commerce undergraduate society

COMM 393 SOLUTIONS

MIDTERM REVIEW SESSION

by Sarah Wang

Practice Problem 1: Consideration & Promissory Estoppel

Related Cases:

- Caliguiri v. Tumillo
- Tulsa Heaters Inc. v. Syncrude Canada Ltd.

ISSUE: Can Sunbucks sue Pearls Inc. for the late fees?

LAW: Consideration is when there is a mutual exchange of promises between two parties. In the case where a promise is made without anything in exchange, it is called a gratuitous promise and will not be enforced by law (Caliguiri). However, promissory estoppel (or equitable estoppel) can be applied if the following elements are present (Tulsa Heaters):

1. There was a pre-existing contract between the parties;
2. One party made a gratuitous promise to relax strict legal obligations;
3. Other party relied on the promise, altered its conduct, and now it would be a real hardship if the promise were not lived up to; and
4. Party who relied on the promise is using this as shield, not a sword.

APPLICATION: When Sunbucks told Pearls Inc. they could deliver the pearls late, no consideration was received and therefore this is a gratuitous promise and hence is unenforceable. Applying the laws of promissory estoppel, Sunbucks and Pearls Inc. had a pre-existing contract as Sunbucks entered into an agreement with Pearls Inc. to purchase pearls. Sunbucks later made a gratuitous promise to relax the delivery date (from September 30 to October 2). Pearls Inc. relied on this promise made by Sunbucks and delivered the pearls late. If the promise were not lived up to, Pearls Inc. would suffer a financial hardship as they would have to pay Sunbucks the fees for late delivery. Pearls Inc. would be using this as a shield to defend themselves against Sunbucks' claim, not a sword to get more.

CONCLUSION: Promissory estoppel would protect Pearls Inc. in this case and Sunbucks would not be successful in bringing a legal action against Pearls Inc. in court.

Practice Problem 2

a) Capacity to Contract / Infants Act

Related Cases:

- RE Collins

ISSUE: Is Megan bound by the contract?

LAW: A contract made with an infant is unenforceable against the infant (whether it's for necessaries or non-necessaries), but enforceable by the infant against the adult) (RE Collins).

APPLICATION: Since Megan is 17 years old, she is considered an "infant" and therefore contracts made with her are unenforceable by the adult party.

CONCLUSION: Megan is not bound by the contract and Aritzya would be ordered to give Megan a refund.

b) Misrepresentation

Related Cases:

- Collins v. Dodge City East
- Weinman v. Brinkman
- Werle v. Sask. Energy Inc.

ISSUE: Can Megan return the jacket?

LAW: Misrepresentation is when one party makes an untrue statement of a material fact, which the other party relies on to enter into a contract and suffers damages as a result. The misrepresentation can be either fraudulent, innocent or negligent (Collins). A fraudulent misrepresentation is one that was made deliberately to mislead the buyer into entering a contract with the seller; the remedy is rescission or damages. An innocent misrepresentation is when the maker of the statement honestly believes (and has a good reason to believe) that the statement is true, when in reality it is false; the remedy is rescission only. A negligent misrepresentation is when the maker of the misstatement owes the other party a duty of care but was negligent/careless in making the misstatement (i.e. the misstatement was not intentional but should have been caught by their duty of care); the remedy is rescission or damages.

APPLICATION: In this case, the salesperson made a false statement by telling Megan the jacket is made from "vegan-down," when in fact it is made from "goose down." This fact was material to Megan as she mentioned she would only purchase the jacket if it did not contain any animal products. Megan decided to make the purchase based on this statement. In this case, there is ambiguity as to what type of misrepresentation occurred. It is uncertain whether the employee knowingly lied (i.e. the misrepresentation was fraudulent). We can likely rule out innocent misrepresentation, as the salesperson did not have a good reason to believe the jacket was made from vegan-down (he/she could have easily checked the label or checked online). As a salesperson, a certain duty of care is owed to customers, and this salesperson breached this duty by making a careless statement about the material of the jacket, which is a negligent misstatement.

CONCLUSION: The salesperson at Aritzya engaged in either fraudulent or negligent misstatement. In either situation, the remedy for Megan is rescission or damages. Therefore, she is entitled to a refund from Aritzya.

c) Contract Formation – Intent, Offer, Acceptance and the Writing Requirement

Related Cases:

- R v. 279707 Alberta Ltd.
- Rudder v. Microsoft Corp.
- Douez v. Facebook Inc.
- Hood v. Enwin Utilities Ltd.

ISSUE: Do Megan and Rachel have a contract?

LAW: In order to have a contract, the following elements must be present: intent, offer, acceptance, consideration, capacity and legality. Intent is presumed in business transactions between arm's length parties. An offer requires specific subject matter, specific parties and a specific price/value; an advertisement alone is not an offer but merely an "invitation to treat." The offer must then be accepted in the manner as specified in the contract, or if the contract is silent, in a reasonable way (same method/faster than how the offer was communicated). Typically, acceptance is effective when retrievable by the offeror, unless the postal acceptance rule applies. If it is reasonable to accept by post (i.e. the contract specified so or the offer came by post), then acceptance is effective when sent (Hood). An offer may be revoked any time prior to acceptance. Consideration is the mutual exchange of promises (Caliguiri). Capacity and legality are generally assumed unless otherwise stated.

APPLICATION: In this case, intent is presumed as Megan and Rachel are arm's length parties engaging in a business transaction. When Megan posted her jacket for sale, no offer was present as this was merely an invitation to treat. On Nov 2, Rachel made Megan an offer to purchase her jacket for $200. On Nov 10, Megan revoked the offer by notifying Rachel via Facebook that she was going to sell her jacket to another girl instead. Rachel would argue that the revocation is invalid as it was not done prior to acceptance, since she mailed Megan a cheque on Nov 6. However, the postal acceptance rule does not apply in this case as the offer was not communicated via mail, nor did it stipulate acceptance by post. Therefore, Megan revoked the offer prior to acceptance (we can assume she never received the cheque and letter by the time she revoked the offer).

Megan is also not bound by her agreement to save the jacket for Rachel until Nov 12 as there was no consideration for it. Megan promised to keep the jacket available for Rachel, but Rachel promised nothing in return, and therefore this was a gratuitous promise and not enforceable. Megan was free to revoke the offer before acceptance, which she did.

CONCLUSION: Megan and Rachel do not have a contract.

d) Discharge of the Contract

Related Cases:

- Jedfro v. Jacyk
- Saturley v. Lund

ISSUE: Was the contract between Megan and Rachel discharged due to frustration?

LAW: Frustration occurs when a completely unforeseeable event beyond the control of either party happens after the contract is made, which makes the contract impossible to perform or makes it radically different than intended (Saturley). If frustration occurs, the contract is discharged.

APPLICATION: Lack of money is not a frustrating event – one must ensure that one can find the money before the contract is entered into. In addition, not being aware of her car insurance payment being due is not "unforeseeable," as Rachel should have known about this. There was also no clause in the contract that specified the contract is subject to Rachel having sufficient funds in her bank account.

CONCLUSION: Rachel will be in breach of contract and Megan will succeed in her lawsuit.

Practice Problem 3: Interpretation

Related Cases:

- BKDK Holdings Ltd. v. 692881 BC Ltd.
- Blackswan Gold Mines Ltd. v. Goldbelt Resources

ISSUE: Will David be successful in his legal action against Emily? How will the court interpret the contract?

LAW: There are three approaches to the interpretation of a contract – the literal approach, the liberal or contextual approach, and as a last resort, contra proferentem. The courts prefer to use the literal or dictionary definition of the terms. Only if a term is ambiguous and the ambiguity cannot be resolved by looking at the literal definition of the terms, will the court consider surrounding circumstances such as the context in which the term was negotiated. The last resort is contra proferentem, in which the court will interpret the contract against the stronger party (e.g. the party who drafted the contract). All of this must be done while avoiding an absurd result and deferring to sound and reasonable commercial practice (Blackswan).

APPLICATION: In this case, we first look at the literal meaning of "beginning of summer." If this term was defined in the dictionary, the court may use this definition to decide how to interpret the contract. Since no definition is given in the case, we can move on to the liberal approach. The parties intended different things – David means the beginning of May whereas Emily meant in late June. Since this still cannot be solved, the court will use contra proferentem as the last resort and interpret against the party who drafted the contract – David. The court will interpret the contract in favour of Emily.

CONCLUSION: David will not be successful in his legal action against Emily.

Practice Problem 4: Legality of Object

Related Cases:

- Maksymetz v. Kostyk
- Phoenix Restorations Ltd. v. Brownlee

ISSUE: Can Deloight LLP obtain an injunction and stop Brad from working at Placewaterhome Cottons LLP? (i.e. Did Brad violate his employment contract?)

LAW: The general rule is that all contracts in restraint of trade are "prima facie" void and illegal. The exception to this general rule is that a court may find a contract in restraint of trade to be enforceable if the party seeking to uphold the contract can prove that it is "reasonable."

To prove that a contract in restraint of trade is "reasonable," the following questions will be asked by a court. (The party seeking to uphold the restrictive covenant must prove every element of the following test for it to be reasonable) (Phoenix)

- Is the restrictive covenant reasonable with respect to the Public Interest?
- Is the restrictive covenant a restraint on competition looking at the nature and location of the business?
- Would the enforcement of the restrictive covenant deprive the public of some special service?
- Is there a legitimate proprietary interest entitled to be protected?
- Is the restraint reasonable given:
    - Size of the restricted geographical area
    - Nature of activities prohibited
    - Length of restriction
    - Overall fairness
- Are the terms certain? (i.e. clear and not vague).

APPLICATION: The clause is prima facie unenforceable and Deloight LLP will have to show that it is reasonable. Where a court will likely find:

- Public Service: It is not clear that the covenant would be depriving the public of a special service. There are many accountants in

Vancouver and this restriction would not unduly deprive the public of receiving service from a professional accountant.

- Legitimate Interest: Yes, the interest to protect the current business would be a business interest that would be threatened by an employee leaving to work at a competitor firm. However, the "reasonableness" of the restraints (discussed next) on competition are likely to be found at issue.
- Reasonable:
  - Geographic Area – the region of North America is far too broad. The legitimate interests of the business would likely be restricted to a geographic area representative of such things such as client base.
  - Nature of Activities – these are also likely far too broad. Banning any type of service related to any professional service that Deloight LLP provides is too broad and would likely leave Brad jobless if this were to be enforced.
  - Length of Restriction – 5 years is far too long. A more reasonable length of restriction would be around 1-2 years.
  - Overall Fairness – this is unfair. The restrictive covenant essentially deprives Brad of all job prospects possible within North America for a period of 5 years.

CONCLUSION: The terms are certain, however, given the above, a court will likely strike down the covenant. Courts will not "rewrite" a covenant to make it enforceable where it would be rewriting the intentions of the parties and it would likely not be saved by the court. Therefore, Deloight LLP will not be successful in obtaining an injunction.

Practice Problem 5: Parole Evidence Rule

Related Cases:

- Hussain v. Ghag

ISSUE: Does Adam have a remedy against Sushi-Is-Us?

LAW: When terms of a contract are clear and unambiguous, the parties are not permitted to introduce evidence outside of the contract to alter its fundamental meaning (Hussain). Exceptions to the rule include a subsequent oral agreement, collateral agreement or oral condition precedent.

APPLICATION: In this case, it is ambiguous whether or not the contract was clear. Adam would argue that "a variety" is an ambiguous term, and therefore the contract was not clear and external evidence (i.e. the terms they negotiated orally) should be allowed to be introduced. Sushi-Is-Us would likely argue that the terms of the contract are clear and that the term "a variety" indicates several different types of sushi, which they did deliver.

CONCLUSION: It is unclear what the outcome would be. If Adam is right, then he would have a remedy against Sushi-Is-Us for breach of contract. If Sushi-Is-Us is right, Adam would have no remedy.

Practice Problem 6: The Constitution Act and the Charter of Rights and Freedoms

Related Cases:

- Liebmann v. Canada

ISSUE: Can Jenny challenge the policy under the Charter of Rights and Freedoms?

LAW: The Charter of Rights and Freedoms applies only to government and government action or decision making. It prevents the government from creating laws or taking action that would be contrary to the rights guaranteed under the Charter. After determining if the Charter applies, discrimination must be present:

- Does the law draw a distinction on the basis of personal characteristics or fail to take into account the claimant's already disadvantaged position resulting in differential treatment?
- Does the differential treatment discriminate under Section 15?
- Is the claimant's dignity demeaned?

If all those above are proven, the burden shifts to the government to show valid pursuant to Section 1 "subject to such reasonable limits as can be demonstrably justified in a free and democratic society." (Liebmann)

APPLICATION: The Charter applies in this case since Jenny's employer is the Canada Revenue Agency, which is a function of the Canadian government. The policy draws a distinction on the basis of age, a personal characteristic that is named in Section 15. We can argue that Jenny's dignity is demeaned as she does not feel "young and vibrant" and can no longer work in a job that she loves. The burden then shifts to the CRA to show that the policy is in place for a valid reason. They will likely fail to do so as age does not have a direct relationship with job performance as a receptionist.

CONCLUSION: Jenny's challenge will succeed and this policy will be eliminated.

Practice Problem 7

a) Capacity to Contract – Inebriation

Related Cases: None

ISSUE: Will the court order Chubway and Blurberry to give John and Chris refunds for the sandwiches and wallets?

LAW: Contracts made with individuals who are lacking in capacity temporarily due to inebriation may be unenforceable against that individual. If it is a contract for a "necessity" (e.g. food, transport, shelter and basic clothing), then it would be enforceable against the individual regardless of the temporary incapacity and the inebriated party would have to pay a reasonable price. For non-necessities, the contract is not enforceable against the inebriated party, on the condition that such party is able to show:

- They were incapable of rational decision making at the time the contract was made;
- The other party was aware of this condition; and
- They then must act promptly on emerging from state of incapacity (and cannot have accepted the benefits of the contract) to repudiate the contract.

APPLICATION: Since sandwiches are considered necessities, both John and Chris would not be able to get refunds from Chubway. The prices marked in the restaurant for the items they ordered will likely qualify as reasonable prices. In terms of the wallets, since they are not necessities, John and Chris can obtain refunds if they are able to prove the above 3 conditions. Having 12 drinks each likely indicates they were incapable of rational decision making. It is uncertain whether the other party (i.e. the salesperson) was aware of their condition. They both acted promptly to repudiate the contract (they went back the next morning).

CONCLUSION: John and Chris cannot get refunds from Chubway but are able to obtain refunds from Blurberry if they can prove that the salesperson was aware of their inebriated condition.

b) Undue Influence, Duress and Unconscionability

Related Cases:

- Buckwold Western Ltd. v. Sagar
- Makay v. Cesar

ISSUE: Do John/Chris have a contract with Blurberry or are they entitled to a refund for the wallets purchased?

LAW: Unconscionable contracts are those where there is an unequal bargaining power between parties and the powerful party gets an extremely advantageous deal. There are two types of unconscionable contracts: due to undue influence or due to duress. Undue influence is where influence is of such a degree that the weaker party is unable to make an independent decision; usually one party has a special skill/knowledge or is in a special position where the other party must place confidence and trust in them (Buckwold Western). Duress is when there is an open and immediate threat against one's person, property or interests. The remedy for both is rescission.

APPLICATION: In this case, duress is present as the salesperson at Blurberry threatened John and Chris' safety unless they purchased the wallets.

CONCLUSION: The court will order the contract to be rescinded and John/Chris can get their money back.

Practice Problem 8: Breach of Contract & Damages

Related Cases:

- Brealta Energy Inc. v. First Capital Management Ltd.
- Westcoast Transmission v. Cullen
- Albrechtsen v. Panaich
- Blackcomb Skiing Enterprises v. Schneider

ISSUE: Will Ben be entitled to get his deposit back? (i.e. Is the deposit a genuine pre-estimate of damages or an unconscionable penalty?)

LAW: In determining whether the deposit is a genuine pre-estimate of liquidated damages or an unconscionable penalty (not allowed), the court will consider what the contract says about the amount (i.e. whether the contract calls it a "genuine pre-estimate of damages" or "liquidated damages"), sophistication of both parties and industry standards. Whether the seller suffers damages or not is irrelevant if the deposit is determined to be a genuine pre-estimate rather than an unconscionable penalty designed to punish the buyer (Blackcomb).

APPLICATION: In this case, the contract specifies that the $100,000 deposit is a genuine pre-estimate of damages. Both parties have agreed to this, so there does not seem to be an issue with the relative sophistication of the parties (i.e. no party is taking advantage of the other). Industry standards for real estate is usually 10-20%, so this requirement is also met. The fact that Jerry suffered no real damages is irrelevant.

CONCLUSION: Ben will not be entitled to get his deposit back and Jerry can keep this $100,000.