

## Lecture 2

### PART 2 - AGREEMENT

#### Aims:

- To understand the model of offer & acceptance as well as how this model fails in some instances to explain some agreements
- To critically examine the doctrine of consideration & its relationship with promissory estoppel
- To understand the requirements of certainty & intention to create legal relations and the objective construction rules used to determine whether these requirements are satisfied
- To examine contracts that must be evidenced in writing to be valid.

#### A - OFFER AND ACCEPTANCE

Offer and acceptance are useful analytical tools, but they do have their limits.

→ The most traditional method of contract formation → approach adopted in determining whether parties who were contemplating entering to a contract have in fact passed beyond the stage of negotiating and concluded an agreement

→ Offeror makes offeree an offer which he/she can accept or reject

Limitations:

- where contract is formed by both parties signing a written document it may sometimes be possible to regard party who signs first as being offeror but in such a case – artificial to analyze formation of agreement in succession of offer/acceptance
- formation of contracts by offer and acceptance encounters difficulties when sought to be applied to everyday contractual situations e.g. advertisement → seller could be liable in damages to each customer who's order not filled
- Does however have crucial consequences when question arises as to time/place where contract formed

**Acceptance:** agreement to an offer

**Invitation to treat:** an invitation to a person to make an offer or engage in negotiations

**Nudum Pactum:** an agreement which is not binding because it is not supported by consideration

**Offer:** an expression of willingness to contract on the terms stated

**Tender:** an offer made in response to an invitation to make it

#### (i) Offer

- An offer is an indication by one person (offeror) that they are willing to be legally bound without further negotiation on the terms they have put forth
- An offer must normally be interpreted in the sense in which it would reasonable be understood by an ordinary person, even through the offeror's actual meaning as otherwise
- Note: degree of finality → Harvey Norman ad is not an offer as stock limited

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

- How does offer and acceptance occur?
  - a) customer makes an offer when taking product to counter and acceptance is when chemist scans item and takes money OR
  - b) Chemist makes offer when displaying product with price and customer accepts when item picked up

Court decided displaying goods not offer as it would mean a customer had accepted offer on picking up an item and could technically be in breach of contract if he/she later decided to not buy at all & shopkeeper shouldn't be

assumed to have relinquished right to refuse to sell to customers or limit number of items in short supply  
B is an invitation to treat → not offer as there is leeway for further negotiation and not ready for legal contract

Example: Auction

1. Advert for auction – invitation to treat
2. Bidding at auction – generally an offer
3. auctioneer banging gavel – acceptance

Now codified in sale of goods legislation

*Barry v Davies* [2000] – highest bidder at auction for goods advertised for sale on a 'without reserve' basis had contractual claim against auctioneer who refused to accept low bid

*Harris v Nickerson* – failure to hold advertised auction gives no contractual claim

Note: use of the word offer doesn't necessarily mean an offer in legalese

- automatic vending machine constitutes offer accepted by customers inserting money
- mere statement of lowest price vendor would accept contains no implied promise to sell at that price – *Harvey v. Facey* [1893]

\* *Australian Woollen Mills Pty Ltd v Cth* (1954) 92 CLR 424

## **(ii) Offers can be made to the whole world or a more limited group**

*Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256

- The plaintiff bought smoke ball on faith of defendant's advertisement and used it as directed for over 8 weeks → for her to succeed, she had to prove the advertisement was an offer
- Lindley LJ
  - For what was that money deposited or that statement made except to negative the suggestion that this was a mere puff & meant nothing at all?
  - The performance of the condition is the acceptance of the offer
- Bowen LJ
  - Inconvenience sustained by one party at the request of the other's is enough to create a consideration
  - "Why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?"
- Court held there was a contract and four issues raised
  1. Was it a genuine offer? Court persuaded by the 1000 pounds deposited in bank to show sincerity → argument that ad was mere puff was met by pointing to precision with which promise to pay reward was made
  2. Smoke Ball Co said if so, they would have made an offer to the whole world → court held that the offer was only accepted by certain ppl
  3. Acceptance – Ms Carlill didn't notify her acceptance but the act of snorting the smoke ball indicated acceptance and was sufficient
  4. Consideration – she went to significant inconvenience snorting smokeball for two weeks when she didn't otherwise have to
- Simpson "Quackery & Contract Law: Case of the Carbolic Smoke Ball"(1985) 14 *J L Stud* 345
- Graw "Puff, Pepsi and 'That Plane': The John Leonard Saga" (2000) 15 *JCL* 281
- Would result have differed had Carlill caught flu 6 months after using smokeball?
- What if Carbolic had not said it had deposited £1000 in the bank to show sincerity?
- Is it relevant whether £1000 was in fact deposited?

Note: evidence of subsequent conduct is not admissible as an aid to interpretation

→ Where property is sold by tender it is established that each person submitting a tender is making an offer, which the seller is then free to accept or reject

### **(iii) Acceptance**

- Can only be accepted by person who offer was made to
- Acceptance must be unqualified & unequivocal in that nothing further left to negotiate
  - A request by a buyer in an acceptance that delivery be made on a certain date will not prevent the acceptance being effective if it is clear that acceptance is not made conditional upon the seller agreement to that date

#### **KEY PRINCIPLES**

- Apply freedom of contract principle – cannot impose contract on offeree
- Must exactly correspond – attempt to introduce new terms is counter-offer (nullifies offer)
- Need not be express – may be inferred from a party's conduct
- Only persons to whom an offer is made may accept it

### **(a) Communication of Acceptance is generally required**

- only counted as accepted once offeror receives communication
- consent sometimes implied from acceptor's conduct
- offeree not bound even though decision to accept has been conveyed to offeror by someone acting without authority to do so
- *Felthouse v Bindley* (1862) 142 ER 1037; ©3-28
  - Plaintiff discussed sale of farming stock with nephew and wrote that 'if I hear no more... I will consider horse mine' → nephew didn't reply but instructed auctioneer (def) horse sold who then mistakenly sold to third party
  - Plaintiff sued in tort for conversion – Q of whether plaintiff's statement meant that a contract would arise if nephew remained silent
  - Def not liable as horse not already sold
  - Q: should an offeree be able to enforce the contract, if wishing to accept the offer, the offeree took the offeror at his/her word and remained silent? How far can principle be taken – what if in previous dealings, silence is taken as acceptance → *Boyd v Holmes* (1878)?

Carter, Peden & Tolhurst – "no need for rigid insistence that silence can never result in a contract"

NOTE: s69 of Restatement (2d) Contracts provides that where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence/inaction – silence/inaction operates as acceptance OR where this has been the case in previous dealings → so should this be adopted and a reform of the rule that silence is not acceptance be made?

- Subject to the silence rule – offeror may stipulate whether or not acceptance must be communicated
- If offeror wishes prescribed method of acceptance to be only method permissible, this intention must be made clear
- *Empirnall Holdings Pty Ltd v Machon Paul partners Pty Ltd* (1988) 14 NSWLR 523
  - Property developer claimed never accepted contract – Court of Appeal said way he acted suggested acceptance
- *Trade Practices Act 1974 (Cth)* ss64-5,

### **(b) Correspondence with Offer**

- Needs to match the offer exactly – mirror image
- If there is a third element (e.g. I will buy if you deliver by Wednesday) there is no common law contract → becomes counter offer

\* *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (Eng) Ltd* [1979] 1 All ER 965

- Contract to sell piece of machinery – whether price variation clause in contract and examined events leading to contract
  1. letter to buyer with price variation clause and clause stating that these terms will prevail over anything contained in buyers response
  2. buyers send back order form to seller with different terms & conditions → no price variation clause
  3. seller signed order and returned to buyer but referred to original statement

Court held that 1 = offer, 2 = counter offer and 3= acceptance → fundamentally seller has accepted letter 2 → agreement made between letter 2 and 3

Note: some times can be no contract at all

When problem solving → a) was offer made to reasonable person and b) was acceptance communicated? (Was it qualified? Etc)

- This case illustrated that acceptance must conform to offer

Bilateral (majority of contracts) – offer to do one thing in return for your promise OR Unilateral (many seen in this course) – make an offer in return for an act

- In theory, communication of acceptance necessary for both but in practice, offeror of a unilateral offer has often implicitly dispensed need to be communicated or get notified – acceptance by actual act e.g. bringing dog back for reward
- Notification and acceptance is distinct but may merge
- Sometimes possible to infer acceptance through actions

### **(c) Postal Acceptance Rule**

- If parties contemplate that the post might be used as means of accepting offer then acceptance is effective as soon as posted (not received)- doesn't even matter if letter arrives → parties involved can prescribe whether this applies e.g. I must receive acceptance by X time
- Protects acceptor from risk of delay or loss of letter
- Effective once letter handed to courier
- If address incorrect - acceptance not effective until actually delivered
- Justification: post office agent of offeror to receive acceptance OR offeree has done all that can be done to communicate acceptance and shouldn't be responsible for subsequent events
- If law was otherwise, it is possible that the offer might be revoked before acceptance delivered
- Rule only applies to acceptance, NOT revocations of offers or acceptances
- As contract formed at place where final act regarded as completing contract occurred – courts regard contract as having been made where acceptance posted or where acceptance communicated
- If offeree attempts to retract acceptance before letter reaches offeror – logical application of rule would prevent but even if so – would be unjust to hold offeror bound if, relying on revocation, altered position

### **(d) Knowledge of Offer Required for Acceptance?**

- Mere fact that person by chance happens to perform act while ignorant of offer will not result in binding contract
- There is however argument that offeror has received what was asked for and nor reason that it shouldn't be paid – German law in reward cases

*R v Clarke* (1927) 40 CLR 227, © 3-34

- Reward for info about murder – Mr. Clarke arrested for murder and gave info that exculpated himself – led to another getting arrested for murder
- Clarke knew of reward at time and asked for it