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 the parties have a similar capacity to negotiate terms favourable to their interests. However, there is increasing recognition this is not always the case in practice:
  - Contracts occur more frequently between consumers and companies than between commercially savvy business people/entities. The inherent inequality of bargaining positions in the former case has led Parliament to pass measures aimed at protecting consumers, for example allowing the courts jurisdiction to grant relief for “unjust” contracts.
  - There is now an emphasis on the will and intention of parties, rather than what is merely contained in the black letter terms of the contracts.

- Many contracts are informal, and the terms are implied. Thus, contract law often has an important role in completing the contract.
A contract exists when the basic elements are satisfied, namely where there is: (i) an agreement (usually comprised of (a) an offer, and (b) acceptance of the offer), (ii) consideration, and (iii) an intention to create legal relations.

Courts use an objective test to determine whether a contract exists ie would a reasonable person perceive that a contract exists? (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*).

Courts will generally try to find a way to uphold a contract rather than hold it does not exist or apply due to technical grounds.

### 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;
- There are no excusing factors for non-performance;
- 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 *consensus 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?
Besides offer and acceptance, the necessary elements of an enforceable contract are (i) an intention to create binding legal relations and (ii) consideration.

**Hint:** Correct analysis of the agreement is essential because this will often determine *when* the contract was entered into (important because a breach of obligations will often depend on when the obligations needed to be performed), *where* the contract is formed (which determines the jurisdiction / relevant applicable law), and *what* the terms of the contract are, both express and implied.

### 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)*

- An offer can be made by words and/or conduct. 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 sufficiently complete 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; the offer must be communicated by the offeror or an authorised agent of offeror to offeree. *(Henthorn v Fraser)*

- However, it is not necessary for an offer to be made to be a specific person or a class or group of people. An offer can be made made to "all
the world", in which case the offeree is regarded as a member of the general public (Carlill v Carbolic Smoke Ball Co)

- When an offer is made, the terms of the proposed contract must be communicated to the offeree. (Thornton v Shoe Lane Parking)

- However, an offer can be made in general terms, leaving the precise terms of the contract to be settled later. (Masters v Cameron)

- The fact that the word ‘offer’ is used is not in itself conclusive (B Seppelt & Sons Ltd v Commissioner for Main Roads).

- An offer must be distinguished from an ‘invitation to treat’, which can be described as any part of the negotiation process that invites further bargaining, rather than acceptance.

2.1.2 Advertisements

**Carlill 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 an invitation to treat. (Carlill v Carbolic Smoke Ball Co)

- However in Carbolic, an advertisement guaranteed the company would be liable to anyone who performed certain conditions involving buying and using a smoke ball product alleged to cure certain ailments if a certain result did not eventuate, namely the curing of those ailments. This was held to constitute a unilateral offer to the world, and thus acceptance falls immediately on those who perform the stipulated conditions.

**Pharmaceutical Society of Great Britain v Boots Cash Chemists**

- **Facts:** An Act allowed pharmacists to sell medicines behind the counter. Boots 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: did the store make an offer by displaying
the items at the counter which the customer then accepted, or did the customer make an offer by picking an item from the shelf which the store then accepted?

- 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 costumer 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 (considered in detail in 6.). An offer may be held not to have existed where there is lack of intention.

- The intention of the offerer is determined by looking at his/her words and/or conduct, the context in which the offer was made, and asking whether an ordinary and reasonable person would regard it as an offer (Cavallari v Premier Refrigeration Company) (Note: certain contexts may create presumptions as to whether there is intention. See 6.)

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