

THE NATURE & IMPORTANCE OF CONTRACT LAW

Contract- an enforceable (legally binding) promise or set of promises

There must be:

- Agreement (offer and acceptance)
- Capacity
- Consideration or substitute (the promise must be paid for or the promise must be recorded as a deed and signed, sealed and delivered by the promisor)
- Intention to create legal relations
- Compliance with any formalities
- Certainty (agreement must be sufficiently certain and complete to be enforceable)

AGREEMENT (Chapter 2 – page 25)

- An agreement is an understanding between two parties that one of them will do something, or will promise to do so, in return for the other doing something, or promising to do so.
- There are two elements to the above: a meeting of the minds (*consensus ad idem*) and at least one promise.
- This need for a promise is what distinguishes a contractual agreement from other types of agreement. If there is no promise, there is no contract.
- Agreement must be entered into voluntarily (it must not be the result of illegitimate pressure being exerted by one party on the other, there must also be no reprehensible conduct, and any relevant consumer guarantees (under the Australian Consumer Law) must be included in the contract, despite whether one party is in a superior bargaining position or not). However:
 - a) whether the parties have reached agreement is determined objectively (from an reasonable unbiased outsider's view), not subjectively (what the parties believe);
 - b) agreement is required only about entering into the contract and its terms, it is not concerned with the desirability of doing so, or what motivates the parties
 - c) an agreement can exist even if one or both of the parties believes that they were obliged to enter into it because of their economic or personal circumstances;
 - d) an agreement can exist even though one of the parties is not happy about its terms and has entered into it only reluctantly

***Smith v Hughes* [1871] 6 LR QB 597 (Court of Queen's Bench)**

- Smith offered to sell oats to Hughes and showed him a sample of what was for sale
- Believing that what he has been shown were old oats, Hughes agreed to purchase them at the price stated by Smith
- Upon later discovering that they were new oats, Hughes sought to return them and avoid paying, Smith refused to take them back and sued for the contract price.
- Court found that both parties were agreed as to the sale and purchase of this particular parcel of oats, and that the age of the oats was not a condition of the contract
- While the parties were not *ad idem* as to the age of the oats, they certainly were *ad idem* as to the sale and purchase of them

Offer and acceptance:

- It must be determined whether one party has communicated to the other an offer which the latter has accepted, if this is found to have occurred, the parties are said to have accepted;

- The specific use of the words “offer” and “acceptance” is not required, any form or words or conduct can amount to an offer/acceptance, so long as an intention can be discerned on the part of the offeror/offeree communicating such a promise or acceptance.

Was there an offer?

Determined objectively – by reasonable person in position of offeree

***Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 (English Court of Appeal)**

- There was an express offer to anyone who performed the conditions (“an offer to the world”), and was not mere puff (as shown by the funds deposited in the bank to prove sincerity)
- Anyone who performed the conditions accepts the offer (as Carlill did)
- Acceptance is when the offeree notifies the performance of the conditions
- Carill wins, Carbolic ordered to pay reward

Offers distinguished from invitations to deal

- An offer intends that an affirmative response will immediately give rise to a binding contract
- An invitation to deal/treat will simply invite negotiations (any responses will be offers which the party issuing the invitation to deal/treat will be free to accept or reject)
- Examples of invitations to treat/deal: advertising goods or services for sale, displaying goods in a shop, conducting or advertising auctions, calls for tender, operating a public transport system, displaying an automatic vending machine, and issuing tickets.

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern)

***LD* [1953] 1 QB 401 (Court of Appeal, UK)**

- Goods displayed in a shop are intended to invite customers (invitation to deal/treat)
- The customer offers to buy the goods when they take them to counter to pay
- The shopkeeper either accepts or rejects - this is when the contract is formed (not when the goods are selected from the shelf and placed in the shopping basket)
- Boots was found not to be in breach of *Poisons Act 1933* (which required sale of drugs to be supervised by pharmacist) as all drug sales were supervised by pharmacist when customer took them up to the counter (where contract was formed)

Auctions – an invitation to deal

The inviting of bids at an auction is seen as an invitation to deal (rather than an offer to sell to the highest bidder), and the auctioneer/vendor is free to accept or reject each bid as it comes in.

***AGC (Advances) Ltd v McWhirtier* (1977) 1 BPR 9454 (Supreme Court of New South Wales)**

- AGC sold a property by auction and removed the reserve price halfway through the auction (thereby indicating that the property would be sold to the highest bidder)
- McWhirtier placed the highest bid, but was informed that the bid was unacceptable
- The property was sold to a lower bidder, and McWhirtier claimed that he was entitled to the property under a contract formed at the auction due to being the highest bidder
- Court decided that bids must be accepted by auctioneer in order for a contract to be formed between vendor and bidder, and that auctions remain an invitation to deal (with bids constituting offers to be either accepted or rejected by the auctioneer)

Advertisements – an invitation to deal

Advertisements are generally treated as invitations to deal. This prevents advertisers being faced with contracts they have no capacity to honour, in the case of running out of stock. As the advertisement is merely an invitation to deal, the advertiser can reject customers' offers when he runs out of stock. There are exceptions however and we need to look at the particular facts of each case.

***Lefkowitz v Great Minneapolis Surplus Store* 86 NW 2d 689 (1957) Supreme Court of Minnesota**

- The defendant store placed an advertisement in a newspaper which read "Saturday, 9AM Sharp. 3 brand new fur coats worth to \$100.00. First served \$1 each"
- The plaintiff was the first customer to ask for one of these coats but was refused
- Court decided that the ad constituted a clear, definite and explicit offer which left nothing open to negotiation and that acceptance of which completed the contract (found in favour of the plaintiff)

Bait advertising:

the practise of advertising certain goods at extremely low prices to attract customers to the store with the intention of selling them other goods, at normal prices, rather than, or in addition to, those advertised. This practice is now prohibited under Section 35(1)(a-b) of the Australian Consumer Law.

Calls for tender – can be an invitation to make an offer, but may be an undertaking

A call for tenders will usually be regarded as merely an invitation to make an offer, but may contain an undertaking to treat the tender in a specified manner which the law will characterise as an offer. In such cases, by submitting a tender, the invitee accepts this offer and thereby creates a contract in the terms of the undertaking, regardless of whether the tender itself is ultimately accepted, or not.

***Blackpool & Fylde Aero Club v Blackpool Borough Council* [1990] 3 All ER 25 (Court of Appeal, UK)**

- The conditions of the tender may bind the parties where the invitee is entitled to have their tender considered – the tender was submitted within the specified timeframe but was not considered by the invitor due to a clerical error
- The plaintiff applied to have their tender considered, and the Court found that the invitation to tender was, to a limited extent, an offer, and the plaintiff's submission of a timely and conforming tender an acceptance.

Requests for information or statements of possible terms

Statements of the terms upon which a person may be willing to contract, and responses to requests for further information, are distinguished from offers (for the same reasons that invitations to deal and distinguished from offers):

***Gibson v Manchester City Council* [1979] 1 All ER 972 (House of Lords)**

- Letter from the council perceived to be an offer to sell a house to Gibson
- Their letter set out the terms upon which they may have been prepared to sell the house and was not an offer

- The plaintiffs asked the defendants at what price they would be prepared to sell certain land
- The defendants replied with a certain price, which the plaintiffs, treating as an offer, accepted
- The Privy Council, however, held that the defendants' reply, rather than being an offer, was merely a statement of the minimum price at which they might be prepared to sell. Therefore the plaintiffs' response that that statement was only an offer which was not accepted by the defendants.

Termination of offers- Revocation

Revocation occurs when an offer is withdrawn and the offeror communicates this decision to the offeree. An offer can be revoked at any time before it is accepted. Once acceptance has occurred this is no longer possible. This means that in a given case, which occurred first (revocation or acceptance) will determine whether or not a contract is formed. Also, an offer cannot be revoked if the offeror has granted the offeree an option covering it. For present purposes, an option involves a promise by the offeror not to revoke the offer, made in exchange for consideration provided by the offeree.

Dickinson v Dodds (1876) 2 Ch D 463 (English Court of Appeal)

- Dodds offered in writing to sell his house to Dickinson and said that the offer would remain open until 9am on 12 June, 1874
- Dickinson decided to accept the offer but did not inform Dodds of this, and on 11 June he heard from a third that Dodds had sold the house to someone else
- Dickinson then left a formal acceptance of the offer at Dodd's residence and an agent of his gave a copy to Dodds personally before 9am on 12 June, 1874
- Dodds refused to sell the house to Dickinson who commenced proceedings for specific performance. He succeeded on first instance and Dodds appealed
- There was no consideration given to keep the offer open until 12 June and therefore Dodds was under no obligation to do so. Revocation of the offer had been communicated to Dickinson by the third party and therefore he could no longer accept the offer as it had been revoked (revocation does not have to be communicated by the offeree, as long as it is communicated it doesn't matter by who)

Revocation will not be effective unless, and until it is communicated to the offeree. In this regard the postal rule does not apply.

Byrne v Van Tienhoven (1880) LR 5 CPD 344 (Court of Common Pleas)

- In a letter dated 1 October, Van Tienhoven offered to sell goods to Byrne. However on 8 October, he posted another letter revoking his offer. This letter did not reach Byrne until 20 October.
- In the meantime on 11 October, Byrne had telegraphed Van Tienhoven accepting the offer and had resold the goods at a profit. Van Tienhoven refused to supply the goods, Byrne sued to recover damages for non-delivery.
- The Court found that the revocation had not been communicated at the time Byrne accepted the offer and therefore a binding contract was in place.
- It would not be fair to apply the postal rule in terms of revocation, as nobody would ever know if they had a binding contract upon which they could act, unless they had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it.

- When making an offer to the world or a particular group, it must be revoked in the same way it was made. Eg. Carbolic Smokeball- publishing a similar ad in the same newspaper to revoke the offer would be sufficient.
- Counter-offers revoke the initial offer and make a new offer (as in *Hyde v Wrench (1840) 3 Beav 334*)
- Requests for further information leave the initial offer open to be accepted (as in *Stevenson, Jaques and Co v McLean (1880) 5 QBD 346*)
- A counter-offer should also be distinguished from a request to alter the terms of the offer. If the offeror agrees to do this and the revised offer is put to the offeree who accepts, a contract will be created (*Fletcher v Kakemoto [2010] QSC 219* esp at para 28)
- If the terms of a purported acceptance differ in any meaningful way from those to the offer, this communication will amount to a counter-offer and as such will terminate the original offer (both under common law provisions and Article 19(2) of the Vienna Convention (United Nations Convention on Contracts for the International Sale of Goods, 1980).

Lapse of time

If an offer specifies a time within which it must be accepted, acceptance after this time will be ineffective unless the offeror agrees to waive the stipulation. However if the offeror intentionally avoids receiving an acceptance within the timeframe, acceptance communicated after that will still be effective (*Bragg v Alam (1982) NSW Conv R 55-082*). If the duration of an offer is not stipulated, it will come to an end after a reasonable time, what is reasonable depends upon the circumstances of the case.

Death (the effect it has on an offer)

An offer will lapse with the death of the offeror and generally cannot be accepted after this time. What if the offeree does not know of the death of the offeror? The offer may still be able to be accepted if it does not require personal performance on the part of the offeror. Even where the offeree does know of the offeror's death, acceptance may be possible if the terms of the offer contemplate that the contract could be performed by the offeror's estate, or if the offer was accompanied by an option not to revoke for a period of time that had not yet elapsed.

Whether the death of the offeree terminates the offer similarly appears to depend on whether the offer was personal to the deceased or not. Thus, if it is clear that performance was to be by the offeree alone, or that only they were to benefit from the proposed contract, the offer will lapse.