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Offer

Offer: a proposal for consideration which can either be accepted or rejected by the offeree

- Offer is **immediately bound** by when the other party **accepts**
- An offer is **a willingness to be bound by acceptance** – if it is accepted you have a contract

Agreement usually consists of offer and acceptance (conventional approach), however this should be viewed as an aid to analysis rather than elements to be satisfied.

- *'it is neither sufficient to explain all cases nor necessary to explain all cases'*. Heydon JA Brambles

If the traditional approach to acceptance cannot be applied, it is relevant to ask (per Heydon JA in Brambles [2001])

- Whether in all the circumstances an agreement can be inferred
- Whether mutual assent has been manifested
- Whether a reasonable person in the position of each of the parties would think there was a concluded bargain

Objective intention: Gibson v Manchester City Council 1979- An offer needs to (1) show an intention to be bound by acceptance; (2) objective evidence will be used as opposed to subjective intention

Subjective intention for unilateral contracts: subjective reliance upon the offer

Invitation to treat: akin to an offer to make an offer (no intention to create legal relations)

Pharmaceutical Society v Boots Cash Chemist: putting goods on the shelf is an **invitation to treat**. It is not tantamount to acceptance. This tells us that there is a difference between the invitation to treat and the offer

Ticket cases: MA Robertson Miller Airline v Commission of Taxation (1975): continue

An offer ends when: (Goldsbrough (1910))

1. When it is **withdrawn by the offeror**;
2. When it lapses (might stipulate that its open for a week, or dependant on some condition, or a changing of circumstances which alters the making of the offer); or
3. When it is rejected

Unilateral and bilateral

- A unilateral contract is one by which an offer is made in the form of a promise to be accepted by performance of a requested act (Carlill [1893]). The contract is unilateral because only one party, the promisor, assumes an obligation.
- A bilateral contract is one which is made in the exchange of mutual or reciprocal promises. [i.e. the offer is made in the form of a promise to be accepted by a counter-promise].

Carlill v Carbolic [1893]

- You can make an offer to the whole world
- You can dispense the need to show a meeting of the minds → this is a unilateral contract
- There is a distinction between a mere 'puff' and something which constitutes an offer → what an ordinary person reading the document would think what's intended.

Revocation of an offer

An offer can be withdrawn any time before it is accepted. If the contract does not state when the offer will be revoked, it should be implied it will be revoked following a reasonable amount of time. Since acceptance of a unilateral contract is by performance, an offeror can revoke the offer any time before the performance has been completed (Mobil Oil 1998).

- Per Mobil, there may be an express or implied ancillary not to withdraw the offer, or it can be implied the offer would not be revoked.

- Here, the franchisees were not adversely affected by performing well, and despite the scheme they were already required to meet certain minimum standards.

Acceptance

Acceptance must have been made in response to, and corresponding with, the offer. Objectively reflecting unqualified assent to the terms, and this being communicated to the offeror.

Offer/acceptance analysis generally: O/A formulation should be considered a “useful tool” *‘it is neither sufficient to explain all cases nor necessary to explain all cases’*. (Brambles 2001; Heydon J). A manifestation of mutual assent may be made even though the moment of formation cannot be determined.

Accepting a bilateral contract

Continue

Accepting a unilateral contract

Continue

Unilateral contract ‘faith on’: Performance of a requested act will not give rise to a unilateral contract if the evidence establishes that the offeree was not in fact acting on faith of the offer.

Subjective consideration on actual intentions, over apparent ones. Objective considerations of the reasonable bystander, on what has been communicated to the offeror. (R v Clarke 1927).

Communication

Generally, the offeree must communicate acceptance of offer to offeror, and agreement not complete until such communication is effected: Powell v Lee (1908). (*This is required as it establishes the meeting of the minds have reached consensus*).

Method: Method of acceptance can be stipulated; however, silence or non-communication cannot be used to bind the offeree to an obligation/offer (Felthouse).

Silence: Silence generally will not constitute acceptance of an offer (Felthouse). Per Empirnall 1988, the offeree may be bound to a contract despite their silence if a reasonable bystander would regard the conduct of the offeree, including their silence, as signalling to the offeror that their offer has been accepted.

Empirnall - taking the benefit

- The objective theory of contract requires an external manifestation of assent to an offer, but the silence of an offeree in conjunction with the other circumstances of the case may indicate that the offeree has accepted the offer.
 - This offeree is most often bound because, knowing of the terms of the offer and the offeror’s intention to enter into a contract, they have **exercised a choice and taken the benefit of the offer**

Overall objective test: Brambles [2001]

Since the above analysis may be uncertain in the context of traditional offer and acceptance analysis, we will look to Brambles [2001] to ascertain formation: that is, **whether the parties’ conduct reveals an understanding or agreement or a manifestation of mutual assent, which reflects an intention to be legally bound to the essential elements of a contract (Heydon J)**.

(Offeror/Offeree) did not/acted reasonably so that (other party) would be entitled to believe that (first party) is assenting to the contract: this is following an objective analysis of what the reasonable, ordinary person would believe in the situation whereby _____.

General rule: message becomes acceptance when the offeror receives notification of the offeree’s acceptance.

The postal rule: if you have a post office box, acceptance is formed when the offeree posts notification of their acceptance to offeror. (*i.e. still applies if mail is lost in transit*).

Electronic communications: is governed by the Electronic Transactions Act 2000 (No 8) in NSW. Continue

Rejected offers: Offers terminate upon rejection and cannot be accepted.

A request for information about an offer is not a contract - Stevenson Jacques v McLean (1880)

Counter-offers: An offer is terminated if offeree makes a counter-offer (Trollope; Hyde v Wrench (1840))

Post-formation conduct: Can be. If can't identify a clear offer and acceptance, however you can identify clear, mutual assent, then this will affect the question. (Farmers' Mercantile v Coade 1921)

Battle of forms: occurs when parties transact business on the basis of their respective standard form.

While parties may agree on basics of sale (e.g. subject matter) other terms may differ

Fixed set of terms, when there is a clash between the two forms. Butler Machine [1979]: Conflict

approach: the last counter-offer kills all preceding offers ("Last shot" approach).

Consideration

Consideration is a requirement to the enforceability of a promise. Following the bargain theory of contract, it requires that something must be given in return for a promise, in order to make it binding.

Bargain requirement: continue

Detriment requirement: continue; must flow from promisee. Note when parties in a contract are considered as joint promisees, consideration only needs to flow from one of the promisees.

Executed/executory? continue

Bargains vs conditional gifts:

Reliance: Acts performed in reliance on a promise will not constitute consideration for that promise unless those acts can be regarded as having been performed in return for that promise. *There is a distinction between contract and estoppel.* (Beaton v McDivitt (1987); working on land).

Sufficiency not adequacy: There is no adequacy requirement, consideration only needs to be sufficient → something that the law regards as valuable (Woolworths v Kelly (1991)).

Past consideration: The general rule, subject to exceptions, is that a promise must be coextensive with consideration. Accordingly, past consideration will not be viewed as good consideration. (Roscorla v Thomas (1842))

NOTE: There is a difference between past consideration and executed consideration.

Executed considerations are considered to be something given as part of the same transaction as the promise (eg unilateral contract where A offers \$50 for a lost dog, B finds and returns it. The contract is made when B returns the dog, and therefore B's consideration is executed, but A's promise remains executory).

Promise to pay for past services: A promise to pay for past services acts as an exception to the past consideration rule – where services are performed at the request of the promisor, the performance of the services by the promisee will constitute good consideration for a subsequent promise to pay for them. (Lampleigh v Brathwait) *Where services are provided at the request of a party, a later promise to pay for those services will be binding as the promise 'couples itself' with the earlier request.* (*Continue - check readings for this)

Discretion as to performance: A promise does not constitute good consideration if the promisor has unfettered discretion as to the performance. (Placer Development Ltd v Commonwealth).

Existing legal duty: A promise to perform an existing legal duty will not be regarded as sufficient consideration.

A promise to perform an existing contractual duty is an illusory consideration as the promisor incurs no new burden, and the promisee receives no benefit he or she **did not already enjoy**. (Wigan v Edwards)

Part payment of debt: The part-payment of a debt does not constitute good consideration for an agreement to discharge the relevant debt (*Pinnel's Case; Foakes v Beer 1884*).

Per Sir Edward Coke in Pinnel's case:

'That payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum

Exceptions to existing duty:

1. Where beneficiary is providing fresh consideration (ie undertakes to do more than obliged to do originally)
2. Beneficiary's promise to perform confers a practical benefit on the modifying party
3. Promise to perform an existing contractual duty is made by the beneficiary to a third party.
4. Promise is made by way of a bona fide compromise of a legal claim.
5. Original contract is terminated by agreement and replaced with a new contract.

Fresh consideration: If the beneficiary undertakes to do something [more than/in excess of] what they originally promised (fresh consideration), the existing legal duty rule does not apply (*Harley v Ponsonby 1857*).

Practical benefit:

If the modifying party/promisor incurs a benefit from the promisee's/beneficiary's promise to perform an existing obligation, the court will find this is sufficient consideration to uphold the modification/concession.

Elements (*Williams v Roffey Bros 1991*):

- i. If A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and
- ii. At some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and
- iii. B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and
- iv. As a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and
- v. B's promise is not given as a result of economic duress or fraud on the part of A; then
- vi. The benefit to B is capable of being consideration of B's promise, so that the promise is legally binding

Musemici v Winadell 1994:

- iii. B thereupon promises A an additional payment **or other concession (such as reducing A's original obligation)** in return for A's promise to perform his contractual obligations on time; and
 - a) As a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit, and **provided that A's performance, having regard to what has been so obtained, is capable of being viewed by B as worth more to B than any likely remedy against A (allowing for any defences or cross-claims), taking into account the cost to B of any such payment or concession to obtain greater assurance of A's performance, or**
 - b) **As a result of giving his promise, A suffers a detriment (or obviates a benefit) provided that A is thereby foregoing the opportunity of not performing the original contract, in circumstances where such non-performance, taking into account B's likely remedy against A (and allowing for any defences or cross-claims) is capable of being viewed by A as worth more to A than performing that contract, in the absence of B's promised payment or concession to A**
- iv. B's promise is not given as a result of economic duress or fraud **or undue influence or unconscionable conduct on the part of A nor is it induced as a result of unfair pressure on the part of A, having regard to the circumstances;** then

Two perspectives on the value judgments to be made. A benefit must flow to the promisor (i.e. incurred by the promisee to flow to the promisor) and this must be worth more, in practice, to the promisor than the cost of the alternative and for claiming damages. Under *Musemici*, this can also be viewed under the

circumstances of the promisee, whereby performing the contract is worth less than non-performance and being able to pursue another opportunity, in the absence of the promisor's concession.

Practical benefit + part-payment of debt: Even in a case where there may be a practical benefit to accepting a lesser amount in payment of a debt, this is not sufficient consideration to find a binding contract. Selectmove's attempt to use the notion in Williams v Roffey Bros [1990] failed as it was held that it was only applicable only where the existing obligation which is pre-promised is to supply one with goods or services, not where it is an obligation to pay money. (Re Selectmove 1995) *Continue – money generally or debtor arrangement?

Promise made to third parties: if a promise to perform existing contractual obligation is made to a person who is/was not a party to the original contract, the court will find this is sufficient consideration (Pao on v Lau Yiu Long 1980). *Continue – review Ross' handout summary

Bona fide compromise: A promise to perform an existing legal obligation will constitute good consideration where it is made by the beneficiary in the form of a bona fide compromise of a disputed claim. (Wigan v Edwards 1973)

Termination and replacement:

The existing legal duty rule has no application where the parties have terminated their original contract and entered into a new contract EVEN if the obligations of the modifying party are more onerous than those in the original contract.

This is because the promise made by the beneficiary is seen as a 'new' promise which provides consideration for the promises undertaken by the modifying parties.

- **NOTE** there must be an **intention by the parties to TERMINATE AND REPLACE** not just to MODIFY the original contract.

Intention to create legal relations

The Court is concerned with whether the parties manifested an intention to create legal relations: this is an objective test, and not a question of whether they actually intended to do so. It is not open to a party to escape a contract by saying that they did not intend to be bound. Per Merritt v Merrit, the relevant question is of whether the reasonable person would regard this agreement to be binding. The surrounding circumstances are to be taken into account under the objective approach (Air Great Lakes v KS Easter).

Written agreement/surrounding circumstances: Although this was put to writing, the court is able to look beyond the terms of the document to determine if the agreement was intended to be legally binding/create legal relations. (Air Great Lakes v KS Easter).

Presumptions: Following Ermogenous 2002, agreements should no longer be regarded as falling into a distinct legal category [for the purposes of determining intention]. Rather, such determination requires objective determination based upon the relevant facts and subject matter of the case.

The party asserting the existence of a contract will always bear the burden of proving that the parties intended to enter into contractual relations.