8/3 - Lecture 2 (Week 1) - Agreement

- → A contract is formed in the 'magic moment' as envisaged by classical contract law
  - ↳ For this to occur, 4 elements must be present
    - → Agreement between the parties (a consensus of what is being entered into)
    - → Intention to create legal relations
      - Determine if a reasonable, objective observer would consider the statement to have legal intention
    - → Certainty of terms (sufficient that the court could enforce them)
    - → Consideration (from each party to the contract)
- → An agreement is said to exist when an offer made by one party is accepted by the other party
- → **Offer:** an expression of willingness to be bound immediately on certain terms without further negotiation
- → It may be difficult to determine if communication is an offer
  - ↳ In *Carlill v Carbolic Smoke Ball Co (1893)* it was demonstrated that an offer can be 'unilateral' (made to the whole world)
    - → There was not necessarily a contract with the whole world though as it could only be with those people who see the advertisement and act upon it
    - → It could be objectively determined that there was intention to contract
    - → Acceptance was present as it is implied by acting consistently with the terms of the offer
      - Acceptance can occur at the same time as the notice of performance being completed
    - → Was also argued that there was no consideration on the part of Carlill
    - → Was also argued to be uncertain in its terms, but courts ruled that the offer had sufficient certainty in its terms (and implied terms by courts)
      - Not necessary to determine the length of 'protection' was unnecessary as she contracted influenza while using the balls
  - ↳ Usually, newspaper advertisements are considered "invitations to treat", as there is no certainty of situation when someone goes to accept (eg. goods may be sold out)
- → An exchange of promises is sufficient to be contractually bound
- → *PSGB v Boots Cash Chemists* [1953] demonstrated that items on a shelf in a store with a price is considered an "invitation to treat", NOT an offer
  - ↳ The offer is made when the goods are presented to the counter with a desire to be purchased, acceptance is when the shop assistant accepts
- → In an auction, the offers are the bids and the acceptance is when the "hammer falls"
  - ↳ This means that the offeror is able to withdraw his offer at any point up until the hammer falls

→ *MacRobertson Miller Airline Services v Commissioner Of State Taxation (WA)* (1975) examined when the "magic moment" occurs in the sale of airline tickets
  - ↳ Conditions on the ticket stated that the airline reserves the right to cancel any ticket or booking
    - → BUT these terms were on the ticket, that was received some period of time after the payment was made
  - ↳ The point at which money is paid bears no relevance to the "magic moment"
  - ↳ Rejection of the offer may occur after the ticket is received, so acceptance occurs through acting consistently with the terms of the offer (ie. turning up to flight)
  - ↳ The same analysis applies does not apply much today as the terms and conditions are often supplied to the customer before payment occurs
    - → Magic moment becomes the point the customer pays for the ticket

→ Offers can be revoked at any time before acceptance
  - ↳ This idea was made clear in *Goldsbrough Mort v Quinn* (1910)
  - ↳ However, Quinn had stated that he would leave the offer open for 1 week, but then revoked it after 2 days (Goldsbrough accepted after 4 days)
    - → Quinn had agreed to keep the offer open for a week IN EXCHANGE for some consideration (5 shillings) of a separate contract (called an <u>option</u>)
      - For an option contract to exist, some separate consideration must be provided
    - → If Quinn revokes the offer before a week, he will be breaching the option contract
  - ↳ As such, valid offer exists 4 days after offer made so contract is enforceable

→ *Mobil Oil Australia v Wellcome International* (1998) determined that revocation of an offer may be effective if made while the offeree is in the process of acceptance, however the offeror would be liable for damages to the offeree
  - ↳ Mobil offered 9 years of tenure if franchisee scores 90/100 or better for the next 6 years in the "Circle of Excellence" judging system
  - ↳ Mobil abandons judging system 5 years later
  - ↳ The language in the statement was not certain enough to constitute a definitive offer

→ **Acceptance:** unqualified assent to the terms of the offer

→ Acceptance can occur in various ways:
  - ↳ Communicated to the offeror (most common)
  - ↳ Acceptance by silence is NOT acceptance
    - → *Felthouse v Bindley*
      - Offeror writes to offeree: "If I hear no more about him I shall consider the horse mine at £30 15s."
      - Offeree does not explicitly accept, so acceptance is NOT present
      - Acceptance MUST be communicated in bilateral offers

- ↳ Acceptance by conduct
  - → *Empirnall Holdings v Machon Paull* (1988)
    - "Mr. Jury [the director and major shareholder of Empirnall] does not sign contracts."
    - "We are proceeding on undertaking that the conditions of the contract are accepted by you and works are being conducted according to those terms and conditions"
    - The decision in *Felthouse* suggests that this does not classify as acceptance, as cannot accept by silence
    - The decision in *MacRobertson*, however, shows that silence <u>combined with</u> conduct can be considered as acceptance (also requires a reason why there is no explicit communication of acceptance)

→ Acceptance is effective when it is communicated to the offeror demonstrating the 'meeting of the minds' to form a consensus

→ **Postal acceptance rule:** if the use of the post for acceptance is envisaged in the offer, acceptance is considered effective once the acceptance is posted

- ↳ This rule was outlined in *Bressan v Squires* (1972)
- ↳ This does extend to acceptance via telegram
- ↳ This does not apply to any other type of communication
  - → ie. it does not apply to the making of offers, revocation of offers, etc.
- ↳ Importantly, it does not apply to any form of instantaneous communication
- ↳ As seen in *Brinkibon v Stahag Stahl* (1983), acceptance through instantaneous communication is effective when it is RECEIVED by the offeror

→ Electronic Communications Act 2000 (NSW)

- ↳ Based on international laws of electronic commerce and communications
- ↳ Considers legal characterisation of a website offering goods and services to be an <u>invitation to treat</u>
- ↳ A contract between a natural person and an automated system, or between automated systems is considered to be effective and enforceable
  - → Where there is an 'input error' in a transaction with an automated system, the person has the right to withdraw that portion of communication
- ↳ Acceptance via electronic systems depends on whether or not electronic <u>communications systems have been designated</u> for receiving communications, and if a <u>specific address</u> has been specified
  - → If yes: communication is effective when it can be retrieved by the addressee
  - → If no: communication is effective when it can be retrieved by the addressee AND the addressee has become aware it was sent to that address
- ↳ Note that these are <u>default rules</u>, so they can be explicitly displaced by the parties

Formation of a Contract WITHOUT Offer and Acceptance

→ *Brambles Holdings v Bathurst City Council* (2001)

- ↳ In 1982, Brambles and council enter into contract for managing a solid waste depot and this was renewed on July 1990
- ↳ Since 1985, Brambles also received liquid waste - on 20 February 1990, Council tells Brambles it would be appropriate to increase liquid waste fees to 1.1c/L, on completion of a liquid waste disposal area
- ↳ 19 September 1991, Council sends letter to Brambles stating that they: "resolved to increase liquid waste fees" to 6 c/L and that the "additional income" should be placed in a fund to establish a Liquid Waste Plant
- ↳ 3 October 1991, Brambles sends letter to Council denying that the existing contract covered liquid waste and stating that it was not viable for Brambles to receive liquid waste without an increase in its remuneration
- ↳ After this, Brambles collects a higher fee consistent with the 19 September letter from the Council, but retains the full increase in fees for itself
- ↳ Council claims contractual entitlement to recover the extra income
- ↳ A key aspect of Brambles was that a contract can be considered to be in effect without formal offer and acceptance analysis
  - → All that is required is an objectively determined "meeting of the minds"
  - → Contract requires <u>objective agreement</u> on the <u>essential terms</u>

→ Heydon JA stated that it is important to consider whether mutual assent has been manifested and if a reasonable person would think there was a concluded bargain

<u>Battle of the Forms</u> → *Butler Machine Tool Co v Ex-Cell-O Corp* (1979)

→ 23 May 1969 - Butler provides a quote to supply a machine tool, stating a price and delivery in 10 months, with 16 terms and conditions in small print on the back, including a price variation clause in case of cost increases

- ↳ There was also a term that stated "All orders are accepted only upon and subject to the terms set out in our quotation… These terms shall prevail over any terms and conditions in the buyer's order"

→ 27 May 1969 - buyer replies to Butler with an order "Please supply on terms and conditions as below and overleaf", with a tear off slip (buyer terms and conditions different from seller)

→ 5 June 1969 - Butler sends a letter "We have pleasure in acknowledging your official order dated 27 May… With duly completed your acknowledgement of order form"

→ In this case, apply the 'last shot rule' - final standard form to be sent is the one that prevails

- ↳ This is because the second form (sent by buyer) is considered a rejection of the offer made by Butler and a new offer made

Lord Denning stated the solution is that the terms in the standard form contracts that can exist together, will, and that only when terms conflict will courts determine which are invalid

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27/3 - Tutorial 2 (Week 4)

Tutorial Questions

1. Barry v Anne
   - → Not a contract as no consideration provided on the part of Barry
     - ↳ While he does suffer a detriment, this was not in connection with the request, as outlined in *Australian Woolen Mills v Commonwealth* HCA, PC (1955)
   - → In unilateral contracts, an offer can be revoked once performance has already begun, but it must be revoked before performance is complete
   - → Revocation of an offer is enforceable if the offeree finds out about the revocation from a reliable source
     - ↳ This comes from the ideas in *Dickinson v Dodds* (1876)
     - ↳ In relation to the question, Anne's mother is a reliable source (she is related and the car is at her place), this means that the revocation is effective
   - → Estoppel is resolution as satisfied the 6 requirements as set out in *Waltons Stores v Maher* (1988)
     - ↳ There was an assumption on the part of Barry that a legal relation would exist
     - ↳ The assumption was induced by the actions of Anne
     - ↳ Barry took action in reliance on the assumption
     - ↳ Reasonable to assume Anne had intention to induce reliance
     - ↳ Barry suffered a detriment in his reliance
     - ↳ And Anne took no steps (that we know of) to reduce the detriment
2. Electronics store
   - → The advertisement was not an offer, rather it was a invitation to treat (states "on approval")
   - → When the forms are filled out, this is the offer on the part of the buyer
     - ↳ The approval from the manager acts as acceptance
   - → By examining the benefit/detriment angle of consideration, it can be determined that consideration was given
   - → This differs from *Australian Woolen Mill*s as there is at least an implied request to purchase a radio in the advertisement
     - ↳ Thus, the purchase of the radio can be consideration as it is in connection with the request
3. Mosman Police v Wendy
   - → Performing an existing legal duty (statutory or contractual) is not sufficient consideration as seen in *Glasbrook Bros v Glamorgan County Council* (1925)
     - ↳ But have the Police gone above and beyond their existing legal duty in their actions
     - ↳ Wendy only asked for assistance, not necessarily for them to show up every hour, so this raises questions in relation to request and connection
     - ↳ Policemen are already obliged to patrol area, so no consideration on their part

4. Jim v FGN
   - → As seen in *Williams v Roffey* (1991), part payment of debt is not sufficient consideration unless there is practical benefit
     - ↳ This practical benefit is consideration on the part of Jim
     - ↳ Jim's completion of the project will provide a practical benefit to FGN
     - ↳ Jim's situation exactly fits the 6 step test provided by Glidewell LJ
5. Crowleys v Sergei
   - → Case reflects many of the ideas of *Musumeci v Winadell* (1994),
     - ↳ Note that differences do apply:
       - → In *Musumeci*, there was the introduction of a competitor which made the lease signed no longer profitable for Musumeci
       - → In this case, there is no introduction of competition or change in circumstances from when Sergei signed the lease
     - ↳ Sergei may assert that in return for the promise of lower rent, Samovar would remain in the location
       - → However, Samovar was already contractually obliged to stay in the location so this is insufficient consideration
       - → As such, Samovar is liable to pay the arrears of rent
   - → However, there is scope for equitable estoppel as seen in *Central London Property Trust v High Trees House* (1947)
     - ↳ In the context of existing legal relations, statements of promise could be enforced even if they were not such to lead to a legally binding agreement, if used as a <u>defence</u> for the party that acted on the promise
     - ↳ By the common law, Sergei has a claim in defensive estoppel

<u>Tutorial Content</u>

- → Consideration does NOT look to the value of what is given by each party
- → As consideration, both parties must give something of <u>legal value</u>
  - ↳ They must give a promise of something the law regards as having value
- → Where consideration is not clear, courts look to the benefit/detriment analysis
- → The action or the promise given must have some <u>connection</u> to the request made
  - ↳ Refer to p.103 of textbook
  - ↳ In AWM, the subsidy was intended to keep the wool industry afloat
    - → It was NOT intended for them to buy more wool
    - → There is nothing in the letters from the commonwealth that requests AWM buy more wool
  - ↳ Also, AWM would have been buying wool anyway (as it is their business to buy wool)
    - → This brings the aspect of connection into question
- → Work the relevant facts of the case back into your answer to get higher marks

- → In Mobil Oil, the court ruled that the statement made was not capable of amounting to an offer, as there was not enough certainty in it
    - ↳ Moreover, the franchisee's were already bound to attempt to get 100% in the circle of excellence, so there is no sufficient consideration on the part of the franchisees
- → Unilateral contract is when one party offers a promise and the other offers an act
- → Refer to textbook pg. 465 Glasbrook v Glamorgan
- → Read Ashton v Pratt over the mid-sem break - relates to existing contractual duty
- → Just because a contract may have multiple meanings, this does not mean the contract is void for uncertainty
    - ↳ If the court can infer the most appropriate meanings, this will allow contract to be enforceable
- → If there is a mutual mistake in relation to subject matter, there is no offer and acceptance so no contract - eg. *Raffles v Wichelhaus* (1864)
- → Parol evidence rule is used if there must be subjective determination of the parties aims, in the case of uncertainty - this means objective determination does not exist
- → *Biotechnology v Pace* and *Hall v Busst* involved an inability of the court to imply terms into a contract - if there are no comparable situations, court will not imply terms
- → A promise to perform an existing contractual relationship to a third party CAN be sufficient consideration - as the third party now receives the benefit and can enforce the contract
    - ↳ Seen on *Pao On v Lau Yiu Long* (1980)
- → NB: the post-judgement interest rate is the RBA rate + 4% (nominally)
- → An important thing to note in *Williams v Roffey*, there were 3 parties and 2 contracts
    - ↳ A main contract between the owner and Roffey had a penalty of delay
    - ↳ A subcontract between Roffey and Williams is the one in question
    - ↳ It was determined that there is no way Williams could have completed the task and not gone bankrupt
    - ↳ By benefit/detriment analysis, there IS a benefit to Roffey from the extra pay, as Roffey will have to find another contractor and pay the penalty
        - → The benefit of not incurring these costs is greater than the benefit they would receive by suing Williams
    - ↳ If there was no benefit, there would not be valid consideration
- → Economic duress is where one party's will is so overborne by the other party that they do not freely consent to the kind of contract they are entering into
    - ↳ Usually this is irrelevant as it is often the more powerful party that are providing the extra consideration
- → Unconscionable conduct requires: special <u>disadvantage</u> that is knowingly exploited
- → Undue influence requires a 'special <u>relationship</u>', eg. a high degree of trust/confidence/dependence