

## The Principles of Contract

This section discusses the factors that are vital to the formation of a valid contract: in legal terminology, offer, acceptance, consideration, and the intention to create a legal relationship. It then looks at the contents of the contract, the terms included by the parties and those implied by statute or the courts. The law of contract is of enormous complexity and the following material may be likened to a landscape painted with a ten-inch brush.

Every day, many times a day, most people in modern society enter contracts or are affected by contracts entered into by others. It is easy to enter a contract; it is such an everyday experience that most of us do not realise when we have entered yet another contractual relationship. For example, if a man rings the doctor for an appointment, catches a bus to the surgery, stops on the way to drop off the laundry and buy a pie and sauce, it is little wonder if he complains of feeling exhausted. Already that day he has used his telephone rental contract, entered into a contract of carriage with the bus company (through its agent, the driver), travelled pursuant to that contract, entered a contract of service with the cleaners, left the clothes on the strength of a bailment agreement, and created and performed a contract for the sale and purchase of a pie and sauce. When that person eventually gets to the surgery it is probably a good thing that he does not realise that the receptionist is only returning his smile pursuant to a clause in her contract of employment.

Similarly, contract pervades the professional life of the artist. Leasing a work space, buying turps at the local hardware shop, insuring works, getting the tradesman around the corner to do some frames, selling a piece to a studio visitor, having an exhibition of works, all involve the creation of a contractual relationship, the formulation of contractual rights and responsibilities and the possibility of legal recourse if those mutual expectations are not fulfilled. Thus it is important to know what contracts are, how to enter them, how to enforce them, how to enjoy them.

### 1. Offer

It seems facile to say that there must be an offer and that the offer must be accepted -- but it is the very root of any bargain. Because it is the basis of the transaction, an offer must be in reasonable detail: it must be clear just what is being offered and on what terms. Thus if a collector says, "I'll buy that one for \$500", the offer is quite clear. On the other hand, if the collector said, "I'd go to \$500 for something that reminded me of the trip to West Wyong", that would not constitute an offer because its terms are too vague. It is really only an indication of intention or desire. A difference of phrasing may seem slight but its effect may be considerable. For example, what if the collector had said: "If you paint me a picture, I'll pay you \$500 if I like it"; or "If you paint me a picture, I'll pay you \$500 if it's any good"; or even "If you paint me a picture, we'll talk about the price when it's finished."

The first example would amount to an offer, but the bargain would be conditional upon the collector liking the finished work. Whether or not the sale will proceed is totally dependent upon subjective criteria. The second example provides the artist with slightly more protection because it might be an objectively good painting, even though the collector does not like it. On the other hand, the third example would not constitute an offer of any kind. It is altogether too vague. It is really only an offer to make an offer.

So that these sorts of disputes do not arise it is often advisable to jot the exact terms of an agreement onto a piece of paper, for then the parties have a record of their mutual expectations. Simple and clear language is all that is required. The paper doesn't make it any more legal -- it just provides an easily formulated and easily filed record.

Most offers may be withdrawn at any time up until they are accepted. Or, the offer may be made for a limited period and at the end of that period it will automatically extinguish ("I'll buy that painting for \$500 . . . You've got 'til Friday"). It is also extinguished by any counter-offer. Thus if a collector offers \$500 for a piece (offer), and the artist says "You can have it for \$650" (counter-offer), it is an implicit rejection of the original offer and destroys it. If the parties eventually settle on \$500, that would involve the acceptance of another, newly made offer: *Hyde v. Wrench* (1840) 49 E.R. 132; *Baker v. Taylor* (1906) 6 S.R. (N.S.W.) 500.

Sometimes, what looks like an offer capable of acceptance, is not. It is merely an indication of preparedness to negotiate. For example, if a gallery exhibits a painting and beside it places a little card detailing the artist's name, the work's title, and the price, that does not constitute an offer to sell that work at that price. It is merely an offer to negotiate, akin to an advertisement. If the collector goes to the gallery owner and says "I'll take it!", he or she is not accepting a standing offer. Rather the collector is making an offer to buy the work at the listed price. The owner can accept or reject that offer!

## 2. Acceptance

Acceptance is achieved by showing the person making the offer that the terms of the offer are agreed to. This may be done orally, in writing, or even implied from conduct (usually by doing the thing required). The latter mode is hazardous and an artist should seek or give at least oral acceptance of an offer.

The acceptance must be communicated to the offeror; it cannot be inferred from silence: *Felthouse v. Bindley* (1862) 142 E.R. 1037.

## 3. Consideration

Consideration is the feature that distinguishes a bargain from a gift. It is the price, not necessarily in money terms, that each party asks of the other in return for entering the agreement. This is important because, in order to enforce a contract, a party has to show that he or she paid a price. This can be done in one of two ways:

1. It may be shown that at the time of the alleged bargain, one party offered a promise if the other party was to do an act. For example, "I'll pay you \$500 when you paint my portrait." In this example, one party gives consideration by making a promise, and the other will provide consideration by painting the portrait.
2. It may be shown that at the time the bargain was reached, each party was to give a promise in exchange for the other's promise. For example, "I'll give you \$500 if you paint my portrait." "O.K. I'll do it!" In this example, the consideration is construed as a promise in return for a promise. Each is consideration for the other. Similarly, a person might offer an artist \$500 not to paint a certain subject. The promise of \$500 would be consideration from the one, and the promise to refrain would be consideration from the other.

The exchange does not have to be even, for the law will not inquire into the relative values of the consideration; one party might provide an enormous sum of money, another might give a promise, and still another might provide a proverbial peppercorn. The important thing is that each has given the other the required price.

It is also crucial that the consideration not be past. Thus if a collector buys a work and then says to the artist that he enjoys the work so much that he is going to give him an additional \$500, that promise is unenforceable because the only consideration that the artist has provided (the painting) is past. The law does not recognise the continuing pleasure given by the work to be of actual value. The promise to pay the extra money would be only a promise of a gift (for the consideration is one sided) and therefore unenforceable.

#### 4. Intention to Create a Legal Relationship

If a promise is to be enforceable it must be shown that it was intended to be a legally binding commitment. This excludes merely domestic arrangements such as promises to pay pocket-money or house-keeping money, for these are to be enforced in the kitchen rather than the courtroom.

In contrast, agreements of a commercial nature are presumed by the courts to be entered with the intention of creating a legal, enforceable relationship. This presumption is particularly important in the artist- gallery relationship because so many galleries do not have written contracts with the artists they represent. Contrary to the commonly held belief, this does not necessarily mean that there is no contractual relationship between them; so long as the terms of their relationship are sufficiently clear (offer and acceptance), the court would not hesitate to find that the parties had intended to enter a legal, and therefore enforceable, contract. If the court's jurisdiction is to be excluded, very particular proof of that intention is required.

#### 5. Contents of the Contract

Not everything contained in a contract is necessarily a term of the contract. Some matters are classified as "mere representations" and are not enforceable. For example, if a person says, "I will sell you this very fine Walter Withers for \$10,000", the phrase "very fine" would not be considered a term of the contract. Rather it would be treated as a promotional puff. On the other hand, the fact that the painting was by Withers and that the price was \$10,000 would be treated as terms of the agreement. It is not always easy to distinguish between terms and mere representations, but one may ask oneself, "Would it appear to a reasonable onlooker, that the party was guaranteeing the truth of the statement?" If the answer is yes the statement is a term of the contract.

The two most important types of term are conditions and warranties. Naming them is easy but accurately describing them is not. For centuries, judges have battled with the definitional problem without reaching any apparent consensus. Difficult as it may be, the problem is an important one because the breach of a condition permits the disappointed party to rescind the contract, whereas the breach of a warranty only permits that party to sue for damages to make up for any loss that has been suffered. Lord Upjohn has suggested that one should ask whether the breach of the stipulation goes so much to the root of the contract that it makes further commercial performance impossible: *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 64. On the other hand, the High Court in *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322 at 336-367 suggested

that a condition was a term without which the parties would not have entered the contract. The facts of that case provide an interesting example of the condition-warranty problem.

The defendant Bancks was the creator of "Ginger Meggs", a well-known cartoon character. The artist contracted with the newspaper to supply every week, for ten years, a full page of "Us Fellers". In return, one of the promises made by the newspaper was that the work would be published on the front page of the comic section. For three Sundays in a row the strip appeared on page three, so Bancks hung up his pencil. In the case that followed, the High Court (!) decided that unless the newspaper had offered front page status to Bancks, the artist would not have entered the contract. Thus that term could be characterised as a condition, the newspaper had breached that condition, and Bancks was entitled to treat the contract as at an end.

What this case illustrates is that whether a term is called a condition or a warranty will depend on the judicial construction accorded it. If the parties wish to make it clear that the breach of particular terms of the contract should permit termination of the agreement, they should not simply call those terms, "conditions", and the others, "warranties". The court will not consider itself bound by such a quixotic foray into the definitional problems of the law of contract. But if the parties spell out the effect of such breach, rather than merely labelling it, the court will give effect to that declared intention.

## 6. Terms Implied by Statute

The Commonwealth and every State government has statutes which impose duties upon manufacturers and sellers of products. These apply to works of art and craft just as much as to any other products.

These statutes have effect in numerous ways but all of them are basically consumer protection provisions. Some imply terms into the contract, others impose liability even in the absence of a contract. This latter approach is both exceptional and useful for it avoids the problems caused by the doctrine of privity of contract.

For example, under the common law where a retailer sold an item to a purchaser, it could not be argued that there was any contractual duty owed by the manufacturer to the purchaser. The relationship was simply between the purchaser and the seller. If there was anything wrong with the goods the purchaser's recourse, if any, was against the seller. Now, thanks to statutory intervention in some jurisdictions, where goods are sold retail, the manufacturer warrants to the purchaser that the goods are of merchantable quality even though there is no privity between them. Thus an artist (the manufacturer) warrants a private collector (the purchaser) that the works (the goods) are of merchantable quality: see Sale of Goods Act (N.S.W.) 1923, s. 64(5); Hire-Purchase Act 1960 (N.S.W.); Manufacturers' Warranties Act 1974 (S.A.); Manufacturers' Warranties Ordinance 1975 (A.C.T.); Trade Practices Act 1975 (Cth), Pt V, Div. 2A.

### 6.1 Conformity with description

A sale by description occurs when a seller describes goods to the buyer and the buyer purchases them on the strength of that description. In such a case there is a statutorily implied term that the goods will in fact correspond to the description. However the term will be implied only if the non-compliance goes to the identity of the goods, rather than their quality. For example, if an artist buys a tube of paint the label of which reads "ochre" and takes it

home only to find that it contains black paint, the seller has breached an implied term in the contract of sale that the goods would conform with their description given on the label and relied upon by the buyer. If the tube had contained paint which was ochre, but which also was chemically defective, there would have been no breach of this implied term because the defect would have been one of quality rather than identity.

## 6.2 Fitness for their purpose

Where:

- (a) goods are supplied to a consumer in the course of business, and
- (b) the consumer has expressly or impliedly informed the seller of the purpose for which the goods are sought, and
- (c) the consumer actually relies on the advice and judgment of the seller,

the Acts imply a term into the contract of sale that the goods will be fit for the stated purpose. For example, if a sculptor is erecting an installation, part of which requires a 100-kilo segment to hang from two wires, the artist might go to the hardware shop and ask for a coil of wire capable of fulfilling these requirements. If the wire subsequently snaps under the weight, it is likely that the seller has breached a statutorily implied condition in the contract of sale, that the goods would be fit for the purpose for which they were sold. Amongst other things, the damages would cover the cost of the wire and any resulting damage to the artwork. Other examples might occur if a ceramist sold wares that leaked, or a sculptor sold a piece made of soluble materials, knowing that it was to be placed outside.

## 6.3 Merchantable quality

When in the course of its business a company sells goods to a consumer, or a private person who deals in such items sells goods, there is an implied condition that they will be of "merchantable quality". In deciding whether the goods are of merchantable quality the courts will look to the description applied to them at the time of sale, the price paid, and any other relevant circumstances. The term will not be implied if, at the time of sale, the seller points out the defects to the buyer, or if the buyer inspects the goods at that time.

Thus, if an oil painting develops a severe crack due to the inadequate preparation of the canvas by the artist or a hand crafted cabinet no longer closes properly because the craftsperson has used some insufficiently seasoned timber, it may be argued that the goods are not of merchantable quality.

This raises interesting implications for creators of ephemeral or self-destructing artwork. Of course in most situations the buyer of such a piece would be fully aware of its fundamental characteristic but where this was not clear to the buyer and not made known to him or her, the term might be implied. More probably, it would be relevant to artists who use materials of inferior quality, that do not last as long as would normally be expected of them; the painting that starts flaking or cracking badly after only a short time; the installation that falls to pieces because of inherent defects of design; the glaze on the ceramic plate that deteriorates.

## 7. Formalities for Entering a Contract

Whether the contract is for services (such as painting a portrait or making a weaving on commission) or for the sale of goods (such as selling a painting or a tapestry already made), the contract may be either wholly oral, wholly in writing, or partly in writing and partly oral. Its form is not relevant to validity. However, there is one important qualification to this; except in Queensland, if the contract is for the sale of goods over the value of \$20, the contract will not be enforceable unless:

- (a) some memorandum in writing of the contract is made and signed by the party to be charged; or
- (b) the buyer accepts some of the goods in part performance of the contract; or
- (c) the buyer gives something in earnest to bind the contract or in part payment (such as the payment of a deposit): Sale of Goods Act, s. 9.

It must be emphasised that this relates only to the sale of goods, not services. Further, it does not affect the validity of the contract, merely its enforceability. If a collector attends an exhibition, singles out a work and says to the artist, "I'll have that one! I'll drop in on Friday with my cheque for \$1,200", the artist cannot enforce that contract of sale unless the collector signs a memorandum, takes a work away, or leaves a deposit. An example of the importance of this occurred at the now defunct David Reid Gallery in Sydney. On one occasion a client told the gallery owner that he would buy all of the works in a Suzanne Archer exhibition. Shortly before the close of this apparently sell-out show the client changed his mind. Although there was a valid contract to purchase the works, the contract was unenforceable because the dealer had neglected to get anything signed by the client or even take a deposit. The potential personal and professional cost of such an omission is obvious. Thus the rule is simple; when selling goods valued at over \$20 outside Queensland, one must obtain either the agreement in writing signed by the buyer, or a deposit. But remember to keep a receipt.

## 8. Avoiding Contractual Responsibilities

At common law a number of factors may vitiate a contract. They include duress, mistake, legal incapacity, deceit, misrepresentation, illegality and undue influence. As one author explains, these are consistent with the consensual theory of freedom of contract because each is a clear example of lack of consent: Peden, *The Law of Unjust Contracts* (Butterworths, Sydney, 1982), p. 9.

One of the most important recent developments in contract has been the preparedness of the courts to vitiate or even rewrite contracts that are harsh or oppressive. The traditional view of the common law was that parties had the freedom to enter contracts. Whether those contracts were beneficial or harsh was a matter for the individual. Usually it came down to a question of which party had the most bargaining power. The stronger party could force the more advantageous terms. This is still largely the position, but there is now some assistance available to the underdog. The courts are certainly more than ever prepared to intervene.

Judicial intervention is usually achieved by fitting the claim into one of the established heads of equitable intervention (such as fraud in equity, undue influence, mistake in equity, innocent misrepresentation and contracts in restraint of trade). There were few cases in the arts industries until 1974 but the possibilities have since been

highlighted through a line of English cases involving the music industry. The case names read like an extract from a Who's Who of the industry: Gilbert O'Sullivan, Fleetwood Mac, Elton John, The Kinks, Sting and so on.

In Australia one may look to the decisions such as *Commercial Bank of Australia v. Amadio* (1983) 57 A.L.J.R. 358 in which a High Court judge said:

``Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party. . . . Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so."

Legislation is increasingly important in this area: Trade Practices Act (for example, s. 45(2)); Industrial Arbitration Act 1940 (N.S.W.), s. 88F; Contracts Review Act 1980 (N.S.W.); Fair Trading Act 1987 (N.S.W.); Consumer Affairs Act 1970 (Qld) and so on.

It is outside the scope of this work to discuss these matters in any detail. The lawyer readers will have need of more detail than non-lawyer readers could withstand. The important point that can be drawn from all of the cases and statutes is that there is an increasing ability to get people out of contracts that are unfair to the point of being unconscionable. It is not an easy matter and is often expensive, but it can be done.

In the music industry, litigation has had the effect of making some of the ``standard contracts" offered by recording and publishing companies, much fairer. It will be interesting to see the effect that such an action would have in the visual arts.

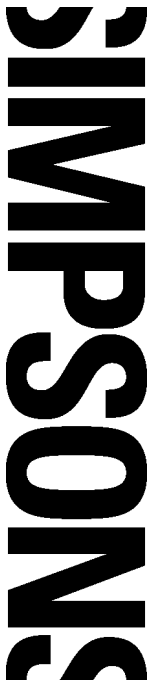
Nevertheless, contracts must be approached on the basis that they will be binding. In certain circumstances, a party may get out of a contractual arrangement, but doing so is fraught with legal difficulty. If escape from a contract is contemplated, see a lawyer. Simply breaching its terms and keeping one's fingers crossed, is certainly not recommended.

## 9. Summary

The elements vital to the formation of a contract are that:

- (a) there has been an offer made;
- (b) the offer has been accepted;
- (c) consideration has been given; and
- (d) the parties intended to create a legal relationship.

The terms of the contract may usually be divided into ``conditions" and ``warranties". The distinction is important although extremely difficult to define, because the type of term breached may affect the remedy available to the injured party.



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These terms may be expressly agreed upon by the parties or may sometimes be implied by statute.

In most circumstances, no particular formalities are necessary for validity but it must be noted that, except in Queensland, in the case of contracts for the sale of goods valued at \$20 or more, a contract must be in writing if it is to be enforceable.

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