

SAMPLE: CONTRACT FORMATION

For a contract to exist between [party X] and [party Y], 4 material elements must be established: agreement, consideration, intention to create legal relations and certainty.

Agreement

In order for [X] and [Y] to have satisfied agreement, an offer must have been made by one party and accepted by the other party.

Bilateral v Unilateral Contracts

<i>Bilateral Contract</i>	<i>Unilateral Contract</i>
<ul style="list-style-type: none">• Most contracts• 2 parties to the contract (“A” and “B”)• Both parties exchange a promise or set of promises for each to do something in the future (eg/ A promises to transfer ownership of his car to B, in return, B promises to pay \$100 to A)• Both A and B’s promises are executory (i.e. to be performed at some point after the contract is formed)	<ul style="list-style-type: none">• Typically reward scenarios• 2 parties to the contract (“A” and “B”)• Only 1 promise is made (eg/ A promises to pay \$100 to B if B finds A’s lost puppy)• B accepts A’s offer when B performs the stipulated task. Contract is formed at same time B performs her obligations under it. (no need to give notice of acceptance prior to performance)• At time contract formed, A’s obligation/promise is executory, and B’s obligation has been executed (i.e. already performed)• Eg/ <i>Carlill v Carbolic Smoke Ball</i>; <i>Mobil Oil v Wellcome</i>

Offer

Is there an offer?

An offer is the indication by one party to another of their willingness to enter into a contract with that other person on certain terms (*Gibson v Manchester CC*).

- Indicates that acceptance is invited and will conclude that agreement between the parties (*Gibson v Manchester CC*)
- Must take the form of a proposal for consideration, giving offeree opportunity to choose between acceptance and rejection (i.e. can’t command someone) (*Brambles Holdings v Bathurst CC* per Heydon JA in obiter)

[X] will argue that [Y] made an offer by [insert facts]. However, [Y] may seek to rebut this argument by arguing that there was no offer and that the [action/conduct/words] only amounted to an invitation to treat (ITT).

To determine whether [action/conduct/words] amounted to an offer, the court will apply an objective test: does it appear to a reasonable person in the offeree’s position (reasonable member of the public for unilateral) that an offer was intended and that a binding agreement would be made upon acceptance (*Gibson, [Carbolic]*)? This inquiry is a question of fact to be answered with regard to the outward manifestation (statement or conduct) of the parties, not some other subjective evidence.

Consider the following:

- Language must be sufficiently certain and promissory (*Gibson* per Lord Diplock)
 - *Gibson*: Council ‘may be prepared to sell house to you’ – not enough to constitute valid offer

- Courts **can clarify some ambiguity**/lack of certainty
 - *Carlill v Carbolic*: time limit by reference to a 'reasonable time'
- Offer must be **final** – more than merely starting negotiations (*Gibson*)
 - *Gibson*: 'may be prepared to sell' and request for 'formal application to buy house'
- Offer must be **more than 'mere puff'** (exaggerated sales talk) (*Carlill*) – **only raise as conclusion**
 - Determined through evidence of capability or willingness to perform
 - *Carlill*: £1000 deposit in bank indicated Carbolic's sincerity – not 'mere puff'
- If **unilateral contract**, **possible to make offer with public** – not a contract with whole world but simply an offer which has conditions capable of being fulfilled by the whole world (*Carlill* per Bowen LJ)

Invitation to Treat (ITT)

An ITT is an invitation to others to make an offer to enter into negotiations. [Y] may seek to argue that [X]'s [actions/words/conduct] only constituted an invitation to enter into negotiations.

- Action/words/conduct lack sufficient indication of willingness to be bound (and possibly certainty)
- Whether particular conduct amounts to an offer is a question to be decided OTF of each case (*Australian Woollen Mills v Commonwealth*)
- Typical Categories:
 - Most advertisements (eg/ catalogues)
 - Goods displayed in shops (*Boots*)
 - Goods offered for sale online (s 148 ETA)
 - Property declared 'on the market' at auctions (*AGC v McWhirter*)
 - Invitations to tender (*Harvela; Hughes Aircraft*)

Shop Sales

- The general rule, is that:
 - Displaying goods for sale, whether in shop window or on shelves of self-service store, is an ITT (*Pharmaceutical Society of GB v Boots Cash Chemist*)
 - Customer makes offer to buy goods at checkout
 - Cashier accepts offer when accepts the item
- Logic: customers must be entitled to return and substitute items they have selected
- *Pharmaceutical Society v Boots*: goods displayed on shelves constituted an ITT

Online Sales

- Per s 14B ETA, a proposal to form a contract made through an electronic system which is not addressed to a particular person, but is made generally accessible to people using that system is to be considered an ITT UNLESS it clearly indicates an intention to be bound in the case of acceptance
- Per s 3(1) ETA, an electronic communication is:
 - (a) a communication of information in the form of data, text or images by means ... electromagnetic energy, or both; **or**
 - (b) a communication of information in the form of sound by means of ... electromagnetic energy ... where the sound is processed at its destination by an automated voice recognition system

Auctions

- The general rule, per *AGC v McWhirter*, is that:
 - Auction is an ITT
 - The bid is an offer; and
- The offer is accepted by the auctioneer's 'fall of the hammer'