

LAW FOR SURVEYORS

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Law for Surveyors  
**Scenario 1: Hugo and Flavia Situation**  
**Brief Facts and Issue**

This is a contractual problem arising between two cousins-Hugo and Flavia. The issue faced by Hugo and Flavia is whether Hugo and Flavia had engaged in a contractual relationship. Hugo wants to know whether he can sue Flavia for a breach of contract and whether he is entitled to any remedy in the form of recovery of the car.

Hugo is the project manager of Posh Properties Limited, while Flavia is his cousin. Flavia mentions that she was willing to sell her car to Hugo for £4000 but subject to Hugo calling and speaking to her directly on the phone before Saturday 10.00 am. Hugo thinks about the deal and sends a WhatsApp message to Flavia, stating that he would pay only £3500 for the car and that if he did not hear from Flavia, he would treat the offer as accepted. Flavia sells the vehicle to another person, and Hugo feels that she has breached their contractual agreement.

**Law**

Generally, a contract is an agreement between two or more legal persons and is legally enforceable by the parties who were privy to that agreement (Cartwright, 2014). All the essential elements of the contracts, such as the offer, acceptance, consideration, and capacity must be met to consider a contract fully formed. For a contractual relationship to exist, there has to be an offer by one party which is unequivocally accepted by another party with the intention of bringing a legally binding agreement between themselves. The proposal by one party must show the intention to be legally bound to another party.

The parties must have consensus ad idem in that the parties must agree to the same thing. This point was observed by Blackburn J in *Smith v Hughes* (*Smith V Hughes*, 1871). Blackburn noted that

*“if one of the parties intends to make a contract on one set of terms and the other intends to make the contract on another set of terms, ...the parties are not at ad idem hence there is no contract...”*

Parties privy to a contract; therefore, in essence have to be communicating the same thing and understand the terms the other is trying to communicate. There must be a common understanding between the parties as to both the subject matter and the whole terms of agreement.

When a party gives an offer, it has been held that a counteroffer invalidates the initial offer, and the contract is not binding. This is so because the parties are not at ad idem (Poole, 2016, p. 33). However, the other party may accept the counteroffer by conduct. In *Hyde v Wrench* (*Hyde v Wrench*, 1840), the defendant was selling a farm for £1000. The plaintiff wrote to the defendant that he was willing to buy the farm for £950 which the defendant rejected. The plaintiff returning to the initial offer, which the defendant also dismissed. He sued for specific performance, but the court held that the defendant was not liable as the initial proposal had been rejected by the plaintiff. Counteroffers make the parties not be at ad idem since one they will be mistaken as to the consideration involved.

It has also been held that the offeror may prescribe his preferred method of communication and the duration on which the offer may expire. If the offeror so wishes, he or she can withdraw the offer before the other party accepts. This was seen in the case of *Dickinson v Dodds* (*Dickinson v Dodds*, [1875]). In this case, the offeror had given a deadline for an offer but sold the house a day before the expiry of the offer. The offeree accepted the offer before the

deadline, but the court held that there was no valid contract between the two parties. The same was witnessed in *Routledge v Grant*.

An offer also, once communicated to the offeree can be revoked by the offeror. The offer is revocable at any time before the offeree communicates acceptance. Once the notice of acceptance is given to the offeror there arises a binding agreement between the two parties. As observed in *Dickinson v Dodds*, the offeror can communicate termination of the offer at any time before the duration stipulated expires.

Furthermore, the court has held that acceptance must be communicated to the offeror through the prescribed method of communication. The acceptance must, however, be unconditional and unequivocal. No variation or modification must be made to the initial offer by the offeror. Common law has held through the centuries that silence by either the offeror or the offeree does not amount to acceptance of the offer. In the case of *Felthouse v Bindely*, the court observed that the silence by John did not amount to acceptance and as such, there was no valid contract with the plaintiff.

In addition to offering and acceptance, an intention to create legal relations must be established by the parties. The absence of an intention leads to unenforceable agreements. The courts, as a general rule, in social and domestic arrangements, proceed from the presumptions that there was no intention to create legal relations. However, if the parties have shown the intention to create legal relations, then the contract will be binding, as was held in *Simpkins v Pays*. In this case, the plaintiff and her grandmother had engaged in a Sunday Newspaper competition where the three entries were made in her name. One entry won, and the plaintiff sued for a third of the winnings. The court held that the two had manifested to enter into a legal relation. In commercial agreements, there is a presumption that an intention to create legal agreement existed between the parties.

### Analysis

The first question was whether an intention to create legal relationship existed between the two parties. Flavia and Hugo are cousins and are, therefore, related. As a general rule, the courts will proceed that there is no intention to create legal relations between parties in such social arrangements. The circumstances and the words used by the parties in this situation will be instrumental in ascertaining intention to create a legal relation. The parties were engaged in a commercial arrangement, and the wordings used by the parties indicated the intention to create legal relationships. Words used by Hugo when he sent the Whatsapp message also suggests an intention.

Flavia told Hugo that she was willing to sell the car for £4000. Hugo later bargains by sending a message that he was ready to buy the vehicle for £3500. This can be held to be a counteroffer and in applying the principle in *Hyde v Wrench*, the initial offer had been rejected by Hugo, and thus Flavia was not bound by the contract. This new amount was a new offer in which Flavia was not bound to accept. Flavia would not be, therefore, held liable after she sold the car to another party as there was no valid contract between the two cousins. Both Flavia and Hugo lacked consensus ad idem as one party knew the consideration to be £4000 while the other at £3500. A lack of meeting of minds does not give rise a binding contract.

As the court held in *Felthouse v Bindley*, silence does not amount to an acceptance. Hugo wrote to Flavia indicating his new counteroffer and further stating that if he did not hear from Flavia, he would treat the offer as acceptance. Flavia did not read the message on WhatsApp, and when he went to pick up the car, he found out that she had sold the vehicle. He feels that the

silence had amounted to an acceptance. However, this is not the case, as was held in the *Felthouse* case. The fact that Flavia did not reply was not an indication of acceptance.

It has also been held that where the offeror prescribes a mode of communication, then the acceptance must be given in such manner. Flavia told Hugo that to show acceptance of the offer, Hugo had to call her and talk to her personally. Hugo only sends a WhatsApp message, which Flavia ends up not reading. The acceptance was, therefore, not valid as it was not communicated in the preferred mode. The offeror is also free to revoke his offer, as was seen in *Dickinson v Dodds* case. Flavia could rescind the offer and sell to another person as she was still not bound by that offer.

### **Conclusion**

In conclusion, the essential elements of a contract were not met in this case. The offer by Flavia was not followed by an unequivocal acceptance by Hugo. Flavia withdrew the agreement before Hugo had effectively communicated his acceptance of the offer. Inasmuch as there was an intention to create legal relations between the two parties, a contract did not arise from the arrangement. No valid contract existed, and as such, Hugo cannot sue Flavia to recover the car.

### **Scenario 2: Posh Properties and Société Français**

#### **Brief Facts and the Issue**

Posh Properties is facing the issue of whether the lease agreement between it and Société Français (SF) has been frustrated. Posh Properties and SF had engaged in a lease agreement prior to the 2016 referendum on Brexit. Since they viewed the contract as long term, they had renegotiated the conditions to allow them stay at the office blocks for two years without paying rent. SF changed its headquarters to France as a result of the vote as it views the contract frustrated. SF writes a letter explaining to Posh Properties Limited that it could not have been foreseeable that the UK would leave the EU making it hard for them to continue operating in UK.

#### **Law**

The doctrine of frustration of a contract arises in a situation where a situation arises, after the formation of a contract, that renders the performance of the contract to be impossible either by way of illegality, commercially useless or an impossibility (Stone et al., 2011, p. 482). The doctrine was developed to remedy injustices that were evident in forcing a party to continue performing the duties imposed on the contract even in situations that were impossible to keep performing the contract.

This was so after the rigid application of the principles of contract law to the case of *Paradine v Jane* (Conlen, 1921, p. 89). In *Paradine v Jane*, the court had interpreted the contract between a landlord and a tenant to force a tenant who had fled during the German invasion for two years to pay the rent incurred during the period of war. Frustration generally operates to discharge a party from the obligations imposed on him by the contract (Kovac, 2018, p. 17)

The doctrine of Frustration can apply where there are supervening events that can change the commercial characteristics of the contract. However, before an event to rendering the contract as frustrated, the change must be fundamental to the performance of the contract. The mere addition of expenses does not render the contract frustrated but can lead to it becoming commercially useless. For frustration to occur, it must be without fault of either party, and the obligation must have become incapable of being performed as circumstances in which it was to be performed have radically changed from which was initially agreed. This was held by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* (Stone et al., 2011, p. 487).

In *Taylor v Caldwell* (*Taylor v Caldwell*, [1863]), the plaintiff and defendant entered into a contract for the use of Survey Garden and a music hall for giving a series of concerts in May 1861. However, a day before the concert, the hall was destroyed by fire without the fault of any of the parties. The plaintiff, however, sued the defendants for a breach of contract. The court held that the defendant had been discharged of his duty by way of frustration as there was no hall to ensure the performance of the contract. Blackburn J stated that there was an implied term in a contract that the parties could be excused from the performance of the contract if, before breach of the contract, a situation arose beyond the control of the parties, which would render the performance of the contract impossible.

In *Tsakiroglou and Co. Ltd v. Noble Thorl GMBH*, the parties had entered into a contract for the supply of large quantities of groundnuts from the Port of Sudan to Hamburg. The defendant, however, had contemplated using the Suez Canal, which was closed at the time. He stated that the alternative route was expensive and thus he was relying on frustration. The court, in rejecting his claims, held that the contract was not frustrated the contracts had no time limit, the expenses could be recovered from the buyer and that the route could not damage the characteristics of the groundnuts. The defendant was, therefore, liable to pay damages to the party. Section 2 of the Law Reform (Frustrated Contracts) Act 1943 takes effect should the contract be rendered as frustrated.

### Analysis

SF and Posh Properties Limited negotiated a lease agreement in 2014 for a twenty-year lease. SF had also negotiated for a 2-year rent-free period as the lease would have a clause prohibiting them from leaving the agreement early. This means that from the year 2014 to the year 2016, SF had been staying on the office blocks on free rent. The 2016 Brexit referendum, however, prompts SF to relocate its headquarters to Paris, since the act of UK leaving the European Union would have brought extra expenses on companies that have no legal personality in the United Kingdom. SF views the additional costs as grounds for frustrating the contract. This event was also not foreseeable for the parties during the formation of their contract.

As observed in *Davis Contractors Ltd v Fareham*, the change must have been fundamental to the performance of the contract to radically affect the performance of it. The 2016 Brexit referendum did not make it impossible for SF to continue operating in UK but only extra expenses to it. SF can attempt to renegotiate the terms of the contract with Posh Properties Limited to account for the economic realities that had taken place since the formation of the contract. This is accordance with the reasoning of the court in *Tsakiroglou and Co. Ltd v. Noble Thorl GMBH* where it was held that where the contract was only going to have extra expenses on its performance, then the other party could recover the expense from Posh Properties, but not render its performance as frustrated.

### Conclusion

The performance of the contract could not be rendered as frustrated after the 2016 referendum since, in essence, the vote did not preclude SF from continuing to operate in the UK. SF cannot, therefore, be discharged from its obligations under the contract and is liable to pay damages to Posh Properties Limited.

### Scenario 3: Posh Properties Limited and Seller of the Blocks of Flats

#### Brief Facts and Issue

Posh Properties Limited aimed to buy blocks of flats from a seller as an investment. Before the purchase, the seller of the property assured Posh Properties Limited of how the tenants were all good, paid their rent on time, and that there were no tenants who had arrears.

Relying on this statement by the seller due to previous history of non-paying tenants, Posh Properties Limited agreed to buy the property. They later discover that this was not the case as there were two tenants who were six months in arrears and had a history of making late payments. The seller knew this. The issue is, therefore, whether Posh Property Limited has any remedy against the seller.

### **Law**

Misrepresentation is the “act of making a false or misleading assertion about something with the intent to deceive”(Garner, 2009, p. 1091). This statement is made by one party to induce another to enter into a contractual arrangement. Misrepresentation renders a contract voidable at the option of the innocent party. The courts have held that for the innocent party to have the option of voiding the agreement, the statement must be untrue, was not a mere sales talk, the statement was not an opinion and that it was intended for the innocent party to rely on it to enter the contract.

In *Derry v Peek* (*Derry v Peek*, [1889]), the court formulated the test for fraudulent misrepresentation. In this case, it was held that to prove that fraudulent misrepresentation existed, the maker must know that it is false, makes it carelessly, and that the maker does not believe in the truth of the statement. In *Andrew v Mackford*, the defendants issued a false prospectus, which induced the plaintiff to buy some shares at the defendant’s company. It was held that the defendants were liable. If the misrepresentation is proved, the remedies available for the plaintiff are rescission of the contract or damages for the deceit.

### **Analysis**

In addressing whether Posh Properties Limited had any remedy against the seller, misrepresentation has to be proved to exist from the statement. First of all, the statement must be untrue. The seller assured Posh Properties that the tenants were all good, with no arrears and that all of the tenants paid on time. This statement, however, turned out to be untrue as there were two tenants who had not paid rent for six months and had a history of paying late. The tenants informed Posh Properties Limited that the seller knew of this before they had entered into the contractual arrangement. The statement made by the seller was also not a sales talk or sales puff.

The statement made by the seller on the status of the tenants was also not an opinion. This is because the seller was in a position of knowing whether the tenants paid rents on time and whether any of them had arrears. Furthermore, the tenants informed Posh properties that the seller knew of their state, which further proves that it was indeed not an opinion. Posh Properties relied on this statement by the seller in influencing its decision to buy the blocks of flats. This is because they had a history of non-paying tenants and the thought of paying tenants induced them into entering the contract.

In applying the test in *Derry v Peek*, the seller knew that the statement he made was false, he did not believe in its truth, and he made it carelessly. This statement amounts to fraudulent misrepresentation. Posh properties can apply for rescission of the contract with the seller by voiding the contract. Posh properties can also sue the seller for the damage caused by the statement that all tenants were good.

### **Conclusion**

In conclusion, the seller had made a fraudulent misrepresentation of the facts to Posh Properties Limited. The seller was, therefore, liable, and Posh could sue for the contract of buying the blocks of flats to be rescinded by declaring it void. Posh Properties can also decide to sue the seller for only damages caused by the statement that all the tenants were good.

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