Contract Formation

A contract is an agreement or set of promises that the law will enforce, for a breach of which the law will provide a remedy.

There are 4 elements to a contract:

1. Agreement
2. Consideration
3. Intention to create legal relations
4. Agreement must be complete and certain

Note the difference between a bilateral and unilateral contract:

- Bilateral: both parties exchange a promise, or set of promises, for each to do something in the future after the contract has been formed
- Unilateral: only one promise is made, and one party accepts the offer when they perform the stipulated task

Agreement

An agreement is traditionally established through an "offer" made by one party (the "offeror") and "acceptance" by the other party (the "offeree").

Agreement occurs when the acceptance is communicated to the offeree.

Offer

Definition

- An offer may be described as the indication by one person to another of his or her willingness to enter into a contract with that other person on certain terms

Objective test

- The courts use an objective standard to determine whether there is an offer, in the view of reasonable person in the offerree's position

Elements which distinguish an offer

- Must not be too vague or uncertain
- Must not be a mere puff (*Carlill v Carbonic Smoke Ball*)
- Must be distinct from an invitation to treat (*Pharmaceutical Society v Boots Chemist*

Ticket cases

- General rule: the ticket is an offer which the purchaser can accept or reject AFTER they have had reasonable opportunity to accept or reject it (*MacRobertson v Commissioner of State Tax*)
- Note: the general rule isn't always followed – the court takes into account the particular facts of the situation

Invitation to treat

An invitation to treat is an invitation to others to make an offer or enter into negotiations. It is not an offer because it lacks sufficient indication of willingness to be bound.

- Most advertisements (eg. catalogues)

    - Note: non-contractual implications, such as misleading and deceptive conduct
- Goods displayed in shops (*Pharmaceutical Society v Boots Chemist*)
    - Goods displayed on shelves are an invitation to treat
    - The customers make an offer by buying the goods at the register
    - The sales assistant can either accept or reject this offer and put through the purchase
- Goods offered for sale online
    - *s.14B of the Electronic Transactions Act 2000*
        - Goods or services offered online are generally to be treated as invitations to treat, unless there is clear intention to be bound by acceptance
- Property declared "on the market" at auctions (*AGC v McWhirter*)
    - General rule:
        - The auction is the invitation to treat
        - The bid is the offer
        - The auctioneer's "fall of the hammer" is the acceptance
    - The seller can withdraw the property before the acceptance of a bid, and can refuse to accept a bid (ie. doesn't have to sell to the highest bidder)
    - The buyer can withdraw a bid before acceptance
- Invitations to tender
    - A person wanting to sell or purchase something might put it to tender (to see who will give the better offer)
    - General rule:
        - The request for tenders is an invitation to treat
        - A tender from an interested supplier is the offer
    - Exceptions:
        - If the wording for the call of tender is promissory and can potentially be seen as an offer (*Harvela Investments v Royal Trust Co of Canada* – "if any offer made by you is the highest, we bind ourselves to accept it")
        - If the call for tenders creates a contract regarding the tender process (*Hughes Aircraft Systems International v Airservices Australia*)

Termination/withdrawal

- Revocation
  - General rule (*Dickinson v Dodds*):
    - Can occur at any time before acceptance, even if the offeror promised to keep it open
    - Effective when it is communicated to the offeree, either by the offeror or some other reasonably reliable source
  - Exceptions:
    - If consideration has been paid to keep the offer open (*Goldsborough Mort*)
    - If there is a promise to hold an offer for the international sale of goods open (*Article 16 of the CISG*)
    - If it is a unilateral contract, performance (acceptance) has commenced, and there is an implied contract not to revoke or estoppel (*Mobil Oil v Wellcome*)
- Lapse of time
  - An offer which is open for a specified period will lapse at the end of that period
  - If there is no specified period, it will lapse after a "reasonable time"
    - What is reasonable will depend on the context
    - Apply an objective standard

- Death of offeror
  - An offer will lapse upon the death of the offeror, where the offeree knows of the death (*Fong v Cilli*)
  - Option contracts remain enforceable against the deceased's estate unless:
    - Personal services of the deceased were required (*Laybutt v Amoco Australia*)
    - Intent of the option was that it was not to be exercisable after death
- Changed circumstances
  - The offeror may stipulate certain conditions on which the offer will stay open or lapse; if these aren't specified, they may be implied