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Topic 2 – Formation: Agreement

Formation Topics 2–8
Read: Text [PtlI.05] p 51
Is there agreement? <ul style="list-style-type: none"> • Identify the offer • Find the corresponding acceptance
Consideration <ul style="list-style-type: none"> • Who must provide consideration? Have they? • Is it sufficient consideration?
Intention to be legally binding <ul style="list-style-type: none"> • Looking objectively at all the relevant circumstances, do the parties intend to be legally bound?
Certainty <ul style="list-style-type: none"> • Is the contract complete? • Are the terms agreed to certain? • Are the promises exchanged illusory?
Written formalities <ul style="list-style-type: none"> • Must this contract conform to written formalities? • If so, have the formalities been met?
Capacity <ul style="list-style-type: none"> • Do the parties to the contract have the capacity to contract?
Has formation of the contract failed? <ul style="list-style-type: none"> • Is there an equitable estoppel? • Is there a right to claim restitution?

FORMATION

Has there been an **agreement** between the parties? (*offer, acceptance & certainty*)

Is there an agreement supported by **consideration**?

Is there an **intention to create legal relations**?

Have all applicable **written formalities** been met?

Do the parties to the agreement have **capacity**?

For an enforceable contract to come into existence, 4 essential requirements must be satisfied:-

1. The parties must reach an **agreement**
 - a. The requirement of an agreement is often expressed in terms of offer & acceptance – one party must make an offer that is accepted by the other party
2. Each party must provide **consideration**
 - a. Each party must give something in return for the promises made by the other
3. It must appear objectively that the parties **intend the agreement to create legal relations** between them
4. The agreement must be **complete & certain**

Satisfaction of these 4 requirements shows that the parties have reached a consensus, that they have struck a bargain that involves an exchange, that they intend their actions to have legal consequences and that they have identified their respective obligations with sufficient precision

THE OFFER – SG16 & Activity 2.1

‘an expression of willingness to enter into a contract on certain terms’ (Paterson et al) – TXT54

Offeror = person making the offer

Offeree = person accepting the offer

Advertisement = a display of goods is merely ‘an invitation to treat’ (potential offerors)

IS IT AN OFFER?

- An offer is an expression of willingness to enter into a contract on certain terms
- An offer can lead to the formation of a unilateral contract (*Carlill*)
 - Or it can lead to a bilateral contract (both parties have outstanding ‘promises’ to keep)
- An offer can be made to the world at large – provided objectively that it is what is intended by the offerer (*Carlill*)
- An offer must be distinguished from a conditional gift (*Carlill*; cf *Australian Woollen Mills*)
- An offer must be distinguished from an invitation to treat (*Boots & Fisher*)
- An offer must be distinguished from a request or supply of information (*Seppelt*)
- Note the particulars around shop sales, auctions, tendering processes & the ‘ticket cases’ – TXT58

Brambles Holdings Ltd v Bathurst City Council – an offer must take the form of a proposal for consideration which gives the offeree an opportunity to choose between acceptance & rejection (Heydon J suggested in obiter)

Carlill v Carbolic Smoke Ball Co (1893) – Unilateral Contract = the courts confirmed that an offer can be made to the world at large, provided objectively that it was what was intended by the offeror - when courts are deciding whether an offer has been made they use an objective test & consider whether a reasonable person in the same circumstances would have thought the conduct was an offer - see TXT55 for story behind the case & Activity 2.1 for case summary & Qs

Australian Woollen Mills v Commonwealth – *Carlill*’s case needs to be distinguished from this case because in certain cases it may not be an offer but it may be a conditional gift (someone is giving you a gift on condition that certain acts are performed) a gift is different from a contract b/c it is voluntary and can be revoked – Activity 2.1(5)

HOW LONG WILL IT LAST?

Withdrawal (TXT65)

- ✓ An offer may be revoked at any time before it is accepted
- ✓ A promise to hold an offer open for a specified period of time is not binding unless the offeree has given consideration for that promise (*Dickinson v Dodds*)
- An offer remains alive until withdrawn by the offerer (*Dickinson v Dodds*)
 - The revocation/withdrawal is effective only once it has been actually communicated to the offeree (but see *Dickinson v Dodds*) - no exception is made for withdrawal sent by post – see *Byrne & Co v Leon Van Tienhoven & Co (1880)*

- An option which is supported by consideration cannot be revoked (*Laybutt v Amoco*)
- Once an offer is accepted, the contract is formed & becomes binding
- The offer will remain open for the period specified or for a reasonable period of time
- The offer may be subject to a condition expressly stated by the offeror; or by a condition inferred from the situation (*Financings v Stimson*)
- **OPTIONS** - Where the offeree gives the offeror some form of consideration (ie. sum of money) to keep the offer open for a certain time (*Goldsborough Mort & Co Ltd v Quinn (1910)*)

Lapse (TXT67)

- An offer lapses after a reasonable period of time has passed or on the basis that the Court can infer rejection from the offeree's failure to accept the offer within a reasonable time (see *Manchester Diocesan Council for Education v Commercial & General Investments Ltd (1970)*)
- Most offers die when either party dies
- If the offeror dies, then the offer may still be accepted if the offeree accepts before they receive notice of the death (*Fong v Cilli (1968)*)
- If the offer is rejected it will lapse
- **OPTIONS** – there is a presumption that the death of the option holder does not prevent the option from being exercised by the option holder's personal representative (*Carter v Hyde*)
 - However if the option is personal to the option holder, then the option lapses
 - Gibbs J suggests that since an option is in essence a conditional contract, it can be enforced against the estate of a grantor, unlike an ordinary offer (*Laybutt v Amoco Australia Pty Ltd*)

Failure of Condition (TXT67)

- Where the offeror makes an offer subject to an express or implied condition the condition must be satisfied before the offer can be accepted
- *Financings Ltd v Stimson* – 'implied condition approach' is the traditional method of dealing with cases in which circumstances change between the making and acceptance of an offer (but is not the only approach)

Rejection & Counter Offer (TXT68)

- If the offer is rejected, it is no longer available for acceptance (*Tinn v Hoffman & Co (1873)*)
- a counter offer is seen as a rejection of the original offer, but an inquiry about the possibility of altering contractual terms or inquiring for further information will not (*Stevenson Jaques & Co v Maclean; Butler Tools*)

Unilateral Contracts (TXT56 & 69 & SG16 & Activity 2.1)

- The offeror makes a promise which requires the offeree to engage in certain acts which will constitute acceptance
- An offeror cannot revoke an offer once the offeree has commenced performance (*Veivers v Cordingley*)
- An offer of a unilateral contract can be revoked, except if an implied contract or an estoppel can be shown by the offeree (*Mobil Oil Australia v Wellcome International Pty Ltd*)

OFFERS & INVITATIONS TO TREAT – SG16 & TXT58 & Activity 2.2

- We need to distinguish an offer from an ‘invitation to treat’
- An invitation to treat is only a request that the other party make an offer or enter into negotiations
- *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd (1953)* – P argued the display of goods should be regarded as an offer, which was accepted when a customer took an item from the shelf and placed it in their receptacle. Court of Appeal rejected the argument on the basis that customers must be entitled to return and substitute articles they have chosen from the shelves – TXT58
- *Goodwin’s of Newtown Pty Ltd v Gurrey (1959)* – D was held to have been ‘offering goods for sale’ in breach of the *Early Closing Act 1926 (SA)*, although the D’s conduct amounted to no more than invitation to treat – the D displayed TV sets with marked prices and provided info to prospective buyers but were told the sets on display were not for sale, but an equiv set could be purchased from the D at the marked price – TXT59
- s35(2) ACL – requires a corporation that has advertised goods or services for supply at a specified price to ‘offer such goods or services for supply’ at that price for a reasonable time and in reasonable quantities

Auctions

- The holding of a public auction will usually be regarded as an invitation to treat
- Each bid constitutes an offer & the auctioneer communicates acceptance of the final bid by the fall of the hammer
- This means that no contractual claim can arise if the auction is cancelled (*Harris v Nickerson (1873)*)
- A bidder is entitled to withdraw their bid before it is accepted (*Payne v Cave (1789)*)
- The auctioneer is not obliged to sell to the highest bidder (*AGC (Advances) Ltd v McWhirter (1977)*)
- s60 Sale of Goods Act 1923 (NSW) – a sale of goods auction is complete when the auctioneer announces its completion and, until such an announcement, a bid may be retracted
- *AGC (Advances) Ltd v McWhirter* – it was held that at announcement that an auction was going to be held without reserve did not alter the general rule – the holding of an auction without reserve did not constitute an offer and did not bind the vendor to sell to the highest bidder – TXT59

ACCEPTANCE – TXT71 & SG18

‘an unqualified assent to the terms of an offer’ (Paterson et al)

WHAT IS ACCEPTANCE?

- An offer may be accepted by way of words or conduct
- The acceptance must be unqualified – the offeree must agree to the terms set out in the offer
- There must be no need for further negotiation btw the parties about the terms of the offer

- A contract is said to come into existence when acceptance of an offer has been communicated to the offerer (*Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957))
- The offeree must be **conscious/aware of the offer in order to accept it** (*R v Clarke*)
- Conduct will not amount to acceptance if it was not carried out **in response** to an offer: *R v Clarke* – **Activity 2.3**
- Acceptance can be inferred from the offeree's conduct (*Empirnal Holdings*)
 - But generally silence does not lead to an inference or acceptance (*Felthouse v Bindley*)
- To be effective, the acceptance must be in exactly the same terms that the offer was made in (*Turner Kempson*) and if specified must be communicated in the manner or method specified in the terms of the offer (*Manchester Diocesan Council*) – **SG20**
- What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*)
- An acceptance generally has effect only when communicated to the offeror (*Latec Finance Ltd v Knight*)
- The offeree must communicate their acceptance to the offeror except if the offeror has dispensed with notice, or if the postal rule applies (*Adams v Lindsell*)
- Facsimiles are considered an instantaneous form of communication so acceptances sent by fax are effective only when it is received by the offeror (*Reese Bros Plastics Ltd v Hamon-Sobelco Australia P/L* (1988))
- Emails – it has not been authoritatively determined, although it has been suggested by way of obiter dictum that email should be treated like other forms of instantaneous communication (*Olivaylle P/L v Flottweg AG (No 4)* (2009))

Postal Rule:

- it has the effect that a contract is made when the acceptance is posted, even if it is received some time later or is lost in the post – **TXT75**
 - it also means the contract is formed at the place where the acceptance is posted
 - it only applies where the offeror intended that the acceptance could be communicated by the post
 - only applies to letters & telegrams
 - it does not apply to instantaneous forms of communication such as emails, fax or telephone (*Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* (1983))
 - in instant forms of communication, the direct communication or awareness of the communication by the offeror would be needed
 - In this case they accepted the principle in *Entores v Miles Far East Co* where in the case of instantaneous communication, which included telex, the formation generally occurs in the place where the acceptance is received
- there are occasions where the Courts will find that actual communication was required despite the possibility that the post could have been used (*Bressan v Squires* (1974))
- Take note of the rules around communication of acceptance by 'modern communications'

- Postal rule should not apply to instantaneous forms of communication such as the telephone (*Hampstead Meats P/L v Emerson & Yates P/L (1967)*) and telex communications (*Express Airways v Port Augusta Services (1980)*)

MEETING OF THE MINDS – ‘Consensus at idem’ – **TXT85**

‘acid test’ of Brambles Case – **CB76**

- For a contract to be determined there must be a ‘meeting of the minds’
 - there must be an acknowledged agreement by both parties to enter into legal relations
- To determine whether or not a contract had been made, Heydon JA in *Brambles Holdings Ltd v Bathurst City Council (2001)* applied the ‘acid test’
- ‘acid test’ = whether in all the circumstances an agreement can be inferred
 - Whether mutual assent has been manifested
 - Whether a reasonable person in the position of each of the parties would think there was a concluded bargain

Method of Acceptance

Manchester Diocesan Council for Education v Commercial & General Investments Ltd (1970) - Where an offeror requires acceptance to be by a particular method the terms of the offer must insist clearly that only acceptance in that mode will be binding

FLOWCHART SUMMARISING THE TOPIC

