When a deal is not a deal

How to handle changing contract terms

Sometimes in the supply chain, what exactly constitutes a deal can be nebulous.

Consider the following claim. A vendor demands from purchaser the sum of $100,000, the balance owing for goods sold and delivered to the purchaser on a running account.

After failing to pay the vendor the $100,000 demanded, the purchaser orally agreed with the vendor to pay $50,000 in full satisfaction of the original amount claimed.

The purchaser defaulted on the oral agreement with vendor, having failed to pay the lower amount agreed upon. The vendor then launched a lawsuit claiming $100,000, the entire amount owing under the original agreement.

Is the vendor entitled to the original amount claimed ($100,000) for the balance owing on goods sold and delivered, or is it restricted to the lower amount ($50,000) that it agreed to accept from the purchaser?

Deal or no deal

It is often very difficult to accurately predict how a court will decide a given case, especially one where a promise modifies an existing common commercial contract, where no "extra" consideration is given for the promise. For example, will a court enforce an agreement of a creditor to accept part payment by the debtor in full satisfaction of the debt? Maybe, maybe not.

The classic case is Foakes vs Beer, an English case decided over 100 years ago that is frequently relied on by Canadian courts today. There, one Dr Foakes paid one Mrs Beer £500 on execution of an agreement and the balance over several years. Contrary to her promise not to claim interest, Beer sued Foakes for the interest owing.

The trial judge granted judgment in favour of Foakes, the jury having found that the principal amount was paid as agreed. The English Court of Appeal reversed the trial judgment and awarded judgment in favour of Beer. Foakes appealed to the House of Lords which, despite many cases to the contrary, dismissed the appeal on the basis that there could be no consideration for Beer's promise. The House held that since a lesser sum cannot be a satisfaction to the plaintiff for a greater sum, Beer's promise not to claim interest was therefore unenforceable.

The decision in Foakes vs Beer was severely criticized, especially given that the kinds of promises made in that case are routinely given by both creditors and debtors.

In consequence, the Ontario legislature in 1895 effectively reversed the decision in Foakes vs Beer with the passage of what is now the *Mercantile Law Amendment Act.* Section 16 of that Act addresses the situation where the debtor has paid the creditor the part payment, and the creditor has accepted that part payment in full satisfaction of the debt. In short, when payment is made in accordance with the agreement, the original obligation is discharged.

However, if the debtor does not live up to his/her promise to satisfy the original amount due by paying the lower amount, or if the creditor does not expressly accept the part payment, the original obligation should stand.

Risky business

Such practices are risky. Based on the above, the vendor can mount a compelling case that it is entitled to the original amount claimed, for three main reasons.

First, the purchaser failed to provide any real consideration for the vendor's promise to accept less than the amount originally due. Second, the vendor is left with not only less than the amount originally due, but incomplete performance by the purchaser of its promise to satisfy the original amount claimed by paying the lower amount. Finally, since the purchaser did not live up to the oral agreement, which was made without new consideration, that deal should not be enforced; rather, the original obligation should stand. Absent performance by the purchaser as promised, the vendor is entitled to demand the original amount claimed.

Lessons learned

To avoid these problems associated with the doctrine of "consideration" and the enforceability of promises that modify existing contractual relationships, get good legal advice.

To address the risks that a promise may be held to be unenforceable by a court on the ground that no extra consideration was given for it, you can do several things. You can use a deed/agreement under seal (the seal imports new consideration). You can enter into a settlement agreement containing reciprocal promises and obligations. Or you can structure the agreement as a novation or "new" agreement.

Once these steps are taken, I predict that the court, if called upon, will have a good basis–founded on old and new precedents–to hold that the revised promise is enforceable because, at the end of the day, a deal is a deal. **b2b**

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