

Week 5: Contract Law: Formation of The Contract

Chapter 7: Contract Law: Formation of The Contract

What is a Contract?

- A **contract** is a legally **enforceable agreement**
- Most contracts do not need to be in writing. Many contracts are made **verbally**, and some contracts are **implied** by the conduct of the parties
- Some contracts are formed and performed at the same time. With other contracts, one or both of the parties make a promise and therefore have an **ongoing obligation** once the agreement has been formed

Requirement 1: Agreement

- An agreement is a **meeting of minds**, and exists when two or more people share understanding an intention
- Many agreements are preceded by a period of **negotiations**
- Sometimes the existence of a finalised agreement can be deduced from the conduct of the parties
- At other times, the existence of a finalised agreement is less clear
 - One party might insist that an agreement has been concluded, while the other party insists that an agreement is still being negotiated, or that no legally enforceable commitments have been made
 - In these circumstances, the test for determining the existence of an agreement is the **existence of an offer by one party and an acceptance of that offer by the other party**
 - An agreement is said to exist if it can be shown that one party has made an offer and that another party has accepted that offer and communicated their acceptance
- An agreement will be formed if all of the following requirements are satisfied
 - One person (the offeror) has made an offer
 - Another person (the offeree) has accepted the offer
 - The offeree has communicated their acceptance of the offer to the offeror

Agreement = Offer + Acceptance

Offer

- A person makes an offer when they **express a willingness** to immediately enter into a contract with the person to whom the offer is directed
- An offer can be made to **one person**, many people, or **'the world at large'**
- An offer can be made in **writing, verbally or indicated** through conduct
- An offer can be:
 - **Accepted** by the offeree,
 - **Rejected** by the offeree, or
 - **Revoked** by the offeror

- The offeror is entitled to **revoke their offer** even if they have promised to keep the offer open for a particular period, **unless the offeree has paid** for the promise to keep the offer open, for example by paying a deposit
- An advertisement promoting a product at a particular price may appear to be an **offer to the world at large**, but it is more likely to be categorised as an **invitation to treat** and not an offer at all ... even if the advertisement uses the word 'offer'
 - **Carlill v Carbolic Smoke Ball Co (1893)**
- It is important to distinguish between that making of an offer and:
 - Mere request for information: Not acceptance
 - Advertisements: Invitation to treat
 - Auctions: Collateral contract (pre-contract before you enter into major contract)

Acceptance, Rejection or Revocation

- **Acceptance:** When the offeree indicates by words or by action that they are **willing to immediately enter into a legally enforceable contract** with the offeror on the terms offered, they are said to accept the offer
- Only the **offeree** can accept the offer
- Acceptance must be **unqualified**, otherwise it is a counter-offer
- Acceptance must be **communicated** to the offeror
- The offeror can waive the requirement that communication be accepted, but they cannot insist that a **failure to respond** is acceptance
- If the offer is accepted, an agreement (and possibly a contract) comes into existence from that moment
- If the offer has **not been accepted** or rejected, the offeror is entitled to revoke their offer
- Silence is not acceptance
 - **However, an important exception:** if the offeree has provided consideration for the offeror's promise to keep the offer open (e.g. by paying a deposit), the offeror cannot withdraw their offer until the period has expired
 - If the offeree has paid a deposit, a separate contract comes into existence, sometimes referred to as an **option**, and the offeror breaches that contract if they withdraw the offer before the promised deadline
- **Goldsborough Mort & Co Ltd v Quinn (1910) 10 CLR 674**

Requests for Information

- There is a difference between making of an offer and a mere request for information
 - For example, if Jin emails Johnny and asks if Johnny is willing to sell his pizza oven for \$8000, Jin is likely to be seen to be merely asking for information rather than making an offer to buy Johnny's oven
 - Similarly a response to a request for information is not an offer. If Johnny replies to Jin's email and says that the lowest price is \$10,000, this is unlikely to be seen as an offer by Johnny to sell the oven at that price

Advertising and Advertisements

- Most advertisements are not offers
- An offer is an expression of willingness to immediately enter into a contract with the person to whom the offer is directed
- Most advertisements are deemed to be 'invitations to treat' rather than offers to the world at large
- An **invitation to treat** is an invitation to another person to make an offer

Auctions and Tenders

- At an auction, the call for bids is an invitation to treat
- The bidders are offerors, and there is no agreement and no contract until the auctioneer accepts an offer on behalf of the seller
- This means that if the auction is 'without reserve' (i.e. there is no minimum price that must be reached before the seller is obliged to sell the product) and the auctioneer refuses to sell to the highest bidder, there is no contract and the auctioneer cannot be sued for breach
- However, in these circumstances the court is likely to decide that there is in fact a second contract, called a **collateral contract**, between the auctioneer will sell to the highest bidder, and the auctioneer could be sued for breach of this collateral contract
- An advertisement calling for tenders is an invitation to treat
 - A person who submits a tender is making an offer, which may or may not be accepted by the person who called for the tenders
 - Once again, if the call for tenders states that the highest/lowest tender will be accepted, a failure to accept the highest/lowest tender will be a breach of a collateral contract

Requirement 2: Intent

- The parties to the agreement must intend to the agreement to be **legally enforceable**
- In deciding whether or not the second requirement is satisfied, the court looks at the **conduct of the parties** from the perspective of an **objective observer** and ask whether the parties were behaving in a way that indicated that they intended the agreement to be legally enforceable
- In applying the objective test, the courts have traditionally made **two important presumptions**

Presumptions

1. If the agreement was made in a **social or domestic context**, the court will presume that the agreement was not intended to be legally enforceable:

- ***Balfour v Balfour (1919)***
- ***Wakeling v Ripley (1951)***
- If an agreement was made between two friends in a social setting, or between members of a household such as a brother and sister or a husband and wife, the court will presume that it was not intended to be a contract

2. If the agreement is made in a **commercial or business context**, the court will presume that it was intended to be **legally enforceable**

- A promise made to customers in a business context will not be enforceable if the promisor can show that the promise was **clearly not intended** to be taken seriously by customers
- **Mere Puff** : A promise made to customers in a business context will not be enforceable if the business can show that the promise was clearly not intended to be taken seriously by customers
 - Such promises are not legally enforceable

Requirement 3: Consideration

- An agreement is not a contract unless both parties to the agreement have paid, or promised to pay, a price, called **consideration**
- Consideration can take the form of:
 - The payment of money
 - The provision of goods
 - The provision of a service
 - The undertaking of an onerous obligation
 - Refraining from doing something, e.g. agreeing not to sue, or
 - A promise to do any of these things
- **Carlill v Carbolic Smoke Ball Co (1893)**

Consideration does not need to be adequate

- The law of contract does not require each party to pay a fair or adequate price, only a price of some legal value
- The requirement that each party contribute to the arrangement is satisfied as long as each party pays some consideration, no matter how inadequate or small in value
 - For example, if Johnny promises to give Jin his pizza oven in return for Jin paying \$50, the \$50 is still consideration and the agreement is still a contract, even though \$50 is not a fair or adequate price for the oven

Consideration must be sufficient, AND NOT:

- **A vague promise**
 - If the price paid by the promisee is a vague promise by the promisee to do something or refrain from doing something, this is insufficient consideration
 - 'Vague' means uncertain or of no legal value
 - For example, if Johnny promises to give Jin his pizza oven in return for Jin's promise to 'be nice' to him or to pay a 'fair price', Jin's vague promise is insufficient consideration and Johnny's promise is therefore unenforceable by Jin

White v Bluett (1853) 23 LJ Ex 36

- A father promise to waive a debt that was owed to him by his son