

CONTRACT FORMATION

Elements of an agreement

For there to be a valid agreement, it must be clearly identified that one party has made an **OFFER** and the other party has **ACCEPTED** that offer. An agreement must be certain.

OFFER

- A clear statement of the terms on which an offeror is prepared to be contractually bound
- “As long as the alleged offer is clear, definite and leaves nothing open for negotiation it constitutes an offer” (*Lefkowitz v Great Minneapolis Surplus Stores*)
- Objective test: used to determine whether the alleged offeror stated the terms on which they are prepared to be bound if the other accepts (*Tooheys v Blinkhorn*)
- It will not be an offer if it was a mere puff (*Carlill v Carbolic Smoke Ball Co*) or an invitation to treat (*Pharmaceutical Society of Great Britain v Boots Cash Chemists*)

An offeree may:

- Accept
- Reject
- Make a counter offer
 - Battle of the forms: for companies using standard form contracts each new form is a counter offer and the terms of the offer will be contained in the last form submitted (*Butler Machine Tool Co Ltd v Ex-Cell-O Corp*)
- Seek more information (*Harvey v Facey*)
- Ignore the offer and do nothing

How can an offer be terminated?

1. Revocation:

→ offeror can only revoke the offer acceptance has not occurred (*Dickinson v Dodds*)

→ only effective when it is received by the offeree – however notice need not be personally given (*Dickinson v Dodds*)

→ Where the offer has been made to a large group of people the revocation should be done in the same manner as the original offer (*Shuey v United States*)

2. Rejection

→ the offer will terminate if expressly or impliedly rejected.

→ words OR conduct sufficient (*Brambles*)

3. Lapse of time

→ the offeror imposes a time limit for acceptance and acceptance has not occurred or;

→ a reasonable time for acceptance has expired (*Ramsgate Victoria Hotel Co v Montefiore*)

4. Change of circumstances

- situations change and the offeror may not want their offer to continue
- of course a new offer may be made

5. Failure of a condition

- problems occur when condition precedent to acceptance is not met
(*Commonwealth of Australia v Antonio Giorgio Pty Ltd*)

6. Death of a party

- If offeree knows of offeror's death generally cannot accept (*Fong v Cili*)
- If offeree does not know of the offeror's death: may be able to accept still (*Bradbury v Morgan*)

7. Supervening incapacity

- if something happens (eg. Mental disability) after the offer is made, but before acceptance, that renders the offeror incapable of performance, then the offer will terminate

ACCEPTANCE: a final and unqualified assent to the terms of an offer, made in the manner specified in the offer, or indicated by the offeror

Rules of acceptance:

- can only be accepted by those persons to whom the offer is made and who have the offer 'in mind' at the point of the acceptance (*R v Clarke*)
- only what has been offered can be accepted
- acceptance must be unequivocal (the offer and acceptance must correspond)
- if some detail is added that does not affect the terms of the offer, then it may be a valid acceptance (*Carter v Hyde*)
- if a detail is added that is purely for the benefit of the offeror, then this may be a valid acceptance (*Boreland v Docker*)
- acceptance must be generally communicated by the acceptor or their authorised agent (*Powell v Lee*)
- acceptance may be communicated by words or actions (*Empirnall Holdings v Machon Paull*)
- the offeror can require acceptance in a prescribed manner (*George Hudson Holdings Ltd v Rudder*)
- the mode of acceptance can be implied from the circumstances (*Howard Smith and Co v Varawa*) eg. Get the offer by mail and reply by mail
- where no mode of communication is prescribed, what is a valid acceptance depends on the nature of the offer and the circumstances of its making
- REVOCATION: an acceptance can be revoked given that the revocation comes to the offeror's attention before he or she receives the acceptance.
- Generally silence can not be stipulated as the required means of acceptance (*Felthouse v Bindley*).

An offeror can waive the right to have the acceptance communicated (*Carlill*) (waiver assumed in unilateral contract). A waiver of communication of acceptance occurs where:

(a.) the offer stipulates a mode of acceptance that does NOT require communication;
AND