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Practical Law: What Makes a Contract?

HOBAN CONSTRUCTION LTD. v. ALEXANDER, 2012 BCCA 75
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Facts: The plaintiffs were shareholders of a corporation and entered into a share purchase agreement with the defendant. The agreement was drafted in hand-written form, without legal assistance, on a single sheet of lined paper, by the parties while standing in a gravel pit. The agreement, signed by all parties and several witnesses, indicated that the defendant would purchase $1,500,000.00 of the plaintiffs' "preferred shares" in the corporation, subject to sums owing for adjustments of federal loans and credit union indebtedness. The plaintiffs expected the contract to be "typed up" by a lawyer in the near future.

Shortly after the agreement was signed, the defendant sent a "cease and desist" letter to the plaintiffs, asking them to cease all business activities related to the corporation, and to return all company property.

Within a few weeks, the defendant phoned the plaintiffs to inform them that he would not purchase their shares. Later in the year, the plaintiffs sold the same shares to another party for $900,000. The plaintiffs then brought an action against the defendant alleging breach of contract, and sought $600,000 in damages – the difference between what the defendant allegedly agreed to pay and what they received from the eventual purchaser.

At trial, the defendant was successful. The trial judge concluded that the sale contract was unenforceable, as it did not comply with the notice requirements of the corporation's unanimous shareholders agreement. **The trial judge also concluded that the agreement was not sufficiently certain and unambiguous to create a binding legal agreement, and that the parties did not intend to create legal relations. The plaintiffs appealed the decision to the British Columbia Court of Appeal.**

Decision: The appeal was allowed.

Analysis: The Court of Appeal determined that the parties *had* intended to enter into binding legal relations. **The Court noted that the "documents at issue identify the parties to the transactions, the subject matter of the transactions, the purchase price, and the effective date of the agreements", and found that an outside observer would not reasonably conclude that either party believed the contract to be invalid or dependent on the preparation of a formal agreement by a lawyer**. In support of this conclusion, the Court cited the fact that the defendant party sent a "cease and desist" letter to the plaintiffs after signing the

impugned agreement, asking them to cease all business activities related to the corporation and to return all company property. The Court found this to be a "crucial" fact that indicated to the outside world that the defendant intended the share purchase agreement to be enforceable.

The Court of Appeal also considered the issue of whether or not the essential terms of the contracts were too vague or uncertain as to be incapable of interpretation and therefore meaningless. The Court found that the agreement was "inelegantly and inartistically drafted", containing "typographical errors and substantive mistakes", and "did not strictly comply with the specifications of the USA". The Court cited several B.C. authorities which stand for the common rule of contract construction that a Court ought to "give the words their plain and ordinary meaning where that meaning does not conflict with the context of the communication as a whole" (*Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at para 37).

The trial judge had found that the contract lacked a closing date and deemed this to be an essential term. She cited the case of *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328, as the basis for this conclusion. The Court of Appeal disagreed with this interpretation of *UBS Securities*, stating that the case "does not stand for the proposition that a fixed closing date is an essential element of all share purchase agreements". The Court noted that it had previously found agreements lacking specified time parameters to not be fatally compromised, as it did in the case of *Langley*. A closing date was deemed by the Court to be unnecessary in order to have an enforceable agreement, as the closing date would be determined when the funds were actually paid.

The Court also took issue with the trial judge's conclusion that the impugned contract's terms were uncertain based on the fact that it referred to "preferred" shareholdings when the plaintiffs did not, in fact, hold preferred shares. The Court found there to be no uncertainty over the subject matter of the sale, as it was clear both from the document and the surrounding circumstances of the sale that the plaintiffs were selling all of their shares. The Court also noted that the defendant did not submit that the reference to preferred shares caused any actual confusion.

The trial judge had determined that the phrase "all sums owing for adjustments" was too vague to make the contract enforceable. The Court of Appeal disagreed, stating that "adjustments are the type of details that are commonly sorted out after an agreement has been reached", and that "the quantifying of the adjustments was not a condition precedent to give effect to the agreement, nor was it an essential element" of the agreement.

Principles to be drawn frtom the *Hoban* case: While this is a BC specific case, it is a Court of Appeal decision which will be binding on the lower Courts in BC and will act as persuasive authority in all other jurisdictions in Canada. The finding at the heart of the decision is that a contract will be found to exist so long as **documents at issue (however crude they may be):**

1) **Identify the parties to the transactions,**
2) **Identify the subject matter of the transactions,**
3) **Contain the purchase price, and**
4) **Contain the effective date of the agreement"**

Even in the face of a Unanimous Shareholder Agreement which may be inconsistent, the law of Contract is strong and wherever possible, it should be expected that a Court will look to give the words of a contract document their plain and ordinary meaning.

In short, while you may not need a lawyer to get into a contract, it is always a good idea to have your contracts drafted or at least vetted by a lawyer to avoid the necessity of hiring a lawyer to litigate the issue for you at a later date. Brownlee LLP has extensive experience at both ends of the contract continuum; we are available to assist you both with drafting and vetting contracts and with advising you and litigating them for you later should you find yourself in a situation like that in *Hoban*.