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A2 GCE LAW

G156/01/RM Law of Contract Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G156 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

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

The defendant and claimant were husband and wife and lived in Ceylon (now Sri Lanka). They returned to England for a holiday but at the end of the holiday the husband returned alone as his wife had been advised to remain in England by her doctor. The wife alleged that her husband had orally promised to pay her £30 per month until she returned to Ceylon. They subsequently agreed to live apart. The wife brought an action to enforce the agreement and was successful at first instance. The defendant appealed to the Court of Appeal.

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. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves ... by which the husband agrees that he will pay to his wife a certain sum of money per week, or per month, or per year, to cover either her own expenses or the necessary expenses of the household and of the children of the marriage. ... 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. ... [T]hey 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. ... Not only could [a wife sue her husband] for his failure in any week to supply the allowance but [the husband could sue the wife] for her non-performance of [her obligation to maintain the house and look after the children]. 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 realms of contracts altogether. The common law does not regulate the forms of agreements between spouses ....

The only question in this case is whether or not this promise was of such a class or not. ... [I]t appears to me to be plainly established that the promise here was not intended by either party to be attended by legal consequences. I think the onus was on the [claimant] and the [claimant] has not established any contract. ... I think that the judgment of the Court below was wrong and that this appeal should be allowed.

SOURCE 2

Extract adapted from *Contract Law, Text, Cases and Materials.* 4th Edition. Ewan McKendrick. Oxford University Press. 2010. Pp 281-283.

What is the basis of the presumption that the parties to domestic agreements do not intend to create legal relations? Is it to be found in the actual, albeit unexpressed, intention of the parties or its basis to be found in a rule of law or public policy? The judgment of Atkin LJ in *Balfour v Balfour* suggests that the initial presumption is derived from the law [or public policy] rather than the intention of the parties. The reasons he gave in support of the conclusion that the parties did not intend to create legal relations did not relate specifically to the position of Mr and Mrs Balfour but were of general application. Thus he advanced the floodgates argument ... and also reasons of policy about the role of the law in the regulation of family relationships. ... This is not to say the intention of the parties is irrelevant. Their intention is relevant but it is relevant to the rebuttal of the presumption rather than its formulation.

Are the reasons given in support of this [presumption against enforceability] of contract law from the regulation of family life valid? Professor Michael Freeman, a leading family lawyer has concluded that they are not. [He argues that *Balfour v Balfour* is based on an outdated, Victorian approach to families. He suggests that it no longer reflects the realities of modern family life.]

Professor Freeman's argument has its attractions in that it recognizes the changes that have taken place in family life since Victorian times. But it has not commended itself to all family lawyers. ... Once the law of contract is admitted into family life, how far do we allow it to go? [Professor Giddens has argued that parents' duties to their children should be enshrined in contracts. Is this really the best way to protect children?] The presence at the birth of a child of the family lawyer, ready and willing to draw up a contract between each parent and the child is not a prospect to be viewed with enthusiasm. ... As Professor Kahn-Freund stated back in 1952, "*Balfour v Balfour* is one of those wise decisions in which the courts allow the realities of life to determine the legal [rules]".

SOURCE 3

Extract adapted from *Jones v Padavatton* [1969] 2 All ER 616, CA.

A daughter was offered $200 a month if she would leave her job in Washington DC and move to London to study for the Bar. Despite not wanting to leave Washington, the daughter agreed and moved to London in 1962. No written contract was made and there was no specific agreement regarding how long this arrangement would continue. In 1964, the mother bought a house for the daughter to live in and told her to rent rooms out to create an income with which she could maintain herself instead of the $200 per month. In 1967, the mother sought possession of the house; the daughter had still not passed her Bar exams.

Lord Justice Danckwerts:

There is no doubt that this case is a most difficult one, but I have reached the conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements. *Balfour v Balfour* was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother.

Lord Justice Fenton Atkinson:

At the time when the first arrangement was made, the mother and daughter were, and always had been, to use the daughter's own words, "very close". I am satisfied that neither party at that time intended to enter into a legally binding contract, either then or later when the house was bought.

Lord Justice Salmon:

I agree with the conclusion at which Danckwerts LJ has arrived, but I have reached it by a different route. ... In the present case the learned county court judge ... came to the conclusion that on these very special facts the true inference must be that the arrangements between the parties ... were intended by both to have contractual force... .

The agreement was to last for a reasonable time. [The period of time that has already elapsed is certainly beyond a reasonable time and therefore the mother is entitled to possession of the house.]

SOURCE 4

Extract adapted from *Contract Law.* 9th Edition. Ewan McKendrick. Palgrave Macmillan Law Masters. 2009. Pp 106-107.

[Both domestic and social arrangements] are presumed not to give rise to legal relations... .

The presumption may ... be rebutted by evidence of contrary intention but a mere subjective intention to create legal relations [is not enough]. There must be some objective evidence of contrary intent. Although a complete list cannot be drawn up of the factors [that a court might consider when deciding whether or not] the presumption has been rebutted, in practice the following three factors are amongst the most important.

The first is the context in which the agreement is made. If an agreement is entered into by family members in what the courts perceive to be a 'business context', the court will be readier to infer that the presumption has been rebutted. [It was] held that legal relations were created when three brothers, who were directors of a family company, entered into an agreement relating to the running of the company. Similarly, where a husband and wife are about to separate or have separated, the presumption does not operate because the parties 'bargain keenly' and do not rely on 'honourable understandings'... .

Secondly, the court will have regard to any reliance which has been placed on the agreement. Where one party has acted to his detriment on the faith of the agreement a court may be more willing to conclude that the agreement was intended to have legal consequences. Such was the case in *Parker v Clark* [1960] 1 WLR 286. The defendants, who were an elderly couple, suggested that the claimants, who were their friends, come to live with them. The claimants ... pointed out that if they were to live with the defendants, they would have to sell their own house. The defendants replied by stating that the problem could be resolved by the defendants leaving to the claimants a share of their house in their will. The claimants accepted this offer, [sold their house and] moved in with the defendants. However the parties soon began to disagree over certain matters and ... the defendants asked the claimants to leave. The claimants left the house ... and brought an action for breach of contract. ... The defendants argued that there was no contract between them because of a lack of intention to create legal relations. It was held that the parties had intended to create legal relations... .

Similarly, there is some authority for the proposition that an agreement between workmates under which one is to provide the other with a lift to work in return for a contribution towards petrol does not create legal relations with regard to journeys to be undertaken in the future (*Coward v Motor Insurers' Bureau* [1963] 2 QB 259) but that it does create legal relations with regard to journeys which have already been undertaken. ... In these cases the determining factor appears to be the fact that the parties have acted in reliance upon the agreement. The courts are reluctant to allow the parties to go back on their agreement once it has been acted upon.

SOURCE 5

Extract adapted from *Esso Petroleum Limited v Commissioners of Customs and Excise* [1976] 1 WR 1 HL.

Esso launched a sales promotion in which anyone who bought at least four gallons of petrol would be given a World Cup coin. The Commissioner of Customs and Excise claimed that the coins were taxable as, they argued, they had been "produced in quantity for general sale". The House of Lords found for Esso on the grounds that the coins had not been 'sold' within the meaning of the taxation legislation. They also considered whether the coins were being given out as a gift or as a contractual obligation. Three of the Law Lords, including Lord Simon of Glaisdale, found that there was an intention to create legal relations; two of the Law Lords, including Viscount Dilhorne, found that there was no intention to create legal relations.

Lord Simon of Glaisdale (in the majority):

I am ... not prepared to accept that the promotion material put out by Esso was not envisaged by them as creating legal relations between the garage [owners who used it and the motorists who bought the required amount of petrol]. In the first place, Esso and garage [owners] put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in a setting of business relations. In the second place, it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations. ... The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage in which the garage [owners] also would share... .

Viscount Dilhorne (dissenting):

True it is that [Esso] are engaged in business. True it is that they hope to promote the sale of their petrol, but it does not seem to me necessarily to follow or to be inferred that there was any intention on their part that the dealers should enter into legally binding contracts with regard to the coins; or any intention on the part of the dealers to enter into any such contract or any intention on the part of the purchaser of four gallons of petrol to do so.

If in this case ... the conclusion is reached that there was any such intention on the part of the customer, of the dealer and of [Esso] it would seem to exclude the possibility of any dealer ever making a free gift to any of his customers however negligible its value to promote his sales.

SOURCE 6

Extract adapted from *Contract Law*. 3rd Edition. Mary Charman. Willan Publishing. 2005. Pp 70-72, 74.

In commercial agreements the general presumption is that parties do intend to create legal relations, although, again, this may be rebutted. However, it is more difficult to rebut this presumption and very clear evidence will be needed. It is very important in a commercial context to remember that most contracts are formed in situations where at least one of the parties is expecting to make some commercial gain... .

It is important that the consumer ... is protected from exploitation by a commercial venture. We can see here two sides to agreement, and the law merely aims to see that fairness exists between them. That is generally the reason for the presumption regarding commercial agreements.

[An example of where the presumption regarding commercial agreements was rebutted is *Rose and Frank v Crompton Bros* [1923] 2 KB 261.] The kind of statement found in *Rose and Frank v Crompton* is known as an honourable pledge clause, one in which the parties bind each other in honour but not in law. Honourable pledge clauses are allowed by the court, with some reluctance on occasions, and the House of Lords re-examined the issue in [*Edwards v Skyways* [1964] 1 WLR 349] Skyways claimed that the term *ex gratia* meant the same as legally unenforceable and this would have enabled the company to avoid a payment to a pilot who had been made redundant. The court did not agree, and emphasised that there was a heavy burden on any party claiming that the presumption in a commercial contract had been rebutted.

The opportunity to restate the extent of this burden of proof arose in the Court of Appeal [in *Kleinwort Benson v Malaysian Mining Corporation* [1989] 1 All ER 785] The trial judge found that a 'letter of comfort', which was really a letter giving support to a credit agreement, did have legal intent, being written in a commercial context, [following] the normal presumption that such agreements were intended to be binding. However, the Court of Appeal, somewhat reluctantly, held that the letter did not carry an intention to be bound... .

The existence of legal intent is therefore an important element in the formation of a contract. The presumptions operate to prevent social arrangements turning inadvertently into legally binding contracts, but, on the other hand, to ensure that the reasonable and realistic intentions of the parties are supported by law.