there was an intention to create legal relations. …

The fact that the coins had little intrinsic value is often used by commentators to demonstrate the strength of the presumption in favour of legal relations in a commercial context.

SOURCE 6

Adapted extract from *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 (CA)

Rose and Frank Co was the US distributor of carbon paper produced by JR Crompton. In 1913, they signed a new contract which included the following 'remarkable' clause:

'This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts ..., but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based upon past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.'

In the High Court, this clause was held to be unenforceable by Bailhache J who thought it repugnant to the intention of the rest of the contract and contrary to public policy. The Court of Appeal reversed that decision and their reasoning regarding the enforceability of the clause was expressly approved of by the House of Lords.

Atkin LJ:

The first question in this case is whether the document signed by the defendants on July 11, 1913, with a counterpart signed by the plaintiffs on August 12, 1913, constituted a contract between the parties. To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour v Balfour*. If the intention may be negatived impliedly it may be negatived expressly. In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both. In this agreement I consider the clause a dominant clause, and not to be rejected, as the learned judge thought, on the ground of repugnancy.