Jackson v. Goldsmith. Yet however sound it may be in theory, the result in practice is unfortunate. That a person should suffer in court for his own stupidities alone in the past presentation of a case is fair enough, but this is secured by the rule that only parties to past actions and their privies can be bound by estoppel. When the facts place a plaintiff in exactly the same position *vis-à-vis* two defendants as a previous plaintiff was placed with regard to them, it would be more convenient and more sensible if the position between the two defendants was bound to be the same in each case. This much at least can be said for a general duty.

B. J. SHAW

CONTRACT – OFFER AND ACCEPTANCE – PROMISE CREATING LEGAL OBLIGATIONS AND MERE STATEMENT – CROWN LIABILITY IN CONTRACT

If the Commonwealth Government promises to pay subsidies to a certain class of manufacturers, can such manufacturers enforce the promise on the ground that the Crown in the right of the Commonwealth has contractually bound itself to pay them?

In *Australian Woollen Mills Pty. Ltd. v. The Commonwealth*[1] the Full High Court, consisting of Dixon C.J., Williams, Webb, Fullagar and Kitto JJ., held in a joint judgment that there was no contractual obligation upon the Crown to pay such subsidies.

The facts of the case are very involved. With the conclusion of the Second World War the Commonwealth Government surrendered its power of compulsory acquisition of wool and allowed the resumption of free auction sales. However it continued the control of prices on cloth imposed during the war. Realizing that the free sale of wool would bring foreign buyers to Australia against whom the local cloth manufacturers would not be able to compete, because of the pegged prices on cloth, the Commonwealth Government informed them by circulars and letters that it would pay subsidies on wool purchased for domestic purposes. To become eligible for payment of subsidies the manufacturers had to submit to governmental control on the amount of wool purchased. This measure was necessary to avoid excessive stock-piling. The Government also declared that it retained the right to review and vary the amount of subsidies. In 1948 the Commonwealth Government decided to end the price control and, therefore, also cease the payment of subsidies. The payments of subsidies on wool purchased before 1949 and still on hand had to be refunded. Subsequently Australian Woollen Mills Pty. Ltd. sued the Commonwealth for payment of money alleged to be due under the above subsidy scheme for wool purchased before

[1] [1954] A.L.R. 453.

1949, and for the recovery of an amount which it was forced to refund.

The action came in the High Court before Kitto J. who referred it to be argued before the Full Court. The Full Court dismissed the action. The Court's view was that the Commonwealth Government never had an intention to assume a legal obligation.[2] Its offer to pay subsidies was simply an announcement of an intended governmental measure and not a promise which would legally bind it if acted upon by the manufacturers.[3]

The distinction between such announcements on the one hand and promises creating binding legal obligations on the other is very subtle. It would appear that if a person made an offer asking for the performance of some particular act, such performance would amount to an acceptance of the offer and create a binding legal obligation on the part of the offeror.[4] However not every statement is intended to create such obligations. It may be a mere gratuitous promise or a flippant remark.[5]

To prove that the offeror intended to bind himself by his promise it must be shown that the offer was such as to induce the offeree to act in the particular way[6] and consequently there had to be a request in the offer, expressed or implied, to perform the act.[7] The Full Court in the present case following this reasoning stated that a test "to determine whether a contract has been made or not is to ask whether there has been a request by the alleged promisor that the promisee shall do the act on which the latter relies. Such a request may, of course, be expressed or implied."[8]

The presence of a request presupposes also the requirement that the offeree should act upon such request, and not simply perform an act which would coincide with the offer.[9] Whether the performance of the act without any knowledge of the request is sufficient to constitute a contractual obligation has given rise to interesting arguments.[10] However as the authorities stand now it is necessary that the offeree should act on the request.

[2] *Ibid.* 470. [3] *Ibid.* 472.

[4] *Williams v. Carwardine* (1833) 4 B. & Ad. 621; *Shadwell v. Shadwell* (1860) 9 C.B. (N.S.) 159; *Alliance Bank v. Broom* (1864) 2 Dr. & Sm. 289; *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256; *Glegg v. Bromley* [1912] 3 K.B. 474.

[5] *Guthing v. Lynn* (1831) 2 B. & Ad. 232; *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch.D. 266; *Wigan v. English & Scottish Life Assurance Association* [1909] 1 Ch. 291.

[6] Salmond & Williams on *Contracts* (2nd edn., 1945) 101; see also Denning J. in *Robertson v. Minister of Pensions* [1949] 1 K.B. 227, 231 and Singleton L.J. in *Turburville v. West Ham Corporation* [1950] 2 K.B. 208, 225.

[7] *Carlill's* case (*supra*); *Combe v. Combe* [1951] 2 K.B. 215 *per* Denning L.J. at 221, and *per* Asquith L.J. at 226. [8] [1954] A.L.R. 453, 468.

[9] *The Crown v. Clarke* (1927) 40 C.L.R. 227.

[10] Goodhart (1951) 67 *L.Q.R.* 456 and (1953) 69 *L.Q.R.* 106; Smith (1953) 69 *L.Q.R.* 99; Denning (1952) 15 *Mod.L.Rev.* 1; Bennion (1953) 16 *Mod.L.Rev.* 441.

This would also facilitate the satisfaction of the requirements imposed by the doctrine of consideration.[11]

The Full Court in the present case regarded this as a very important element to determine whether contractual relationship was existent stating that "in cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement. Between the statement or announcement, which is put forward as an offer capable of acceptance by the doing of an act, and the act which is put forward as the executed consideration for the alleged promise, there must subsist, so to speak, the relation of a *'quid pro quo'*."[12]

For better understanding of the issues involved in the present case it must be also mentioned that it is not material that the offeree has already bound himself to perform the same act under a contract with a third party, if the request of the offeror can be regarded as sufficient further inducement for him to do so.[13] In such cases it is presumed that the act based on the inducement amounts to sufficient consideration to make the offeror liable on his promise.

Considering the facts of the present case in the light of the principles evolved it would appear that all the requirements to create a binding contract have been satisfied. There was clearly an offer to pay the subsidies. Coupled with the offer was a request to buy wool at prices that, if complied with, would place the manufacturers in financial difficulties. The refusal by manufacturers to purchase wool would cause serious disruptions in the cloth market. These circumstances make it self-evident that reliance was placed on the promise made by the Commonwealth Government. The prevention of such economic disruptions and the guarantee of a stable supply of cloth amounts therefore to sufficient consideration. It was an inducement made to the manufacturers to enter into contracts with wool sellers.

However the Full Court dismissed the action on the ground "that the Commonwealth authorities never supposed for a moment that they intended to make an offer capable of leading to a contract binding the Crown . . . ."[14]

The fact that one of the parties to the alleged contract was the Crown makes it imperative to seek the real grounds for the decision in the law relating to Crown liability in contract. In fact, the Full Court itself admitted that to consider the action under the general law of contract would create difficulties "which ensue if one puts

[11] *Carlill v. Carbolic Smoke Ball Co. (supra).* [12] [1954] A.L.R. 453, 467.
[13] *Shadwell v. Shadwell (supra); Scotson v. Pegg* (1861) 6 H. & N. 295; *Chichester v. Cobb* (1866) 14 L.T. 433. [14] [1954] A.L.R. 453, 473.

aside a vital element in an entire legal problem and seeks to obtain the decision of a Court on an artificial basis."[15]

This, however, was caused by the admission made by counsel for the defence that if a contractual relationship was established the Crown would regard itself as liable in spite of its privileged status.

Considering the admission made by the defence one would presume that the rights of both parties were considered on equal footing. This, however, was not so. Throughout the judgment it can be seen that vital importance is placed on the fact that one of the parties was the Commonwealth Government. The Court admitted that the defence is entitled "to rely on the absence of statutory authority as an element tending against the inference that a contract binding the Crown was intended by anybody."[16] The Court further stated that "the fact that one of the parties to the dealings in question was the Crown is, of course, a relevant and, indeed, a fundamental consideration"[17] and ". . . . if there was an intention on the part of the Government to assume a legal obligation, one would certainly have expected statutory authority . . . ."[18] and ". . . . . the Commonwealth authorities never supposed for a moment that they intended to make an offer capable of leading to a contract binding the Crown . . . ."[19]

Although by s. 75 of the Commonwealth Constitution and s. 56 of the Judiciary Act 1903-50 the Commonwealth is made liable in contract, the Courts have always been wary to enforce such obligations where they would disturb the Crown's inviolable privileged status, undermine its public responsibilities or interfere with matters of political expedience.

Different explanations were devised by the Courts to negative the Crown's contractual obligations on such occasions.

One such explanation was that if the Parliament did not provide funds for the particular contract it was regarded by the Courts as non-existent.[20] However the rapidly expanding commercial activities of the Crown brought about the modification of this view.[21]

But in the meantime another principle was evolved. The Crown was to be held liable in contracts of commercial character only, as all other promises would fetter its future executive actions.[22] What amounted to a commercial contract was never explained, and the principle was severely criticised.[23] Again situations arose where the prevention of gross injustice forced the Courts to recognize promises of non-commercial character made by the Crown.[24]

Therefore this gave rise to the attitude which regarded the Crown

[15] *Ibid.* 467. [16] *Ibid.* [17] *Ibid.* [18] *Ibid.* 470.
[19] *Ibid.* 473. [20] *Churchward v. The Queen* (1865) L.R. 1 Q.B. 173.
[21] *New South Wales v. Bardolph* (1935) 52 C.L.R. 455.
[22] *The Amphitrite* [1921] 3 K.B. 500.
[23] Holdsworth (1929) 45 *L.Q.R.* 162, 166; Mitchell (1951) 13 *Mod.L.Rev.* 319, 455. [24] *Robertson v. Minister of Pensions (supra).*

as liable in all contracts unless in contracting the Crown did not comply with statutory requirements,[25] or a subsequent statute was passed enabling the Crown to revoke the contract.[26]

As, however, situations arose where the imposition of otherwise clear contractual obligations on the Crown would create governmental or political difficulties, a new approach negativing such liability has been discovered.

Already Denning J. in *Robertson v. Minister of Pensions*[27] (while attempting to explain the real reasons for Rowlatt J.s' decision in *The Amphitrite*[28]) has distinguished between binding promises creating contractual obligations on the part of the Crown and mere expressions of intention by the Executive. The further development of this view has been successfully continued in the present action. Without considering the real issues concerning Crown liability, but never forgetting that one of the parties to the alleged contract was the Crown, the obligations of the Commonwealth Government were negatived with the assistance of the respectable and innocent-looking principles of the law relating to offer and acceptance.

Thus while the successful development of the modern law required the extermination of archaic fictions, new artificial legal concepts have been evolved sacrificing progress to convenience.

I. I. KAVASS

[25] *Commercial Cable Co. v. Government of Newfoundland* [1916] 2 A.C. 210; *Auckland Harbour Board v. The King* [1924] A.C. 318; *Commonwealth v. Colonial Ammunition Co.* (1923) 34 C.L.R. 198.
[26] *Ransom & Luck Ltd. v. Surbiton Borough Council* [1949] Ch. 180.
[27] *Supra.* [28] *Supra.*

EVIDENCE=RECALL OF WITNESSES–ADMISSION OF FRESH EVIDENCE AFTER CLOSE OF CASE

"In our opinion, when a jury desires that a witness should be questioned further at any time before verdict, that may be done, and we add that if the question is relevant, and no compelling contrary reason exists, it is desirable that such a request should be complied with."[1]

These words are found in the decision of the Full Court of the Supreme Court of Victoria (Gavan Duffy, Barry and Dean JJ.) delivered by Barry J. in the case of *R. v. Hodgkinson.*[2] Barry J. continued:[3]

"It follows that when a witness is thus recalled if, in fairness, either counsel should be allowed to question him, or another witness should also be recalled and questioned, it is within the competence of the judge to permit that to be done. . . If, however, the effect of acceding to a jury's request would be to put a prisoner at

[1] [1954] V.L.R. 148. [2] [1954] V.L.R. 140. [3] *Ibid,* 148.