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## CONTRACT FORMATION

To create a contract, the following elements must be satisfied:

1. **Agreement (Offer and Acceptance)**
2. **Consideration**
3. **Certainty**
4. **Intention to Create Legal Relations**
5. **Formalities**

There is no fixed order, talk about them in the order most logical. Start with what you think you know. You don't have to talk in detail about all elements. One or two will be real issues and the others will be obvious. Spend time on a detail discussion of the issues, briefly outline those that are obvious. Focus on those that are arguable. **Ask:** Would a client raise a question on that point?

Where we are unable to establish a legally binding contract, we consider whether **estoppel** is applicable.

Lastly, determine the **remedies**.

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### Topic 2 – Agreement

**Agreement** exists when an **offer made by one party is accepted unequivocally by the other party**, or else it can be inferred from the circumstances that the parties have reached an agreement.

A. You have an agreement if a **reasonable person would think an agreement had transpired by looking at what is presented (objective approach)**

- I. What you need is agreement. Offer and acceptance are a mode to identify if there is an agreement

B. **Offer – An expression of willingness to be bound into a contract on terms stated, without further negotiation**

- I. There is an offer when a reasonable person in the offeree's position would consider that an offer was made — this is a question of intention (**objective test**)

- II. Offers can be made to the whole world — **unilateral contracts** or contracts made through the performance of an Act (*Carlill v Carbolic Smoke Ball Company*)

- i. If the person asking the offer explicitly or impliedly expresses the offer that it will be sufficient to act on the proposal without communicating acceptance of it, performance of the condition is sufficient acceptance without notification

- Facts: Carbolic Smoke Company placed a number of advertisements in newspapers to the world stating that they will be monetarily compensated if they contract certain illnesses, despite utilising the carbolic smoke ball, and to show their sincerity, they have deposited money
- Principles: Deposit showed serious intention to be legally bound; Offeree put themselves in a position of inconvenience; Satisfying conditions constituted acceptance; Offer restricted to those who acted upon the terms.

- III. **Display of items does not constitute an acceptance of an offer** to sell until, customer having indicated what they need, the shopkeeper, or someone on their behalf (the owner of the good), accepts that offer. (*Pharmaceutical Society of Great Britain v Boots Cash Chemists*)

- i. Invitation to treat ≠ Offer. The customer makes the offer when they take the goods to the check out

- IV. **Duration of offers**

- i. If an offer is made and nothing is said about duration of the acceptance, it is to be **open for a reasonable time** — this is to be determined on the circumstances and can be affected by the subject matter (*Carlill v Carbolic Smoke Ball Company*)

- V. **Revocation of offers**

- i. An offer may be **withdrawn at any time before acceptance** if it is communicated to the offeree, even if the offer is stated to remain open for a definite period of time (*Dickinson v Dodds*)
  - Facts: Dodds wrote an offer to Dickinson to sell his house and promised to keep the offer open until Friday. However during this period, he sold it to a third party and also communicated the withdrawal of the offer through a friend. (Reliable)
- a. **Exception: Revocation in option contracts**
  - i) However, if it is an option contract, or a non-gratuitous offer, the offer is bound and unable to revoke the offer due to the consideration (*Goldsborough Mort v Quinn*)
    - Facts: Respondent gave plaintiff an option contract to accept the offer in the sale of land within a week, in which five shilling was put in consideration for this option. However, respondent attempted to retract offer but this was not possible.
- ii. Offeror **does not have to personally communicate** the revocation of offeree, it can be done by a representative, as long as it occurs reliably and reasonably (*Dickinson v Dodds*)
- iii. **Revocation** of an offer **must be communicated** to the offeree. It is not effective until it reaches the offeree (*Stevenson, Jacques & Co v McLean*)
- iv. Rejection of an offer, or the making of a counter-offer, revokes an offer (a previous made offer) (*Butler Machine Tool Co v Ex-Cell-O Corp*)
  - Facts: An offer was made containing a price escalation clause. A counter offer was then made without this clause; it contained a detachable receipt which the company (original offeror) sent back with a notation stating that they assumed it was on their terms. The **battle of forms** – last one acknowledged stands.
- v. **Revocation in unilateral contracts**
  - a. An offeror can revoke an unilateral offer when the offeree is in the midst of the performing the act, however, must revoke in a manner in which the offer was made – **this is a question of fact, not law**
  - b. An offeror can retract unilateral offers while its conditions are being performed, unless estoppel operates. In this case, the offeree must show that they have suffered detriment (*Mobil Oil Australia Ltd v Wellcome International Pty Ltd*) [Court found that there was no offer. It was more corporate encouragement]
    - i) It cannot be revoked, however, if the act has already been performed
      - Facts: Mobil General Manager for retail marketing stated very good rewards for achieving 90% or better in the Circle of Excellence scheme.
      - Held: Uncertain and vague terms of the reward meant there was no certainty; Franchisees did not suffer a detriment by improving their own performance and therefore no real consideration.

#### Difference between a bilateral and unilateral offer

A bilateral contract is an agreement by which each party promises to perform an act in exchange for the other party's act (their contractual obligations). In this case, each promise is regarded as sufficient consideration for the other (the two promises support each other).

This can be contrasted with a unilateral contract, where an offer can be accepted through performance & only one promise (that of the promisor) is executory when the contract is formed. In a unilateral contract, the act of performance is consideration for the promise, whilst the promise is consideration for the performance.

For example, in a bilateral contract between Leslie and Anne, consideration would be the promise of Leslie to Anne which allows Anne to gain a benefit or obviate a detriment (*Currie v Misa*), and is a promise specifically bargained for by both parties (*Australian Woollen Mills v Commonwealth*). Contrastingly, in a unilateral contract from Ron to reward anyone who provides information about his missing handmade chair (i.e. an offer which may be accepted through performance - *Carlill v Carbolic Smokeball Co*), consideration would be if April, were to perform the act requested in the contract and contact Ron with relevant information. If, in doing so, April suffers a detriment or obviates a benefit (*Carlill*) which was induced by Ron's unilateral contract/"offer to the world", consideration is valid and the contract may be upheld (granted that all other elements are satisfied). Also on the topic of acceptance and unilateral contracts, conduct or performance will only suffice as acceptance if it can be proved that the offer induced the performance not other ulterior motives (*R v Clarke*).