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## TOPIC 1 – CONTRACT FORMATION

### The Theories

- Classical Theory: ‘contract is the central concept on which commercial law is founded’ (Schmitthoft)
  - Contract law provides a mechanism under which parties to a definite agreement can regulate their relationship
- Economic efficiency
  - Provides rules to facilitate economic exchange and efficiency
  - It would be inefficient to enter into contracts that might be decided by the court at a later time
- Critical legal scholars: claims it conceals politics – supports the existing economic and social order
- Feminist:
  - Women are physically, socially and psychologically different from men; those differences need to be taken into account
  - The law reflects a masculine viewpoint e.g. intention and domestic arrangement (i.e. wives entering into a contractual agreement with their husband) – there is no intention to be legally bound to their husband
- Relational theory: contract as a social relationship – most people don’t usually use the contract laws

### (A) AGREEMENT - OFFER

#### Rules as to offer

- ✓ Must be definite
- ✓ Must be made to a single person or a class of persons
- ✓ Must be communicated. Cannot be accepted without knowledge of existence
- ✓ All terms of the offer must be brought to the notice of the offeree
- ✓ Must be distinguished from an **invitation to treat**. An invitation to treat is an invitation or an enticement to others to make an offer.
- ✓ May be revoked any time prior to acceptance
- ✓ May have conditions of acceptance
- ✓ May lapse through non acceptance
- ✓ Reasonable person test: would it appear, to a reasonable person in the position of the offeree, that an offer was intended and that a binding agreement would be made upon acceptance

#### Concept of an offer

1. **THE NATURE OF THE OFFER:** In *Brambels Holdings Ltd v Bathurst City Council*,
  - Heydon JA suggested ‘obiter’ - an offer must take the form of a proposal for consideration which given the offeree an opportunity to choose between acceptance and rejection.
  - Therefore, a communication which uses “the language of command” and “peremptorily requests” the other party to adopt a particular course of action may not be regarded as an offer i.e. there needs to be a choice
2. **OBJECTIVE APPROACH:** In determining whether an offer has been made, the crucial issue is **whether it would appear to a reasonable person** in the position of the offeree that an **offer was intended**, and that a **binding agreement would be made upon acceptance** (Duke, Paterson and Robertson p.57)

- This is referred to as the *objective approach*. This approach requires an outward manifestation of an intention to form a contract ([Taylor v Johnson](#) (1983 151 CLR 422)).

#### ***Carlill v Carbolic Smoke Ball Co***

- **FACTS:** The defendant manufactured and sold the Carbolic Smoke Ball which claimed to prevent influenza if used correctly. The advertisements in various newspapers said that if influenza was contracted after having used the device for the specified amount of time, that a \$100 reward would be given. They claimed that the \$100 had already been deposited into the bank. The plaintiff contracted influenza after following the correct usage.
- **ARGUMENTS:** (1) No promise was intended and that the advertisement was mere puff. (2) No offer had been made to any particular person. (3) The plaintiff had not notified her acceptance of any offer. (4) The agreement was uncertain because it failed to stipulate a period within which the disease must be contracted. (5) The plaintiff had supplied no consideration for the defendant's promise.
- **OBJECTIVE TEST:** would it appear to a reasonable person in the position of the offeree that an offer was intended and that a binding agreement would be made upon acceptance?
- **DECISION:** (1) The statement relating to the bank deposit made it clear that a promise was intended. The Court construed the advertisement objectively, according to what an ordinary person reading the advertisement would think, rather than by reference to what the defendant actually intended. (2) The offer was made to the whole world and could be accepted by any person who performed the conditions on the faith of the advertisement. (3) Although acceptant of an offer must normally be notified to the offeror, the offeror may dispense with that notification. An offer that calls for performance of particular conditions may be accepted by performance of those conditions (unilateral contract). (4) A reasonable construction must be placed on the advertisement, which made it sufficiently certain. It was possible to construe the document in three different ways, so that the reward would be paid to any person who contracted the disease after using the smoke ball as instructed. (5) The use of the smoke ball by the plaintiff constituted both a benefit to the defendant and a detriment to the plaintiff, either of which would have been enough to constitute good consideration for the promise.

### **3. UNILATERAL AND BILATERAL CONTRACTS**

- Bilateral contracts: there is an exchange of promises.
  - At the end of the formation of a bilateral contract the obligations of both parties remain to be performed → e.g. on Monday, Thor telephones Loki and promises to purchase Loki's car in return for Loki's promise to sell and deliver it to Thor. The following day Loki refuses to complete the sale by delivering the car. What is the legal consequences of this? → the exchange of promises created a binding contract. Loki is now in breach of contract.
- Unilateral contracts: the offeree accepts the offer (formation) by performing his or her side of the bargain (i.e. accepts by performance) ([Carlill v Carbolic Smoke Ball Co](#)).
  - **As the High Court explained "the consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer"**.
  - E.g. by the time the contract is formed, the offeree has already performed all his or her obligations

### *Australian Woolen Mills Pty Ltd v Commonwealth*

- **ARGUMENTS:** Plaintiff claimed that a unilateral contract had arisen out of the Commonwealth Government's subsidy scheme. The Commonwealth subsidized purchases of wool by manufacturers of woolen products to enable those manufacturers to supply the products at low prices.  
AWM claimed that these announcements by the Commonwealth constituted a contractual offer.
- **DECISION:** In this case, AWM failed to establish that there was a relation of quid pro quo between the Commonwealth's promises and AWM's acts. AWM also failed to establish that, viewed objectively, the offer was intended to give rise to a contractual obligation.
  - The High Court said "A, in Sydney, says to B in Melbourne: "I will pay you 1,000 pounds on your arrival in Sydney." The next day B goes to Sydney. If these facts alone are proved, it is perfectly clear that no contract binding A to pay 1,000 pounds to B is established." The facts therefore did not establish the requisite quid pro quo required for consideration.

4. **DEFINITION OF OFFER:** An offer is an expression of willingness to enter into a contract on specified terms. A proposal only amounts to an offer if the person making it indicated that an acceptance is invited and will conclude the agreement between the parties (Duke, Paterson and Robertson p56)

What is not an Offer?

1. **MERE SUPPLY OF INFORMATION:** given response to a requires from another negotiating party

### *Harvey v Facey (1893)*

- **ARGUMENTS:** P telegraphed owner of 'Bumper Hall Pen' with 2 enquiries: 1. Willing to sell? 2. Lowest price? Owner responded only to the second enquiry.
- **DECISION:** cannot treat as binding except with price... everything else was left open.

2. **PUFF:** an exaggerated or unsustainable claim about a product that is made in an advertisement (*Carlill*)
  - Consider how a reasonable person in the position of the offer would interpret the advertisement
  - Factors such as vagueness of statement, and other details relevant considerations (*Leonard v PepsiCo Supp*)
3. **ADVERTISEMENTS AND INVITATIONS TO TREAT:** an invitation to treat is an invitation to others to make offers or enter into negotiations e.g. shop sales, auctions (invitations to treat until the buyer makes an offer), tenders (once you submit your tender it becomes an offer).
  - Indication of a person's willingness to negotiate entry into a contract "offer to negotiate ... advertisements for sale of goods is not an offer" *Carlill*
  - E.g. advertisements (*Partridge v Crittenden*), Brochure distribution (*Grainer v Gough*), Shop displays (*Pharmaceutical Society of Great Britain v Boots Cash Chemists*), Display of items in shop window (*Fisher v Bell*).
  - Issue in the intention to be bound: where the offer is clear, definite and explicit and leaves nothing open to negotiation it will constitute an offer

- Distinguishing objective guide: if the merchant limits the number of acceptors then it is possible to argue that it is an offer to the world at large (*Lefkowitz v Great Minneapolis Surplus Store*).

## Categorising Transactions

### 1. AUCTIONS

- *Advertisements for auction*: at common law advertisement does not bind auctioneer to carry out auction, may withdraw various lots at auction itself or cancel altogether without incurring liability from potential bidders.
- *With reserve*: call for bids is akin to invitation to treat. Each bid is an offer that may be accepted or rejected by auctioneer. Acceptance occurs when auctioneer knocks down, agreement formed. Can withdraw bid before this time (*Payne v Cave*)
- *Without reserve*: contract is made between the auctioneer and the highest bona fide bidder, if refused to knock down, breach of contract (*Warlow v Harrison*). Bid has same legal character as with reserve, must still be accepted (*AGC v McWhirter*)
- *Internet auctions*: most require registration and acceptance of terms and conditions which govern contractual relationship form online auction (*Symthe v Thomas*). Effectively an auction with reserve, specific performance (sale of Goods Act s60). No legal relationship prior to the fall of the hammer (or selection of the tenderer) (*Payne v Cave*).

#### *Symthe v Thomas (NSW Supreme Court)*

- **FACTS:** Thomas listed a rare and valuable Wirraway aircraft on eBay, with an auction duration of 10 days and a minimum price of \$150k. Symthe placed a bid for \$150k and 'won' the auction. He refused to complete the transaction. Symthe sued.
- **DEFENCES ARGUES: (1) Privity:** the contract was the eBay User Agreement between Thomas and eBay, and between Symthe and eBay, but there was no contract or agreement between Thomas and Symthe; the eBay listing was an invitation to treat; even if there was offer and acceptance, the contract was uncertain and incomplete as the time for payment was to be negotiated. Symthe waived his right to bid on the auction, based on the content of the disputed phone call.
- **DECISION:** rejected each of Thomas' defenses, and concluded that there was a valid and concluded that there was a valid and enforceable contract for the sale of the aircraft, Remedy: specific performance.

### 2. ADVERTISEMENTS: advertisements will usually be invitations to treat rather than offers. No always (*Carlill*). Depending on the outcome of the case

- Advertisements through catalogues/circular: only an invitation to treat, placing an order is offer which can then be accepted by retailer.
- Advertisements in newspapers/magazine: generally, invitation to treat except sell 15 washing machines to first 15 customers Monday for \$200 cash, where it is an expression to another (here the public at large) of a "willingness to be bound by the stated terms, not invitation for customers to make offer (*Australian Woolen Mills*) it is a promise.
- Advertisements appearing on the internet: question of construction. Construed as invitation to treat unless in the circumstances, it is clear that the party placing the advertisement intends to be bound upon acceptance (product will be supplied whether or not in stock).

- **FACTS:** Australian Government announced a wool subsidy scheme and the plaintiff claimed it purchased wool “in pursuance of the said agreement”, that is, under the subsidy scheme. Argued that a contract had been formed by the offer of a subsidy and was accepted by buying the wool.
- **OFFER:** an offer can only lead to a binding agreement if the offer identifies the terms of the proposed agreement with sufficient certainty.
- **CONSIDERATION:** must be a quid pro – statement and act referred to must exist in a clear relationship to each other. The subsidy was not a request, invitation or inducement to purchase wool. There was nothing to suggest that subsidy and purchase of wool were related, no quid pro quo.
- **INTENTION:** there must have been a voluntary assumption of a legally enforceable duty, so that the offer should have been intended to give rise to a legal obligation. Arguable intention would have been manifested by some form of statutory authority.

3. **TENDERS:** owners who want to ensure they receive a range of competitive quotes. Submit tenders, the owner then has the option of accepting the most attractive bid.
- Advertisements for tender: similar legal status to ad, for auction with reserve i.e. ad is indication of a person’s readiness to receive offers – invitation to treat (*Spencer v Harding*). Liability generally does not arise if choose not to accept any tenders. Each case must be considered on its fact (*Hughes Aircraft v Air services Australia*).
  - Exceptions to the general proposition that a person can incur no liability to individual tenders:
    - i. An ad inviting tenders indicates that highest/lowest bidder will be accepted → offer to highest bidder → (*Harvela*) Acceptance occurs when the person submits the tender that turns out to be the highest tender.
    - ii. Can incur contractual liability by failing to comply with agreed tendering process → (*Blackpool and Fyde v Blackpool Borough Council*) → invitation to tender indicated all conforming tenders would be considered; (*Hughes Aircraft v Air services Australia*) → letter signed by prospective tenderers, comply/participate “there is a preliminary process contract which includes an implied term to act in good faith and engage in fair dealing.”
4. **OPTIONS:** a form of offer which also contains a promise not to withdraw it for a certain time. Options must be purchased. Offers cannot be withdrawn if there is an option. A breach of the option contract is the remedy of the main contract (*Goldsbrough Mort & Co Ltd v Quinn*).
5. **STANDING OFFERS:**
- Indication by one party of a willingness to provide G/S over specified period.
  - Accepted every time an order is placed. Can be withdrawn any time before acceptance.
  - After placing the order, the contract is formed and parties are bound in relation to that particular order.
  - If goods not delivered it is a breach, if they refuse to take delivery it is a breach
  - No obligation from offeree to deal exclusively with the offeror.

6. **TICKETS:** in some cases, the courts are concerned to identify offer and acceptance for the purpose of determining when, rather than whether, a contract was formed between two parties
- If handed out by a person and the customer took it and retained it without objection, his act was regarded as an acceptance of the offer
  - Tickets from automatic vending machine: presence of machine ready to accept money constitutes offer, passenger accepts by inserting coins. After this point, it is too late for terms to be introduced to govern the transaction. Any terms appearing on the ticket issued by the machine that were not drawn to passenger's attention beforehand could not be regarded as forming part of the contract.
  - Purchase of ticket prior to carriage: depending on the prominence of notice, terms may be incorporated into the contract.
    - i. Crucial factor is the extent of time a passenger has to read the terms before actual carriage (*Thorton v Shoe Lane Parking*)
    - ii. The contract is formed at the time fare is handed over and ticket is received (*Wilkie v London Passenger*)
    - iii. Pre booked ticket sent in mail/pick up, contract is formed over the phone when the booking and payment was made, terms on ticket may not form part of the contract (*Oceanic Line Special Shipping v Fay*)
    - iv. However, court may find that the contract subject to any implied terms that ordinarily govern such transactions (*Hollingworth v Southern Ferries*).

***MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) (1975)***

- **FACTS:** The airline's practice was first to quote the fare and availability of seats and then to issue a ticket in return for the fare. The ticket was contained a condition giving the airline the right to cancel a flight or booking without incurring any liability.
- **ARGUMENTS:** The issue before the High Court was whether an airline ticket issued by MacRobertson Miller was chargeable with stamp duty as an "agreement" or a "memorandum of agreement".
- **DECISION:** The court held unanimously that a ticket did not record the terms of an agreement, but rather the terms of an offer which was subsequently accepted by conduct. The Judges reasons for reaching that conclusion differed. Barwick CJ defined it as a unilateral contract – whereby a passenger makes the offer accepted by conduct of the plaintiff by performance: "having regard to the known contingencies of airline operation it would be incongruous to infer the making of a promise to carry from the mere payment of the fare and its acknowledgement by the issue of a ticket. The ticket... should be regarded as doing no more than denominate the carriage which, if performed, will earn the prepaid fair."

7. **AUTOMATIC VENDING MACHINES:** may attempt to impose terms on other contracting party to exclude/limit liability.

***Thorton v Shoe Lane Parking***

- **ISSUE:** whether terms referred on ticket form party of the contract → court said for vending machines "offer is made when machine ready to receive money, acceptance when car proceeds to machine and ticket is taken" if a notice, terms are included.

## Fate of an Offer

- **TERMINATION/REVOCAION:** an offer can be withdrawn at any time before acceptance (*Goldsbrough Mort & Co v Quin*) even if the offeror promised to keep the offer open for a period (*Routledge v Grant*)
  - **Where the offer is specific to offeree:**
    - Must be actual communication *Byrne v Van Tienhoven*
    - Offeree can be informed about the withdrawal from a reliable source. *Dickinson v Dodds*
  - **Unilateral contract scenario**
    - Prior to performance: may be withdrawn prior to performance so long as publicised as prominently as the original offer *Shuey v United States*
    - It has been held a unilateral offer cannot be withdrawn once the offeree has partly performed the requested act *Daulia Ltd. v Four Millbank Nominees Ltd*
    - **BUT** the notion that there is a general principle preventing revocation of offers in exchange for acts (unilateral contracts) has been rejected by the Full Federal Court *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* will turn on specific facts – regarded as having entered into an implied ancillary contract not to revoke/estopped from falsifying assumption.
- **REJECTION:** offers terminate upon rejection and cannot be accepted (*Stevenson Jacques v McLean*). To effectively reject, there must be actual communication to the offeror.
  - **Counter Offer:** If offeree responds to offer by changing terms, this amount to a counter offer and operates as a rejection of initial offer (*Hyde v Wench*). Counter offer is distinguished from request for information or clarification of terms, such requests will not operate as rejection of original offer (*Stevenson Jacques v McLean*)

### *Northland Airlines Ltd v Dennis Ferranti Meters*

- **FACTS:** Seller (Ferranti) in Wales negotiated with buyer in Canada for the sale of amphibian aircraft “confirming sale of Grummond Mallard aircraft... please remit \$5,000. Buyer (Northland) replied “this is to confirm your cable and my purchase of Grummond Mallard aircraft pending delivery... Please confirm delivery to be made 30 days within this date.” Seller did not reply and sold aircraft to a 3<sup>rd</sup> party at a higher price.
- **DECISION:** buyer telegram was not an acceptance of offer because it introduced two new terms.

- **Lapse of time:** an offer can specify a date or time upon which the offer will lapse.
  - Once this time has passed offer lapses and offeree is unable to accept it to form an agreement
  - Where unspecified, the offer will lapse within a ‘reasonable’ time after the offer has been made (*Ballas v Theophilos*) either (1) withdrawn or (2) regarded as being refused
  - Look at the conduct of the offeree (*Manchester Diocesan Council*)

## Failure of a Condition in Conditional Offer

- Offers can be made which are expressly or impliedly subject to condition (*Gilbert v Pitt*) (parties in lease and certain conditions must be complied for lessee to exercise an option to renew the lease)
- E.g. A offers to buy B’s stock which A previously inspected. A’s offer to buy at a specified price is expressed to be subject of the goods being in same condition as when earlier inspected by A.