

CONSTRUCTION CONTRACTS

*A report on the essential elements that validate a contract
and the likely misrepresentations of construction contracts*



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1. INTRODUCTION

A contract is a written or spoken agreement between two or more parties that is enforceable by law. It is the action of establishing a legal relationship, usually where there is a mutually benefitting agreement between two parties (*Uff 2013*). A legal relationship in construction could be a contractor receiving a monetary payment in return to execute building works for the client.

To establish a contract there must be an 'offeror' whom is the person proposing the contract, and the 'offeree' whom is the person(s) that the offer is made. The offer can be presented and accepted in various ways and is distinguishable from an invitation to treat (ITT), where the offeror is inviting many offerees to submit their offers which is an act of willingness to negotiate before signing a contract. Finally, all parties involved must understand the terms in which they are binding to, otherwise the contract can be void or unenforceable.

It is imperative to note that this report does not aim to discuss all factors that validate a contract, nor discuss all cases of misrepresentation. Therefore, this report will focus solely on the essential elements of validation and misrepresentation.

2. VALIDATING A CONTRACT

2.1 Consideration

Consideration is the mutual exchange of benefit or reward between two or more parties, and if absent from the contract then the contract is void. Additionally, consideration is not valid if the action is executed without reference to a promise prior to that executed action, nor does the value of the benefit or reward must be substantial (*Adriaanse 2007*). Simply, past consideration is no consideration.

For example, if a construction company carried out work beyond the agreed scope of work in the contract, then the client is not obliged to pay if both parties did not demonstrate consideration prior to the execution of the additional scope of work. Nevertheless, in the case of *Lampleigh v Braithwaite* (1615) the plaintiff won the case even though there was no past consideration the plaintiff acted upon a request of the defendant.

2.2 Agreement

An agreement refers to the acceptance of the original terms and conditions set out in the contract by all parties, and if absent the contract becomes void. Once the terms of the contract are agreed, then parties are bound to honour the agreement. Using the *Carlill v Carbolic Smoke Ball Company* (CSBC) case, CSBC outlined clear conditions in use of their product and Mrs Carlill accepted those conditions through her actions creating a unilateral contract/agreement between both parties. Mrs Carlill won her case as CSBC attempted to retract on their contractual duties.

'Promissory estoppel' can be used to prevent an individual from reneging their promise, although one needs to prove that the claimant relied on the promise to their own detriment even if consideration was absent (Adriaanse 2007). In essence, it is an equitable mechanism to prevent injustice of a reliant person(s) as per *Central London Property Trust LTD (CLPT) v High Trees House LTD* (1947) where an agreement by CLPT to reduce the rent of High Trees House tenants during the Second World War resulted in the plaintiff claiming back-payments after the war. The court decided that the plaintiff was not entitled to back-payments.

2.3 Intention to be Bound

There must be an intent to create a legal relationship, otherwise the contract is void. *Rose and Frank v Compton* (1923) presents a case where there was no legal intention to be bound through an *'honour clause'* stating that the *'agreement'* was an expression of the parties' aspirations to sustain a healthy relationship.

Privity of contract ensures that only contracted parties reserve the rights to enforce the contractual conditions, although the case of *Dunlop Pneumatic Tyre Co LTD v Selfridge & Co LTD (1915)* recognised that certain non-contracted parties can also be legally bound if indirect agreements infiltrate through supply chains. This situation could potentially materialise through the construction supply chain and have a financial significance on material prices.

However, there are exceptions to privity and one being the '*Contracts (rights of third parties) Act 1999*' which enables third parties to enforce certain conditions. Nevertheless, the original contract must state its intention to permit this act. For example: the main contracted developer of a client did not adhere to the structural planning design of a third-party engineering company which resulted in the building collapsing, then the engineering company could enforce terms in the contract relating to quality and design.

3. RULES TO AN OFFER

An offer must be distinguishable from an ITT, and an ITT only becomes a contract if accepted (Adriaanse 2007). *Marston Construction CO LTD v Kigass Ltd 1989* epitomises the importance of acceptance regarding an offer as the cost accrued by Marston was solely preliminary and formed part of the ITT process. Opposingly, *William Lacey (Hounslow) Ltd v Davis (1957)* favoured the plaintiff as William Lacey actioned additional pre-construction activities at the request of Davis in anticipation of winning the tender. William Lacey did not receive the tender and the court found in favour of the plaintiff as the requested work exceeded the expected duties of the tendering process.

Enquiries and replies are not offers, construction companies that are tendering jobs therefore should be aware that the enquiries they receive from sub-contractors prior to any official agreement are not legally binding.

The case of Boulton v Jones (1857) signifies the importance of communication of the offer as Boulton resumed Brocklehurst's orders without notifying Jones, giving Jones grounds to refuse payment of the goods from Boulton as Jones originally contracted with Brocklehurst.

4. RULES TO ACCEPTANCE

Foremost acceptance must be in response to an offer. If a counteroffer is rejected, then the initial offer that was countered is automatically unavailable to the offeree as Hyde v Wrench (1870). Additionally, consideration should be given to the substance of the acceptance as unquantifiable promises could exhaust a company's capability as when Witham promised to supply Great Northern Railway (GNR) with whatever and whenever (GNR v Witham, 1873).

Agreements must be fully complete and agreed. A contract should not be agreed if the full terms within the contract are not transparent otherwise it could be eligible for voidance. Foley v Classique Coaches Ltd (1943) disputed over the unquantified price of petrol that Foley would charge Classique. Despite the court favouring Foley, the case was not void as Classique preformed their duty for several years, and therefore they were in breach of the contract.

A letter of intent (LOI) could be utilised to award a tender to the successful contractor subject to finalisation of agreements in the original tender. A LOI is a willingness to enter a legal agreement at a future date, however does not bare any legal weight and they usually do not materialise to a formal contract (Adriaanse 2007). British Steel Corporation v Cleveland Bridge & Engineering (1984) supports Adriaanse's statement as the defendant sent a LOI to British Steel for the supply of steel nodes, but no formal accord to the frequency of delivery was agreed. The court issued that the plaintiff was entitled to '*quantum meruit*' for delivery expenses despite Cleveland counterclaiming for late delivery.

5. MISREPRESENTATION

5.1 False Statement

A case of false statement arises when party 'A' has deliberately misled party 'B' into a contract. Examples of false statement can make a contract voidable. Nevertheless, the degree of misrepresentation is critical in assessing the nature of the false statement (*Avon Insurance plc v Swire Fraser Ltd* 2000) as if a statement only slightly deviated away from the facts, then it will not be assessed as misrepresentation (LawTeacher.net 2018). Likewise, a true statement that has been misinterpreted by an individual is not an act of misrepresentation nor would be a statement that has clearly been expressed as an opinion.

However, silence alone does not always equal misrepresentation, it must accompany an action which can be interpreted as a 'statement' (Lawteacher.net 2018). Consider a partitioner has used the wrong proprietary partitions in a construction project and the partitioner remained silent and executed steps to conceal the mistake then this could be viewed as misrepresentation, as per similar court case *Gordon v Selico* 1986.

The final step is to assess if the false statement directly led to the individual entering the contract 'inducement'. A roofing company wishes to secure the contract for a new school being built by a construction company. The roofing company exaggerates on their experience fitting the specific type of roof required for the project, however the contractor is unaware of this and decide to offer the contract to the roofers because of this over exaggeration. Post-roof instalment the contractors discover that the new roof was defective and wish to sue the roofing company for misrepresentation. In this example, the court would rule with the plaintiff as the representation induced the contractors to make contract with the roofers as per the comparable case *Smith v Land and House Property Corp* (1884).

However, if the roofers had not made the misrepresentation known to the contractor, then the court would not consider it as misrepresentation as it was not known to the contractors at the time. *Horsfall v Thomas* (1862) gives reality to this example as the plaintiff attempted

to sue Thomas for a default in a gun he has purchased, however it was the plaintiff that failed to inspect the gun prior to payment and Thomas did not attempt to conceal the gun before payment.

5.2 Fraudulent

Fraudulent misrepresentation accrues through the act of an individual(s) providing a statement/information knowing themselves that the information provided is false (Uff 2013). The innocent party could claim damages if incurred through the supply of that false information, or the innocent party can affirm or rescind the contract. Although, for a judge to rule to rescind the contract all relevant parties must be able to return to their pre-contract positions without inflicting damages to third party.

The extent of damages caused can vary depending on the severity. For example, a property developer might deceive a buyer of a potential property through deliberately concealing the condition of the property which would occur financial damages, or if the property is suffering structural issues which result in injury or death then the damages become more severe.

The law however must differentiate between a deliberate lie, and a statement that has been carelessly placed such as the issue in *Derry v Peek* 1889 where the plaintiff lost their claim as they could not prove the statement made by the defendant was intentionally incorrect.

5.4 Wholly Innocent

Similarly to false statement, an individual will present the innocent party with a false statement, however the individual is unaware that the statement is false. If found liable the innocent party can claim damages or rescission (Uff 2013).

This scenario took place in *Howard Marine v Ogden* (1978), and despite the plaintiff honestly believing their false statement they were found liable of over-estimating the carrying capacity of two barges from a register provided by Lloyd's that consequently delayed Ogden's shipping, resulting in Ogden's counter claim for monetary damages which was awarded by the Court of Appeal.

The individual who delivered the false statement can redeem themselves if they can prove that they undoubtedly believed the statement to be true (Uff 2013). For *Howard Marine*, this defence did not prevail as even though they genuinely believed the capacity was 1,600 tonnes, the correct tonnage allowance (1,195) was stated in the documents that was possessed by the plaintiff and therefore no reasonable circumstance for plaintiff exists to assume the tonnage was of different value to that than the 1,195tn stated in the documentation.

5.3 Negligent

If an individual failed in their duty of care that resulted in damages, this can be deemed as negligent misrepresentation. Unlike fraudulent, the party making the statement genuinely believes that the information that is being provided is correct through negligent actions.

The claim of negligent misrepresentation was considered the third type of misrepresentation following the case of *Hedley Byrne v Heller* (1964) in *Adriaanse* (2007). Despite the plaintiff's case failing due to an exclusion clause renouncing all responsibility of the defendant, the case gave rise to the possibility of an individual claiming for damages if they relied on the expertise of another individual and that '*expertise advice*' resulted in loss or damages.

Dutton v Bognor Regis Urban District Council (1972) found the defendant liable for negligence through their building inspector failing to identify the inadequate groundwork to foundations built as part of a residential property which resulted in subsidence, owned by

Sadie Dutton. This implies the importance of appropriate and professional care in construction as failure to exercise due care can result in a court case for negligence.

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