

## Offer- Is there an offer?

Traditionally there needs to be a clear offer and a clear acceptance in response (Carlill). There must be a **definite** promise to be bound without further negotiations (Gibson). There is also a **bargain** requirement- an exchange for something specified (Australian Woollen Mills). In unilateral contracts the exchange is a promise for an act, while in bilateral contracts mutual promises are exchanged. These elements are assessed **objectively** (Carlill). An offer must not be:

- Negotiations/supply of information (Gibson)
- Mere puff (Carlill)- the bank deposit negated this
- Invitation to treat (Boots)
- Mere inquiry (Stevenson Jacques)
- Conditional gift (AWM)- 'I will give you \_\_\_\_\_ if \_\_\_\_\_' - no exchange
- Contain too many exclusion clauses, allowing the promisor discretion whether to carry out promise or not (MacRobertson Miller, Placer)

If an objective assessment shows the reasonable person would have thought the above things weren't an offer then there is no definite offer (Carlill).

If there isn't an extremely clear offer and acceptance in the facts, consider the **non-traditional model** where a search is done to see if mutual assent has been manifested objectively (Brambles, Heydon JA). For example, an 'arrangement' described- no clear offer and acceptance said- discuss.

## Termination of Offer (Revocation, rejection, lapse)- Is the offer still open to be accepted?

### Revocation

- You cannot revoke after an offer has been accepted (Goldsbrough Mort)
- An offer can be revoked any time prior to acceptance unless consideration is given to hold the promise open in the form of a **binding option** (Goldsbrough Mort). Otherwise it is deemed nudum pactum (naked promise).
- Revocation must be **communicated** to the offeree otherwise it will not count- this must happen before acceptance. Reliable 3<sup>rd</sup> parties are able to communicate revocation (Dickinson). Also, the **postal acceptance rule doesn't apply to revocation**- the revocation needs to be received first otherwise it will not be effective (Henthorn).
- In unilateral contracts, any offer may be revoked at any time once the promisee has embarked upon performance prior to full completion of the required act (Mobil). However, there is a qualification that if there is an **implied ancillary contract** not to revoke revocation will not be permissible (Mobil). Factors considered were the offeror's knowledge the performance has commenced, the offeror's understanding as to whether the offeror is at liberty to revoke, any detriment/benefit to the offeree by completing (detriment=more likely implied ancillary), circumstances of the case etc.

### Rejection

- Making a **counter-offer** will terminate the original offer, but mere inquiry won't (Stevenson Jacques, Hyde v Wrench). (E.g. Am I able to \_\_\_\_\_, would it be willing to shift on price?). There isn't a counter-offer.

### Lapsing

- If a time is specified as to when the offer lapses, it will lapse after that time.
- If no period is stipulated, the offer will lapse after a reasonable time has passed. This is judged because a term either implies this (e.g. buying perishables) or the court can also infer rejection from the offeree's failure to accept the offer within a reasonable time (Manchester Diocesan Council).

### **Acceptance- Has the offer been accepted allowing agreement to be manifested?**

- An alternative form of acceptance occurs when a **reasonable** person would believe there is a **mutual assent** to the terms of an offer, even though there is no identifiable 'ad idem' – meeting of the minds. (Brambles- see correspondence) (E.g. Brambles charged and retained fees the council had earlier asked for which Brambles had said it was unable to charge. They then began charging 1.3c instead of 1.1c to depositors, this was viewed as assent to the council's terms.

#### Nexus

- The offeree must be both **aware of the offer and acting in response** to it for effective acceptance (Clarke). This uses a subjective approach- the offeree must be acting on the faith of the offer.

#### Communication of Acceptance

- The communication of acceptance rule can be expressly or impliedly **waived** (Carlill). This is implied in the nature of some contracts (e.g. newspaper advertisement, reward cases).
- The method of acceptance prescribed isn't mandatory unless it is made expressly clear- (E.g. "the only form of acceptance allowed will be \_\_\_\_"). If there is no insistence on the prescribed mode, acceptance in a mode "**no less advantageous**" to the offeror is effective acceptance (Manchester Diocesan Council).
- A contract cannot be forced on the offeree by stipulating silence as the prescribed method of acceptance (Felthouse). However, silence coupled with conduct may amount to acceptance, such as the offeree taking the benefit of the offer/services (Empirnall). For example, Empirnall took the benefit of the architects after having a reasonable opportunity to reject their services.

#### Postal Acceptance

- The postal acceptance rule says that acceptance of an offer occurs as soon as it is placed in the post (Henthorn). This can only be justified if it can be inferred that the parties **contemplated post as a possible means of acceptance**. (Henthorn).
- Although revocation of an offer through post still requires communication so if an acceptance and revocation happened at the same time the acceptance would win and there would be a contract because revocation hasn't been communicated. (Henthorn).
- The postal rule has been stretched to include telegrams (Cowan v O'Connor 1888) However, instantaneous communication such as telex, email, facsimile etc. are based on normal rules (Brinkibon). However, if the message is sent and received by a 3<sup>rd</sup> party, sent out of office hours or not intended to be read immediately there is room for movement (Brinkibon- Lord Wilberforce).