CONTRACT LAW – WEEKLY NOTES

FORMATION OF A CONTRACT

Importance of Contract Law in Business
1. Where obligations are met, and
2. Where rights can be asserted.

Made possible because the law (1) will compel performance; and (2) award compensatory damages where performance had been improper or at all.

This enforceability is what distinguishes a contract from other arrangements.

Definition and Elements of a Contract
A promise, or a set of promises, that is/are legally binding (Clarke & Clarke, Contract Law: Commentaries, Case and Perspectives [2016]).

What Makes It Enforceable?
1. There must be complete consensus between the parties as to the terms of the agreement;
2. The parties must intend to be legally bound by the agreement;
3. The promises which constitute the agreement must be supported by something of value (Consideration);
4. The agreement must be sufficiently certain;
5. The parties must have sufficient capacity to enter into a contractual agreement; and
6. The agreement must comply with any required formalities.

These are referred to as the 'elements' of a contract.

Consideration: The price paid for the promise (e.g. money, goods, services, a promise to do something, a promise not to do something [Forbearance]).
Forbearance: The surrender or suspension of a legal right, which constitutes valid consideration where it is bargained for in exchange for a promise (e.g. suing, etc.)

<u>IMPORTANT:</u> The application of contract law is objective – when assessing whether a contract is made, the law is not applied subjectively and does not concern itself with what the parties thought of felt, but what the reasonable person would infer from the conduct of the parties and their contractual circumstances.

Enforceability of Contract: All the elements of the contract must be present.
<u>BUT:</u> Even if they exist, the contract may be invalid or unenforceable for other reasons (e.g. duress or misrepresentation) or where their sole purpose is to pursue a criminal outcome.

Doctrine of Privity of Contract
- Only a party to the contract can sue or be sued on it.
  - In Australia Coulls v Bagot's Executor & Trustee Co Ltd (1967):
    - 'According to our law, a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations.'
- Although, exceptions exist.
  - Under agency and trust relationship, and Insurance Law (s 48 [1] Insurance Contracts Act 1984 [Cth]) – Zurich Australian Insurance Ltd v Metals and Minerals Insurance Pty Ltd (2009):
    - 'Section 48 confers a statutory right of recovery upon a non-party referred to or specified in a general contract of insurance as a person insured or to whom cover extends.'
- Privity distinguishes contract law from tort law; a civil wrong (e.g. negligence) independent of a contract.

1. Contract Law
   - Rights and obligations arise from agreement.
   - Only parties to the contract (those in privity) can enforce it.
   - The duty exists because the parties voluntarily entered into a contract.
2. Tort Law
   - Rights and obligations arise from law, not agreement.
   - A duty of care can exist between people who have never met.
   - Liability arises from a civil wrong (e.g. negligence, defamation, nuisance).

Exceptions to the doctrine include agency, trusts, assignment of contractual rights, insurance contracts, and statutory exemptions (in some jurisdictions). In Australia, courts will sometimes use Trust Principles to allow third-party enforcement.

Privity: The legal relationship that exists between parties to a contract, conferring enforceable rights and obligations exclusively upon them.
Trust Principles: An exception to privity by permitting a third party to enforce contractual rights, where one contracting party holds those rights on trust for the third party.

Elements of a Contract: Agreement
- 'Agreement' is normally identified by an offer made by one party (the offeror) which is accepted by the other party (the offeree).
- This may be express (written or verbal) or implied (where the contracting parties conduct Manifested Mutual Assent to the contractual arrangement).

1. Express Contract
   - Terms are clearly communicated.
   - Agreement is explicitly stated (written or oral).
   - Evidence is direct.
2. Implied Contract
   - Agreement is inferred from (a) conduct (e.g. one's actions), (b) circumstances, and (c) established dealings between parties.

        - The law looks at whether a reasonable person would conclude that agreement existed.

Manifested Mutual Assent: The parties behaved in a way that objectively shows they agreed.

Elements of a Contract: Offer
A clear statement of the terms upon which an offeror is prepared to be contractually bound if validly accepted; definite promise to be bound on certain specific terms.

- Dysart Timbers Limited v Nielsen (2009): 'An offer is a statement of the terms upon which the offeror is prepared to be bound if acceptance is communicated while the offer remains alive.'

A promise is 'illusory' where the promisor has unfettered discretion in relation to performance.

<u>NOTE</u>

A. May be 'express' or implied.
B. Must not be vague.
C. Must not be confused with answering a question or supplying information (Harvey v Facey [1893]).

Harvey v Facey (1893)
<u>FACTS</u>
H: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price."
F: "Lowest price for Bumper Hall Pen is $900."
H: "We agree to buy Bumper Hall Pen for $900."

<u>ISSUE</u>

- Was there a contract between Harvey and Facey?
    - No, there wasn't. The Privy Council held that Facey's reply was not an offer, but merely a statement of the lowest price he would consider. Since there was no offer, there could be no acceptance, and therefore no contract.
- Which statement was the offer?
    - There was no offer made by Facey. Harvey's initial message was not an offer, it was a request for information (an inquiry). Facey's reply was also not an offer, it was merely providing information about the price. As Facey did not say "I will sell it to you for $900," the court ruled that he simply answered the question about the price. Harvey's final telegram could only be an acceptance, if there had been an offer. But since there was no offer from Facey, this statement could not create a contract.

A statement of pricing is not automatically an offer. There must be clear language showing (a) willingness to be bound, and (b) without needing further negotiation.

'Offer' v 'Invitation to Treat'

1. An offer must be distinguished from an invitation to treat.
2. An invitation to treat invites others to enter into the deal.
3. Invitations are justified on practical and commercial grounds.

The law treats advertisements, shop displays, and price lists as invitations to treat (not offers). If every advertisement or displayed product were a legal offer, businesses would face serious problems.

1. Stock Problems
    - A store advertises; "TVs for $500". If that were a legal offer, every customer who says "I accept" could legally demand a TV, even if the store only has 10 in stock.
2. Mistakes in Pricing
    - A pricing error occurs; "$5 instead of $500". If it were an offer, the business would be legally bound by the mistake. By treating it as an invitation to treat, the store can refuse the customer's offer at the checkout.
3. Freedom to Choose Customers
    - Businesses need the ability to (1) refuse service in certain lawful situations, (2) decline suspicious transactions, (3) check age for restricted goods, and (4) conduct credit checks.
    - If shelf displays were offers, the seller would lose this control.

If advertisements and displays were treated as offers; businesses would be exposed to Indeterminate Liability, sellers would lose control over contract formation, and commercial efficiency would be undermined.

Indeterminate Liability: The open-ended and unforeseeable legal responsibility extending to an undefined class of claimants, for undefined amounts, over an undefined duration.

Recognised Invitations to Treat

1. <u>Display of goods</u> in a shop; Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953].
2. Auctions; Barry v Davies (2001) and Harris v Nickerson (1873):
    - Plaintiff travelled to the auction, which was postponed. He claimed damages for travelling expenses.
    - Held: The advertisement of the auction was an invitation to treat.
    - Auctioneer is inviting offers from bidders, not making an offer to sell to the highest bidder. Bid can be accepted or rejected. Acceptance of an offer by the fall of the hammer; Payne v Cave (1789).
    - Offer can be withdrawn before it is accepted. Auctioneer does not have to accept any particular bid.
3. <u>Advertisements</u> in circulars, catalogues, and newspapers; Partridge v Crittenden (1986). In most cases, it also applies to web page advertisements.
4. <u>Tenders</u> – In a tendering process, each bidder makes only one bid without knowledge of the details of any other person's bid.
    - The tenderer makes the offer, not the person calling for tenders (the inviter).
    - The inviter can accept or reject any tender; Meudell v Mayor of Bendigo (1900).

    - However, if the inviter states that the best tender will be accepted, then the contract arises with the best tenderer; Harvela Investments Ltd v Royal Trust Co of Canada (CI) [1986].

'Process Contract' is different. It arises when (a) the party inviting tenders promises to follow certain procedures (Promissory Language), (b) that promise is sufficiently definite to amount to an offer, and (c) when someone submits a tender, they are accepting that offer.

Process Contract: A separate contract about how the tender process will be conducted.
Promissory Language: The wording that objectively demonstrates a commitment or undertaking capable of forming a legally binding obligation.

Many government invitations to tender now include clauses designed to exclude the possibility of a process contract.

Rules for Offers
1. An offer may be made to a particular person, a class of people, or to the whole world (Carlill v Carbolic Smoke Ball Company [1893]).
2. The offer must be communicated to the person or persons for whom it was intended (Fitch v Snedaker [1868], Williams v Carwardine [1833], R v Clarke [1927]).
3. Offers must be distinguished from 'Puffery' (Leonard v Pepsico Ltd [2000]).

Puffery: Obvious exaggeration or promotional hype that no reasonable person would take seriously as a real person. It is not legally binding.

Termination of Offer
1. Revocation (Withdrawal)
    - An offer may be revoked at any time prior to acceptance (Routledge v Grant [1928]).
    - It becomes effective once it has been communicated to the offeree (Byrne v Van Tienhoven [1880]).
    - Revocation does not necessarily have to be communicated by the offeror. It only needs to be reliable (Dickinson v Dodds [1876]).
    - Notification via email is regulated by legislation common to all Australian jurisdictions.
        - If the offeree has specified an email address, the communication occurs when the offeror's email enter the offeree's information system.
        - If the offeree has not indicated an email address, then the communication occurs when the email message comes to their attention.
    - Unless there is a Binding Option (an 'Option Contract') to keep the offer open (Goldsborough Mort & Co Ltd v Quinn [1910]).
        - To exercise the option, there must be clear and unequivocal communication.
        - The effect is to grant to the option holder an Exclusive Right to decide whether to proceed with the purchase of the property, which is the subject of the option.

Binding Option: A legally enforceable promise to keep an offer open for a certain period of time.
Option Contract: A separate binding agreement where one party pays (or gives consideration) for the right to keep an offer open for a fixed time.
Exclusive Right: An 'exclusive right' means (1) only the option holder has the power to accept, (2) the offeror cannot undermine that right, and (3) the property is effectively "reserved" during the option period.

The withdrawal of an offer does not have to be communicated directly by the person who made the offer. It is enough if the offeree receives reliable information that the offer has been withdrawn.

Dickinson v Dodds (1876)
- Dodds offered to sell property to Dickinson.
- He said the offer would remain open until Friday.
- Before Friday, Dodds sold the property to someone else.
- A third party told Dickinson about the sale.
- Dickinson then tried to accept the original offer.

The Court's Decision
- The offer had already been revoked.
- Even though Dodds did not personally tell Dickinson.
- Dickinson had reliable knowledge that the property was sold.

Therefore, there was no contract, because the offer no longer existed.

<u>EXAMPLE</u>
- Sarah owns a house.
- She gives Tom a 30-day option to buy it for $800,000.
- Tom pays $5,000 for the option (a binding promise/option).

For 30 days:
- Sarah cannot withdraw the offer,
- She cannot sell to someone else, and
- Tom can choose whether to buy.

Tom has the exclusive right to decide. If he says yes within 30 days → A contract of sales forms. If he says nothing → The option expires.