

Contract Notes

Formation

Establishing an agreement

- Making an offer:
 - o Judged objectively from reasonable person POV in position of offeree. – *Harvey v Facey*.
 - o Unilateral offer distinguished from 'mere puff' is objective bystander assessed – *Carlill v Carbolic Smoke Co.*
 - o Unilateral offer needs to be intended to give rise to an obligation – *Australian Wollen Mills v Commonwealth*.
 - o Advertised goods = Invitation to treat – *The Boots Case*.
- Terminating an offer:
 - o Must be terminated before acceptance.
 - o Revocation:
 - An offer is not revoked until it has been communicated to the offeree – *Byrne v Van Tienhoven*.
 - It need not be communicated by the offeror – *Dickenson v Dodds*.
 - If the offeree has paid to keep this offer open, offer cannot be withdrawn – *Goldsborough Mort v Quinn*.
 - o Rejection:
 - Once an offer is rejected it cannot be revived.
 - Counter offer amounts to rejection of original offer – *Hyde v Wrench*.
 - Mere enquiry not counter offer – *Stevenson Jacques v McLean*; cf *Fletcher v Minister for the Environment*.
- Accepting an offer:
 - o Only the offeree can accept the offer.
 - o Acceptance must correspond with the offer – *Hyde v Wrench*; cf *Stevenson Jacques*.
 - o Acceptance must be response to the offer – *Australian Wollen Mills*; cf *R v Clarke*.
- Communicating Acceptance:
 - o Offeree must assent to the terms, the acceptance must be unqualified, and the offeree must have knowledge of terms at time of acceptance – *Tinn v Hoffman & Co*.
 - o Agreement reached when acceptance is received by offeror – *Carlill*.
 - o Offeror may dispense with communication if unilateral contract – *Carlill*; cf *Latec Finance v Knight*; or
 - o The postal acceptance applies – *Adams v Lindsell*.
 - Effective if offeree contemplated acceptance by post – *Henthorn v Fraser*; cf *Tallerman v Nathan's Merchandise*.
 - Does not apply to 'instantaneous forms of communication' – *Entores v Miles far Eastern*; *Brinkinbon v Stahag Stahl*; *Olivaylle v Flottweg*; cf *Stevenson Jacques v McLean*.
 - o The act being preformed must be for the purpose of accepting the offer (Unilateral) – *R v Clarke*.
 - o Offeror can revoke offer after commencement of act – *Mobil Oil v Lyndell Nominees*.
 - o Cannot accept by silence (Offeror stating not hearing back is assumed acceptance) – *Felthouse v Bindley*.
 - o Can accept through conduct (Doing the terms (Bilateral)) – *Empirnall Holdings Pty Ltd v Machon Paull Partners*.
 - Considered objectively on conduct.

Consideration:

- Rules:
 - o Consideration must be satisfied in the form of a price in return for the promise – *Beaton v McDevitt*.
 - o Must move from the person who wants to enforce the promise – *Dunlop Pneumatic Tyre Company Ltd v Seftidge & Company Ltd*.
 - o Need 'quid pro quo/nexus between the promisor's promise and the act or forbearance of the promise – *Australian Wollen Mills v Commonwealth*.
 - The act or forbearance must be done in reliance on the promisor's promise and at the request of the promisor.
 - o Benefit not need to move to promisor.
 - o One on behalf of both promisees may supply joint consideration – *Coulls v Bagot*.
 - o Must be something of value in the eyes of the law (sufficient) – *Thomas v Thomas*.
 - o Need not be adequate – *Chappell & Co v Nestle Co*; cf *Woolworths v Kelly*.
- Insufficient Consideration Rules:
 - o Past consideration cannot be used to enforce a new promise – *Roscorla v Thomas*.
 - Unless it is implied that the services were to be paid for (commercial transactions) – *Lempleigh v Braithwait*.
 - o Pre-existing contractual duty cannot be used as consideration for new promise – *Stilk v Myrick*.
 - Unless:
 - There is a variation of the contract supported by something over and above an existing duty – *Hartley v Ponsonby*; or

- a promise is made to one person which is already an existing duty to another – *Pao On v Lau Yin Long*; or
- The promisor obtains benefit/obviates disbenefit and the promise is not given as a result of economic duress or fraud on part of the promisee – *Williams v Roffey Bros*; cf *Musumeci v Winadell*.
- Part payment of debt cannot be consideration for the promise to forego the entire debt – *Pinnel's case*; cf *Foakes v Beer*.

Estopple:

- Equitable general rules/plaintiff needs to prove that: - *Walton Stores v Maher*; cf *Commonwealth v Verwayen*; *Giumelli v Giumelli*; *Van Dyke v Sidhu*.
 1. The plaintiff assumed that a particular legal relationship existed or would exist between the parties and that the defendant would not be free to withdraw from the relationship;
 2. The defendant has induced the plaintiff to adopt the assumption or expectation;
 3. The plaintiff acts or abstains from acting in reliance on the assumption or expectation;
 4. The defendant knew or intended him to do so;
 5. The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
 6. The defendant has failed to act to avoid the detriment whether by fulfilling the assumption or expectation or otherwise.

Intention to create legal relations:

- Objectively assessed from a reasonable bystander POV taking into account the surrounding circumstances/context – *Ermogenous v Greek Orthodox Community*.
- Presumptions:
 - Intention is presumed in commercial dealings; however:
 - Can be rebutted if parties expressly make agreement binding 'in honour only' (onus of proof is on party stating no intention) – *Rose & Frank Co*.
 - No intention in domestic or private arrangements (possibly overturned) – *Balfour v Balfour*.
 - Intention must always be proved (new HC adoption), onus of proof on the party claiming intention – *Ermogenous v GOC*.
- Letters of comfort...
- Preliminary agreements:
 - Subject to contract 3 Categories: – *Masters v Cameron*.
 1. Parties have reached finality in arranging all the terms and intend to be immediately bound to the performance of those terms.
 2. Parties have completely agreed on all the terms but have made performance conditional upon the execution of a formal document.
 3. Intention of the parties to not make a concluded bargain at all, unless and until they execute a formal document.
 4. (suggested since *M v C*) Parties are content to be immediately bound by agreed terms whilst expecting a further contract in substitution for the first – *Sinclair, Scott & Co Ltd v Naughton*.
- Agreement to negotiate in good faith...
- Presumption on no intention:
 - Private and domestic arrangements:
 - It is presumed that there was no intention to create a legally enforceable agreement – *Balfour v Balfour*.
 - The presumption can be rebutted.
 - In divorce/separation presumption is reversed – *Merritt v Merritt*.
 - Onus of proof of intention is on party seeking to rebut.
 - Test is objective bystander with reference to:
 - Circumstances surrounding agreement; and/or
 - The express terms of the agreement.
 - Spiritual relationships:
 - High court has overturned the presumption of no intention between spiritual leader ...
 - (NSWCA) presumption is no longer the appropriate test and intention must be proved in every case.
 - Limits on enforcement:
 - Uncertainty:
 - Terms too vague.
 - Terms incomplete.
 - Illusory promise.
 - Formalities:
 - Non compliance with requirements of writing.
 - Contracts generally don't have to be in writing.
 - Statutes may require otherwise.
 - Electronic equivalent will usually be sufficient.
 - Incapacity:

- Minors.
 - Young children not bound.
 - Contract for 'necessaries' usually enforceable – *Sales of Goods Act (SA) s2*.
 - Other contracts not binding unless ratified after turning 18 – *Minor's Contract Act (SA)*.
 - Intoxication and Physical/mental disability.
 - Company – *Corporations Act ss 124-126*.
- Vitiating factors:
 - Misrepresentation.
 - Mistake (rare).
 - Duress.
 - Undue influence.
 - Unconscionability.
 - Illegality and public policy.

