The judgments highlight the conceptual differences underlying the intrusion and confidentiality approaches. For the focus on confidentiality, the "public domain" is global, interconnected and abstract. Information is either "out there" or it is not and, once it is "out there", it is futile to attempt to intervene. This encourages an all-or-nothing approach to injunctions. Intrusion concentrates on the local and concrete harm to the claimant at a particular time. It is more sensitive to where, when and how that repetition occurs and the harm it entails to the particular claimant. This encourages a more nuanced and sensitive approach.

Although privacy injunctions may not be able to hold back the tide, they can provide defences allowing time and space, free from the intrusion of a media storm, for private and family life. Rather than fear that public respect for the law will be weakened, this modest but realistic remedy aimed at concrete relief should do much to strengthen respect for the law.

Oliver Michael Butler

Address for Correspondence: Emmanuel College, Cambridge, CB2 3AP, UK. Email: omb24@cam.ac.uk

VARYING CONTRACTS

MWB Business Exchange Centres Ltd. v Rock Advertising Ltd. [2016] EWCA Civ 553 deals with a number of important issues concerning variation of contracts. Rock occupied as licensee premises managed by MWB. In August 2011, Rock decided to expand its business, and entered into a written agreement with MWB for larger premises for 12 months beginning 1 November 2011. The licence fee was agreed to be £3,500 per month for the first three months, and then £4,433.34 from 1 February 2012. Unfortunately, Rock's business was not as successful as hoped and, by late February 2012, it had incurred arrears of over £12,000. MWB gave notice purporting to terminate the agreement, but the parties then orally agreed to reschedule the licence fee payments due from February to October 2012: Rock would pay less than the originally agreed amount for the first few months, but after that would pay more, with the result that the arrears would be cleared by the end of the year. Pursuant to this agreement, Rock paid £3,500 to MWB, which was the first instalment due in accordance with the revised payment schedule. However, MWB subsequently changed its mind and sued for the arrears. MWB presented two arguments why Rock could not rely upon the oral variation. First, MWB pointed to an anti-oral variation clause in the written contract. Second, MWB relied upon *Foakes v Beer* (1884) 9 App. Cas. 605 for the proposition that the variation was not supported by consideration. Both arguments failed before a unanimous Court of Appeal (Arden, Kitchin and McCombe L.JJ.).

Clause 7.6 in the original contract stated: "All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

This raised a tricky question of law: can an anti-oral variation clause be varied other than in accordance with that clause? Before this year, that was a difficult question to answer due to conflicting decisions of the Court of Appeal (compare *United Bank Ltd. v Asif* (11 February 2000, unreported) and *World Online Telecom v I-Way Ltd.* [2002] EWCA Civ 413). This inconsistency was fully considered in *Globe Motors Inc. v TRW Lucas Varity Electric Steering Ltd.* [2016] EWCA Civ 396, in which the Court of Appeal concluded that it was possible to vary a contract orally despite an anti-oral variation clause. The discussion in *Globe Motors* on this issue was obiter, but unsurprisingly followed by the Court of Appeal in *MWB*, and the clarity brought by these decisions is welcome. In principle, "party autonomy" means that any term can be varied by the parties and this includes anti-oral variation clauses. As Cardozo J. said in *Alfred C Beatty v Guggenheim Exploration Company* (1919) 225 N.Y. 380, at 387, "Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other". Nevertheless, anti-oral variation clauses may continue to serve some purpose in reducing frivolous claims of an oral agreement: a party might well find it difficult to establish that both parties intended any oral accord to alter their legal relations, especially where they originally included a term that requires formal variation (e.g. *Globe Motors*, at [117], per Underhill L.J.).

On the facts of *MWB*, the Court of Appeal was satisfied that the variation was intended to be legally binding and supported by consideration. This latter conclusion is perhaps a little surprising. MWB was owed over £12,000 and a further licence fee of over £4,000 per month. Rock paid £3,500 only. This looks very much like part payment of a debt, and *Pinnel's Case* (1602) 5 Co. Rep. 117a and *Foakes v Beer* make it clear that part payment of a debt is not good consideration for the extinguishment of that debt. Had MWB accepted not a lesser sum of money but instead a "horse, hawk or robe" (per Lord Coke in *Pinnel's Case*) as full satisfaction of Rock's debt, the decision would have been entirely orthodox. This is because, in giving the horse, hawk or robe, the debtor is doing something that he is not obliged to do; and the court will not inquire into the adequacy of the consideration if the creditor freely accepts that horse, hawk or robe as full satisfaction for the extinguishing of the debt (cf. *MWB*, at [85], per Arden L.J.). But, whilst a creditor might place his own idiosyncratic value on a horse, it is impossible to value less money as being more valuable than a greater sum of money (unless, for example, payment is made earlier than agreed or in a more convenient form). That explains the rules in *Pinnel's Case* and *Foakes v Beer*.

The Court of Appeal circumvented this principle on the basis that MWB did not *only* receive part payment of a debt, but *further* received a "practical benefit". This practical benefit was present because MWB would ultimately be likely to recover a greater sum from Rock, and – most significantly – MWB would avoid the property standing empty for some time, causing further loss. This extension of "practical benefit" to the context of part payment of debt is novel but not entirely unexpected. After all, in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, the Court of Appeal held that a promise to pay more might be supported by consideration if the promisor "obtains in practice a benefit or obviates a disbenefit". Unfortunately, *Roffey* did not cite *Foakes* (a decision of the House of Lords) and it has been unclear how the two decisions fit together. This was recognised by Peter Gibson L.J. in *In re Selectmove Ltd.* [1995] 1 W.L.R. 474, who said:

> it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of *Williams's case* to any circumstances governed by the principle of *Foakes v Beer* .... If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.

This was an understandable approach for the Court of Appeal to adopt, but left the law in an unsatisfactory state: the performance of an obligation to render services may be good consideration (*Roffey*), but the performance of an obligation to pay money may not (*Foakes*). This distinction has largely been wiped away by *MWB*.

So what is left of *Foakes v Beer*? Perhaps it is limited to its own facts concerning payment of a debt by instalments (see e.g. *MWB*, at [84], per Arden L.J.). But, even then, perhaps the promisee will now be able to identify a "practical benefit" conferred upon the promisor (cf. Lord Blackburn's quasi-dissent in *Foakes v Beer*). This highlights the need to be clear about what "practical benefit" means. On the facts of *MWB*, it was of course arguable that (at least until the end of the contract period) MWB was entitled both to the full sum of money due and to expect that the property would not be left standing empty. As a result, it might be thought that this is akin to *Foakes v Beer* in that MWB did not receive anything to which it was not already entitled. However, it is not entirely clear whether Rock was entitled to leave the property standing empty under the original agreement and Arden L.J. placed some emphasis on the fact that MWB requested or at least indicated it wanted this benefit from the renegotiation. Such a request (and the lack of duress) is likely to be crucial in identifying a practical benefit.

Since the oral variation was supported by consideration, there was no need to consider Rock's alternative argument that MWB was estopped

from going back on its promise. However, the Court of Appeal found that such a claim would not have succeeded. Even though MWB had received a "practical benefit", Rock had suffered no detriment, and could readily be restored to its previous position: it was not inequitable for MWB to go back on its representation. Kitchin L.J. emphasised that it would not be inequitable to go back on the promise simply because the representee made a payment in reliance on a representation (cf. *Collier v P. & M.J. Wright (Holdings) Ltd.* [2007] EWCA Civ 1329; [2008] 1 W.L.R. 643, which only concerned summary judgment: see *MWB*, at [92], per Arden L.J.). Kitchin L.J. also thought that, although promissory estoppel will often only suspend an obligation, estoppel might operate to extinguish the obligation, depending on the nature of the promise made: "[a]ll will depend upon the circumstances" (at [61]).

MWB highlights that the decision in *Foakes v Beer* might be attacked on one side through adopting a "practical benefit" approach to consideration and on the other side from promissory estoppel. Both routes can effectively mean that a debtor does not have to pay the entirety of the debt. If the very same facts of *Foakes* were to arise today, it is perhaps unclear what result a court would favour. In 1937, the Law Revision Committee recommended a departure from *Foakes*, essentially because a creditor would obtain a practical benefit from the prompt payment of part of a debt rather than trying to insist on the payment of the whole sum due. But it is significant that Parliament has not accepted or implemented those reforms. Moreover, the decision in *Foakes* has been supported by some commentators, not least because it provides clear guidance as to what constitutes consideration (see e.g. J. O'Sullivan, "In Defence of *Foakes v Beer*" [1996] C.L.J. 219). As a result, it is not entirely satisfactory for the Court of Appeal effectively to side step *Foakes* and resort to the notion of "practical benefit" that was clearly not endorsed by the House of Lords in *Foakes* itself. In the absence of legislation, it is to be hoped that the Supreme Court will soon have the opportunity to provide guidance on this issue.

Paul S. Davies

Address for Correspondence: St. Catherine's College, Oxford, OX1 3UJ, UK. Email: paul.davies2@law.ox.ac.uk

UNCONSCIONABLE BARGAINS, OVERREACHING AND OVERRIDING INTERESTS

MORTGAGE Express v Lambert [2016] EWCA Civ 555 concerned a sale and leaseback. In desperate circumstances, the naïve and vulnerable *A* (Ms Lambert) entered into a sale and leaseback arrangement in respect of her flat. She was paid a small proportion of the value of the flat, which was then registered in the joint names of *B* (the buyers). *B* mortgaged it without