

## **Topic 1: Acceptance**

### **General Principle - 10**

#### **Objective Approach to Acceptance - 10**

- *Taylor v Johnson* - 10

#### **Counter-Offer - 10**

- What is a counter offer (rejection is not termination) - 10
  - *Brambles Holdings v Bathurst City Council* - 10
- Counter offers not acceptance – 10
- Cases
  - *Turner, Kempson* (Raspberry selling) - 10
  - *Dunlop v Higgins* (Adding delivery to acceptance) - 10
  - *CJ Bova Pty Ltd v Geoffrey Needham Pty Ltd* (Subject to confirmation) – 11
  - *Carter v Hyde* (Hotel furniture) – 11
  - *Redwood Pty Ltd v Mongoose Pty Ltd* - 11
- Misdescription - 11
- Battle of the forms - 11
  - *Butler Machine Tool Co Ltd v Ex-Cell-O Corp* - 11

#### **Awareness of the Offer - 12**

- Acceptance requires awareness - 12
  - *Crown v Clarke* (Arrested Snitch) – 12

#### **Communication of the Acceptance - 12**

- Acceptance requires communication - 12
- Communication must be by offeree or agent – 12
  - *Powell v Lee* (Headmaster position) – 12
- Waiving communication – 12
  - *Carlill v Carbolic Smoke Ball Co* (Smoke bomb ad) – 12
- Acceptance not reaching offeror – 13
  - *Latec Finance Pty Ltd v Knight* (TV hire purchase) – 13
- Agreement to different terms – 13
  - *ICTA Investments v GE Commercial Group* (Nightclub lighting) – 13

#### **Silence as Acceptance - 13**

- Silence is not acceptance (generally) - 13
  - *Felthouse v Bindley* (Uncle buying horse) – 13
  - *Allied Marine Transport v Vale do Rio Doce Navegacao* – 13
- Objective bystander rule – 14
  - *P'Auer AG v Polybuild Technologies International Pty Ltd* - 14
- Conduct with past dealings indicate acceptance – 14
  - *Brogden v Metropolitan Railway Co* (contract different terms) - 14
- Conduct can be acceptance – 14
  - *Empirnall Holdings v Machon Paull Partners* (I hate signing contracts) – 14

### **Method of Acceptance - 15**

- Prescribing mode of acceptance and waiving that - 15
- Unclear prescription of mode of acceptance – 15
  - *George Hudson Holdings Ltd v Rudder* (Shareholder post acceptance) – 15

### **Postal Rule - 15**

- Application - 15
- Acceptance at postage not receipt – 15
  - *Adams v Lindsell* (Selling Wool postage kerfuffle) – 15
  - *Tallerman & Co v Nathan's Merchandise* (sneaky solicitor) – 16
- When postal rule cannot apply - 16
  - *British and America Telegraph Co v Colson* – 16
- Negating postal rule – 16
  - *Holwell Securities v Hughes* (Losing hand delivered letter) - 16
- Loss, destruction, delay of letter – 16
- Supplying the wrong address - 16

### **Instantaneous Methods of Communication - 17**

- Postal rule inapplicable - 17
  - *Entores Ltd v Miles Far East Corp* (London Telex Amsterdam) – 17
  - *Brinkibon Ltd v Stahag Stahl* (Counter-offer telex) – 17
- Electronic Act - 17

### **Revocation - 18**

- Revocation any time before acceptance with communication – 18
  - *Financings Ltd v Stimson* – 18
- Exception - 18
  - *Goldsbrough Mort & Co Ltd v Quinn* – 18
- Knowledge is essential – 18
  - *Patterson v Dolman* - 18

## **Topic 2: Construction**

### **Parol Evidence Rule (PER) - 19**

- The rule - 19
- Parts of the PER– 19
- Applies only to contracts wholly in writing- 19
  - *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* – 19
- PER covers all extrinsic evidence – 19

### **Exceptions to the Parol Evidence Rule (PER) - 20**

- Clarify ambiguity - 20
- Identify subject matter of contract - 20
- Identify parties of contract - 20

## **Construction and Interpretation - 20**

### **Construction Debate and Ambiguity Gateway - 20**

- Using surrounding circumstances [AMBIGUITY GATEWAY] - 20
  - *Codelfa Construction v State Rail Authority of NSW* - 20
  - *Royal Botanic Gardens* - 20
- Meaning of terms to reasonable businessperson - 20
  - *Electricity Generation Cooperation v Woodside* - 21
- Reaffirmation of *Codelfa* - 21
  - *Mount Bruce Mining v Wright Prospective* - 21

### **Construction Process - 21**

- Interpretation of terms to reasonable businessperson – 21
  - *Mannai Investment v Eagle Star Life Assurance* - 21
  - *Toll v Alphapharm* – 22
- Principles on how to construct contractual terms – 22
  - *Peppers Hotel v Hotel Capital* – 22
- Absurd results – 22
  - *Investors Compensation Scheme v West Bromwich Building Society* – 22

### **Exclusion Clauses - 23**

- What's an exclusion clause – 23
- Issues with exclusion clauses – 23
- Courts don't like exclusion clauses – 23
  - *Photo Production v Securior* – 23

### **Construing Exclusion Clauses - 24**

- (1) Contra Proferentum – 24
  - *Darlington Future v Delco* - 24
  - *Council of Sydney City v West* (Dude where's my car?) - 24
- (2) Deviation Cases – 24
- (3) Four-corners Rule – 24
- (4) Covering Negligence - 24

### **NSWCA Opinion on Construction – 25**

- Surrounding circumstances to be used even with no ambiguity – 25
  - *Campbelltown City Council v WSN Environmental Solutions* - 25
- Unambiguous but outrageous language allows for departure – 25
  - *Campbelltown City Council v WSN Environmental Solutions* - 25

## **Topic 3: Express Terms**

### **General Principle - 26**

#### **Factors to Account For - 26**

- Effect of Signature - 26
- Difference between written and unwritten contracts - 26
- Degree of notice for incorporation of unusual terms - 26
- Attitude of courts towards sophisticated commercial parties - 26

#### **Incorporation: The Effect of Signature -26**

- Signage is likely binding - 26
  - *L'Estrange v F Graucob* (Not reading the contract)- 26
  - *Wilton v Farnsworth* - 27
  - *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (Spoiled Vaccines) – 27

#### **Exceptions to the Rule on Signature - 27**

- Signage does not bind with non-contractual documents - 27
  - *DJ Hill Co v Walter H Wright* (Delivery receipt w/ exclusion) - 27
- Misrepresentation - 28
  - *Curtis v Chemical Cleaning & Dying Co* (Wedding dress stained) – 28
- Non est factum (this is not my deed) – 28
  - *Petelin v Cullen* (Signing document thinking it's a receipt) – 28
  - *Saunders v Anglia Building Society* (Widow dumbass nephew) - 28

#### **Incorporation of Written Terms by Notice - 29**

- Requirements of incorporating terms – 29
- (1) Providing notice of terms before contract formation - 29
  - *Oceanic Sun Line Special Shipping Co Inc v Fay* (terms on ticket) - 29
  - *eBay International v Creative Festival* (term on ticket but not website) – 29
  - *Olley v Marlborough Court Ltd* (Stolen furs hotel guest) - 29
- (2) Terms in non-contractual document – 30
  - *Causar v Brown* (Dry cleaning dress pulled threads) – 30
  - *Oceanic Sun Line Special Shipping Co Inc v Fay* (Brochure terms) – 30
  - *Chapleton v Barry UDC* (exclusion clause on ticket) – 30
- (3) Reasonable steps to give attention – 30
  - *Thornton v Shoe Lane Parking Ltd* (Conditions inside parking) – 30

#### **Unusual Terms- 31**

- Unusual Terms require more – 31
  - *Maxitherm Boilers Pty Ltd v Pacific Dunlop Pty Ltd* - 31
  - *Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd* – 31
  - *Infertoto Picture Library Ltd v Stiletto Visual Programme Ltd* - 31

### **Incorporation through a Course in Dealings - 31**

- Course of dealings can incorporate terms – 31
- Two requirements must be established - 31
  - *Balmain New Ferry Co Ltd v Robertson* (Cheapass Lawyer) - 32

### **Parol Evidence Rule (SEE CONSTRUCTION) - 32**

### **Pre-contractual Statements - 33**

- Three categories - 33
- Three factors to consider - 33
- Promissory statements of significant importance can be incorporated – 33
  - *Manning Hotel Pty Ltd v DH MB Pty Ltd* – 33

### **Incorporation by Ticket - 33**

- Party disavowing terms will succeed if they show - 33

## **Topic 4: Implied Terms**

### **General Principle - 34**

### **Terms Implied by Fact – 34**

- Onus of proof lies on who wants implementation – 34

### **Formal Contracts - 35**

- Requirements for implied terms - 35
  - *BP Refinery (Westernport) v Hastings Shire Council* (Subsidiary rates) – 35
- (1) Implied term is reasonable and equitable - 35
  - *Attorney General of Belize v Belize Telecom Ltd* - 35
  - *Peters American Delicacy Co Ltd v Champion* (Price alteration) - 36
- (2) Implied term must give business efficacy – 36
  - *Grocon Constructors (Victoria) v APN DF2 Project 2*– 36
  - *The Moorcock* (Vessel resting at bottom of River Thames) – 36
- (3) Implied term must be obvious – 37
  - *Shirlaw v Southern Foundries* – 37
  - *Codelfa Construction v State Rail Authority of NSW* (Construction loud) – 37
- (4) Implied term must be capable of clear expression – 38
  - *Shell (UK) Ltd v Lostock Garage Ltd* (No petrol subsidy) – 38
- (5) Implied term must be consistent with other terms in contract – 38

### **Informal Contracts - 38**

- Terms of contract must be determined before implied terms are considered – 38

### **Terms Implied by Law - 38**

- Implied by law when suitable – 38

- Requirements - 38
  - *Liverpool City Council v Irwin* (Landlord implied obligation) – 39
  - *CBA v Barker* (Implied term of trust and confidence) – 39

### **The Implied Term of Good Faith - 39**

- Major Controversy – 39
  - *Renard Constructions (ME) v Minister for Public Works* (Clusterf\*\*k) – 39
  - *Burger King Corp v Hungry Jack's* (Burger King wants in AUS) - 40
- Not suitable with large commercial entities - 40
  - *Esso Australia Resources v Southern Pacific Petroleum* – 40
- Sir Anthony Mason Good Faith definition – 40
- Exact meaning will depend on circumstances - 40

### **Implied Duty to Cooperate - 41**

- *Scanlon v American Cigarette Company Pty Ltd* (no 3) - 41

### **Terms Implied by Custom - 41**

- Particular circumstances can lead to implied clauses - 41

## **Topic 5: Unconscionable Conduct**

### **General Principle – 42**

- Unconscionable conduct does exist if the bargain is harsh on one – 42
  - *CBA v Amadio* - 42

### **Elements of Unconscionability - 42**

- Three main elements - 42
- (1) One party must have a special disadvantage – 42
  - *Luong v Du* – 42
  - *Blomley v Ryan* (Landowner sold land while drunk) – 43
  - *Permanent Mortgages v Vandenberg* - 43
- Existence of situational disadvantage does not guarantee unconscionability – 43
- (2) Actual knowledge of special disadvantage – 43
  - *CBA v Amadio* – 43
  - *Kakavas v Crown Melbourne* – 44
- Wilful Blindness – 44
  - *Permanent Mortgages v Vandenberg* – 44
- (3) Exploitation of special disadvantage - 44
  - *Johnson v Smith* – 44
- (DEFENCE) Transaction fair, just and unreasonable – 44
  - *CBA v Amadio* - 44

### **Cases of Unconscionable Conduct - 45**

- *CBA v Amadio* (son dupes parents) – 46
- *Louth v Diprose* (weird infatuation) – 46

- *Mackintosh v Johnson* (femme fatale/hardening Louth) – 46
- Protection not extended to idiots (only *Kakavas*) - 47
  - *Kakavas v Crowne Melbourne* (High roller loses all) – 47
  - *Bridgewater v Leahy* (uncle sells land to nephew markdown) – 48
  - *ACCC v Berbatis* (store renews lease at cost of lawsuit) – 48
- Opportunistic actions and hard bargains not unconscionable conduct - 48
  - *ACCC v Samton Holdings* (landlord asks money to renew lease) - 48

## **Topic 6: Undue Influence**

### **General Principle - 49**

### **Categories of Undue Influence - 49**

- *Johnson v Buttress* (old man reliant on caretaker giving gift) - 49
- *Allcard v Skinner* – 49
- Classes of Undue Influence – 49

### **Class 1: Actual Undue Influence - 50**

- Evidentiary onus lies on unduly influenced party - 50
  - *Williams v Bailey* – 50

### **Class 2: Presumed Undue Influence - 50**

- Parent & Child - 50
  - *Lancashire Loans Ltd v Black* (Extravagant mother) – 51
  - *Grace v Grace* (Shares with voting control) – 51
- No presumption for child exerting control on parent – 51
  - *Walton v Walton* (son discharging debt to mother) – 51
- Guardian & Ward – 52
  - *Powell v Powell* (Stepmom making child share) – 52
- Religious Adviser & Disciple – 52
  - *Allcard v Skinner* – 52
  - *Hartigan v International Society for Krishna Consciousness* (donated gift) – 52
- Undue influence from third party with no direct benefit - 53
  - *Khan v Khan* (selling house with religious advice) – 53
- Class 2B: Relationships outside presumption – 53
  - *Tulloch (deceased) v Braybon & ors (No 2)* – 53
- Consideration must be insufficient or transaction disadvantageous – 54
  - *Edith White v Judith Liane Wills* – 54
- Two circumstances must be proved if presumption is to arise – 54
  - *Mace v Mace* (elderly mother gives one son property) - 54

### **Rebutting the Presumption - 54**

- Procurement of independent advice – 54
  - *Westmelton v Archer and Schulman* (Solicitor payments) - 55
- Transaction product of free will - 55

## **Principle in Yerkey v Jones - 55**

- Lender tainted by association – 55
  - *Garcia v NAB* (Couple mortgage future guarantees) - 55

## **Topic 7: Termination**

### **General Principle - 56**

- Right to terminate can arise in different ways - 56

### **Classification of Terms - 56**

- Three forms of terms - 56

### **Conditions - 56**

- Breach of a condition gives right to termination – 56
  - *Arcos v Ronaasen* (Timber minor issue) - 57
- Using word colloquially is insufficient - 57
- TEST OF ESSENTIALITY – 57
- Range of factors that can determine if a clause is a condition – 57
  - *Tramways Advertising v Luna Park* (advertising 8 hours) – 58
  - *Associated Newspapers v Bancks* (Comic front page to third) - 58

### **Intermediate Terms - 59**

- Between conditions and warranties – 59
  - *Hong Kong Fir Shipping v Kawasaki Kishen* (seaworthy ship) – 59
- Breach may give rise to termination if it is serious enough – 59
  - *Koompahtoo Local Aboriginal Land Council v Sanpine* (joint venture) - 59

### **Repudiation - 60**

- Inability or unwillingness to perform - 60
  - *Galafassi v Kelly* - 60
- Basic principles of repudiation - 60
  - *Earney v Australian Property Investment Strategic* – 60
  - *Laurinda v Capabala Shopping Centre* (construct register lease) - 60
- Statement of unwillingness to perform is sufficient – 61
- Repudiation can occur through conduct – 61
  - *Carr v Ja Berriman* (landowner and builder) – 61
- Series of breaches can give rise to repudiation – 61
- Breaches of instalment contracts may give rise to repudiation – 61
- Erroneous interpretation can give rise to repudiation – 61
- Erroneous interpretation won't be repudiation if reasonable grounds – 61
  - *Shepard v Felt & Textiles of Australia* – 61
- Good faith can be taken into account – 62
  - *Sopov v Kane Constructions* - 62

### **Anticipatory Breach - 62**

- Basically repudiation: renouncing obligations before performance - 62
  - *Foran v Wright* (vendors can't complete sale) – 62
- Entitled to damages from renunciation – 62



- *Maple Flock Co v Universal Furniture Products* (one sub-standard batch) - 62

### **Termination for Delay - 63**

- Specification of time is of the essence - 63
- No stipulation – 63
- Time a condition if subject matter requires – 63
- Time can give rise to breach when notice is served - 63
- Time is not of the essence unless expressly stated – 63
  - *Louinder v Leis* (Selling property no time essence) – 63
- Five factors determining whether time is of the essence - 64

### **Notice - 64**

- Termination via notice – 64
- Things the notice must contain to be effective – 64
- Notice makes time of the essence but does not change the terms of the contract - 64

### **Election - 65**

- Election to termination or affirm – 65
- Estoppel operates on election to continue - 65
- Election must be unequivocal and clearly communicated – 65
  - *Immer (No 145) v Uniting Church in Australia Property Trust* – 65
- Failure to perform after other repudiation will amount to election to terminate – 65
- There must be knowledge of the facts giving rise to termination – 65
  - *Sangent v ASL Developments* – 65
- Election to affirm after a breach does not necessarily bind to future breaches – 66
  - *Tropical Traders v Goonan* (Sale of land late payments) – 66

### **Restriction of Termination - 67**

- (1) Estoppel by convention – 67
  - *Waterman v Gerling Australia Insurance Company* (insurance company) – 67
- (2) Relief against forfeiture – 67
  - *Tanwar Enterprises v Cauchi* - 67
- (3) Implied duty of good faith – 67

# Topic 1: Acceptance

## General Principle:

**Acceptance is a clear and unconditional assent to the terms of an offer**

- a. For a contract to come into existence between two parties there must be a mutual assent to the terms of the bargain (**'a meeting of the minds'**)
- The communication of the acceptance can arise through an express or implied form of assent (e.g. signing a contract)
  - The acceptance may only be given by the party to whom the offer was made or by their agent

## 1. The Objective Approach to Acceptance:

### *Taylor v Johnson (1983) High Court (Also in Toll Pty Ltd v Alphapharm Pty Ltd)*

- *Ratio*: An offeree who acts in such a way as to suggest to all and sundry that they are accepting the offer, and to induce the offeror to contract with them on that basis, will be bound
  - *Objective Approach* considers whether an **impartial third party observer would believe that the offeree was giving their assent to the terms of the offer**
- Not to be confused with subjective approach which considers actual intentions and understandings of the parties

## 2. Counter-Offers

- If purported acceptance **contains qualifications or proposes any changes to the transaction**, then it is instead a **counter-offer**
  - Rejection of the offer by the offeree will not necessarily terminate the offer itself (***Brambles Holdings v Bathurst City Council***)
- Counter-offers do not constitute as an acceptance

### *Turner, Kempson & Co Pty Ltd v Camm [1922] Victorian Supreme Court*

- *Facts*: Turner made offer to sell Camm 15 tons of raspberry pulp
  - Camm agreed but added that he wanted the pulp delivered in 'three lots of 5 tons each, approximately 10 days between each delivery'
- *Ratio*: Court held that inclusion of new terms meant that it was a counter-offer, rather than an acceptance (offeree suggested new terms as to the delivery of the goods)

### *Dunlop v Higgins*

- *Facts*: Offeree purported to accept an offer and included with the acceptance a request that the goods be delivered on a certain date
- *Ratio*: Valid acceptance because the acceptance was accompanied by a mere request to delivery rather than a new condition

### **CJ Bova Pty Ltd v Geoffrey Needham Pty Ltd**

- **Facts:** Settlement offer was made by plaintiff
  - Defendant's solicitors responded with terms that were subject to confirmation of the defendant
- **Ratio:** Use of term 'subject to confirmation' was held to be a rejection rather than an acceptance
  - Implied that further action would be needed before the offer could be regarded as having been accepted

### **Carter v Hyde**

- **Facts:** Carter offered to sell his hotel to JHyde with all the furniture in the hotel
  - When JHyde accepted, his letter of acceptance made reference to the furniture in the hotel at the time of acceptance (Carter argued that this constituted a counter-offer)
- **Ratio:** A mere error contained in the statement of acceptance does not constitute a counter-offer

### **Redwood Pty Ltd v Mongoose Pty Ltd**

- **Ratio:** "Commonly, offer and acceptance fail to correspond where the offeree in purporting to accept the offer ..... it fails to reflect accurately what was originally offered."
- "Unless it can be reasonably established that the offeror ignored any such restatement as a misdescription, the failure to accept exactly what was offered results in the purported offer being cast as a counter-offer and there is no acceptance of the offer." **(COUNTER-OFFER)**
- "However, where an offeree in error misdescribes what is being offered, the misdescription is not fatal if it is clear that the offeree really intended to accept the terms and conditions contained in the offer." **(MISDESCRIPTION)**

- To assess misdescription, element of reasonableness must be applied
  - If **reasonable recipient** of the acceptance would have regarded the errors as inconsequential, then no actual counter-offer has been made

### **Battle of the Forms:**

#### **Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd**

- **Facts:** Seller suggested a price and terms to buyer
  - Buyer sent the seller an order form containing buyer's own terms
  - Seller accepted the offer and used the order form
  - Seller subsequently attempted to enforce a clause contained in its own set of terms
- **Ratio:** "when there is a 'battle of forms', there is a contract as soon as the last of the forms is sent and received without objection being taken to it"