

Contract Law

Creation of Contracts

- Contracts are required as they promote certainty in aspects crucial to business, and need to be recognised by law.
 - o Loan agreements
 - o Hiring workers
 - o Building and construction
 - o Purchasing or leasing real property
 - o Insurance
- **CONTRACT** : a transaction entered into by two or more parties that is enforceable in the courts , in order for a transaction to be classified as a contract it must bear elements of a contract
- Common contracts
 - o Purchasing coffee
 - o Purchasing a train ticket
 - o Accepting a part time job

Forms of a contract

Form of contract	Definition	Example
Verbal contract	The contract is formed verbally (by spoken words alone)	Agreeing to mow a neighbour's lawn for a small sum of money
Contract by conduct	The contract is formed from the actions of the parties	Taking a can of baked beans to a supermarket checkout, giving the cashier money and receiving the beans in exchange (no words are exchanged during the transaction)
Written contract	The contract is expressed in a written document	Joint venture agreement between two construction companies to build a road tunnel
Mixed contract	A contract formed from a combination of two or all of the above	Going to the train station and asking for a ticket to the city (verbal), paying the fare and receiving the ticket (conduct), the ticket itself (written).

Essential Elements of a contract

ESSENTIAL ELEMENTS

- Agreement
 - o Offer
 - o Acceptance

DEFECTS

- Lack of Capacity
- Illegality
- Lack of Genuine Consent

- Intention
- Form.
- Consideration

A contract is only valid if there is an agreement by both parties that include intention and consideration.

Agreement

- Made up of an offer by one party and an acceptance by the other party

Offers

- The expression to another of a willingness to be legally bound by the stated terms
- A clear and definite promise communicated to others and capable of being accepted
- **Offeror:** person making the offer
- **Offeree :** the person to whom the offer is made
 - o A **single party**, either a person or a business. For example, you attend a neighbour's garage sale and offer your neighbour \$50 for a chair on display.
 - o A **distinct group** of parties, either persons or businesses. For example, you post a notice on a noticeboard in your workplace offering to sell your refrigerator for \$100.
 - o An **indistinct group** of parties, either persons or businesses, including the 'world at large'. For example, you post notices around your neighbourhood offering a reward of \$200 for the return of your lost dog

When do offers end ?

REJECTION

destroys offer and cannot be revived. Sometimes results in a counter offer.

REVOCAION

The offeror, before acceptance communicates their change of mind to offerer thus nullifying the contract.

LAPSE

The offer expires due to a lack of response within a time frame or death.

Counter-offers: the rejection of an offer and the proposal of a new offer thus destroying the previous offer.

Case Study : Counter Offer

Hyde v Wrench (1840) 3 Beav 334

- W offers to sell his farm to H for £1000. H counter the offer by offering £950 , W refused.
- H then indicated he would pay £1000 for the farm, W did not reply.
- H insisted as W did not formally withdraw the £1000 offer he was required to continue the sale ,H sued .
- **DECISION:** by making the counter-offer H had rejected the original offer and as a result that offer was no longer valid. By offering to pay £1000 again H was making a second counter-offer, and W was under no obligation to accept.
- **CONTRACTUAL NEGOTIATIONS VS NEGOTIATIONS**
- **CONTRACTUAL NEGOTIATIONS :** such as in the case study above , where a clear offer and agreement is legally binding

What is not offers

COMMUNICATIONS WHICH ARE NOT OFFERS : For a communication to be a valid offer it must make clear the offeror is prepared to enter into a binding agreement with the offerer. The offer must be unconditional (not reliant on an event or circumstance)

NEGOTIATIONS	<ul style="list-style-type: none"> - Required to find the requirements of each party before contract is drawn. - During negotiations it is essential to distinguish between pre-contractual statements and offers. If no distinction is made disputes can arise
REQUESTS FOR INFORMATION	<ul style="list-style-type: none"> - An enquiry made to help a person decide whether they want to enter into an agreement or not. <p><i>Harvey v Facey [1893] AC 552</i></p>
ADVERTISEMENTS	<ul style="list-style-type: none"> - Regarded as an invitation to treat (invitation to make an offer) - In the case of “limited stock and sell at discount until the stock is exhausted” the court will view this as an offer. <p><i>Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1 QB 401</i></p> <ul style="list-style-type: none"> - PSGB claimed the self-service of drugs was irresponsible - Lord chief claimed that while the store advertises the drugs for sale the it is not an offer by the store. Instead the offer occurs when the customer brings the drugs to the cashier as an offer to buy. The pharmacist overseeing the transaction is the offerer and he/she can then choose to accept the offer or not.
MERE PUFF	<p>A promise made to customers which are not meant to be taken seriously. However if a monetary value is stated it is not mere puff</p> <p><i>Carlill v Carbolic Smoke Ball Co</i></p> <p>Offered a 100\$ reward however when C asked for the reward CSBC claimed it was mere puff. However as CSBC had deposited 1000 into an account for this it was clear intention.</p>

Acceptance

- An offer that is accepted by the offeree(party who receives the offer) and then communicated to the offeror (party who made the offer)

- Normally only the offeree can accept the offer however there are extensions where solicitors acting on behalf of their clients are instructed to communicate acceptance.
- Can be communicated :
 - o Verbally
 - o In writing
 - o Through conduct
 - o If a specific method of acceptance is required the offeror only may specify this condition of communication.
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- Must be communicated unless impliedly waived
 - o *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256
 - o
- Must have knowledge of an act in reliance on the offer
 - o *R. v Clarke* (1927) 40 CLR 227
 - o Clarke gave information to secure his own release and not in response to the offer for reward (it didn't help him that he admitted this!) – to be effective as an acceptance the information needed to be ‘given in exchange for the offer’ . Acceptance of the offer must be stated it is not implied .
- Can be either Express acceptance of implied acceptance

Express Acceptance

- Occurs when the offeree communicates his or her acceptance by direct communication (verbal or written).
- **The timing of an express acceptance** is important as the offeror may withdraw their offer or put a time limit on acceptance. There are 3 different outcomes depending on mode of communication
 1. **By phone or in person** : acceptance is immediate
 2. **Ordinary mail** : acceptance occurs when the letter is posted not when the offeror receives the letter
 3. **Electronically** (email/text message) :
 - a. Offeror gives particular instructions as to where the acceptance should be sent , eg. A particular email address/ number . : Acceptance takes place when the offeror receives the message in their information system, regardless of it being read or not.
 - b. No specific directions given : acceptance only occurs when the offeror has read the acceptance/ is made know of it.
- Most business will use a direct mode of communication with an instantaneous/ near instantaneous – e.g telephone and email - means of communication with a given address. However with other means it is advised to allow the possibility of delay .

Implied acceptance

- Occurs when the offerees conduct of actions convey acceptance
- Eg. When a customer takes items to the counter and gives money to the cashier. The cashier accepts the offer by taking the money even though there were no words involved.
- Unilateral Contracts : when the offeree accepts the offer at the same time that they perform their promise . These are offers made to the world at large . Eg. A Reward for finding a lost dog .

Responses that are not acceptance

- It is the responsibility of the offeree to exclusively communicate their acceptance to the offeror. While they may communicate non-acceptance they are under no obligation to do so.
- **Silence or inaction on the part of the offeree**
 - o *Felthouse v Bindley* (1862) 11 CB(NS) 869 .
 - o This is important to protect individuals and business from unsolicited offers of goods or services. Without this rule, goods could be offered with the implication of acceptance even if the party does not require the service as they would have been obligated as a result of lack of response.
- **Conditional Acceptance** : is not a valid acceptance. This occurs when the offeree does not agree to all the terms. Acceptance must be unconditional (asis/ without alternation)
 - o In this case the original offer was rejected and a new offer (counter-offer) is created.

Case study Acceptance (Acceptance by conduct)

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523

- E was a developer and M its architect.
- Before a written contract was finalised, M started work on the project. E knew about this and made a progress payment.
- E later refused to sign the contract, stating that the managing director 'does not sign contracts'. M continued work but E later refused to proceed with the arrangement and denied that an agreement was in force. M sued for damages.
- **Decision of the court:** the actions of E amounted to acceptance of M's offer of services and a contract was in force between the parties. M was awarded damages
 - o While inaction usually warrants non-acceptance, in the case of the offeree drawing substantial benefit from an informal contract inaction will not operate to invalidate an agreement.
 - o The courts overlook the technical inaction in order to achieve fairness . The court applies the innocent bystander test of acceptance : would a third party view the offer as accepted .
 - o Conduct of the parties and consideration of overall fairness should outweigh the technical legal deficiencies within an agreement.

Intention

- An agreement is formed when an offer is accepted, however not all agreements are contracts. As such only a contract can be enforced by the court.
- Intention: the willingness of all parties to an agreement to be legally bound by that agreement, the intention to create legal relations.
- In order for intention to be satisfied :
 - o All parties must understand and accept that they are entering into a legally binding contract
 - o Intention to create legal relations must be either:
 - Expressly stated : declared in writing or verbally
 - Implied : by the conduct of the parties

Express intention

- Parties both make a clear intention to be legally enforceable relations verbally or in writing .
- Eg. A term or written agreement that the parties intend for it to be legally enforced or for any disputes to be handled by a specific court.
- *Rose and Frank & Company v J. R. Crompton & Bros Ltd*
 - o RF entered into an agreement with JRCB with the following document : *This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts ... but it is only a ... record of the purpose and intention of the ... parties ... to which they each honourably pledge themselves ... based on past business ...*
 - o **DECISION** : the agreement states clearly that this is not a binding contract . therefore RF have no legal standing .

Implied intention

- If it would be apparent to a third party that the parties intended their actions to be legally binding the court would rule in favour of fairness.
- *Wakeling v Ripley* (1951) 51 SR (NSW) 183
 - o While the court would usually not rule a agreement between family members as a legally binding contract , W had changed their position based on the stipulations of the contract. R was aware of this therefore the parties are legally bound .
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How the court sees Intention

- When making a ruling based on intention the court will consider the following factors:
 - o the relationship of the parties
 - agreements between family's may sometimes not satisfy requirements
 - *Balfour v Balfour* [1919] 2 KB 571
 - even though there may have been consideration. Agreements between spouses 'are not contracts because the parties did not intend that they should be attended by legal consequences.
 - o the nature of the agreement under dispute
 - o any history of dealings between the parties
 - o Whether either party has gained a benefit under the agreement.
 - o Onus[responsibility] on pl to show contract was intended.
- Most commercial agreements will satisfy the requirement of intention.
 - o *Carlill v Carbolic Smoke Ball Co* [1893] QB 256

Consideration

- What each party provides or promises to provide to the other as part of the agreement.
- An agreement will not be valid unless both parties have provided consideration.

Types of Consideration

- May be anything of legally recognisable value (monetary value)
 - o money
 - o goods
 - o services
 - o a promise to perform a specific action
 - o a promise to not perform a specific action
- Consideration is not : a promise to be a better son/daughter/spouse, a declaration of love, an expression of friendship etc.

Value of Consideration

- **SUFFICIENT CONSIDERATION** : legally recognisable value
- **ADEQUATE CONSIDERATION** : within fair and reasonable
- Consideration MUST be sufficient however it does not need to be adequate.

CASE STUDY CONSIDERATION SUFFICIENT VS ADEQUATE

Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256

- Example: willingly selling a car worth \$10,000 for \$1,000. The court will not set aside the contract of sale if the seller later changes their mind since the consideration provided by the buyer was sufficient (of legally recognisable value). The courts expect sellers to ensure that they make good bargains and will not set aside a contract on the basis that the sale price was inadequate.
- Note: if the buyer misled or pressured the seller into under-selling the car then the seller may have a case for setting aside the contract

Past Consideration

- If consideration is provided after the finalisation of the agreement it is not valid and referred to as past consideration
- Performance of a pre-existing duty or obligation may not be sufficient

CASE STUDY PAST CONSIDERATION

Roscorla v Thomas

- R bought a horse from T. After the sale, T assured R that the horse was 'sound and free from vice'. The horse turned out to be vicious and R sued T.
- The court found that the promise as to the horse's temperament was not supported by consideration.
- The vicious horse serves as a reminder that warranties about the fitness of goods must be secured prior to agreement . **Doctrine of *caveat emptor* – buy beware**

OTHER EXAMPLES

- *Stilk v Myrick* (1809) 170 ER 1168
 - o Even though they were offered the remaining wages of the ships deserters, they were already under a contract for their wages. As such the captain was under no obligation to pay the promised bouns wages as there was no consideration.
 - Contractual blackmail : party threatens not to perform contractual obligations unless demands are met.
- *Hartley v Ponsonby* (1857) 119 ER 1471

- Similar to *Stilk v Myrick* however as the number of deserters directly effected the seaworthiness of the vessel as such. Hartley could have terminated the contract, by continuing on he was doing more work than originally required and as such the contract was modified. Therefore he is entitled to the bonus pay.
- *Foakes v Beer* (1884) 9 App Cas 605

Estoppel (5)

- A legal principle that prevents a party from denying that a contract exists
- Used to enforce promises made before the contract is finalised, if denying the existence of a contract causes unfairness to one party.

CASE STUDY ESTOPPEL

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

- CASE :
 - M was a land owner. He made an arrangement with W, a retail store operator, to construct a new shopping centre on his land.
 - The basis of the arrangement was that the shopping centre would be constructed to W's requirements and that once constructed, W would take out a long-term lease over the shopping centre.
 - However, at no stage was a formal contract of lease signed by W.
 - M commenced work on the site by demolishing existing buildings and starting construction of the shopping centre. W knew about these developments and started having doubts about the project but said nothing.
 - M had gone to great expense and inconvenience in reliance on W's promise to enter into a lease. He sued W for breach of contract. W defended itself on the basis that no contract existed, only a promise to enter into a contract
- DECISION :
 - The court agreed that a lease should be recognised. In the circumstances it was unconscionable for W to rely on the absence of a formal agreement, having done nothing to stop M from acting in reliance on its promise until it was too late. Consequently, the court was prepared to recognise a lease and ordered W to pay damages to M.

Promissory or equitable estoppel

- **CRITERIA FOR PROMISSORY ESTOPPEL pp 119**
 - The promise assumed that a legal relationship existed or would exist
 - The promisor induced that assumption
 - The promisee acted or refrained from action based on that assumption
 - The promisor knew the promisee would act accordingly
 - The promisee will suffer a detriment if the assumption is not fulfilled
 - The promisor acted unconscionably in failing to prevent the damage to the promisee

Formalities

- Some contractual agreements happen by word of mouth, however in most courts all terms must be expressed or implied within a formal document. This provides valuable evidence during a trial. Common law does not require it to be in writing however statute law does
- **CONTRACTS TO BE IN WRITING :**
 - Bills of exchange and promissory notes

- Cheques
- Assignments of copyright
- Contracts of marine insurance
- Assignments and mortgages of life insurance policies
- An acknowledgement of debt barred by the State Limitations Act
- Most forms of consumer credit contract
- **STATUTE OF FRAUDS 1677 :**
 - Provides that no action shall be taken unless the contract is signed by both parties , however most of this statute has been re-worked in most states and territories except for contracts under :
 - Contracts dealing with land interests :
 - Contracts dealing with guarantees
 1. Guarantee : promise made by a party to insure that if a third party should fail to carry out the agreement they would . does not need to be in writing.
 2. Indemnity : contract for the purpose of insuring a party against loss . must be in writing .

The Memorandum required

- The evidence of an agreement :
 - The names of the parties must be specified
 - The subject matter must be stated
 - The consideration must be apparent
 - The memorandum must be signed by the party to be charged or by an authorised personal .

Effect of non-compliance : The doctrine of part performance

- A contract that is not in writing is non-enforceable however if part of the contract has been undertaken equity will be enforced.
 - *Watson v Delaney 1991 22 NSWLR 258* : a promise was made for life tenancy on the basis that the tenants carry out their own repairs. Normally this would be required in writing , however in this instance it was enforceable.