

CONTRACT A EXAM NOTES

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AGREEMENT

The first element of contract formation. Generally satisfied when one party – the offeror- makes an offer which the other party- the offeree – accepts

OFFER

Offeror: The person who makes the offer (Becomes the promisor once offer is accepted)

Offeree: The person whom may accept or reject the offer (Becomes the promisee after the offer has been accepted)

Types of Contract

Definition: An expression of willingness to enter a contract on certain terms.

- **Unilateral:** An offer made to the general public which is to be accepted by performance (eg. Sign advertising reward for a lost dog)
- **Bilateral:** Two parties each promise to perform an act in exchange for something else (eg. A promises to wash B's car for \$100). Both parties are executory meaning they will be performed at some point after the contract is formed.

TEST: Must prove that a **reasonable person** would believe that an offer was made, the acceptance of which is binding (**Gibson**)

STEP ONE: Has an offer been made?

Distinguish offers from:

- **Mere puff:** Offeror makes a claim that is not meant to be taken seriously or literally (eg. 'Reg Bull gives you wins') (**Carbolic**)
- **Invitations to treat:** Invitations to negotiate/make an offer, including:
 - Goods for sale in a shop (**Boots**)
 - Advertisements (except those which promise a reward- **Carbolic**)
 - Goods for sale online (**Electronic Transactions Act s14B**)
 - Auctions (a bid is an offer which may be accepted by auctioneer) (**McWhirter**)

Tenders: A tender is typically an invitation to treat, however may be binding if there is a promise to follow certain protocol in a tender procedure (**Harvela; Hughes Aircraft**)

- "if any offer made by you is the highest offer received **we bind ourselves to accept... provided** [it] complies with the terms..." (**Harvela**)

TERMINATING AN OFFER

- **Revocation:** Offerors may revoke an offer any time before it is accepted (**Dickson v Dodds**)
 - Revocation is effective once it has been communicated to the offeree by words or conduct, including via a reliable third party (**Dickson v Dodds**)

- **Lapse:** If an offer has an expiration date, it will terminate on that date. If no date is specifically given, it will expire after a reasonable time
- If the offeror has promised to hold the offer open for a certain amount of time, the offer may still be withdrawn before the specific acceptance period – **some exceptions**
 - If consideration has been paid to keep the offer open (**called an option**) (*Goldsborough Mort*)

Revocation of unilateral offers: May be withdrawn even if performance has commenced (*Mobil Oil*), However there may be instances where there is an **implied ancillary contract** not to revoke the offer once the offeree commences performance (*Mobil Oil*)

Death: If the offeror dies the offer will terminate (*Fong v Cilli*)

- This does not apply if the offer is an option, it may be enforceable against the state (*Fong v Cilli*)
 - The estate must comply with the offer as long as it was done within the time frame and under the conditions
 - This does not apply if the contract relies on the personal skill of the offeror (*Laybutt v Amoco*)

Failure of condition and changed circumstances: An offer will be terminated if there is a **fundamental change** to the circumstance in which the offer was made

- This is a high threshold and will rarely be met (*Nielson v Dysart Timbers*)

Rejection and counter offers: If an offeree rejects the offer or makes a counter offer, the original offer will be terminated.

- A mere enquiry is not a counter-offer (*Stevenson, Jacques & Co v Mclean*)
 - ‘Would you accept X’ or ‘Is there room for improvement’

ACCEPTANCE

Definition: Offeree gives their unqualified assent to the terms of the offer, thus forming an agreement.

TEST: With regard to the external manifestations of their conduct, would a reasonable person believe the parts had reached an agreement? (*Fitness First*)

Step One: Has the offeree accepted the offer?

Conduct amounting acceptance – Unilateral Contracts:

- A unilateral contract will only arise when the offeree performs the requested acts in reliance of the offer. Therefore, acceptance must be in response to that specific offer.
- Courts can apply a subjective test in this instance to determine whether the offeree was acting in reliance (*Crown v Clarke*)

- Acceptance may be inferred from the offeree's conduct, even when the offeree does not formally assent to the offer (*Empirnall*) or even purports to reject it (*Brambles*)
- Acceptance cannot be inferred from silence (*Felthouse v Bindley*)

Bilateral Contracts:

- An offeree will effectively accept an offer if the offeree behaves in such a way that a reasonable person would believe that he is assenting to the terms of the offer, even if there is no real consensus between the parties

Step Two: Has the offeree effectively communicated acceptance to the offeror?

- **Acceptance must be communicated to the offeror** (*Latec Finance*)
- A contract is formed when and where the offeror received notice of acceptance (*Brinkibon*)

EXCEPTIONS:

- **Postal acceptance rule:** Where acceptance is delivered via mail, it is effective as soon as it is posted if the offeror intended acceptance to be communication by post (*Adams*)
- **Specific prescribed way of communicating acceptance** ie. 'Must be through email' etc. (*Latec Finance*)
- **Electronic communication:** *Electronic Transactions Act* governs acceptance delivered by email, text, social media, etc., but not phone or voicemail (**ETA s 3**).
 - Time of dispatch = when communication leaves offeree's IT system (**s 13(1)**).
 - Time of receipt:
 - If sent to designated address = when communication is capable of being retrieved by offeror, i.e. once delivered (**ss 13A(1)(a), 13A(2)**).
 - 'Designated address' is a high threshold.
 - If sent to non-designated address = when communication is capable of being retrieved by offeror **AND** offeror is aware it has been delivered (**s 13A(1)(b)**).
 - Place of receipt is generally offeror's place of business (**s 13B(1)(b)**).

Step Three: Does acceptance correspond with the offer made?

The terms that the offeree accepts must be those which were offered. However, when parties have been negotiating prior to reaching an agreement, there may be confusion as to which terms will constitute the final agreement.

Conflict Approach: A strict approach, the terms of the last offer made will apply. 'Battle of the forms' (*Butler per Lawton & Bridge LJ*)

Synthesis Approach: The court will synthesis the terms put forward by both parties. Looking at all the documents passing between the parties and from them or from the conduct of the parties, whether they have reached an agreement on all material points.

SPECIFIC TYPE OF OFFER- TICKET SALES

- In cases involving tickets for transport, the ticket containing terms and conditions is generally considered to be an offer, which is accepted when the offeree boards the plane/boat (*MacRoberston per Stephen J*)

CONSIDERATION

Definition: Something given in exchange for a promise

TEST: Must prove that sufficient consideration was given in exchange for the other party's promise to perform.

WHEN IS CONSIDERATION NOT REQUIRED?

- Consideration is not required for promises required by law to be in deeds. **Example:** *s.52(1) Property Law Act* requires 'All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.'

TWO ESSENTIAL ELEMENTS OF CONSIDERATION

- Promisee **must confer a benefit** (usually, but not necessarily, on the promisor) or **s/he must suffer or incur a detriment**
 - (benefit/detriment requirement)
- AND**
- The benefit or detriment **must be given in return for** the Promisor's promise
 - ('bargain' requirement)

STEP ONE: BENEFIT DETRIMENT REQUIREMENT

In most cases each party will suffer a detriment and receive a benefit, however the promisee only needs to confer a benefit **OR** incur a detriment.

- "A valuable consideration, in the sense of law, may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given suffered or undertaken by another ..." (*Currie v Misa, Per Lush J*)
- Must come from the promisee, but does not need to move to the promisor, can be to another party.
- **Example:** Money paid- Financial gain for promisor, financial loss for promisee.

STEP TWO: BARGAIN REQUIREMENT

The detriment or benefit **must be given in return** for the promise (*quid pro quo*).

