

Offer

The indication by one person to another of their willingness to enter into a contract with that other person on certain terms. - Gibson

A proposal will only amount to an offer if the person making it indicates that an acceptance is invited and will conclude the agreement between the parties

It is an objective test, the outwards manifestations are what the court will use to judge whether an offer has been made, not the parties subjective intentions (Carlil)

May need to distinguish between offer and mere puff, which is exaggerated sales talk that a reasonable person wouldn't believe

Invitation to treat

- Is an invitation to others to make an offer or enter into negotiations.
- It is different to offer because it lacks sufficient indication of willingness to be bound

Most advertisements

- Are invitations to treat not offers
- E.g. catalogues

Goods displayed in shops

- Are invitations to treat not offers
- **Boots Chemist**

goods offered for sale online

- The displaying of things for sale online is an invitation to treat
- The selecting of a product and putting it in your basket is an offer
- The acceptance is made when the store accepts payment and places your order.
- **ETA s14B**

- 1) A proposal to form a contract made through one or more electronic communications that:
 - a. Is not addressed to one or more specific parties AND
 - b. Is generally accessible to parties making use of information systems

Is to be considered an invitation to make offers, unless it clearly indicates that the intention of the party making the proposal is to be bound in case of acceptance

- 2) Subsection 1 applies to proposals that make use of interactive applications for the placement of order through information systems

Auctions

- General rule:
 - Auction is an invitation to treat
 - Bid is an offer
 - The offer is accepted by the auctioneer's fall of the hammer
- This applies even if the property is said to be "on the market" or advertised for auction "without reserve"
 - **AGC v McWhirter**
- This means that:
 - The seller can withdraw the property before acceptance of a bid
 - The seller can refuse to accept a bid (doesn't have to sell to the highest bidder)
 - The buyer can withdraw a bid before acceptance

Tenders

- General rule is:
 - Request for tenders is an invitation to treat
 - Tender from interested supplier is the offer
- exceptions
 - Sometimes the call for tenders may be an offer
 - **Harvela Investments**
 - "we invite you to submit...any offer you wish to make...if any offer made by you is the highest offer we receive then we bind ourselves to accept"
 - Sometimes the call for tenders will create a contract regarding the tender process
 - **Hughes Aircraft**
 - If in the invitation for tenders, the party sets out how the tender process will work, this in itself becomes its own contract that has to be complied with

Terminating an offer

Revocation/withdrawal

- Offeror withdraws offer
- Can occur any time before acceptance
- Even if the offeror promised to keep it open (unless consideration paid to keep it open)
 - **Dickinson v Dodds**
- Can be by words or by an action that is inconsistent with the continuance of the offer
 - **Dickinson v Dodds**
 - Selling property to someone else was an act inconsistent with the offer still being open
- If the offer was made to the public at large, it needs to be revoked in the same way or in another way that covers the same people/area

Exceptions

- If consideration has been paid to keep an offer open, it cannot be rescinded.
 - Called an option to purchase
 - **Goldsborough**
- If a unilateral contract and performance has commenced then you cannot revoke if there is an implied contract not to
 - When considering whether such an implied contract exists can consider:
 - Does the offeror know the offeree has commenced performance?
 - Does the offeree understand that incomplete performance is at their own risk?
 - Did the parties intend that the offeror should be able to revoke the offer?
 - Is the performance beneficial or detrimental to the offeree?
 - **Mobil oil**

CISG – article 16

- 1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- 2) However, an offer cannot be revoked—
 - a. if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
 - b. if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer

Lapse of time

- Offer may be open for a specified period - will lapse at the end of the specified time.
- If no time prescribed, after a reasonable time
 - What is "reasonable" will depend on the context - apply objective test

Death

Of offeror

- Offer will lapse on the death of the offeror where the offeree knows of the death
 - **Fond v Cilli**
- There is no clear authority as to whether an offer will lapse on death of an offeror when offeree doesn't know about the death (depends on the parties intentions and the circumstances)
- Option contracts remain enforceable against deceased estate unless
- Personal services of deceased required or
- Intent of option was that it not be exercisable after death
 - **Laybutt v Amoco Australia Pty Ltd**
- No clear authority as to whether the offer will lapse on the death of the offeree - seems like it would but depends on individual case situations.

Failure of a condition/change of circumstances

- May terminate if there has been some **fundamental** change of circumstances or a failure in condition
- The offeror may stipulate circumstances in which an offer will stay open or lapse (e.g. subject to a roadworthy certificate)
- If the offeror does not do so expressly, it may still be obvious to an objective observer that the offer was made on the basis of certain circumstances. It may be that if these circumstances change, that the offer lapses
- Something that is unlikely but still possible isn't enough to terminate contract
 - **Nielsen v Dysart Timbers**

Rejection

- By the offeree
- The rejection must be communicated

Counter offer

- Need to distinguish between a counter offer and a mere inquiry
- If a counter offer is made then the original offer is rejected and no longer able to be accepted
- Counter offer initiates new terms
- Mere inquiry is just asking to see if there is a chance of changing terms
 - o **Stevenson, Jaques & Co v McLean**

CISG – Article 19

- 1) A reply to an offer which purports to be an acceptance but contains, additions, modifications or limitations is a rejection and therefore a counter-offer
- 2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance
 - Unless the offeror without delay objects to these new terms or dispatches a notice to that effect
- 3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Offer Cases

<u>Name</u>	<u>Facts</u>	<u>Decision</u>
Gibson	<ul style="list-style-type: none"> - Council wrote to G proposing to sell council housing - G completed the application form and returned to the council - There was an election and new council stopped all proposed sales - G sought to enforce the sale 	<ul style="list-style-type: none"> - Not an offer, the words “may be prepared to sell” and the request for a “formal APPLICATION” were fatal to the ability of the letter to form an offer
Carlil	<ul style="list-style-type: none"> - Ad in newspaper that said if you use this ball according to the instructions and still get sick we will give you 100 pounds - We have 1000 pounds deposited at the bank to show sincerity - C used ball with instructions and got the flu, claimed the 100 pounds. 	<ul style="list-style-type: none"> - It is an objective test and this isn't a mere puff because a reasonable person would say that offer was intended - Why else would there be the deposit unless they were intending to pay people. - It is possible to make unilateral offer to the world at large
Boots Chemist	<ul style="list-style-type: none"> - Legislation made it illegal to sell drugs except under pharmacist supervision - Pharmacists were at the checkouts but customers could pick items off the shelf without supervision. - Was having the goods on the shelf capable of being an offer? 	<ul style="list-style-type: none"> - Held that offer was bringing them to the counter and that displaying them was merely an invitation to treat, acceptance was the processing of the transaction
AGC v McWhirter	<ul style="list-style-type: none"> - Company owned a building and the directors of the company tried to buy the building as individuals. The auctioneer didn't want to sell to them even though they had the highest bid and that the property was "on the market" and they chose the second highest bid. 	<ul style="list-style-type: none"> - This was deemed acceptable because the bid was an offer not the acceptance of one.
Harvela investments	<ul style="list-style-type: none"> - H was a company with three shareholders. R tried to sell its shares to the other two saying “we invite you to submit...any...offer you wish to make” “if any offer made by you is the highest offer received we bind ourselves to accept provided it complies with the terms” - H submitted 2 million offer 	<ul style="list-style-type: none"> - Held that telex was an offer, which they bound themselves to accept even though this is not the usual way for tenders. - Referential bidding wasn't allowed so the next highest with a good bid had to be accepted.

	<ul style="list-style-type: none"> - O's offer was 2 million or 100,000 in excess of any other offer. 	
Hughes Aircraft	<ul style="list-style-type: none"> - H unsuccessfully submitted a tender for services but claimed that the tendering process had not been complied with 	<ul style="list-style-type: none"> - There was a contract made for the way that the tender process was being conducted - Not allowed to not follow the procedure they had stipulated
Dickinson v Dodds	<ul style="list-style-type: none"> - D offers to sell land to Di and says the offer is open for two days - The next day D sells land to someone else - Di finds out on the same day this has happened - Di tries to accept before the time is up 	<ul style="list-style-type: none"> - D was allowed to revoke any time before Di accepted because no money was paid for the option
Goldsborough	<ul style="list-style-type: none"> - G paid 5 shillings for the right to purchase land from B at 30s per acre within a week - Q purported to revoke the offer, G accepted within the week and sought specific performance 	<ul style="list-style-type: none"> - Because the offeree paid consideration for the option to have a week to consider the offer, the offeror couldn't withdraw before the week was up
Mobil Oil	<ul style="list-style-type: none"> - Mobil promised their franchisees that if they score above 90% in the standard of excellence program for 6 years in a row they were entitled to 9 free extra years of franchise - P worked for 4 years and scored above 90 - M then changed their policy and cancelled the offer 	<ul style="list-style-type: none"> - Said that there wasn't an offer because the statement made by Mobil was too vague to be a contractual obligation - Said in obiter that even if it was an offer, M would be entitled to revoke even though performance had commenced because it wasn't a contract where there was an implied contract not to revoke the offer once performance had commenced.
Fond v Cilli	<ul style="list-style-type: none"> - Vendor died before one of the purchasers signed the contract, the purchaser who had not signed had notice of the death - 	<ul style="list-style-type: none"> - Offer lapsed - Implication that an offer may still be accepted before notice unless personal services required.

<p>Nielsen</p>	<ul style="list-style-type: none"> - N wanted to appeal a court decision against D. - N offered to settle - Three hours after email was sent the court said that the appeal had been allowed - D accepted the offer - N argued contract wasn't valid due to change in circumstances 	<ul style="list-style-type: none"> - Held not to be a fundamental change in circumstances because though it wasn't expected, both parties knew that the court could've decided to hear the appeal
<p>Stevenson</p>	<ul style="list-style-type: none"> - M offered to sell iron to S for 40s per ton, offer open until Monday - On Monday S asked "please respond whether you would accept 40 for delivery over two months, or if not, longest limit you could give" - M didn't answer and sold to someone else - S accepted the offer - 	<ul style="list-style-type: none"> - Held that S hadn't rejected the offer with a counter offer, it was actually a mere inquiry - So there was a binding contract