

1. **Agreement** (offer & acceptance)

1.A. Agreement: **offer**

1.A.I. Offer: **requirements** – is there an offer? when does a proposal or suggestion become an offer?

1.A.I.a. Requirements: **ticket cases** – is this a ticket case analogous to *MacRobertson Miller*?

1.A.I.b. **Invitation to treat**: is it merely an invitation to treat i.e. not an offer?

1.A.II. **Bilateral or unilateral**: what type of contract is it? any further considerations for unilateral contracts?

1.A.III. **Revocation**

1.B. **Acceptance**

1.B.I. **Requirements**: is there acceptance?

1.B.I.a. Further requirements: **unilateral contracts**

1.B.II. Operation: **when & where acceptance occurs**

1.C. Otherwise: **the acid test**

2. Consideration ('bargain' / 'quid pro quo') – 'consideration is an essential requirement for an enforceable contract'

2.A. **Exception**: consideration is not required for agreements made under a seal ('a deed')

2.B. **Requirements**: is there consideration? i.e. is there *quid pro quo*?

2.B.I. Insufficient: **matters of policy**

2.B.II. Insufficient: **conditional gifts**

2.B.III. Insufficient: **detrimental reliance**

2.C. Required: **consideration must be sufficient** *but need not be adequate*

2.C.I. Adequate: **need not be adequate**

2.C.II. Sufficient: **must be sufficient**

2.C.II.a. Insufficient: **past consideration**

2.C.II.b. Insufficient: **execution of an existing duty**

2.C.II.b.ii. Exception: **conferral of a practical benefit**

2.C.II.b.ii. Exception: **duty owed to third party**

2.C.II.b.iii. Exception: **bona fide compromise**

3. Intention to create legal relations

3.A. Presumption: **religious matters suggest that a contractual relationship is not to arise**

3.B. Presumption: **letters of comfort**

3.C. Presumption: **domestic & social agreements**

3.D. Presumption: **government agreements**

3.E. Presumption: **preliminary agreements** ('subject to a formal contract of sale')

4. **Certainty**: interrogating individual terms

4.A. Insufficient: **incomplete** i.e. failure to reach agreement

4.B. Insufficient: **uncertain** i.e. terms are too vague

4.B.I. Sufficient: **acceptable ambiguity**

4.B.II. Insufficient: **agreements to negotiate**

4.B.III. Insufficient: **unacceptable ambiguity**

4.C. Insufficient: **illusory**

5. **Privity**: contract is formed – now can X enforce a contractual benefit? does X have contractual obligation?

5.A. **Two limbs**

5.A.I. **Second limb**: only a party to the contract can **incur an obligation** under the contract

5.A.II. **First limb**: only a party to the contract can **enforce a benefit** ('3rdP beneficiary rule')

5.B. **Abrogations** i.e. non-application of the privity rule where a non-*involved* party *is* a party

5.C. **Exceptions** i.e. circumventing the privity rule in relation to non-parties

5.C.I. Exception: **agency** i.e. principal & agent are the same person

5.C.II. Exception: **trust**

0. Concept

1. Rights *in rem*

1.A. *In rem* right: **ownership**

1.A.I. Personal property: **fixtures**

1.A.I.a. Fixtures: **outlining the test**

1.A.I.b. Fixtures: **applying the test**

1.A.I.c. Fixtures: **results**

1.A.II. Personal property: **contentious property**

1.A.II.a. Contentious property: **body parts**

1.A.II.b. Contentious property: **privacy**

1.A.II.c. Contentious property: **animals**

1.A.II.d. Contentious property: **human rights**

1.B. *In rem* right: **lease** (also easement but we don't study those here)

1.C. *In rem* right: **possessory title**

1.C.I. Real property: **adverse possession** of unclaimed land

1.C.I.a. Adverse possession: **starting time**

1.C.I.a.i. Adverse possession: **identifying the land**

1.C.I.a.ii. Adverse possession: **identifying rights attached to particular adverse possessors**

1.C.I.b. Adverse possession: **stopping time**

1.C.I.c. Adverse possession: **rights of adverse possessor**

1.C.I.d. Adverse possession: **actions against adverse possessor**

1.C.I.e. Adverse possession: **regaining possession**

» STRUCTURE «

1.D. Acquisition of property

1.D.I. Equity: **profit a prendre** arising out of failure to meet formalities of sale contract

1.D.II. Equity: **interests** arising out of enforceable contracts

1.D.II.a. Equity: **doctrine of conversion** – at ii. contract stage of the sale of real property under Torrens system

1.D.II.b. Equity: **doctrine of loss** – at ii. contract stage of the sale of real property under Torrens system

1.D.II.b. Equity: **doctrine of deficiencies**

2. Rights *in personam*: how does your proprietary right operate with your *personal* (particularly **contractual**) rights?

2.A. Licences

2.B. Bailments

3. Intentional torts

3.A. Intentional torts: **trespass to land**

3.A.I. Trespass to land: **extent of the land**

3.B. Intentional torts: **remedies**

3.C. Intentional torts: **defences** – the plea of *jus tertii* ('the right of a third party')

» TOPIC III : ESTOPPEL «

1. Estoppel

1.A. Estoppel: **common law estoppel** – assumption as to an existing fact

1.B. Estoppel: **equitable estoppel** – assumption as to future conduct

1.B.I. Equitable estoppel i.e. future conduct: **proprietary estoppel** – assumption as to land-based interests

1.B.II. Equitable estoppel i.e. future conduct: **promissory estoppel** – assumption re: not to enforce legal rights

2. Remedies

0. Agency: **concept**

1. Agency: **requisite relationship for the particular act**

1.A. Requisite relationship: **relationship between agent-principal at the time of the act**

1.B. Requisite relationship: **relationship between agent-3rdP**

1.C. Requisite relationship: **the two relationships are referable to one another**

2. Agency: **sources of authority**

2.A. Sources of authority: **requisite sources of authority**

2.A.I. Requisite sources of authority: **operation of law or statute**

2.A.II. Requisite sources of authority: **ratification**

2.A.III. Requisite sources of authority: **actual express authority**

2.A.IV. Requisite sources of authority: **actual implied authority**

2.B. Sources of authority: **exceptions to authority**

2.B.I. Exceptions to authority: **subsequent ratification** i.e. principal *subsequently* ratifies agent's acts

2.B.II. Exceptions to authority: **ostensible authority** i.e. principal gave *impression* to 3rdP that agent has authority

3. Agency: **act must be within the purpose of the relationship**

4. Agency: **consequences if no authority**

1. Agreement (offer & acceptance)

1.A. Agreement: **offer**

- Defined: '[a] manifestation of willingness to enter into a bargain' so made as to justify another person in understanding that his assent to that bargain is invited & will conclude it'.

1.A.I. Offer: **requirements** – is there an offer? when does a proposal or suggestion become an offer?

- There was an **objective intention to make the offer** (*Gibson v Manchester City Council*¹).
Lord Diplock: 'The only contract that is alleged is one made by letters accompanying documents passing between the parties. The outcome of this appeal depends upon their true construction'. ... 'The words "may be prepared to sell" are fatal to [this document being construed as an offer]'. ... 'It is ... a letter setting out the financial terms on which it may be the council will be prepared to consider a sale & purchase in due course'.
 - Affirmed: an offer cannot be a mere puff** (*Carlill v Carbolic*²).
Lindley LJ: cannot be so vague that you cannot construe it as a promise – but *this* case was 'not dealing with any inference of fact ... [but] with an express promise to pay £100 in certain events' i.e. the £1000 deposited *is* the promise.
 - Affirmed: cannot purport to exclude all liability in the event of non-performance** (*MacRobertson Miller*³).
Clauses purporting to alleviate a party from all possible liability of not performing the contract is illusory i.e. excluding 'the whole area of possible obligation' is illusory.
- The offer made was **final** (*Gibson v Manchester*).
Lord Diplock: 'Left blank the space for the purchase price ... & sent the form to the corporation ... with a covering letter in which he requested the corporation either to undertake at their own expense to carry out repairs to the tarmac path ... or to make a deduction from the purchase price to cover the cost of the repairs'.
 - Insuff:** 'we have more work to do', 'maybe' (*Mobil Oil*).
- Look at the plain meaning (*Carlill v Carbolic*).
Bowen LJ: 'No limit of time fixed for catching the influenza so advertisers cannot have seriously meant to promise to pay money to every person who catches the flu at any time after inhaling the smoke ball → look at the plain meaning → there are 2 constructions: [a] protection warranted to last during the epidemic; [b] protection while it is in use or warranted during a reasonable period after use → sufficiently definite.
Lindley LJ: 'I think it would be pushing the language of the ad too far to construe it as meaning that [you would be guaranteed against influenza for the rest of your life]'. Possibly meant catching the prevailing epidemic or whilst you are using this remedy after using it for 2 weeks OR reasonable time after having used the smoke ball – what is a reasonable time?

1.A.I.a. Requirements: **ticket cases** – is this a ticket case analogous to *MacRobertson Miller*?

- Carparks: machine makes the offer, you accept it when you enter *or exit*.
- Transport: ticket is the offer (*Stephen J (obiter) in MacRobertson Miller*).
- Planes specifically: purchase of ticket ≠ agreement i.e. *receipt of payment = issuing of ticket; reading of conditions = purchase of ticket; offer = passenger by presenting himself for travel; acceptance = when airline accepts to carry him* (*MacRobertson Miller*).
Barwick CJ: 'the airline operator was not in contractual relations with the intending passenger until it had provided him with a seat on the airplane' – that is, contractual relations were formed as the carrier's performance constitutes acceptance. ... 'the issue of the ticket ... is mainly a receipt for the payment of the fare' & the fare is 'no more than the prepayment of the fare payable for actual carriage performed.' ... 'the airline operator will have earned the fare' if it carries the passenger in accordance with the reservation or any permissible variations of it.
Stephen J: no agreement is formed when ticket is simply purchased.
Barwick CJ: 'The ticket, apart from any specific terms ... would not be regarded as entitling its holder to a place on a particular flight. It should be regarded as doing no more than denominate the carriage which ... will earn the prepaid fare.'
'Although the terms of the ticket in this case with their express & extensive limitations & exclusions preclude the existence of an antecedent contract of carriage, it is my opinion that, without the presence of these express provisions & in the absence of an express provision to carry, the ticket would not represent an agreement or memorandum of agreement to satisfy the relevant portion of the schedule to the *Stamp Act*.' Allows appeal.

¹ *Gibson v Manchester City Council* [1979] 1 WLR 294 House of Lords: scheme to allow tenants of council housing to purchase their houses → Council wrote letter to Gibson re: the house he was renting, saying the Council 'may be prepared to sell the house to you' upon the completion of an application form → Gibson did not nominate purchase price → abandoned scheme → Council denied contract → TJ said there was offer & acceptance → Council appealed to HOL → not an offer

² *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 Court of Appeal: Ds claimed their 'Carbolic Smoke Ball' prevented colds & influenza → advertised in many newspapers – £100 reward to any person who contracts the flu / cold / any disease after using the ball 3x daily for 2 weeks, £1000 deposited shewing sincerity in the matter, will last a family several months making it the cheapest remedy in the world at the price' → P used smoke ball in reliance on ad & in accordance with directions from Nov 1891 – Jan 1892 → contracted influenza & sought £100 → Carlill won.

³ *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125: prospective passenger selects flight → handed ticket after paying fare → passenger presented ticket to secure seat on flight → ticket condition: 'airline reserved right to abandon any flight or cancel any ticket but passenger entitled to a proportionate refund & airline under no other liability to passenger' → WASC said it was an agreement → airline appealed.

» TOPIC I : CONTRACT «

1.A.I.b. **Invitation to treat:** is it merely an invitation to treat i.e. not an offer? *{Pharmaceutical Society⁴}*

- Defined: expression of a willingness to entertain (receive) offers.
i.e. where the final offer is pending *as there is no indication as to which products you will buy!*
- Example: display of goods in self-service store;⁵ magazine ads;⁶ auction;⁷ etc.
 - Process: i. invitation to treat *is display of goods*; ii. offer *is when you hand over the items & pay*;
 - iii. acceptance *is when money is received*.

Somervell LJ: 'Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organised way of doing what is done already in many types of shops ... namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying "I want this"? The assistant in 999 times out of 1 000 says, "That is all right".' ... 'I can see no reason for implying from this self-service arrangement any implication other than that which the LCJ found in it ... that it is a convenient method of enabling customers to see what there is & choose ... articles which they wish to have'.

Birkett LJ: In non-self-service situations, '[t]here is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.'

1.A.II. **Bilateral or unilateral:** what type of contract is it? any further considerations for unilateral contracts?

Bilateral		Unilateral
Two specific parties exchanging promises	Promisee	One specific party making offer, stated to be acceptable by performance
Executed i.e. acceptance is by notifying other party <u>or</u> signature	Formation	Executory <i>at the time of formation</i> i.e. a contract in which the promises are made & completed immediately e.g. purchase of a product
Performance is merely consideration	Performance	Performance is both acceptance & consideration <i>{MacRobertson Miller}</i>
Signing of offer is sufficient	Signing	Does not require notification of acceptance
Offeror & offeree agree on terms	Control	Offeror retains a lot of control
A emails B: 'will you draft an ad for my business?' → B emails A: 'yes I will' → agreement	Example	A emails B: 'I will pay you \$10K if you draft an ad for my business & you email the ad to me by 5pm tomorrow' → B emails A: 'here is the ad' → agreement

1.A.III. **Revocation:**

- a. Offer deemed to be open for a reasonable time (unless effectively revoked).
 - Exception: unless offer is explicitly stated to be open for a specific time (unless effectively revoked).
- b. Offer can be revoked at any time prior to effective acceptance *{Goldsbrough⁸}*.
 - Including: statement that offer will be open for specific time *{Dickinson v Dodds}*.
 - Exception: where offeree has given consideration to keep offer open → option (ancillary agreement to keep principal offer open) *{Goldsborough; Mobil Oil}*.
 - Exception: where offeree has 100% performed a unilateral contract i.e. consideration *{Mobil Oil⁹}*.
The Court: policy considerations re: unilateral contracts – offeror may not know that offeree has commenced performance & offeree may not understand the offeror is at liberty to revoke.
- c. Revocation must be communicated to offeree *but need not be communicated by offeror* *{Dickinson v Dodds}*.

⁴ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401: Boots operated self-service shop → one part displayed certain drugs & was controlled by registered pharmacist → whenever a customer took drugs to the cash register the pharmacist supervised that part of the transaction & was authorised by Ds to prevent a customer removing drugs if he saw fit → *Pharmacy & Poisons Act 1933* (UK) made it unlawful for a person to sell drugs unless 'the sale is effected by a registered pharmacist' → appeal dismissed.

⁵ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401.

⁶ *Partridge v Crittenden* [1968] 1 WLR 1204.

⁷ *Payne v Cave* (1789) 3 TR 148: but in some circumstances, the conduct of an auction may amount to the making of an offer e.g. where auctioneer indicates that there is no reserve price.

⁸ *Goldsbrough Mart & Co v Quinn* (1910) 10 CLR 674: specific performance terms in a doc dated 8/2/1909 signed by the respondent – 'for five shillings I grant Goldsbrough the right to purchase the whole of my freehold ... within one week at X pounds per acre, subject to the usual terms & conditions of sale re: such lands, within 1 week' → within 1 week Q alleged that offer was made under a mistake & tried to repudiate the offer → appellants accepted within 1 week anyway.

⁹ *Mobil Oil Australia v Wellcome International Pty Ltd* (1998) 81 FCR 475: Mobil told its franchisees that it would reward franchisees who live up to 90% performance standards under a scheme called "Circle of Excellence" over 6 years → reward was discussed in a vague way, but essentially would be the extension of the franchisee's tenure with no cost → several franchisees lived up to standards of scheme, acting in reliance on scheme → scheme abandoned after 4 years.

1.B. Acceptance

1.B.I. Requirements: is there acceptance?

1. Acceptance must **correspond to offer** i.e. acceptance \neq counter-offer {Butler Machine Tool¹⁰}.

NB: also see *Brambles Holdings & Brinkibon v Stahag* below.

Lawton LJ: 'It cannot be said that the buyers accepted the counter-offer by reason of the fact that ultimately they took physical delivery of the machine. By the time they took physical delivery of the machine, they had made it clear by correspondence that they were not accepting that there was any price escalation clause in any contract which they had made with the Ps'.

- Counter-offer 'kills' the original offer e.g. *battle of forms*.

'These T+Cs shall prevail over any T+Cs in the buyer's order' which were different to the seller's T+Cs i.e.

Lord Denning MR: case decided on documents alone & buyer purported to accept seller's offer, but 'counter-offer kills the original offer'. 'When there is a "battle of forms", there is a contract as soon as the last of the forms is sent & received without objection being taken to it' i.e. whoever fires the last shot.

Bridge LJ: 'counter-offer amounts to a rejection of an offer & puts an end to the effect of the offer'.

→ Cannot reconcile differences in material terms, although disagreement re: non-material terms.

Lord Denning MR: 'The T+Cs of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well & good. If differences are irreconcilable – so that they are mutually contradictory – then the conflicting terms may have to be scrapped & replaced by a reasonable implication.'

Lawton LJ: 'That offer was not accepted. The buyers were only prepared to have one of these very expensive machines on their own terms. Their terms had very material differences in them from the terms put forward by the sellers. They could not be reconciled in any way.'

2. Acceptance must be **communicated** i.e. silence does not constitute acceptance {Felthouse v Bindley¹¹}.

| So as not to place an obligation on everyone who receives an offer to respond.

- Exception: conduct can objectively be taken to infer acceptance to offeror's knowledge {Empirnall¹²}.

i.e. if Empirnall had no idea about the work being done, then no opportunity to reject, then probably can argue in favour of Empirnall.

McHugh JA: 'The silent acceptance of an offer is generally insufficient to create any contract. ... After a reasonable period has elapsed, silence is seen as a rejection & not an acceptance of the offer. Nevertheless, communication of acceptance is not always necessary ... The ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted.'

→ Example: where offeree under a duty to communicate rejection of offer

e.g. custom of trade, course of dealings, previous relationship between parties.

McHugh JA: 'offeree may be under a duty to communicate his rejection of an offer. If he fails to do so, his silence will generally be regarded as acceptance' e.g. custom of trade, course of dealing, previous relationship between parties. ... 'the offeree will be bound because, knowing the terms of the offer & the offeror's intention to enter into a contract, he has exercised a choice & taken the benefit of the offer.'

– Required: offeree had chosen to take the benefit of the offer e.g. progress payments.

McHugh JA: Q of fact e.g. commenced work to the knowledge of the offeror. 'Empirnall relied on [the] statement that "Eric does not sign contracts". ... The objection was not to the T+Cs but to the manner of acknowledging them' i.e. taken to be saying "actually we do want to be bound but we just don't want to sign a contract".

1.B.I.a. Further requirements: unilateral contracts {Carlill v Carbolic}

- Performance = acceptance + consideration as detriment of doing act is sufficient.

Bowen LJ: Consideration: use of the carbolic smoke ball, 'cannot be said to be doing nothing at all'.

Lindley LJ: user puts himself at some inconvenience at D's request i.e. use of ball.

- Acceptance need not be notified → but if notice is required (which is doubtful) then the person who makes the offer gets the notice of acceptance contemporaneously with his notice of performance of the condition.

Bowen LJ: 'as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself' by looking at the character of the transaction that notification is not required, 'but that if he performs the condition notification is dispensed with'.

¹⁰ *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401: battle of forms i.e. 2 businesses both have their standard form contracts → 1/ additional item for the cost of installation, 2/ different delivery date 3/ different terms re: cost of carriage, 4/ right to cancel for late delivery; 5/ at foot of order, tear-off slip to acknowledge acceptance of T+Cs → machine supplier Butler supplied machine for £75,535, on back of quotation were T+Cs, inc. a price variation clause → delivered 18 months after quote given so costs had increased so much that Butler claimed £2,892 → XLO rejected & relied on own T+Cs that they provided on the back of their order → TJ held that price variation clause continued through whole dealing & Butler did all that was necessary & reasonable & that XLO 'trapped' Butler.

¹¹ *Felthouse v Bindley* (1862) 11 CB (NS) 869; 142 ER 1037: uncle (Felthouse) wrote to his nephew (John Felthouse) offering £30 for his horse, 'if I hear no more about him I shall consider the horse mine at £30' → John did not reply → John employed auctioneer to sell his farming stock but not the horse → auctioneer sold the horse by mistake → P sued auctioneer.

¹² *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523: developer Empirnall retained architects Machon → E asked M if he would be interested in acting as project manager for development → M said yes → later on, M submitted contract to E but was told that the director 'does not sign contracts' i.e. contract not signed → D proceeded working → P made progress payments.

0. Agency: **concept**

- *Previously* – broadest definition: agent consents to act on behalf of principal pursuant to principal's grant of authority i.e. law was concerned with ensuring the accountability of the agent.
- *Previously* – strictest definition: agent has authority to create legal relations between principal & a third party¹ i.e. focuses on principal as he holds the authority & without a principal, there is no agency.
- **Currently – balanced approach**: agent with authority can create or *affect* legal rights & duties as between the principal & third parties² i.e. what has the principal done & what has the agent done in response to this.

1. Agency: **requisite relationship for the particular act**

1.A. Requisite relationship: **relationship between agent-principal at the time of the act** {*Beazley*}

- I. Required: **principal has capacity to perform the act** they are performing through an agent {*Christie v Permewan*}.
 - Principal: may be an infant {*G(A) v G(T)*} or a corporation {s 124(1) of *Corporations Act 2001* (Cth)}.
 - Act: *any* act they may do themselves can be done through an agent {*Bevan v Webb*}.
- II. Required: **agent has capacity**.
 - Agent: may be an infant *so long as they understand the nature of the agency* {*Smally v Smally*}.
 - Capacity: need not be contractual {*Watkins v Vince*}; subject to any qualifications that may apply {e.g. *Legal Profession Act 2007* (Qld); *Property Agents and Motor Dealers Act 2000* (Qld)}.

1.B. Requisite relationship: **relationship between agent-3rdP** {*Beazley*}

1.C. Requisite relationship: **the two relationships are referable to one another** {*Beazley*}

2. Agency: **sources of authority**

NB: we only really talk about – actual *express* authority + actual *implied* authority + *ostensible* authority.

2.A. Sources of authority: **requisite sources of authority**

2.A.I. Requisite sources of authority: **operation of law or statute**: 3rdP cannot claim lack of knowledge of the law

2.A.II. Requisite sources of authority: **ratification**: can be used as either a source or an exception (both = agency)

2.A.III. Requisite sources of authority: **actual express authority**

- a. What: express consent of principal & agent,³ by words or writing.
- b. How: written / oral / POA / scribble on a piece of paper / company articles.
 - Contract: authority determined by construing terms of the contract.
 - POA: deed will be strictly construed,⁴ or statute will be construed according to the proper construction e.g. statute was held to vest power in the agent to do anything which the principal could do so as to avoid argument re: agent's authority.⁵
- c. Effect: does not bar other sources of authority without express limitation i.e. actual implied or ostensible authority.

2.A.IV. Requisite sources of authority: **actual implied authority**

- a. Source: implied consent of principal & agent.⁶
 - Implied: inferred from the relationship or conduct of the parties.
- b. How:
 - i. Incidental authority: acts incidental to expressly authorised acts; or
 - Agent authorised to *lease* property: implied authority to describe property to prospective lessees.⁷
 - Agent authorised to *sell* property: no implied authority to make representations re: extensions of time under contract.

¹ *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1968) 100 CLR 644 at 652.

² *Petersen v Moloney* (1951) 84 CLR 91 at 94.

³ *Poulet Frais Pty Ltd v Silver Fod Company Pty Ltd (as trustee for the Baler Family Trust)* [2005] FCAFC 131 at [124].

⁴ *Tobin v Broadbent* (1947) 75 CLR 378.

⁵ *Spina v Permanent Custodians Ltd* (2008) 13 BPR 25, 463; [2008] NSWSC 561 at [108]

⁶ *Poulet Frais Pty Ltd v Silver Fod Company Pty Ltd (as trustee for the Baler Family Trust)* [2005] FCAFC 131 at [124].

⁷ *Bacon VC in Mullens v Miller* (1882) 22 Ch D 194.

» TOPIC IV : AGENCY «

- ii. Usual authority: act that the agent would usually have the authority to do
i.e. first characterise the nature of the relationship.
 - Managing director: implied authority to do all the things that someone in that position would usually, including employing others to provide services + guaranteeing loans + agreeing to indemnify other guarantors⁸ + borrowing \$ + giving security over the company's property + authorising agents to enter into contracts on behalf of the company.⁹
 - Ordinary director: no implied authority to bind the company.¹⁰
 - Real estate agent: implied authority to find purchase but not to bind the vendor to terms.¹¹
 - Solicitor: no implied authority to bind client to a contract.¹²
 - Solicitor: no authority to receive or effect a revocation of an offer received for client, without course of conduct between the parties.¹³
- iii. Customary authority: act is in accordance with reasonable business practice applicable to the particular transaction i.e. reference to rules of a market / customs of the business.
 - Expressly incorporated: expressly incorporated into contract made by the agent with the 3rdP.
 - Trade, custom or usage implied into contract: usage must be notorious / certain / reasonable.¹⁴ i.e. necessary to identify evidence of usage within the particular market or area of business which shows a person who holds such a position customarily holds such an authority.
- iv. Implied from parties conduct: history of dealings between the parties; evidence may be relevant.
 - Board of directors: if they usually allows one of its directors to enter into contracts of a particular type without needing to seek the sanction of the board then actual implied authority.¹⁵
 - Mortgage transactions: established that the broker had implied authority to receive the net proceeds of the final loan for the purpose of applying them to the investments agreed upon between the principal & the broker. The fact that the broker did not in fact use the moneys for that purpose was irrelevant.¹⁶
 - Subject to express directions from the principal:¹⁷ but does not preclude implied authority being established due to a course of dealing where initially the principal expressly forbade the agent from performing the particular task e.g. the principal nonetheless adopts the transaction & gives effective to it – may be inferred that the agent was impliedly authorised to perform similar tasks in the future.¹⁸
 - Cannot be inconsistent: cannot be inconsistent with the substantial character of the agency.
 - Inconsistent: to transact the sale through a particular agency, was at variance with a direction to make a payment to an entity which bore no relationship to that of the vendor or to the nominated entity & who in fact had no such relationship.¹⁹
 - Inconsistent: cannot add a term to a contract which gave equal representation on the board to the contracting parties when the substance of the agreement was that the principal was to acquire 51% of the issued share capital of the company.²⁰

2.B. Sources of authority: **exceptions to authority**

2.B.I. Exceptions to authority: **subsequent ratification** i.e. principal *subsequently* ratifies agent's acts

2.B.II. Exceptions to authority: **ostensible authority** i.e. principal gave *impression* to 3rdP that agent has authority

Concept

- Basis: estoppel; but is a *positive* basis for relationships.
- Rationale: to remedy the injustice that would flow if one person who represented another to be his agent were able to resile from that representation [Pacific Carriers at [39]-[40]].
- Rationale: contracting parties should be held to the objective appearances of intention they create.

⁸ *Hely-Hutchinson v Brayhead Limited* [1968] 1 QB 549.

⁹ *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72.

¹⁰ *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

¹¹ Barwick CJ and Gibbs J in *Brien v Dwyer* (1978) 141 CLR 378 at 387.

¹² *Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582.

¹³ *Singer v Trustee of the Property of Munro* [1981] 3 All ER 215 at 218.

¹⁴ *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226.

¹⁵ *Hely-Hutchinson v Brayhead Limited* [1968] 1 QB 549.

¹⁶ *Cousens v Grayridge Pty Ltd* [2000] VSCA 96.

¹⁷ *Fray v Voules* *1859(1 El & El 839.

¹⁸ *Powercor Australia Ltd v Pacific Power* [1999] VSC 110 at [1274].

¹⁹ *Smith v Peter and Diana Hubbard Pty Ltd* [2006] NSWCA 109 at [71].

²⁰ *Marriot v General-Electric Co Ltd* (1935) 53 CLR 409.