Parol Evidence Rules

Trumped by Evidence of Intentional Deception or Accidental Inducement

Helpful Guide to Understanding the Enforceability of Clauses Excluding Previous Representations

The question regarding supremecy of contract in a business relationship often arises. The parol evidence rule states that where a written contract exists and such contains a complete express term, evidence and argument that the term is altered in someway by external writing (eg. a preceding email regarding the term) or verbal representation is forbidden whereas it is the written term within the contract that trumps any contradicting term found outside the contract. In this way, the parol evidence rule is used to ensure that business transactions will be based on the terms embodied within a contract document without the risk of being trumped by unembodied terms. However, it is important to bear in mind that the parol evidence rule is merely a legal tool used to ensure that a contract is interpreted, and applied, in accordance to the terms written within the contract when the contract is a valid and enforceable contract but the parol evidence rule lacks the ability, and fortunately so, to make an otherwise unenforceable contract enforceable.

Laypeople, and some lawpeople, will sometimes attempt to argue that a written document, that may be titled "Contract" and signed or sealed, thus appearing at first glance as a bona fide agreement, holds supremecy. The argument, "*there is a contract and it is signed and therefore nothing else matters*", is an inaccurate perception. Of course, it remains accurate to say that a person who signs an agreement without proper care is bound to the agreement when the other party to the agreement relies on the agreement in good faith and for value; ***Realcor Commercial Realty Inc. v. Seca***, 2009 CanLII 12325 at paragraph 21; however, there are situations where a signed document is merely a signed document without any actual legal teeth.

The legal rules regarding contract formation require the element of 'intention'. The element of intention is sometimes referred to as a "meeting of the minds" or *ad idem* (which is *Latin* for meeting of the minds). Where a genuine intention to enter

into a contractual relationship is absent, a contractual relationship is absent - and the parol evidence rule fails to absolutely mandate that intention existed. Again, and as above, the parol evidence rule simply precludes a party to a contract from arguing that what a contract document says is something other than what it says due to some external evidence. As an example, where a contract document states, "*Wiring will be 12 gauge copper*", the parol evidence rule prevents use of external evidence, such as an email that says, "*Wiring will be 18 gauge aluminum*". The parol evidence rule provides supremecy to the term embodied within the contract.

The Saving Law

The parol evidence rule can be defeated, as should be, where it is shown that a contractual relationship, and therefore any contract document as evidence such as a signed "Contract", fails to exist. Again, without a valid and enforceable contract, the parol evidence rule is unable to apply to the terms within the contract because the contract fails to exist in law. The case of ***Smith v. Mid City Auto Centre Ltd.***, 2003 SKPC 152 at paragraph 31 states:

> The modern position is very flexible; parol evidence will generally be allowed on the basis of the principle that the parties to a contract must have a genuine intention to bind themselves to an agreement if it is to be legally enforceable. Of course, this can only happen if the parties mutually agree on the essential terms of the contract which must include all essential material representations made orally by one of the parties to the contract where the other party has relied upon the representations to his/her detriment, even though the representations were not incorporated into the written contract.

Where a person can hold a tangible written document in hand, where such document is titled, "Contract", and is signed or sealed and initially appears in everyway as a valid contract but the person is actually holding an unenforceable contract that is unsaved by the parol evidence rule is most common when the contract formation would fail to exist 'but for' a deceit or fraudulent misrepresentation. When it is shown that a deceit or fraudulent misrepresentation enticed a party into agreeing to a contract that otherwise would be without agreement, the contractual relationship failed to form and the purported contract

document is unenforceable. Quite simply, the signed contract is merely an initial appearance of a meeting of the minds rather than the genuine meeting of the minds that is required to form an actual, enforceable, contractual relationship.

Evidence that a contract was entered into by way of the mischief of misrepresentation is permissible rather than excluded by the parol evidence rule. This was said by the Court of Appeal in ***Beer v. Townsgate I Ltd.***, 1997 CanLII 976 at page 16:

> ... In my opinion, the parol evidence rule cannot operate to exclude evidence of a misrepresentation that induced the making of the contract and thus be used to allow the defendant to rely on a clause in the face of the misrepresentation: see *Canadian Indemnity Co. v. Okanagan Mainline Real Estate Board*, 1970 CanLII 152 (SCC), [1971] S.C.R. 493 at p. 500, 16 D.L.R. (3d) 715 at p. 720.

In situations where 'but for' the tort of deceit a contract would be avoided, the result is that the purported 'contract' is vitiated and unenforceable and unsaved by the parol evidence rule; ***D.L.G. & Associates Ltd. v. Minto Properties Inc.***, 2014 ONSC 7287:

> [69] There is an established principle that a disclaimer or exculpatory clause will not immunize a tortfeasor from an award of damages for committing the tort of fraudulent misrepresentation. There is ample authority for the proposition that "*fraud vitiates every contract and every clause in it*": *Pearson & Son v. Dublin Corp.*, [1907] A.C. 351 at p. 362; *Ballard v. Gaskill*, [1955] 2 D.L.R. 219 (B.C.C.A.); *1018429 Ontario Inc. v. FEA Investments Ltd.*, 1999 CanLII 1741 (ON CA), [1999] O.J. No. 3562 (C.A.) at paras. 52-54; *Nepean (Township) Hydro Electric Commission v. Ontario Hydro*, 1982 CanLII 42 (SCC), [1982] 1 S.C.R. 347, *Francis v. Dingman (1983)*, 1983 CanLII 1985 (ON CA), 43 O.R. (2d) 641 (C.A.), leave to appeal to S.C.C. refused, 23 B.L.R. 234n; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (CanLII) at para. 446.
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> [70] In *Pearson & Son v. Dublin Corp.*, supra, Lord Halsbury stated at p. 356:

> The action is based on the allegation of fraud, and no subtly [sic] of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury.

And 'softer' forms of misrepresentation may still be in play, ***1250810 Alberta Ltd. v. 1284768 Alberta Ltd.***, 2010 ABQB 125:

> [47] Although 128 may have failed to plead particulars of fraud, it must be remembered that misrepresentations that fall short of fraud may still vitiate a contract. In *Bauer v. Bank of Montreal*, 1980 CanLII 12 (SCC), [1980] 2 S.C.R. 102, 110 D.L.R. (3d) 424, McIntyre J., stated:
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> The third argument involves the assertion that the execution of the guarantee was procured by misrepresentation of its full nature and effect by the bank or, alternatively, that there was a failure to explain its nature and effect. The misrepresentation alleged is that the bank manager told the guarantor that upon his paying the amount secured under the guarantee, the book debts would be reassigned to him. This representation was false for the reason that it contradicted the bank's own document. It was contended that the guarantee would not have been executed in its absence. Various authorities were cited for the proposition that a contract induced by misrepresentation or by an oral representation, inconsistent with the form of the written contract, would not stand and could not bind the party to whom the representation had been made. These authorities included *Canadian Indemnity Company v. Okanagan Main Line Real Estate Board et al.* [1970 CanLII 152 (SCC), [1971] S.C.R. 493.], per Judson J. at p. 500, *Jacques v. Lloyd D. George and Partners Limited* [[1968] 1 W.L.R. 625 (C.A.)], per Lord Denning at pp. 630-631, *Firestone Tire and Rubber Company Limited v. Vokins and Co. Ltd.* [[1951] 1 Lloyds L.R. 32 (K.B.D.).], see Devlin J. at p. 39, and *Mendelsohn v. Norman Ltd.* [[1970] 1 Q.B. 177 (C.A.).]

> No quarrel can be made with the general proposition advanced on this point by the appellant. To succeed, however, this argument must rest upon a finding of some misrepresentation by the bank, innocent or not, or on some oral representation inconsistent with the written document which caused a misimpression in the guarantor's mind, or upon some omission on the part of the bank manager to explain the contents of the document which induced the guarantor to enter into the guarantee upon a misunderstanding as to its nature. ... The cases referred to above support the general proposition advanced but rest upon a factual basis providing support for the argument. In each case there is a clear finding of a specific misrepresentation which led to the formation of the contract in question, a circumstance not to be found here. ...
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> [Emphasis added.]

> [48] For there to be certainty in commerce, parties to a contract must be able to rely on the written contract as representative of their respective rights and obligations, so long as there is no evidence of oppression or misrepresentation. In *Ronald Elwyn Lister Ltd. v. Dunlop Canada*, (1982) 1982 CanLII 19 (SCC), 1 S.C.R. 726, 135 D.L.R. (3d) 1 Estey J. states at p. 745:

> Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. This is particularly true where, as here, the two contracts, at the time of commencement of action, are not executory but have been acted upon and performed by the parties. Where, as here, the persons engaged in the commerce at hand were fully and continuously in contact with their legal advisors, there is neither need not warrant for the intervention of the courts to remake or set aside these contracts.

Those comments are probably of even more weight where the person who wants to make an offer retains a solicitor and that solicitor drafts the offer, which is later accepted by the offeree. There must be certainty in commerce.

[Emphasis added.]

Note Only, Opinion of Writer:

As the above authorities show, where a successful misrepresentation or oppression argument results in the vitiation of a contract, the enforceability of the contract is nullified. As clear as the above appears, nullifying a contract by arguing that misrepresentation or oppression trumps the validity of the contract is challenging and concernedly so. While certainty in contracts is important for commerce as indicated within the authorities above, avoiding unfair contracts is also important for function of bona fide commerce. Per courtroom experience, within the Small Claims Court environment, it appears that Deputy Judges prefer to accept the

tangible written contract in hand than to prudently review arguments that the tangible written contract arises only where intangible misrepresentations occurred during negotiations or at other times during the business dealings. This prefered 'reliance' upon the existence of a written contract appears, wrongly so, that the existence of a tangible document trumps the intangible underlying principles of contract law as well as tort law. Legal professionals, such as lawyers and paralegals, ought to work diligently to argue, and thereby better inform the Deputy Judges, that where a wrongdoing occurs so as to negate the intangible existence of a contractual relationship, what is stated within the tangible contract document, is negated - and is unsaved by the parol evidence rule, or any other "*language, craft, or machinery*" within a contract or within the principles of contract law; accordingly, the 'tort' of misrepresentation, or even simply the occurrence of a failure of 'meeting of the minds' trumps the written contract. The argument should simply be that, 'Just because you hold in hand a document titled Contract does not mean that a contract actually exists'. An enforceable contractual relationship is intangibly created by the foundational principles of contract law. A document titled "Contract" is created tangibly by a photocopier. The foundational principles of contract law do, and should, trump a photocopier.