

## **Contract Law Notes - Table of Contents**

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# Offer

- An offer is an expression of willingness to enter into a binding agreement with the offeree on specific terms
  - A proposal only amounts to an offer if the person making it indicates that an acceptance is invited and will conclude the agreement between parties
- Must take form of a proposal for consideration which gives the offeree an opportunity to choose between acceptance and rejection:
- *Brambles Holdings v Bathurst City Council:*
  - Communication which “uses the language of command” and “peremptorily requests” may not be regarded as an offer
- **Appear to a reasonable person in position of the offeree that an offer was intended**
  - Objective – does not matter if offeror didn’t intend to make an offer
    - *“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 v Carbolic Smoke Ball Co)*
  - ***Carlill v Carbolic Smoke Ball Co***
    - Newspaper advertisement offering bank deposit reward for person who contracted cold or influenza after using device
      - Bank deposit made it clear it was intended
  - ***Gibson v Manchester City Council***
    - Local council sent letter inviting formal application by council tenants to buy their house. P completed and returned application. Change of government and the scheme was dropped
      - Council’s letter was not an offer: *“may be prepared to sell the house to you”, “A letter setting out the financial terms on which it may be the Council will be prepared to consider a sale and purchase in due course”*

- **Puffery**

- Not an offer
- Puffery refers to promotional statements and claims that express subjective rather than objective views, which no "reasonable person" would take literally.
- *Carbolic Smoke Ball*

- **Supply of information**

- Not an offer (*Stevenson*)

- **Invitations to treat**

- An invitation for others to make offers or enter negotiations is not in itself an offer waiting for acceptance
- **Goods for sale**
  - *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*
    - "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"
    - "It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price"
- **Tenders**
  - Involves each interested party submitting a single bid without knowing what other bids have been made
  - A call for written tenders usually constitutes an invitation to treat, with each tender constituting an offer
  - A person calling for tenders can stipulate the basis on which the tender process will be conducted and will be bound by any conditions he/she says will govern the tender process (that is give conditions that someone can either accept or reject)
    - *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd*
      - ◆ A call for tenders was held to amount to an offer because the vendor promised to accept the highest bid

- ◆ Promise to accept the highest bid, when the highest bid received – completed a contract
- Obligations imposed on tenderers, such as obligation not to withdraw their tenders
  - *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*
    - ◆ Council under implied contractual obligation to give consideration to complying tenders
    - ◆ The call for tenders amounted to an offer which was accepted by the submission of a complying tender
    - ◆ Mistakenly failed to consider the P's complying tender
  - *Hughes Aircraft Systems International v Airservices Australia*
    - ◆ Letter committing themselves to participate in the tender process
    - ◆ Terms of second contract set out in a request for tenders which amounted to offer accepted by each tenderer's lodgment of a tender
- **Auctions**
  - Invitation to treat
  - Auctioneer invites offers – each bid constitutes an offer – then communicates acceptance of bid by the hammer
  - Bidder entitled to withdraw bid before it is accepted
  - Auctioneer not obliged to sell to highest bidder
  - Advertised to be held "without reserve"
    - *AGC (Advances) Ltd v Mcwhirter*
  - Holding an auction without reserve – England:
    - Auctioneer makes an offer to sell to the highest bidder
    - If highest bid not accepted, no contract arises but can be sued under separate, collateral contract
- **Ticket cases**

- Courts usually regarded the issue of the ticket as an offer which can be accepted or rejected by the passenger after the passenger has had a reasonable opportunity to consider the conditions on the ticket (*MacRobertson Miller Airline Services v Commissioner of State Taxation WA*)
- **Online transactions**
  - Proposal to make contract through electronic communication which is not addressed to a particular person, but is made generally accessible to people using information systems, is to be treated as an invitation to make offers unless it clearly indicates an intention to be bound in the case of acceptance (*Electronic Transactions Act 1999 Cth s 15B NSW*)
- **Terminating an offer**
  - An offer will cease to be available for acceptance when it is withdrawn by the offeror, lapses or is rejected by the offeree. The withdrawal must be communicated to the offeree - can be made by any reliable third party (*Dickinson v Dodds*)
- **Withdrawal**
  - General rule
    - An offer may be revoked at any time before it is accepted
    - At common law, a promise to hold an offer open for a specified period is not binding unless the offeree has given consideration for that promise
    - (*Dickinson v Dodds*)
    - The offeror can therefore revoke the offer before the specified period for acceptance has expired, provided the offer has not been accepted in the meantime
    - The withdrawal of an offer is effective only when it has been actually communicated to the offeree. No exception is made for withdrawal sent by post
    - (*Byrne & Co v Leon Van Tienhoven & Co*)
  - Options

- An option is an agreement between an option holder and a grantor under which the option holder is entitled to enter into a contract with the grantor on specified terms, either at a specified time or within a specified period. Option holder is then free to choose whether to exercise that option at a time within that period
- Promise to hold an offer open is binding at common law if consideration has been given in return for that promise
- *Goldsbrough Mort & Co Ltd v Quinn (1910)*
  - ◆ Option to purchase property as a contract for the sale of that property, conditional upon the option being exercised within the specified period.

- **Rejection/counter-offer**

- Once offer has been rejected it is no longer available for acceptance (*Tinn v Hoffman*)
- A rejected offer may later be revived or may form the basis of an agreement which is inferred in the absence of a valid offer and acceptance (*Brambles Holdings v Bathurst City Council*)
- The making of a counter-offer is treated as a rejection of the original offer and will, therefore, also extinguish it (*Harris v Jenkins*)
- Distinction between counter offer and inquiry relating to alteration of terms – in determining whether an agreement was made the courts concerned to ascertain the intentions of the parties from language and conduct of their communications (*Greig and Davis Law of Contract*)
- Buyer might make an inquiry if asks whether there is room for movement on the price – not manifested an intention to reject and so seller's original offer should be treated as remaining open

- **Lapse of time**

- An offer which is expressed to be available for acceptance for a particular period of time will lapse at the end of that period. If no period is stipulated, the offer will lapse after a reasonable time as passed
  - Either on the basis that a term can be implied that the offer lapses after a reasonable time has passed or on the basis that the court can infer rejection from the offeree's failure to accept the offer within a reasonable time
    - ◆ What period of time is reasonable will depend on the circumstances, including the nature of the subject matter and the form in which the offer was made (*Bartolo v Hancock*)
- **Death** terminates the offer generally (*Reynolds v Atherton*), but in option there is presumption that death of the option holder does not prevent the option from being exercised by the option holder's personal representatives (*Carter v Hyde*). However if offer is personal to the option holder, then the option lapses
- **Failure of condition and changed circumstances**
  - An offer may be made subject to express or implied condition that must be fulfilled before offer can be accepted or it may be made subject to an express or implied condition that it should lapse upon the happening of a certain event
  - *Financings Ltd v Stimson* – D's offer subject to implied condition that the car should not continue in the condition it was in when the offer was made and that, on the failure of that condition, the D's offer lapsed
- If the offer is made to the whole world, then the offeror must use appropriate means to communicate the revocation of the offer to all potential offerees - *Mobil Oil Australia Ltd v Wellcome International*
- If there is no time period stipulated in the offer then an offer will end at the expiration of a reasonable period of time.

# Acceptance

- o Acceptance occurs where the offeree (acceptor):
  - o Communicates to the offeror, whether expressly or by their conduct that he or she is willing to enter into a legally binding agreement with the offeror on the exact same terms put forward by the offeror. (*Crown v Clarke*)
- **Test:**
  - o Subjective: No contract is formed unless there was real consensus between parties.
  - o Objective: Considers external manifestations of acceptance, disregarding the offeree's state of mind.
- *Smith v Hughes* - there is no contract if the parties are not *ad idem* (of one mind) unless estoppel prevents one of the parties from denying that he or she had agreed to the other's terms.
- **Consciousness of the offer**
  - In the case of bilateral contract formed verbally or in writing, it will usually be clear that the offeree has deliberately accepted the offer.
  - The situation is different with unilateral contracts. If an offeree performs an act requested by an offeror without intending to accept the offer, has a contract been formed? The answer depends on the type of approach taken. (*Crown v Clarke*)
- o **Elements**
  - o **Acceptance must be communicated to the offeror**
    - Silence cannot amount to acceptance (*Felthouse v Bindley*)
    - Silence in conjunction with other circumstances may be acceptable (*Empirnall Holdings*)
      - 'Whether a reasonably bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted.'
  - o **Acceptance must be unconditional or unqualified**



- If there is an agreement on all terms of the offer, and the parties intend to be bound immediately, this would be considered unqualified acceptance of the offer. (*Masters v Cameron*)
- Exact same terms as the offer (*Butler Machine Tool Co*)
- **Method of acceptance can be stipulated**
  - (*Carbolic Smoke Ball*)
- **Acceptance of a Unilateral Contract**
  - Offeror can waive the need to communicate acceptance (*Carbolic*)
- **Acceptance can be implied from the offeree's conduct**
  - Acceptance is determined objectively (*Empirnall Holdings*)
  - (*Brogden v The Director of the Metropolitan Railway Company*)
- **Only an offeree can accept the offer**
  - (*Crown v Clarke*)
- **Acceptance may be communicated only by his or her agent**
  - (*Powell v Lee*)
- **A counter-offer is not acceptance**
  - (*Hyde v Wrench*)
- **Mere inquiry does not constitute acceptance**
  - (*Stevenson*)
- **The Postal Acceptance Rule**
  - Where the parties contemplate acceptance by mail, acceptance will be complete as soon as the letter is properly posted (*Henthorn v Fraser*)
  - Acceptance takes place when the letter is posted, not when it is received, even if the acceptance is lost in the post.
  - **Exceptions to the postal rule:**
    - **Intention:** For the rule to apply, acceptance by post MUST have been contemplated by the parties (*Henthorn*)
    - It may be excluded by the offeror either expressly or impliedly.

- **Revocation:** rule only applies to acceptance – i.e. cannot use for revocation of OFFER (*Byrne and Co*)
- Postal rule can be negated by requiring actual communication instead of constructive (postal) communication (*Elizabeth City Centre v Corralyn*)

#### ○ **Instantaneous communication**

- The Postal Acceptance Rule does not apply
  - General Rule: The contract will be formed when acceptance of the offer is communicated to the offeror and that communication is received.
  - (*Brinkibon*)
- Telegrams have been treated as ordinary mail

#### ○ **Electronic Transactions Act 2000 (NSW)**

##### 13 Time of dispatch

(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication, the time of dispatch of the electronic communication is:

- (a) the time when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator, or
- (b) if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator-the time when the electronic communication is received by the addressee.

##### 13A Time of receipt

(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication:

- (a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee, or
- (b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:
  - (i) the electronic communication has become capable of being retrieved by the addressee at that address, and
  - (ii) the addressee has become aware that the electronic communication has been sent to that address.

##### 13B Place of dispatch and place of receipt

(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication:

- (a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business, and
- (b) the electronic communication is taken to have been received at the place where the addressee has its place of business.