

EXAM NOTES
CONTRACTS (70211)

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CONTRACT FORMATION

Definitions:

Contracts can be:

- **Valid** (binding)
- **Void** (never existed)
- **Voidable** (valid until it is avoided, then becomes void)
- **Unenforceable** (may be illegal etc. validity with a technical defect)

Performance can be:

- **Executed** (completed)
- **Executory** (to be completed)
- **Express** (written or spoken word)
- **Implied** (by conduct/behaviour)
- **Formal** (must be in seal or deed, written on paper, contract signed by both parties, attested by independent witness, must be delivered and recorded)
- **Simple** (must include the 6 essential elements. or in writing)

Unilateral Contracts

- One party promises to do something in return for an *act* of the other party, as opposed to a promise
- **Carlill v Carbolic Smoke Ball Co** – The offeree does not undertake to perform, but accepts the offer by way of performing their side of the bargain. An offer can be made to the world at large.

Bilateral Contracts

- A promise by one party is exchanged for a promise by the other
- The exchange of the promises is enough to render them both enforceable.

OFFER

ELEMENTS

1. **Must be communicated by the offeror to the offeree**
2. **May be made to a particular person, a group of persons, or to the world at large**
3. **Must be clear and unequivocal**
4. **Must be distinguished from “mere puffs”, a request for further information, or an “invitation to treat”**

What is it? An expression of willingness to enter into a contract on specified terms with another party (**Tallerman and Co Ltd v Nathan’s Merchandise (Vic) Pty Ltd (1957)**; **Carlill v Carbolic Smoke Ball Co [1888]**)
Offeree must indicate acceptance is invited and provides opportunity accept and reject (**Brambles Holdings Ltd v Bathurst City Council [2001]**)

1. Communication

- An offer is ineffective until it communicated by the offeror to the offeree. If the offeree is unaware of an offer, then it would be impossible to accept. (**R v Clarke (1992)**)

Offer must be definite

- Is it complete so that merely saying "I accept" is sufficient to constitute a contract?

Objective Test

- Would it 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

2. Made to a person/group/world at large (Carlill v Carbolic Smoke Ball Co [1893])

3. Clear and Unequivocal (Lefkowitz v Great Minneapolis Surplus Store (1957))

4. Distinguished from mere puffs/invitation to treat/request for further information

Mere puffs

- Not an offer; no reasonable person would believe it to be an offer (**Leonard v Pepsico Inc (1999)**)

Offers and Invitations to Treat

- An invitation to others to make offers or enter into negotiations (**Harvey v Facey [1893]**)
- A person who responds to an invitation is making the offer, which may be accepted or rejected.

Advertisements

RULE: Ad not an offer; The person responding to the advertisements, if he/she responds to the advertisement will be making the offer (**Partridge v Crittenden (1968)**)

- Circulars, catalogues, brochures and price-lists distributed by traders considered invitations to treat.. (**Grainger and Son v Gough [1896]**)

Shop Sales

RULE: Display of items in shop windows; only an offer when purchased (**Fisher v Bell [1961]**)

- Shops are not bound to sell goods at the price indicated and a customer cannot demand to buy a particular item on display. (**Pharmaceutical Society Of Great Britain v Boots Cash Chemists Ltd [1953]**)

Auctions s 60: Auction Sales (Sales of Goods Act 1923 (NSW))

RULE: Auctioneer does not make offer to sell but invites offers from those at auction

- A sale of goods by auction is complete when the auctioneer announces its completion and until such announcement, a bid may be retracted
- Each bid constitutes an offer; auctioneer communicates acceptance of the final bid by the fall of the hammer (**Payne v Cave (1789)**)
- No contractual claim can arise if auction cancelled (**Harris v Nickerson (1873)**)
- A bidder is entitled to withdraw from bid before accepted (**Payne v Cave**)
- Auctioneer is obliged to sell to highest bidder (**AGC (Advances) Ltd v McWhirter (1977)**)
- **‘Without Reserve’**

- **No reason to distinguish between a sale by auction whether with or without reserve.** An auction **remains** an invitation to treat. If the sale is offered without reserve, it indicates that an offer below the reserve price is one, which is liable to be accepted.
- Therefore the auctioneer is free, despite promise, to withhold hammer. (**AGC (Advances) Ltd v McWhirter (1977)**)
- This converts add into an offer to sell to the highest bidder and the highest bidder accepts by being the highest bidder (**Warlow v Harrison (1859) 1 El & El 295**)

Tenders

RULE: Each party submits a single bid without knowing what other bids have been made

– **Liability if:**

→ **Wording indicates the highest/lowest be accepted could be interpreted as an offer**

– **Harvela Investments Ltd v Royal Trust Co Of Canada (CI) LTD [1986] 1 AC 207**

- **Process contract:** An invitation to tender can be seen as an offer which is accepted by putting in the tender. This completes one contract. The invitation to submit tenders amounted to an offer capable if acceptance by submission of highest bid.

→ **Failure to comply with agreed tendered process**

– **Blackpool And Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195.**

→ **Duty to act in good faith both in performing obligations & exercising rights**

– **Hughes Aircraft Systems international v Airservices Australia (1997)**

Options

- **RULE:** An agreement between an option holder and a grantor where the option holder is entitled to enter contract on specified terms and exercise option at a specified time or within specified period
- Offer can be withdrawn prior to acceptance → Can make promise not to withdraw an offer but must be supported by consideration (**Goldsbrough, Mort & Co Ltd v Quinn (1910)**)

Ticket Cases

RULE:

→ **Ticket handed out by a person: MacRobertson Miller Airline Services v Commissioner Of State Taxation (WA) (1975)**

- If the customer took and retained it without objection, this act is an acceptance of the offer

→ **Ticket from automatic machine: (Thornton v Show Lane Parking Company [1971])**

- The customer pays money and gets a ticket. They are committed - cannot refuse it or get money back. Offer: when the proprietor of the machine holds it out as being ready to receive the money. Acceptance: when the customer puts his money in the machine
- If nothing comes out the machine, can sue for breach of contract

Electronic Transactions

x 3 RULES:

s 14B Invitation to Treat Regarding Contracts (Electronic Transactions Act 2000 (NSW))

1. (1) A proposal to form a contract made through electronic communications that:

- (a) is not addressed to one or more specific parties, and
- (b) is generally accessible to parties making use of information systems,

is considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

2. ETA's confirm that a contract between a person and an automated system is not invalid on grounds that a natural person was not directly involved with the process; and

3. Where a person makes an input error during a transaction with an automated system and profits with no opportunity to correct the error, the person is entitled to 'withdraw the portion' of communication in which the input error was made as soon as learning of the error and has not received benefit from goods/services provided by the other party

Fate of an offer

- Offer will cease to be available for acceptance when withdrawn by offeror, lapses or rejected by offeree

Termination/Rejection

RULE: Once an offer has been rejected, it is no longer available for acceptance (**Stephenson, Jacques & Co v McClean (1880)**)

- Attempt to accept later is a new offer and rejection to the original offer (**Stephenson**)
- If a request for information and not a counter offer, P can accept the original offer. (**Stephenson**)
- May be revived/form the basis of an agreement if valid O&A not evident (**Brambles Holdings v Bathurst City Council [2001]**)

Counter Offer

RULE: A rejection of the offer to which it relates and will become an offer that can be accepted/rejected (**Northland Airlines Ltd v Dennis Ferranti Meters Ltd (1970)**)

- Cannot accept offer if new terms introduced; this = counter offer, therefore the original offer lapses

Withdrawal/Revocation

RULE: An offer may be revoked at any time before it is accepted (**Dickinson v Dodds (1876)**)

- An offer open for a specified period is not binding unless the offeree has **considered** that promise (**Dickinson v Dodds (1876)**)
- Offeree can be informed from a reliable source BUT withdrawal is only effective when **communicated**
- No exception is made for withdrawal by post (**Byrne & Co v Leon Van Tienhoven & Co (1880)**)

Lapse

RULE: An offer which is available for acceptance for a period of time will lapse at the end of that period

- If no period is stipulated → Objective test - reasonable time for offer to lapse (**Balla v Theophilor (1957)**) i.e 16 mths long

Death

RULE: Death of an offerer or offeree will terminate the offer (**Fong v Cili (1968)**)

Failure of Condition and Changed Circumstances

RULE: An offer may be made subject to express or implied condition that must be fulfilled before the offer can be accepted (**Financings Ltd v Stimson [1962]**)

Unilateral Contract Offer

→ **Prior to performance:** May be withdrawn prior to the offeree entering into performance of the contract (**Shuey v US (1875)**)

→ **Partly performed:** An offer made in return for performance of an act is revocable at any time.

- **Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998) Facts:** Mobil told franchisee of a proposal which they accepted saying tenure will be extended if they achieve 90% of Circle of Excellence judging's. 4yrs later = abandoned. **Held:** Mobil's abandonment meant that the franchisees could not complete the performance. If there is an implied contract not to revoke, the offerer will only be prevented from revoking the offer. Mobil did not make offer to franchisees – uncertain terms of the reward =uncertainty; scheme was merely in a developmental stage.

ACCEPTENCE

ELEMENTS

1. **Who can accept?**
 - a. When and where the contract comes into being?
2. **Must be in response to an offer**
3. **Must correspond with the offer**
 - a. Battle of the Forms
4. **Must be communicated** (Conduct; Postal Rule)

What is it? An unqualified assent to the terms (**Carlil Carbolic Smoke ball**) - The moment of contract 'Meeting of the minds' (**consensus ad idem**) (**Fitness First Pty Ltd v Chong**)

1. Who May Accept?

- **RULE:** An offer can be accepted by those person to whom it was made

When and where?

- Acceptance cannot occur unless and until the offeree has received the offer; the offeree must be aware of the existence and terms of the offer before they accept

2. Is it in response to an offer?

→ *By someone other than the Offeree*

- Where a contract is made, where the contracting party is or may be of importance; no other person can interpose and adopt the contract (**Boulton v Jones (1858)**)

→ *By more than one Person*

- Offerors need to ensure they are not committed to obligations they cannot meet
- Where offer is accepted by more than one party, liability= construct terms (**Patterson v Dolman 1908**)

3. Does the acceptance Correspond with the offer? (R v Clarke (1927))

- Perform the act without intending to accept = no acceptance
- If offeree attempts to vary terms or add additional terms = counter offer

The "Battle Of The Forms"

- When two companies deal with each other during business, they will use **standard form contracts**. **BUT...**On whose terms was the contract made? Which company breaching the contract?
- **Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (England) LTD (1979)**
- If you accept an offer, **you must accept an offer exactly, without modifications; if you change the offer in any way, this is a counter-offer that kills the original offer.**
- Suggested **two** different **approaches**:
 - o Synthesis approach: The "**documents** are to be **considered as a whole**, and the important factor was finding the decisive document".
 - o Conflict approach: "**Last shot**" approach (preferred) → Last counter-offer kills preceding offers

4. Was acceptance communicated?

- 'Meeting of the minds' to form a consensus (**Carlil v Carbolic Smoke Ball Co [1888]**)
- Clear language **needed** to support construction of the document, signing not enough (**Latec Fiinance Pty Ltd v Knight [1969]**)

Inferred by Conduct (**Empirnall Holdings Pty Ltd v Machan Paull Partners Pty Ltd (1988)**)

- It is incumbent on the party who has received an offer to reject it explicitly or be bound
- Where an offeree takes the benefit of a contract in circumstances indicating that the offeror will be paid for his services, the inference is open that terms of the offer were accepted

Scope

– Postal Rule →

- Applies with:
 - Telegrams: Given to the post office and delivered to the recipient the same way as posted letters (**Cowan v O'Connor (1888)**)
 - Emails; is that also the same as post? Probably Yes (**Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4) [2009]**)
- Does not apply to **instantaneous communication**:
 - Telephone; communication over the internet (**Entores Ltd v Miles Far East Corp (1955)**)

Exception to the Postal Rule

- ‘Acceptance is effective as soon as posted’; if the D’s were not bound by their offer until answer received the acceptance and those could go on indefinitely. (**Adams v Lindsell (1818)**)

Postal Rule in Australia:

- A finding that a contract is completed by posting of a letter of acceptance **cannot be justified unless it is inferred that the offeror contemplated and intended** that his offer might be accepted by doing the act (**Tallerman & Co Pty Ltd v Nathan’s Merchandise (VIC) (1957)**)
- **Actual notice** is required (**Bresson v Squires [1974] (1957)**)
- **It must be reasonable inferred that the offeror contemplated and intended** for acceptance to come about through the act of posting (**Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994]**)
- If postal rule applies = determines contract time and place of formation even if no acceptance received

Negating Postal Rule:

- Deemed duly served if mailed by registered or certified letter; service is deemed to occur on the third business day (**Elizabeth City Centre v Carralyn [1994]**)
- Exchange by post by earlier correspondence clearly stated contracted would be formed upon receipt (**Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994]**)

ENDING THE CONTRACT

BREACH AND REPUIDATION

PERFORMANCE AND BREACH

What is Breach? Where a party does not perform his/her obligations according to terms of the contract.

What is Performance? It depends on compliance of the contract terms not on carelessness, blameworthiness or affected by events (**Hawkins v Clayton**)

May give the non-breaching party right to terminate IF:

- a. A provision of the contract permits discharge for breach in the circumstances (e.g. where there is failure to perform by a specific date the other party will need to terminate)
- b. If the other party repudiates that contract – renounces their obligations (indicates they wont perform obligation)
- c. The breach is sufficiently serious

Performance Required by the Contract

- Has there been performance in accordance with contractual terms?
 - Did the party perform in the way required by the contract AND
 - Generally expressly specified
 - If not, determined as a matter of construction or implied
 - At the time required by the contract?
 - Courts will imply a term for what is a reasonable time

Response to Breach of Contract

- Where the aggrieved party alleges that the other party has breached a contract, the other party may respond by:
 - Acknowledging the breach and try to rectify the situation
 - Dispute the breach has occurred by arguing that the aggrieved party's interpretation of what is required under the contract is incorrect
 - May argue that there is a term in the contract limiting his/her liability for breach
 - Attempt to argue an excuse for his/her failure to perform according to contractual terms (i.e. contract was not formed properly, contract was frustrated or the enforceability of the contract is affected by misinformation, an abuse of power of illegality)

Remedies and the Right to Terminate

- The aggrieved party will have a right to damages to compensate for any loss caused by the breach ONLY IF...
 - Breach of contract is established
 - The contract is fully performed
 - Partially Performed
 - May ALSO elect to continue with performance of the remainder of the contract, if so...
 - Other party may agree to continue with course of action preserving relationship between the parties
 - If the other party does NOT agree, the aggrieved party may seek remedy of specific performance
 - If the aggrieved party wants to terminate the contract following breach (because they do not trust the other party/do not see the contract as beneficial) does not require assistance of the courts

Order of Performance

- Can be consecutive – parties performance obligations at different times (Burton b Palmer)
- Can be concurrent – Parties must be ready, willing and able to perform e.g. is seller of land then buyer paying at same time