

Freedom of contract

Law



Freedom of contract stipulates that parties to a contractual agreement are free to contract with any party of their choice and insert as many rights and obligations as they may deem fit in their contract. As a general rule, courts will not act to interfere with this freedom by imposing terms and conditions for the parties, but rather seek to enforce the wishes of the contracting parties as stipulated by the express terms, oral undertakings, or by the conduct of the parties (Stone R, 2009: 23). In light of this therefore, provided all the essentials of a valid contract are met, courts will always seek to give effect to the wishes of the parties. The essentials of a valid contract include, offer, acceptance, consideration, intention to create legal rights, legality of the subject matter, and capacity of the parties. Among these essentials, consideration forms the foundation of any given contract as there must be some sort of value to be derived from the transaction. For any claim, arising out of a breach of contract, the party alleging the breach has to prove to the court the existence of the essential of consideration. Section 2(d) of the Indian Contract Act 1872 explains consideration as, “ When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or promises to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.” It is therefore evident from this definition that a party alleging a breach of contract has to prove the existence of some value derived from the performance of the contract. Similarly, in *Currie vs. Misa*¹ consideration was defined as, “ A valued consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”

From this definition, the consideration in the scenario was the €50 that Henry promised to pay Tom after he had successfully towed his car. However, for the essential of consideration to be considered as satisfied by a court of law, such consideration must not be past. This is because past consideration is no consideration and thus cannot be enforced by the courts. Consideration is considered past if it is made after the promisor has already acted upon the promise. For example, if A cleans the house belonging to B in September and upon cleaning the house, B promises to pay A some sum of money in October. Such an agreement is not enforceable in a court of law as A's consideration is past. This is because such an undertaking will be interpreted as merely a promise or a gratuitous act, and thus not enforceable. In *The Re McArdle*² a wife and her three grown up children shared a house. The spouse to one of the children carried out some decoration on the house and later the other children made her a promise to compensate her ? 488 and proceeded to execute a document to this effect. The other children later went back on their promise and the wife sued them for a breach of contract. The court held that the contract for the payment of the money could not be enforced as all the labor had been concluded by the time the promise was made. The consideration was past; hence it was no consideration at all. Similarly, in the scenario Henry's promise to pay Tom €50 came after the work of towing the vehicle had already been completed, and Tom cannot rely on this consideration as it was a past consideration. In light of the foregoing argument, the court should not enforce Tom's claim against Henry as the consideration was already past. Henry, in his defense, may also argue that the promise to pay Tom €50 was merely a promise hence a unilateral contract which was enforceable in a court of law. A

<https://assignbuster.com/freedom-of-contract/>

unilateral contract is basically a one sided contract whereby the promisor makes a promise to the promisee, who in turn does not make any promise back. Such a contract is one sided because there is no intention to create binding rights on both parties. In the scenario, there was no interchange of promises between both parties and as such, the contract may be deemed as a unilateral contract. A unilateral contract can be revoked at any time before acceptance of the offer, and as such Henry had the discretion to revoke the offer at any time he pleased. Moreover, it is an accepted legal principle that there must be a nexus between the promise and consideration. Failure to show such a nexus renders the contract a unilateral contract which can be revoked at any time by the party making the promise. In *Carlill v Carbolic Smoke Ball Company*³ the company specialized in the business of manufacturing and selling carbolic smoke balls. The company placed newspaper advertisements offering a reward of ? 100 to anyone who used the carbolic smoke balls three times a day, as prescribed, and went ahead to contract a cold, influenza or any other disease. Carlill purchased the smoke balls and used them as prescribed, but went ahead to contract influenza. He claimed the award but the company refused to compensate him, and so he instituted a claim for a breach of contract. The lower court directed the company to pay him. On appeal, the House of Lords dismissed the appeal since the company had deposited the amount in a bank account showing their seriousness and commitment to fulfill their promise. Had the company not deposited the amount in the bank account, this would have been treated as a mere puff, and thus the appeal would have been upheld. The court was of the opinion that the mere advertisement of a product on a newspaper or any other medium did not constitute a valid offer, which was capable of

<https://assignbuster.com/freedom-of-contract/>

acceptance by the other party. In the case, the advertisement of the smoke balls in the newspaper amounted to an invitation to treat as opposed to a valid offer capable of acceptance by the purchase of the smoke balls. The Promisor could thus waive the offer at any time. In light of the foregoing argument, Henry's promise to pay Tom €50 was merely a promise, which needed no actual performance, leading to the formation of a unilateral contract that cannot be enforced by the court. Henry's alleged promise to Tom was merely a puff in which he undertook no serious steps or conduct to indicate that he was willing to pay Tom the money. The court should therefore dismiss Tom's claim against Henry for the payment of the aforementioned amount of money. References *Carlill v Carbolic Smoke Ball Company* [1893] 1 Q. B. 256 *Currie v. Misa* (1875) L. R. 10 Ex. 162 *Re McArdle* [1951] AC 669 *Stone, R.*, (2009), *The Modern Law of Contract: Seventh Edition*, New York; Cavendish Publishers.