



Investment industry practice can be considered in determining whether contract is formed, Court of Appeal rules

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In its decision earlier this year in *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, the Ontario Court of Appeal examined the extent to which industry custom and common practice may be utilized in determining whether a contract has been formed between two parties. In particular, the investment industry practice of conducting multi-million dollar deals over the telephone was cited by the Court in finding that a binding agreement for the purchase and sale of shares had been concluded between the parties to this litigation and in ordering specific performance of that agreement.

UBS Securities Canada – the Canadian operation of a worldwide network of securities dealers and brokers – sought to increase its holdings in Bourse de Montréal, a private Quebec company that operated the Montreal Stock Exchange. To this end, UBS approached Sands Brothers Canada, an Ontario corporation, and resubmitted by email an earlier offer to purchase the shares. In a subsequent telephone call, Sands Canada ultimately accepted the bid and asked UBS to “draw up the papers.” UBS then sent an email to Sands Canada confirming the deal and informing it that UBS would be entering into an agreement with a third party to dispose of UBS’ excess Bourse shares (Bourse’s by-laws mandated that no shareholder could own more than 10% of its shares). The agreement was reiterated and confirmed on a telephone call the next day. Counsel for both companies were soon in contact, discussing various aspects of the sale. Counsel for UBS composed and sent a draft share purchase agreement to

Sands Canada for its review, however, no written agreement was ever signed.

Several days later, Bourse announced that it was listing its shares in March or April of the following year. UBS heard nothing from Sands Canada until a week later. In a phone call to UBS, Sands Canada complained that it had not heard from UBS since the listing had been announced and disputed that there had been a binding agreement, saying that many matters important to the agreement had been left unaddressed. Sands Canada informed UBS that it would not deliver the shares. UBS commenced legal proceedings immediately, demanding that the contract be enforced by the court. After losing at the first trial, UBS appealed and a second trial was ordered.

In its second trial several years later, UBS was successful in enforcing its contract with Sands Canada for the purchase of the Bourse shares. In her trial ruling, Madam Justice Pepall observed that a binding contract cannot exist without a “meeting of the minds” on its “essential terms.” She found that the court must determine whether a “reasonable bystander” would conclude that the parties had reached an agreement. Justice Pepall found that the parties had indeed formed an oral agreement and that the parties had relied on this agreement; they had drafted closing documents and UBS had entered into a third party sale for some of the Bourse shares. Justice Pepall therefore ordered Sands Canada to deliver the shares to UBS in accordance with the agreement.

Sands Canada appealed this decision to the Court of Appeal, alleging (among other things) that the trial judge erred in finding that the parties had entered into a binding contract in their oral discussions over the phone. Writing for a unanimous appeal panel in dismissing the appeal, Gillese J.A. found that the trial judge's consideration of custom and common practice in the securities industry was entirely proper in ascertaining whether an agreement had been reached. Both parties were sophisticated business entities and securities industry participants, and the trial judge did not err in accepting the uncontradicted evidence that it is customary in the securities industry to consummate trades by binding verbal agreements. Gillese J.A. also found that the trial judge was also correct in relying on such evidence to identify the "essential terms" of the contract and to support her conclusion that these terms had been agreed upon. In making such a finding, the Court observed that without such customs as the ability to complete deals verbally, the securities industry cannot operate effectively.

It is clearly the case that the securities industry relies heavily upon verbal agreements. Its participants are involved in buying and selling assets (usually shares) that continually fluctuate in value. A delay of hours, or even minutes, in completing a purchase and sale of securities can mean a difference of millions of dollars to the buyer or seller. Industry participants must therefore be able to quickly reach binding agreements with a minimum of formality or face the prospect of losing lucrative deals or entering into deals at prices that are very different from what was originally contemplated.



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