

# The Kinds of Promises Legally Enforced

## Offers

There can be serious consequences if an offer is found to be legally binding. In *Denton* a railway schedule was found to be a unilateral contract, and thus the company was liable for publishing trains in the schedule that they knew would not run.

### Intent to be bound

- Generally there must be an intent to be bound and price quotes are merely invitations to negotiate not an offer to sell (*Johnson Bros.*).
- An exception to this is when the offer is clear, explicit and definite. The offeror may impose any conditions they please upon the initial offer but may not add arbitrary conditions following acceptance (*Lefkowitz*).
- When items are displayed in a store, this is only an invitation to treat. The offer occurs when a customer takes an item to the cashier and the shopkeeper must then accept the offer (*Boots*).

### Withdrawal of Offers

- An offer that is not accepted within a reasonable amount of time is viewed as withdrawn or refused (*Manchester Diocesan Council*).
- Offers may be withdrawn at any time so long as the offer has not been accepted and it has been communicated (which may be indirectly) to the other party (*Dickson v. Dodds*).

## Acceptance

- Acceptance of an offer must be communicated to the other party to have a binding contract (*Larken v. Gardiner*).
- Both parties must agree on the exact terms of a contract for it to be binding, and ‘acceptance’ on different terms is really a counter offer (*Eliason v Henshaw*).
- In battle of the forms it is the last form that is seen to lay out the terms of the contract (*Butler Machine Tool Co.*). This is generally seen to favour sellers.

### Tendering

- In *Ron Engineering* the SCC adopted the two-contract approach for tendering.

- Contract A (unilateral)– The call for tenders. It’s terms governs the tendering process. If a bid is successful the bidder is bound to enter in to contract B. Now seen as a bilateral contract, exchange of promises for future performance.
- Contract B – The construction contract.
- A privilege clause in a call for tenders may allow for a bid that is not the lowest to be accepted but does not give the right to accept non-compliant tenders (*MJB Enterprises*).
- Contract A is now seen to have two implicit terms: that all bids be treated equally and that only compliant offers may be accepted (*Double N Earthmovers*).

## Formalization and Certainty

- An agreement to agree does not give rise to a contract. Here the missing terms were price, quantity and delivery (*May and Butch Ltd.*)
- Alternately, documents should be read broadly and a contract will not fail due to some ambiguity if the parties clearly intended to be bound and had a working relationship (*Hillas v Arcos*).
- Contracts can be enforced even when price is not agreed upon. In *Foley v. Classique Coaches* the price was to be agreed upon time to time in writing. Here the price had to be reasonable and the sales contract for petrol was a part of a sale of land contract.
- There can be an implied term to negotiate in good faith by a landlord and not refuse the renewal of a rental contract where offer was market rent (*Empress Towers*). Not used in precedent.
- Even if the parties believe they have a contract it may only be illusory if no clear bargain ever occurred (*Scammell*).

## Correspondence

### Postal Acceptance Rule

- The Postal Acceptance Rule is the exception to the rule that acceptance must be communicated to the other party to form a contract. Here acceptance occurs when the offeree puts their acceptance into the mail, not when it is received. This rule only applies to acceptances, not revocation of offers (*Henthorn v Fraser* and *Byrne v Van Tienhoven*). Today this rule is only used when the parties clearly intend to use mail for communications.
- An exception to the postal acceptance rule is when a letter is lost in the mail and never received even if it was properly addressed (*Holwell Securities Ltd.*).

## Instantaneous Communication

- The post acceptance rule does not apply to faxed documents. They are received when they arrive at the other fax machine. There will be little time between these two occurrences, but it can effect who has jurisdiction over a dispute (*Eastern Power*).
- The rule for electronic transactions is similar to that for fax. An acceptance is received when it arrives in the offerors server / inbox s. 18(2). Here the location acceptance is seen to be sent / received is the parties places of business s. 18(3) (*BC Electronic Transactions Act*)

## Consideration

- Consideration is formally required to have a contract. Formalities in contracts serve three functions: evidentiary, cautionary, channelling.
- Policy framework for enforcement of promises:
  - Evidence – always important
  - Deliberation – did the parties try to make a contract?
  - Unjust Enrichment – important but still only a policy factor
  - Reliance – desire to protect reasonable reliance on a promise
  - Facilitate Private Ordering – what sort of arrangements do we want to enforce for the betterment of society.

## Enforcement of Gift Promises

- The adequacy of consideration is not a factor in determining if there was a contract (*Thomas*). Here payment of 1 pound per year was sufficient consideration as it formalized the contract.
- Agreement to give up something you had no right to in the first place is not good consideration (*White*). Here there was also the policy factor of not wanting to reward whining.
- An agreement to give up things you are legally entitled to (forbearance on legal rights) can be consideration (*Hamer*). Here there was also clear intention to form a contract. Can only be distinguished from *White* on policy factors.

## Mutuality

- There must be an obligation on both parties in order for a contract to be formed (*GNR v Witham*). This obligation can take the form of minimum purchase amounts or exclusivity for example.
  - However, framework contracts such as this are enforced in some jurisdictions.
  - In *Tobias v Dick* a one-sided promise was not enforced both due to lack of mutuality and to prevent one party from taking advantage of the other.

- Court may imply in a promise to use reasonable efforts as consideration when the agreement had been functioning in that way (*Wood v Lucy, Lady Duff Gordon*). Here profits were also split which gave benefit to the defendant who tried to claim there was no contract.

### Going Transaction Modifications

- An agreement to complete a pre-existing contract or duty is not consideration and therefore not enforceable and any extra money promised is an unenforceable gift (*Harris v Watson* 1791 and *Stilk v Myrick* 1809). These cases were both seamen already on the ship they had agreed to serve on.
- In sale of goods contracts agreeing to a price increase is not enforceable as it lacks consideration (*Gilbert Steel*).
  - Plaintiff claims that it was a new contract not a modification which was rejected.
  - Estoppel was used by the plaintiff but was rejected as it cannot be used to create obligations.
  - Plaintiff also tried to argue increased credit and promise to give good prices in the future but these are good examples poor arguments for consideration.
  - This goes against the International Sale of Goods Act. Canada has no modern sale of goods laws.
- In England courts have accepted that receiving a practical benefit from agreeing to a price increase may serve as consideration (*Roffey Bros.* 1991). Here extra money was required for the job to be completed on time, which was offered by the initial offeror.
- In New Brunswick it has been established that GTAs do not require fresh consideration as long as the modification did not occur under duress (*NAV Canada* 2008).
- In British Columbia the doctrine from NAV Canada has been accepted with the additional term that there was detrimental reliance (*River Wind Ventures* 2009).
- Debt settlement is a special case in GTAs. Formerly it followed traditional rules and an agreement to accept less was not enforceable (*Foakes v Beer* 1894); however the *Mercantile Law Amendment Act* and the *Law and Equity Act* (BC) now enforce and agreement to collect less money by creditors.

### Settlements

- Forbearance on the right to make a legal claim is good consideration even if that claim would have failed (*Fairgrief v Ellis*). What you are giving up here is a chance of succeeding, even if it is unlikely.
- However if the settlement is based on misleading facts it may not be enforceable (*B.(D.C.) v Arkin*). This decision was based on mistake, not lack of consideration.
- *Stott v Merit* sets out criteria for a valid settlement: reasonable claim, good faith in making the claim, no concealment of the fact.

## Charitable Subscription

- Charitable subscriptions are gift promises not enforced by common law even if there was reliance on a donation (*Dalhousie College*).

## Intention and Non-Bargain Promises

- There must always be an intent to be bound, which would lead a reasonable person to believe that there was a contract.
- Natural love and affection may not serve as consideration (*Balfour in Jones v Padavatton*)
- However family situations may result in a legal relationship in special circumstances where there was a clear intent to be bound and consideration is found in a party giving up many things (*Jones v Padvatton*). Here there were also communications via lawyers.
- Parties may also purposefully enter non-binding agreements so long as it is clear this was the intention (*Rose v JR Crompton*)

## Promises Under Seal

- A seal is not equivalent to consideration.
- Sealed documents are a transfer of property.
- Requirements: in writing, sealed, signed, and delivered.
- A sealed document cannot be obtained by fraud as it is the intentions of the parties that give rise to legal obligations.
- Purposes of using a seal
  - Evidentiary – show there was a contract
  - Cautionary – formalization encourages thought about rights that are being given up
  - Channelling – declares parties intend to be bound

## Past Consideration

- Past consideration is not good consideration.
- Policy factors for this:
  - Lack of deliberation
  - Lack of reliance
  - No unjust enrichment
  - Distinguish moral from legal obligations
  - Concerns regarding fraud on creditors – could give a relative creditor status by claiming you owed them for what was a gift.

- A promise about a contract that has already been executed is without consideration (*Riscorla v Thomas*)
- An exception to this is an initial request for service can imply a payment; however this is categorized as a unilateral contract, not as allowing past consideration (*Lampleigh v Brathwait*).

### Promissory Estoppel

- Reliance is not consideration.
- Common law estoppel barred a party from denying facts that had been previously agreed upon.
- Promissory Estoppel addresses future conduct, which had been agreed upon. It is only available as a defence not as a cause of action (*Combe v Combe*). Equitable doctrine articulated in *Hughes*.
- Promissory estoppel is only available when there is an underlying assumption of legal relationships (*NM V ATA*). Here the 'contract' was based on a romantic relationship.
- May be used to defend the belief that strict rights under contract are suspended during negotiations (*Hughes*).
- A promise can be binding so long as it was intended to be and there was an existing legal relationship; however this may only be used as a defence to damages not as an independent cause of action, which results in promises to pay less being enforced but not promises to pay more (*High Trees*).
- However in Australia the courts have allowed estoppel to be used to enforce a pre-contractual promise (*Waltons v Maher*).
- As estoppel is an equitable doctrine fairness is sometimes considered in its application (*Combe v Combe*).
- Indulgences in allowing late payments do not give rise to estoppel unless there was clear intention to alter legal relationships (*John Burrows*).
- Intent to change legal relationship may be implied through the conduct of the parties (*Owen Sound*). This is seen as at odds with the *John Burrows* case.
- As estoppel is an equitable doctrine and agreement to accept less is not enforced when there is undue pressure or intimidation (*D&C Builders*).

### Unilateral Contracts

- Unilateral contracts are open ended and accepted through performance
- A unilateral contract is formed with anyone who fulfills the conditions regardless of whether the offer motivated them or not (*Williams v Carwardine*).
- An exception to this is when the party who fulfills the offer did not know it existed (*R v Clarke*). This is contrary to the Quebec Civil Code, which state that fulfilling all conditions is sufficient for the formation of a unilateral contract.

- It is not necessary to notify the offeror of acceptance; the offeree only needs to perform to result in contract formation (*Carbolic Smoke Ball Company*).
- A common current form of unilateral contracts is government subsidy programs.
  - An affirmative action program which offered funding for disadvantaged students to attend university was not allowed to be cut half way as the offer was for full degrees (*Dale v Manitoba*)
  - In a potato subsidy program, it was found that everyone who met the conditions was entitled to subsidy (*Grant v New Brunswick*)
- Courts can also imply in a second contract to not break the first one in the middle of performance (*Errington v Errington*), which lines up with the modern rule that once performance has commenced the contract may not be revoked (*Ayerswood Development Corp v Hydro One Network*).
  - As a result of this government subsidy programs now have very specific wording with regards to eligibility.
- Courts may also choose to view something as mutual promises instead of a unilateral contract if it is favoured by the situation and by policy factors (*Dawson v Helicopter Exploration*).

## Contracts and Third Parties

### Third-party beneficiaries

- The common law rule of privity of contract states that only someone party to a contract may enforce it, even if the contract was made for the benefit of a third party (*Tweedle v. Atkinson*)
- Privity of contract exists both vertically and horizontally
  - Vertical privity is seen in retail settings: consumer  $\Rightarrow$  retailer  $\Rightarrow$  distributor  $\Rightarrow$  manufacturer. Here one may only sue the person next to them in the chain. This can cause problems as the chain may be broken such as by bankruptcy.
  - Horizontal privity is seen when it is a person who is not the buyer affected by a product.
- Privity of contract can be avoided using trust, assignment or agency.
  - Under trust law a beneficiary may sue
  - Assignment is a transfer of rights but not of obligations
  - Agency results in the principle granting rights to contract to the agent on their behalf.
- In *Beswick v. Beswick* a contract between uncle and nephew that included that the nephew support the widow was able to be enforced by the widow but only because she was the administratrix of the will.
  - The remedy granted was specific performance.
  - There were strong policy reasons to enforce the contract here

- Privity of contract also comes up in the case of employee liability. When an employee damages something are they protected via their employer's contract with the customer?
  - In *London Drugs* the issue was whether the employees would be covered by a limited liability clause that was in the storage contract. Here the court read in an intent to cover the 3<sup>rd</sup> party when they were acting in the course of their employment performing actions laid out in the contract.
  - In *London Drugs* the SCC relaxes privity of contract from the approach in *Greenwood* using a modified agency test.
  - It is important to note that *London Drugs* only gives coverage to employees when their employers have insurance. The employer may also expressly exclude employees from coverage.
- In *Fraser River Pile*, the approach in *London Drugs* is applied in a general commercial setting. Here the court establishes that third parties are to be covered when their actions are that which was expected to fall under the contract.
- In *Canadian Tire*, the action fails in contract for a boy damaged by a bicycle purchased by his father as he was not privy to the sale of goods contract and was not a buyer for the purpose of the *Sale of Goods Act*.
- Note that British Columbia does not have any legislation on third-party rights to contracts.

## Mistaken Identity

- In mistaken identity cases there are two victims: the initial seller and the good faith purchaser. Because the rogue is rarely still around, contract law must allocate the risk between these two victims
- *Nemo dat* principle: You cannot sell what you do not have. Codified in the *Sale of Goods Act* s26(1)
  - In mistaken identity this principle goes against the policy reasons which state that the final good faith purchaser deserves protection.
- In *Philips v. Brooks* the seller was unable to claim against the final purchaser, because the rogue's false identity was not brought up until after the terms of sale had been established.
  - The contract was clearly with the person there not with "Sir George"
- In *Ingram v. Little* the contract was void as the court found the offer was made to "PGM Hutchinson" and only he was legally able to accept it.
  - The dissent found that you contract with the person in front of you. Also wanted to apportion the loss which isn't usually allowed for in Canadian Law



- In *Avery v. Lewis* the court finds that the initial sales contract based on mistaken identity is voidable until the goods are re-sold to a good faith purchaser. Here the car was sold and the initially seller cannot reclaim it.
  - General presumption that you contract with the person in front of you
  - Puts the risk on the seller who allows the rogue to leave with the goods before there has been full payment.

### *Non est factum*

- Historically *non est factum* was available in cases of fraud/forgery or when the party was blind/illiterate and did not know what they were signing.
  - It is not available to a person of full capacity who mistakenly signs a document, because generally the person who signed the document was in the best position to prevent the loss.
- In *Saunders v. Anglia*, even though the old lady did not know exactly what the document said because her glasses were broken, she was aware of the fundamental nature of the document which prevented the claim of *non est factum*.
  - This contract would have been voidable before the mortgage to Anglia Building.
- In *Marvco v. Harris*, *non est factum* was not available because the Harris signed the documents trusting their son-in-law. They could have easily read them.