

Part 2: Agreement

Seminar 2:

A. Offer and Acceptance

(i) Offer

To determine whether there is an offer, the crucial issue is whether it would appear a reasonable person in the situation of the offeree that an offer was intended, and binding agreement would be made upon acceptance.

Invitation to Treat

Invite others to make offers or enter into negotiations. Items displayed for sale in shops are regarded as invitation to treat, not offer.

(1) Shop Sales

**** Pharmaceutical Society of Britain v Boots Cash Chemists Ltd [1953] 1 QB 401***

- The plaintiff argued that the display of goods on the shelf should be regarded as an offer, which was accepted when a customer took the item off the shelf and into his or her receptacle.
- However the Court of Appeal rejected this on the basis that customers must be entitled to return and substitute articles they have chosen from the shelf. (The goods on the shelf is simply invitation to treat)
- Customer makes an offer when they present items to the cashier and are not bound until the cashier has accepted that offer--- Birkett LJ, “it is an offer by the customer to buy and there is no sale effected until the buyer’s offer to buy is accepted by the acceptance of the price.”

(2) Auctions:

Auctions are also held to be invitations to treat. Each bid is considered an offer, and acceptance is communicated by the fall of the hammer. This entails that:

- The auction can be cancelled
- A bidder is entitled to withdraw his bid before it is accepted
- No obligation to sell to the highest bidder

(3) Tender:

A tender process involves each bidder submitting a single bid, without knowing what the other parties bid. A call for tenders is regarded as an invitation to treat, and the bids are regarded as offers.

Similarly, the tender does not have to accept the highest bid. But if the person calling for tenders promises to accept the highest bid, the call for tenders will be regarded as an offer.

(4) Ticket Cases

The view held after *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* is that the ticket only represents an offer made to the passenger, which he accepts by presenting himself for travel. No contract is formed by the purchase of the ticket alone (Ticket itself is just the receipt).

Unilateral Contract

For an unilateral contract, the act constitutes consideration and acceptance of the offer.

**** Australian Woolen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424***

[Facts]

- Commonwealth government announces it would pay a subsidy on wool purchased
- AWM purchased large quantities of wool, but ultimately didn't get subsidies for all of that.

[Held]:

- The plaintiff claimed that a unilateral contract had arisen out of the Commonwealth wool subsidy scheme. The High Court held that, for a unilateral contract to arise, the promise must be made in return for doing the act.
- **High Court's view:** In the case AWM, buying the wool constitutes consideration, and satisfies the "detriment" requirement (**benefit & detriment test**), but AWM did not buy the wool either "**at the request**" of CW, or "**in**

return” for the promise (**bargain requirement** not satisfied). Hence it failed to show that there was a relation of *quid pro quo* (a advantage granted in return for something) between the CW’s promises and the AWM’s act.

- The court **distinguished** this from a **conditional gift**. The principle test is whether the offeror has expressly or impliedly requested the doing of the act by the offeree. **Examples:** If A, in Sydney says to B, in Melbourne “I will pay you \$1000 on your arrival to Sydney” and B goes to Sydney, there is no contract because there may be no relation between A’s statement and B’s act if B intended to go to Sydney anyhow and A is merely announcing that he will give B a gift upon arrival to Sydney. No quid pro quo between announcement and the act.
- **The Privy Council’s view:** They also **failed show objectively** that the promise was **intended** to give rise to contractual obligations. (A reasonable person would not see the government making an implicit request). The statements made by the CW were in the nature of policy **announcements** (government scheme) and no request to purchase wool could be implied.
- Since **Woollen Mills case**, Australia starts to adopt **Bargain Theory**.

Distinguish Counter offer vs. Requesting Information vs. Modification Offer

Seppelt & Sons Ltd v Commission for Main Road (1975): Use of the word “offer” is not sufficient to constitute an actual offer in the contractual sense.

(ii) Offer can be made to the whole word or a limited group

Unilateral Contract / Mere Puff

* *Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256*:

[Facts]:

- Carbolic manufactured a device which allegedly protects against colds and influenza.
- They advertised that they would pay \$100 to whoever uses their product properly and still contracts a cold.

- They also advertised that they have deposited \$1000 in a well known bank for this purpose.
- Carlil bought the product, used it according to the instructions, and still contracted influenza.

[Held]:

- The defendant's **defences** include:
 - (i) There is no intention: the advertisement was not intended to be a serious promise (an offer), it was "mere puff": nothing is binding because it was not made to anyone in particular—cannot contract with whole world.
 - (ii) There was never any acceptance by Mrs Carlill. Certainly she did not communicate to the Carbolic Smoke Ball Company.
 - (iii) The promise was too vague—the time term is not clear (warranty period is unspecific): within how many days if you catch cold is our responsibility.
 - (iv) There was no consideration given by Mrs Carlill—it was a *nudum pactum*. (*conditional gift*)
 - (v) It is the contract with everyone.
- **Was it a mere puff?** No, the promise was **intended**, as the deposit was made with the Alliance Bank.---Lindley LJ 'here is a distinct promise expressed in language which is perfectly unmistakable.' (**PS:** Generally, Advertisement should be considered to be 'mere puff', but except Carlill case).
- The contract was found to have been made despite the fact that the parties had never communicated with each other or exchange money or goods. An offer that calls for particular performance of certain conditions maybe accepted by the performance of those conditions.
- **Reasonable time:** the offer is open to anyone who uses the smoke ball as directed and contracts the flu, within a reasonable period. Judges must exercise their judgment as to what is reasonable.
- **Bowen LJ: Inconvenience sustained by one party at the request of another is enough to create consideration.** The court held that the use of smoke ball by the plaintiff constituted both a benefit to the defendant and a detriment to the plaintiff, either, of which would be enough to satisfy good consideration for the promise.

- Is there **sufficient consideration**? Yes, the person who acts upon the advertisement and accepts the offer puts himself to some inconvenience as the require of the offeror.