

CONTRACT LAW
SUMMARY
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1. INTRODUCTION

1.1 DEFINITION:

- A contract is simply an agreement between two parties that is legally binding. The law of contract is concerned with:
 - The making of the contract
 - The enforceability, and effect of the terms of the contract on the parties
 - The performance and discharge of the contract
 - Rights and remedies available where the contract is breached
- General principles of contract law are derived from common law.
- The modern law of contract is based upon the idea of freedom of contract whereby parties are free to choose who to contract with, and to negotiate the terms therein. This assumes that parties all parties are equal bargaining strength to maximise the outcome. Thus, it is recognised that there are exceptions when parties are not equal:
 - Growing recognition that contracts that far more consumers enter into contract than commercial people/entities. Parliament has recognised the need to protect consumers, and allow the courts jurisdiction to grant relief for “unjust” contracts.
 - Emphasis on the will and intention of parties, rather than what is on paper.
- Many contracts are informal, and the terms are implied. Thus, contract law often has an important role in completing the contract.

1.2 TRADITIONAL ELEMENTS FOR LIABILITY OF BREACH OF CONTRACT

- A claim for breach of contract will succeed if it is shown that:
 - A valid contract was made between the parties
 - The party has breached the contract as properly construed; and
 - There are no excusing factors for non-performance; and
 - The contract was terminated; and
 - It is not unconscionable to make the claim.

2. AGREEMENT

- The law of contract will enforce obligations where there has been agreement between the parties. Absent of agreement, there is can be no contract.
(Gibson v Manchester City Council)
- The courts are looking for *concensus ad idem* – a meeting of the minds between the two parties.
- The traditional analysis is to ask: has there been an offer made by one party to be bound by terms of a contract which is accepted by another?

2.1 Offer

2.1.1 What is an offer?

- Any proposition is an offer if it shows a party's intention to be legally bound immediately upon acceptance of the proposal. Such an intention is met where an offer has been made in clear and unequivocal terms.
[Gibson v Manchester City Council]

- The existence of an offer is ascertained by asking whether a reasonable third party would conclude an offer had been made. This objective test takes into account:
 - The express conduct or words used by the parties rather than their subjective intentions.
 - Whether the terms are complete enough so that acceptance is enough to constitute a contract.
- An offer must be communicated to the offeree and received, otherwise the offer is ineffective. Thus, one cannot receive an offer from a third party; offer must be communicated by offeror or an authorised agent of offeror to offerree. (*Henthorn v Fraser*)
- When an offer is made, the terms of the proposed contract must be communicated to the offeree. (*Thornton v Shoe Lane Parking*)
- Offer can be made in general terms, leaving the precise term of the contract to be settled later. (*Masters Cameron*)

2.1.2 Advertisements

Carhill v Carbolic Smoke Ball Co.

- Generally, an advertisement is an invitation to do business, not an offer, as it invites a bargaining response rather than acceptance. Such propositions are considered as an *invitation to treat*. (*Carhill v Carbolic Smoke Ball Co*)
- However in *Carbolic*, the advertised guarantee that the company would be liable to anyone who performed certain conditions (involving buying the smoke ball product did) constitute a unilateral offer to the world –. Thus, acceptance falls immediately on those who perform the stipulated condition.

Pharmaceutical Society of Great Britain v Boots Cash Chemists

- Facts: An Act allowed pharmacists to sell medicines behind the counter. Boot's shop stocked its medicines on shelves allowing customers to effectively choose their purchases. The issue in this case was at which point the sale was concluded. Was it at the counter or beforehand when the customer picks an item from the shelf?
- Held: Where goods are placed on shelves (allowing customers to freely choose them, before being paid at the exit counter), the offer is made by the customer to the cashier at the register. The register may accept and the sale is completed.. The display of goods on the shelves is only an invitation to treat.

2.1.3 Contractual intention negatived

- In determining the existence of a contract, the courts have placed emphasis on determining the intention of the parties to enter into a legally binding contract. An offer may be held not to have existed where there is lack of intention.

Masters v Cameron

Facts: A document was signed by the parties that stated sale of property was to take place. Document has a clause that "this agreement is subject made subject to the preparation of a formal contract of sale". At issue was whether the document constituted a contract.

Held: If there has been an agreement which is subject to a formal contract being prepared, then it forms a contract. If not, then it is a question of the intention of the parties, in which case, the following may apply:

- The parties may intend to be immediately bound, but that performance of certain terms is dependent on the execution of a contract later.
- The parties may intend not to be bound immediately, but only when a contract has been drawn up and executed.

- Need to know the actual subjective intention of the parties, and extrinsic evidence beyond writing may be used to adduce such an intention.

Great Air Lakes v Ks Easter (Holdings) Pty Ltd.

Facts: Document between the parties evidence that the purchaser intended to purchase from the vendor was signed by both parties. Clause in document said it was subject to additional terms and conditions. Subsequent drafts went back and forth, and finally purchaser chose not to buy and denied the existence of any contract.

Held:

- Court held that contractual intention had not been negated in this case. The document stated clearly that the purchaser “intends to acquire”, and the vendor “will warrant”, which prima facie shows intention.

However, inferring from extrinsic evidence – what the parties said and their conduct – court found that there mutual agreement in relation to the documents.

The court is mainly concerned with external appearances of conduct/words to work out the intention of the parties.

2.1.4 Auctions and Tenders

- In cases of auction, it is considered that an auctioneer who puts something up for sale is not offering but inviting bids for the good. Thus, the bids constitute an offer, and a contract is formed when the auctioneer accepts the bid at the fall of the hammer. (*AGC v McWhirter*)
- Until the goods are declared sold, no contract is formed, and buyers are able to withdraw their offer.¹
- Although the buyers’ offer is generally considered an offer only, there is conflicting authority on whether the auctioneer is bound to accept the highest bid. In such cases there may be a process contract to accept the bid. (i.e a contract to contract) Pay special attention to the terms and details of the auction process.

¹ Codified in Sale of Goods Act 1954; s60 (ACT); Sale of Goods Act 1896; s59 (Qld); Sale of Goods Act 1895; s57 (SA); Sale of Goods Act 1896; s62 (Tas); Goods Act 1958; s 64 (Vic) Sale of Goods Act 1895, s 57 (WA)

AGC v McWhirter

Facts: A bid was made at a “without reserve” auction; bid was rejected by auctioneer as not high enough.

Held: Despite the “without reserve” condition, the auction remains an invitation to treat. The reserve price only serves to notify bidders that a bid below this price will not be accepted. No contract is made until acceptance at the fall of the hammer. (Holland J)



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