

Enforceable Contracts: Intention To Create Legal Relations

Nik Malini Nik Mahdi, Universiti Malaysia Kelantan, Kota Bharu, Malaysia, nmalini@umk.edu.my

Nur Izzati Mohamad Anuar, Universiti Malaysia Kelantan, Kota Bharu, Malaysia,
nurizzati.ma@umk.edu.my

Nurul Hasliza Razmin, Universiti Malaysia Kelantan, Kota Bharu, Malaysia, nhasliza@umk.edu.my

Nur Dalila Mat Yusoff, Universiti Malaysia Kelantan, Kota Bharu, Malaysia, nurdalila@umk.edu.my

Abstract

Contrary to the general view of non-lawyers and laymen; not all promises or agreements can be accepted or are enforceable at law. An agreement is enforceable if an aggrieved party whose rights have been breached by the other party to the agreement can enforce those rights or get his remedies from the courts of law. In order for a contract to be enforceable, a promise or agreement must be valid and binding between the parties; meaning that they must be capable to be legally construed as contracts that are valid and binding at law. The elements of an enforceable contract is judicially explained by VC George in the case of **Kajang Sri Rock Products Sdn Bhd v Maybank Finance Bhd & Ors**¹ in that “To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that there must be consensus ad idem, those parties must *intend to create legal relations* in the sense that the promise to each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.’ This paper seeks to explain what is ‘intention to create legal relations,’ for object failure to understand this most basic of a contractual element apart from the classic ‘offer’ and ‘acceptance’ requirements, will render a promise or agreement unenforceable at law thereby throwing many precious business relationships and business ventures into the floors of the courts with very lengthy and expensive court battles therein.

Introduction

Intention to create legal relations is one of the principal ingredients of a valid and binding contract, which in its absence; shall render a contract (though prima facie having the requisite offer, acceptance and consideration) as void ab initio. In determining whether there is a succinct and clear intention that the parties be bound by their obligations to the contract; the court shall look into the statement or promises, or in other words ‘the statement of intention’ that is made to one another; this ‘statement of intention’ can be made either by the offeror or the offeree or both.

A Statement of Intention

A statement of intention though made is also not intention if the offer is uncertain as in the case of **Guthing v Lynn**², to pay 'an extra £5 will be paid if the horse is lucky' or in the case of **Ahmad Meah v Nacodah Merican**³ an agreement to build ‘a suitable house.’ However, in **Ward v Byham**⁴, a promise to make a child happy was held to be a part of consideration. It is opined that in this latter case the court might have looked at the intention of the parties as a whole, especially on the part of the father making

¹(1992) 5 CLJ 611

² (1831) 2 B & AD 232

³ (1890) 4KY 583

⁴ (1956) 1 WLR 496 at p. 103

that promise that he had really intended to make the child happy.

However not all promises or agreements that are uncertain, (though there are 'intention' per se in the promises made) are ultimately deemed as void due to uncertainty of those promises. In the case of **Hillas v Arcos**⁵, the court was willing to construe the previous dealings of the parties in order to arrive at the conclusion that there was sufficient intention to be bound between the parties notwithstanding the uncertainty of terms in the options. In this case; P, in 1930, agreed to sell D a quantity of Russian softwood timber 'of fair specification.' The contract contained a clause giving to P an option to purchase further timber in 1931, but the option gave no particulars as to the kind or size or quality of the timber, nor the manner of shipment. When P sought to exercise the option, D pleaded that the clause was too indeterminate and uncertain to indicate an unequivocal intention to be bound, and that it was merely an agreement to negotiate a future agreement. It was thence held by the House of Lords that in the light of the previous dealings between the parties; there was sufficient intention to be bound; the terms left uncertain in the option could be ascertained by reference to those contained in the original contract and from the normal practice of timber trade.

Bilateral Contract & Unilateral Contract

In bilateral contracts such as in the advertisement; as evidenced in the case of **Harris v Nickerson**⁶; it was held that the advertisement of sale by auction was a mere statement of intention to hold a sale and not an offer that could be accepted to form a binding contract therein. As for unilateral contracts however; it has been held in the celebrated case of **Carlill v Carbolic Smokeball Co**⁷ that a statement of intention to reward anyone who had contracted influenza after using the smoke balls pursuant to the requirements in the advertorial was valid and accepted as a legally binding intention or promise to contract notwithstanding that in general, the law for bilateral contracts involving advertisements are not offers but mere invitations per se. Hence, following the case of **Carlill v Carbolic Smokeball Co Ltd**⁸, it seems that statements of intention in the form of promises to reward be it in the form of an advertorial is taken by the courts as valid and genuine intention to contract for the performance of a party as consideration to the promise is evident; (the same) sufficient enough to merit such a conclusion.

Social, Domestic & Family Arrangement

In cases involving social, domestic and family arrangements where there is natural love and affection between the parties, the courts normally presume that there is no intention to have legal consequences, meaning there is no contract no matter how and in what manner such statements of intention has been made between the parties. Hence, as discussed earlier, in **Balfour v Balfour**⁹ a statement of intention by the husband to give a monthly allowance to his wife from Ceylon is not a contract, neither it is to promise the wife 15 pounds sterling a week 'as long as the business is okay' or 'so long as I can manage it' as in the case of **Gould v Gould**¹⁰ since; as per the words of Edmund Davies LJ 'those words import such uncertainty as to indicate strongly that legal relations were not contemplated...furthermore such uncertainty...how and by whom is it to be determined whether the business was okay or whether the husband could 'manage' to keep up the payments...'

However the court is willing to hold that there is intention if the other party has acted in pursuant to that promise to the detriment, sacrificial or forbearance of that party to show that as in the cases of **Merritt v**

⁵ (1930)

⁶ (1873) LR 8 QB 286

⁷ (1893)1 QB 256

⁸ *ibid*

⁹ (1919) 2 KB 571

¹⁰ (1969) 3 All ER 728 & Court of Appeal

Merritt¹¹, **Simpkins v Pays**¹² and **Parker v Clark**¹³ there really was a common intention to contract.

Business Arrangement

In a business arrangement there is a presumption that the statement of intention found in the promises made between the parties is a binding intention capable of culminating into enforceable contracts. Thus, there is a strong presumption that the parties intend to be legally bound unless this presumption is successfully rebutted by the express exclusion of legal jurisdictions for both parties in the contract as in the case of **Rose & Frank Co v JR Crompton & Bros**¹⁴.

Negotiations for the sale of land or houses; though they are business arrangements may also be found by the courts as just mere negotiations which do not constitute firm offers for there were no consensus ad idem between the parties as to the real terms and conditions of the contract. Agreement that is 'subject to contract' or 'subject to formal promise to be drawn up' is also found by the courts in most cases as having no intention to contract unless there are other evidence strong enough to rebut the presumption from the facts surrounding the case; evidence cogent enough to show that there is a common intention from both parties that the promises made should have legal consequences therein.

In **Winn v Bull**¹⁵ there was a written agreement between the plaintiff and defendant for the lease of a house subject to and is dependent upon a formal contract being prepared but ultimately no formal contract was entered into. It was held that there was no enforceable contract. Similarly, in the Malaysian case of **Low Kar Yit & Ors v Mohd Isa & Anor**¹⁶, the defendant gave an option to the agent of the plaintiffs to buy a parcel of land subject to a formal contract being drawn-up and agreed between the parties. The plaintiff's agent duly exercised the option but the defendant subsequently failed to sign the agreement for sale, whereupon the plaintiffs instituted proceedings for specific performance or alternatively for breach of contract. Gill J held that on the construction of the document sued upon, the option was conditional upon and subject to a formal contract to be drawn-up and agreed upon between the parties. The exercise of the option amounted to nothing more than an agreement to enter into an agreement. Therefore there was no contract.

Contrary to the above cases however; in another Malaysian case of **Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor**¹⁷; it was held that the pro-forma is a contract. In this case, the respondent purchaser had signed a booking pro-forma in which the parties agreed to the purchase price of a house to be built by the appellants, a housing developer. Subsequent to the payment of a deposit and the signing of the pro-forma, the appellants informed the respondent that the price of the house was to be increased. The respondents did not agree to the increased price and applied for specific performance. The appellants contended that the pro-forma was 'subject to contract' in the sense that until a further document was mutually agreed and signed; no contractual obligations arose from it. This argument was rejected by the Lordships, holding that the appellants were bound by the pro-forma and could not argue that it did not create the obligation to purchase and sell the property.

In short, the use of the expressions 'subject to contract' or the like does in most cases, raise an inference that there is no intention to create legal relations in a commercial or business arrangements thereby

¹¹ (1970) 2 All ER 760

¹² (1955) 1 WLR 975

¹³ (1960) 1 WLR 286

¹⁴ (1925) AC 445, (1925) 2 KB 26

¹⁵ (1877) 7 Ch. D. 29 at p. 32

¹⁶ (1963) MLJ 165

¹⁷ (1981) 1 MLJ 56

rebutting the presumption that there is intention to be legally bound in the same. However the expression 'subject to contract' is not a magic word or so intractable that it cannot be overcome; for as per Sir Garfield Barwick in the earlier mentioned case of **Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor**¹⁸ it is really a question of intention-

The question whether the parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law... The purpose of the construction is to determine whether the parties intend presently to bound to each other or whether, no matter how complete the arrangements might appear to be, they do not so intend until the occurrence of some further event including the signature of some further documents or the making of some further arrangements. The question is one as to be expressed intention and is not to be answered by the presence or absence of any particular form of words.'

Hence, difficulties frequently arise where parties in negotiations reach 'points of agreement' or 'exchange letters of intent' or 'letters of comfort' but nevertheless contemplate that a formal document is to be later drawn up. As discussed before, the question whether or not a binding contract is concluded is a matter of interpretation for the courts to decide. In **Kleinwort Benson Ltd v Malaysian Mining Corporation Berhad**¹⁹, it was held that a 'letter of comfort' where a company stated that it was its policy to ensure that its subsidiary could meet its liability in respect of loans made to it, did not have contractual effect as the words in question were intended as a statement of existing fact and not as a contractual promise for 'really, it was only just a moral responsibility.'

The letter of intent is another commercial device by which one party indicates to another that he is very likely to place a contract with him. A typical example would be a contractor proposing for tender for a large building contract and who would need to sub-contract for plumbing and electrical works. He would need to obtain estimates from the sub-contractors on which his own tender would, in part be based but he would not wish to enter into a firm contract with them unless and until his tender was successful. Often he would send a 'letter of intent' to his chosen sub-contractors to tell them of his selection. More often than not such letters are so worded so as not to create any obligation on either side though sometimes it does have an invitation to commence some preliminary work which at least creates an obligation to pay for that work and as per Fay J in the case of **Turiff Construction Ltd v Regalia Knitting Mills Ltd**²⁰, 'save as in exceptional circumstances, it can have no binding effect.'

In the leading case of **British Steel Corp v Cleveland Bridge and Engineering Co Ltd**²¹, it was held that no contract is made merely on the basis of letter of intent, there were only negotiations but no contract had resulted. There was only a request to commence work pending a formal contract. There was nothing decided on the issue of price, delivery dates and other applicable terms and conditions. Hence the defendant's counter claim for breach of contract as against the plaintiffs claim (in this case the plaintiffs' claim for work done on the request of the defendant was allowed based on the principle of *quantum meruit*) must fail for there were no obligations on the plaintiffs to deliver the steel nodes within a reasonable time.

A statement of intention is equally not an offer in a 'business arrangement' if it just to supply information hence rebutting the presumption that there is an intention to contract. In **Harvey v Facey**²² a statement of

¹⁸ (1981) 1 MLJ 56 at p. 58

¹⁹ (1989) 1 All ER 785 CA

²⁰ (1971) 222 Estates Gazette 169

²¹ (1984) 1 All ER 504

²² (1893) AC 552

fact merely to supply information is cannot be treated as an offer and when 'accepted' cannot create a valid contract. The facts of the case is as follows:

A telegraphed to B 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid.' B replied by telegram, 'Lowest price for Bumper Hall Pen 900 pounds. A telegraphed, 'We agree to buy 'Bumper Hall Pen for 900 pounds asked by you.' Bumper Hall Pen was a plot of land and A claimed that this exchange of telegrams constituted a valid offer and acceptance.

The Privy Council held that there was no contract made in that B when stating the lowest price of 900 pounds were merely supplying information and that the real offer was made by A when they telegraphed to buy the land at 900 pounds to B. Thus there was no contract formed in this case as there was no acceptance by A to the offer made by A therein.

Likewise in the case of **Clifton v Palambo**²³, the plaintiff and defendants were negotiating for a large scattered estate and the plaintiff wrote to the defendants as follows:

'I...am prepared to offer to you or your nominee my Lytham estate for 600,000 pounds ...I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.'

The Court of Appeal held that that letter was not a definite offer to sell, but a preliminary statement as to price especially in a transaction of such magnitude, was but one of the many questions to be considered.

It is opined that the decision of the Court of Appeal was to a large extent influenced by the fact that among others, that the Schedule of Completion was not yet finalised and that both parties were just at the mere negotiations stage bearing in mind such 'large a transaction'²⁴ of land involved.

In short, based on the cases presented earlier; it would appear that whether a statement of intention or an act can be construed as a definite intention to contract, hence a valid offer or an invitation to treat; depends largely on the intention to be bound by the maker of that statement or the doer of that act. If he intends to be bound, then that statement or action is an offer; if he is merely supplying information, or merely negotiating with the other party the terms of a contract; then that statement or action is merely at a pre-contractual basis which are invitations to treat and definitely are not definite offers. In reaching to the conclusion whether or not there is a real intention in the promises made between the parties; the courts have to consider whether that intention to be bound is there from the actual surrounding facts of the case, trade customs and actual dealings, past or present between the parties involved. The courts might also consider the reliance of a party on that promise or performance done in relation to the promise in order to ascertain whether there is really any intention to create a legally binding contract therein.

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²³ (1944) 2 All ER 497

²⁴ As per Lord Greene at p. 499, *ibid*

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