

3 principle elements under CONTRACT FORMATION

1. **Agreement** – offer and acceptance
2. Consideration – exchange of something of value
3. Intention – parties intended to create relations to be bound to each other (create legal relations)

AGREEMENT

↳ court won't enforce anything b/w parties unless there is an agreement.

e.g) if I promise to paint your house and I don't do this ⇒ court **can't** enforce since there is NO CONSIDERATION (i.e there's nothing there that I can get worth value) = legal worthless = not enforceable

Offer & Acceptance analysis is used by courts....

- Courts objectively consider the words and conduct of the parties (what they did) to *see whether an offer has been made* and, if it has, *whether it has been accepted* ⇒ i.e an agreement
- Courts determine where and when the contract was formed ⇒ necessary for contracts across jurisdictions
- Courts use this kind of analysis to determine whether agreement exists, where and when agreement was reached and the express terms of that agreement.
↳ determining what they have agreed upon

OFFER:

↳ “a statement upon which maker is prepared to be bound” – court looks for preparedness/ willingness to be bound to the statement by the person making the statement, to the person to whom the statement is made on terms which are clear/certain (using an OBJECTIVE TEST – ie. What would the ‘reasonable’ person think)

.... i.e) court is trying to locate ***promissory intent***

AUTHORITY: *Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd* [2010] EWCA Civ 1331:

“In determining whether an offer has been made the correct approach is to ask whether [the offeree] (having the knowledge of the relevant circumstances which [the offeree] had), acting reasonably, would understand that [the offeror] was making a proposal to which he intended to be bound in the event of an unequivocal acceptance”

e.g) *Gibson v Manchester City Council* [1979] 1 All ER 972

- the Manchester Council decided a new policy to allow tenants that lived in council owned premises, to buy those premises. They sent out letters, and in the letters said the council may be prepared to sell. Gibson filled a form and applied.

- Later, council scrap the policy and not proceed. Gibson argued he had a binding contract with the council, arguing the contract was an ‘offer’ and he ‘accepted’ when he filled the form and returned it.

- COURT HELD: the letter sent was NOT an offer, it was an ***‘invitation to treat’***

↳ becos, the letter was ambiguous and equivocal cos it said, ‘it ***may*** be prepared to sell’

↳ court also stated the letter sent by Gibson amounted to an ‘offer’ which the council did NOT accept

The case highlights that an offer has to be found in the words/conduct of the parties, and also indicates some things resemble offers but don't amount to offers an ***‘invitation to treat’*** distinguishes an offer.

'invitation to treat'

- It's NOT an offer, it's an invitation to make an offer
- We are surrounded by 'invitations to treat'
e.g) an advertisement, brochures
↳ NOT OFFERS, but an invitation to make an offer...

TREAT: means to bargain.

- Common law recognised that with statements like this, ONE party is inviting people to make offers
- Where the supplier is making representations to potential customers, inviting customers to make offers to purchase their goods

e.g)

1. u see a bottle of scotch on display = shopkeeper inviting the customer to treat
2. u take the bottle to the counter = making an offer to the shopkeeper to purchase the product
3. the shopkeeper will usually accept, the CONTRACT IS FORMED,
4. you've got the money, they've got the bottle, contract done.

This is an invitation to make an offer, **to** bargain

- Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] 1 QB 401 – illustrates **distinction** to **'treat'** and an **'offer'**
 - Pharmaceutical company didn't like the fact that chemist was displaying products on shelves for consumers to purchase – they argued (based off statute) that you can't sell pharmaceuticals to public unless there's a qualified chemist at point of sale.
 - Court found that this displaying of products was an **'invitation to treat'** and when customer to product to counter, the chemist was there at point-of sale.
- Harris v Nickerson (1873) LR 8 QB 286
- Lefkowitz v Great Minneapolis Surplus Store 86 NW 2d 689 (1957)

- Store advertised dresses at a really low price
- Statement said 'first come, first served'
- Lefkowitz came first but store refused saying this policy could only be taken up by women (cos it's a women's coat)
- He sued the store for breach of contract
- He said store offered this coat through their phrase ^, he was first one there and court agreed with him
- The advertisement was an offer on it's clear wording, which he accepted when he came to buy the coat, and the store could NOT impose new terms in the offer, after acceptance had taken place

Murphy J states: *'where the offer is clear, definite and explicit and leaves nothing open for negotiation, it constitutes an **offer, acceptance of which will complete the contract**'*

CONTRACT HAS BEEN FORMED when the act specified in the offer has been formed

- Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256
 - Advertisement presented an offer which showed a willingness to be bound to a contract and this was accepted when Carlill performed the act in the advertisement.
 - A unilateral contract formed

In the case of Advertisements, they are seen by thousands of customers so if advertisements were to be regarded as 'offer' it'd be unrealistic.

In some cases, advertisements MAY RESULT TO AN OFFER

- Where the advertisement **shows a clear promissory intent** i.e a statement, to which the maker of the statement is **prepared to be bound** objectively, then that advertisement could be seen to be an offer.

Tender

- Another example where an advertisement can be BINDING is with tenders

What is a tender?

- Macq wants a new lec theatre built
- Uni would call for tenders, send out info to CALL people to BID for this job
- Construction companies would put their offers

The *call* for tenders by the uni would amount to an **'invitation to treat'** – i.e looking for offers, inviting for offers

When companies put in it's tender, that'd be an **offer**. When uni collects all the offers, it accepts one of the offer. Each tender is considered as a *separate offer* and it'll decide which one to accept.

BUT, a **call for tenders** can also amount to an offer, if the uni says it'll explicitly accept the *'first tender'* or the *'lowest priced tender'* or a *'certain kind of tender'* – court can rule that it's an offer.

They can also be binding as offers when the *'call for tenders'* **promises to treat a tender** that is submitted **in a particular way** – or if uni promises to follow a process when considering the tenders

↪ what is created is a separate 'process contract' ⇒ formed unilaterally

i.e if the uni stipulates that the tenderer must comply with certain requirements and the tenderer follows those requirements, a PROCESS CONTRACT may be formed.

... if process is not followed by uni, a breach of the process contract could be the result

- Blackpool & Fylde Aero Club v Blackpool Borough Council [1990] 3 All ER 25 (process contracts)
 - The councils call for tenders amounted to an 'offer' – that offer was to consider all tenders that were properly submitted.

Company argued when it submitted it's tender, that was an acceptance

- Court agreed – *there was a contract to consider the tender in a particular way, by a particular process and that contract was breached by the council.*

↪ it meant that the club lost the opportunity to be a tender BUT it was awarded damages

To whom can an offer be made? – to one person directly (the displaying in the shop) to a group of persons (through advertisement), specific people

Offers don't last for ever, only until it's terminated or revoked

TERMINATION OF OFFER

How may an offer be terminated?

- through **laps of time**, or specified time specified in the offer e.g) u have until 5 to accept otherwise offer lapses.
- Or by the **lapse of a reasonable time** – based on the circumstances

BUT an offer can be terminated by **REJECTION**.

- Hyde v Wrench (1840) 49 ER 132

- Wrench offered hyde property of 1000 pounds
- Hyde replied with a counter-offer of 950
- Wrench rejected
- Hyde replied asking to buy for 1000
- Wrench rejected
- Court found no contract since when hyde made his counter, the contract for the land for 1000 was REJECTED = CONTRACT TERMINATED = no offer for Hyde

A counter offer, amounts to a **REJECTION AND TERMINATES** the original offer.

Courts must be satisfied that the counter-offer really is a counter-offer – depends on the words, and judged objectively

- Stevenson Jacques & Co v McLean (1880) 5 QBD 346
 - A request for information was mistakenly taken for a REJECTION
 - The request for info here WASN'T a counter offer cos a counter offer ***needs to be an offer in it's own terms***

OFFERS CAN ALSO BE TERMINATED BY a **FAILURE OF A CONDITION** – an offer may lapse upon failure of condition in the offer.

An offer may be made subject to an express or implied condition that a certain state of ***affairs will exist***. If that statement of affairs ceases to exist, the offer will be held to have lapsed and no longer capable of acceptance.

EXPRESS CONDITION : an offer to buy land subject to development approval. If development approval doesn't come about, the offer lapses, it's not capable of acceptance

IMPLIED CONDITION : when u offer to buy a car, u want it in the same condition.

- *Financings Ltd v Stimson* [1962] 3 All ER 386

OFFERS CAN ALSO BE TERMINATED BY REVOCATION

↳ when an offeror makes an offer, the law holds the offeror can **revoke the offer** – to withdraw the offer so long as this takes place **BEFORE acceptance**

2 main rules of revocation:

- 1) To be a valid revocation, an offer can only be revoked **BEFORE acceptance** by the offeree
- 2) The revocation **MUST BE COMMUNICATED** to the offeree to be effective, when it is RECEIVED – this can be made by the offeror directly or someone else on the offeror's behalf as long as that person can objectively be regarded as a *reliable source* e.g) an agent

Must be **before acceptance** and **must be communicated**

- Dickinson v Dodds (1876) 2 Ch D 463
 - Dodds offered to sell land to Dickinson
 - Before Dickinson could accept the offer, Dodds sold the land to someone else without revoking the offer he made to Dickinson.
 - Dickinson's agent found out that Dodds sold the land to someone else and then advised Dickinson who accepted the offer. So it was accepted after it was sold to someone else
 - Court REJECTED Dickinson's argument because he knew it had been sold and this led to 'revocation' since it was communicated to him by a reliable source.
 - Dodd's revocation was valid

Communication takes place when it's received.

When does communication of revocation take place?

- Court needs to decide when did u revoke
- Depends on the nature of the communication – in cases of ***non/instantaneous communication*** such as by 'post' / 'telegram', revocation takes place when it is ***received by the party NOT*** when it's sent (for acceptance it's occurs when it's *sent* not for revocation)
- If the communication is ***instantaneous***, e.g) fax, email, text revocation takes place when the offeree could reasonably be expected to have accessed that message
 - If it's in normal business hours: when the email/fax is physically generated by the offeror computer, equipment/machine, regardless of when the offeree reads it, it's **REVOKED**
 - Outside of business hours: then it's **REVOKED** at the start of normal business hours on the ***following day***

Electronic Transactions Acts – an electronic communication by email, takes place ***depending on whether*** the offeree has ***stipulated an email address*** – if this is the case, the communication takes place when the information enters to offeree's system

If ***no email was stipulated***, communication takes place when the email comes to the actual ***attention*** of the offeree.

PROBLEM AREAS WITH REVOCATION OF OFFERS:

1. OPTION CONTRACTS: Where the offeror promises not to revoke the offer before a certain time

e.g) where the offeree says they've got to think about it, and the offeror promises to keep the offer open for a period of time

- To keep an offer open for a period of time, and to be binding/enforceable, a promise must be supported by ***consideration***.

NOTE: just cos they promise to keep it open, such a promise is not enforceable unless there's consideration

- Parties can get around this by entering into a valid/enforceable contract – ***option contract***
↳ to keep an offer open for a specific period of time

e.g) offer to sell property for a price, and offeree wants to think about it until Friday ⇒ the offeror promises to *keep it open* → here, the purchaser gives consideration for that promise i.e. '*option fee*' (a promise to pay an amount of money)

↳ NOTE: a ***separate contract (option contract)*** has been entered into, BUT NO CONTRACT has been entered for the sale of the property

Now if....

- ✓ On Friday, the purchaser is ready to buy ⇒ option contract is discharged ⇒ parties enter into contract to 'buy the land' (option fee is taken into account when purchasing the property)
- ✗ On Friday, if purchaser CAN'T purchase ⇒ option contract is still discharged ⇒ purchaser loses option fee money ⇒ offeror can sell property to another purchaser

2. REVOCATION OF A UNILATERAL OFFER:

- Carlill v carbolic smoke ball
↳ how could they revoke it's offer? *The revocation is done the same way the unilateral offer was made*

Recall the case: we will give 100pounds to anyone using smoke ball and catches the flu. Carlill took up the offer by purchasing the smoke ball and using it ⇒ the act she performed which created a unilateral offer.

If carbolic smoke ball put a sign saying they're not going to implement this policy, that would be enough to revoke, even if the other party didn't see it.

Problem arises when 'acceptance' takes time.....

- Where the offeror makes a unilateral offer and the offeree '*starts performing*' the act ⇒ the act of performing the act specified in the offer creates the CONTRACT.

What happens if you revoke but offeree has already commenced performance of the act, in circumstances where performance requires time...

e.g) stop smoking for a month, and I'll give \$1000. But what happens if I revoke my offer on the 10th day??

TRADITIONALLY: courts said; if an offeree had started act of acceptance, then they should be given a reasonable opportunity to complete the act ⇒ revocation would be too late

.... NOW IN AUST. COURTS: *Mobil Oil Australia v Lyndel Nominees* (1998) 153 ALR 198

- Mobil had an agreement with various franchisee's to operate at certain franchise outlets; using mobil oil products
- Mobil oil advised it's franchisee's it'll give them favourable terms, if they achieved certain 'sales targets'
- Lyndel was one of the franchises which achieved the targets
↳ Mobil oil withdrew it's prev statement

- Lyndel said it had worked on achieving the targets and it was too late for Mobil oil to revoke their offer, they should be bound to it, and that the act performed by Lyndel would amount to acceptance
 - ↳ FED COURT AGREED, BUT 'full court REVERSED IT'
- *Why?* – held that there was no 'clear' **offer** by mobil oil

BUT even if there was an implied condition in the offer to not revoke the offer, the fed court said it wouldn't be unjust to an offeree if the offeror revokes after the offeree's acceptance has started

- ↳ but they could sue for damages for breach of implied contract

HELD: revocation is effective, if what the offeree has done is for their own benefit – because the increase in sales actually benefited Lyndel and so it WASN'T UNJUST for Mobil Oil to revoke (so the offeree can't hold the offeror to their offer)

↳ i.e) an offer CAN BE REVOKED after the offeree has COMMENCED carried out the terms of the offer ⇒ if terms were 'completed' then that would've been a full acceptance

ACCEPTANCE:

↪ "Consensus ad idem": meeting of minds

↪ acceptance: when the offeree indicates they will enter into the agreement on the offeror's terms ⇒ using an objective test

NOTE: *the acceptance must mirror the offer. So you can't say 'yes I agree, but on one condition..'* = NO! there is NO ACCEPTANCE here...BUT **CAN constitute as a counter offer** – (remember, this extinguishes the original offer)

RULES OF ACCEPTANCE:

1. **Acceptance cannot be conditional** (as explained above)
2. **Acceptance must be in reliance on offer**
 - R v Clarke (1927) 40 CLR 227
 - Clarke was charged with murder
 - Gave info to police, answered questions
 - Police used info to chase certain people and Clarke was exonerated
 - Later, he found out that police offered rewards for info leading to culprits
 - Police refused to give it
 - HC: rule = no contract. *Why?* – he did not rely on the offer of which he was unaware when he gave the info + he gave info but not for the reason for the reward (it was for the exoneration thing)

Acceptance is only valid if the offeree is relying on/responding to the offeree's offer (objectively)

⇒ thus, offeror must be aware

-if u knew about the offer, then a *rebuttable presumption* arises that your acceptance was in reliance on it

↪ *rebuttable presumption*: assumes a state of affairs to exist or assumes that a fact exists...but you can rebut it with evidence

3. Acceptance may be express or implied

i.e expressly articulated / implication of the conduct

BUT, silence or lack of response CANNOT amount to acceptance

e.g) you can't say I'll sell you my boat and if I don't hear back from you by Friday then you've accepted my offer...

- *Felthouse v Bindley* (1962) 142 ER 1037
 - Uncle wrote letter to nephew asking to buy his horse, if I don't hear from you, I'll assume it's mine
 - Nephew didn't reply
 - Later on, nephew said 'I agreed with him in my own mind'
 - Nephew instructed the auctioneer to withdraw the horse from auction to sell to his uncle
 - Auctioneer misunderstood and sold the horse (accidentally)
 - The uncle sued his nephew
 - Court held that nephew did nothing to communicate his intention / bind himself. Nothing had been breach

Concl.... 'silence won't amount to acceptance'

NOTE: *offeree may be deemed to have accepted an offer, if they act in a way that shows that it's consistent with an agreement*

- *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523

4. Acceptance must be communicated (back to the offeror)

Q: *when does communication take place??*

- Acceptance takes place when it is received by the offeror, i.e) when they find out about it

HOWEVER, **2 exceptions**;

1. In cases of unilateral offers: e.g) carlill. *Why?* – cos communication of acceptance is unnecessary, it's the TERMS that make it CLEAR. For there to be a contract, you just do as it says...e.g) lost dog, you just find the dog

2. Postal acceptance rule:

*'where acceptance is by way of letter or telegram (not fax /email) or **NON-INSTANTANEOUS COMMUNICATION**, acceptance takes place when it is **SENT**'*

↳ JUSTIFIABLE: since when you communicate by letter = risk to both parties – the offeree doesn't know if the acceptance letter will ever arrive/ offeror doesn't know if letter was thrown away by offeree

- Offeree is at risk: since when they sent acceptance letter, they may start performing contract
- Offeror is at risk: because they can exclude the operation of the rule. *HOW? in the terms of the offer*

↳ it's irrelevant if the letter never arrives, BUT still need to prove u sent it/sent it to the right place

↳ **COMMUNICATION IS REQUIRED**, deemed to have taken place when letter was posted

- *Henthorn v Fraser [1892] 2 Ch 2* – postal rule applies where it is 'reasonable, authorised or contemplated' ----> either one..

If facts show it would be 'reasonable' to take place by letter

When it specifies, 'you can accept by post'

On an 'objective test' this must have been within the contemplation of the parties (due to facts) that acceptance can take place by post

In ^ case, Lord Hershall said:

'where circumstances are such, that it is within the ordinary contemplation of the parties, that according to ordinary usage, that post might be used, then the acceptance is effective, as soon as it is posted'

If offer is sent by mail and if there's no specifications in the contract as to how to reply, and you reply by mail, court will HIGHLY LIKELY find it 'reasonable' ⇒ acceptance takes place when letter is posted = **RISK TO OFFEROR**

- *Tallerman & Co v Nathan's Merchandise (1957) 98 CLR 93* –

'A finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be **inferred that the offeror contemplated and intended** that his offer **might be accepted** by the doing of that act'

Exception to the postal acceptance rule

- *Bressan v Squires [1974] 2 NSWLR 460*
 - Option to purchase land
 - The option is to be exercised '*by notice in writing to me at any time on or before 20th dec*'
 - On 18th posted a note exercising the option which didn't arrive until 21st dec
 - HELD: The words were specific in that the notice needed to be in the '*hands*' of the offeror, rather than just sent ⇒ so posting didn't mean accepting

SUMMARY

Acceptance takes place when it's **received** EXCEPT where the postal acceptance rule applies, then it takes place when it's sent

Revocation of postal acceptance (by speedier means)

e.g)

- I make an offer to you by mail in writing
- Circumstances of the case indicate that acceptance through post is 'reasonable' ⇒ postal accp. applies
- You send your acceptance by post
- BUT, you change your mind, you don't want to accept anymore
- And then you contact by speedier means, like calling them up.. DOES AGREEMENT still exist?

There's 2 competing views....

- *Wenkheim v Arndt* (1873) 1 JR 73
 - Said, yes there is an agreement due to postal acceptance rule, that creates the contract
 - Can't withdraw cos you're unilaterally withdrawing from the contract which has been already entered into
- *Dunmore v Alexander* (1830) 9SH (Ct of Sess) 190
 - NO CONTRACT, since offeree has REJECTED the offer in the very first actual communication with the offeror ...even though the letter was posted

Why? Cos the offeror is not aware of any prior acceptance (hasn't received the letter yet)

ALSO, postal acceptance rule is a rule of 'convenience'

Alternatives to Offer & Acceptance

↪ "Battle of the Forms": commercial parties e.g) the buying and selling of timber. Each party has a form when buying and selling to protect themselves.

When a dispute arises; forms are looked at and they usually **AREN'T IDENTICAL** ⇒ but you don't have an acceptance of an offer unless it's a mirror image

Question is on **what terms** has contract been formed on?

- *Tekdata Interconnections Ltd v Amphenol Ltd* [2010] 1 Lloyd's Rep 357
- *Butler Machine Tool Co v Ex-Cell-O Corp* [1979] 1 All ER 965
 - Used offer/acceptance analysis and looked at the terms

Goodman v Cospak [2004] NSWSC 704:

- Puts forward approaches to how courts can resolve whether contract has been formed and what the terms of the contract are;
 - 'Last shot' approach: where conflicting communications are exchanged, each is a counter-offer, so if a contract forms, it must be on the terms of the final document in the series leading to the concl of the contract
 - 'Higher status' approach: the status of the forms is examined and the terms on the form with the higher status establishes the terms of the contract
 - 'Global or Synthesis' approach: the existence of agreement is established without reference to offer and acceptance

Brambles Holdings v Bathurst City Council (2000-1) 53 NSWLR 153