

CONTRACT FORMATION

AGREEMENT - OFFER & ACCEPTANCE

Types of contracts

Bilateral contract

- Two parties to the contract
- Both parties exchange a promise or set of promises for each to do something in the future
- Both A and B's promises are **executory** (i.e. to be performed at some point after the contract is formed)

Unilateral Contract

- Two parties to the contract
- A promise made in return for performance
- At time contract formed, A's obligation/promise is **executory** and B's obligation has been **executed** (i.e. already performed).
- *Carlill v Carbolic Smoke Ball; Mobil Oil v Wellcome*

OFFER

Definition:

- "An offer may be described as the indication by one person to another of his or her willingness to enter into a contract with that other person on certain terms" - Carter, Peden & Tolhurst, *Contract Law in Australia* (6th ed, 2013) [3-07]
- "A proposal only amounts to an offer if the person making it indicates that an acceptance is invited and will conclude the agreement between the parties" - Paterson, Robertson and Duke – Principles of Contract Law, 5th ed, 2016 (referring to *Restatement of Contracts (2d) (US)*)
- In *Brambles*, Heydon JA suggested in obiter that an offer must take the form of a proposal for consideration which gives the offeree an opportunity to choose between acceptance and rejection.

Parties

- Offeror: person who makes the offer
- Offeree: person to whom the offer is made (i.e. who may accept or reject the offer)

Objective test:

- "An offer is an objective manifestation of willingness to be bound by certain terms, upon the acceptance of those terms by the relevant party" - *Gibson v MCC, per Denning LJ*

What elements distinguish an offer?

- The language must be sufficiently certain and promissory - *Gibson v MCC*
- Must be distinct from a mere puff - *Carlill* (deposit of 1,000 pounds - acted on their offer)
 - A puff is a statement which is so far-fetched that no reasonable person would believe it
- Must be distinct from an invitation to treat - *Boots*

Gibson v Manchester Council (1979 HL)

- No reason here to depart from conventional approach of construing the documents to identify a clear offer and acceptance

Carlill v Catholic Smoke Ball (1893 UK CA)

- Acceptance occurs by performance - acceptance need not be notified before performance.

Crown v Clarke

- Acceptance must be in response to the offer

Unilateral contracts

Ticket cases

- General rule is that ticket is an offer which the passenger can accept or reject after he or she has had reasonable opportunity to accept or reject - *MacRobertson, per Stephen J*

- When advising what approach you think a court would take as to when a contract is formed in a ticket scenario, consider:
 - the particular facts;
 - what arguments each party would make;
 - the conventional approach: considered the usual approach, is that the ticket is an offer which the purchaser can accept or reject after he or she has had reasonable opportunity to accept or reject (as per Stephen J in *Mac Robertson v Commissioner of State Tax (WA)* (1975 HCA))
 - the different approaches taken by the judges in *MacRobertson*;
 - Barwick CJ: no contract because of the exemption clause - in any case, passenger makes the offer by presenting at the airport, and airline accepts by carrying (ie, no contract until passenger provided with a seat on airplane). The ticket is a receipt of the prepaid fare.
 - Jacobs J: ticket is not a contract because ticket is the offer and the sweeping exemption clause
 - the approaches taken in *Baltic* and *Oceanic Sun Line*;
 - *Baltic Shipping* – contract formed when ticket issued to passenger;
 - *Oceanic Sun Line* – contract formed when exchange order issued in NSW by travel agent to passenger (to be exchanged for ticket when boarding ship in Greece).
 - The fact that ticket scenarios raise the issue of how the technical approach of pinpointing a moment of “offer” and “acceptance” can be difficult and artificial.

Invitation to Treat

- The essential difference between an offer and an invitation to treat is the offeror’s intention to be bound by any potential acceptance. Offers embody that intention. Invitations to treat do not
- Is an invitation to others to make an offer or enter into negotiations
- Not an offer because lacks sufficient indication of willingness to be bound.
- In determining whether a statement is an offer, the intention of the alleged offeror is determined by reference to three factors:
 - Terminology used
 - Limitations upon who could accept the offer
 - Limitations upon what was being offered
- Typical categories of invitation to treat:
 - Most advertisements (e.g. catalogues) - but not non contractual implications – e.g. misleading and deceptive conduct
 - Goods displayed in shops (*Boots*)
 - Goods offered for sale online (*Electronic Transactions Act 2000 Vic* s14B) - unless clear intention to be bound by acceptance
 - Property declared “on the market” at auctions (*AGC v McWhirter*)
 - the auction is an invitation to treat;
 - the bid is the offer; and
 - the offer is accepted by the auctioneer’s “fall of the hammer”.
 - Invitations to tender (*Harvela, Hughes Aircraft*)
 - General rule:
 - request for tenders is an invitation to treat;
 - tender from interested supplier is the offer
 - Sometimes the call for tenders may be an offer - *Harvela*
 - Sometimes the call for tenders will create a contract re: tender process - *Hughes Aircraft*
 - If there is a strong element of good faith - *Hughes Aircraft*

Revocation of offer

- General principle: revocation can occur at any time before acceptance, but will only be effective when received by the offeree - *Stephenson v McLean*
- Can occur at any time before acceptance, (even if the offeror promised to keep it open) – *Dickinson v Dodds*
- Effective when it reaches (i.e. communicated to) the offeree (by offeror or some other reasonably reliable source - *Dickinson v Dodds*)

- Revocation needs to be communicated to the offeree
- Exceptions:
 - If consideration has been paid to keep the offer open (options) - *Goldsborough Mort*
 - If there is a promise to hold an offer for the international sale of goods open - (2)(a) if it indicated that it is irrevocable (eg. stating fixed time for acceptance) or (2)(b) if it was reasonable for offeree to rely on the offer as being irrevocable and offeree has acted in reliance on the offer (*CISG Article 16*)
 - If a unilateral contract, performance (acceptance) has commenced, and there is an implied contract not to revoke or an estoppel – *Mobil Oil*

Goldsborough Mort v Quinn (1910 HCA)

- Griffith CJ/ O'Connor J - conditional contract
 - There was a contract to sell the land subject to a condition (i.e. exercise of the option).
 - This is the traditional view followed in subsequent cases
- Isaacs J – two separate contracts
 - option was a preliminary contract to hold the offer open (i.e. an offer with a promise not to withdraw); and
 - the exercise of the option created a second contract to sell the land.
- On either analysis:
 - An option contract (a promise to keep an offer open, for value) is binding, and specific performance can be given.

Mobil Oil v Wellcome Intl Pty Ltd (FFC 1998)

- No offer - statement too vague and uncertain to be a contractual obligation
- There is no general proposition that an offeror can't revoke a (unilateral) offer before acceptance, even where the offeree has commenced performance.
- But there may be times where there is an implied ancillary contract not to revoke the offer once the offeree commences performance (an implied promise not to revoke given in return for consideration of commencing performance) - in which case revocation is still effective and offeror is liable to pay damages for breach of ancillary contract.
- No such implied ancillary contract here because:
 - “commencing” performance is too vague
 - the franchisees did not suffer any substantial detriment
 - the franchisees were already bound to adhere to Mobil franchisee standards

Lapse of offer

- If neither revoked nor accepted, an offer will lapse at the end of a stipulated time
- If no time is stipulated, it will lapse at the end of a reasonable time - a reasonable time depends on context and is determined by an objective test
- The death of the offeror will cause the offer to lapse on the notice of death (however depends on parties' intentions and the circumstances)
 - An offer may still be accepted before notice of death unless personal services required - *Fong v Cilli*
 - Uncertain as to whether an offer will lapse on death of the offeror when offeree doesn't know about the death
 - Option contracts remain enforceable against deceased unless:
 - Personal services of deceased required
 - Intent that the option is not enforceable after death - *Laybutt v Amoco*

Change in circumstances

- Offer made be open or lapse with stipulated circumstances, or if not said expressly it may be obvious to an objective observer that the offer was made on the basis of an event
- A fundamental change in circumstances will cause the offer to lapse - *Dysart (NZ Case)* - however the court did not agree on the conceptual basis of this rule (use cautiously)
- The conditions on which an offer could lapse needed to be communicated directly during negotiations

- Three circumstances where an offer will lapse:
 1. Was the offer subject to an implied condition that it was to remain open only while a particular state of affairs continued?
 2. Will an offer lapse as a matter of law if the circumstances fundamentally change?
 3. Given the terms of the offer, the change of circumstances and the subsequent 'acceptance' viewed as a whole is there an objectively concluded agreement?

Rejection and counteroffer

- Rejection terminates the offer
- A counter offer "kills" the original offer and transfers the onus of acceptance between the parties
- Counter offer needs to be distinguished from a mere inquiry

ACCEPTANCE

Objective test

- "Would the reasonable person consider the parties to have reached agreement having regard to their external manifestations"? *Fitness First v Chong*
 - Does not require "a meeting of minds" between parties (as in the subjective test in *Smith v Hughes*)
 - Signature test is virtually absolute - *Fitness First v Chong*
 - Exception: in unilateral contracts, the subjective intention of the offeree is relevant, and acceptance must be in response to the offer - *Clarke*

Communication of acceptance

General rule: acceptance must be communicated to the offeror - *Latec Finance, per Jacobs JA*

- Exceptions:
 1. Acceptance can be inferred from conduct, regardless of correspondence between the parties - *Empirnall, Brambles*
 2. Offeror dispenses with the need to communicate acceptance
 - In bilateral contracts, clear language needed to dispense requirement to communicate acceptance - *as per Jacobs JA in Latec Finance*
 - In unilateral contracts, acceptance is the act of performance - *Mobil Oil*
 3. Acceptance cannot be inferred from silence - *Felthouse*

General rule for instantaneous communications: communication of acceptance is effective when and where it is received by the offeror - *Brinkinon, Latec Finance*

- Exceptions
 1. **Postal acceptance rule** for non-instantaneous communications: acceptance occurs when letter posted - *Adams v Lindsell*
 - Courts generally consider instantaneous communication as 'telephone, telex, fax, email, text, communication via interactive websites', and non-instantaneous as 'postal mail and telegraph', but this is not a universal rule *Lord Wilberforce in Brinkibon*
 - Postal rule applies when offeror 'contemplated and intended acceptance by post'
 - Note: no acceptance rule under *CISG Articles 18(2), 24*
 2. **Electronic Transactions Act (Vic) 2000** for electronic communication:
 - Time of receipt is the time that the communication becomes capable of being retrieved at an address designated for that purpose by the addressee - even if the addressee is not aware of it (*s 13A(1)(a)*)
 - The designation requirement is very stringent - it has to be specifically designated for that purpose, a letterhead or an email on website is not sufficient
 - If the communication is sent to a non-designated address, it will still qualify as acceptance when it becomes capable of being retrieved, but only when the addressee becomes aware that it has been sent to that address (*s 13A(1)(b)*)

Correspondence between offer and acceptance

General rule: acceptance must correspond with the offer. Any variance in the terms is a counter-offer (to be distinguished from a mere inquiry) and the original offer is terminated.

- Note that under *CISG Article 19(2)* a reply to an offer containing additional or different terms which do not materially alter the terms of the offer still constitutes an acceptance and not counter offer. Material terms include price, payment, quality, quantity, place and time of delivery, extent of liability, settlement of disputes *Article 19(3)* and will constitute a counter-offer *19(1)*.
- Battle of the forms: if the parties have tried to impose their own terms and conditions on the contract, then there are two approaches - *Butler Machine Tool*
 - Conflict approach - *Per Lawton and Bridge LJJ*
 - Uses the traditional method of pinpointing offer/acceptance
 - “The last shot prevails” where the last form was agreed and uncontested
 - Synthesis approach - *Per Denning LJ*
 - A broad view which takes into account all the “shots fired” on both sides, and creates a more holistic contract
- If a traditional method of identifying offer and acceptance is not viable, consider *Heydon J’s approach in Brambles* or *Lord Denning’s approach in Butler* (i.e. in all the circumstances can an agreement be inferred?)