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## Memorandum of Advice to the Producers

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You may be liable to Keith Bonham for **breach of contract** if it is found that there exists a contract between you and Bonham. In the absence of a contract, remedies may be sought under **promissory estoppel**.

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### Breach of Contract

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#### Advertisement

Your advertisement is not significant in the determination of the existence of a contract. It can be considered an invitation to treat, and it is distinguished from the offer in *Carlill v Carbolic Smoke Ball Company*<sup>1</sup>, as a reasonable person in Bonham's position would not perceive the same level of sincerity. In the alternative, it may be a mere request for information: *B Seppelt & Sons Ltd v Commissioner for Main Roads*<sup>2</sup>; regardless, it is not an offer.

#### Application Form

Given the sparse details on the form, a reasonable person in your position will not perceive Bonham as expressing a desire to contract without further negotiation. Instead, it is an expression of his willingness to negotiate. If the advertisement is a request for information, then the application form could be merely a provision of information.

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[153 words]

<sup>1</sup> [1893] 1 QB 256.

<sup>2</sup> (1975) 1 BPR 9147.

## Invitation

If the application form is an expression of willingness to negotiate or a provision of information, it is possible that the invitation is an offer. A similar result follows if the form is an offer; the “mirror image” rule dictates that the terms must be accepted exactly without alteration. Hence, the invitation is at best a counter-offer: *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (Eng) Ltd*<sup>3</sup> per Lawton J.

The test of whether the alleged offer is indeed an offer is an objective test – whether a reasonable person in the position of Bonham views it as an indication by you that you are willing to contract on those terms without further negotiation: *Australian Woollen Mills Pty Ltd v Commonwealth*<sup>4</sup>. Since the relatively sparse number of terms in the contract could be offset by your explanations in “much detail”, let us consider two cases.

Suppose that he submits his form before your explanations. The sparsity of the terms in the alleged offer would appear to support the conclusion that further negotiation lies ahead; this situation is analogous to *Seppelt & Sons*<sup>5</sup>, where agreement as to price was found to be insufficient to evidence a completed deal. Conversely, if he submits his form afterwards, the inconsistency of being under the impression that he is guaranteed a place, yet being told “pretty clearly” that nothing is finalised until the creation of the formal contract, causes us to conclude that this is not an offer.

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[215 words]

<sup>3</sup> [1979] 1 All ER 965.

<sup>4</sup> (1954) 92 CLR 424.

<sup>5</sup> Note 2.

Furthermore, the letter does not state that he is a contestant, only inviting him to participate in the finalisation of contestants.

## Invitation as Basis for Non-binding Agreement

If it is found that the invitation is an offer, the provision that “You will receive a formal contract” causes us to consider classification under the three categories espoused in *Masters v Cameron*<sup>6</sup> per Dixon CJ, McTiernan and Kitto JJ. If the form is submitted after Bonham is told that nothing is certain (and hence no obligations exist) until the completion of the “legal paperwork” (which you claim refers to the formal contract), then this case seeks refuge in category three. If he had submitted it beforehand, one could determine that it is nothing more than an agreement to agree by examining future conduct: *Seppelt & Sons*<sup>7</sup>.

The fact that the “agreement” is signed in an informal atmosphere laced with alcohol, it weakens, if not obviates, the strong presumption that parties intend to be bound in commercial situations: *Esso Petroleum Ltd v Commissioner of Customs & Excise*<sup>8</sup>. It is unlikely that serious negotiations that added to the content of the “agreement” occur during the meeting, and one can infer that the explanations provided are of a general nature instead of discussing the terms of the formal contract.

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[236 words]

<sup>6</sup> (1954) 91 CLR 353.

<sup>7</sup> Note 2.

<sup>8</sup> [1976] 1 All ER 117.

## Invitation as Basis for Immediately Binding Contract

It is possible that the court finds that you intended to create a binding legal relationship immediately, in either category one or two of *Masters v Cameron*<sup>9</sup>. This is unlikely, as you have expressed your intention to finalise the contract; such changes are not permitted in these categories. However, if it is the case, consideration could be used to provide a barrier to the existence of the contract.

Firstly, it has been held that consideration must be sufficient: *Chappell & Co Ltd v Nestle & Co Ltd*<sup>10</sup>. You can contend, in your favour, that the consideration that you have allegedly used to purchase Bonham's act of refraining from social and work commitments is the prize money that he could possibly attain by such participation. This consideration is clearly illusory and insufficient, since the prize may not necessarily be won by him.

Secondly, if the above is unsuccessful, then you may be able to contend that clause 4 of the "agreement" stipulates that you would "try" to proceed according to the Production Schedule. The word "try" appears to invoke a good faith requirement, and as long as this requirement is met (definitely honestly, and possibly reasonably: see *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*<sup>11</sup>), you may have an option or discretion as to whether you will perform your alleged obligations and include Bonham as a contestant. Such discretion causes the consideration to be illusory: *Placer Developments Ltd v Cth*<sup>12</sup>.

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[214 words]

<sup>9</sup> Note 6.

<sup>10</sup> [1960] AC 87.

<sup>11</sup> (1991) 24 NSWLR 1.

[76 words]

However, Bonham may argue a narrower construction of the word “schedule”, such that it refers only to the *timing* of events. If in such a case, the court holds that a contract existed and is breached, you will be liable for damages proportional to the amount required to restore Bonham to the position he was in had the breach not occurred.

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<sup>12</sup> (1969) 121 CLR 353.

## Promissory Estoppel

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### Basis for Estoppel

If the court holds that no contract exists between you and Bonham, the plaintiff may seek a remedy under promissory estoppel. Despite the original inability of plaintiffs to use estoppel as the sole basis for an action (*Central London Property Trust v High Trees House Ltd*<sup>13</sup> per Denning J), it is now accepted in Australian law that estoppel can be used as a “sword” as well as a “shield”: *Waltons Stores (Interstate) Ltd v Maher*<sup>14</sup>. That case is also authority for the proposition that estoppel can arise from situations where there is no pre-existing legal relationship, as in this case.

### Unequivocal Promise

It is an integral part of estoppel that the promise relied upon to the plaintiff's detriment is clear and unambiguous, or unequivocal: *Legione v Harteley*<sup>15</sup> per Mason and Deane JJ. You could contend that in this case, the promises are vague and undefined, and in any case, unreliable. This is due to the inconsistency; he hears that he is guaranteed a place yet he is told that nothing is certain until later. The formal contract cannot be taken for granted. This distinguishes this case from *Waltons*<sup>16</sup>, where the innocent party was under the impression that the concluding contract was forthcoming due to the actions of the defendants. The silence after the meeting is not indicative of acquiescence on your part, but rather a lack of a definable promise.

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[210 words]

<sup>13</sup> [1947] KB 130.

<sup>14</sup> (1988) 164 CLR 387.

<sup>15</sup> (1983) 152 CLR 406.

<sup>16</sup> Note 14.

However, Bonham could argue that the detailed explanations would have led a reasonable person in his position to believe that formal contracts would be forthcoming.

## Reliance

Even if Bonham succeeds on proving that point, there must be reasonable reliance on the promise: compare *Legione*<sup>17</sup> with *Waltons*<sup>18</sup>. While Bonham has no other option but to resign from his position if he were to participate in the show, you could contend that it is unreasonable for someone to resign from employment to participate in an activity, which, though two months long, is transient in nature. If reliance is established, it is uncontested that the reliance has placed him in a position of material disadvantage from loss of income and incurred expenditure: *Legione*<sup>19</sup>.

## Unconscionability

In the context of promissory estoppel, part of unconscionability entails that one party encourages the other party to rely on the adoption or assumption of the promise: *Austotel v Franklins*<sup>20</sup>. While Bonham could argue that the detailed explanation of “secrets” and the “guarantee” that he is given are encouragements, you could contend that your statement that nothing is finalised until the formal contracts are signed demonstrates that you cautioned, instead of encouraged, the

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[196 words]

<sup>17</sup> Note 15.

<sup>18</sup> Note 14.

<sup>19</sup> Note 15.

<sup>20</sup> (1989) 16 NSWLR 582.

potential participants. Furthermore, your quick response to his enquiry contradicts any claim of bad conscience.

## Remedies under Estoppel

However, if Bonham can in fact prove the claim of promissory estoppel, a minimum equity is generated by his reliance in his favour: *Waltons*<sup>21</sup> per Mason and Wilson JJ. In this case, a restorative award for his loss, such as for his loss of income, and for the cost of the drum lessons, would be appropriate. In general, courts will not enforce the promise causing the estoppel, noting that the promises in these cases differ from those backed by consideration: *Commonwealth of Australia v Verwayen*<sup>22</sup>. The court will also find the appropriate relief considering all those affected to ensure equity: the other children in *Giumelli v Giumelli*<sup>23</sup> for example. Hence, it is unlikely that Bonham will succeed in specific performance of inclusion in the show, or damages arising from the lost opportunity to participate.

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[155 words]

<sup>21</sup> Note 14.

<sup>22</sup> (1990) 170 CLR 394.

<sup>23</sup> (1999) 196 CLR 101.