ESSENTIAL ELEMENTS OF A VALID CONTRACT IN A BUSINESS CONTEXT

A contract can be defined as an agreement between the two parties, who voluntarily tie themselves in an agreement for a purpose of business or else. The contract creates a legal relationship between the parties and holds some duty to perform. It is necessary for a contract that its consideration must be lawful. The breach of contract usually results in a shape of compensation. In other words, we can say that a contract is a promise between two parties mutually agreed to do or not to do something. There are various essentials of a contract but two of them are vital. One is offer and the other is acceptance. The offer is an important part of a contract, which shows the intention of establishing a legal relation. The second part of a contract is acceptance, which makes the contract complete. Proposal and acceptance are always reciprocal for a valid contract.

In order to convert a mere agreement into a legally binding contract, the law requires certain pre-conditions to be fulfilled. These pre-conditions may be termed as the essentials of the contract, and in default of any of the essential the law does not recognize the agreement as legally binding transaction. To make a valid contract the law requires that one of the parties to the contract must have made an offer to the other. The term offer signifies the willingness of the party making the offer to do or to abstain from doing something in reference to the proposed agreement, with the object of obtaining the assent of the other party. Offer needs to be distinguished from Invitation to Treat and the only difference
between them is the “price”. In case of offer the price is fixed not negotiable however, in invitation to treat the price is not fixed and can be negotiated.

To constitute a valid offer it is essential that it must be absolute in itself and made to a specific person. In the case Fisher v Bell the court has decided that for a valid contract the offer must be coupled with a time period within which it is to be accepted and if the party makes default in stating the time period for the acceptance of the offer, the law on its own furnishes a reasonable” time frame within which offer is to be accepted (FISHER v. BELL, 1961). Offer may or may not be coupled with conditions, but if it is conditional than acceptance of the offer is valid only if the acceptance is made with all the conditions stated by the proposer.

There is a difference between a contract and an agreement, all contracts are agreements but all agreements are not contract. An agreement becomes a contract when there are competent parties, lawful consideration, free consent and object. Contract is a form of agreement which directly contemplates and creates an obligation. In an agreement of a contract it is not always necessary that offer and acceptance should be expressed orally or in writing. In some contracts they are implied. For example when a patient goes to the doctor for his checkup it is implied that he will pay the doctor’s fee. These contracts are called implied contracts or quasi-contracts and an implied acceptance is always there. Quasi-contracts usually help out in those situations where one person is liable to be compensated by another person the shape of money. It is not necessary that they have entered into a contract or signed an agreement but it is obvious in Quasi Contracts that one person receives a benefit from another person. In other words, the obligation under a quasi-contract is imposed by the law for the reason that the defendant has been unjustly enriched at the expense of the plaintiff. E.g

“A” received a television delivered by “UPS” mistakenly and installed it in her lounge. The law binds her to pay the price of that television though she did not order the television but keeping the television created a quasi-contract and the court will make sure that price must be paid to the television company. Quasi contracts are also different from tort as in tort there is no duty owed to persons and the damages recoverable are liquidated.

Quasi contracts and torts are different from each other, as in tort damages are always liquidated while in contract they are un-liquidated. Contracts and Torts both are different from Quasi-Contract. As in both
cases breach of a primary right exist, which results in a remedial duty to pay compensation (W. V. H. Rogers, Percy Henry Winfield, J. A. (John Anthony) Jolowicz. , 27-Jul-2010)

For example when

“A” pays money under a mistake to “B”, instead of “C”. “B” is under the obligation to refund it to “A”, even though the payment was voluntary and is not induced by any fraud or misrepresentation emanating from “B”. In this illustration it cannot be said that there was any primary duty on “B” not to accept the money paid to him under a mistake and the only duty on him was the remedial or secondary duty to refund the money to “A”:

CONSIDERATION IS ESSENTIAL IN ORDER TO CREATE A VALID CONTRACT COMPETENCY OF THE PARTIES ARE ALSO VITAL

Consideration is one of the essential elements in making a contract. It is a promise to do or not to do something. It means when the promisor wishes and the promisee agrees to follow his wishes by doing or abstain from doing something. For making a valid contract the competency of parties is also seen. Insane, minor or lunatic persons cannot enter into a valid contract hence. Invitation to treat means that an offerer is willing to negotiate on the price of the item. Hence we can say that the price tag for items on the shelves of self service stores is offers or invitation to treat. It merely depends upon the owner’s consideration however Most of the item’s prices are negotiable. In Harvey v Facey case the court held that if a price tag is displayed by someone on a property it means that the owner is interested in selling the said property at a certain price which never means an offer but regarded as an invitation to treat. (Harvey v Facey, 1893). Offer it can be revoked at any time necessarily before the transaction and must be communicated to the offeree.

Case Law

Alvin is running a bargain, of expensive cars. Last Monday he accidentally tagged a car for sale for 5000 Pounds, while its real price was 25000 pounds. Bert came and accepted the offer to buy the said car. Alvin soon realized his mistake and changed the tag into its actual price which was 25000 pounds. Bert insisted Alvin to sell the car amounting to 5000/- pounds but Alvin refused to do so. Bert became angry and
decided to sue Alvin. Later on that day Cat came in and she liked the car and wished to buy it for 25,000/- pounds but she asked for some time to arrange finances and left the showroom. Next day Dell came and after seeing the car decided to buy it. He paid the full price of 25000/- pounds cash and Alvin sold the car to him.

- Bert should not be advised to sue the Alvin as the price tag on the car was a mere invitation to treat not an offer and it is not necessary that the seller should accept the price made by the buyer. The court in the case of Fisher v Bell has decided that the goods which are placed on the shelves of the shop having a price tag on them should be treated as an invitation to treat and they should not be considered as an offer. The final price is always paid to the cashier.

- Considering Alvin and Cat’s communication, it has been calculated that for a valid acceptance law compels an offeree to provide an additional consideration. It is important to know that this type of contract is known as an optional contract and Cat did not provide any consideration, hence Alvin is at liberty to sell the car to any other person without waiting for her to return.

- Alvin and Dell in the above mentioned case entered into a perfect contract. Alvin’s previous acts not to sell the car do not affect the contract to sell and Dell has a good title of a car with no worries to be sued.

**EXCLUSION CLAUSE**

In a contract exclusion clause is usually used where the offerer wants to minimize the rights of an acceptor. In many cases the district courts worldwide through their verdicts have limited the operation of exclusion clause especially in England and Wales. In a common law system the main statutory intervention to minimize the scope of this clause the first Act is Unfair Contract Terms Act 1977 and the second is Unfair Terms in Consumer Contract Regulations 1999.

The exclusion clause has been divided into three different types:

1. **True exclusion clause.** This type of clause identifies the potential breach of contract, and then reasons not legally responsible for the breach.

2. **Limitation clause.** This type of clause puts a limitation on the sum that can be asserted at the time of breach of contract in spite of the factual loss.
3. **Time limitation clause.** This kind of exclusion clause puts a time limitation bar in order to claim the certain right from the contract.

**COURTS AND STATUTES SEEK TO ENSURE THAT EXCLUSION CLAUSES ARE FAIR & REASONABLE**

In one of the case L’Estrange v Graucob the court held that the exclusion clauses can only be functional when they are actually part of the contract (L’Estrange v F Graucob Ltd, 1934) and they have described three methods.

1. **Incorporation by signature:** It means that the said clause should be clear and understandable to an offeree at the time of his signature. E.g at the time of handing over clothes to the dry cleaner, at the back of the receipt it is clearly mentioned that the dry cleaner will not be responsible if the colors of the clothes fades during the said process.

2. **Incorporation by notice:** In Parker v SE Railway the court decided that a party can incorporate an exclusion clause in a contract. It is essential that the other party must be well informed about the said clause and this information must be conveyed on time (Parker v South Eastern Railway, 1877).

3. **Incorporation by previous course of dealings:** According to McCutcheon v David Mac Brayne Ltd the court held that the parties can add an exclusion clause in a contract if the course of business between them is regular and consistent (McCutcheon v David MacBrayne Ltd, 1964).

Exclusion clause must be clear and well incorporated, otherwise court is of the opinion that it is strange that the parties enter into a contract and allow the other party to evade fault based liability and the party accepts his liability for negligence. In Canada SS Lines Ltd v The King the court held that;

“If the exclusion clauses mention negligence explicitly, then liability for negligence is excluded however if negligence is not mentioned, then liability for negligence is excluded.” (Canada Steamship Lines Ltd V The King, [1952])

**Case Law Example.**

Mr. Tom is the owner of a private members gym. He purchased some new exercise bicycles. But after some time he received complaints from the members of the gym regarding jammed
pedals. He called the bicycle company and registered the complaint. The representative of the company quoted a clause which stated:
“Bicycle Ltd will not be liable for any faults or defects in equipment supplied unless such faults are reported in writing within one week of the delivery.”

**WILL THE COMPANY (BI-CYCLE LTD) BE ABLE TO RELY ON THE CLAUSE OF EXCLUSION?**

In a contract, offer and acceptance must be absolute and qualified. The offer may or may not be coupled with the condition but if the condition is attached to the offer the promisee has to accept the offer with the condition attached. Hence, in our case the Bi-Cycle company is on the principle of exclusion clause and is under no liability for the claim of the Tom. Since the right to file a suit has been expired according to Time limitation clause of the profile of exclusion. It is vital to mention here that, Article 16&15 sub-clause II, III and IV of Sales of Goods Act (III of 1930) describes implied conditions as to quality or fitness. However the abovementioned case does not qualify the conditions mentioned in Sales of Goods Act.

**PRINCIPLES OF LIABILITY IN NEGLIGENCE.**

Salmond has defined “a Tort as a civil wrong for which the remedy is a common law action for un-liquidated damages, and which is not exclusively the branch of a trust or other merely equitable obligation.” In order to learn more about Tort we need to understand its five essential elements, which are as follows. (Sir John William Salmond, (3 December 1862 - 19 September 1924))

1. Civil wrong.
2. Infringement of right in rem.
3. Right fixed by law.
5. Remedy in a shape of damages i.e. compensation in a shape of money.

No action in tort can be maintained, when the relationship does not give rise to any duty of care to plaintiff. Damages either for breach of contract or in tort are to be calculated in terms of actual loss. Plaintiff in a suit cannot claim any sum as damages happen on account of his own negligence. He is bound to take all rational steps to lessen the loss and if
some damages are caused to him due to his own failure of performing his part of the contract damages for breach of contract under the Tort cannot be granted (CLC, 2000). In tort the action is coercive which may result in assault, battery, imprisonment etc. or may be committed without force. A person who is claiming damages in tort must prove that the injury caused to him was direct, the injury was not too remote, there were approximate reason and a proper care had not been observed. It means that there is a duty and an obligation upon the defended to take the proper care and to avoid causing injury to the plaintiff in all the circumstances.

E.g. it is the responsibility of a road user to carefully drive and avoid the accidents. etc.

**Case Law: Donoghue v Stevenson**

In the above titled case where Mrs. Donoghue visited a café in Scotland with her friend and ordered a beer. She drank a half bottle and when she poured remaining beer into her glass a rotten snail fell into it. She was shocked and become sick and as a result she filed compensation. The court put liability on manufacturers and defined that an organization is held liable to strictly follow the standard rules of the company’s constitution to perform the duties with care (Donoghue v Stevenson, [1932])

Lord Atkin further interpreted that:

“a manufacturer of products, which he sells in such a form as to show that he intends them to reach to the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in injury to the consumers life or property, owes a duty to the consumer to take that reasonable care.”

(Atkin, (28 November 1867 – 25 June 1944))

There was another case Carroll v Fearon a manufacturing company of tires negligently manufactured few tires which resulted in a serious accident on the motorway. There was no specific negligent act or omission on the part of the manufacturer. The court in this case held the manufacturing company responsible for this accident. While describing such injury which is directly caused by tort feasor and damaged as a result of that breach the act comes under the domain of negligence and the manufacturer is responsible (Carroll v Fearon & Ors, January 20, 1998)
Proximate cause:

Proximate cause, means that a person who is suing must be able to prove that the harm which is caused to him was by the tort. In order to claim damages under the tort law a person who is claiming also has to prove that the injury, which is caused to him, is not remote or old one e.g. “A” a learner driver caused an accident because of his inexperience. “B” filed a suit for damages regarding the injury caused by the accident, having some old injuries as well. Now he has to prove that the injury caused to him was recent and not the old one.

VICARIOUS LIABILITY, THE RULES THAT THE COURT APPLY IN DECIDING THE BLAME FOR NEGLIGENT ACT OF AN EMPLOYEE TO THE EMPLOYER

Vicarious liability proposes a situation, where one person is responsible for the actions and omissions of another person e.g. a master is liable for the acts of his servant, however, an employer will not be responsible if the act is done outside the workplace and does not come under the course of his employment. Most of the time it is very difficult to determine the said responsibility. In order to establish the vicarious liability three questions may be sought out:

1. Was a tort committed?
2. Was a tort feasor and employee?
3. Was the employee acting the course of employment when the tort was committed?

In the case Lynch v Binnacle Ltd the court clearly applied the three rules of vicarious liability (Lynch v. Binnacle Ltd, 2011) The plaintiff who worked in a company as a cattle drover. One day the plaintiff solely drove the cattle from one place to another which was actually three people’s job. On that day two employees were absent, while driving the cattle to the market as he passed behind the bullock he received a kick on his groin and suffered some nasty injuries. The plaintiff sued his employer, asserting that his injuries resulted from his master’s negligence and he is responsible. After detailed arguments when the case went to the Supreme Court the case decided that; “The actions of the other drivers in deserting their posts was negligent, that this negligence caused the plaintiff’s injuries, and that the employer was hence vicarious liable” (extempore, 2012)
LEGAL RELATIONSHIP BETWEEN THE PARTIES IN TORT IS DIFFERENT TO THE RELATIONSHIP BETWEEN THE PARTIES IN CONTRACT

The area of tort law known as negligence is when the harm caused by carelessness, not with any bad intention. Negligence means failure to exercise the due care. Jay MFeinman defines the negligence as “The core idea of negligence is that people should exercise reasonable care when they act by taking account of the potential harm that they might foreseeable cause to another person.(Feinman).

A contract is based upon consent and a tort is inflicted against somebody and without his consent. A contract demands a privity between the parties to it; where as in torts no such privity is needed a breach of contract is an infringement of a right in personam; where as torts are violation of a right in rem. For a breach of gratuitous undertaking of any service, there lies no action under the contract act, but insofar as tort is concerned, any negligent performance of it does invite an action. In case of a contract, the duty is fixed by the will and consent of the parties. It is owed to definite persons; whereas in the case of tort, the duty is one imposed by the law and is owed to the community at large. In breach of contract, the mental element for the breach is Immaterial in a tort it is sometimes taken into consideration.

In breach of contract, damages are only for the purpose of compensating for the breach, but in tort, compensation is the only remedy. Crime is a wrong against the society, tort is a wrong against and individual. As crime is a wrong against the society, the state initiates action against the accused. In tort, the individual who is the victim initiates action. In crime, the state action is called prosecution. In tort the individual action is called a suit as a rule; the object of criminal justice is punishment of the accused. In tort, the object is compensation to the victim. Thus, criminal law looks to the accused and law of torts looks to the victim. Restoration of the status of the victim is the purpose of Tortious action Crime, as a rule, is non-compoundable. Tort is compoundable, though fine by way of money is imposed in crime; it goes to the state and not to the victim. Whereas in tort compensation amount must be paid to the victim.

Tort is a violation of a right-in-rem while breach of contract is an infringement of right-in-personam. In tort the duty is obligatory by the law and should abide by the society in general, whereas in contract the consent of the parties is the binding authority. In a tort the obligation arises independently of any consent, whereas in a contract the obligation is founded on the consent of the parties. In a contract there is always a
harmony between the parties, whereas no such harmony is present in case of tort. In breach of contract motive of the defended is immaterial, whereas in tort it is often taken into consideration though not always. In breach of contract and Tort there is a different parameter to award the damages and compensation.

In a few cases, tort and breach of contract resemble. In both cases infringement of private rights takes place and the society in general is not concerned at all when breached. Furthermore, in both cases action is taken by the person himself and the remedy is by the way of compensation & damages. In some cases a person can be liable for the breach of contract and tort simultaneously.

e.g.

“A physician who harms his patient by negligently administering a poisonous drug is liable both in tort and in contract”.

The contract is founded on consent and tort is imposed without consent. In tort the duty arises from the law and in contract duty arises from an agreement between the parties. In tort reasonable foreseeability is applied to determine damages, while in contract only laws which arises 'naturally' and which is within the reasonable contemplation of the parties is used to determine damages.

Case Law

Dave and Manjit work as delivery drivers for Hurryhaste Ltd. Dave has been employed for three years. Manjit has been taken on as casual laborer. Dave and Manjit decided to have a race to see who can make the most deliveries. Manjit reversed his van into a parked car in haste, denting the door. Dave received a phone call to pick his daughter from the school urgently. Dave decided that he should make a few deliveries, while on the way to his daughter's school, after his last delivery Dave negligently crashed the van into Sheila’s car, injuring her. Sheila was not wearing her seat belt.

Manjit. He himself is personally liable to the owner of the parked car. In this case we have to see the rule of vicarious liability of the master, second either this act of Manjit was foreseeable and does the casual labor covered by vicarious liability or not? There were a company van and Manjit was performing his duty, hence, vicarious liability of a master is
proved. However employer would probably escape liability unless plaintiff could show that his behavior was foreseeable and that the employer knew of his tendency to engage in races etc. Is Manjit liable to his employer if he has caused damage to his employer’s van? The answer is yes.

Dave. He is himself personally liable for the incident and he cannot escape from the liability by just pleading that it was an emergency and he had to pick up his daughter. He is negligent and is liable for the personal injuries and damage to Shelia’s van; is his employer liable? Also refer to the concept of contributory negligence; Shelia will be guilty of contributory negligence if her failure to wear the seat belt contributed to some or all of her injuries. For example, if she suffered whiplash which was contributed to by failure to wear seat belt she may be contributory negligent by fifty percent.

Conclusion

Despite the valuable distinction between tort and contract remedies, courts appear to be increasingly willing to allow business plaintiffs to recover in tort for breaches of commercial contracts. To preserve commercial parties’ freedom to craft the terms of their relationships with their contracting partners, courts should avoid the temptation to punish a breaching party by providing a tort remedy to a plaintiff. Rather, courts should hold on to the distinction between tort and contract remedies and only allow there recovery of contract damages for a breach of contract.

BIBLIOGRAPHY

Carroll v Fearon & Ors, EWCA Civ 40 (Court of Appeal - Civil Division, Judge Wilson-Mellor) January 20, 1998).
Canada Steamship Lines Ltd V The King, A.C. 192 (UK [1952]).
Donoghue v Stevenson, 100, AC 562 (UKHL [1932]).
Feinman, J. M. (n.d.). Distinguished Professor of Law at Rutgers.
Harvey v Facey, 1,AC 552 (UKPC 1893).
L'Estrange v F Graucob Ltd, 2 KB 394 (Kings Bench 1934).
Lynch v. Binnacle Ltd, IESC 8 (Cavan Co-op Mart [2011]).
McCUTCHEON v David MacBrayne Ltd, 4 (UKHL 1964).
Parker v South Eastern Railway, 2 CPD 416 (UK 1877).
Sir John William Salmond. ((3 December 1862 - 19 September 1924)
W. V. H. Rogers, Percy Henry Winfield, J. A. (John Anthony)
Jolowicz.. (27-Jul-2010). Winfield and Jolowicz on Tort. Edition, 18,
revised. Sweet & Maxell.