Case and Comment

COMBE v. COMBE (1951) 1 ALL E.R. 767

CONTRACT – "PROMISSORY ESTOPPEL" – PROMISE MADE AND ACTED UPON – ABSENCE OF CONSIDERATION

The much discussed principle enunciated by Mr. Justice Denning (as he then was) in Central London Property Trust, Ltd. v. High Trees House, Ltd., (1947) K.B. 136, has been greatly clarified as a result of the decision in this case. The so-called "High Trees doctrine" stated that when a party makes a promise intended to be acted upon, and which is in fact acted upon by the promisee to his detriment, the promisor shall be held to his promise even in the absence of consideration; consideration would be lacking in such a case if the detriment were not incurred at the express or implied request of the promisor. There was the further requirement that the parties must have intended to create legal relations. After Mr. Justice Denning's decisions in Robertson v. Minister of Pensions, (1948) 2 ALL E.R. 767, and Bob Guiness, Ltd. v. Salomonsen, (1948) 2 K.B. 42, there was a tendency to regard this doctrine as creating a new cause of action. The Combe case makes it clear that the principle has a much more limited application.

A wife, petitioner in divorce proceedings, gave instructions to her solicitors to apply for an order for permanent maintenance in the event of a decree nisi being granted to her. On Feb. 1, 1943 the decree nisi was granted, and on Feb. 9, 1943, the wife's solicitors wrote to the husband's solicitors asking them to confirm, that with respect to permanent maintenance the husband was prepared to make the wife an allowance of £100 a year income tax free. The husband agreed through his solicitors to allow her this sum. The decree absolute was made on Aug. 11, 1943. The husband failed to make the agreed payments, but his wife, knowing he was not in a good financial position, refrained from applying to the court for an order for permanent maintenance. However, in 1950, the wife brought an action against the husband claiming the amount of the arrears on the ground that she was entitled to them under the husband's promise.

The action was tried by Byrne, J. The defendant (husband) contended that the agreement was unenforceable because there was no consideration for the promise. Plaintiff's counsel took the position that a promise was made by the husband for the purpose of making an arrangement about maintenance, that he intended to be bound by it and knew that it was going to be acted upon by the wife, and that the wife did act on it. Mr. Justice Byrne accepted this argument

The defendant's appeal was heard by a Court of Appeal including Lord Justice Denning. They reversed the judgment of the Court below, explaining and distinguishing the High Trees case; they held that since there was no proof that the husband had requested the wife to forbear from applying to the Courts for maintenance, there was no consideration for his promise which was therefore unenforcable.

Perhaps the most interesting feature of this case is the fact that Denning L.J., only two and one-half years after his decision in Robertson v. Minister of Pensions (supra) and within four years of the High Trees case, found it necessary to explain these cases. The principle he had enunciated was not on its face easily reconcilable with the generally accepted view on the law of consideration. He had also given the impression that he was judicially accepting the recommendation of the Law Revision Committee that certain promises should be enforceable even though not supported by consideration. The opportunity was at hand in the present case to explain his true position, and this he did with characteristic lucidity. In his own words:

> "Much as I am inclined to favour the principle of the High Trees case, it is important that it should not be stretched too far lest is should be endangered. It does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties."

Also Lord Justice Asquith said:

> "It is unnecessary to express any view as to the correctness of the decision in the High Trees case, although I certainly must not be taken to be questioning it. I would, however, remark in passing that it seems to me a complete misconception to suppose that it struck at the roots of the doctrine of consideration."

Perhaps the High Trees decision did not strike "at the roots of the doctrine of consideration," but as interpreted by some it did give the doctrine a rather severe shaking. The Court of Appeal in the present case has attempted, not necessarily to strengthen these tenacious roots of consideration, but at least to protect them. The decision is all the more noteworthy because Lord Justice Denning himself came to the defence of the doctrine. The result is that we have the principle of the High Trees case still at our disposal, tempered by the proviso that it may only be used as a defence, and is not available as a cause of action.

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