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Contract Formation

Elements

1. Offer
2. Acceptance
 - a. Agreement, *Consensus ad idem*
3. Consideration
4. Intention
5. Certainty & Completeness

Offer

Definition: A clear statement of terms by which a person is prepared to be bound. An expression of willingness to be bound upon acceptance. OBJECTIVE test of whether the statement would be understood as an offer by a reasonable person.

Unilateral Contracts:

- Offer, acceptance, consideration and performance occur simultaneously i.e. *Carlill v Carbolic Smoke Ball Co*, finding a lost dog.
 - “The consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer.”
- The obligations of one party are executed at the time of contract formation, as compared to a bilateral contract where the obligations of both parties are executory at the time of formation.
- Distinguished from Conditional Gifts:
 - *Australian Wool Mills Pty Ltd v Commonwealth* → high court held that the promise must be made in return for the doing of the act.
 - I.e. distinguishes “I will pay you \$100 *on your* arrival in Sydney” from “I will pay you \$100 *for your* arrival in Sydney”
 - Must establish that the money was to be paid in return for the act.
 - All comes down to quid pro quo.
- **Tests:**
 - Principle test → Whether the offeror has expressly/implied requested the doing of the act by the offeree.
 - Secondly, court can look to whether the offeror has stated a price which the offeree must pay for the promise.
 - Thirdly, court can ask whether the offer was made in order to induce the doing of the act.
- **Withdrawal**
 - Offer cannot be withdrawn once performance has commenced.
 - Though there are exceptions:
 - *Mobil Oil Australia Ltd v Wellcome International Pty Ltd*
 - Basically depends on whether it is unjust for them to revoke the offer or not.
 - Factors:
 - Whether the offeror knows the offeree has commenced performance.

- Whether the offeree understands that incomplete performance is at their own risk.
- Whether the parties intended that the offeror should be at liberty to revoke the offer.
- Whether the acts towards performance are beneficial/detrimental to the offeree.

Invitations to Treat

- An offer is distinguished from an invitation to treat, which is an invitation to others to make offers/enter into negotiations.
 - E.g. A homeowner indicating that they might be interested in selling at a certain price is regarded as an invitation to treat, not an offer.
- Wine merchants price lists are seen as invitations to treat on the basis that if it was an offer, the merchant might find themselves obligated to supply unlimited quantities.
- **Fisher v Bell**
- **Pharmaceutical Society of GB v Boots Cash Chemists**
- **Goodwin's of Newtown Pty Ltd v Gurrey AUS [1959]**.
 - Australian cases offer a broader view of when the offer happens whereas UK is very strict that the offer happens at the counter.

Shop Sales

- Display of goods on a shelf/window are generally considered as an invitation to treat, rather than an offer.
- **Fisher v Bell [1961]** → held that the shop owner who displayed a flick-knife in their shop window had not committed the statutory offence of “offering” the knife for sale.
- **Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd** → the court rejected that customers placing items from a shelf in their baskets constituted an offer on the basis that customers must be entitled to return/substitute articles they have chosen from the shelves. As such, they found that an offer is not made until they present the items to the cashier, and are not bound until the cashier accepts that offer.

Auctions

- Generally regarded as an invitation to treat.
- Well accepted that the auctioneer does not make offers to sell, but merely invites offers from those present at the auction.
- Bids made by attendees constitute offers, and the auctioneer communicates acceptance of the final bid by the fall of the hammer.
 - This means no contractual claim can arise if the auction is cancelled.
- A bidder can withdraw their offer before it is accepted, and the auctioneer is not obliged to sell to the highest bidder.
- **Payne v Cave**

Tenders

- A “tender” process involves each interested party submitting a single bid without knowing what other bids have been made.

- A call for written tenders usually constitutes an invitation to treat, and each tender constitutes an offer.
- A person calling for tenders can stipulate the basis on which the tender process will be conducted, and will be bound by any conditions which they say will govern the process.
- **Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd** → a call for tenders was found to amount to an offer because the vendor promised to accept the highest bid.

Electronic Transactions

- A proposal to make a contract through electronic communications which is not addressed to a particular person, but is made generally accessible to people using information systems, is to be treated as an invitation to make offers unless it clearly indicates an intention to be bound in the case of acceptance.
- Where a natural person makes an input error, in the course of transaction with an automated system, and the system provides no opportunity to correct that error, then the person who made the error is entitled to “withdraw the portion of the communication in which the input error was made”, provided they do so as soon as possible after learning of the error, and provided they have not received any material benefit from goods or services provided by the other party.

Termination of an Offer

- An offer will cease to be available for acceptance when it is withdrawn by the offeror, lapses or is rejected by the offeree.

Withdrawal

- An offer may be revoked at any time before it is accepted.
- At common law a promise to hold an offer open for a specified period is not binding unless the offeree has given consideration of that promise.
- The withdrawal of an offer is effective only when it has been communicated to the offeree.
- No exception is made for a withdrawal sent by post.
- **Dickinson v Dodds** → courts say that it doesn't matter who/what/why the person is made aware the person became aware that the offer has been revoked, as long as it's reliable i.e. a friend can tell you and it counts if you trust them as reliable.

Options

- A promise to hold an offer open is binding if consideration has been given in return for that promise, this agreement is then described as an option.
- An option is an agreement between an option holder and a grantor under which the option holder is entitled to enter into a contract with the grantor on specified terms, either at a specified time or within a specified time period. The option holder is then free to choose whether to exercise that option within that time/time period.
- **Goldsbrough, Mort & Co Ltd v Quinn** → The grantor gave the option holder an option to purchase certain land at a specified price at any time within one week of the agreement in return for the sum of five shillings paid to the grantor. The grantors attempt to repudiate the offer before acceptance was held to be ineffective. The option

holder exercised the option within the specified time period and was able to force the grantor to sell the land as agreed.

Lapse

- An offer which is expressed to be available for acceptance for a particular period of time will lapse at the end of that period.
 - If no period is stipulated, the offer will lapse after a reasonable time has passed.
- ***Bartolo v Hancock*** [2010] → the “here and now” offer which lapsed after a short period of time due to the circumstances.
 - “To treat the offer as open for acceptance (unless withdrawn) until the case is to treat Mr Hancock as willing to let the case run and incur liability for an increasing amount for costs even the result of a later acceptance (mutual withdrawal) could have been achieved on day one.”
 - Basically take into account costs, circumstances etc when determining what a reasonable period of lapse is.

Rejection and Counter Offer

- Once an offer has been rejected, it is no longer available for acceptance.
 - It can later be revived however, or may form the basis of an agreement which is inferred in the absence of a valid offer and acceptance.
 - Making a counter offer is treated as a rejection of the first offer, and therefore extinguishes it.
- Distinction between a counter offer and an inquiry relating to alteration of the terms.
 - By requesting information, the offeror is not intending to reject the offer, but simply looking for guidance as to accept or not.

Acceptance

Definition: An unqualified assent to the terms of an offer.

Conduct Constituting Acceptance

- ***Smith v Hughes*** → “If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other’s terms”.
- An offeree will effectively accept an offer if the offeree behaves in such a way that a reasonable person would believe he/she is assenting to the terms of the offer, even if there is no real consensus between parties.

Consciousness of the Offer

- ***Crown v Clarke*** → adopted the approach that while an offeree’s conduct is normally assessed by reference to external manifestations, performance of a requested act will not give rise to a unilateral contract if the evidence establishes that the offeree was not actually acting on the faith of the offer.

- Unilateral contract only arises if the offeree performs the act in reliance on the offer.

Communication of Acceptance

- Acceptance generally only has effect when communicated to the offeror.
- ***Latex Finance Pty Ltd v Knight*** → court established that while a contract is not made until acceptance of an offer has been communicated, however, an offeror may expressly/impliedly dispense with the need for actual communication:
 - The offeror may agree to treat the doing of the act as an effective acceptance.
 - Always for unilateral, though it can apply to bilateral.
 - The offeror may treat the despatch of an acceptance by a particular method as effective, whether or not the acceptance is received by the offeror.
- **The Postal Rule**
 - When acceptance is communicated via mail, acceptance is effective as soon as it is posted.
 - Doesn't apply to instantaneous modes of communication i.e. telephone.
 - **Email** → if it's been stipulated that that's the form of communication that acceptance can be communicated by, then once the offeree sends the email that's when acceptance is accepted. If it hasn't been specified, then acceptance occurs when acceptance is capable of being read i.e. when the email reaches the offeror's inbox.
- **Method of Acceptance** → if an offer prescribes an exclusive method for the communication of acceptance, then only acceptance communicated by that method is effective.
- **Silence** → A contract cannot be forced on the offeree by stipulating silence as the prescribed method of acceptance.
 - ***Felthouse v Bindley***
- **Acceptance Inferred from Conduct**
 - ***Farmer's Mercantile Union and Chaff Mills Ltd v Coade*** → held that an agreement to buy could be inferred from the respondents inaction once they became aware they were on the register of shareholders.
 - ***Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*** → a contract was held to be formed even the guy didn't sign it because he said he "didn't sign contracts" and then took benefit of the of the services provided by the architects.

Preliminary Agreements

Masters v Cameron (1954)

Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes:

1. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intended to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

2. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.
3. Or, **thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.**
 - a. Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own.
 - b. So, as Parker J said in *Von Hatzfeldt-Wildenburg v Alexander* [1912], in such a case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract.
 - c. Not binding.

Consideration

Rules

1. Consideration must move from the promisee, though it doesn't have to go to the promisor (it may go to a third party).
2. Consideration must be something of value to the promisee; doesn't matter what it is, as long as it's of value to the promisee.
 - a. *Chapell & Co Ltd v Nestle Co Ltd* [1960].

Consideration must be sufficient

- Consideration need not move to the promisor, but it must move from the promisee.
 - A may undertake a contractual obligation to B in return for a benefit conferred by B on C.
- Where two+ parties to a contract are joint promisee's, consideration may be provided by one of them on behalf of both/all of them.
 - This principle accepted in *Coulls v Bagots Executor and Trustee Co Ltd* (1967).
 - Accepted that even if B is a party to the contract, it doesn't matter that they did not personally give consideration.

Sufficiency of Consideration

- Must be sufficient, but need not be adequate.
- *Thomas v Thomas* (1842) → Courts do not consider what is adequate consideration.
 - A woman paid \$1 toward the ground rent and promised to keep the house in good repair, in return for living there for life → considered good consideration.
- Though inadequacy of consideration doesn't invalidate a contract, it can be taken into account as evidence of procedural unfairness in the contract's formation.

Discretion as to Performance

- If the promisor is not bound to perform, then the promise constitutes an illusory/fake consideration.