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Problem-Solving Question

Emily v John

Issue 1: Is the draft contract outlining the terms of sale enforceable and binding of both parties?

Rule:

There are three elements in a valid contract: agreement, consideration, and intention.

Offers and acceptance are the two sub-elements of agreement. The first element is the offer - acceptance. The offer must be definitive, clear, and communicated to the offeree expressing willingness to enter into the contract.[1] Acceptance must be made by the offeree to the offeror without any condition for the offer.[2]

The parties must consider or promise in exchange for a bilateral contract. It shall be something that "value in the eye of law".[3] The promise to transfer a property due to love and affection to the transferee is not sufficient to show consideration.[4]

The intention to is the final rule that requires the parties' assurance to be legally bound by the contract. If a promise was made in a social or domestic context, generally no intention was established. If the agreement is primarily arranged for the benefits of each party, then legal intention is found.[5]

Application:

- Offer and acceptance: John made an offer to purchase a parcel of Emily's backyard, and she made clear acceptance without any revisions. An agreement was established regarding the sale of the backyard parcel.

- Consideration: Emily promised to sell and John made the promise to purchase due to the mutual benefits they may get from the deal; then, the promise was sufficient and valid under the eye of the law.

- Intention: The promises were made for the advantages of Emily and John, and the legal intention sustained.

Conclusion: The drafted contract on purchasing the property for$50,000 is enforceable and binding.

Issue 2: Whether the modified contract extending the payment deadline by 60 days is binding and enforceable?

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[1] *Australian Woollen Mills Pty Ltd v Commonwealth* [1954] 92 CLR 424.
[2] *Hyde v Wrench* [1840] 3 Baev 334.
[3] *Chappel & Co Ltd v Nestle Co Ltd* [1960] AC 87.
[4] *Dunton v Dunton* [1892] VLR 114.
[5] *Ermogenous V Greek Orthodox Community of Sa Inc* [2002] 209 CLR; *Roufos v Brewster* [1951] 51 SR 183.

Rule: The same rules on agreement, consideration and intention are applied.

Application:

It a new offer from John to purchase a parcel of the backyard with payment to be made within 60 days. There is no acceptance from Emily for the new offer.

Conclusion: There is no agreement on the extending payment deadline, therefore, the modified contract is not binding.

Issue 3: Whether the clause granting John an option to purchase additional portions by 1st September is binding, although she did not fully understand the legal effect when she agreed?

Rule:

The first rule is the parties shall be bound by the contract that they signed, regardless a party read the contract.[6] However, such term of contract can be vitiated by some factors, such as misrepresentation, duress, undue influence, mistake, unconscionable conduct. Among these factors, undue influence is the act of taking advantage from the position having influence over the contracting party to achieve a benefit from its conduct. The transaction made under the undue influence is voidable. The innocent party may request to rescind the contract and request for compensation.[7] The court may take into account various considerations in examining the existence of undue influence, such as standard of intelligence, age and status of health, the length of friendship, experience of the trusting party and dominant party.[8]

Application:

It is indicative that their length friendship give rise to a presumption of an undue influence from John to Emily. John took the advantage from the transaction that he can buy additional portions from Emily, and Emily was unduely influenced by their relationship and other presentations from John to agree.

Conclusion:

John made an undue influence to Emily in respect of the contractual term enabled him to buy additional portions before September 01. Therefore, the contractual term is voidable. Emily can sue Tom and request for rescission and/or damage.

Issue 4: Whether the presentation on conducting the requisite soil testing and environmental impact assessment (EIA) is enforceable and binding?

Rule:

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[6] *L'Estrange v Graucob* [1934] 2 KB 394; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165.
[7] *Quek v Beggs* [1990] 5 BPR 97405.
[8] *Johnson v Buttress* [1936] 56 CLR 113.

The oral statement made before the establishment of the contract can be determined as a contractual term or a collateral contract.

The first rule is the distinction between a representation and a contract term. If a statement was made to the party with promissory nature, it is a term of contract and therefore binding.[9] If the statement was a fact information that induce a party to enter into the contract, it is a representation and not binding.[10] The language of the statement, the relative knowledge and expertise of the parties, the importance of the statements to the inquirer and the time of making statement are some considerations of the court in determination of a term or representation.[11]

The second rule is the categorization of the terms. If the term is essential, it is a condition and the breach of such term entitles the innocent party to damages and rescission the contract.[12] If the term is not essential, it is a warranty and the breach of term can lead to damages claim from the innocent party.[13] The term can be an innominate term, which is not able to classify into condition or warranty. The available remedies for breach of innominate term depends on the seriousness of the breach.[14]

The oral statement with the promissory nature can form a collateral contract which is binding both parties.[15]

Application:

- The oral statement on soil testing and EIA was incorporated into the written contract as a term because it has promissory nature about the undertaking that John would carry out in exchanging of the benefit that Emily agreed to sell a parcel of land to him.

- The statement was important and essential to the contract, because it was a statutory requirement for the contract to be valid. If John failed to perform the warranty on making soil testing and EIA, Emily would not have agreed to conclude the contract. Therefore, it was a warranty.

- John breached the warranty so Emily can sue John to rescind the contract and request for compensation.

Conclusion:

[9] *Oscar Chess Ltd v Williams* [1957] WLR 370.
[10] *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435.
[11] RMIT, Topic 6: Terms of a Contract and Non-contractual Representation, page 3.
[12] *Poussard v Spiers & Pond* (1876) 1 QBD 140.
[13] *Bettini v Gye* (1876) 1 QBD 183.
[14] *Koompahtoo Local Aboriginal Council v Sanpine Pty Ltd* (2007) 233 CLR 115
[15] *Hospital Products Ltd v United States Surgical Corproration* [1984] 156 CLR 41.

The oral statement about soil testing and doing EIA was a contractual term, not a representation. It was incorporated into the contract as a warranty. John breached the warranty, so Emily can sue him to rescind the contract and seek for damages.

CASE NOTE

Introduction

The case Elivir Halilovic v Prestige Motor Sport Sydney Pty Ltd [2018] NSWCATCD 4 was heard and decided by the Judge Charles of Consumer and Commercial Division of New South Wales Court. The hearing was adjourned on November 7, 2018, and the judgement rendered on January 19, 2018.

Parties

The Plaintiff was Elivir Halilovic and the Defendant was Prestige Motor Sport Sydney Pty Ltd.

The claims for violations of Consumer Law of Australia NSW (ACL NSW) had been brought by Plaintiff against Respondent in relation to an used Ferrari motor. Plaintiff bought an used Ferrari motor from Defendant. The motor was 10 years old and had travelled 39,737 kilometres. Plaintiff was told by Respondent that there was nothing wrong with the motor, and a test was made at that time and no issues was found. However, after the test, Plaintiff requested for the rear engine to be repaired, and in fact it had been. A few months later, there was a problem with the engine and the motor failed to re-start. The motor was examined by Ferrari Brisbane with various flaws found and fixed, however, it still failed to re-start. Plaintiff filed its claims against Respondent for selling a defective motor, which was not in acceptable quality and fit for purpose, the defects of the motor were major failures, and claimed for damages.

The essential argument of Plaintiff was the motor was not in acceptable quality, did not fit for purpose. The defects of the motor, in particular, the gearbox, was a major failure, and therefore Respondent breached sections 54 to 57 of the ACL NSW.

The Court considered the following issues: Whether the vehicle was defective at the time of sale? What regulations of ACL NSW had been contravened by Respondent? What were the available remedies for Plaintiff? Besides the ACL NSW, whether any available remedies under the contract for Plaintiff.

Analyses

Firstly, the Court examined whether the motor was defective when it was sold to Plaintiff. In the absence of the pre-sale inspection report, Plaintiff was genuinely informed that the vehicle was not defective, and it was further strengthened by the statement of the sale's representative that nothing wrong with the motor. The fact showed that the motor was unable to re-start just 3 days after sale, and given the proximity of time and short distance driven, defects existed when the motor was sold to Plaintiff. This ruling is correct and persuasive.

Secondly, the Court examined whether Respondent breached the ACL NSW or under common law as general.

The Court considered that Respondent did not breach s 56, s 57 and s 58. Respondent did not fail to provide the motor did not correspond with the description provided, for the reason the statutory guarantee is in respect of identity of goods, not quality or specification.[16] There was no doubt to the Court that the delivered motor was the one that Plaintiff wanted to buy. There was also no model or sample provided to Plaintiff, so s 57 was inapplicable. Respondent did not breach s 58 whereas the fact supported that Respondent was always willing to recover the fees for repairment. The Court was both correct and persuasive.

The Court considered that The Court found that Respondent breached s 54(1)(a) for the motor did not fit for all the purpose for the same kind of product, and s 54(2)(c) for not being free from defects, for the reason that the motor was defective when it was sold to Plaintiff. As a result, the consumer guarantee of the acceptable quality of s 54 had been contravened. Further, the Court ruled that Respondent breached s 55 because the motor did not fit for the disclosed purpose of the plaintiff. The motor could not operate normally and was used for driving. The decision was made correctly.

The Court examined the available remedies under the ACL NSW that Respondent shall be liable for breaches of consumer guarantees. In this respect, it was essential for the court to evaluate whether the defect was a major failure, as provided under s 259 – 260. Taking into account all the relevant facts, the Court found that the defects reported by Ferrari Brisbane were not significant, its impact on the breakdown of the motor was unclear, and there was no major failure. The same was applied to the gearbox. I do not agree with the court in this section. The judge himself recognized that that there were many defects incurred with the motor, which made the motor was not in acceptable quality, the ordinary purpose of the motor was to drive; however, the plaintiff did not achieve this purpose. As a reasonable consumer, Plaintiff would not have agreed to purchase a motor that could not restart after three days of selling. The defective motor shall be determined as a major failure in 260 ACL NSW.

Subsequently, the Court reviewed the remedial measures applying to the breach of Respondent. Having considered that Respondent complied with the consumer's request, as provided by s 259(2)(b), no further reasonable cost was granted.

Finally, the Court reviewed the claims under contract law, and found that Respondent breached the contract. However, at all material times, Respondent was willing and in fact took remedial actions to Plaintiff as required to cure the defects. Therefore, no further relief was provided.

Finally, Respondent won the case.

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[16] *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441.

Conclusion

I agree with the majority of the judgement that there was a breach of ACL NSW, in particular the consumer guarantee with respect to being fit for purpose and in acceptable quality. However, I disagree with the Court that Respondent did not make a major failure for not complying with these consumer guarantees. For the rest of the judgement, the judge made an accurate and logical decision that Respondent remedied the defects and thus it should not impose any additional costs, although the violation of ACL NSW was found.

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B. Secondary source

RMIT, Topic 6: Terms of a Contract and Non-contractual Representation, page 3.