

THE PROBLEM

Jenny runs a successful home decoration business in Adelaide. She is considering expanding the business to offer home renovations as well, but is not sure how to go about this. One day her cousin Steven rang her from Queensland, to say he was thinking of moving back to Adelaide, as the weather was too hot in Brisbane and he was concerned about future flooding and cyclones in the city. Jenny was excited to hear this, as Steven worked in the home renovation industry. Jenny told him about her wishes to expand her business, and suggested it would be perfect if he moved back to Adelaide as she could employ him to work in her business, being in charge of home renovations. Steven told her that sounded like a good prospect, but, he added, he was really concerned about the costs of moving. "Listen", said Jenny, "My business is doing really well. If you come here to work for me, I'll pay your moving costs and help to find a place to live and settle in". After this they discussed salary. When Steve asked her to send him something recording the details, Jenny replied that "as we are family I don't think we need to involve lawyers at this stage - I'll e-mail you the main details". Steven agreed, and Jenny sent him the following e-mail:

Dear Steve

Could you please confirm this records our discussion from last week.

- 1. If Steven Smith moves from Brisbane to Adelaide to work for Jenny Williams, Jenny will pay the cost of Steven's move from Brisbane to Adelaide to a limit of \$20,000 and will help him to find a new residence in Adelaide.*
- 2. Steven Smith's starting salary will be \$80,000 and he will be employed for a fixed term of three years.*
- 3. Other details of employment will be agreed by Jenny Williams and Steven Smith after he has moved to Adelaide.*

Steven sent a phone text message in reply, saying "Hi Jen, you fax looks pretty right. Steve".

It took 3 months for Steven to sell his house, after which time he immediately resigned from his job, taking one month's holiday in Brisbane before he was to move to Adelaide. A week before Steven was due to leave, Jenny had become seriously ill. She rang Steven and told him she was winding up the business as ill health was forcing her to resign. She also told him she would obviously not need to pay him anything as he had not moved. When Steven, shocked, mentioned the sale of the house, Jen said she was sorry, but she needed all the money from the sale of her business to pay for treatment, and that he would just have to find somewhere else to live and get another job.

Question 1: Advise Steven what actions he may have against Jenny.

Alternatively, assume Jenny is not ill and Steven resigns from his work and moves to Adelaide.

When he arrives in Adelaide, he sends a bill of \$20,000 for the costs of moving. Jenny rings up Steven and tells him that the business has run into financial difficulties after a couple of major clients have gone bankrupt and been unable to pay their bills. She says that if she pays him \$20,000 now it will cause serious financial problems, but she can pay him \$5,000, and will still employ him. Steven is not happy but feels that he has no alternative but to accept the sum of \$5,000.

Steven starts work for Jenny, but in nine months' time he and Jenny have a serious falling out. The business has recovered from its financial difficulties and with Steven's home renovations is making a good profit. However, Jenny refuses to pay Steven the extra \$15,000 in moving costs. Steven resigns from his job and is considering relocating back to Brisbane.

Question 2: Advise Steven as to whether or not he can recover the \$15,000.

*Notes: Please answer **both** questions. The two questions should not necessarily be seen as demanding answers of equal length. You will be marked on your answer as a whole, with no particular weighting given to any component of that answer.*

Please disregard any possible statutory claims, for example under the Australian Consumer Law.

Question 1

Steven could firstly argue that the arrangement between he and Jenny constituted a contract, and that Jenny breached that contract. If this argument were unsuccessful, he could alternatively seek a remedy by arguing that the promises made by Jenny give rise to an estoppel.

To show that a contract existed between he and Jenny, Steven would have to show that he and Jenny reached an agreement, and that this agreement satisfied the requirements of a binding contract.

To show that an agreement was reached between the parties, Steven could employ the framework of offer and acceptance analysis. In this analysis, agreement is generally said to occur when an offeree actually communicates acceptance of an offer to the offeror.¹ Steven could argue that Jenny made an offer during their first phone call which was accepted by Steven in that same phone call, and that Jenny's subsequent email was simply a memorandum recording the contents of their discussion. Alternatively, Steven could argue that the phone conversation was a negotiation which gave rise to an offer by Jenny in the form of her email, and that this offer was then accepted by Steven via text message. Either interpretation could be successful, though there is some doubt as to whether Steven clearly expressed acceptance of Jenny's proposal at either stage. In any case, Steven would be arguing that he had clearly agreed to, and was bound to, move to Adelaide and work for Jenny. Little turns on the question of which of the interpretations is accepted, as it seems the content of the agreement consists of the terms listed in Jenny's email in either case.

Jenny would argue that if an offer could be made out, Steven could only have accepted it by actually moving to Adelaide. To support her argument she might point to the conditional 'if' in the first term of her email, to the fact that no date was specified for Steven's move, and to authority which supports an offeror's right to make the doing of an act the only way in which an offer can be accepted.² If Jenny were successful in this argument, it follows that no contract arose between the parties, as her phone call one week before Steven moved would be seen as a revocation of the offer, which she would have been free to do at any time prior to Steven's act of acceptance.³ This argument seems at least somewhat likely to succeed.

If Steven were successful in arguing that he clearly accepted a proposal by Jenny to move to Adelaide and work for her, there are several other issues with which he would have to deal in

¹ *Latec Finance Ltd v Knight* [1969] 2 NSWLR 79.

² *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666, 691.

³ *Dickinson v Dodds* (1876) LR 2 Ch D 463.

order to establish that the bargain was a binding contract. The first is whether the parties manifested an intention to enter legal relations, which is necessary in contract formation.⁴

Jenny would argue that the agreement was not intended to create legal relations, as Jenny and Steven are cousins and there is a presumption that agreements between family members are not intended to create legal relations.⁵ This presumption can be rebutted, however, where an agreement between relatives is 'commercial, rather than social or domestic'.⁶ Given the arrangement between Jenny and Steven was commercial in nature, it seems likely that Steven would be successful in arguing that the arrangement was intended to create legal relations.

Another issue is the requirement of completeness, which stipulates that the parties must have agreed on the essential terms of the contract, which are those terms without which the contract cannot be enforced without the court stepping beyond the bounds of its role as an interpreter of the contract.⁷ Jenny would likely argue that there can be no contract between the parties because of a lack of agreement on all essential terms. She would do this firstly by pointing out that no date for Steven's move or employment was explicitly agreed upon, and that these missing terms are essential ones. Steven would argue that the parties' understanding was that Steven would move within a reasonable time, and that employment would commence upon Steven's move. The argument is likely to succeed, as courts are generally reluctant to invalidate agreements, preferring to give effect to bargains where possible.⁸ Jenny would secondly point out that agreements to agree are generally considered unenforceable.⁹ Jenny would argue that her and Steven's agreement to agree 'on other details of employment' was hence a term with no effect, and that the missing details were essential terms. Steven would likely be successful in arguing, however, that the contract can still be

⁴ *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

⁵ *Balfour v Balfour* [1919] 2 KB 571.

⁶ *Roufos v Brewster* (1971) 2 SASR 218, 222.

⁷ *Thomson v White* [2006] NSWCA 350, [100].

⁸ *Hall v Busst* (1960) 104 CLR 206, 239.

⁹ *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 604.

enforced meaningfully in the absence of agreement on the finer details of his employment, and that these terms were not essential.

The requirement of certainty stipulates that terms must be sufficiently clear that meaning can be attributed to them.¹⁰ Jenny might successfully argue that her promise to help Steven find a residence in Adelaide is too uncertain. Where a promise is found to be uncertain, however, the promise can be severed from the agreement and the contract preserved, provided the term is not essential and that the courts can infer that the parties intended the agreement to be enforceable absent the term in question.¹¹ It is likely that if the term were considered uncertain, Steven would successfully argue that the term was a non-essential term of the agreement without which the agreement would still be intended to be enforceable.

It seems possible that Steven could succeed in establishing that a contract to move to Adelaide and work for Jenny existed between the parties, and that this contract was breached by Jenny. His possible remedies for breach shall be considered.

It would be very unlikely that a court would order specific performance of the contract, as courts are generally reluctant to grant specific performance for personal services such as the proposed employment in this case.¹² Jenny is also winding up her business, and courts will not order specific performance where performance is impossible in the circumstances.¹³ An action for debt would also be inappropriate, because Steven is not simply seeking payment for a defined outstanding sum. Steven would hence seek expectation damages to put him into the position he would have been in had the contract not been breached.¹⁴ Jenny would likely successfully argue, however, that Steven's damages ought to be reduced on the grounds that

¹⁰ *Whitlock v Brew* (1968) 118 CLR 445.

¹¹ *Fitzgerald v Masters* (1956) 95 CLR 420.

¹² *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428.

¹³ *Ferguson v Wilson* (1866) LR 2 Ch App 77, 91.

¹⁴ *Robinson v Harman* (1848) 1 Ex 850.

he ought to take reasonable steps to mitigate his loss.¹⁵ It seems reasonable that Steven will be able to find another job and find a suitable dwelling, and hence his damages would be the difference between a substitute job's expected or actual salary and his contracted \$80,000 salary over three years, as well as the cost of moving to a new house, up to a maximum of \$20,000.

If Steven were unsuccessful in establishing that he and Jenny's agreement constituted a contract which Jenny breached, he might argue that the circumstances give rise to an estoppel. Steven would likely successfully argue that Jenny's actions induced him to adopt an assumption about the prospect of a pending legal relationship, and this can give rise to an estoppel.¹⁶ Steven would also likely be able to establish that in leaving his job and incurring the expenses involved in selling his house, he relied upon Jenny's representations to his detriment, meeting a key requirement for an estoppel.¹⁷ Moreover it is clear that Steven's reliance and actions were reasonable, which is another relevant consideration.¹⁸

What Jenny would likely argue is that for her to resile from her proposed actions would not be unconscionable. It is often said that a representor's departure from their promise must be unconscionable in order for an estoppel to arise, and whether conduct is unconscionable is a very broad enquiry.¹⁹ That Jenny was forced to resile by her illness and did attempt to give Steven reasonable warning of her circumstances casts some doubt on whether Jenny would be found to have acted unconscionably. An estoppel is generally given effect by ensuring the relying party has their assumption made good.²⁰ In this case, however, the benefit to Steven of forcing Jenny to make good Steven's assumption would drastically exceed the value of the

¹⁵ *Wenham v Ella* (1972) 127 CLR 454.

¹⁶ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

¹⁷ *Thompson v Palmer* (1933) 49 CLR 507, 549.

¹⁸ *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182.

¹⁹ *Commonwealth v Verwayen* (1990) 170 CLR 394, 445.

²⁰ *Giumelli v Giumelli* (1999) 196 CLR 101.

detriment he incurred, and an approach would likely be favoured in which Steven is compensated for his detriment.²¹

Question 2

If it is assumed that Jenny and Steven have between themselves a contract for reimbursement and employment, the relevant issue is whether the alteration to their contract can be legally binding. If it is legally binding, Steven will not be able to sue for breach and recover the \$15,000. The standard legal position is that where only one side of a contract is altered, the alteration is not legally binding, as one party has provided no consideration, having merely promised to perform duties which they were already legally obliged to perform under the original contract.²²

There are, however, some circumstances in which a one-sided alteration of a contract can be legally binding. Jenny would likely point to authority which suggests that where a one-sided alteration is made in exchange for a real benefit which outweighs the value of damages which would be obtained for breach, the alteration will be binding provided it was not made under 'unfair pressure'.²³ It seems clear that by agreeing to Jenny's proposal, Steven did obtain a real benefit, in that he was able to ensure he was employed by Jenny. It also seems that this benefit exceeded the damages he would likely attain in a suit for breach, as even expectation damages generally fail fully to put a plaintiff in the position they would have been in had the contract been performed. It seems likely that Steven would successfully argue, however, that he agreed to the alterations under unfair pressure, as he was in a new city, faced with few options, and facing the prospect of his employer refusing to honour their agreement. If he

²¹ *Ibid.*

²² *Stilk v Myrick* (1809) 2 Camp 317.

²³ *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 744.

were successful, it follows that that the alteration of the contract was not binding, and Steven would be able to sue for breach and attain the \$15,000.

Jenny might argue, however, that since Steven induced Jenny to rely on the assumption that he would not enforce a contractual right, an estoppel arises which prevents Steven from subsequently asserting his contractual right to the \$15,000. An estoppel can arise in such a situation, if the party who relied on the assumption changed their position in reliance on the assumption, and would suffer a detriment if the contractual promise were suddenly enforced.²⁴ In this case, however, Jenny's business is doing well and there seems to be no way that having suddenly to pay the \$15,000 would visit a detriment upon her. As such, it is likely she would fail in arguing that an estoppel arises.

²⁴ *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101.