

**UNIVERSITY OF AUCKLAND**

**INTRODUCTION  
TO THE LAW OF CONTRACT  
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## INTRODUCTION TO THE LAW OF CONTRACT

### INTRODUCTION

1. The aim of this short course is to provide an introduction to the central principles of New Zealand contract law. The law of contract underpins both small and large-scale economic activity. Buying a candy bar, the purchase of a home, the lease of a factory or the chartering of a ship, are all dependent upon contract law. In New Zealand, legal principles are founded on the principles developed at common law in England. As a colony, New Zealand imported English common law. However, while the foundations remain firmly in place, New Zealand contract law does have some distinctive features, notably the various contract statutes which codify common law principles and, in some areas, greatly simplify them. Perhaps the contract statute which is most regularly referred to in the courts is the Contractual Remedies Act 1979 which governs the cancellation of contracts for breach or for misrepresentation. Perhaps the most common questions which a practising lawyer hears from clients in the contract area are:

- What does our contract mean?
- Can we cancel the contract or are there other grounds upon which to get out of the contract?
- If there is a breach of contract, what is our claim worth?

2. These questions translate, for lawyers, into questions of interpretation, cancellation or vitiation and damages. This short course will cover other important areas, but it is worth keeping these key areas in mind.

### DO WE HAVE AN AGREEMENT?

3. While disputes as to whether a binding contract has, in fact, been formed are relatively rare, they do occur from time to time. The approach at common law is to examine the dealings between the parties to see whether objectively the parties have reached an “agreement”. As with other areas of contract law, the approach involves examining the dealings and what they convey to a reasonable person, not

the subjective wishes or desires or intentions of the parties. For there to be a valid contract, there are a number of fundamental requirements:

- Offer and acceptance.
- Consideration.
- An intention by the parties to create legal relations in their contract.
- The capacity of both parties to contract.
- A contract which is lawful.

#### **OFFER**

4. To constitute an offer, a communication must be sufficiently certain in identifying a contracting party and the proposed essential terms of the contract and indicate an intention that the party making the offer will be contractually bound if there is an acceptance. An offer has to be distinguished from an invitation to treat which is not an offer, but merely an invitation to another party to make an offer which can then be considered. There are many areas where a communication has been held to fall short of being an offer – displaying goods in a self-service shop, advising of a pricing indication, requesting tenders. In all those situations, the communication invites an offer from the person receiving it.
5. Some communications which might appear not to be binding, have been held to amount to offers. An advertisement which promises to pay a sum of money to anyone who performs certain specified acts will be an offer which is capable of being accepted by doing the acts required. While a mere request for tenders will not be an offer, an invitation to submit tenders for consideration, where the request for tenders says that a party inviting tenders will abide by a precise tender process, it may give rise to an initial contract in requiring the party seeking tenders to keep to the promised tender process. Similarly, if a request for tenders says that the highest tender would be accepted, this would be an offer capable to accept the highest conforming tender which would be accepted by the submission of a tender.

**LAPSE**

6. An offer will not last forever. If it contains a stipulated date upon which it will expire, then that will govern the situation. Alternatively, an offer can lapse after a reasonable period of time. Determining whether an offer has lapsed is a question of construing the offer in the contractual context.

**ACCEPTANCE**

7. To be valid, an acceptance must be unqualified and unequivocal. If the acceptance introduces new terms, it will not be an acceptance but a counter-offer which is said to “kill” the initial offer. Determining whether a response amounts to an acceptance will, again, be a matter of interpreting the document objectively.
8. An acceptance has to be communicated to the offeror. Acceptance can be by words or conduct but something must be communicated. Simply thinking that you accept is not an acceptance. An acceptance of an offer may not result in a binding contract, if the intention of the parties was not to be bound until a formal written contract was entered into, or, it was established practice for formal documents to be drawn up and completed before there could be a binding contract.

**POSTAL RULES**

9. Where the post is used to send an acceptance, the “postal rule” would apply. This rule means that there will be an acceptance when a document containing the acceptance is posted rather than when it is received by the offeror. Of course, the offer itself can stipulate that acceptance will only be effective when it reaches the offeror, or, in all the circumstances, the dealings may show that the parties could not have intended there to be a binding contract until the acceptance was actually communicated.
10. Where instantaneous communications are used, or the parties are speaking to each other, acceptance will take effect when it is received. Where electronic communications are used, the time at which a communication will be received by a party is set down by statute in the Electronic Transactions Act 2002. If the offer stipulates the way in which it is to be accepted, then, there will be no contract unless acceptance is carried out as stipulated.

11. The established approach to the area is to look at the communications between the parties and work out whether, on the communications, a contract has been entered into. This involves identifying the offer and acceptance. There is some support for the power of the courts to look at communications in a more general way and make an overall assessment to determine whether a contract has been formed but generally this looser approach has not found favour.
12. If a court finds that an offer has been accepted and the parties did intend to be immediately bound, then the court will try to give effect to that intention by interpreting the relevant documents notwithstanding omissions or ambiguities. A binding contract will require agreement, express or implied, or agreement on the means of reaching agreement, on all legally essential terms and those terms which the parties considered to be essential. If parties say that essential terms are not agreed, then there can be no binding contract at that stage. A court will not imply terms to fill in gaps where negotiations are, in truth, required to reach a binding agreement. If the agreement reached is vague or ambiguous, while the court will try to give effect to what the parties plainly considered would be a binding agreement, it will not write in essential terms or correct vagueness or ambiguity which makes the determination of meaning impossible.

### **CONCLUSION**

13. For there to be an enforceable contract, the parties have to give, what the law calls, consideration for the contract. This has been described as “either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”. Both parties have to provide something of value in exchange for the promise of the other for there to be a binding contract.

### **INTENTION TO CREATE LEGAL RELATIONS**

14. There must also be present an intention on the part of the party to create legal relations. It is rare that an agreement fails for want of an intention to create legal relations. There is a presumption that contracting parties, who have made promises in exchange for good consideration at arms length, do intend to create legal relations. However, this can be rebutted by producing clear evidence to the contrary. By way of example, an agreement may be expressed in wording which

indicates that the promise given is not intended to be legally enforceable (letters of comfort and letters of intent). In the context of family or domestic arrangements, the circumstances may mean that an apparent agreement or arrangement was not intended to be contractually binding and enforceable before the courts.

### **CAPACITY**

15. If a party to an agreement does not have capacity to enter into it, the contract may be rendered voidable. Lack of capacity may come in various forms – persons who are intoxicated or otherwise of unsound mind and persons who are under the age of 18 years.

### **LAWFUL**

16. A contract must also be lawful if it is to be upheld. If a contract is prohibited by statute or under common law principles, it will be void and of no legal effect. Under the Illegal Contracts Act 1970 it is possible to obtain relief in circumstances where a contract is found to be illegal. Common law principles of illegality reflect matters of public policy and make certain kinds of agreement void – contracts to perform a tort or a crime, contracts for sexually immoral purposes, contracts which are entered into to prejudice the administration of justice, contracts which defraud the revenue, contracts which prejudice good government. There are also some kinds of contracts or contract terms which are void at common law. Parties cannot agree to preclude the intervention of the courts (although they can, of course, agree to the arbitration of disputes). Nor can parties enter into agreements which are in restraint of trade. Agreements in restraint of trade are void unless justified on grounds of public policy.

### **THE FORM OF A CONTRACT**

17. Generally, a contract can be in writing or oral or partly in writing and partly oral. There are, however, situations where a contract has to be in writing. If an agreement is made by deed, the requirements under the Property Law Act 2008 must be fulfilled. Contracts for the sale or lease of land and contracts of guarantee must meet the requirements for writing under the PLA.