

CONTRACT LAW SUMMARY



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INTRODUCTION

DEFINITION:

- A contract is simply an agreement between two or more 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, and
 - Rights and remedies available where the contract is breached.
- General principles of contract law are derived from common law and now is codified in the Contract and Commercial Law Act 2017.
- 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 have equal bargaining strength to maximise the outcome. Therefore, it is recognised that there are exceptions when parties are not equal:
 - There is growing recognition that consumers have lesser bargaining power when entering into contracts than commercial counterparts. Parliament has

recognised the need to protect consumers and allow the court's jurisdiction to grant relief for "unjust" contracts.

- There is now emphasis on the will and intention of parties, rather than what is in writing.
- Many contracts are unwritten, and some key terms are implied. Contract law has an important role in completing or interpreting such contracts.
- A contract exists when there is (i) an offer (ii) acceptance of the offer (iii) consideration (iv) an intention to create legal relations.
- The Courts use an objective test to determine whether a contract exists i.e., would a reasonable person perceive that a contract exists based on words, conduct, and background circumstances? (*Smith v Hughes 1871*).

TRADITIONAL ELEMENTS FOR LIABILITY OF BREACH OF CONTRACT

- A claim for breach of contract will succeed if it is shown that:
 - A valid contract existed between the parties
 - The party has breached the contract as properly construed,
 - There are no mitigating factors for non-performance,
 - The contract was unable to be performed,
 - It is not unconscionable to make the claim.

OFFER

- The law of contract will enforce obligations where there has been agreement between the parties. In the absence of agreement there can be no contract (*Gibson v Manchester City Council 1978*).
- 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 other necessary elements of an enforceable contract are (i) an intention to create binding legal relations and (ii) consideration.

AGREEMENT

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 1978*).

- 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 (*Smith v Hughes 1871*). 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; the offer must be communicated by the offeror or an authorised agent of offeror to the offeree (*Wiles v Maddison 1943*).
- When an offer is made, the terms of the proposed contract must be communicated to the offeree (*Thornton v Shoe Lane Parking 1971*).
- Offers can be made in general terms, leaving the precise terms of the contract to be settled later, but this is subject to the intention as disclosed by the language used (*Hillas & Co Ltd v Arcos Ltd 1932*).
- It is not necessary for an offer to be made to be a specific person or a class or group of people. For example, an offer may be made to "all the world", in which case the offeree is regarded as the general public (*Carlill v Carbolic Smoke Ball Co 1892*)
- The fact that the word 'offer' is used is not in itself conclusive.
- 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. For example, the mere statement of the price may constitute an invitation to treat, and not an offer, because this invites further bargaining (*Harvey v Facey 1893*).

Advertisements

Carlill v Carbolic Smoke Ball Co 1892

- 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*.

Pharmaceutical Society of Great Britain v Boots Cash Chemists 1952

- 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. 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. Otherwise, a customer who had put a good

in their basket would be obliged to take it because the contract would have been concluded once the good had left the shelf.

Contractual intention negated

- 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 to contract.
- The intention of the offeror 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 (*Boulder Consolidated Ltd v Tangaere 1980*).

Masters v Cameron 1954

Facts: A document was signed by the parties that stated a sale of property was to take place. The document has a clause "this agreement is 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.
- It is necessary to know the actual subjective intention of the parties, and extrinsic evidence beyond writing may be used to adduce such an intention.

Auctions

- 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 (*Payne v Cave 1789*).
- Until the goods are declared sold (e.g., when the auctioneer announces it by bringing down his/her hammer), no contract is formed, and buyers are able to withdraw their offer.
- An auctioneer can acknowledge a bid, but acceptance does not occur until the goods are declared sold.
- 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. In some situations, i.e., where there is a sale *without reserve*, there may be a process contract binding the auctioneer to sell to the highest bidder (*Barry v Davies 2000*).

Tenders

A tender is a bid made in writing offering a price for the sale or purchase of goods and/or services.

A tender should be distinguished from an 'expression of interest', which merely provides information. As for auctions without reserve, a tendering process may form a process contract that binds the party receiving the tenders to accept the best conforming tender.

Pratt Contractors Ltd v Palmerston North City Council 1995

Facts: Palmerston North CC requested tenders for a bridge according to their plans. Tenders had to be submitted with a small non-refundable deposit. A particular process whereby the tenders would be considered was supplied. Pratt's tender was the cheapest and best fit the criteria that Palmerston North CC required, however, another tender was chosen.

Held: this was a breach of a process contract. Palmerston North CC was bound to take the lowest conforming tender because of the specificity of the requirements and the payment of the small sum of money. However, if the language were less specific a process contract may not have existed.

TERMINATION OF OFFER

- If an offer exists, and it has not been accepted then:
 - The offer can be revoked at any time, except where the parties have agreed to an options contract.
 - The offer can lapse after a reasonable amount of time. This is to be determined on the facts of the case (*Ballas v Theophilos (no 2) 1957*). If too much time has passed, the offer may be held to have lapsed and can therefore not be accepted.
 - An offer can be conditional on a certain event for example advertisement of goods for X dollars "while stocks last") where failure of condition will mean that no valid contract has been formed.
 - An offer will terminate if a particular state of affairs upon which it relies ceases to exist (*Dysart Timbers v Nielsen 2009*).
- The death of the offeror may have the effect of terminating the offer.
- Rejection of an offer can terminate the offer. Rejection can be expressed or implied through a counter-offer. A counter-offer kills the original offer, and thus the counter-offer forms the new offer that must be accepted in order for a contract to be formed (*Butler v Ex-Cell-O-Corp (England) Ltd 1979*).



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