



LAWS1015: CONTRACTS

Course Notes

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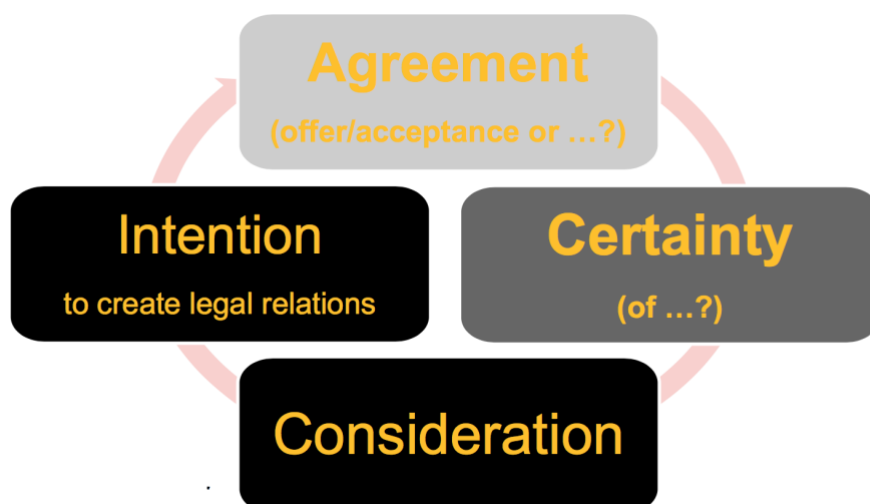
Lecture 1: Introduction

What is a contract?

- Agreement between two parties that the law will enforce.
- Does not have to be in writing
- Who decides terms in a contract: parties involved that define their obligations. Yet court may imply some terms if some are omitted
- Any person with ‘capacity’ to make a contract can bind themselves to a contract, but only themselves (privity).
- Legal consequences flow from breach of contract by a party – damages or termination
- One way or another, contracts come to an end (are discharged)

Formation of Contracts (Elements)

- Agreement between parties of the terms
- Certainty of the terms
- Intention to create legal relations
- Consideration



Thorne v Kennedy [2017] HCA 49

Facts of the Case	<ul style="list-style-type: none"> • The D, Mr Kennedy (67) met P, Ms Thorne (36) on a dating site. Mr Kennedy had substantial assets worth \$18 million whereas Ms Thorne had very little assets and spoke very little English. • Days prior to marriage, D required P to sign a Binding Financial Agreement (BFA) and that if she refused the wedding would not proceed. At this time, P's family had all flown over; bells were ringing... • D had a lawyer advise P, she was told that it was the worse BFA the lawyer had seen. • Despite that P signed the agreement 4 days prior the wedding. • At separation 4.5 years later P sought settlement.
Issue	The issue before the Court was whether the BFA signed by P was binding and enforceable.
Held	<ul style="list-style-type: none"> • The Court found both agreements were voidable due to both undue influence and unconscionable conduct. • The Court noted that the wife was powerless to make any decision other than to sign the agreement, referred to the lack of bargaining power and a lack of outcome for the wife that was fair or reasonable. • The Court referred to the following further factors including the wife's: <ul style="list-style-type: none"> • Lack of financial equality • Lack of permanent status within Australia at that time • Reliance on the husband for all things

	<ul style="list-style-type: none"> • Emotional aspect of the relationship (motherhood, preparation and so on) • Publicness of the marriage • Sense of urgency cultivated by the husband
Principle of Law	Contracts signed due to undue influence and unconscionable conduct are voidable.

Lecture 2: Agreement (Offer and Acceptance)

Definition Offers

- An offer may be described as the willingness for one party to be bound to another through contract on certain terms, without negotiation.
- Whether a statement is an offer depends on whether – *objectively* – it can reasonably be interpreted as containing promissory intent to be bound by legal relations.

Unilateral Offers

Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256 (PRD, p.45)

Facts of the Case	<ul style="list-style-type: none"> • The D, Carbolic Smoke Ball Co offered a €100 reward to people who contracted influenza when using the smoke ball for a certain period of time. • "€1000 is deposited with the Alliance Bank shewing our sincerity in the matter". - deposited to show sincerity. • After seeing this advertisement the P, Carlill bought one of the balls and used it as directed. She subsequently caught the flu and claimed the reward. The company refused to pay. P sued for the reward.
Issue	There are several issues before the Court in relation to (1) whether the statement made by D was an offer and (2) whether it had been accepted by P. (3) It also raises the question as to whether P had supplied consideration for D's promise.

Held	<ul style="list-style-type: none"> • (1) The Court held that the advertisement made by D was not a mere ‘puff’, rather constitutes an offer. The deposit of 1000 pounds made by D in aid of shewing sincerity is proof to pay 100 pounds in the event specified by D. • The plain meaning of the advertisement is to be taken objectively by the perspective of the general public. • Advertisements offering rewards are offers to anybody who performs the conditions specified in the advertisement, and anybody who does perform said conditions accept the offer. • (2) As an ordinary rule of law acceptance of an offer must be communicated to the offeror in order that the two minds may come together in agreement. • It seems to be drawn from an inference that acceptance of offers drawn from an advertisement does not require formal notification of acceptance, yet performance of the conditions laid out in the offer dispenses the need for notification. • (3) Inconvenience sustained by one party is sufficient consideration for the promise made by the offeror. • In this case, the Court held that use of the smoke ball by P constituted both a detriment to P and a benefit for D through a promotion of sales, either of which would be enough to constitute good consideration for the promise. • <i>Appeal Dismissed</i>
Principle of Law	<p>(1) In unilateral offers communication of acceptance is not necessary. Performance of the conditions set out in the offer constitutes both acceptance and good consideration for the promise.</p> <p>(2) Statements made in advertisements may be a mere ‘puff’ and not intended to be legally binding. Yet if the advertisement contains promissory intent it may constitute a unilateral offer.</p>

Invitations to Treat

Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953] 1 QB 401 (PRD, p.54)

Facts of the Case	<ul style="list-style-type: none"> • <i>The Pharmacy and Poisons Act 1933</i> (UK), s 18 prohibited the sale of certain drugs unless ‘the sale is effected by, or under the supervision of, a registered pharmacist.’ • D operated a self-service chemist in which drugs were on display. • P brought action against D claiming a contravention of s 18 of the above Act.
Issue	Is a contract formed when an item is placed into the basket?
Held	<ul style="list-style-type: none"> • The display of items on the shelves of a self-serve basis does not constitute an offer rather is recognised as an ‘invitation to treat’. • In the case of ordinary shops, although the goods are displayed and it is intended that customers choose what they want, a contract is not formed

	<p>until the transaction takes place at the register wherein the shopkeeper accepts the offer from the customer to purchase the item.</p> <ul style="list-style-type: none"> • As a result, there was supervision as required by the Act at the relevant time. • <i>Appeal dismissed</i>
Principle of Law	Items on display in a shop are not considered offers to sell rather is recognised as 'invitations to treat'. A contract is formed when the customer accepts the invitation to treat and offers to buy the item at the specified price to the shopkeeper.

Auction

- Advertisements to sell at an auction is simply a 'declaration of intention'¹ to hold the sale, and as such any persons claiming expense and time wasted in travel and wish for compensation is not legally binding the auctioneer.
- **The offeror holding an auction is simply putting up a request for bids in which each bid constitutes an offer which the offeror may accept the highest bid.**

Tickets

- Traditionally tickets had their conditions printed at the back of tickets for travel. As a result, the natural question that arises is whether customers that bought these tickets are bound to the conditions printed at the back of the ticket as it would be unjust.
- In *MacRobertson Miller Airline Services v Commissioner of State Taxation* the following condition was printed:
 - "Airline reserves the right to abandon any flight or cancel any ticket or booking; upon abandonment and cancellation the passenger is entitled to refund and the airline incurs no other liability."
- Although in a practical sense, payment means the loss of funds, in itself does not constitute the formation of a contract. **A binding contract is formed when the offeree receives the ticket (terms).**
- **Immediately after there is a reasonable period in which the offeree may rescind the contract.**

Termination of Offers Including Duration and Revocation

- Revocation of an offer may be valid up until the point it is accepted by an offeree. These cases are analysed based on 'first come first serve'.

Dickinson v Dodds (1876) 2 Ch D 463

- Furthermore, revocation of an offer need not be explicitly communicated by the offeror, so long as the offeree has knowledge that the offer has been revoked.

¹ *Harris v Nickerson*.

Hyde v Wrench (1840) 49 ER 132

- A counter-offer constitutes rejection of the original offer and is in itself a new offer; rejection may be either express or implied through the actions of the party which display inconsistency with the intention to accept.

Stevenson, Jacques & Co v McLean (1880) 5 QBD 346

- However, a request for more information does not constitute rejection of an offer.

Goldsborough Mort v Quinn (1910) 10 CLR 674 (PRD, p.56)

Facts of the Case	<ul style="list-style-type: none"> • The respondent made an offer to sell land at the price of 1 pound per acre, which was to be accepted within one week of the date of offer. • Feb 10: "in consideration of the sum of the sum of 5 shillings paid to me I hereby grant Goldsbrough the right to purchase the whole of my [land known as Bena Billa] within a week from this date at the price of one euro 10 s per acre... subject to the usual terms and conditions of such sale for such land." • However, two days later the R, Mr Quinn revokes the offer alleging that it was made by mistake. • On Feb 14 the P, Mr Goldsborough accepts R's offer.
Issues	The issue is whether there was a valid offer to accept on February 14.
Held	<ul style="list-style-type: none"> • Griffith CJ: "All agreements consist, in substance, of an offer made by one party and accepted by the other. The offer and acceptance may be contemporaneous, or the offer may be made under such circumstances that it is to be regarded as a continuing offer subsisting at the moment of acceptance. At that point, there is a consensus <i>ad idem</i>, that is, a contract" • "An offer may be withdrawn at any time before acceptance. A mere promise to leave it open for a specified time makes no difference, because there is as yet, no agreement, and the promise, if made without some distinct consideration, is <i>nudum pactum</i> and not binding." • In this present case, an options contract was formed and was thus binding an enforceable upon R to sell the property to D within the stipulated time period.
Principle of Law	Offers may be revoked before they are accepted except in cases of an options contract.

Revocation of Unilateral Offer

Mobil Oil Australia v Wellcome International (1998) 81 FCR 475 (PRD, p.58)

Facts of the Case	<ul style="list-style-type: none"> • Mobil Oil operated incentive schemes for its franchises known as the Circle of Excellence. Franchises who achieved high scores in the Circle of Excellence judging were given rewards. • The manager of Mobil Oil, in 1991, sought to implement a 'tenure for performance scheme whereby a franchisee who achieved a score of 90% or better at the Circle of excellence for the next 6 years would be granted a 9-year renewal of their franchise without cost. • Franchisees were given a brochure which included a tear-off slip which they could sign to indicate that they accept the challenge to achieve higher than 90%. • Mobil Oil abandons the incentive scheme in 1996.
Issues	The issue is whether the offeror may revoke an offer once the offeree has commenced performance.
Held	<ul style="list-style-type: none"> • Lockhart, Lindgren and Tamberlin JJ: "A unilateral contract is one in which the act of acceptance of the offer is also an executed consideration for the promise offered." • <i>Appeal allowed.</i>
Principle of Law	The offeror is at liberty to revoke a unilateral offer once the performance of the Act, which constitutes acceptance and consideration, has commenced.

Definition of Acceptance

- Acceptance is defined as an unqualified assent to the terms of an offer.
- If the offer says nothing on the matter, the following requirements will be implied:
 - **Unequivocal: the acceptance must be unequivocal acceptance, and**
 - **Communication: the acceptance must be communicated.**
- Mirror image rule: must accept offer on all terms without negotiation

Relationship Between Offer and Acceptance (Reliance)

R v Clarke (1927) 40 CLR 227 (PRD, p.69)

Facts of the Case	<ul style="list-style-type: none"> • Western Australian Government offered \$1000 for information leading to the arrest of the convicted murder of two police officers. • In June, Clarke was arrested and charged with one of the murders, which four days later, Clarke who had seen the proclamation, gave information at the trial thereby satisfying the conditions of the reward. • However, at the time Clarke asserted that he "did not have any intention to claim the reward" and his sole motivation was only to clear himself of the murder charge. • LatBer on, Clarke then proceeded to claim the reward.
Issues	The issue before the High Court was whether Clarke's actions in satisfying the terms of the reward amounted to an acceptance of the offer of reward.

Held	<ul style="list-style-type: none"> • The Court found in favour of the Crown, on the basis that at the time he gave the information, Clarke did not have in his mind to claim the reward. • Thus, Clarke's providing of the information required by the reward proclamation was not valid acceptance of the offer of the reward. • Isaacs ACJ: • [231] "The information for which Clarke claims the reward was given by him when he was under arrest with Treffene on a charge of murder, and was given by him in circumstances which shows that in giving the information he was not acting on or in pursuance of or in reliance upon or in return for the consideration contained in the proclamation, but exclusively in order to clear himself from a false charge of murder." • "[Clarke] has, in my opinion, neither legal or moral claim to the reward. The learned Chief Justice held that [232] Clarke never accepted or intended to accept the offer in proclamation, and, unless the mere giving of the information without such intention amounted in law to an acceptance of the offer or to performance of the condition there was neither 'acceptance' nor 'performance', and therefore there was no contract."
Principle of Law	The relationship of offer and acceptance is such that in order for a legally binding contract to be enforceable, a person accepting and performing must act on the offer. Without this valid acceptance there can be no agreement and subsequently no contract.

Communication of Acceptance (Modes of Acceptance)

Acceptance by Silence

<i>Felthouse v Bindley</i> (1862) 142 ER 1037 (PRD, p.72)	
Facts of the Case	<ul style="list-style-type: none"> • John Felthouse, was about to sell his farming stock by auction. • He discussed the sale of a particular horse to his uncle, the P. • The P wrote to his nephew on 2 January 1861 offering to buy the horse and saying: 'if I hear no more about him, I consider the horse mine at £30 15s'. The nephew did not reply but instructed the auctioneer, the D, not to sell the horse. • At an auction sale, the D by mistake sold the horse to a third party • The P sued the auctioneer.
Issues	Had the horse been sold to P; namely did the nephew's silence constituted acceptance of the offer?
Held	<ul style="list-style-type: none"> • The horse in question being catalogued with the rest of the stock, the D was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which the uncle had named: but he had not communicated such his intention to his uncle, or done anything to bind himself.

	<ul style="list-style-type: none"> • A proposal had been made but there was no form of communication by the nephew to accept. As such a valid contract had not been made. • <i>Rule absolute.</i>
Principle of Law	An offeror cannot impose on an offeree an offer to which acceptance can be implied by silence.

Acceptance by Conduct

Empirnall Holdings v Machon Paull Partners (1988) 14 NSWLR 523 (PRD, p.73)

Facts of the Case	<ul style="list-style-type: none"> • Empirnall Holdings, E, engaged Machon Paull, MP, to redevelop a site it owned. • MP sent a contract to E, but was notified that E “does not sign contracts”. • MP continued to carry out work and E continued to make payments in accordance to contract. • E went bankrupt owing MP considerable sums.
Issues	Was there a valid contract between the two parties?
Held	<ul style="list-style-type: none"> • Although the objective theory of contract requires an external manifestation of assent to offer, the silence of an offeree in conjunction with the other circumstances of the case may indicate acceptance of an offer. • E had a reasonable opportunity option to reject the offer made by MP yet continued to take the <i>benefits of the offer</i> and make payments in accordance to the terms. • The objective analysis of the conduct of the offeree, including their silence, as signalling to the offeror that the offer had been accepted.
Principle of Law	If a party takes the benefit of an offer, knowing the offeror expects to be paid, this will imply acceptance.

Formation of contract without offer and acceptance

Brambles Holdings v Bathurst City Council (2001) NSWLR 153 (PRD, p.75)

Facts of the Case	<ul style="list-style-type: none"> • In 1982 Brambles, the defendant/appellant, and the Council, plaintiff/respondent, entered into a contract for the defendant to manage the P’s Solid Waste Disposal Depot. • In about 1985, the D began to receive liquid waste at the Depot, and to charge for its acceptance. The D retained this money. • Before the initial contract expired, the parties began negotiation for a new contract. • On Feb 20, 1990, the P wrote to the D stating that it was “appropriate” for the D to increase liquid waste fees to a certain level (1.1c/L) upon completion of a liquid waste disposal area.
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	<ul style="list-style-type: none"> • The parties entered into the second contract on 12 July, 1990. C 21 and 22 of the second contract specified the fee to be charged for “general commercial waste” and required a portion of that fee to be remitted to the plaintiff. • On 19 Sept, 1991 the P wrote to the D stating that it had resolved to increase liquid waste fees (to 6c/L) and that “additional income” should be placed in a fund for the establishment of a Liquid Waste Treatment Plant. • The D responded in a letter on Oct 3, 1991 denying that the contract between the parties covered liquid waste, yet proceeded to charge liquid waste fees at the rate set out on 19 Sept and retained the moneys. • In 1996 P sued D in relation to the retained liquid waste fees.
Issues	The issue is whether the Council is entitled the retained fees by Brambles, whether the 19 Sept contract exists between the parties and if so, what the terms are.
Held	<ul style="list-style-type: none"> • Heydon JA set out to analyse this case in the principle of law outlined in <i>Empirnall</i>. • Basically, the question that the Court sought out was whether there was an explicit manifestation of an agreement. • Agonising over whether there was an offer and an acceptance is could be counter-productive. Especially when the correspondence between the parties is ambiguous. • The 19 Sept letter was not an explicit offer, more so a command, yet the 3 Oct letter was also neither an acceptance nor rejection. • The Court analysed the conduct of the parties post negotiation, that 5 years continued and Brambles kept collecting the higher fee pursuant to the Sept letter. • The Council was proposing an increase in fees, but only on the condition that the moneys received from that increased were to be retained by the appellant and paid to the Council to establish the liquid waste treatment plant. • The appellant’s conduct, objectively viewed, was an unequivocal acceptance of the offer. • The appellant accepted the benefits proposed which could not be severed from the obligations proposed. • The appellant submitted that it was not allowed to retain any moneys additional to the 1.1c/L to which it was entitled under the arrangement that, as at that date, was already in place. This meant that it received no consideration and therefore, the contract was binding. • The Oct 1991 contract laid the basis for the establishment of a liquid waste treatment plant that would enable more liquid waste to be deposited at the depot and alleviate problems with the handling of solid waste. This would enable the appellant to earn more.

	<ul style="list-style-type: none"> • Moreover, the practical effect of the Oct 1991 contract was to enable the appellant to continue using the Council's land for the depositing of liquid waste without the real prospect of the Council imposing any limit. • The Court found that the benefits outlined were adequate consideration. • <i>Appeal dismissed.</i>
Principle of Law	Express offer and acceptance does not need to be had in order for a binding contract to exist. The two are sought out with the sole intention of proving agreement, yet if a manifestation of agreement exist such as with the conduct of parties, a binding contract is enforceable.

Correspondence Between Offer and Acceptance

Postal 'Acceptance' Rule

Bressan v Squires [1972] 2 NSWLR 450

- If use of the post for acceptance is envisaged in the offer, it will be effective to create a contract as soon as the acceptance is posted (mailbox rule)
- Extends to telegrams (also given to post office for ultimate delivery).

Postal 'Payment' Rule

Wardle Agricultural and Rural Finance Pty Ltd [2012] NSWCA 107

- Postal rule does not extend towards payment. In cases where parties envisage the post as a method of payment, payment is effective when it is received and not when it is posted.

Instantaneous forms of communication

Brinkibon v Stahag Stahl Und Stahlwarenhandels-gesellschaft [1983] 2 AC 34 (PRD, p.91)

Facts of the Case	<ul style="list-style-type: none"> • Brinkibon, the P, wanted to sue Stahag, the D, for breach of contract. • Acceptance of Brinkibon's offer had occurred by way of telex (instantaneous) from London to Austria. • The question of where the contract was validly formed was important so as to determine which jurisdiction to apply.
Issues	The issue before the Court was whether the postal acceptance rule extends towards instantaneous forms of communication. If it did, an enforceable contract was formed in England and if not it was formed in Austria.
Held	<ul style="list-style-type: none"> • The Court held that in instances where acceptance manifested in forms of instantaneous messaging, it is communicated the moment the offeror receives the positive reply. • As such, a valid contract was formed in Austria.

Principle of Law	The postal acceptance rule does not extend towards instantaneous messages such as fax, telex and even voice. Acceptance is formed when the offeror receives said acceptance.
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Electronic Contracting

- When contract formation is envisaged in electronic communications, the natural question that arises is whether traditional contract laws apply.
- Yet what constitutes as electronic contracting? Are contracts formed over interactive websites and emails considered legally binding?

Electronic Transactions Act 2000 (NSW)

- *Electronic Transactions Act 2000 (NSW)*, based on the UNCITRAL Model Law on Electronic Commerce 1996 and UN Convention on the Use of Electronic Communications in International Contracts was legislated to govern electronic contracting.
- Note that for study, refer to the Act. I have also only highlighted important parts.

Section 5: Interpretation (Definitions)

Section 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:
- Communication is delivered when it is capable of being received by the addressee at an electronic address designated by the addressee, or
 - Communication is delivered to the addressee, when sent to another electronic address, when both:
 - The electronic communication has become **capable of retrieving** by the addressee at that address, and
 - The addressee has become aware that the electronic communication has been **sent to that address**.
- Notice the slight difference when an electronic communication address is specified

Section 14(A):

When a contract is formed or performance of a contract between parties where the proper law of the contract is (or would on its formation be) the law of this jurisdiction, and so applies:

- When some/all parties are located in Australia or elsewhere, and
- The contract is for business/personal/family/household/other

Section 14(B): Invitation to treat regarding contracts

(1) Any proposal to form contract made through electronic communication that:

- Is not addressed to a particular party, and
- Is accessible to parties making use of information systems,

Is considered to be an invitation to treat, unless clearly indicating the intention of the party that they intend to be bound.