

Pharmaceutical Society of Great Britain v Boots Cash Chemists (P 38)

- An ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed.

2.6.2 Auctions (P 39)

AGC (Advances) Ltd v McWhirter (P 39)

- **An auction remains an invitation to treat.** If the fact that there is a reserve price is notified, it indicates to the bidders that an offer below the reserve price will or may not be considered. If the sale is advertised as being without reserve or to the highest bidder it means that the highest bid is an offer that is liable to be accepted and if accepted, will make a contract but the vendor remains free to withdraw the property from sale or decline to accept any bid.
- **Advertising an auction without reserve will be characterised as the auctioneer making an offer to sell to the highest bidder,** this offer can then be accepted by anyone who makes a bid. In this event, a collateral contract is created between the auctioneer and the bidder, the terms of which are that the property will be sold to the highest bidder. If this does not happen then the bidder will have an action in damages for breach of contract against the auctioneer.
- This does not alter the characterisation of the bid as merely an offer as far as the seller is concerned, with the result that there is still no contract of sale between the seller and the bidder if the latter's bid was not accepted by the auctioneer.
- **Auctions of goods** - sale of goods legislation provides that until the auctioneer announces the completion of the sale, any bidders may retract their bids.
- **Online auctions** - it has been held that a seller who lists a good for sale with a disclosed reserve price is making an offer to sell to anyone who makes the highest bid within the specified time frame, provided the bid is at or above the reserve price and made without a qualification not previously agreed to by the seller. As a result, a person's bid amounts to acceptance and a contract is created thereby.

2.6.3 Advertisements (P 42)

Advertisements are characterised as only an invitation to deal

- Responses can then only be offers made to the advertiser and can be rejected when supply is exhausted.

Lefkowitz v Great Minneapolis Surplus Store (P 42)

- Where the offer is clear, definite and explicit, and leaves nothing open to negotiation, it constitutes an offer, acceptance of which will complete the contract.

Bait Advertising

The practice of advertising certain goods at extremely low prices to attract customers to the store with the intention of selling them other goods, at normal prices, rather than, or in addition to, those being advertised. **This is now prohibited by the ACL.**

Australian Consumer Law - Section 35(1) (P 43)

A person must not, in trade or commerce, advertise goods or services for supply at the specified price if:

- (a) there are reasonable grounds for believing that a person will not be able to offer supply those goods or services at that price for the period that is and in the quantities that are reasonable having regard to:

- .i the nature of the market in which the person carries on business, and;
 - .ii the nature of the advertisement, and;
- (b) the person is aware or ought to be aware of those grounds.

2.6.4 Tenders (P 43)

A call for tender is usually regarded as an invitation to make an offer, which if made, can be accepted or rejected by the person making the call.

Blackpool and Flyde Aero Cub v Blackpool Borough Council (P 43)

- A call for tender may contain an undertaking to treat the tender in a specified manner which the law will characterise as an offer, by submitting a tender, the invitee accepts this over and thereby creates a contract in the terms of the undertaking, regardless of whether the tender itself is ultimately accepted, or not.
- These contracts are often referred to as 'pre-award contracts' - generally will be no more than an invitation to treat, not giving rise to contractual obligations, however it may give rise to obligations to act fairly.
- Although, it is obviously open to persons to enter into a preliminary contract with the expectations that it will lead in defined circumstances to a second or principal contract. Defining if a case falls into one category or the other depends upon a consideration of the circumstances and the obligations expressly or impliedly accepted.

Colonial Ammunition Co v Reid (P 45)

- **The effect of accepting a tender depends upon its terms: it may obligate both parties or only the person submitting the tender.** There can be no contract for a party to take the goods or services except as ordered by that party, once they order the goods and services there is a contract to take those, but until the order is given, this agreement is nothing more than a tender on the part of the plaintiff to supply at the prices therein named within the order.

2.7 Requests for information (P 45)

3. Mere responses to requests for information are also not offers – example: someone asks, how much would you sell x for? Response: for \$1000 – this is not an offer.
 - Offers are distinguished from requests for information about the subject matter of a possible contract and statements of terms upon which a person may be willing to contract.
 - The response to such a statement cannot be an acceptance; at most, it will be an offer which the maker of the initial statement can accept or reject.
 - Characterisation of a communication as an offer, or not, is to be determined objectively by referencing to the intention of the parties, the factors to be considered include:
 - The inherent likelihood, or otherwise, of the communication being an offer;
 - The terms of the communications passing between the parties;
 - Whether the parties contemplated the eventual involvement of lawyers; and
 - Later events

2.8 Termination of Offers (P 46)

4. Offers are terminated by any of the following:

2.8.1 Revocation (P 46)

person making offer withdraws offer, this can happen any time prior to acceptance.

- An offer can be revoked any time prior to acceptance even if a promise was given to keep the offer open for a longer period of time unless that promise was separately paid for (in which case the promise turns into an enforceable option)
- There must be proper communication to the offeree in order for the revocation to occur
- In order for revocation to be effective it must actually hit the offeree before the offeree accepts the offer – this can be done to offers to the world.

Dickson v Dodds (P 46)

- The courts found that there was no binding contract between Dickinson and Dodds, while the revocation had not been directly expressed to Dickinson, Dickinson was aware that Dodds no longer wished to enter into a binding contractual agreement prior to his acceptance of the offer.

Byrne v Van Tienhoven (P 47)

- On 1st October Van Tienhoven offered to sell goods to Byrne
- On 8 October Van Tienhoven posted a second letter revoking his offer, this letter was received on 20 October.
- On 11 October Byrne telegraphed Van Tienhoven accepting the offer and had resold the goods for a profit
- Van Tienhoven refused to supply the goods and Byrne sued for damages

Had Van Tienhoven revoked his offer?

- The courts found that a person who has accepted an offer not known to him have been revoked, shall be in a position to safely act upon the footing of that offer and acceptance shall constitute a contract binding on both parties.

2.8.2 Rejection (P 50)

The offeree rejects the offer, destroys the original offer

- Rejection is not effective unless it is communicated to the offeror and so the offer is not terminated until then.
- Should the offeree change their mind and wish to accept, this may be done provided the acceptance reaches the offeror before the rejection and the latter clearly knows the offerees latest intentions

2.8.3 Counter offer made by the offeree (P 50)

Both rejection and counter offer destroys the original offer

- Because a counter-offer has the effect of terminating the offer, it must be distinguished from a mere request for information, or clarification.
- A counter-offer must also be distinguished from a request to alter the terms of the offer, if the offeror agrees to do this and the revised offer is then put to the offeree who accepts, a contract will be created.
- If the terms of a purported acceptance differ in any meaningful way from those of the offer, it would appear that at common law this communication will amount of a counter-offer and as such, will terminate the offer.

2.9 Acceptance (P 54)

According to common law, acceptance is an affirmative 'yes' response to an offer, where the offer is accepted in its entirety and this results in what is called a meeting of the minds - *ad idem*.

Crown v. Clarke (P 55)

- a person cannot accept an offer if the person was not aware of the offer but acted in the manner required by the offer.

5 principles regarding acceptance:

2.10 Who can accept an offer? (P 57)

1. Acceptance can only be done by the person to whom the offer is made (Who can accept offers?)

2.11 How can an offer be accepted? (P 58)

2. Methods of accepting offers:
 - Accepting by explicit language or;
 - Words or acceptance by conduct.
 - Acceptance by conduct is by an objective standard, how would a reasonable person interpret this conduct, would a reasonable person interpret this conduct as being an acceptance of the offer.

2.12 Correspondence between offer and acceptance (P 58)

3. Acceptance is only effective if it corresponds exactly with the terms of the offer, if an offeree tries to accept an offer on different terms this is not acceptance, this is a counter-offer.
 - Look to the last document that was sent and see if there was any object, if so the contract is based on the last document that was sent (British courts).
 - The Australian courts say that when there are lengthy back and forth negotiations, you can't look at the last form that was sent but rather the communications as a whole

Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd (P 59)

- Butler sent an offer to Ex-Cell-O corp with their standard conditions
- Ex-Cell-O corp responded positively but with their own conditions and there was no further correspondence from Butler
- Butler attempted to recover money from Ex-Cell-O corp in line with their own terms and Ex-Cell-O corp refused to pay
- In the first instance the court held that Butler was entitled to the money owed by Ex-Cell-O corp as the terms were explicit. On appeal, the court held that while the terms in Butler's original offer were clear, Ex-Cell-O corp had responded with their own terms, destroying the original offer and creating a counter-offer. The court required the documentation to be reviewed as a whole and it was found that it was clear the contract was based on Ex-Cell-O corp's terms.

Maxitherm Boilers v Pacific Dunlop (P 63)

- The courts decided that the correspondence and conversations viewed as a whole described a contract coming into existence and its acceptance

2.13 Communication of acceptance (P 64)

In order for an acceptance to be valid, it must be communicated to the offeror.

- Even if the offeree decided to accept, that in itself is not good enough, if the offeree remains silent and does not communicate acceptance then it is not a valid acceptance.
- This communication of acceptance determines when and where the contract has been made