Suit No. AI96-30-02749

Trial Decision Reported At:
(1995), 105 Man.R. (2d) 282

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Twaddle and Kroft JJ.A.

B E T W E E N:

CLARENCE MERVIN DALE,	)	
RITA LYNN FLORENCE EMERSON,	)	**A. L. Berg** and
ANN MARIE MACINTYRE and	)	**D. G. Guenette**
SHERYL LYNN MINNE	)	for the Appellant
	)	
(*Plaintiffs*) *Respondents*	)	**A. Peltz**
	)	for the Respondent
	)	
- and -	)	Appeal heard:
	)	**March 14 and May 27, 1997**
	)	
THE GOVERNMENT OF MANITOBA	)	Judgment delivered:
	)	**June 19, 1997**
(*Defendant*) *Appellant*	)	

SCOTT C.J.M.

The principal issue on this appeal is whether, as found by the trial judge, a legally enforceable contract was entered into between the plaintiffs and the defendant.

In 1992, each of the plaintiffs (and others) were accepted into the affirmative action program known as the ACCESS program (the program) created by the defendant. ACCESS was the generic name adopted to describe a number of programs funded by the provincial Department of Education, and administered by various education institutions and organizations, in this instance the University of Manitoba (the University),

to provide post-secondary educational opportunities to disadvantaged persons.

The Facts

A number of such programs had been offered successfully for many years at the University. During their currency, the government established eligibility criteria, set the financial support rules, and determined the number of funded students who would be admitted each year and, most significantly, provided "full funding" for the program. The University's area of responsibility under the agreements with the government was the entire administration of the program, including the academic standards to be met (the courses made available to the successful applicants were part of the University's regular academic system), all interviews and eligibility assessment functions, and orientation meetings. For this purpose, special program staff were provided. Applicants applied for admission into both the University and the program.

"Fully funded" meant that the University was not expected to use other funds to deliver the program, although, due to the government's block funding arrangement, at the end of the year the University could be in a "profit" or loss situation with respect to the program. The critical component was the number of students who remained in the program during its 11-month yearly cycle.

The program was perceived as being very successful in providing long-term benefits, not only to the students but to the government.

As early as 1979, a government management committee study concluded that “program graduates pay back in seven years not only the cost of their own education but the cost of dropouts as well. The ripple effect of consumer spending from increased earnings remains uncalculated but is estimated to be considerable.”

There were three components to the ACCESS program: academic, personal, and financial. Some students were accepted into the program without funding assistance. The four students in this case were all ACCESS students who were accepted into the program for the 1992/93 academic year. Three were fully funded from the start, and the fourth, the plaintiff MacIntyre, participated in the 1992 intake process and was offered ACCESS funding at that time. However, because of the availability of alternate funding, she did not receive regular ACCESS funding until January 1994. Most ACCESS students entered the program as mature students. All plaintiffs participated in the 1992 intake process for the ACCESS program in education (Emerson); social work (Minne); arts/pre-law (Dale); and northern social work at Thompson (MacIntyre). The selection process involved advertising and recruitment of applicants by the University, and a screening process followed by an orientation program leading up to offers of places in the program. The plaintiffs, like most if not all ACCESS candidates, had to weigh the accumulation of student debt, family obligations, and time out of the work force before deciding to enter the program.

The program was substantially impacted upon prior to the start of the ‘91/92 academic year by the termination of cost sharing arrangements

between the federal and provincial governments. Notwithstanding, the University and the government, after much negotiation and discussion, "chose to resume being bound by the provisions of the agreements which had been terminated" The program was therefore continued into the following year on the same basis as had existed in the past.

Various manuals and brochures were prepared by the University, with the concurrence of the defendant, for distribution to those interested in the program, which indicated *inter alia* that the program was offered and administered by the University and funded by the provincial Department of Education. Nothing was specifically said about the continuation of the financial commitment from year to year. Each successful candidate received written offers of placement in the program signed by the program director to which they were required to respond in writing.

The program's funding regime consisted of a mixture of loans and bursaries. Initially all required financial supports were paid by the program out of its annual block funding from the government. In other words, the program consisted entirely of non-repayable benefits. But this changed as the public financing environment altered. In 1991/92 (coincidental with the withdrawal of the federal government from the program), students entering the program suffered significant reductions in their basic living allowance. This shortfall was offset by a "guaranteed" Canada Student Loan (CSL) of up to $3,200, ultimately repayable by the student. (Guaranteed in this context meant guaranteed eligibility.) This was the regime in place when the four plaintiffs were accepted as ACCESS students. Students already in the program prior to '91/92 were

"grandfathered" until the '93/94 academic year.

For the '94/95 academic year, the third academic term for the plaintiffs, the government unilaterally introduced significant changes to the program. The defendant assumed responsibility for the administration of the financial support component and altered the mix of non-repayable supports and loans so that, thereafter, all funded students would have to apply for a CSL to the full extent of their entitlement with only the remainder of their assessed needs to be paid, as before, by way of a non-refundable grant. This had a very significant adverse economic impact on the four plaintiffs and others already in the program since, although the total amount of financial support remained more or less the same, the students were now obliged to first exhaust all loan funds available before being able to access the government grant. In the result, they all incurred a far greater personal student loan liability.

The Trial

During argument, it was not challenged that it was the plaintiffs' understanding, principally from discussions with ACCESS staff, that funding would continue, or be available, from the government of Manitoba as existed when they entered it at the beginning of the '92/93 academic year, and thereafter to the completion of their four years at the University. The trial judge found that prior to offering positions in the program the plaintiffs Dale, Emerson and Minne were told that the amounts which the province had set for them for '92/93 would continue "for the four years until they got their degrees." It is beyond doubt that no candidate was

warned that the funding program or package offered to them might change adversely during the course of their academic program.

All plaintiffs made significant financial and lifestyle sacrifices to enter and remain in the program. This included attending university eleven months a year, maintaining specified academic standards, living at a subsistence level, incurring debt, and otherwise significantly altering their lives.

The plaintiffs discontinued their action against the University prior to trial.

In a comprehensive judgment, Schulman J. began his analysis with the following (at para. 11):

> There is no issue over the Government's liability to provide the students with some funding during the second, third and fourth years. The issue is whether the Government must maintain, in the subsequent years, the level and character of funding set for the first year.

After reviewing the voluminous documentary evidence concerning the operation of the program, the information available to the applicants, and after considering the evidence of the plaintiffs, University staff and government officials responsible for the program, he concluded (at para. 13):

> . . . is clear to me that the Government committed itself contractually to the students to pay to them the same level and character of funding during the second, third and fourth years of the programme as committed in the first, provided they remained eligible for the funding. . . .

As to the ability of the plaintiffs to enforce any rights that they might have against the government, as opposed to the University, he found that (at para. 14):

> . . . . .
> . . . it was an implied term of the agreement that when the students were ascertained and offered a position in the programme they became parties to the agreement with the Government. In other words, a new and individual agreement was made between a student and the Government when ACCESS administrative staff made an offer and the student accepted. It follows that when a letter was written to each of the students offering him/her a position in the programme, the Government made an offer of funding which was accepted when he/she enroled in the programme and registered in the University.

In answer to the government's submission that any offer to the students was made, not by the defendant, but by and on behalf of the University, he held (at para. 15):

> . . . that when the ACCESS programme wrote to the students offering them a place in the programme, it made the offer of funding on behalf of the joint-enterprisers or joint operators of the programme, or alternatively, as agent of the Government, which offer could be accepted by them when they accepted a position in the programme and registered at the University.

He rejected the government's suggestion that the defendant was merely an arm's length funder (at para. 17):

> . . . The Government's involvement in the programme was substantially greater than that of an independent funding agency. The circumstances outlined at paras. 10 to 13 of these reasons

> indicate that the Government had a hands-on involvement in the operation of the programme.

In light of the circumstances of the students (para. 21 of Schulman's decision):

> The Government owed a higher duty of disclosure of all material facts to the students than it would have owed in a normal commercial dealing with the general public. The situation cried out for the students' being told, prior to being admitted into the programme, that there was no guarantee as to the level or character of funding for the second, third and fourth years, if such was the case. The Government knew that the students should be told . . .

Given all of the circumstances (at para. 21):

> . . . it was a reasonable expectation of the parties that the level of funding committed for the first year would be guaranteed to continue during each year of the programme in the absence of advice to the contrary prior to the students' enroling in the program. As such, the Government committed itself to providing such a level of funding throughout the programme. It was a provision of the contract that the Government would do so.

In the final result, he concluded that the government breached the agreement that it had with each of the plaintiff students when it changed the level and character of funding in 1994, and granted a declaration accordingly.

Decision

Although there were many issues addressed in the factums and during argument, this is in reality a simple case that falls to be decided on

the basis of the application of fundamental principles of the law of contract and agency.

At the outset, it is essential to address the findings of fact made by the trial judge, which were vigorously assailed by appellant's counsel. In my opinion, Schulman J. was undoubtedly correct when he concluded not only that the plaintiffs believed that they had a contractual arrangement with the government not to alter the terms and conditions of the funding arrangements that existed at the time of their entry into the program in 1992, but that in fact such an understanding had been communicated to them by the designated ACCESS staff at the University. There was ample evidence to support these findings.

This being so, the central question becomes whether the communication of this information to the students committed the government or the University of Manitoba, or both.

Before moving on to this question, the answer to which depends on whether the University ACCESS staff had the ostensible or apparent authority to commit the government, I turn briefly to consideration of one of the most venerable authorities concerning the law of contract, namely ***Carlill v. Carbolic Smoke Ball Company***, [1893] 1 Q.B. 256 (C.A.), where the principle was established that an enforceable offer could be made to a "stranger" or an unknown member of the general public. Of particular relevance for this case is the statement of principle found in ***Carlill*** that, where an offer – such as that found to be made here – is continuing in

nature, then notification need not precede performance. In other words, notification of acceptance need not be made so long as the offer continues to remain unrevoked. For an interesting review of the modern application of what has now come to be called unilateral contracts, see Professor G.H.L. Fridman, Q.C., **The Law of Contract in Canada** (3rd ed., Carswell). In chap. 2(3)(h) at p. 75, Professor Fridman points out that the applicability of this principle in any given situation depends on whether the "offer" was intended to be taken seriously, or was merely promotion or "puffing." His conclusion is that "practical considerations have ousted logical analysis." Applying a "robust and pragmatic view" to the facts of this case, it is plain to me that by virtue of the role assigned by government to the University that a binding offer was made to the student applicants, open for acceptance without specific and direct communication to government.

As noted earlier, the determining question is on whose behalf was the offer communicated. For the purposes of this decision, I accept (without necessarily so finding) that the University ACCESS personnel did not have the actual or real authority to commit the government of Manitoba with respect to the level and continuation of funding. It seems from the evidence of Dr. Bracken and Professor Gardner, the senior University officials responsible for the program, that this may have been so. It is clear, however, that the staff who dealt with the ACCESS students, and were their sole source of information concerning all particulars and requirements of the program, sincerely and honestly believed – and communicated to the students – the contrary: that is that the commitment made to the students at the time of their entry into the program in 1992 would continue up to the time they obtained their undergraduate degree.

In support of its position that the ACCESS personnel did not have the ostensible or apparent authority to speak on behalf of government, the defendant placed strong reliance on the decision of the House of Lords in ***Freeman and Lockyer***, [1964] 1 All E.R. 630 at 645-46, and in particular, on the following passages:

> . . . where the agent on whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely on the agent's own representation as to his actual authority. He can rely only on a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates. The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, viz., by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into the ordinary course of such business.
>
> . . . . .
>
> [There are] four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown: (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that he (the contractor) was induced by such representation to enter into the contract, i.e., that he in fact relied on it; and (d) that under its

> memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

The government argues that since the persons in charge of the program for the University correctly understood the true situation with respect to the funding, that the ACCESS staff did not possess the ostensible authority to bind the defendant. But this argument conveniently ignores the fact that the program staff at the University were the only real contact that the students had with the program and were the ones with the operational authority to administer the scheme.

A more pertinent quotation from the same case, and one with broader application to the non-commercial circumstances that we have in this case is (at p. 644):

> In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either on the representation of the principal, i.e., apparent authority, or on the representation of the agent, i.e., warranty of authority. The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, i.e., by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has normally "actual"

authority to enter into.

Reliance is also placed on ***Western Dominion Coal Mines Ltd. v. The King***, [1947] S.C.R. 313 at 324-25, a case which on examination is of no assistance to the defendant. It simply confirms that the principal, in the absence of any evidence concerning the ordinary scope of the agent's duties, cannot be held liable for the agent's representations when it is clear that the latter did not have actual authority.

And finally there is ***Armagas Ltd. v. Mundogas SA***, [1986] 2 All E.R. 385, where it was agreed that the agent did not have ostensible or apparent authority, circumstances far different than those before us. Thus, the court held (at p. 390):

> Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal: see *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174.

But here again, the court also observed (at pp. 389-90):

> In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the oustide [*sic*] world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course dealing and honoured transactions arising out of it.

There can be no quarrel with these authorities, indeed, none is taken by the respondents, who simply observe that they, upon consideration, are entirely supportive of their case. I agree. I have no difficulty in concluding that the program administrators had the apparent or ostensible authority to speak on behalf of the "owner" of the program, namely, the government of Manitoba. Here the government, after defining all of the terms and parameters of the program, left it entirely to the University program staff to deal with the student applicants throughout the course of the four-year program. To the "outside world" they were the only ones, up until the changes that are the subject matter of this action, with whom the students made their arrangements, a fact well-known to the government. How can it be said in these circumstances that the University staff did not have the apparent authority to make a commitment on behalf of the government which had delegated all the administrative responsibilities to them while nonetheless maintaining, as the trial judge found, a "hands-on involvement" in the operation of the program? Given this role, it was incumbent on government, if it was concerned that this authority might be abused, to give clear instructions about the full implications of changes to the program regime. This was not done.

The trial judge concluded that the offers of funding by University ACCESS staff were made on behalf of the joint operators of the program, or alternatively as the agent of the government. He was entirely correct in the latter part of his conclusion. Indeed, given the evidence accepted by him concerning the role that the government expected the ACCESS staff to play, and that they did play throughout the program (and

specifically with respect to the four applicants before the court), it is difficult to see how he could have come to any other conclusion.

In my opinion, this is sufficient to decide this appeal. There was a legally enforceable offer made to the students on behalf of the government, which these applicants accepted. The terms of the contract were as found by the trial judge. While Schulman J. felt obliged to deal with a multitude of other legal issues put before him by counsel (about which I intentionally make no comment), the legal effect of his judgment, now affirmed by this decision, is correctly set forth in the precise terms of the formal judgment roll taken out after trial:

> THIS COURT DECLARES that the Defendant Government of Manitoba is a party to a contract with the Plaintiffs, whereby the said Defendant is required to continue to provide, subject to assessed needs, the same base level of grants and other supports for living allowances, rental subsidies, transportation, day care, medical and dental and optical care, special support costs, and tuition and books, as was provided to the said Plaintiffs during their year of initial registration.

The appeal is accordingly dismissed with costs.

_____ C.J.M.

I Agree:

_________________________________ J.A.

I Agree:

_________________________________ J.A.