

## **Contracts**

### **1. Formation of a contract**

- a) Agreement – Offer
- b) Agreement – Acceptance
- c) Consideration
- d) Intention
- e) Certainty/completeness
- f) Promissory estoppel

### **2. Parties to the contract**

- a) Capacity
- b) Privity

### **3. Terms**

- a) Express terms
- b) Extrinsic evidence
- c) Implied terms
- d) Construction/classification
- e) Exclusion clauses

### **4. Enforceability**

- a) Formalities/part performance
- b) Statutory illegality
- c) Common law illegality/public policy
- d) Consequences of illegality

### **5. Vitiating factors**

- a) Misrepresentation (innocent/fraudulent)
- b) Duress
- c) Undue influence
- d) Unconscionable conduct
- e) Third party impropriety
- f) Rescission

### **6. Termination**

- a) Termination by performance
- b) Breach and repudiation
- c) Termination by agreement
- d) Frustration

## 1. FORMATION OF A CONTRACT

### 1a) Offer

- **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
- Feature of an offer: ***Australian Woollen Mills Pty Ltd v Commonwealth (1954)***
  - Consideration
  - Intention to be bound
- May be revoked at any time prior to acceptance
- All offers must be communicated to the offeree before they can be accepted: ***Fitch v Snedaker (1868)***
- A mere supply of information may not constitute an offer: ***Harvey v Facey (1893)***
- Mere puffery may not constitute an offer: ***Leonard v Pepsico Supp (1999)***
- Distinguish between offer to world at large and invitation to treat
  - Where the offer is clear, definite, explicit and leaves nothing open to negotiation, it will constitute an offer.
  - Objective guide:
    - Terminology: merely calling something an offer does not make it an offer
    - Limiting the acceptors e.g. first four people
    - Limiting the offer e.g. one per customer
  - Ads in newspapers are typically not offers but invitations to treat: ***Partridge v Crittenden (1968)***
  - Brochure distribution usually invitation to treat: ***Grainger and Son v Gough (1896)***
  - Shop displays are not offers: ***Pharmaceutical Society Of Great Britain v Boots Cash Chemists (Southern) Ltd (1953)***, ***Fisher v Bell (1961)***

### Special situations

- **Auctions**
  - Acceptance occurs at the fall of the hammer: ***Payne v Cave (1789)***, ***Sale of Good Acts 60***
  - No claim if auction is cancelled: ***Harris v Nickerson (1873)***
- **Tenders**
  - Not usually an offer: ***Spencer v Harding (1870)***
  - Liability may arise where:
    - Wording indicates the highest or lowest bid may be accepted: ***Harvela Investments Ltd v Royal Trust Co of Canada (1986)***
    - Failure to comply with agreed tendering process: promise to give proper consideration to complying tenders ***Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council (1990)*** or there is a preliminary process contract which includes an implied term to act in good faith and engage in fair dealing: ***Hughes Aircraft Systems International Inc v Airservices Australia (1997)***
- **Options**

- An offer which contains a promise not to withdraw it for a certain time
- Crucial feature: offeree must have provided consideration for the benefit, usually a nominal sum of money
- **Tickets**
  - Ticket handed out, accepted by customer without objection = acceptance of an offer
  - Proprietor of automatic machine makes an offer when ready to accept money, accepted when customer puts money in: ***Thornton v Shoe Lane Parking Company [1971]***

## Fate of an offer

- **Termination:**
  - Rejection terminates the offer: can be express or implied, cannot be accepted: ***Stevenson Jacques & Co v McLean (1880)***
  - Revocation/withdrawal:
    - If offer is to specific person, must be communicated: ***Byrne v Van Tienhove (1880)*** or can be informed from a reliable source: ***Dickinson v Dodds (1876)***
    - If offer is to world at large, may be withdrawn prior to performance so long as publicised as prominently as original offer: ***Shuey v United States (1875)***; if partly performed, depends on the specific facts, no universal principle stopping revocation of offer: ***Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998)***
- **Counter offer**
  - Acts as rejection of original offer: ***Hyde v Wrench (1840)***
  - Becomes an offer that can be accepted or rejected: ***Northland Airlines Ltd v Dennis Ferranti Meters Ltd (1970)***
  - Objective test to determine whether it is a request for further info or counter offer: ***Stevenson Jacques & Co v McLean (1880)***
- **Lapse of offer**
  - Effluxion of time: if no time limit set, offer expires after reasonable time: ***Bartolo v Hancock (2010)***, ***Balla v Theophilos (1957)***
  - Generally, death of either party will terminate the offer but this can be unworkable and may not suit the parties: ***Reynolds v Atherton (1921)*** but avoid generalisations: ***Fong v Cili (1968)***
- Condition bringing offer to end: ***Financings Ltd v Stimson (1962)***

## 1b) Acceptance

- Meeting of the minds – Objective test: **Taylor v Johnson (1983)**
- Conditional acceptance and need for finality: **Masters v Cameron (1954)**
  1. Parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound but wish to have their terms restated in a form that is more full or precise → contract is valid
  2. Parties have agreed to all terms and plan no departure from the terms but have made performance conditional upon the execution of a formal document → contract is valid
  3. The intention of the parties is not make a concluded bargain at all unless they execute a formal contract → no enforceable contract as the agreement was not in its final form

### Who may accept

- An offer can only be accepted by those persons to whom it was made
  - Must be in response to an offer: **R v Clarke (1927)**
  - By someone other than the offeree: **Boulton v Jones (1857)** – only the person who received the offer can accept the contract where the personality of the contracting party is important
  - By more than one person: **Patterson v Dolman (1908)** – offerors need to be careful that they are not committed to obligations they cannot meet. Where the offer can be accepted by more than one, the liability will depend on the ways the terms are construed.

### Acceptance must be communicated

- Manner of communication up to the parties or up to the offeror if s/he prescribes the method of acceptance: **Latec Finance Pty v Knight 1969**
- Exception to this → **POSTAL RULE** (won't be examined)
- Silence cannot amount to acceptance: **Felthouse v Bindley (1862)**
  - This rule modified → Can be inferred by conduct: in circumstances where it is incumbent on the party who has received the offer to reject it explicitly or be bound: **Empirnall Holdings Pty Ltd v Machon Paull Parnters Pty Ltd (1988)**
- Objective test: failure to comply with the stipulation may not be fatal especially if its to the advantage of the vendor: **Manchester Diocesan Council for Education v Commercial and General Investments (1970)**

### Correspondence between acceptance and offer

- Acceptance must correspond with offer
- If the offeree attempts to vary the terms or add additional terms this amounts to a **counter offer**
  - Last shot prevails: **Butler Machine Tools v Ex-Cell-O Corp Ltd (1979)**
  - Take into account “realities of commerce”: **Goodman v Cospak [2004] NSWSC**

### Agreement in the absence of apparent offer and acceptance

- Can still be valid contract without clear offer and acceptance: **Brambles Holdings Ltd v Bathurst City Council (2001)**