

**BAILII Citation Number:
[1965] EWCA Civ 365**

Case No.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

From his Honour Judge Trapnell

Shorditch County Court

Royal Courts of Justice

12th November 1965

Before:

THE MASTER OF THE ROLLS

(Lord Denning)

LORD JUSTICE DANCKWERTS

and

LORD JUSTICE WINN

Between:

D. & C. BUILDERS LIMITED

PLAINTIFFS RESPONDENTS

SIDNEY REES

DEFENDANT APPELLANT

**(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Ltd.,
Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C.2.)**

MR M. REYNOLDS (instructed by Merton Jones, Lewsey & Jefferies)

appeared as Counsel for the Appellant.

MR S. C. ISAACS (instructed by Bishop & Co.)

appeared as Counsel for the Respondents.

HTML VERSION OF JUDGMENT

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THE MASTER OF THE ROLLS: D. & C. Builders Ltd are a little company. "D" stands for Donaldson, a decorator, "C" for Casey, a plumber. They are jobbing builders. The defendant has a shop where he sells builders' materials.

In the spring of 1964 the defendant employed the plaintiffs to do work at his premises, 218. Brick Lane. The plaintiffs did the work and rendered accounts in May and June, which came to £746 13s. 1d. altogether. The defendant paid £250 on account. In addition the plaintiffs made an allowance of £14 off the bill. So in July, 1964, there was owing to the plaintiffs the sum of £482 13s. 1d. At this stage there was no dispute as to the work done. But the defendant did not pay.

On 31st August, 1964, the plaintiffs wrote asking the defendant to pay the remainder of the bill. He did not reply. On 19th October, 1964, they wrote again, pointing out that the "outstanding account of £480 is well overdue." Still the defendant did not reply. He did not write or telephone for more than three weeks. Then on Friday, 13th November, 1964, the defendant was ill with influenza. His wife telephoned the plaintiffs. She spoke to Casey. She began to make complaints about the work: and then said: "My husband will offer you £300 in settlement. That is all you'll get. It is to be in satisfaction." Mr Casey said he would have to discuss it with Mr Donaldson. The two of them talked it over. Their company was in desperate financial straits. If they did not have the £300, they would be in a state of bankruptcy. So they decided to accept the £300 and see what they could do about the rest afterwards. Thereupon Mr Donaldson telephoned to the defendant's wife. He said to her: "£300 Will not even clear our commitments on the job. We will accept £300 and give you a year to find the balance." She said: "No, we will never have enough money to pay the balance. £300 is better than nothing." He said: "We have no choice but to accept." She said: "Would you like the money by cash or by cheque. If it is cash, you can have it on Monday. If by cheque, you can have it tomorrow (Saturday)."

On Saturday, 14th November 1964, Mr Casey went to collect the money. He took with him a receipt prepared on the company's paper with the simple words: "Received the sum of £300 from Mr. Rees." She gave him a cheque for £300 and asked for a receipt. She insisted that the words "in completion of the account" be added. Mr Casey did as she asked. He added the words to the receipt. So she had the clean receipt: "Received the sum of £300 from Mr. Rees in completion of the account. Paid, M. Casey." Mr Casey gave in evidence his reason for giving it: "If I did not have the £300 the company would have gone bankrupt. The only reason we took it was to save the company. She knew the position we were in."

The plaintiffs were so worried about their position that they went to their solicitors. Within a few days, on 23rd November, 1964, the solicitors wrote complaining that the defendant had "extricated a receipt of some sort or other" from them. They said they were treating the £300 as a payment on account. On 28th November, 1964, the defendant replied alleging bad workmanship. He also set up the receipt which Mr Casey gave to his wife, adding: "I assure you she had no gun on her." The plaintiffs brought this action for the balance. The defendant set up a defence of bad workmanship and also that there was a binding settlement. The question of settlement was tried as a preliminary issue.

The Judge made these findings:

"I concluded that by the middle of August the sum due to the plaintiffs was ascertained and not then in dispute. I also concluded that there was no consideration to support the agreement of November 13 and 14. It was a case of agreeing to take a lesser sum when a larger sum was already due to the

plaintiffs. It was not a case of agreeing to take a cheque for a smaller amount instead of receiving cash for a larger amount. The payment by cheque was an incidental arrangement."

He decided, therefore, the preliminary issue in favour of the plaintiffs. The defendant appeals to this court. He says that there was here an accord and satisfaction - an accord when the plaintiffs agreed, however reluctantly, to accept £300 in settlement of the account - and satisfaction when they accepted the cheque for £300 and it was duly honoured. The defendant relies on Sibree v. Tripp (1846) 15 Meeson & Welsby, p.24 and Goddard v. O'Brien (1882) 9 Queen's Bench Division p.37, as authorities in his favour.

This case is of some consequence: for it is a daily occurrence that a merchant or tradesman, who is owed a sum of money, is asked to take less. The debtor says he is in difficulties. He offers a lesser sum in settlement, cash down. He says he cannot pay more. The creditor is considerate. He accepts the proffered sum and forgives him the rest of the debt. The question arises: Is the settlement binding on the creditor? The answer is that, in point of law, the creditor is not bound by the settlement. He can the next day sue the debtor for the balance: and get judgment. The law was so stated in 1602 by Lord Coke in Pinnel's Case (1602) 5 Coke's Reports, p.117a - and accepted in 1889 by the House of Lords in Foakes v. Beer (1884) 9 Appeal Cases, p.605.

Now, suppose that the debtor, instead of paying the lesser sum in cash, pays it by cheque. He makes out a cheque for the amount. The creditor accepts the cheque and cashes it. Is the position any different? I think not. No sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque. The cheque, when given, is conditional payment. When honoured, it is actual payment. It is then just the same as cash. If a creditor is not bound when he receives payment by cash, he should not be bound when he receives payment by cheque. This view is supported by the leading case of Cumber v. Wane (1718) 1 Strange, p.426, which has suffered many vicissitudes but was, I think, rightly decided in point of law.

The case of Sibree v. Tripp (1846) 15 Meeson & Welsby, p.24, is easily distinguishable. There the plaintiffs brought an action for £500. It was settled by the defendant giving three promissory notes amounting in all to £250. Those promissory notes were given upon a new contract, in substitution for the debt sued for, and not as conditional payment. The plaintiff's only remedy thenceforward was on the notes and not on the debt.

The case of Goddard v. O'Brien (1882) 9 Queen's Bench Division p.33, is not so easily distinguishable. There a creditor was owed £125 for some slates. He met the debtor and agreed to accept £100 in discharge of it. The debtor gave a cheque for £100. The creditor gave a written receipt "in settlement on the said cheque being honoured." The cheque was clearly given by way of conditional payment. It was honoured. The creditor sued the debtor for the balance of £25. He lost because the £100 was paid by cheque and not by cash. The decision was criticised by Fletcher Moulton L.J. in Hirachand Punamchand v. Temple 1911, 2 King's Bench at p.340, and by the editors of Smith's Leading Cases, 13th ed. (1929) Vol. 1, p.380. It was, I think, wrongly decided. In point of law payment of a lesser sum, whether by cash or by cheque, is no discharge of a greater sum.

This doctrine of the common law has come under heavy fire. It was ridiculed by Sir George Jessel in Couldery v. Bartram (1929) 19 Chancery Division at p.391. It was said to be mistaken by Lord Blackburn in Foakes v. Beer (1884) 9 Appeal Cases, p.623. It was condemned by the Law Revision Committee (1945 Command. 5449), paragraphs 20 and 21. But a remedy has been found. The harshness of the common law has been relieved. Equity has stretched out a merciful hand to help the debtor. The courts have invoked the broad principle stated by Lord Cairns in Hughes v. Metropolitan Railway Co (1877) 2 Appeal Cases at p.448:

"It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to

suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties."

It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.

This principle has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. This was well illustrated during the last war. Tenants went away to escape the bombs and left their houses unoccupied. The landlords accepted a reduced rent for the time they were empty. It was held that the landlords could not afterwards turn round and sue for the balance, see Central London Property Trust v. High Trees House 1947 King's Bench, p.130. This caused at the time some eyebrows to be raised in high places. But they have been lowered since. The solution was so obviously just that no one could well gainsay it...

In applying this principle, however, we must note the qualification: The creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them.

In the present case, on the facts as found by the Judge, it seems to me that there was no true accord. The debtor's wife held the creditor to ransom. The creditor was in need of money to meet his own commitments, and she knew it. When the creditor asked for payment of the £480 due to him, she said to him in effect: "We cannot pay you the £480. But we will pay you £300 if you will accept it in settlement. If you do not accept it on those terms, you will get nothing. £300 is better than nothing." She had no right to say any such thing. She could properly have said: "We cannot pay you more than £300. Please accept it on account." But she had no right to insist on his taking it in settlement. When she said: "We will pay you nothing unless you accept £300 in settlement," she was putting undue pressure on the creditor. She was making a threat to break the contract (by paying nothing) and she was doing it so as to compel the creditor to do what he was unwilling to do (to accept £300 in settlement): and she succeeded. He complied with her demand. That was on recent authority a case of intimidation: see Rookes v. Barnard, 1964 Appeal Case, p.1129 and Stratford v. Lindley, 1964, 2 Weekly Law Reports at pp. 1015-6. In these circumstances there was no true accord so as to found a defence of accord and satisfaction: see Day v. McLea (1889) 22 Queen's Bench Division, p.610. There is also no equity in the defendant to warrant any departure from the due course of law. No person can insist on a settlement procured by intimidation.

In my opinion there is no reason in law or equity why the creditor should not enforce the full amount of the debt due to him. I would, therefore, dismiss this appeal.

LORD JUSTICE DANCKWERTS: I agree with the judgment of the Master of the Rolls. Foakes v. Beer (1884) 9 Appeal Cases, p.605, applying the decision in Pinnel's Case (1602) 5 Coke's Reports, p.117a, settled definitely the rule of law that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction.

In *Foakes v. Beer*, Lord Selborne (at p.613), while approving *Cumber v. Wane* (1718) 1 Strange, p.426, did not overrule the cases which appear to differ from *Cumber v. Wane*, saying :

"All the authorities subsequent to *Cumber v. Wane*, which were relied upon by the appellant at your Lordships' Bar (such as *Sibree v. Tripp*, *Curlewis v. Clark* and *Goddard v. O'Brien* have proceeded upon the distinction, that, by giving negotiable paper or otherwise there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability."

Lord Selborne was distinguishing those cases from the case before the House.

But the giving of a cheque of the debtor for a smaller amount than the sum due is very different from "the gift of a horse, hawk, or robe, etc." mentioned in *Pinnele's* case. I accept that the cheque of some other person than the debtor, in appropriate circumstances, may be the basis of an accord and satisfaction, but I cannot see how in the year 1965 the debtor's own cheque for a smaller sum can be better than payment of the whole amount of the debt in cash. The cheque is only conditional payment, it may be difficult to cash, or it may be returned by the bank with the letters "R.D." upon it, unpaid. I think that *Goddard v. O'Brien* (1882) 9 Queen's Bench Division p.33, either was wrongly decided or should not be followed in the circumstances of today.

I agree also that, in the circumstances of the present case, there was no true accord. Mr and Mr Rees really behaved very badly. They knew of the plaintiffs' financial difficulties and used their awkward situation to intimidate them. The plaintiffs did not wish to accept the sum of £300 in discharge of the debt of £ 482, but were desperate to get some money. It would appear also that the defendant and his wife misled the plaintiffs as to their own financial position. Mr Rees, in his evidence, said: "In June (1964) I could have paid £700 odd. I could have settled the whole bill." There is no evidence that by August, or even by November, their financial situation had deteriorated so that they could not pay the £482.

Nor does it appear that their position was altered to their detriment by reason of the receipt given by the plaintiffs. The receipt was given on the 14th November, 1964. On 23rd November, 1964, the plaintiffs' solicitors wrote a letter making it clear that the payment of £300 was being treated as a payment on account. I cannot see any ground in this case for treating the payment as a satisfaction on equitable principles.

In my view the county court judge was right in applying the rule in *Foakes v. Beer*, and I would dismiss the appeal.

LORD JUSTICE WINN: The learned Judge found the following relevant facts:

1. When the plaintiff builders ceased work on the defendant's house there was no dispute as to the amount, in terms of money, of the work they had done.
2. After allowing due credits, the Defendant in August, 1964 owed the plaintiffs £482 13s. 1d.
3. The plaintiffs submitted accounts and by letters of 31st August and 19th October requested payment: the defendant ignored the letters: he did not put any complaint into writing before 28th November .
4. On 13th November , the defendant's wife, on his behalf, telephoned to plaintiffs, offered to pay £300 in satisfaction of their account and said that this was all they would get: she did not base her offer of a lesser amount on any dispute about workmanship or any items charged: she said her husband could not pay more. The judge thought that he could have paid the whole amount in the previous June or July but was unable to say whether he could have done so in November.
5. The plaintiffs were hard pressed for money and therefore agreed through one Mr Donaldson to accept £300 in settlement of their account.
6. After Mr Donaldson had agreed to take £300 he was given the choice of taking it in cash or by a cheque drawn by the defendant: he was content to take a cheque.

7. When a cheque for £300 was collected the next day a receipt was given, at the insistence of the defendant's wife, including the words "in completion of account."

8. The arrangement to pay by cheque was merely incidental to the settlement agreement: it was arranged "to suit the plaintiffs' convenience."

The Judge summed up his conclusion in law upon those facts in the succinct phrase "this case did not fall under the cheque cases." He also said in his judgment that he had found the issue difficult in law: of that I am myself also conscious.

The question to be decided may be stated thus: Did the defendant's agreement to give his own cheque for £300 in full settlement of his existing debt to the plaintiffs of £482 and the plaintiff's agreement to accept it in full payment of that debt, followed by delivery and due payment of such a cheque, constitute a valid accord and satisfaction discharging the debt in law?

Apart altogether from any decided cases bearing upon the matter, there might be a good deal to be said, as a matter of policy, in favour of holding any creditor bound by his promise to discharge a debtor on his paying some amount less than the debt due: some judges no doubt so thought when they held readily that acceptance by the creditor of something of a different nature from that to which he was entitled was a satisfaction of the liability, cf. Pinner's case (1602) 5 Coke's Reports, p.117a, Smith v. Trowsdale (1854) 3 Ellis & Blackburn, p.83; , Cooper v. Parker (1855) 18 Common Bench, p.822, Exchequer Chamber. A like approach might at some time in the past have been adopted by the Courts to all serious assurances of agreement, but as English law developed, it does not now permit in general of such treatment of mere promises. In the more specific field of discharge of monetary debt there has been some conflict of judicial opinion.

Where a cheque for a smaller sum than the amount due is drawn by a person other than the debtor and delivered in satisfaction of his debt, it is clear that the debt is discharged if the cheque be accepted on that basis and duly paid; cf. Hirachand Punamchand v. Temple 1911, 2 King's Bench at p.330.

In the instant case the debtor's own cheque was accepted, though not stipulated for by the creditor, as the equivalent of cash, conditionally of course upon its being duly paid on presentation: such is the modern usage in respect of payments of money due, common, though not yet universal, in domestic no less than commercial transactions. This court must now decide the effect of that transaction.

Had this case arisen in 1883 it would have fallen to be determined in favour of the defendant by force of the decision of a Divisional Court of two judges, Mr Justice Grove and Baron Huddleston in Goddard v. O'Brien (1882) 9 Queen's Bench Division p.33, in which Cumber v. Wane (1718) 1 Strange, p.426, was distinguished and not followed.

Goddard's case came to be decided upon a Case stated by the Judge of the Southwark County Court in which it was set out that the defendant in the action was indebted to the plaintiffs in the sum of £125 odd for billiard table slates sold and delivered by them to him. A representative of the plaintiffs agreed with the defendant to accept the sum of £100 in discharge of the debt of £125 odd and thereupon the defendant gave to the plaintiffs a cheque for £100 payable on demand and the plaintiffs gave him a receipt stating that the cheque was taken "in settlement of account of £127 7s. 9d. on said cheque being honoured." The cheque was duly honoured. No other consideration was given by the defendant or received by the plaintiffs in satisfaction of the debt. The county court Judge held that there had been a good accord and satisfaction by reason of the cheque being a negotiable security. The question for the opinion of the court was whether he was right in so ruling. Mr Justice Grove and Baron Huddleston were of the opinion that he was right. Mr Justice Grove said :

"The difficulty arose from the rule laid down in Cumber v. Wane. But that doctrine has been much qualified, and I am not sure that it has not been overruled."

He referred to Sibree v. Tripp and treated it as "a direct authority that the giving of a negotiable security is not within the rule of Cumber v. Wane." Baron Huddleston was also of the opinion that "the doctrine of Cumber v. Wane, if not actually overruled, has been very much qualified." He approved the terms of a note in Smith's Leading Cases at p.366, which was in the following terms: "The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such an agreement being *nudum pactum*. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight would turn the scale and render the consideration sufficient to support the agreement."

I interpose the comment that I find it impossible in the instant case to visualise any benefit or legal possibility of benefit to the builders which might derive from the receipt of the defendant's cheque for £300 instead of the same amount of cash.

Only two years after the decision in Goddard's case the House of Lords in the case of Foakes v. Beer, reported in (1884) 9 Appeal Cases, p.605 had to consider the effect of an agreement between a judgment debtor and a judgment creditor that in consideration of the debtor paying down part of the judgment debt and costs of paying the residue by instalments, the creditor would not take any proceedings on the judgment. The House held this to be a *nudum pactum*, being without consideration, and that it did not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of interest upon the judgment. Pinnel's case and Cumber v. Wane were expressly followed. Lord Chancellor, Lord Selborne, said :

"The question, therefore, is nakedly raised by this appeal whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in Pinnel's case in 1602, and repeated in his note to Littleton, section 344 (2), but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, inter se, by several creditors."

Pausing there, it may be observed that the Lord Chancellor was considering in this passage the nature and effect of such an agreement rather than the effect of its performance as a satisfaction. He went on to say :

"It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine (of Cumber v. Wane existed and were improperly disregarded in Cumber v. Wane ; and yet that the doctrine itself may be law, rightly recognised in Cumber v. Wane, and not really contradicted by any later authorities. and this appears to me to be the true state of the case."

The Lord Chancellor then stated his understanding of the doctrine to which he was referring, as stated in Pinnel's Case, to be

"that payment of a lesser sum on the day (it would of course be the same after the day) in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum."

He further said :

"If the question be ... whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole) were held to be, generally, binding, though not under seal

... but I think it impossible ... to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to Cumber v. Wane ... such as Sibree v. Tripp, Curlewis v. Clark and Goddard v. O'Brien, have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability." It is clear that this speech did not deal with the effect of the giving of any cheque or negotiable instrument in respect of part of the debt due since it left any case involving such an element upon one side: on the other hand, it did go a long way to restore the authority of Pinneel's Case and Cumber v. Wane.

It is further to be noted that the Lord Chancellor in the last passage quoted emphasised the need for consideration to support the accord and he said :

"What is called 'any benefit, or even any legal possibility of benefit' in Mr. Smith's notes to Cumber v. Wane , (8th Ed. p.366) is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal."

Lord Blackburn made it clear in his speech that he had felt hesitation in concurring as he did in the decision because he felt convinced that

"all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole."

He remarked obiter (p.615) that "if it had been a promissory note the authorities are that it would have been a good satisfaction."

In 1911, in the case already referred to of Punamchand, Lord Justice Fletcher Moulton said :

"I have grave doubts whether Goddard v. O'Brien was rightly decided, because, when the facts are looked at, it appears that the cheque was there given, not in substitution for the debt, but only as conditional payment of the amount, so that the case really stood on the same footing as payment of a less amount in discharge of a greater."

Lord Justice Farwell in the same case said, referring to the case of Day v. McLea (1889) 22 Queen's Bench Division p.610:

"In that case, there being no consideration for the discharge of the balance of the debt, it was held that the creditor could retain the money, and sue for the balance."

In my judgment it is an essential element of a valid accord and satisfaction that the agreement which constitutes the accord should itself be binding in law, and I do not think that any such agreement can be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz., performance, of an agreement of accord, does not provide retroactive validity to the accord, but depends for its effect upon the legal validity of the accord as a binding contract at the time when it is made: this I think is apparent when it is remembered that, albeit rarely, existing obligations of debt may be replaced effectively by a contractually binding substitution of a new obligation.

In my judgment this court should now decline to follow the decision in Goddard v. O'Brien and should hold that where a debtor's own cheque for a lesser amount than he indisputably owes to his creditor is accepted by the creditor in full satisfaction of the debt, the creditor is to be regarded, in any case where he has not required the payment to be made by cheque rather than in cash, as having received the cheque merely as conditional payment of part of what he was entitled to receive: he is free in law, if not in good commercial conscience, to insist upon payment of the balance of the amount due to him from the debtor.

I would dismiss this appeal.

Order: Appeal dismissed with costs.