

# THE LAW OF CONTRACT (HD NOTES)

These notes were originally designed for class participation when I was a student but have been updated over time for use as a professional tutoring and lecturing resource. They provide a detailed analysis of the material and cases and will be a useful resource for learning the course content, participating in class discussions and completing assessment. They have been updated to be consistent with the latest edition (13th ed.) of the textbook for this class.

PROFESSIONAL  
TUTOR NOTES

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### **Law of Obligations**

Private law is the field of law referring to the law of obligations (obligations placed on a particular person) and the law of property (obligations placed on all members of society regarding physical items). It is exclusively enforceable by the individuals who have the relevant rights.

Two common types of private law are contracts and torts. Torts refers to civil wrongs (breach of legal duty), actions that harm others. They are civil as they can be enforced by the person wronged, not the state. Torts provide a remedy against a perpetrator. The legal duty self-imposed in contracts, is automatically imposed in torts. For a tort, there is the assumption of a pre-existing right (e.g. interference with body) that is infringed.

Other types of private law include:

- contract/restitution; and
- equity.

Torts and contracts are often interlinked and need to be considered together. Concurrent liability is when a plaintiff has the option of pursuing both a tort or contract case against a defendant. Damages cannot be replicated between the two cases. This allows the plaintiff to have a significant choice as the rules re damages, remoteness of case etc. differ between the two fields.

### **Tort & contract differences**

Contracts are a self-imposed obligation BUT parties to a contract often have responsibilities imposed on them that are not stated as part of the contract. Torts differ in that they are imposed by law.

Torts are universal duties. By the doctrine of privity of contract, duty is only owed to parties of the contract. Torts require everyone to avoid performing them.

Liability is very strict in relation to contract law.

### **Damages**

Damages are the remedy for both contract and tort cases. They are essentially compensation.

Torts: damages are designed to put the victim in the position they would have been in if the tort had not occurred (i.e. not better, just to the level they would have been at).

Contracts: damages are designed to put the victim in the position they would have been in if the contract had not been broken (i.e. better off than they currently are or would have been).

### **Unjust enrichment**

Another area of private law regarding the obligation to return unjust gains or to compensate for it. It aims to return to the plaintiff the unjust gains. This is a quasi-contractual area. Need to show (1) enrichment of other person at your expense, and (2) show some reason for injustice e.g. belief you have not made payment, under duress, belief of entering a contract that falls through. If a person receives money and believes they were entitled to it, then used/spent it, you have no claim for unjust enrichment. It can also result in property rights e.g. if unjust enrichment involves transfer of property of items.

### **Equity**

Equity is the body of law that historically emanated from the Court of Chancery when the strict legal rules produced injustice. It is now merged with common law (Act that allowed them to be administered in the same court) yet the principles have not fused together. Equity is designed to address wrongs in the (rigid) common law system.

Three obligations of equity are relevant to contract law:

1. Obligation to not harm others by acting irrationally (i.e. fulfilment of expectations) (equitable estoppel)
2. Obligation to act solely in the interest of those who placed their trust in us (fiduciary obligations)
3. Obligation to not misuse confidential information

### **Equity will impact contract law by:**

- Equitable remedies supplement common law damages, they can be available for both equity issues and contract issues.
- A contract will be set aside in equity for an unconscionable act that occurred in negotiations.
- Equity will rectify a written document where parties mistakenly recorded the contract terms.

Can have cases where equity creates the obligation, contracts creates the punishment.

Equity in its exclusive jurisdiction: equity causes case and gives remedies (e.g. fiduciary)

Equity in its auxiliary jurisdiction: equity allows for additional remedies to contracts, not the source of the case. e.g. injunction in addition to extra damages; specific performance remedy (i.e. must do something is only an equity remedy)

Estoppel is compensation for relying on promises that aren't legally enforceable or for believing a contract existed when none did. Remedy is equitable.

Damages for unjust gain is to reverse the gain; damages in tort is to increase gain.

In tort and contract, infringement of pre-existing right gives rise to another right to claim from damages. Unjust is different - doesn't stem from pre-existing right.

Unjust/restitution referred to as quasi-contract because it doesn't comply with all elements for a technical contract, created fictional contract that someone is a good person i.e. contract to repay an overpayment because they are a good person, the law didn't recognize it and it couldn't fit into any category to get it to court, law of paying someone back for an implied promise.

### **Statutory obligations and regulation**

The primary statute is the Australian Consumer Law, as established in s2 of the Competition and Consumer Act 2010 (Cth). This covers misleading and deceptive conduct, unconscionable conduct, unfair terms and consumer guarantees. Classical contract

There are four essential elements for contract formation:

1. Agreement (offer and acceptance)
2. Consideration
3. Intent to create legal relations
4. Certainty

What makes contract binding is the exchange of promises. It occurs without anything being done; contract is executory when nothing has been done by either party. When part of the contract is complete, it's partially executory. e.g. building a house and payment.

Comply with strict legal procedures.

Laissez faire may result in unfair contracts as both parties may not be on the same footing, inequality of bargaining power, impacts on others/society

Contract is about 2 parties reaching agreement, courts don't interfere. Modern theory has courts filling in gaps in contracts, upholding contracts if essential phrasing is present.

Contract is a "thing" – it's defined, a representation of our contract, no space for emotions to enter.

Contracts serve to deter and to allow for enforcement.

All contracts are different thus can't use single theory. Some involve producing before contracts. Use objective test: what would a reasonable person to think/understand

State provides mechanism to enforce contracts. As part of this, the State also sets regulations on how the contract is interpreted (objective test).

Contract law: power conferring institution, work requires some degree of assurance, thus being able to make a legal obligation from a promise is necessary and increases freedom. It does infringe on freedom by not allowing us to simply change our mind but the benefit outweighs the cost.

### **Theories for legal contract:**

1. Freedom (increasing freedom)
2. Increasing wealth for society (problem: encourages materialistic approach), economic efficiency
3. Judicial (no single theory, depends on how the court case goes and the judicial opinion)

### **Offer and Acceptance**

The traditional approach in establishing a contract is that one party makes an offer and the other accepts it. This approach determines some magical moment of formation when parties are of one mind and their individual wills come together to create binding obligations. In reality, attaching offer and acceptance to an act is artificial. The rules of offer and acceptance are merely “an aid to analysis”. A contract can be made without an identifiable offer and acceptance, provided the parties manifested their mutual assent. The “Acid test” in a case where O and A cannot be identified, according to Cooke J in *Meates v Attorney-General* [1983] NZRL 308, 277, “is whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain.”

### **Offer**

A legal offer is a manifestation of a desire to be legally bound, now or in the future, on certain terms. The key factor is whether it would appear to a reasonable person in the position of the offeree that a contract was intended and that a binding agreement would be made upon acceptance.

#### ***Gibson v Manchester City Council* [1979] 1 WLR 294 (House of Lords)**

##### **Facts:**

- Scheme to allow council housing residents to buy the flat they live in
- Council sent letter/form to Gibson ... ‘We may be prepared to sell it to you for \$X’
- He completed the form (leaving the price blank) and returned it
- Before formal K’s were signed there was a change in government and the new govt abandoned the policy
- Gibson argues there is a K and seeks specific performance

##### **Held: (Lord Diplock)**

- Only K alleged is one by letters accompanying documents passing between parties (linking documents). Outcome depends on their construction
- Agreeing with Geoffrey Lane LJ he found that the letters constituted ‘but a step in the negotiations’ which didn’t reach their fruition due to the change in govt
- Departure from conventional approach (i.e. offer and acceptance) not warranted here
- Gibson’s original letter was an expression of interest inquiring both what the price would be and if he could get a mortgage from the council. Their response which included the key phrase ‘may be prepared to sell’ does not constitute an offer. It was an invitation to make a formal offer to buy upon the enclosed application form. The form attached had section titles including ‘Application to buy council house’ and ‘Application to for a loan to buy council house’ adding more weight to the view that it letter could not constitute an offer.

### **Unilateral Contracts**

A unilateral K is made when one party produces an offer and the offeree accept the offer by performing his or her side of the bargain. A unilateral K is unilateral in that only one party is ever under K because the other party has performed their K obligations to form the K. A bilateral K is formed by both parties agreeing to the K.

For there to be a unilateral K, the promise needs to be made in return for doing something. There must be a quid pro quo and it must be stated. It must be established that the benefit is to be paid in return for doing something that is requested of them in the first place.

## *Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (Ct of Appeal)*

### Facts:

- The Manufacturer of "Carbolic Smoke Balls" released an advertisement stating that if a person used their product 3 times a day for 2 weeks and got the flu or a cold that they would claim a £100 reward.
- They further claimed to have placed £1000 into a bank account to 'show their sincerity on the matter'.
- Carlill on the faith of the advertisement purchased and used the product and still got sick (she contracted during the use of the product). She tried to claim the reward to no avail. Carbolic alleged there was no K, giving the following reasons:
  1. No promise intended, ad was 'mere puff' or advertising speak, not actually an offer;
  2. No offer being made to a specific person; offer being made to world ∴ not a valid offer;
  3. No acceptance as there was no notification that the contract was accepted;
  4. Not sufficiently certain (no timeframe); and
  5. No consideration. Use on certain terms of no benefit to them, only the sale.

### Held:

#### Lindley LJ

- No mistaking that it was a distinct, express promise to pay £100 in certain circumstances.
- 1. Not mere puff due to the statement re money in the bank – otherwise for what purpose was that statement made but to lead people to believe it was not puff.
- 2. Offers of reward are rarely made to specific people – that does not make them less binding if the conditions are completed.
- 3. Notification is generally required, though not always. This situation is an exception or if not an exception, acceptance need not precede performance. This is a continuing offer that was not revoked. Even if notice is required it is given contemporaneously with notice of performance. The true/ objective view is, that in this situation, due to the language of the offer, the offeror indicated that he does not expect/ require notice.
- 4. True that the advertisement is uncertain re: the time that you can contract influenza, after having used the product and still receive the reward. Clear that it does not mean forever. Should be what a reasonable person would infer to be a reasonable amount of time in the circumstances if none is set. This amount of time was reasonable.
- 5. The use of the product, will create confidence in it (if it works) which is a benefit that leads to further sales by that individual or others hearing of the successful use of the product. Clear consideration. Additionally, the person acting on the ad puts themselves through the inconvenience of following the conditions. Conclusion... ample consideration.

#### Bowen LJ

- Must read the advertisement in its plain meaning, as the public would understand it. As manufacturers intended to be read by the public.
- The ad was intended to have some effect, that being to make people use the product. Any ordinary (reasonable) person reading this advertisement would think it were a reward.
- On the issue of time – he thinks it ought to be a reasonable time after use ... though in this case it is not an issue as she contracted it whilst using the product.
- Offer made to the whole world – but it ripens into a K when someone comes forward having completed the conditions. The contract is made with the limited number of people who comply with the offer. Not akin in any way to invitations to treat or invitations to negotiate.

- General rule is that notice is required. However, an offeror may dispense with the requirement by intimating expressly or impliedly that it is sufficient to act on the proposal without communicating acceptance. How do we tell if this is done? Language of the offer, nature of the transaction etc. The nature of a reward is that notification is not required, only performance e.g. finding a dog after seeing a poster. Implied that notification is not required.
- On consideration, he states that here there is a request to use ... that is enough. Definition of consideration is any act from which the defendant derives a benefit or advantage OR any labour, detriment etc. by the plaintiff, if the act is performed with the consent, express or implied of the defendant.

NB- for unilateral contracts acceptance of the offer is made by one person performing his or her obligations. ∴ consideration = performance.

### *Australian Woollen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424*

Cth announced in series of letters that it would pay a subsidy on all domestic wool purchases for use by Australian manufacturers in 1946. In 1948, the scheme was cancelled. AWM tried to obtain the remaining subsidy payments but failed as there was no K. HCA held that the letters were policy statements and not a request from the Cth for AWM to do something. The letters were not offers to K.

Ticket Cases: Conventional analysis is that a ticket constitutes an offer which is capable of acceptance or rejection by the passenger once the passenger has had a chance to review the relevant terms and conditions (i.e. get one plane = acceptance). Thus, the ticket simply records the terms of the offer. Ticket cases show the difficulties of an offer and acceptance analysis in certain modern cases. For this case, we go back to the reasonable person test. Consent may be relevant - specific (read T&C) and those where we just agree in general are therefore limited by reasonable approach. E.g. can't agree to give up an organ just to purchase a song on iTunes. The T&C must be reasonable.

### *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) (1975) 133 CLR 125*

#### Facts:

- Process was: Prospective passenger told of available seats & price. Having selected a flight, he or she was handed a ticket with appropriate details – in return for the fare. At the appropriate time, he or she presented the ticket to secure seat.
- A condition on the ticket stated airline had the right to cancel any flight and passenger would be entitled to a refund for the proportion of the journey cancelled and the airline would be under no other liability to carry the passenger nor reschedule.
- For stamp duty reasons, it was necessary to determine whether there was a K or not at time of receiving the ticket.

#### Held:

##### Barwick CJ

- The entitlement of the airline to retain the fare is dependent on the actual performance of carriage of the passenger.
- The ticket was just a receipt for prepayment of the fare. No K until airline had provided a seat on the plane. In the absence of express agreement to carry (as in clause 2 and 5 of T&C), a ticket is not a K. MMAS had no such clause ∴ not a K. Possible condition subsequent (see below, K exists but only comes into effect when condition (i.e. seat on plane) is met).

##### Stephen J

- Conduct is required to determine if a K exists. Acceptance is by conduct (i.e. overt act in demonstration of agreement to T&C) or the failure of the passenger to reject the offer.
- Thus a ticket is no more than a record of the terms of an agreement. In cases where passenger does not read the T&C, a K may be formed by an overt act (i.e. boarding plane) or the passing of a reasonable timeframe without rejection (i.e. read T&C, dislike, request refund).

- If someone fails to reject offer and demand refund, then they accept T&C.

**Invitations to treat:**

K and invitations to treat are different in that an invitation to treat is an invitation to make an offer or to enter negotiations.

Shop sales: The display of goods in a shop window or on shelves is usually an invitation to treat. The offer stage is when the shopper presents the products to the cash register.

***Pharmaceutical Society of Great Britain v Boots Cash Chemists Inc [1953] 1 QB 401***

All sales of drugs needed to be supervised by a registered pharmacist. In a self-service store, if the purchase is complete at the time of selecting an item and placing it in their basket, then sales are not under supervision. If by displaying the drugs, they were making an offer, they would be in violation of the act. But display of goods is not an offer. It is just an invitation to treat. Somerwell and Birkett held that selecting an item is an invitation to treat and that no sale is complete until the buyer's offer is accepted by the seller. This occurs under the supervision of a pharmacist ∴ no K and not in violation. Somerwell obiter: if sale is complete once an article is placed in basket, then shoppers cannot exchange items without first paying for it and then returning it. Clearly not convenient method of displaying shop wares and allowing customers to choose what they will buy. The rule that display of goods = invitation to treat was extended to situations where goods were displayed for self-service.

In Australia, a less technical approach is adopted. An offer may come from displaying or advertising products for sale (*Goodwin's of Newtown Pty Ltd v Gurrey*, Australia Consumer Law, text pg. 59, displaying TVs with marked prices, told not that actual box but identical ones for sale).

***Fischer v Bell [1961] 1 QB 394***

Displaying a flick knife is not offering the knife for sale (an offence). It's is an invitation to treat.

Auctions: A public auction is an invitation to treat. Bids constitute an offer and the fall of the hammer indicates acceptance of the offer. Thus:

- No K claim if an auction is cancelled
- Bids can be withdrawn before hammer fall, can also be withdrawn until auctioneer announces that auction is complete
- Auctioneer is not required to sell to highest bidder

If an auction is done without reserve, there is still no K to sell to the highest bidder. The same general rules above apply. In England, 'without reserve' is taken to indicate a K to sell to highest bidder.

Tenders: Tenders are generally the same as auctions. They are an invitation to treat with each tender being an offer. However, the stipulations of the tender process may result in binding obligations.

***Harvela Investments Inc v Royal Trust Co of Canada [1986] 1 AC 207***

Letter stated that Harvela bound themselves to accept the highest offer complying with conditions of tender. Overturned on the issue of referential bids.

***Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195***

Implied K obligation to give consideration to tenders that complied with stated requirements, essentially under K to consider the offer

***Hughes Aircraft Systems International v Airservices Australia (1997) 76 FLR 151***

(tender conducted by CAA) CAA bound to a K to accept each tender (preliminary K).

### **Conditional contract**

There are two types of conditional Ks:

1. K doesn't come into existence until condition is filled (condition precedent to formation) K never exists until condition met. e.g. purchase house if deposit made by set date. No K until deposit is made.
2. K formed at a set point e.g. employment K dependent on satisfactory references (condition subsequent to formation). K already exists but comes into effect when condition is met.

### **Termination of offer**

An offer will no longer be available for acceptance if it:

1. Is withdrawn by offeror
2. Lapses
3. Or is rejected by the offeree (counter-offer)

Withdrawal: General rule: offer may be revoked at any time before accepted. A promise to hold an offer open for a specified time is not binding unless the offeree has given consideration for that promise (of keeping the offer open) – this is an Option. Withdrawal of an offer is only effective when actually communicated to the offeree. No exception for withdrawal by post.

Options: a promise to hold an offer open for a certain time is binding if something has been given for that option. This agreement is described as an option. Option holder is entitled to enter into a contract with grantor on specified terms within a specified time period or at a specified time.

#### **Goldsborough, Mort & Co Ltd v Quinn (1910) 10 CLR 674**

Facts:

- Goldsborough was granted an option (the promise to keep an offer open) to purchase Quinn's land for a certain price per acre, paying 5 shillings for said option. After the agreement for an option was concluded Quinn tried to cancel the deal and refused to sell the land to Goldsborough.
- Respondent contends there was never an agreement for the sale of land, rather an agreement to agree.

Held:

Griffith/O'Connor:

- A mere promise to leave an offer open is not binding, but such a promise is binding when there is consideration given.
- Option given for value (consideration) is not revocable. Found that the K was for the land, not the option (i.e. K made, just had to finally agree).
- Such a promise is not distinguishable from an option to purchase contained in a lease agreement.
- Contracts for sale of land are specifically enforceable, most other contracts are not (non-fungible goods may allow for specific performance).

Isaacs:

- Formed 2 Ks. The first is that the offer should extend for a week. The second would have been for the sale of the land. The first K is breached, second never comes into existence.

**Note:** Griffith/O'Connor analysis is accepted today. i.e. K would be to sell land, not to enter into 2 separate Ks.

Lapse: An offer which has a acceptance period will lapse at the end of the period. If there is no specific period, then a reasonable timeframe is adopted. A reasonable timeframe depends on the nature of the offer and the way it is made (written lasts longer than verbal).

Both the death of the offeror and the offeree will terminate the offer. If there is an option, the offeree's estate/representative may exercise the option, unless the option was personal to the offeree.

Rejection: Once an offer is rejected, it is no longer available for acceptance. It may be revived later as the basis of an agreement. A counter-offer is also seen as rejection of the original offer and extinguishes the offer. There is a distinction between rejection and inquiry (e.g. any wiggle room on price). Inquiry suggests that the buyer has not manifested an intention to reject the offer.

Rejection with a unilateral contract is more difficult. There is no issue if the offer is withdrawn before the offeree begins to perform. The issue arises when the offeree has begun to perform but not yet completed the acts required by the K. It has been held that an offer made in exchange for an act becomes irrevocable once the act is partly done. However, *Mobil* changed it to be that an offer made in return for performance of an act may be revoked at any time. The only time that could not be done was when there was an implied K to not revoke or an estoppel. An estoppel will arise only if the offeree assumes the offer will not be revoked and acts in such a way as to cause detriment. There **MUST** be a detriment.

Estoppel - If you make a promise and someone acts on it, you are bound to compensate for any loss. No K but there is an estoppel, thus you need to compensate for any perceived loss. Cause of action in estoppel is different to cause of action in K - they are separate issues but may arise from the same facts. When bringing estoppel, you're not saying that there is a K, just a promise that you acted upon.

***Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998) 81 FCR 475*** – estoppel/ revocation of unilateral contract offer

Facts:

- Mobile Oil Australia were in the process of creating an incentive scheme for its franchisees, one of which was Wellcome International.
- Certain rewards e.g. overseas holidays were to be offered for those franchisees that scored highly. It also had a tenure for success element attached.
- Following management and policy changes, Mobil decided it would no longer offer the tenure benefits but would instead give discounts on renewal fees. A group of franchisees sued and Mobil at that time decided to abandon the program altogether. The issue here is whether a unilateral contract can be revoked even after performance of the offeree has begun.
- **Note**: it was found that no offer was made, as the terms were uncertain and vague but the judges still address the issue of revocation of unilateral contract offer and estoppel.

Held: (Lockhart, Lindgren and Tamberlin JJ)

- The trial judge held that unilateral contracts could not be revoked after performance has begun. This was based on the view that if the offeror could withdraw at this point he or she would be benefitted or the offeree detrimented to some extent. This position is different to bilateral agreements that, without estoppel, could be revoked at any time before acceptance of the offer.
- The Full court disagreed holding that a unilateral contract can be revoked unless performance is complete or an estoppel exists. Although in some cases there may be an 'implied ancillary contract' in which the 'offeror promises not to revoke once the offeree' commence performance, that is not the same as saying it cannot be revoked. No universal proposition that an offer cannot be revoked once offeree commences or embarks upon performance.
- In this case performance was underway but was not complete so the only way that the Franchisees could enforce the agreement was if there was an estoppel. The elements of estoppel are 1. Representation 2. Reliance and 3. Detriment. Whilst the first two elements were satisfied the behaviour (trying harder to meet excellence targets) which the Franchisees relied upon only benefitted them through improved financial performance.

### **Conduct constituting acceptance**

Acceptance is the unqualified agreement to enter into a contract and assent to the terms of an offer.

Subjective approach to acceptance requires there to be a real meeting of the minds and consensus between the parties. Objective approach only looks at the external manifestations of consent and ignores the offeree's state of mind. In practice, there is little difference between the two as subjective approach is combined with the pple of estoppel. The pple of estoppel operates when a person conducts themselves in a way that a reasonable person would interpret as agreeing to a K. The objective approach is to be adopted by the courts as "what matters is what each party by words and conduct would have lead a reasonable person in the position of the other party to believe."

#### ***Smith v Hughes* (1871) LR 6 QB 597**

Buyer agreed to purchase oats, thinking they were new oats. They were old oats and new oats were not of the type required. Estoppel prevented the denial of any K as seller acted in such a way to indicate a K. The same result came from an objective approach as well.

#### ***Fitness First (Australia) Pty Ltd v Chong* [2008] NSWSC 800**

Chong signed 12-month gym application form, tried to cancel and claimed to be unaware of \$200 cancellation fee. But and offeree will accept an offer if acting in such a way as to lead a reasonable person to assume that they have agreed to T&C of K. Irrelevant that there was no meeting of the minds as Chong had manifested consent to the T&C and K by signing the form. [Signed K material comes into play]

### **Consciousness of offer**

In a bilateral K, it will usually be clear that the offeree has deliberately accepted an offer. In a unilateral K, the K will only take effect if the offeree performs the requested acts in reliance upon or in faith of the offer.

#### ***Crown v Clarke* (1927) 40 CLR 227**

##### **Facts:**

- Clarke offered information regarding a murderer to remove the blame from himself. Later tried to claim £1000 reward from the Crown.
- Clarke admitted under cross-examination that he did it to avoid getting into trouble, question his credibility/motivation.
- No K due to motivation underlying the act.

##### **Held:**

- Starke J held that a unilateral K is an exception to the rule of objective assessment of outwardly manifestations regarding the K.
- The objective test is used to get at the "meeting of the minds" issue (it's a proxy for the test).
- It's not applied when we know there was no meeting of the minds.
- In this case, Clarke categorically stated that there was no meeting of the minds ∴ objective test not used here, can use the subjective test (look at motivation). Normally conduct is enough UNLESS you admit that there was a vastly different motivation behind it. We rely on the "benefit of presumption" for the objective test.

### **Communication**

General rule: acceptance only has effect when it is communicated to the offeror. An offeror may dispense with communication in one of two ways:

1. Offeror may treat doing the act as acceptance (e.g. unilateral K)
2. Offeror may treat despatch of an acceptance by a particular method as effective, whether or not acceptance is received by offeror

Postal rule: acceptance is effective when and where the acceptance is posted. Places the offeror in a difficult position in that they may not know that the K has been formed (i.e. mail not yet delivered) yet they are held accountable to the K. Also applies to telegrams.

**Mrjana v Imagine Education Australia Pty Ltd [2016] NSWCATAP 232 [1]-[40]**

Facts:

- Contract for hairdressing course to be provided by the Respondent to the Appellant in QLD.
- Offer to provide services was accepted by the Appellant sending an email from Albury, NSW to the respondent, which was received by the respondent at its business in QLD.

Issue:

- Whether the Tribunal was correct in determining that the contract was not made in NSW and therefore that it did not have jurisdiction to hear and determine the appellant's claim.
- The Tribunal essentially held that because the email was sent to the respondent in QLD, the K was formed in QLD.

Law:

- The Tribunal has jurisdiction to hear and determine a consumer claim only if (CC Act 1988, s 7(2) and (3)):
  - ~~(a) The goods or services to which the claim relates were supplied in NSW;~~
  - ~~(b) A contract or other agreement to which the claim relates contemplated that the goods or services would be supplied in NSW (whether or not this actually occurs)~~
  - (c) A contract or other agreement to which the claim relates was made in NSW??
- S 13B(1)(a) of the *Electronics Transactions Act, 2000 (NSW)* – "unless otherwise agreed ... the electronic communication is taken to be **received** at the place where the addressee has its place of business."
- S 13A unless otherwise agreed "time of receipt is the time when the electronic communication becomes capable of being retrieved by the addressee"

Held:

- Appeal dismissed.
- Question is: when was the contract made or in other words **when is the process of formation of the contract completed?**
- **General Rule (*Tallerman & Co v Nathan's Merchandise*) is that it is not completed until acceptance is "actually" communicated to the offeror.** Further that a contract cannot be completed by the posting of acceptance unless it is inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act. The contract is only complete when the acceptance is received by the offeror: **and the contract is made at the place where the acceptance is received** (*Entmores Ltd v Miles Far East Corp* – acceptance via telex – similar decisions for Fax, Telexes and Telephones)
- As noted in the appellant's submissions there is some **debate about whether or not email comms are instantaneous or virtually instantaneous or whether the postal rule should apply.**
- Whilst emails may be relayed through various servers etc. prior to delivery **there is no basis to conclude that delivery by email should be considered other than a virtually instantaneous for of communication which must be received in order to complete formation.** Not appropriate or necessary to apply the postal rule (policy) [consider the implications of such a ruling for businesses]. (policy – also people usually expect to be actually told whether an offer has been accepted)
- **Unless, the acceptance is communicated by email and the offer contemplates that acceptance would occur merely by sending acceptance rather than actual receipt.**
- This was not the case here – the application form includes a postal address, however nothing contained therein amounts to an offer which was capable of being accepted merely through sending acceptance via email or post.

- **Also, the appellant's submissions are inconsistent with legislation on electronic transactions/ and certain international law.**

**Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957)98 CLR 93**

Must also be inferred that the offeror might reasonably have intended for the offer to be accepted. Limited application for specific case.

**Bressan v Squires [1974] 2 NSWLR 460 at 461-462**

According to [the formulation of Lord Hershell in *Herthorn v Frazer*], all that needs to be in contemplation of the parties is the post as a mode, indeed as a possible or permitted mode, for the law to impose the consequences that the contract is concluded by the action of posting.

Instantaneous communication: general rule applies (i.e. when and where the acceptance is communicated/received by offeror). Applies to telephone and telex. It was noted that telex in a large company is not necessarily direct to the primary person but it is convenient to treat it as if it is.

**Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH [1983] 2 AC 34**

Facts:

- English buyer, Austrian supplier of steel bars. Buyer sent telex to Austria accepting the terms of sale offered, sellers objected on the grounds that English courts had no jurisdiction. The Rules of the Supreme Court allowed a writ to be served on someone outside the jurisdiction if the contract was made within. Therefore, it was important to access when the contract was made.

Held:

- If acceptance was communicated via post, the contract would be created when the letter was in the hands of the Post Office in London but it was communicated via telex.
- The general rule is that the contract is formed when acceptance is communicated to the offeror. Even if the parties are not in the same place, it appears logical, that if communication is instantaneous there should be no departure from this general rule.
- Held that the K was made when the telex was received and is therefore made/ enforceable in Austria, not England.
- Noted "no universal rule can apply to all situations; must be resolved by reference to the intention of the parties, by sound business practice and in some cases by a judgment where the risks should lie..."

Fax: general rule applies (i.e. when and where the acceptance is communicated/received by offeror).

**Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd (1988) 5 BPR 11**

Fax is sent on telephone lines ∴ should be treated as instantaneous communication.

Email & interactive websites: Governed by the Electronic Transactions Acts (ETAs).

Where a communication is sent to an address designated by an addressee, the time of receipt is the time that it enters the information system or becomes capable of being retrieved by the addressee. The listing of an email address or fax number on a letter head does not amount to designation.

Where a communication is not sent to an address designated by an addressee, the time of receipt is the time that it becomes capable of being retrieved by the addressee and comes to the attention of the addressee (2005 Convention, text pg. 80).

**Method of Acceptance**

Silence as acceptance: A K cannot be formed or forced on the offeree by stipulating silence as the method of acceptance.

***Felthouse v Brindley* (1862) 11 CB (NS) 869**

Facts:

- Uncle purchased nephews horse with a "If I hear no more about him ..." letter. Nephew agreed but did not communicate it to uncle. Auctioneer accidentally sold horse, uncle sued for conversion.

Held:

- Unsuccessful as ct held no contract existed as acceptance of the offer was not communicated. Objectively - no contract. Subjectively - is a contract.

Acceptance inferred from conduct: In some cases, cts will accept an agreement has been formed even if no agreement has been communicated (i.e. acceptance via conduct). Test is whether a reasonable person would regard offeree's conduct (inc. silence) as signalling acceptance of offer.

***Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523**

Facts:

- Ppty developer (Empirnall) verbally engaged architects (Machon) for a development. Architects sent K to developer, told owner does not sign K. Continued to work, received progress payments. Developer went bankrupt ∴ determine if a K or not. In bankruptcy, a personal claim is just for money, breach of contract, etc. They rank below a proprietary claim (claim against a piece of property).

Held:

- The offeror will be bound if he dispenses with the need to communicate the acceptance of his offer (though he cannot assert that he will regard silence as acceptance).
- Nevertheless, the silence of an offeree in conjunction with the other circumstances of the case may indicate that he has accepted the offer.
- It might be said that failure to communicate rejection should generally be regarded as acceptance of the offer sufficient to form a contract. However, more often than not the offeree will be bound because, knowing of the terms of the offer and the offeror's intention to enter the contract, he has exercised a choice and taken the benefit of the offer.
- If a person, reasonable opportunity to reject, takes the benefit of the offered services under circumstances where a reasonable person would expect compensation, he assents to the terms proposed and accepts offer.
- Here the Empirnall's actions manifested in such a way as to be bound.

**Correspondence between Offer & Acceptance**

A 'battle of the forms' arises when both parties use standard forms that are inconsistent with each other in forming a K. English approach is that the last shot (i.e. last form sent) becomes the counter offer and will provide, if recipient can be taken to have agreed to terms of the offer. There is a K as soon as the last of the forms is sent and received without objection being taken to it.

***Butler Machine Tool Co Ltd v Ex-Cell-O-Corp (England) Ltd* [1979] 1 WLR 401**

Facts:

Seller provided a quotation and required acceptance of standard terms (inc. price variation clause). Buyer requested own terms and included a tear-off form. Seller returned tear-off form with a statement that going ahead with original conditions. Three communications:

1. Seller making offer to buyer, T&C on back including price increase clause if costs increase
2. Buyer requested supply on own T&C; tear off slip to return for acceptance
3. Seller returned the slip of paper, reiterate will go ahead with original seller's terms

Buyer prevails b/c didn't implicitly reject second offer (1<sup>st</sup> from buyer). They also didn't restate their offer ∴ no new counteroffer.

Denning: traditional analysis- counter offer kills original offer buyer was most emphatic about getting own terms in therefore they should triumph, based on looking at all of the communication. If you look at all circumstances, it looks like a contract. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication. Documents have to be considered as a whole. Matter of construction. Thus starting here, find the terms of the contract. More reasonable to say that buyers terms govern it. Example of ct getting more heavily involved in details of contract, not just if there is a contract or not.

Lawton LJ- buyers terms had very material differences. Can't be reconciled ∴ kill the quotation. Accepted counter offer by printed tear off slip. The sentence refers to the price and identity of the machine, doesn't bring small print into play

Two approaches possible in *Butler*:

1. Synthesis (Denning) – K formed by terms that are agreed to. Any gaps filled in by the ct from implied terms.
2. Classical (Majority) – assumes a single set of terms is either accepted or not. One entire set must prevail. Ex-Cell-O's order constituted a counter-offer which put an end to the effect of the quotation and which was accepted by Butler's acknowledgment.

### **Meeting of the Minds**

In many cases, there is the idea that a K is only formed when there is a meeting of the minds. Whether an actual consensus is required or just the appearance of one is needed depends on whether you adopt a subjective (actual meeting of minds) or objective (appearance of meeting of minds) view.

### **Agreement without offer & acceptance**

A K can be formed without an identifiable offer and acceptance.

### ***Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61**

Facts:

- First K for D to manage the P's solid waste disposal depot. But D started to receive liquid waste and charge for it.
- Before end of 1<sup>st</sup> K the D tendered for the 2<sup>nd</sup> K and was accepted
- After expiry of the 1<sup>st</sup> negotiations on the terms of the 2<sup>nd</sup> continued
- P wrote to D saying it was appropriate for D to increase the charge for liquid waste when they complete the liquid waste disposal area
- Second K agreed. Specified charge for "general commercial waste" and required portion of fee to go to the P. P wrote to D saying increase the charge for liquid but place some of the fee in a fund to establish a Liquid Waste Treatment Plant. D said the K does not cover liquid waste.
- D charged the fees set out in letter from P but retained the moneys. P sued D in relation to the retained fees.

Held:

(Mason)

- Agrees with Ipp AJA. States that this case shows the difficulties in pressing the classical theory of K too far.

(Heydon JA)

Five rules (leaving out the one re: implied terms)

1. Pre-contractual conduct is only admissible on questions of construction if the K is ambiguous and if the pre-contractual conduct casts light on the genesis of the K, its objective aim, or the meaning of any descriptive term – *Codelfa*
2. Post contractual conduct is admissible on the question of whether a K was formed
3. Post contractual is not admissible on the question of what a K means
4. Construction of the K is objective and the subjective beliefs of the parties are generally irrelevant (in the absence of any argument re rectification or an estoppel is found)

- From the construction of the K it is clear that general commercial waste should be taken to include liquid waste – both in the sense that the ordinary meaning of the words would lead us to believe this and the construction of the clauses imply this.
- The D also argued that the measurement used in the contract relating to fees was in cubic metres which did not relate to liquid and hence liquid was not intended to be part of the K. The judge stated that the conversion of the standard to one appropriate to liquid involved an elementary calculation.
- Can't use the letter etc. to interpret the contract since they post-date the K and the contract contains no ambiguity. Subjective beliefs of the parties are unimportant.
- A manifestation of mutual assent can be made even though neither an offer or acceptance could be identified. An agreement can be evidenced other than by offer and acceptance!
- The question is whether the conduct of the parties, viewed in light of the surrounding circs, shows a tacit understanding or agreement?
- If offer and acceptance analysis is not always necessary or sufficient, principles such as the general principle that a rejection of an offer brings it to an end cannot be universal. A rejection offer could remain operative if it were repeated, or otherwise revived or if in the circs it should for some reason be treated, despite its rejection as remaining on foot.
- In this case: despite at first rejection the offer in the letters they late accepted the benefit offer – to charge higher fees for liquid – knowing that the only way the council permitted higher fees was for 1.1 cents to be retained. The charging of higher prices conveyed only 2 possibilities, either it was in breach of the condition on which the benefit was conferred or it was accepting the condition. What would the reasonable bystander think?

(Ipp AJA)

- Parties were wrong in their understanding of the meaning of the agreement.
- Parties wrongly believed the original K did not apply to liquid waste.

This case shows that the objective approach to interpretation of the terms has a tendency to separate contractual obligations from the will of the parties. In most cases the intentions of the parties will coincide with the intention that a reasonable person would attribute to them – but in making a K the parties necessarily subject themselves to the court's interpretation of their rights and obligations.

### **Electronic Transactions Act 2000**

**(1) In this Act:**

"addressee" of an electronic communication means a person who is intended by the originator to receive the electronic communication, but does not include a person acting as an intermediary with respect to the electronic communication.

"automated message system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.

"electronic communication" means:

(a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both, or

(b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.

"information" means information in the form of data, text, images or sound.

"information system" means a system for generating, sending, receiving, storing or otherwise processing electronic communications.

"transaction" includes:

(a) any transaction in the nature of a contract, agreement or other arrangement, and

(b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement, and

(c) any transaction of a non-commercial nature.

### **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:

(a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee, or

(b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:

(i) the electronic communication has become capable of being retrieved by the addressee at that address, and

(ii) the addressee has become aware that the electronic communication has been sent to that address.

(2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.

(3) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 13B.

### **14A Application and operation of this Part**

This Part applies to the use of electronic communications in connection with the formation 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:

(a) whether some or all of the parties are located within Australia or elsewhere, and

(b) whether the contract is for business purposes, for personal, family or household purposes, or for other purposes.

#### **14B Invitation to treat regarding contracts**

(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 as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

(2) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

#### **14C Use of automated message systems for contract formation-non-intervention of natural person**

A contract formed by:

- (a) the interaction of an automated message system and a natural person, or
- (b) the interaction of automated message systems,

is not invalid, void or unenforceable on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

#### **14D Error in electronic communications regarding contracts**

(1) This section applies in relation to a statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract.

(2) If:

- (a) a natural person makes an input error in an electronic communication exchanged with the automated message system of another party, and
- (b) the automated message system does not provide the person with an opportunity to correct the error, the person, or the party on whose behalf the person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:
- (c) the person, or the party on whose behalf the person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication, and
- (d) the person, or the party on whose behalf the person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

(3) The right of withdrawal of a portion of an electronic communication under this section is not of itself a right to rescind or otherwise terminate a contract.

(4) The consequences (if any) of the exercise of the right of withdrawal of a portion of an electronic communication under this section are to be determined in accordance with any applicable rule of law.

#### **14E Application of Act in relation to contracts**

(1) Subject to subsection (2), the provisions of sections 7 and 13-13B apply to:

- (a) a transaction constituted by or relating to a contract, or
  - (b) an electronic communication relating to the formation or performance of a contract,
- in the same way as they apply to a transaction or electronic communication referred to in those sections, and so apply as if the words "For the purposes of a law of this jurisdiction" were omitted.

(2) However, this Part (including subsection (1)) does not apply to or in relation to a contract to the extent that:

- (a) Part 2 would of its own force have the same effect as this Part if this Part applied, or
- (b) a law of another State or Territory (that is in substantially the same terms as Part 2) would of its own force have the same effect as this Part if this Part applied.

### **Terms**

Promisor = person making the promise (e.g. builder)

Promisee = person to whom the promise is made, seeking to enforce (e.g. person wanting building work done)

### **Consideration**

Consideration is something the law regards as valuable, given in return/exchange for a promise and can be seen as the agreed price of the promise. Designed to distinguish between bargain promises (i.e. promises involving some degree of bargaining, contracts) and general promises (not enforceable). A consideration is a reason for a promise to be completed, a good reason for the promise to be enforced by the Courts. The modern view is a narrow view of the consideration. Historically, a bargain/negotiation was enough of a reason to enforce a promise/agreement. Now, something has to be exchanged.

The doctrine of consideration requires that something be given in return for a promise in order to make it binding. Consideration is usually present and is taken for granted in most agreements. E.g. pay \$1000 to have a fence made, the \$1000 is the consideration, the promise is to build the fence, the promisee is the person wanting the fence, the promisor is the contractor building the fence.

Consideration is a requirement of the enforceability of promises. e.g. if you don't pay, there is no consideration and there is no agreement in the fence example above. When an agreement is made by exchange of promise, each party's promise provides consideration to support the promise made by the other. If there is not consideration on both sides, the agreement may not be enforceable.

#### ***Example:***

Govt contract for Precinct Space at for the Comm Games – the License Fee (consideration) was to pay \$1 on demand – which presumably would not be exercised but ticks the consideration box].

### **Essential elements**

1. Promisee must incur a detriment or confer a benefit on the promisor (the benefit/detriment requirement) **AND**
2. The benefit or detriment must be given in return for the promise (the "bargain" requirement")

#### **1. Benefit/Detriment requirement**

The person to whom the promise is made must either confer a benefit on the promisor, or must incur a legal detriment, in the sense of undertaking an obligation. E.g. B wishes to enforce A's promise to pay \$1000. The consideration given by B must be to transfer property (e.g. car) or to promise to do so.

Mutual promises will provide good consideration for each other. A promises B, B promises A, both confer a benefit on the other and a detriment to themselves (have to follow through on promise).

#### ***Ballantyne v Phillot***

##### **Facts**

- P (man) started proceedings to recover debt from his former mistress B
- B asserted she had some evidence to claim the reverse and would sue in defamation
- Third party gets them to sign an agreement in which P agrees to stop proceedings against B and release all claims against her.
- B relies on the agreement when P starts new proceedings to recover the debt
- As consideration for Phillott's promises B relied on a statement in the signed document that she had no right to claim against P in respect of the action of debt or otherwise.

- High court held by 2-1 that B had not given consideration for P's promise.

Held (Menzies J)

- That B did not promise to give up a claim against P and no promise could be implied in the circumstances. The promise did not constitute a benefit to Phillot or a detriment to Ballantyne.

**Class:** shows that a case may satisfy the bargain element without the benefit/ detriment element.

## 2. "Bargain" requirement

Benefit conferred to promisor or detriment suffered by promisee must be given in return for a promise. E.g. paid \$1000 as consideration must be agreed price for the promise. So the act of consideration (e.g. payment) must be performed as the agreed price of the promise and must be performed at the request or implied request of the promisor. There is an element of quid pro quo in the bargain requirement.

An act may satisfy the bargain component but not the benefit/detriment component.

### *Australian Woollen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424*

Facts:

- Plaintiff claimed a unilateral contract had arisen out of the govt's wool subsidy scheme.
- Subsidized wool purchases of manufacturers so they could supply products at low prices.
- Announced via letter that it would pay a subsidy on all wool purchased for domestic use by Aus manufacturers (2006).
- AWM purchased large amount of wool over 2 years, including in April, May, June 2008 that the subsidy was not paid.
- Govt announced discontinuation of scheme in 1948 but stated that they would ensure each manu' would have a certain amount of subsidized wool at 30 June 1948.
- The stockpile exceeded this amount so the govt required AWM to repay the subsidy on the excess.
- AWM repaid but then later sued.

Held: (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ)

- In order for a unilateral contract to exist in this case – the statement relied upon as a promise must have been offered as consideration for the doing of an act, and that act must have been done in consideration of the promise inherent in the statement. Must be a relation of quid pro quo!
- Was there a request (express or implied) on the part of the promisor? Was there an inducement or simply an incentive?
- The statement which is argued to be an offer must have been intended to give rise, on the doing of the act, to an obligation. Here it was not contractual but administrative and not an offer rather a policy. If this was a contract or was intended to be so there would likely have been a form – in the absence of this there is too much uncertainty.
- The appellate further submitted that the govt wanted manufacturers to purchase so that there could be woollen goods on the home market – arguing essentially an implied request to do so. Court held that the absence of a request may negate the formation of a contract but the presence does not establish a contract itself
- Conditional gift