



ANU LAW
STUDENTS'
SOCIETY

LAWS1204
Contracts
2nd Semester 2009

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Question 2

76/100

Erma will not be liable if the pre-contractual statements made by John constituted a collateral contract. However, this is unlikely.

Parole Evidence Rule

The issue is whether the parole evidence rule applies in this case. Where written agreements appear to constitute the entire agreement, extrinsic material will not be admissible (LG Thorn.). As commercial contracts tend to reduce everything to writing, the rebuttable presumption of the Parole Evidence applies, limiting the contract only to the main signed agreement.

Collateral Contract?

The issue is whether a collateral contract exists. The parole evidence rule does not apply to exclude evidence of a collateral contract (Hellibut Symms v Buckleton). A collateral contract will exist where the statement is promissory and given as consideration for the main contract (JJ Savage).

Promissory?

The issue is whether John's statements were promissory. In deciding this, the language used (JJ Savage), the relative expertise (Oscar Chess) and importance (Van den

Esschert) may be taken into account. ABC may analogise with JJ Savage, where the language represented mere opinion: "fine by me", "I hate". Erma could argue that as he was the director, his expertise was significant, and this was intended to be promissory.

Similarly, the subject matter was of some importance, resulting in over \$1 million damage to ABC and happened just 1 month before signing. Thus, the statements are likely promissory.

Given as consideration?

The issue is whether the statements were intended to be given as consideration for entry into the main contract, as required for a collateral contract to exist (JJ Savage). Given the financial benefits available to Erma, a reasonable person would likely see the statement as consideration. Thus, it was likely consideration.

In contradiction?

The issue is whether such a collateral contract was in contradiction to the main agreement. A collateral contract will not be valid if this is the case (Hoyts v Spencer). As the main contract explicitly requires Erma to provide paperwork and not sell to other parties, John's statements

clearly contradict the main contract. Thus, a collateral contract is unlikely to exist, meaning the parole evidence rule applies, as do solely the terms in the main agreement.

Misrepresentation?

Erma may also obtain damages/other remedies under misrepresentation given John's statement "no paper work please".

Fact?

The issue is whether John asking for no paperwork is a statement of fact. Only statements of fact can be misrepresentation (Edgington). However, even statements of opinion impliedly represents as fact reasonable grounds for having that opinion (Smith v Land & House). Erma may argue that John asking for no paper work implied as fact that the ABC did not want any paperwork. ABC could argue that given the statement was attached to "I hate the stuff", he was merely representing his own opinion, and thus not one of fact. It seems likely it was merely his own opinion.

Falsity?

The issue is whether (assuming above is found as fact) the fact was false. The representation must be false for misrep to apply (With v O'Flanagan). Clearly, the ABC did want paperwork and so John's statement was false.

Reliance?

The issue is whether Erma relied on the statement in entering the contract. This is a question of fact, though required (Redgum). Given the conversation took place less than a month before the agreement was signed, it appears Erma was induced. Thus, reliance seems shown, and assuming John's initial statements were factually based, a misrep exists. The remedy for this has traditionally been rescission (Alati). Now under the trade practices act (TPA), a wider range of remedies including damages (s 82) and discretionary relief (altering contract, etc.) (s 87) are available.

Liable for breach of selling to 3rd parties?

For a claim for damages against Erma to succeed, the breach must be shown, as must causation and remoteness. Given only the terms of the main contract apply, the term that Erma only purchase for the purpose of selling them to the Cth Gov was breached by selling to third parties. Causation and remoteness may be disputed, though.

Causation?

The issue is whether the ABC losing market share was caused by Erma's action of selling products to third parties at a discount rate. It is sufficient that the breach only be a (one) cause of the loss. But-for test (Alexander v Cambridge Conduit Corp.). Erma could argue that the main reason the ABC lose market share was because of poor management.

However, the ABC could argue one of the causes was her cheapening of the products (for example if it was an irregular good - price down, consumption down, such as public transport - usual though). Thus, causation is likely satisfied, provided the ABC can justify how a decrease in price decreased consumption (like it's an irregular good).

Remoteness?

The issue is whether the ABC losing discounted sales revenue and market share was too remote. For this, the loss must be satisfied in the ordinary course of events, or must arise from actual knowledge (*Hadley v Baxendale*). Erma could analogise with *Hadley*, as she was merely a transporter with no particular expertise in the area. Nor did the ABC draw her attention to such knowledge. The ABC could argue it's common knowledge that altering a product's supply will alter its price, but it seems unlikely a transporter would be knowledgeable that selling a small number of goods could cause \$1.1 million in damage. Thus, it is likely too remote and the damages claim is likely unjustified.

Liability to damages for fire?

The issue is whether Erms is liable for the \$100,000 fee imposed as part of its contract with the government. Courts will not impose a penalty clause in a contract (*Dunlop v NG*). As \$100,000 seems like more damages than would generally be caused by not keeping records, the \$100,000 seems like a penalty rather than a liquidated damages clause. Thus, it is unlikely to be enforceable by the ABC.

Given damages only cover losses, the ABC will be unaffected, and Erma likely will not pay the expectation damages of \$100,000.