

Offer and Acceptance.

What constitutes a contract?

Stewart, Swain and Fairweather have described a contract in the following terms:

[A contract] is an agreement between two or more parties, involving one or more promises that are given for something in return, and that the parties intend to be legally enforceable.

Essential features of a contract:

1. An agreement made between two parties.
2. Where a promise is made by the promisor in return for consideration to be shown by the promisee.
3. Parties intend to be legally bound.

What is an offer?

- A statement of terms on which the offeror is prepared to be bound.
- Provided that acceptance is communicated along the same terms as the offer, as long as the offer remains alive.

Whether there is an offer?

1. An offer can be made to the world at large AND an offer made to the world at large may not require communication of acceptance. All it requires is performance of the task to signify acceptance. Authority for these propositions:
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256. Also, read your casebook pages 50 to 53 for this case. See also ***Storer v Manchester City Council [1974] 3 ALL ER 824.*** In that case it was held that the Council's letter to Storer attaching the contract for sale amounted to an **offer** which Storer **accepted** by signing the contract for sale documents and returning the same to the Council.
2. An offer has to be distinguished from an invitation to treat. For example in self-service stores. Authority for this proposition is ***Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1 QB 40.***
In this instance, the actual display of the prescription medicines were not an 'offer for sale' by Boots. The offer was only made when the customer brought the item to the cash register counter. It was then up to the person at the cash register to either accept or reject the customer's offer. An acceptance would depend on whether the customer had a prescription for the drug.
Therefore, a mere display on the shelf of the shop was an 'invitation to treat' and not an offer.
3. A mere supply of information is not an offer.
See ***Harvey v Facey*** where an inquiry by H of F, elicited a reply from the latter that the lowest price for the property was 900 pounds sterling. H wrongly construed the reply from F to be an offer which he attempted to accept by seeking the title deeds for inspection. It was held that the F's reply to H's query was a mere **supply of information and not an offer.**
4. In the same vein, circulars, display of goods catalogues and advertisements setting out the price and other particulars are to be construed as invitations to treat.
5. What about auctions? An auctioneer when calling out bids (say for example \$750) is not making an offer. The actions of the auctioneer constitute an invitation to treat. See ***Payne v Cave (1789) 100 ER 502*** the proposition of which is good law in Australia. A bidder can withdraw an offer any time before the offer is accepted.

6. Where there is no reserve price, the auctioneer is obliged to sell to the highest bidder- when there is no reserve price. See **Barry v Davies [2001] 1 All ER 944**. Here it was held that where there is no reserve price stated, the highest bidder would secure the goods as it would be a fair and logical outcome for that to happen.

7. In a tender system, it is the tenderer who makes the offer. If an inviter of a tender says that the best bid will be accepted, then he is obliged to accept it. However, where there is an express reservation by the inviter about accepting bids, then the inviter has the prerogative to reject all bids. **Blackpool & Fylde Aero Club v Blackpool Borough Council. Construing a process contract is a matter of fact. Some features are:**

- Where there is a clearly laid down procedure for the submission of a tender.
- In such an instance, where an tenderer(invitee) conforms with the precise terms of a tender he has the legitimate expectation that his tender will be opened and considered at the same time as the other bids which have conformed to the stipulations for submission as well.

In the **Blackpool case**, the invitee conformed to all the terms of the tender but due to an administrative error, the Council did not consider the tender due to an administrative error. The Aero Club were therefore awarded damages for the loss of a chance of being considered due to the Council's administrative error.

Can an advertisement for a teaching position in a University be regarded as a process contract?

Roback v University of British Columbia (2007) 277 DLR (4TH) 601

The lack of specificity and details of a specialised tender meant that the job application was not a process contract. The important feature here is that unlike a process contract, applicants were not expected to submit a detailed job description with specificity. All they were required to do was to submit a curriculum vitae and 3 references.

Internet Auctions

Acceptance by the offeree will normally be constituted by accepting the offer by clicking the 'accept' button. See the case of **Smythe v Thomas (2007) 71 NSWLR 537**, in the context of an online auction conducted on eBay.

Termination of offers

Done in the following ways:

- Lapse of time.
- Rejection
- Revocation
- Failure of a condition
- Death of offeror or offeree.

Lapse of time

Depends on the facts of each case.

Empirnall Holdings Pty. Ltd v Machon Paull Partners Pty. Ltd (1988) 14 NSWLR 523

In this instance, acceptance was inferred from the conduct of Empirnall, who although did not sign the contract, nevertheless accepted the work that the architects did and made progress payments as well. In relation to the signing of the contract that the architects had sent them, they had said that their director and major shareholder 'does not sign contracts'. The **question** here

was whether the offeree's conduct and the offeree's silence could constitute acceptance of the architects' terms and conditions.

It was **HELD** in the NSW CA that the offeree had had a reasonable opportunity to reject the offer but had not. In fact, by conduct that is, by accepting the work and making progress payments, they appeared by conduct to have agreed to the terms.

Acceptance was therefore inferred by conduct and a lapse of time in which the offeree had not signed the contract could not be construed as a rejection of the contract, as the offeree's conduct suggested otherwise.

An objective assessment of the facts provided the indication that the offeree had acquiesced to the contract.

Rejection

REMEMBER: once an offer is rejected, the offer is terminated! You cannot go back to the offeror and say, "I've had a change of heart. I'd like to buy at the price that I earlier rejected". This is precisely what happened in *Hyde v Wrench*.

Revocation

An offer may be withdrawn at any time before it is accepted. This is so even if the offer is communicated to be on the table for a particular length of time. It may be withdrawn at any time prior to the lapse time if it has not been accepted. The offer will be kept open by the offeror provided the offeree has shown Consideration for it.

Routledge v Grant and Dickinson v Dodds

NO CONSIDERATION HAD BEEN SHOWN BY THE OFFEROR TO KEEP THE OFFER OPEN. When the property was sold to a third person, that sale was held effective by the Court as no consideration had been provided by the offeree to keep the offer alive.

It (consideration) has to be something of value.

Revocation of an offer must be effectively communicated. Revocation becomes effective when the offeree receives the news of revocation from the offeror. As the revocation of the offer had not reached the offeree in this instance, the court held that there was still a contract.

When does communication of the terms occur?

In instantaneous communication such as a telephone conversation, or face to face conversation it is when a party speaks provided it is heard by the other side.

Failure of a condition

The offer may be subject to an express or implied condition

Financings Ltd v Stimson [1962] 3 ALL ER 386

The offer to purchase a car lapsed as the car sustained significant damage before the offer lapsed and therefore, the car could not be sold. Sometimes, an offer is open for a limited time

Death of offeror or offeree

If the contract is for personal services and the offeror dies, it cannot be enforced. On the other hand, if the contract may be fulfilled by the deceased offeror's personal legal representative, such as the contract to sell land, it may be completed. Parties have to be in complete agreement as to what they have agreed to.

Rules of Acceptance

The general rule is that acceptance must be along the lines of the offer.

1. The language denoting acceptance must be clear and readily understood.
2. The acceptance must be in reliance of the offer
3. Acceptance must correspond with the terms of the offer. Some careful consideration of this rule is necessary.
4. Acceptance may be express or implied. Is there acceptance in a given instance? However, mere silence is not to be construed as acceptance.
5. Conduct of the parties may also indicate that there is a contract? This arises where there has been no formal acceptance of an offer, but the conduct of the offeree denotes acceptance.

Brogden v Metropolitan Rly Co (1877) 2 App Cas 666

In which the course of conduct between the parties of supplying and acceptance of deliveries of coal over a period of 2 years was sufficient to establish a 'course of dealings' and hence a finding that a contract existed between the parties although a formal written agreement was not executed

- The reality of commercial discussions are such that it is difficult to slot precise events as to which constitutes an 'offer' and which constitutes 'acceptance'.
- However, a contract may be inferred by the conduct of the parties. Such conduct must be capable of proving an express contract between the two parties. This is a very useful test for you to bear in mind. The relationship between the parties is looked at in totality.

Bear in mind that inference of contract by **conduct** means that the **conduct must be clear**.

Beech J in Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323 at [320]

Inferences are drawn only when the evidence is clear.

- The general rule is that acceptance must be communicated. However, please note that where an offer is made to the world at large by the offeror, with precise ways of complying with it, that is, accepting the offer), then the fulfilling of the tasks by the offeree is sufficient to indicate acceptance
- Acceptance by letter or telegram. The postal acceptance rule is that acceptance is at the time of posting a letter or sending a telegram. It is not at the time it is received by the offeror.
- It is very important for you to note that the postal acceptance rule does not apply to fax messages or telephone and telex communications.
- What about email communication?
 - Two rules:
 - 1- If the offeree has specified an email address, communication occurs when the offeror's email enters the offeree's email system.
 - 2- If the offeree has not indicated an email address, then communication occurs when it actually comes to the offeree's attention. See Electronic Transactions Act 2000 (Vic.); s.13(3).

Battle of the Forms

This is especially so in a commercial contractual relationship where the contract may have multiple clauses. The questions which arise are:

1. Which party's terms apply? A's or B's?
2. Whether a term may be implied by law and not incorporating the conditions of either party on a particular point.
3. Terms incorporating the suggestions of both parties.

4. No contract at all as the objective person (usually the court) cannot find a contract based on those wordings, or for that matter, a party's course of conduct.
- Any one of the above 4 eventualities may occur in the light of the cut and thrust of offers and counter-offers. This is rightly termed 'Battle of the Forms' cases. It is par for the course in Construction contracts and complex Insurance contracts (one such example being All Risks Policies covering contingencies during construction and/or operational stage(s) of a manufacturing facility).
 - Most importantly, the legal team acting for a party must ensure that the key clauses on their client's wish-list are incorporated into the contract. It saves grief later when disputes as to the wordings arise. This is because seeking to incorporate your version of the term or terms **only after the dispute has arisen, is not an easy thing to do.**

The Last Shot Method

The first approach is where parties exchange conflicting communication, known as counter-offers, if a term in the contract is to be found it rests with the last document sent by a party to which the other side has no objections, or at least raises no objections. This is the last shot method.

In short, the **last document to which no objections are raised prevails as a term in the contract.**

Higher Status Doctrine

Tekdata Interconnections v Amphenol

A confirmation of an offer to transport goods which contained terms which differed to the terms set out in the earlier offer, prevailed and the contract was found to have incorporated the terms in the confirmation of offer document. This was in spite of the fact that the subsequent invoice that was issued carried on the original terms of carriage based on the original offer. That is because by the time the subsequent invoice incorporating the original terms was issued, the contract had already been formed by the confirmation of offer document.

The 'higher status' doctrine may also be used in a single document such as an insurance policy. The transaction goes like this:

1. The insurance company sends out the terms and conditions in printed form.

The insured or its representative makes an amendment by manually striking out a clause or a few words in a clause. It then might or might not add it's in own words which it deems