

LST2BSL

Pt. 1 – Lecture Notes

Making a Contract

Contract law is important for business relations.

Contract: is an agreement that is legally enforceable (in court) b/w 2 or more parties that expresses each party's rights & obligations.

Ethics involved in contracts: Contracts involve promises; they create & contain duties; they foster relationships of trust.

Types of Contract:

- Oral or written or a combination, or out of conduct
- All share key elements in common

Key Elements for contract formation:

- *Consensus ad idem* (meeting of the minds)
 - o **Offer:** made by the offeror to the offeree (Only offeree can accept offer). Readiness to contract (to be legally bound) on particular terms; eg 'I'll sell my car to you for \$10,000' not 'I'm considering selling my car'. Distinguishing negotiations & offer can be difficult. Offer made in hope of being accepted by offeree & a contract being formulated. Whether a statement is an offer is determined objectively (would a reasonable person hearing it believe it was an offer); comes down to – importance of statement to parties involved (reliance on statement), language used, finality of statement, general context in which it was made.
Expiry of offer: occurs after a reasonable time or a period specified by the offeror. Offer can be withdrawn at any time by offeror. Responding to an offer by changing the terms is known as a counter-offer (requesting more information is not a counter offer).
 - o **Acceptance:** Can be performed in different ways – express (orally/written), imply (through conduct), via performance (unilateral contracts). Usually communicated to offeror.
Acceptance can be communicated many different ways, such as; fax/email/phone/SMS – all considered 'instantaneous' – or via post, here acceptance is effective when posted not when received (postal-acceptance rule). Offer may specify method of communication for acceptance.
Acceptance cannot occur: through silence/inaction, through a different mode than requested by offeror, when person is not responding to offer or when it is actually a counter-offer – acceptance must show consensus, *consensus ad idem*.
- **Intention to create legal relations (to be legally bound)**
Not all agreements are legally enforceable – for an agreement to be binding, the parties must have intended it be. Intention is ascertained objectively (would a reasonable person hearing it believe the intention). The context of the agreement generally indicates whether the parties intended it to be legally binding – intention always depends on all facts of the case. Context can be

commercial/business context, social/domestic context or charitable/volunteer context.

Sometimes parties use language indicating that they may not yet be ready to be legally bound (eg Conditional Agreement), such as; subject to contract, subject to finance or preliminary/non-binding agreement. This means there might not be an agreement until certain conditions are satisfied or parties may simply be delaying performance.

When parties agree to finalise the agreement in a formal document later ('subject to the preparation of a formal contract of sale'), there are 3 possibilities.

1. Parties have reached agreement & are ready to be bound immediately, and ready for performance. The later written document will simply restate the agreement (a formality).
2. Parties have reached agreement and are ready to be bound immediately, but performance is conditional upon preparing & signing written document.
3. Parties do not intend to be legally bound, unless and until the formal document is prepared and signed.

- **Capacity to contract**

Both parties must have legal capacity (ability) to contract, usually presumed. Some categories of person have limited to no capacity to contract (protection from exploitation), including; mentally ill, intoxicated, some business associations, some gvt authorities, bankrupt & minors.

Minors have a limited capacity to contract; necessities (eg food & housing) and beneficial services (eg education & employment). Effect of this incapacity may vary:

- Voidable: If permanent or involving continuing obligations, minor can avoid contract before turning 18 or within reasonable time after turning 18.
- Void: if not in above categories (necessities, beneficial services, or voidable), Agreement is not legally binding.

- **Consideration:** All contracts must involve an exchange – AKA consideration. As always there are exceptions including; deeds; promissory estoppel). Consideration must be something of sufficient value, such as; a promise (to do/not do something), act/performance of obligation or a practical benefit. Need not be adequate or of the same value – exchanges don't need to be equal. Past consideration is not good consideration this may include; something already done/given in the past, or repeating/performing an existing obligation. Something new must be given in exchange for a new promise. A genuine compromise can be good consideration. Illusory consideration/promises are not good consideration such as; to make a payment 'of an amount to be determined... from time to time'.

Consideration Exceptions:

1. **Deed:** Called formal agreement or contract 'under seal'. It is 'signed and sealed' and witnessed.

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Pt. 2 – Case Summaries

Buckanera v Hawthorn Football Club (p. 195)

Injunction to prevent threatened breach

Background: Buckanera was a football player who was contracted to play for HFC. Part of this contract stated that Buckanera couldn't play for opposition clubs while contracted to HFC. It seemed like Buckanera intended to play for a competing club, HFC sought an injunction to prevent the threatened breach of contract.

Issue: Would the court issue an injunction?

Outcome: The court issued an injunction ordering Buckanera not to play for any club except HFC while contacted there.

Ratio decidendi: An injunction is an order issued to prevent a likely breach of law, including a threatened breach of contract. An injunction will not be issued if it has the indirect effect of enforcing contractual promises like an order of specific performance. In this case, the injunction didn't force Buckanera to play for HFC, like specific performance would, it stopped him playing from opposition clubs – if he didn't want to play for HFC he could earn a living elsewhere.

Carlill v Carbolic Smoke Ball Co (pp. 63, 75, 85-6, 91)

(1) intention to be legally bound, (2) exchange of consideration, (3) offers to anyone (4) acceptance of offer by conduct

Background: Carbolic Smoke Ball Co claimed that their patented 'smoke balls' would prevent influenza. The company published an advertisement in a newspaper stating they would pay a reward of £100 to anyone who use the 'smoke balls' and still got the influenza. The company opened a bank account with £1000 to show their intentions were there. Company refused to pay Carlill as they stated that there was no enforceable contract.

Issue: (1) Was the promise to pay £100 legally binding? (2) Did Carlill provide consideration? (3) Could an offer to everyone be validly accepted by anyone who knew of the offer? (4) How did Carlill accept the offer if there was no direct communication b/w plaintiff and defendant?

Outcome: (1) The promise to pay £100 was legally binding. (2) The act of buying and using the smoke balls was the necessary consideration. (3) If someone learns of the offer before providing consideration then they can accept the offer. (4) Acceptance was given buying purchasing and using the smoke balls.

Ratio decidendi: (1) The advertisement stated that there was a bank account – this showed Carbolic's seriousness. This shows that the promise was intended to be legally binding. (2) An act performed in expectation of a known promise constitutes consideration even though the act is performed before the promise is said to be legally binding: buying and using the smoke balls then catching influenza was consideration by Carlill and therefore, the contract was legally binding. (3) Valid acceptance by anyone who the offer is addressed to creates an enforceable contract: in this case, offer was addressed to everyone and was therefore, validly accepted by Carlill. (4) Carlill performed the required actions listed in the advertisement after reading it, this constitutes acceptance.

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Pt. 3 – Legal Provisions

Section 51: Clear title. Supplier has clear title (the right to sell the goods to the consumer). Also applies outside 'trade or commerce'.

- Section 52: Undisturbed possession (consumer has right to undisturbed possession). Also applies outside 'trade or commerce'.
- Section 53: No undisclosed securities (goods are supplied to consumer free of any encumbrances [securities or charges]). Also applies outside 'trade or commerce'.
- Section 54: Acceptable quality of goods.
- Section 55: Fitness for purpose.
- Section 56: Correspondence with description.
- Section 57: Correspondence with sample.
- Section 58: Repair and spare parts. Manufacturer will take reasonable action to ensure facilities for repair are available for reasonable time.
- Section 59: Express warranties. Manufacturer will comply with any express warranty.
- Section 60: Due care and skill. Services are rendered with good care and skill
- Section 61: Fitness for particular purpose. Where consumer communicates to seller (express/imply) the purpose for which the services are acquired, the services will be reasonably fit for that purpose. Except where consumer does not rely on the seller's skill/judgment to recommend something suitable.
- Section 62: Reasonable time for supply. Where time not specified in contract, services are supplied in reasonable time.
- Section 64: Implied guarantees cannot be contracted out of.
- Section 259(2): Other failure (not major) – consumer can: require supplier to fix. If supplier doesn't then can get 3rd party to fix and recover costs from supplier or reject goods (subject to limit).
- Section 259(3): Major failure – consumer can: reject the goods (subject to limits) or get compensation.
- Section 259(4): Consumer can claim damages from any reasonably foreseeable loss resulting from failure.
- Section 260: A failure is a major failure if a reasonable consumer wouldn't have purchased the good if they knew of problem, or goods don't match description/sample, or goods are unfit for purpose, or goods are unsafe.
- Section 261: A supplier can 'fix' a failure by repairing, replacing or refunding.
- Section 262: A consumer cannot reject goods if: 1) rejection period has passed, or 2) consumer has destroyed products, or 3) goods damaged for unrelated reasons after delivery, or 4) goods attached/incorporated in other property.
- Section 263: Rejecting goods. Consumer notify seller rejection of goods. Goods returned to supplier. Supplier either refunds or replaces.
- Section 267: Actions against suppliers of services. Almost identical to actions against suppliers of goods except instead of rejecting goods, consumer may terminate the contract.
- Section 271: Actions against manufacturers. Where there is a breach of s54, s56, s58 or s59, consumer may recover damages from manufacturer.

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Pt. 4 – Glossary

Distinguished precedent: Precedent is different in a significant way from the new situation.

Divisible contract: Contract which, because of wording, may be divided into smaller agreements so that payment must be made upon the performance of each smaller agreement.

Doctrine of precedent: When deciding new cases judges must follow decisions made by higher courts in the same hierarchy. Only follow *ratio decidendi* not *obiter dicta*.

Duress: Illegitimate pressure brought upon by threats etc.

Exclusion clauses: A term within a contract which limits or excludes liability.

Exclusive powers: Law making powers exercised only by the commonwealth government.

Executive branch of government: This is the Crown, the chief minister & the cabinet of ministers that control government departments. They administer/execute legislation, thereby putting government policies into effect.

Express terms: Terms which are said or written.

Extrinsic materials: Relating to “The Purpose Approach”, materials from outside the legislation, such as; memoranda, the Minister’s second reading speech.

Federal system of government: there are three types of law making powers relating to different levels of government; exclusive powers, shared/concurrent powers & residual powers.

Fraudulent misrepresentation: See ‘Deliberate misrepresentation’.

Freedom of contract: This is a principle which tells us that parties are generally free to include any terms they want into a contract.

Frustration: When something occurs after the contract is created (a supervening event) that makes performance impossible or fundamentally different from what was intended – not just a small change in circumstances, where the risk of such a change was foreseeable and taken on by parties (eg weather, price changes). Not deliberately caused by one party.

Golden Rule: If “The Literal Approach” gives an absurd/irrational outcome then the court can take a common-sense approach.

House of Origin: The house, in bicameral legislature, where legislation is introduced.

House of Review: The house, in bicameral legislature, where legislation is passed after acceptance by the House of Origin.

Immediate Loss: See ‘Direct loss’.

Implied terms: Terms which are taken to be agreed upon even if never discussed/written. Can be universal (apply to all contracts), generic (apply to a genre of contracts) or implied ad hoc (apply to 1 contract).

Incomplete performance: See ‘Partial performance’.

Injunction: a court order to do (or not to do) something.

Innocent misrepresentation: Misrepresentation made unintentionally (no dishonesty) and not carelessly (no negligence). May or may not be rescinded.