

LAWS5002 – Contracts

CONTRACT FORMATION

To create a contract, the following elements must be satisfied:

1. **Agreement (Offer and Acceptance)**
2. **Consideration**
3. **Certainty**
4. **Intention to Create Legal Relations**
5. **Formalities**

There is no fixed order, talk about them in the order most logical. Start with what you think you know. You don't have to talk in detail about all elements. One or two will be real issues and the others will be obvious. Spend time on a detail discussion of the issues, briefly outline those that are obvious. Focus on those that are arguable. **Ask:** Would a client raise a question on that point?

Where we are unable to establish a legally binding contract, we consider whether **estoppel** is applicable.

Lastly, determine the **remedies**.

Topic 2 – Agreement

Agreement exists when an **offer made by one party is accepted unequivocally by the other party**, or else it can be inferred from the circumstances that the parties have reached an agreement.

- A. You have an agreement if a **reasonable person would think an agreement had transpired by looking at what is presented (objective approach)**
 - I. What you need is agreement. Offer and acceptance are a mode to identify if there is an agreement
- B. **Offer – An expression of willingness to be bound into a contract on terms stated, without further negotiation**
 - I. There is an offer when a reasonable person in the offeree's position would consider that an offer was made – this is a question of intention (**objective test**)
 - II. Offers can be made to the whole world – **unilateral contracts** or contracts made through the performance of an Act (*Carlill v Carbolic Smoke Ball Company*)
 - i. If the person asking the offer explicitly or impliedly expresses the offer that it will be sufficient to act on the proposal without communicating acceptance of it, performance of the condition is sufficient acceptance without notification
 - Facts: Carbolic Smoke Company placed a number of advertisements in newspapers to the world stating that they will be monetarily compensated if they contract certain illnesses, despite utilising the carbolic smoke ball, and to show their sincerity, they have deposited money
 - Principles: Deposit showed serious intention to be legally bound; Offeree put themselves in a position of inconvenience; Satisfying conditions constituted acceptance; Offer restricted to those who acted upon the terms.
- III. **Display of items does not constitute an acceptance of an offer** to sell until, customer having indicated what they need, the shopkeeper, or someone on their behalf (the owner of the good), accepts that offer. (*Pharmaceutical Society of Great Britain v Boots Cash Chemists*)
 - i. Invitation to treat ≠ Offer. The customer makes the offer when they take the goods to the check out
- IV. **Duration of offers**
 - i. If an offer is made and nothing is said about duration of the acceptance, it is to be **open for a reasonable time** – this is to be determined on the circumstances and can be affected by the subject matter (*Carlill v Carbolic Smoke Ball Company*)

V. Revocation of offers

- i. An offer may be **withdrawn at any time before acceptance** if it is communicated to the offeree, even if the offer is stated to remain open for a definite period of time (*Dickinson v Dodds*)
 - Facts: Dodds wrote an offer to Dickinson to sell his house and promised to keep the offer open until Friday. However during this period, he sold it to a third party and also communicated the withdrawal of the offer through a friend. (Reliable)
- a. **Exception: Revocation in option contracts**
 - i) However, if it is an option contract, or a non-gratuitous offer, the offer is bound and unable to revoke the offer due to the consideration (*Goldsborough Mort v Quinn*)
 - Facts: Respondent gave plaintiff an option contract to accept the offer in the sale of land within a week, in which five shilling was put in consideration for this option. However, respondent attempted to retract offer but this was not possible.
- ii. Offeror **does not have to personally communicate** the revocation of offeree, it can be done by a representative, as long as it occurs reliably and reasonably (*Dickinson v Dodds*)
- iii. **Revocation** of an offer **must be communicated** to the offeree. It is not effective until it reaches the offeree (*Stevenson, Jacques & Co v McLean*)
- iv. Rejection of an offer, or the making of a counter-offer, revokes an offer (a previous made offer) (*Butler Machine Tool Co v Ex-Cell-O Corp*)
 - Facts: An offer was made containing a price escalation clause. A counter offer was then made without this clause; it contained a detachable receipt which the company (original offeror) sent back with a notation stating that they assumed it was on their terms. The **battle of forms** – last one acknowledged stands.
- v. **Revocation in unilateral contracts**
 - a. An offeror can revoke an unilateral offer when the offeree is in the midst of the performing the act, however, must revoke in a manner in which the offer was made – **this is a question of fact, not law**
 - b. An offeror can retract unilateral offers while its conditions are being performed, unless estoppel operates. In this case, the offeree must show that they have suffered detriment (*Mobil Oil Australia Ltd v Wellcome International Pty Ltd*) [Court found that there was no offer. It was more corporate encouragement]
 - i) It cannot be revoked, however, if the act has already been performed
 - Facts: Mobil General Manager for retail marketing stated very good rewards for achieving 90% or better in the Circle of Excellence scheme.
 - Held: Uncertain and vague terms of the reward meant there was no certainty; Franchisees did not suffer a detriment by improving their own performance and therefore no real consideration.

Difference between a bilateral and unilateral offer

A bilateral contract is an agreement by which each party promises to perform an act in exchange for the other party's act (their contractual obligations). In this case, each promise is regarded as sufficient consideration for the other (the two promises support each other).

This can be contrasted with a unilateral contract, where an offer can be accepted through performance & only one promise (that of the promisor) is executory when the contract is formed. In a unilateral contract, the act of performance is consideration for the promise, whilst the promise is consideration for the performance.

For example, in a bilateral contract between Leslie and Anne, consideration would be the promise of Leslie to Anne which allows Anne to gain a benefit or obviate a detriment (*Currie v Misa*), and is a promise specifically bargained for by both parties (*Australian Woollen Mills v Commonwealth*). Contrastingly, in a unilateral contract from Ron to reward anyone who provides information about his missing handmade chair (i.e. an offer which may be accepted through performance - *Carlill v Carbolic Smokeball Co*), consideration would be if April, were to perform the act requested in the contract and contact Ron with relevant information. If, in doing so, April suffers a detriment or obviates a benefit (*Carlill*) which was induced by Ron's unilateral contract/"offer to the world", consideration is valid and the contract may be upheld (granted that all other elements are satisfied). Also on the topic of acceptance and unilateral contracts, conduct or performance will only suffice as acceptance if it can be proved that the offer induced the performance not other ulterior motives (*R v Clarke*).

C. Acceptance — Unequivocal/Unqualified assent to the terms of the offer

- I. An offer may be **accepted only by the person** or persons to whom it is **addressed**. (*Reynolds v Atherton*)
- II. Acceptance is **effective on communication**. **Silence cannot amount to an acceptance**. An acceptance is generally effective to conclude a contract only when the fact of acceptance is communicated to the offeror. Until then, the offeror can withdraw the offer. (*Felthouse v Bindley; Dickinson v Dodds*)
 - Facts: Complainant had a conversation with his nephew about buying his horse. After their discussion, the uncle replied by stating that if he didn't hear anymore from his nephew concerning the horse, he would consider acceptance of the order done.
- III. There needs to be an **'existence of the same mind' between the two parties** for the making of an agreement, otherwise there is no binding contract. (*Dickinson v Dodds*)
- IV. Offeror may **stipulate what is necessary for an offer** to be accepted. However an offeror cannot impose a contract on the offeree (*Felthouse v Bindley*)
 - i. You may impose on someone a particular mode of acceptance, e.g. in writing, etc. however, you cannot impose on someone silence as a mode of acceptance
- V. **Implied acceptance**
 - i. Acceptance need not be expressed in words, it may be **inferred from a party's conduct**. For conduct to amount to implied acceptance of an offer, it must be of such a character to lead to the inference that the agreement had been accepted and was to be acted upon. (*Empirnall Holdings v Machon Paull Partners* then in *Brambles Holdings v Bathurst City Council*)
 - Facts in *Empirnall*: Defendant were architects working for plaintiff. Some time into the work, defendant submitted a contract to the plaintiff, but was told that the director 'does not sign contracts'. Contract wasn't signed, defendant wrote a letter saying that they are proceeding under the understanding that the plaintiff accepted the contract
 - Principal: **When the offeree takes the benefit of services which he knows are in accordance to the offer, and had a reasonable time to reject the offer, it signals acceptance.**
 - ii. Where an offeree with **reasonable opportunity to reject the offer of goods or services takes the benefit of the offeror**, where the offeror was to be paid in accordance with the offer, it can be said that **there is acceptance** on the terms. (*Empirnall Holdings v Machon Paull Partners* then in *Brambles Holdings v Bathurst City Council*)
 - Facts in *Brambles*: Since the Council owned the facility, the prices which were able to be charged were governed by the Council, not Brambles. By raising its prices in accordance with the Council's conditions, Brambles had, by its conduct, accepted the offer of the Council to pay the extra income
- VI. **Counter-offers**
 - i. Offer and acceptance must exactly correspond. An attempt to **introduce new terms (materially different terms) is a 'counter-offer'**. Any departure from the terms of the offer will result in the purported acceptance being ineffective, except as a 'counter-offer'. Although itself is capable of acceptance, a **counter-offer nullifies the original offer**. (*Butler Machine Tool Co v Ex-Cell-O Corp*)
 - ii. A request for more information does not amount to a counter-offer, the original offer still remains in tact (*Stevenson, Jacques & Co, McLean*)
 - Facts: Offer to sell an iron to complainant where the offer would be open till Monday. Complainant sent telegram to seller asking if he would accept payment over two month period. When he tried to accept offer on Monday, it was sold.
- VII. **Unilateral Contracts**
 - i. Communication of acceptance is generally not required for an offer in a unilateral contract. Acceptance will usually take the form of performance of an act. (*Carlill v Carbolic Smoke Ball Co*)
 - ii. Although the performance of conditions can be an acceptance of the offer, **without mutual consensus between parties**, the offer will become immaterial. (*R v Clarke*)
 - iii. There **cannot be assent without knowledge of the offer**. Ignorance of the offer means there is no legal claim to it. (*R v Clarke*)
 - iv. The mere fact that a person **by chance happens to perform** that act **while ignorant of the offer will not result in a binding contract**, unless they are acting 'in pursuance or in reliance upon' the offer. (*R v Clarke*)