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## Topic 2 Part A: Formation of Contract - Offer

### Relevant Cases:

- *Carlill v Carbolic Smoke Ball Co* [1893] - Offer
- *Gibson v Manchester City Council* [1979] - Invitation to treat
- *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) - Ticket as offer, not concluded contract
- *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] - Invitation to treat, not offer
- *Goldsborough Mort & Co Ltd v Quinn* (1910) - Option
- *Mobil Oil Australia Ltd v Wellcome International* (1998) - Revocation

### Offer

An offer is a statement by an offeror with an intention to be bound by specified terms. An offer is only effective once it is communicated to the offeree.

A proposal only amounts to an offer if the person making it indicates that an acceptance is invited and will conclude the agreement between the parties. Contracts may take the form of:

1. A unilateral contract (1 executed and 1 executory promise)
  - a. An offer is made to everyone and is accepted and performed simultaneously.
    - In **Carlill**, the offer was accepted and consideration conveyed through the execution of the act in return for the promise.
2. A bilateral contract (2 executory promises)
  - a. Formed when there is an exchange of promises.

### Objective Assessment

In order for the courts to determine whether there has been a valid offer, the test is that an offer must normally be interpreted in the sense that it would reasonably be understood by an ordinary person – **Carlill v Carbolic Smoke Company** (1893).

An offer is not valid if the language of the offer is vague and/or not specific in communicating the intent to enter an agreement - **Gibson v Manchester City Council** [1979] House of Lords, Lord Diplock.

### Identifying an Offer

An offer should be distinguished from the following:

1. Invitations to treat or negotiate (**Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd** [1953];
2. Puffery (**Carlill v Carbolic Smoke Ball Co** [1893]);
3. Supply of information (**Stevenson Jacques and Co v McLean** (1880)); and
4. Counter-offers (**Butler Machine Tool Co Ltd v Ex-Cell-o Corp** [1979]).

#### Invitation to Treat

**Shop sales:** In **Pharmaceutical Society of Great Britain v Boots Cash and Chemists** [1953] QBCA, the court ruled products on display or on a shelf in a shop are an invitation to treat, and not an offer. An offer is made by the customer, once they have selected the goods and have taken them to the sales counter. Up to this point customers are allowed to return goods to the shelves, so a contract cannot be made. The offer is accepted and a contract is made when the shop takes payment, and not before.

**Auctions:** An auctioneer does not make an offer to sell, but merely invites offers from those present at the auction. Each bid constitutes an offer, the fall of the hammer constitutes acceptance.

**Tenders:** A call for written tenders will usually constitute an invitation to treat, each tender constitutes an offer.

#### Puffery

In **Carlill v Carbolic Smoke Ball Co**, the court ruled that an offer is not mere puffery if the language was not so vague that you could not construe it as a promise. There was

clear intention in the advertisement by reference to the language used, and the money deposited. A statement made with sincerity conveys an offer.

### **Supply of Information**

A supply of information is not an offer.

### **Counter-offers**

A modification of an offer which implicitly rejects an original offer and makes it no longer available for acceptance. The traditional method for the battle of forms mentioned in **Butler Machine Tool Co Ltd v Ex-Cell-O Corp** is followed in Australia.

## **Recipients of Offers**

An offer will only be effective when it (all of its terms) is communicated to the offeree. An offer cannot be accepted unless the acceptor is aware of the existence of the offer and its terms - **Carlill v Carbolic Smoke Ball Co** [1893], **MacRobertson Miller Airline Services v Cmr State Taxation** (WA) (1975).

## **Ticket Cases**

If one is handed a ticket or another document with terms, and they retain the ticket or document, then they are bound by those terms.

In **MacRobertson Miller Airline Services v Commissioner of State Taxation** (WA) [1975], the court in varying judgements said that a contract was not made when a ticket was issued, rather it is a receipt and the offer is made by the customer in taking a seat and the acceptance results through the execution of the service. Barwick CJ said that it is similar to a unilateral contract, the customer taking the seat is an offer and the airline, in accepting the offer through execution of service, was allowed to keep the money paid for the ticket as a reward, else they return the money. Stephen J (dissenting) said that the ticket recorded the terms of an offer and a customer then had the chance to accept or reject those terms, and by taking a seat, agreed to the terms and a contract was formed.

## **Termination of an Offer**

### **Revocation**

An offer may be revoked anytime before acceptance, and is only effective once it is communicated to the offeree (including all potential offerees). An offer must be withdrawn in the same mode as it was made, **Carlill v Carbolic Smoke Co**

In a Unilateral Contract, as per **Mobil Oil Australia Ltd v Wellcome International** (1998), an offer that is made to the world cannot be revoked while an offeree is in the act of executing consideration to accept the offer.

### **Rejection**

An offer may be rejected either expressly or inferred through an offerees actions, including making a counter offer as per **Stevenson Jaques and Co v Mclean** (1880). Once an offer has been rejected, it is no longer available for acceptance.

### **Lapse of Time**

An offer 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 period of time.

### **Option**

An offeror will not be bound by a mere promise to keep an offer open unless as in **Goldsbrough Mort and Co Ltd v Quinn** [1910] separate consideration is paid. Griffith CJ and Isaacs J both said that a promise to keep an offer open if supported by some consideration means that there can be no withdrawal of an offer within that period of time. There is a valid separate contract for valuable consideration.

An offer, after a reasonable period of time without acceptance will lapse.

### **Non-occurrence of a Condition**

Where an offer is subject to a condition, such as finance or other approval, the failure of that condition causes the offer to lapse, **Meehan v Jones** (1982).

### **Death**

Where an offeror dies, the offeree may accept the offer at any time before the death notice.

## **CASES**

### **Carlill v Carbolic Smoke Ball Company [1893]**

FACTS The Carbolic Smoke Ball Company advertised that a £1000 reward would be paid to any person who contracted influenza, a cold or any disease after having used the smoke ball three times a day for two weeks and that the £1,000 was deposited with the Alliance Bank, Regent Street, to show the sincerity of the Carbolic Smoke Ball Company. Mrs Carlill bought the smoke ball in reliance of the advertisement and used it three times a day between 20 November 1891 and 17 January 1892-after which she caught influenza.

HELD The English Court of Appeal in an absolute majority found for Mrs Carlill, on the basis that a contract existed between the parties, and that Carbolic owed Mrs Carlill the advertised £1000. The court classified the contract as a unilateral contract, that is, an offer made to the world that is accepted by somebody performing the condition. Acceptance of the offer was contemporaneous with the performance of the condition and in this respect notification of the acceptance need not precede the performance

### **Gibson V Manchester City Council [1979]**

HOUSE OF LORDS - Offer or invitation to treat

FACTS Mr Gibson inquired about buying the house he was renting from the council. The council's reply gave a price and said 'If you would like to make formal application to buy your Council house, please complete the enclosed application form and return it to me as soon as possible'. He did so, and later sought specific performance.

HELD: He failed. It was impossible to regard the council's letter as an offer to sell capable of acceptance so as to constitute a contract.

### **MacRobertson Miller Airline Services V Commissioner Of State Taxation (WA) (1975)**

HIGH COURT OF AUSTRALIA - Ticket as offer or concluded contract

FACTS The airline's ticket was typically given on tender of the price for the proposed travel entered on it. The ticket drew attention to endorsed 'conditions of carriage' which contained sweeping exemptions, including giving the airline the right to cancel or alter flight arrangements and to refuse carriage. A question arose whether the ticket attracted stamp duty as an 'agreement or memorandum of an agreement'.

HELD: It could not be so described, since no contract was concluded at the time it was issued. Per Barwick CJ: the exemptions fully occupied the whole area of possible obligation so as to preclude any contract of carriage arising on issue, and, even disregarding them, the airline was not in contractual relations with the intended passenger until it provided him with a seat on the aeroplane: the ticket being only a receipt for payment of the fare. Per Stephen and Jacobs JJ: the ticket was merely an offer open for acceptance orally or by the later conduct of the passenger.

### **Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953]**

FACTS Boots Chemists sold pharmaceutical products in a self-service fashion. That is, the products were on the shelf, customers lifted the products off the shelf and took them to the cashier for payment without reference to the pharmacist. The Pharmacy and Poisons Act 1933 (UK) made it an offence to sell poisons without the supervision of a registered pharmacist. The Pharmaceutical Society prosecuted Boots for selling poisons without proper supervision.

HELD The court found in favour of Boots on the basis that a sale was when a binding contract came into existence. A contract was not formed at the point when the