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UNRECOGNIZED HORNETS' NESTS OF BASIC CONTRACT LAW - DOES THE LAW PERMIT A SELLER TO OFFER THE SAME ITEM TO TWO OR MORE BUYERS UNDER BILATERAL CONTRACTS?

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Abstract: The law of contracts stands as a mechanism for creating and enforcing legal rights and obligations that ensure that parties are held to their respective promises. However, if contract law permits a seller to agree to sell the same item to two or more buyers to the extent of creating two valid contracts, this may violate one of the main purposes of contract law which is to bring certainty and predictability pertaining to the duties and rights of the parties. This article initially examined the elements of contract law to analyze if the same could give rise to two or more valid bilateral agreements purporting to sell the same item to different individuals. This was followed by proposed reforms to the existing framework to protect both sellers and buyers who may not be aware of the legal framework governing their relationships. After assessing and evaluating whether a seller of limited stocks can contract to sell more than they own, it was identified that it is legally possible for a seller to be bound by two or more valid contracts to sell the same item. It was proposed to either interpret the expression of willingness to sell a product by a seller with limited stocks as an invitation to treat or subject the validity of concepts of offer and acceptance to the condition of availability of stocks as mechanisms to afford protection to domestic sellers who may be incautious of the surrounding legal rules.

Keywords: Offer; Acceptance; Contract.

1. Introduction

Agreeing to sell and eventually selling items to two or more buyers is not impossible as many businesses engage in such activities daily without getting obstructed by law as they are perfectly legal. The problem arises when the seller is only capable of selling a few items. There is a limit to which the legality of such a contractual performance can be stretched. If a seller can produce items to match customer

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demand, it is possible to enter an unlimited number of contracts. However, what if the production ends? During the COVID-19 pandemic many enterprises, both minor and major had to stop trading due to financial issues. (Bartik et al.,2017) In the event of halting production, sellers are practically barred from selling items as they will not be able to agree unconditionally to sell products that they can't supply.

The main objective of this research is to analyze and evaluate whether it is legally possible for an individual or a business to enter into several agreements with different buyers to sell the same item/s and avoid liability. The research will first analyze the key elements of a valid agreement to discern if constituent elements of contract law permit such transactions. Secondly, the legal remedies available for buyers and methods used by sellers to avoid liability in such situations will be discussed followed by recommendations.

2. Is it possible for a seller to enter two binding legal obligations to sell the same product/s under basic principles of contract law?

For statement/s to crystalize into binding and enforceable legal obligations, which is often coined as a valid contract, six key elements must be present: offer, acceptance, awareness, consideration, capacity and legality (Button, 2023). The purpose of the following undertaking is to analyze and determine whether out of the above constituent elements, concepts of offer, acceptance and consideration make it possible for a seller to form binding legal obligations simultaneously with two or more buyers despite having limited stocks.

An Offer is defined as an expression of willingness to form binding legal obligations on defined terms. (McKendrick, 2015, p.26) It has been established that judges pay attention to the language used between the parties to discern if an offer has been made. Accordingly, a letter sent by the council that stated that they were prepared to sell the house did not qualify as an offer as the language used was ambiguous. (Gibson v Manchester City Council [1979] 1 WLR 294 (HL)Therefore, for a statement to qualify as an offer the words should not leave room for further negotiations. If an offer is an unqualified expression of willingness to form lasting obligations, can a seller direct such expression to two or more parties, such as to constitute two valid offers? The simple response would be yes. However, the answer could be given in the affirmative subject to the condition that the seller has enough products to sell. However, what if the seller has only limited stocks? The issue is can a seller with limited stocks offer items to two or more parties under a bilateral agreement. Parker CJ's judgment given for the case of Patridge v Crittenden throws some light into answering this question (Partridge v Crittenden [1968] 1 WLR 1204).

In the case of Partridge v Crittenden, the issue for the courts was to decide whether the newspaper advertisement to sell Bramblefinch cocks and hens was an offer or a mere expression of willingness to conduct further negotiations (Partridge v Crittenden [1968] 1 WLR 1204). The case was taken before the Queen's Bench division of the House of Lords. Ashworth J treated the advertisement in Partridge v Crittenden as an invitation to treat due to its form and the way chosen to publish. In his Lordship's own words;

'The insertion of an advertisement in the form adopted here under the title "Classified Advertisements" is simply an invitation to treat. That is really sufficient to dispose of the case.

However, Lord Parker CJ refused to treat the advertisement as an offer not merely because of it being an advertisement but as otherwise the advertiser would be placed in a difficult position of being contractually obligated to sell more goods than he actually owns. According to His Lordship, it is both business sense and common sense to treat the advertisement in Partridge v Crittenden as an invitation to treat as the same was not advanced by a manufacturer who is capable of matching supplier demand. Applying the same principle to the question of whether a seller with limited stocks can offer the same item/s to a buyer/s, the answer would be that since the offer comes from a seller with insufficient products, such an offer may be treated as an invitation to treat.

McKendrick is critical of this line of argument for giving the impression that an offer is only capable of acceptance while stocks last (McKendrick, 2015, p.30). McKendrick is partially both correct and incorrect in pointing out that the validity of an offer is not determinable by the availability of stocks. It is correct because, if a seller is capable of manufacturing new stocks to match the customer demand, he can continue to offer products that can form contracts despite the current status of the stocks. Law is yet to address the kind of issue that may arise when a seller who halted manufacturing advances an offer to sell his limited stocks which is the focal point of this research. In fact, the law of contracts does not have any express rule governing the invalidity of an offer. If an individual clearly expresses their intention to create a binding obligation, such expression will attract the label of an offer irrespective of the availability of stocks and there are no expressed legal rules on how an offer gets invalid. Thus, as per contract law, there is either an offer or no offer at all and in between the flavor of invalid offers is missing.

It is partially incorrect because McKendrick's reference is for manufacturers whereas Parker CJ specifically mentioned in his judgment that he was not referring to manufacturers. In Patridge v Crittenden, the seller was involved in a one-off transaction and was not a manufacturer who could produce or acquire goods (Partridge v Crittenden [1968] 1 WLR 1204). There is no bar in law to offer future

goods. Future goods are defined as goods to be produced or acquired by a seller after a contract of sale (Sale of Goods Act, 1979). Therefore, sellers are authorized to offer goods that they are yet to own or produce and are non-existent in the eyes of a buyer. The issue arises when the seller promises to sell an existing item that is already offered to someone else.

If the courts are requested to deliberate on this issue of whether a seller can promise the same item twice to different buyers, Parker CJ's judgment in Patridge v Crittenden hints that there is a possibility of courts treating such a promise as an invitation to treat since the willingness to transact originates from a person lacking enough stocks to fulfill the demand (Partridge v Crittenden [1968] 1 WLR 1204). To counter the difficulties raised in Patridge v Crittenden, McKendrick proposes the solution of introducing offers that are subject to the limitation that they are capable of acceptance only till the stocks last (McKendrick, 2015, p. 28).

Judges do not seem to be prepared to declare the second promise as invalid in such a case. However, what if the offer comes from not the seller but the buyer? Assume the situation of a seller with limited stocks getting several offers from several buyers, the issue is does the law prevents such a seller from accepting such offers owing to a lack of availability of stocks. Whether or not a seller refrains from accepting depends on his personal preference, if he is willing to accept all the offers, the law does not prohibit it, at least as far as we can be concerned, contract law does not prohibit such an action which may later result in a breach of contract.

Acceptance is defined as an assent to the terms proposed by an offeror that mirrors the terms of the offer (McKendrick, 2015, p. 34). A seller in receipt of two offers to purchase his only available product/limited stocks could technically agree to both proposed terms as the abstract principles of contract law permit the same. The meaning of acceptance simply means agreeing to the terms, and the law does not expressly state that offerees are estopped from agreeing to sell more than they own, nor does it say that once acceptance is rendered, further acceptance can't be given to other offers to buy the same product. It is worth noting the practical significance if any, about such transactions.

Accordingly, if a seller in possession of limited stocks gets an offer from two buyers on two separate occasions, can the seller agree to satisfy both offers? Practically, a seller is not able to fulfill both offers, but the issue is can he nonetheless agree? Assuming that a seller promised part of the bulk to buyer A and the whole bulk to buyer B, the question would be whose contract remains valid? In the event of a company being the seller, these kinds of issues may arise even against legitimate transactions. This could happen because the company is a body corporate acting through its agents (Salomon v A Salomon and Co Ltd [1896] UKHL 1). As such,

there could be several agents who can contract on behalf of the company. The consequence of this might result in the company promising the same stocks to several parties. Thus, agents of the company may be unaware of the fact that they are promising the same stocks.

Revisiting the earlier question, the issue is whether buyer A or B has a valid contract. For reasons explained earlier, the seller is not legally prohibited from accepting both offers. However, offer and acceptance aren't the only components that decide which party has a valid contract. Therefore, the validity question shall be ascertained with reference to the communication of acceptance, awareness, consideration, capacity and legality.

In order for the seller's acceptance to crystalize into a valid acceptance, it must be communicated to the offeror (Entores v Miles Far East Corp [1955] 2 QB 327). According to Lord Denning, if the acceptance is not heard by the offeree, then there will be no contract (Entores v Miles Far East Corp [1955] 2 QB 327). The acceptance takes place at the moment of its receipt (Brinkibon Ltd v Stahag Stahl [1983] 2 AC 34). Thus, among other things such as consideration, one of the important elements to ascertain the existence of a valid contract would be communication of acceptance. If the seller communicates acceptance to buyer A, prior to informing the same to buyer B, and assuming all other elements of a valid contract are in existence, then buyer A will form a valid contract with the seller before buyer B. However, provided the property in the goods did not pass to buyer A, the law does not state that the seller is precluded from accepting the offer from buyer B to sell the same stocks promised to buyer A. The question is whether both parties have a valid contract. Under classic contract law, any offer meeting the matching acceptance will give rise to a valid contract, thus it can be argued that it is legally possible to render acceptance to match two offers although the stocks can only satisfy one offer. The issue with this kind of promise passed between sellers and buyers who eye on the same product is that actions of a seller agreeing products to buyers A and B leading up to the contract formation are considered perfectly legal, which in turn creates faith in the parties that they are entering into something legitimate. All this happens only to be told in the end that the seller has violated the law by promising things that he could not fulfill. This approach lacks fairness. This is analogous to a driver being penalized for causing an accident in a country that has no road rules. Therefore, it is fundamental to change the law to prevent a seller from contracting in circumstances where he lacks stocks rather than punishing him for violating a contract.

Things get complicated when the seller promises a part of the stock to one buyer and the whole to another. If the seller promises a part to buyer A and communicates acceptance, there will be a valid contract between both parties. As explained earlier, a seller is not prevented by law from selling the same stock. Hence, it is legally

possible to enter a second contract with buyer B to sell the whole stock. It must be stressed that a second contract becomes legally impossible only in the event of buyer A acquiring title to part of the goods. If the goods are specific and the parties are silent as to their intention regarding the passing of title, the title passes at the point of contracting provided the contract is unconditional and the goods are in a deliverable state. (Sale of Goods Act, 1979) Thus the seller will lose rights to the stocks promised to buyer A in the event of contracting to sell specific goods to the latter. In such an event, if the seller promises the whole bulk to buyer B, then he will be promising both goods owned by him and buyer A to buyer B.

It is illegal for the seller to promise the part belonging to buyer A under the Nemo Dat Quod Non-Habet principle to a second buyer (Goode and McKendrick, 2020, p. 73). The issue is would such a second contract remain partially valid to the extent of permitting the sale of the seller's ownership of the part of the goods to the second buyer. English law has yet to address this. However, the Montana Code recognizes the existence of partially valid contracts (28-2-604, MCA). If English courts were to deliberate on this, it is safe to assume that the validity of the contract with buyer B may be upheld as partially valid since English law favors facilitating trade. The fact that English courts have not been placed to decide the partial validity of a contract can be because the majority of contracts are in writing and are supported with a severability clause that upholds partial validity (Scholz, 2024).

Considering the above scenario what may be the situation if part of the bulk promised to buyer A gets destroyed preventing the seller from satisfying his duty wholly with respect to buyer A and partially with respect to buyer B? If the partial validity adopted by Montana Code Annotated is being followed or if the contract is supported with a severability clause, the seller will only have to compensate buyer A for failing to provide goods as agreed, whereas the seller will not be liable for buyer B as the contract with buyer B remains partially invalid as ownership to the part of goods which got destroyed remains with buyer A. As the rest of the goods promised to Buyer B remain intact, the seller can safely satisfy the valid part of the contract with Buyer B.

However, it must be noted that English law has not hinted that they are prepared to follow a USA code to address the aforesaid situation and if basic contract law principles are used to address the same, both contracts with buyers A and B can be taken as valid provided the seller accepted and communicated offers directed by both parties. This has become a possibility because English law is silent on whether a seller can accept two offers to sell the same stocks. However, if both contracts with buyers A and B are taken as valid, both buyers will be legally entitled to receive damages to cover their losses in the event of the stocks promised to buyer A getting

destroyed as illustrated above. Just as the seller contracted twice, he will be held liable twice for the non-fulfillment of his duty. This does not appear unfair given that the seller has advanced promises that he can't fulfill, thus deserving punishment, but as explained earlier purely legitimate transactions could also unwittingly fall prey to this kind of circumstances. Can a seller faced with such an uncompromising situation avoid liability is a question worth addressing.

3. Can a seller avoid liability after agreeing to sell the same item twice?

A seller who has agreed to sell the same item to two or more buyers may be able to avoid liability if he uses the defense of frustration. Frustration is defined as: 'frustration occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract' (Davis Contractors Ltd v Fareham Urban District Council [1956] UKHL 3).

If the parties can successfully raise the defense of frustration, the contract automatically comes to an end (McKendrick, 2015, p. 254). If both contracts illustrated above are taken as valid and the seller is made liable under both, then the applicable defenses should operate. Accordingly, if the seller uses the defense of frustration against the destruction of goods promised to buyer A, then under the classic model of contracts, he should be able to avoid liability against both buyer A and B for the destruction of goods. Pleading frustration against buyer A is quite straightforward as it entails frustration with the entire contract. However, if the seller were to plead frustration against buyer B, it becomes complicated as part of the stocks promised to buyer B remains still intact and English law does not recognize partially frustrated contracts (Beale and Twigg-Flesner, 2020). However, this is subject to one qualification: if the contractual duties are severable, then frustration too can operate severally (Beale and Twigg-Flesner, 2020).

Therefore, if the seller can demonstrate that his duty towards buyer B in supplying the remaining goods is separate from his duty to supply the destroyed goods, the seller may be able to plead partial frustration against buyer B. If the seller is allowed to plead frustration as explained, then he will be capable of avoiding liability for his fraud or error in agreeing on the same stocks to two parties. It is highly unlikely that the law will permit this. If only Atiyah's backward reasoning is used, all these issues can be adequately responded to, whereas if forward reasoning is used, there may be a high probability of the seller avoiding liability in the given instance (McKendrick, 2015, p. 29).

The above discussion attempts to address legal issues that could arise when title to goods has passed to buyer A at the time of contracting. However, if the goods

promised to buyers A and B are unascertained, then the contract with buyer A will not be capable of passing title to buyer A until the goods are ascertained, (Sale of Goods Act, 1979) as such it is legal for the seller to contract with buyer B to sell the entire stock as the seller will be agreeing to sell his goods. Even if the law has not addressed this issue, since the seller can fulfill only one promise, it can be assumed that he will be liable for the defaulted obligation. Thus, contract law is not without a remedy for many situations.

The researcher submits that the above issues mainly occur due to the uncertainty surrounding the concept of consideration. The traditional definition of consideration is given in the case of Currie v Misa (Currie v Misa (1875) LR 10 Ex 153). In the absence of consideration, a promisee could not enforce a promise (McKendrick, 2015, p. 67). Thus, an obligation or a promise could not be enforced if the promisee has given or promised to give something in exchange for the promise or promisor has obtained something in return. If the rules on consideration are adequately defined, the question of whether buyer A gets the part of the stock or buyer B gets the entire stock leaving nothing to buyer A, could be given a clear solution. However, the basis of consideration and its rules are currently at a reflux. Practically, businesses have found solutions for the kind of problems that may arise when more than one party bids for a product. One such solution would be the demand for a deposit payment to secure a deal. Since a deposit is a valuable form of consideration to hold the seller to his promise, many times the individual who has paid a deposit gets a valid opportunity to secure the contract and obtain clear legal rights against the seller. However, what if neither party provides any form of monetary consideration? In such an event who can claim for a binding contract with the seller? The Pitt v PHH throws some insight into these questions (Pitt v PHH Asset Management Ltd [1994] 1 WLR 327).

In the case of Pitt, the defendants put a cottage on the market for 205,000 gbp, both the claimant and Miss Buckle made bids to purchase the cottage. The claimant's bid was accepted by the defendants, but since the competing bidder's bargain was better, the defendants sold the cottage to her. On being sued, the defendants argued that the contract with the claimant couldn't be enforced since the claimant did not advance any consideration for the promise not to consider other offers. The court nevertheless upheld that the claimant had advanced sufficient consideration. Since promising to give something in return also constitutes consideration, which is coined as executory consideration, (LexisNexis,2019) then both the claimant and Miss. Buckle can be considered as having considered at the point of agreeing to buy the cottage for 205,000 and 210,000 respectively.

In the case of Pitt, the main issue was that the seller had sold the cottage to Miss Buckle which was once promised to the claimant. The seller eventually became liable for breach of contract for failing to satisfy the contract with the claimant. The judgment does not address whether it is legal for a seller to sell the same item to two individuals as it only focuses on whether the claimant has a valid contract that was breached. However, it can be implied from the judgment that it is legally possible to enter two valid agreements to sell the same item/s which is why Miss. Buckle obtained rights to the cottage and the seller became liable for failing to provide the same cottage to the claimant. Since consideration was broadly defined the seller in question became liable twice for failing to provide the same item to different individuals. This case illustrates that nonregulation of the concepts of offer and acceptance coupled with the ambiguous concept of consideration can result in a seller being penalized twice or more with respect to the sale of the same item which is unfair to the interests of sellers.

Conclusions and recommendations

The above discussion demonstrated that it is legally possible for a seller to enter into two agreements to sell the same item/s. As per the case of Pitt v PHH, there is no legal bar on the extent to which a seller can agree to sell products and therefore, product availability is not a condition which have to be satisfied before transacting (Pitt v PHH Asset Management Ltd [1994] 1 WLR 327). As such, if a seller has valid enforceable contracts that he is unable to fulfill due to a shortage in stocks or discontinued production, the law is rather quick to penalize the seller for not fulfilling his obligations. The absence of rules subjecting the validity of an offer and acceptance to any condition is the main reason why sellers are legally forced into contracts that they cannot fulfill due to the limited availability of stocks.

This article argues that it is of the essence to regulate the concepts of offer and acceptance despite the current trend in facilitating laissez-faire ethics as a step towards protecting the interests of sellers and putting an end to the issue encapsulated in this article. It is proposed to subject the validity of an offer and acceptance to the condition of product availability which in turn eliminates the possibility of sellers being held on to contracts that they could not fulfill. Parker CJ's judgment in Patridge v Crittenden implies the possibility of interpreting an offer made by a seller of limited stocks as an invitation to treat rather than an offer that works as a clear depiction of how law intervenes on behalf of domestic sellers who may negligently end up creating promises which they could not fulfill (Partridge v Crittenden [1968] 1 WLR 1204).

The proposed reform subjecting the validity of an offer and acceptance to the condition of availability of stocks eliminates the possibility of a seller agreeing to

sell more than they own, thus protecting sellers from being penalized before the law. However, the said change results in the buyer/s being prevented from suing a seller who did not supply the promised items. While agreeing to sell more than one owns is a clear breach of trust deserving punishment, the issue is that sellers may not be aware that their conduct is wrong as the law does not expressly appear to impose any condition on their ability to sell and thus they may be unwary of the fact that they are committing a breach of contract until being summoned to a court of law.

It is important to note that, as much as buyers deserve to have the right to claim damages for unfulfilled promises, sellers also have the right to not get penalized for their lack of understanding of the legal framework. To strike an effective balance between both forms of interest, the concepts of offer and acceptance should only be made subject to the condition of product availability with respect to domestic sales. Since many domestic transactions are one-off transactions that do not involve bulk purchases, compromising the right of a buyer to sue a seller under limited situations such as limited product availability is not a greater attack on the buyer's interests.

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Author Contributions

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