Contracts case summaries

Formation of a Contract

a) The Fact of Agreement: Offers

What is an Offer?

- An offer is an indication by one person to another of their willingness to enter into a contract on certain terms. They must also intend to be **legally bound** on acceptance of the offer.
- The test is "would a reasonable person take the question or statement as an offer?" – the use of the word offer in a statement by a party will not automatically make it a legal offer capable of acceptance *Spencer v Harding* (1870) LR 5 CP 561. The court will look at the substance of behaviour and objectively decide if it is an offer. If an offer is heard of from an unauthorised person, there is no offer for acceptance.

The Fact of Agreement		
Case	**Facts**	**Ruling**
Offer		
Australian Woollen Mills Pty Ltd v Cth - (1954) 92 CLR 424 What is an offer?	Government implemented a scheme to facilitate the supply of wool products to the public at a reasonable price. Scheme involved payment of subsidies to Australian wool manufacturers in relation to wool purchased for the production of garments. Australian Woollen Mills purchased considerable quantities of the wool and the Gvt did not pay the subsidies. AWM sued for the unpaid subsidies claiming that the purchase of wool was consideration for the promise to pay subsidies.	**An offer is an expression of intention to be bound by certain terms (457)** **There was no contact and no offer as the court found the government made a statement on public policy therefore not an offer capable of being accepted** The court had to decide if the purchase of wool was the consideration of the payment of the subsidies. The courts ratio was that the act of the consideration must be in direct response of the offer. The courts ratio was also that the party making the offer must have intended to be legally bound by the offer.
Carlill v Carbolic Smoke Ball Co - [1892] 2 QB 484 Offers to the world at large An offer can be made to the world at large too, i.e. that it is capable of acceptance by anyone.	Carbolic Smoke Ball Company had an advertisement which provided that if anyone purchased and used their carbolic smoke ball and still contracted influenza they would pay them a reward of 100 pounds. The advertisement also provided that as an act to prove	**An offer can be made by a person (offeror) to another person (offeree) > bilateral or to all the world (unilateral). An objective test is applied to determine whether an offer has been made. An offer is distinguished from puff.**

The acceptance of this type of offer is often by performance of the consideration.	their sincerity they had deposited 1000 pounds in a bank account. Mrs Carlill used the smoke ball as prescribed and contracted the flu. She requested payment of the reward and Carbolic argued that there was no contract.	The issue to the court was whether or not the advertisement could be an offer. The court first looks if the ad was a "mere puff". The court decided that an advertisement can be an offer to the world at large which can be accepted by performance, no formal acceptance is required. The offeror can determine how acceptance of an offer will be made. The court describes consideration as being any act by the plaintiff which the defendant derives benefit or advantage or which causes inconvenience, detriment or labour on the part of the plaintiff.
Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) [1953] 1 QB 401 **Invitation to Treat** A seller indicating his/her willingness to negotiate without showing the terms to be bound. Communication in response to an invitation to treat cannot be an acceptance, but can be an offer (e.g. I have a car to sell [invitation to treat], I'll pay $500 [offer]). A shop advertising products is not an offer, but an invitation to treat. A mere stating of a price will not ordinarily be an offer. Goods on a shelf in a shop is not an offer, but an invitation to treat.	Section 18 of the Pharmacy and Poisons Act at the time provided that the purchase of pharmaceutical items must be done with the supervision of a pharmacist. Boots Cash Chemists opened the first "self-serve" pharmacy where patrons were able to pick up their products and then go and pay.	**Display was not an offer. The offer was made when the customer proceeded at checkout and wanted to buy medicine. When presented at register the pharmacist supervision was present therefore not breach of legislation.** The question for the court was whether the items on the shelf were offers to the customers. The court ultimately decided that the items on the shelf should be treated as invitations to treat, or invitations to make offers. The display is not an offer. The offer is when the customer picks up the product and the offer is accepted by the shop keeper at the time of sale.
Barry v Davies - [2001] 1 All ER 944 **Auctions** It is established that in an auction, when an auctioneer puts up an item for sale he or she is not making an offer to sell to the highest bidder, but is inviting offers from the assembled bidders. When a bidder makes an offer it can be accepted or rejected by the auctioneer, it is accepted by the fall of the hammer. However, if the auction is advertised	Davies conducted an auction of a couple of machines which were worth over 14,000 pounds. Barry offered 200 pounds per machine which was the highest bid for them. Davies refused Barry's offer. Barry sued for damages on the basis that Davies breached the contract to sell to him being the highest bidder.	**Holding of an auction for sale without reserve is an offer by the auctioneer to sell to the highest bidder** (NOTE: Would apply if offer above a reserve also) **auctioneer acted as agent of the owner in the formation of the contract with the highest bidder, and this gave rise to a collateral contract with the auctioneer himself.** There is a collateral contract between the auctioneer and the highest bidder constituted by the auctioneer to sell to the highest bidder which was accepted when the bid was made. The court also made a decision regarding consideration in such a contract,

1. The rule only applies if it is reasonable, contemplated or authorised that acceptance may be by post or telegram; **2.** The letter or telegram must be properly posted (i.e. correct address, have appropriate postage or other fees paid and actually be deposited with the post office); **3.** It is irrelevant that the letter or telegram ever reaches its destination; **4.** The offeror can exclude the operation of the rule at the time the offer is made.		
Brinkibon v Stahal Stahl [1983] 2 AC 34 **CONTRACT FORMATION, Where the contract was formed, Jurisdiction.**	The complainants, Brinkibon Ltd (London based) were buying steel from the defendants, Stahag Stahl (Austria bases). The complainants sent their acceptance of the offer by Telex, which was to the defendants in Vienna. Brinkibon Ltd later wanted to sue Stahag Stahl for breach of contract and applied to serve an out of jurisdiction party.	**Place of acceptance – for postal rule is place where letter is posted** The appeal was dismissed and the courts held that the contract was formed in Austria and the breach of contract would have to go through Austrian courts. As the communication of acceptance was received by Telex in Vienna, this was when the contract was created. The court reaffirmed **Entores v Miles Far East Co**, which stated that the postal rule did not apply to instantaneous forms of communication, which would include Telex. However, the court also stated that there was no universal rule and each case would have to be resolved by looking at the intention of the parties and sound business practice.
Bressan v Squires [1974] 2 NSWLR 460 **CONTRACT ACCEPTANCE, Postal rules**	P granted D for $2 an option to purchase property for $65,000. Clause 1 of the option stated that "this option may be exercised by you by notice in writing addressed to me at any time on or before 20 December 1972." The notice to exercise the option was posted (registered post) 18 December and received 21 December. The parties disputed whether it had been validly exercised.	**If actual notice specifying dates are requested, postal acceptance does not apply** The general rule is that 'a contract is not concluded until acceptance of an offer is actually communicated …' but post presents an exception 'based upon notions of expediency and convenience'. The rule applies whenever the parties contemplated post as a mode – even if just a possible or permitted mode – of communication.

Certainty and Completeness		
If it is clear that the parties regard themselves as having reached a concluded and binding contract, the court will seek to give effect to that contract even if there are terms that were left to be agreed upon at a later time. If the court is unable to do so, the contract is void.		
Sufficient completeness		
Booker Industries v Wilson Parking (Qld) (1982) 149 CLR 600 **Completeness** An agreement must contain **all of the essential terms** of the agreement. If an agreement is executed, the court is less likely to void it on incompleteness. Incompleteness can be overcome if there is a mechanism for determining one or more terms of the contract.	Wilson leased premises to Booker for 3 years. Clause 4.01 granted Wilson an option for a further lease term of 3 years. The option stipulated that the terms of the new lease would be the same as the original lease with exception to the rent. It stipulated that the rent may be agreed mutually by the parties and failing that agreement then such rent as may be fixed by an arbitrator but in any such case will not be less than the last term's rent. Wilson sought to exercise his right to the option and Booker rejected arguing that it was void for incompleteness.	**The specific price does not need to be stated (as long as there is an agreed mechanism to determine the price** The court had to decide whether the option clause regarding the rent was sufficiently complete to be enforceable. The court found that the contract was that the lessor do all that is reasonably necessary to ensure that the rent is so fixed and that was a complete contract. An agreement that has a mechanism for determining a clause is sufficiently complete to be enforceable.
Sufficient certainty		
Whitlock v Brew (1968) 118 CLR 445 **Certainty** Once the essential terms have been established, it is then to be determined if they are uncertain. The fact that a term is ambiguous does not render it uncertain. **Uncertainty is where there is more than one construction of a term**. The court is reluctant to find uncertainty except in the clearest of cases. Courts will take into consideration the following matters when there is an uncertain term. **External Standards** If an external standard is referred to in the contract, the court can refer to that standard.	Whitlock agreed to sell land to Brew. The agreement stipulated that Brew would grant a lease of the petrol station on the land to Shell 'on such reasonable terms as commonly govern such a lease'. Whitlock purported to rescind the agreement and forfeited the deposit. Brew sought recovery of the deposit, he argued that the clause re Shell was uncertain and the contract was void for uncertainty.	**A contract must contain a reasonable degree of certainty to be enforceable** The court had to decide whether the reference to the reasonable terms as commonly govern such a lease was an uncertain clause. The court found that it was uncertain as it did not specify the rent or the term of the lease to Shell. The judgment provided that extrinsic material may not be resorted to expect where such evidence may call in aid interpretation of the written instrument.
Agreements to negotiate in " good faith"		

Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1 **Agreements to Negotiate**	After long negotiation, the parties signed 'heads of agreement'; for a joint venture to develop a coal mine near Heathcote. It stated 'the parties will forthwith proceed in good faith to consult together upon the agreement… but [this] shall not in the meantime in any way prejudice the full and binding effect of what is now agreed'. Negotiations on important terms continued for four years, but terminated when Coal Cliff put forward a proposal different to that envisaged in the heads of agreement. Sijehama claimed substantial damages for breach of an obligation to negotiate in good faith.	Sijehama failed. Although a promise to negotiate in good faith might be enforceable, the present agreement was too illusory or too vague and uncertain to be enforceable, and it was binding only in honour. If the subject matter is clear and parties enter into further discussions for more comprehensive agreement the original agreement is not necessarily void – **the key factor is does it have a framework in which things which they can't agree on or is there a mechanism to resolve things they cant agree on? If there is all okay**
United Group Rail Services Limited v Rail Corporation New South Wales (2009) 74 NSWLR 618 **Agreements to Negotiate** The court can enforce an agreement to negotiate in good faith.	United in two contracts undertook to design and build new rolling stock for NSW Rail Corp. Both contracts contained identical clauses that stipulated that any difference or dispute that arose between the parties would be referred to senior representatives of each party. These representatives were then obliged to meet and undertake genuine and good faith negotiations with a view of resolving the dispute or difference.	**Confirms the Australian position that clauses requiring parties to negotiate in good faith are, in most circumstances, valid and enforceable** The court had to decide whether an agreement to negotiate in good faith is an uncertain term. The court found that in appropriate circumstances a clause to negotiate in good faith is enforceable.
Agreements to agree		
May & Butcher v R [1934] 2 KB 17 **A court will not enforce an agreement to agree**	After WW2 Government's disposal's board was set up to sell excess tents. They agreed to sell tents to May and Butcher Ltd who left £1,000 as a security deposit for their purchases. According to the written agreement between the disposals board and the company, the price for the tents, and the dates on which payment was to be made were to be agreed between the parties, as and when the tents became available. In 1923 a new disposal's board took over and refused to sell the tents. They stated that they no longer considered themselves bound by the contract.	Were the terms of the agreement sufficiently certain to constitute a legally binding agreement between the parties? There was no agreement between the parties. A contract for the sale of the tents had never in fact been concluded. This was because a fundamental term of the agreement that was necessary for the sale to be completed had not been agreed. As such, there could not be a contract. The agreement between the claimants and defendant therefore was simply an agreement to agree, and not enforceable

Agreements subject to contract		
Masters v Cameron (1954) 91 CLR 353 **Subject to Contract** The meaning of the term "subject to contract" is found in this case:	The parties signed a written memorandum for the sale of Cameron's farm to Master's. The memorandum said that it was subject to contract. Masters made a deposit of 1750pounds to Cameron's real estate. Later Master's refused to complete the transaction and claimed he was entitled to a refund of the deposit. Cameron claimed that the memorandum created a binding and enforceable contract even though no formal contract was entered into.	The court had to decide whether the memorandum was an enforceable contract. The court found that it was not a binding contract. The court makes a decision on the meaning of "subject to contract" as one of three things: 1. Parties intend to be immediately bound by the terms and immediately perform the conditions but at some point a formal contract will be made; OR 2. Parties intend to be immediately bound by the terms but will not perform the conditions until the formal contract is made; OR 3. Parties do not intend to be bound until a formal contract is signed. **Fourth category:** When the parties agree to be immediately bound by the informal agreement, but further agree that it shall be replaced by a formal agreement with additional terms. The informal agreement is then enforceable.
Pavlovic v Universal Music Australia Pty Ltd (2015) 90 NSWLR 605 **Binding agreements and authority of lawyers to bind**	2005 Mr Pavlovic and Universal Music Australia Pty Limited (Universal) entered into a joint venture arrangement to run a recording label, Modular Recordings Pty Limited (Modular). 2014, the parties, through their lawyers, started negotiations to end the joint venture through a Deed of Release and Settlement. Universal's lawyers sent the draft Deed of Release (the Proposed Deed) to Mr Pavlovic's lawyer, who stated that Mr Pavlovic will sign the Proposed Deed. Universal's lawyers responded, allowing Mr Pavlovic "a further 48 hours to sign the documents and forward copies to us"	The two key issues before the court were: - Did each party's lawyers have actual or ostensible authority to enter into an agreement on their behalf? - If so, did the parties—acting through their lawyers—enter into a binding agreement on the terms of the Proposed Deed? Parties are bound to an agreement in the manner in which they have previously agreed to become bound, unless there is an outward manifestation of intention to become bound in some other manner. Lawyers generally have authority to negotiate the terms of an agreement on behalf of their clients, but not to bind their clients to the agreement. 'Clear and cogent evidence' is required to show that a lawyer has authority to bind a client in contract. There is an exception to the general rule in the context of litigious proceedings, where lawyers have an implied authority to