

## CONTRACT LAW

### FORMATION OF A CONTRACT

The four essential elements necessary for the formation of a contract are:

- Agreement – Offer & Acceptance (objectively)
- Consideration
- Intention to create legal relations.
- Certainty

### OFFER

- An offer is a proposal to enter into contract on certain terms, which the offeror indicates, if accepted will conclude the agreement - *Gibson v Manchester City Council*
- Test - whether a reasonable person believes an offer was intended- *Carlill v Carbolic Smoke Ball Company*
- **Acceptance must be communicated** – a contract comes into existence when acceptance of an offer has been communicated to the offeror - *Tallerman & Co Pty Ltd v Nathan's Merchandise (VIC)*
- **Proposal amounts to an offer** – if the person making it indicates that an acceptance is invited and will conclude the agreement between the parties - *Brambles Holdings Ltd v Bathurst City Council*
- **Reasonable person test** – whether it would appear to a reasonable person in the position of the offeree that an offer was intended, and that a binding agreement would be made upon acceptance - *Carlill*
- **Self-service shop** – not offer, customer indicates offer to pay and shopkeeper accepts – *Boots Chemist*

### Unilateral Contract

- **Unilateral contract** – offeree accepts the offer by performing his / her side of the bargain - *Australian Woollen Mills Pty Ltd v Commonwealth*
- Whereas a bilateral contract is an exchange of promises, obligations of both parties are *executory* at time of formation (to be performed).
  - *Quid pro quo* (this for that) is required between the offeree's act and the offeror's promise.
    - Principle test – whether offeror expressly / implied requested the doing of the act by offeree
    - Whether offeror has stated a price which the offeree must pay for the promise
    - Whether the offer was made in order to induce the doing of the act.
- **No agreement for ticket purchase** – unilateral contract; performance by carrying passenger – *MacRobertson Miller Airline Services*

### Termination of an offer

- **Offer may be revoked** any time before it is accepted - *Goldsbrough Mort & Co v Quinn*
- **Counter-offer** – the making of a counter-offer is treated as a rejection of the original offer and will also extinguish it - *Harris v Jenkins*
- **Revocation of unilateral contract** – see *Mobil* for abandonment of incentive scheme.

### ACCEPTANCE

- Acceptance is an unqualified assent to the terms of an offer – *Brambles*
- The test is whether a reasonable person in the position of the offeror / offeree would believe that a bargain was concluded.
- Test – whether a reasonable person would believe that an offeree accepted the terms of the offeror - *Smith v Hughes*
- **Unqualified assent to the terms** - Meeting of the minds; *consensus ad idem* between parties - *The Crown & Clark*
- **Acting on the faith of the offer** – act required for acceptance are performed on the faith of the offer - *The Crown & Clark*
- **Rejecting an offer** – brings offer to an end, unless otherwise treated as available for acceptance – *Brambles*

### Communication of acceptance

- **Must be communicated** – to the offeror - *Carlill*
- **Unilateral contract** – accepted by the doing of an act.

### Methods of communication

- General rule that acceptance is effective only when received by the offeror, applies to acceptances sent electronically.
- Electronic communication – *Electronic Transactions Acts (ETAs)* ref. pg 81 textbook.
- **Where acceptance received** – contract formed when acceptance communicated - *Brikibon*

### Methods of acceptance

- **Silence is not acceptance** - *Felthouse v Bindley*
- **Acceptance by conduct**
  - Reasonable bystander would regard offeree's conduct, inc. silence signalling acceptance of offer (eg. offeree took the benefit of services provided knowing to be paid according to offer; had reasonable opportunity to reject) – *Empirnall Holdings*
  - **Post-formation conduct** - Agreement without offer and acceptance – *Brambles*

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### Counter-Offer

- **Acceptance of Counter-offer** – when offeree attempts to vary terms proposed, then purported acceptance will give rise to a contract only if it is accepted by the original offeror - *Hyde v Wrench*
- **Battle of forms – offer v counter-offer:** Denning J considered correspondence as a whole; (eg. seller's acknowledgement of the buyer's order was a decisive document, contract on the buyer's terms) – *Bulter Machine Tool Co Ltd v Ex-Cell-O-Corp Ltd*

### CONSIDERATION

The essential elements of consideration are; a promisee must confer a *benefit* on the promisor or incur a detriment - *Currie v Misa*; and that benefit or detriment must be given *in return for* the promise; the bargain, *quid pro quo* - *Australian Woollen Mills*

### Essential elements

1. **Benefit/detriment** – promisee must incur a detriment or confer a benefit on the promisor - *Currie v Misa*
  - Test – a valuable consideration may consist of a benefit accruing to one party, or some forbearance undertaken by another.
2. **Bargain requirement** - that benefit or detriment must be given in return for the promise.
  - **Quid pro quo** – acts must be performed *in return* for the promise - *Australian Woollen Mills*
  - **Performance of acts** - *Australian Woollen Mills*
    - **Contract** - acts are said to be performed **at the request of** the person making the promise.
    - **Conditional gifts** – a promise to pay someone \$100 **if** they perform a certain act is a conditional gift. Whereas, **in return for** performance of an act gives rise to a contract.
  - **Reliance** – act performed **in reliance on** a promise will not constitute good consideration, unless acts performed **in return for** that promise – (eg. no detriment suffered living rent free for 7 years) – *Beaton v McDivitt*
  - Note – may seek remedy in estoppel.

### Sufficiency of consideration

- **Discretion to performance** – a promise will not constitute good consideration if promisor retains an unfettered discretion as to performance. If promisor is not bound to perform, then promise will be an illusory consideration - *Placer Development Ltd v Commonwealth*
- **Past consideration** – not sufficient (eg. horse bought and warranty sought after) - *Roscorla*

### Existing legal duty

- General rule that a promise to perform an existing contractual duty is an illusory consideration - *Wigan v Edwards* (p 103).
- **Existing legal duty** - a promise to perform an existing obligation is not good consideration for the promise of extra payment - *Stilk v Myrick*
- Public policy consideration – principle to discourage parties from seeking to secure additional benefits by threatening to breach contract. See 104.

### Exceptions to the existing legal duty rule

1. **Fresh consideration** – beneficiary by undertaking to do something more than originally promised - *Larkin v Girvan*
2. **Practical benefit** – good consideration (eg. practical benefit of carpentry work completed on time) – *Williams v Roffey Bros* (p. 107). Apply *Musumeci v Winadell Pty Ltd* - See 109.
  - Reason to doubt completion of bargain
  - Modifying party makes a concession, i.e. accept reduced beneficiary obligations.
  - Not result of economic duress, fraud or undue influence - “unfair pressure”
  - Beneficiary's performance is capable of being regarded by modifying party as worth more than any remedy against the beneficiary.
  - **No applicable to part payment of debt** – *Re Selectmove*.
3. **Promises made to third parties – promise to perform is made by beneficiary to third party** - promise to perform an act which the promisee is already under an existing obligation to a third party to perform will constitute good consideration (e.g. shareholders obtain benefit of a direct obligation which she is able to enforce) - *Pau On*
4. **Bona Fide Compromise of a legal claim** – Prevents unfair advantage / threat to withhold performance; not vexatious or frivolous – (eg. amend defects of house, new consideration as promisor asserts he is not bound to perform obligation) - *Wigan v Edwards*
5. **Termination and replacement** - Parties terminated original contract and entered into a new contract. Even if the obligations of modifying party more onerous and obligations of beneficiary are identical to original contract.

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## INTENTION

- A contract will not be made if the parties to an agreement appear not to have intended to create legal obligations.
- **Objective approach** - reasonable people regard the agreement as intended to be binding, no presumption of intention to create legal relations – *Ermogenous*
- **Account for surrounding circumstances** – inc. actions and statements of parties - *Air Great Lakes*
- **Onus** - person who claims contract made bears the onus of establishing the elements of formation.
- **Commercial agreements** – promises uttered in course of business; honourable not legal commitment; no intention (eg. letters of comfort) - *Banque Brussels*
- **Domestic / social agreements** – may be binding (eg. family living arrangements, ref to selling possession – permanent intention; agreement frustrated by bad behaviour) – *Todd v Nicol*
- **Government agreements** – no intention where administrative / political activity (eg. Dept Agriculture advice on controlling infestation of cattle ticks) – *Administration fo Papua New Guinea v Leahy*
- **Preliminary agreement** – depends on intention disclosed by language; (1) binding terms substantially decided; (2) agreement conditional upon formal contract – binding; (3) no contract, in negotiation – not binding - *Masters v Cameron*

## CERTAINTY

- Contract must be sufficiently certain and sufficiently complete, such that parties' right and obligations can be identified and enforced. Courts may resolve ambiguities and fill gaps in agreements to some extent - *Australian Chilling & Freezing*.
- Test – Whether the agreement is sufficiently certain and sufficiently complete that it is capable of constituting a binding contract. Consider nature and circumstances in which the agreement was made.

### Three aspects of certainty

#### 1. Completeness

- **Agreement on all essential terms** – intended to fix agreement – *Milne v AG (TAS)*; without term, contract would be meaningless – *ANZ v Frost Holdings*
  - Sale of land - date of completion not essential, but parties must agree on price - *Hall v Busst*
  - Sale of goods – where agreement silent on price, obligation to pay a *reasonable price* imposed by the *Sale of Goods Act 1923* (NSW), s 13 (2)
  - Obligation to pay a *reasonable price* can only operate where agreement has been reached on all other essential terms - *ANZ*

- **Executed contracts** – Court less likely to find an agreement incomplete if wholly/partly performed. Where delivered, finding of not binding has more serious consequences than if executory – *Husain*

#### 2. Certainty

- **Capable of meaning** – (eg. supplier's costs not uncertain) – *Australian Chilling and Freezing*
- **Reasonableness** – sale at a reasonable price is enforceable and not uncertain (eg. contract for sale of land and improvements void for uncertainty on price) - *Hall v Busst*
- **External standards of measure** – if determined by 3rd party, not vital if left to one party, least min. provision in range, not uncertain (eg. no external standard applied to equity participation scheme) – *Biotechnology v Pace*.
- **Agreements to negotiate** – in good faith are certain, assessed on case-by-case basis; must be sufficiently detailed to be meaningfully enforced and not lead to agreement to agree – *United Group Rail Services v Rail Corp NSW*

#### 3. Not illusory

- **Discretion exercised according to objective criteria** – not illusory – *Meehan v Jones*.
- **Unfettered discretion** - Illusory promise where the promisor has unfettered discretion to the performance of a promise. However, normally obligation to pay if a reasonable sum can be determined by objective criteria, and determined by the court. (eg. Cth expressed discretion to determine unspecified sum of money) - *Placer Development*.
- **Exemption clause** - Illusory where **exemption clause is so sweeping** in its effect that it effectively deprives the promise of any force - *MacRobertson Miller Airline Services*
- **latitude of choice** - manner of carrying out agreed stipulations, not illusory – *Thorby*
- **Subject to finance** – not void for uncertainty – *Meehan v Jones*
- **Terms unilaterally decided by third party** – contract not illusory if additional terms to be determined unilaterally by third party – *Goderke v Kirwan* (eg. all matters were settled – not uncertain, binding)

### Circumventing uncertainty

- **Severance** - sever non-essential term; must determine intention that agreement valid from instrument as a whole – *Whitlock v Brew*.
- **Waive compliance**

## PRIVITY

### DOCTRINE OF PRIVACY

- Only a person who is a party to a contract can enforce the contract and incur obligations under it.
- Contract cannot confer an enforceable *benefit / burden* on a non-party.
- Sometimes considered an unsatisfactory rule.
- Several ways to bypass the rule.
- A person who wishes to enforce a contract must establish that he / she:
  1. Is a party to (that is, privy to), the contract
  2. Has provided good consideration

### Methods for Third Party to Obtain Relief

1. **Specific Performance or Damages** - The contracting party may enforce the contract
2. **Doctrine of agency** – argue privity has no application, as apparent non-party may be able to claim that despite appearances as an agent to the principal.
3. **Trust** - in respect of the contract, one of the contracting parties was acting as a “**trustee**” – **enforce contract by proceedings in equity**
4. **Estoppel** – Third party may establish they had belief that they had enforceable rights against them, or promisee made representation and third party relied on that representation to their detriment if promisee resiled.
5. **Misleading or deceptive conduct** – damages under *Australian Consumer Law*.

### Identifying Contracting Parties

#### ***Coulls v Bagot's Executors and Trustee (1967) – HCA***

- Three questions for consideration:
  1. Is O'Neil Construction entitled / bound to pay royalties payable under the agreement to Bagot (trustee)?
  2. Is O'Neil Construction entitled / bound to pay royalties payable under agreement to deceased's widow (Doris Coulls)?
  3. If the royalties are paid to Bagot's does it hold them as executor / trustee or, on behalf of the widow and deceased's estate jointly?
- Majority – agreement b/w company and Mr Coulls; and Mrs Coulls was not a party to the contract. O'Neil Construction entitled and bound to pay royalties payable under agreement to the executor.
- Reasons:
  - No express promise by company to pay royalties to the widow upon the testator's death.
  - Contract documents transaction b/w AL Coulls and the company.
- Barwick J (Dissent)
  - Agreement is only enforceable if both parties are parties to the action (ie. executors and Mrs Coulls jointly). *A person not a party to a contract may not sue upon it so as directly to enforce its obligations*

### Non-application of the Privity Rule - Agency

- **Agency** - privity does not apply if a person promised a benefit under contract can show that one party involved in contractual negotiations acted as an agent.
- Agent – power to enter into a contract on behalf of another person.
- Establishment of agency – must show principal expressly or impliedly consented to the agent acting on his/her behalf to give effect to relations w/ third parties.
- For particular transaction considered, agent purported to act on behalf of the principle (not own behalf), unless subsequently ratified.
- **Novation** – one party transfers contractual benefits to third party by assignment / novation of contract.

#### ***Port Jackson Stevedoring v Salmond and Spraggon (1978) – HCA – Privy Council upheld dissenting judgment.***

- Blue Star – Schick – Salmond (bill of lading)
- PJS 49% owned by Blue Star, commonly acted as its carrier and was aware of the terms of the bill of lading.
- Barwick J (dissent)
  - **Found** – Carrier was acting with the authority of the stevedore as its agent. Further, the stevedore provided consideration by unloading the goods.
  - **Parties to arrangement** – consignor and stevedore at point of accepting the bill of lading. Stevedore should have indemnity under CI 2 and CI 17.
  - **Contractual agreement** - Performance of acts satisfied consideration and attracted agreed terms.
  - Stevedore accepted the consignor's offer – inferred from longstanding relationship b/w carrier and stevedore, knowledge of terms of the bill of lading, charged for stacking and storing, paid by consignee.
- Mason and Jacobs:
  - Bill of lading was offer made by the consignee to the stevedore through its agent, the carrier. This was accepted by the stevedore through performance (which constituted consideration) in the act of unloading the goods with the knowledge of the offer and in reliance on it.
  - This was a unilateral contract, not a bilateral contract made through the agency of the carrier.
- Stephen J: Stevedore provided no consideration. Subsequent unloading of goods could not operate as consideration for the earlier promise.
- Public policy considerations.
  - International commercial comity – tension b/w interest of fleet-owning nations that carriers / independent contractors should be protected from liability of shippers / consignees, and interests of nations relying on import / export trades.
- Principle in *Scruttons* – p 272 textbook.