

## 1. Contract Part 1 Agreement

### Elements:

- (1) **Agreement** – offer & acceptance
- (2) **Consideration** – must be sufficient, cannot be past/existing duty
- (3) **Intention to create legal relationship** – social/domestic/commercial

### Other relevant:

- subject to contract
- incompleteness & uncertainty
- promissory estoppel
- formal contract requires for writing
- contractual capacity
- legality

### 1.1.1 Offer

= a clear statement of the terms on which an offeror is prepared to be contractually bound without further negotiation

- The offer must be **communicated** by the offeror or an authorised agent of offeror to offeree: [Henthorn v Fraser](#)
- However, it is not necessary for an offer to be made to a specific person or a class or group of people. An offer can be made to "**all the world**", in which case the offeree is regarded as a member of the general public: [Carlill v Carbolic Smoke Ball](#)
- The fact that the word 'offer' is used is not itself conclusive:  
[B Seppelt & Sons Ltd v Commissioner for Main Roads](#)
- An offer must be distinguished from "**an invitation to treat**", which is preliminary communication between parties that invites further bargaining, they are merely an invitation to make an offer: [Pharmaceutical Society v Boots Cash Chemist](#)
  - **Advertisements**
  - **Price lists**: [Granger & Sons v Gough](#)
  - **Display of goods in shop windows**: [Fisher v Bell](#)
  - **Auction**
- An offer must be distinguished from a **supply/request of information**: [Harvey v Facey](#)

### 1.1.2 Duration of offer (revocation)

- Offer may be **revoked before acceptance**: [Goldsborough Mort v Quinn](#)
- Will only be effective when **communicated to/received** by the offeree, before acceptance: [Ryne v Van Tienhoven](#)  
Or when the offeree **becomes aware** of the revocation:  
[Dickinson v Dodds](#)
- The revocation does not necessarily by given by the offeror himself, and can be **implied** from words or conduct:  
[Dickinson v Dodds](#)
- However, if the promisee **paid a consideration** to keep the offer open or if the promise to keep it open has made by **deed**, the offeror will not be able to withdraw the offer:  
[Goldsborough Mort & Co Ltd v Quinn](#)
- In terms of unilateral offer, if the performance of the offer itself benefits the offerees, the revocation while offeree is **in the process of acceptance** can be effective, but will render the offeror liable in damages to the offeree:  
[Mobil Oil Australia Ltd v Lyndel Nominees Pty Ltd](#)
- A mere inquiry is not a rejection to the offer: [Stevenson Jaques & Co v McLean](#)

- **Counter-offer** kills the original offer: [Hyde v Wrench](#)

## 1.2 Acceptance

= final and unqualified assent (accept only what was offered) by the offeree to the terms of the offer

- Acceptance must be in reliance on the offer (this means that all the time of acceptance, the offeree must **know of the existence of the offer** and the acceptance must be based on the offer made): [R v Clarke](#)
- Acceptance must **correspondent** with the offer, any departure from the offer will amount to a 'counter-offer': [Butler Machine Tool Co Ltd v Ex-Cell-O Corporation \(Eng\) Ltd](#)
- **Implied acceptance** by acting consistently with the terms of the offer: [Brogden v Metropolitan Railway Company](#)
- **Communication** of acceptance is required (bilateral): [Felthouse v Bindley](#)

### EXCEPTIONS are:

- Where an offeree with a reasonable opportunity to reject the offer of goods or services **takes the benefit** of them under circumstances which **indicate** that they were to be paid for in accordance with the offer: [Empirnall Holdings v Machon Paull Partners](#)
- In unilateral contract, acceptance takes the form of **performance**: [Carlill v Carbolic Smoke Ball Co](#)
- **Postal acceptance rule**: when the parties **contemplated** that acceptance would be communicated by mail: [Henthorn v Fraser](#)  
acceptance will be complete when the letter is posted – contract on the date posted (even if the letter is lost in post or the offeror does not receive it)  
[Bressan v Squires](#)
- **Silence** is no acceptance: [Felthouse v Bindley](#)

## 1.3 Consideration

= the price paid by one party for the other party's promise, can be an act, promise or forbearance

- Must be referable to the promise and must be part of the bargain: [Australian Woolen Mills v Commonwealth](#)
  - Must **move from the promisee** (but not necessarily to the promisor): [Coulls v Bagot's Executor and Trustee Co Ltd](#)
  - Must be **sufficient**, i.e. be of some value, cannot be illusory but not necessarily to be (commercially) adequate: [Chappell & Co Ltd v Nestle & Co Ltd](#); [Thomas v Thomas](#)
  - **Past consideration** is not good consideration – cannot enforce promise made after contract complete: [Roscorla v Thomas](#)
- Exception:**
- when the act was done in the past, there is an understanding/intention between two parties that the services **would be paid for**, then the recipient of the benefit of the services may come under an obligation to make restitution: [Re Casey's Patents](#)
  - Consideration cannot be **illusory**, cannot be too vague: [White v Bluett](#)
  - **Performance of public duty** is not good consideration: contra [Glasbrook Bros Ltd v Glamorgan County Council](#)
  - **Performance of existing contractual duty** is not good consideration: [Stilk v Myrick](#); contra [Hartley v Ponsonby](#)
  - **Exceptions:**
    - However, a promise to perform an existing obligation can constitute good

- constitute good consideration where there are **practical benefits to the promisee**: *Williams v Roffey Bros & Nicholls (Contractors) Ltd*
- Promise to perform the existing duty to a **third party** may be good consideration if it is a benefit to the promisor: *Ward v Byham*
- **Part payment of existing debt** is not good consideration: *Foakes v Beer*
- **Forbearance to sue** or to compromise is a good consideration, but **cannot threaten to break** existing obligation to get more out of the other side: *Wigan v Edwards* contra *Musumeci v Winadell* (continue to pay rent, but by a less amount)
- Formal contract can be enforced without consideration

#### 1.4 Intention to create legal relationship

- Intention is ascertained by an **objective test**:  
*Ermogenous v Greek Orthodox Community of SA*
- The presumption of **no intention** applies in domestic contexts involving **family members or friends**: *Cohen v Cohen*; *Balfour v Balfour (husband & wife)*; *McKean v Thomas (neighbour)*
  - However, the presumption may be rebuttable, and the **burden of proof** lies on the party who alleges there was a contract:  
*Ermogenous v Greek Orthodox Community of South Australia*
  - consider:
    - the circumstances in which the agreement was reached;
    - the express terms of the agreement
- In **commercial context**, the general presumption is that commercial transaction attracts intention to create legal relations:  
*Esso Petroleum Ltd v Commissioners of Customs & Excise*; *Chappell & Co Ltd v Nestle & Co Ltd*
- However, an **honourable clause** may make the agreement unenforceable in law, which is a clear statement that no intention to create legal relations  
*Jones v Vernon Pools Ltd*
- In terms of letter of comfort, it should be construed objectively to check the parties' intention: *Banque Brussels Lambert SA v Australian National Industries Ltd*

#### 1.5 Subject to contract

= where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract

The case may belong to any of three classes: *Meehan v Jones*

An objective test:

- (1) parties have reached finality in arranging all the terms of their bargain and intended to be immediately, and the terms will be **restated in a more precise form but not different in effect**. --- **BINDING**
- (2) parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to what they have agreed, but **performance suspend until a formal contract is executed**. --- **BINDING**
- (3) The intention of the parties is **not to make a concluded bargain** at all, **unless and until they execute a formal contract**. --- **NOT BINDING!!**  
(conditional acceptance = conditional on the final formal contract = no final and unqualified acceptance to the offer)

- There is also a 4<sup>th</sup> category, although not recognized by the HC. The parties are content to be bound immediately and exclusively by the terms which they have agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms. --- BINDING.

### 1.6 Incompleteness & Uncertainty

**Incompleteness** = some important part of the transaction is not yet to be agreed on

**Uncertainty** = no sufficiently precise and clear meaning of the language

**Illusory promise** = performance depends on the unfettered discretion of one of both parties

So long as there is intent and agreement on points possible, the court will try to imply into the contract the terms relating to the essential matters.

- Where the agreement has partly performed or has previous record, courts will be reluctant to hold it void for uncertainty, and operative by relying on **past dealings**: Hillas v Acros
- A contract is void if the term is **uncertain and not severable**: Whitlock v Brew
  - If can be **severable**, contract operative without the problem clause: Nicolene Ltd v Simmonds
- An **agreement to negotiate** in the future on some fundamental matter is too vague to be enforced: Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd
  - However, an agreement to negotiate, if **made in good faith**, maybe enforceable depending on its terms and construction: United Group Rail Services Ltd v Rail Corporation

### 1.7 Promissory estoppel

= party is not allowed to break the promise

If there is a promise made without consideration that promise may still be binding where estoppel applies.

**Elements** (when no pre-existing legal relationship): Waltons Stores (Interstate) Ltd v Maher

- (1) D had **induced the plaintiff** to adopt that assumption or expectation ---- By clear and unambiguous promise or representation;
- (2) P assumed or **expected a particular legal relationship** in which the defendant was not or would not be free to withdraw ---- Assumption;
- (3) P made an act or omission **in reliance on that assumption** or expectation ---- Reasonable reliance;
- (4) D **knew or intended** him to do so;
- (5) This will lead to **detriment for P** if D does not fulfil the assumption or expectation -- -- Detrimental reliance;
- (6) D **fails to act to avoid** the detriment whether by fulfilling the assumption or expectation or otherwise ---- Unconscionable
- **Silence** may amounts to a representation which lead to the operation of promissory estoppel: Waltons Stores (Interstate) Ltd v Maher
- *However, promissory estoppel is not allowed when there is a clear contradiction to the intention of the parties: Austotel v Franklins*

### 1.8 Formal requirements for writing

= Conveyancing Act (NSW) 1919 s54A

- Contract **relating to interest of land**: e.g. sale/lease
- Does not require the contract itself to be in writing, that there is **written evidence** of it, otherwise the contract is unenforceable

- The “note or memorandum” can come into evidence after the contract was made, and no need that it is indented to provide evidence of the contract: [Popiw v Popiw](#)
- The note must contain all the material terms of the contract, and the failure to include a material term in the oral contract will mean that the note is insufficient:  
[Pirie v Saunders](#)