

## PART III – OFFER

### I INTRODUCTION

#### A *Contextualisation*

The law distinguishes between enforceable and unenforceable promises by reference to a series of formal requirements:

- 1 *Agreement*  
The parties must reach an agreement by way of offer and acceptance
- 2 *Consideration*  
Each party must provide consideration in return for the obligations
- 3 *Intention*  
The parties must have the intention to create legal relations
- 4 *Certainty*  
The agreement must be complete and certain

Contractual agreement exists where an offer made by one party is accepted by the other party. The contract comes into existence when acceptance of an offer has been communicated to the offeror. Prior to formation, either party is free to withdraw from negotiations because no contractual obligations have yet been imposed.

Questions of fact are very important in the determination of contractual obligations. It has been suggested that the technical requirements for contract formation are artificial and cannot always be satisfactorily applied to everyday transactions (eg, *MacRobertson*).

**Exam note:** explain outcomes of cases and note inconsistencies by reference to factual similarities/differences.

#### B *Definitions*

##### 1 *Offer*

**Definition:** an offer is a statement of the terms upon which an offeror is prepared to be contractually bound.

The offeror must indicate their willingness to be bound immediately upon acceptance. This willingness is determined objectively, according to outward manifestations of intention (ie, the offeror's conduct). In determining intention, conduct is assessed from the perspective of the reasonable person in the position of the offeree.

The existence of an offer is a question of fact determined on a case by case basis. It may be express (written or spoken) or implied (from the offeror's conduct). In either case, the conduct alleged to amount to an offer must be promissory in nature.

**Australian Woollen Mills v Commonwealth:**Facts

- In 1946, the Commonwealth introduced a scheme whereby wool purchased by manufacturers for local use was subsidised by the government
- AWM purchased large quantities of wool over the next two years
- In June 1948 the government discontinued the subsidy scheme
- Because AWM's wool stocks were so high, it required AWM to repay some of the money it had received
- AWM claimed this breached a unilateral contract between it and the government

Issue

- Did the Commonwealth's conduct amount to an offer to be contractually bound?

Reasoning

- AWM claimed that the announcement of the subsidy scheme by the Commonwealth constituted a contractual offer to pay the subsidy in return for AWM purchasing wool for domestic consumption
  - Each purchase of wool was said to constitute a unilateral contract
  - The purchase of wool was said to constitute acceptance of the offer and valid consideration
- The alleged promise must be made *in return* for the act performed
  - The test to be applied is: did the offeror expressly or impliedly request the doing of the act by the offeree?
  - Other relevant factors include
    - Did the offeror state a 'price' which the offeree must pay for the promise?
    - Was the offer made to induce the doing of an act?
    - determining whether an offer has been made will involve the drawing of inferences
- Policy: the announcement of the subsidy was merely a statement of government policy and not an offer capable of acceptance

Decision

- The offer was defective
  - No request was made or could be inferred to have been made for AWM to buy wool
  - AWM's purchase of the wool was not performed in return for the Commonwealth's promise to pay the subsidy
  - At any rate, the specifics of the subsidy were insufficiently clear and certain
  - Further, the Commonwealth's announcement was a statement of policy

Notes

- Relevance of reliance – an alternative, 3-stage test is proposed in *Shadwell v Shadwell*:
  - Do the facts indicate loss by P?
  - Was a promise made to induce P to act in a certain way?
  - Has D benefited?
  - On the facts, these stages aren't satisfied, since
    - AWM didn't lose anything except the subsidy, which it was never entitled to have
    - D did not benefit from the subsidy (though P may be encouraged to buy

wool)

The existence of an offer depends on there being a promise to do or to refrain from doing something. The mere supply of information by an (alleged) offeror cannot amount to an offer in itself, though it may be used in a future contract.

See:

- *Harvey v Facey* [1893] AC 552  
Telegraph listing 'lowest cash price' for a property not a valid offer

### ***MacRobertson Miller Airline:***

#### Facts

- The airline first quoted availability of seats and price
- It then issued a ticket in return for the fare
- The prospective passenger was then handed a ticket
- This ticket contained conditions giving the airline the right to cancel a flight or cancel a booking without incurring any liability
- Stamp duty was payable if the ticket constituted an agreement or memorandum of an agreement
- It became necessary to decide when a contract between the airline and a passenger was made
- It might also be necessary to decide when a contract is formed in situations involving
  - questions about jurisdiction;
  - determination of whether statutory obligations have been breached; or
  - determination of when contractual obligations commence

#### Issue

- When did the contract between the airline and a passenger come into being?

#### Reasoning

- Barwick CJ:
  - Passenger makes the offer
  - Airline accepts the offer by carrying the passenger
  - There is no agreement until the passenger *is on board* the plane
  - Because the airline reserves the right not to carry the passenger, no contractual obligations should arise until the passenger is, in fact, accepted
  - If the passenger is not carried due to overbooking or cancellation, the airline has to refund the fare
  - Therefore, the ticket is not subject to stamp duty and is just a receipt (not a contract)
- Stephen J:
  - Airline makes its offer by issuing the ticket
  - Passenger accepts this offer when
    - They *board* the plane; or
    - Have had a *reasonable period of time* to consider the terms and have not taken steps to reject the offer
  - Stamp duty is only payable on contracts
  - This approach is somewhat different (artificial?)

- The judges infer the parties' intention in different ways:
  - Barwick CJ views the airline's intention as not manifesting itself until the passenger actually boards the plane
  - Stephen J views the airline's intention as manifesting in its issuing the ticket, and the offeree's intention to accept it as not rejecting the terms and conditions printed on the ticket within a reasonable timeframe

#### Decision

- The ticket did not record the terms of an agreement, but rather the terms of an offer which was subsequently accepted by conduct
- Barwick CJ and Stephen J reach different conclusions about which party makes this offer

## 2 *Unilateral contract*

A unilateral contract arises where the offeree accepts the offer by *performing* his or her obligations under the agreement.

Acceptance of this type of contract is effected by one party performing its obligations under the contract, leaving only one party with outstanding obligations owed to it after the contract is formed.

## 3 *Withdrawal and Reneging*

Withdrawal refers to one party refusing to continue negotiations or accept an offer prior to the contracts formation. Such conduct cannot amount to a breach of contract, because no obligations have yet been undertaken by either party.

Reneging occurs when, after the formation of the agreement, one party refuses to perform their obligations. Such conduct is said to 'renege' (go back on) the promise made to the other party, and may constitute a breach of contract.

## 4 *Criticism of Conventional Analyses of Offer*

- Inconsistency between contractual theory and practice
  - Intentions of the parties do not always manifest themselves in their actions
  - Objective determination of intention is often contrary to parties' actual intentions
- Unilateral contracts can give rise to difficulties

# II INVITATIONS TO TREAT

## A *Invitations to Treat*

An offer may only give rise to contractual obligations if it is intended by the offeror to do so. If this intention is not present, the statement is merely one of 'willingness to contract upon certain terms if the other party offers to deal on those terms.' Such statements are invitations to treat (to make offers on those terms).

Justification for the distinction between offers and invitations to treat:

- Commercial offerors should not be contractually obliged to provide goods of an advertised type and price to everyone who requests them, since the number of requests may be more than their available stock
- *Grainger & Sons v Gough* [1896] AC 325, 334:

*The transmission of such a price list does not amount to an offer to supply an unlimited quantity of the wine described... If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description he would be quite unable to carry out...*

### 1 Advertisements

Advertisements are generally regarded as invitations to treat, especially where the advertisement occurs in a catalogue or newspaper.

- Offers in catalogues are invitations to treat (*Grainger v Gough*), because no-one could ever offer to supply an infinite quantity of a product to everyone
  - The offer is always made by the customer
- Placing an advertisement in a newspaper does not amount to 'offering for sale' because it is an invitation to treat (*Partridge v Crittenden*)

### 2 Display of goods

Displays of goods in shop windows with prices are merely invitations to treat.

- In a self-service department store, the offer is made by the customer when they take their goods to the counter, at which point the shopkeeper decides whether to accept their offer (*Boots Cash Chemists*)
- Displays in shop windows are not 'offers for sale' but invitations to treat, even with a price tag affixed; the display is simply inducing offers for the listed price (*Fisher v Bell*)

### 3 Auctions

An auctioneer's call for bids is only an invitation to treat. Bidders make offers to buy at the asking price, which may be accepted 'by the fall of the auctioneer's hammer' (*British Car Auctions v Wright*).

However, goods offered for auction 'without reserve' implies the existence of a collateral contract that the goods will be sold.

- Sale 'without reserve' implies a unilateral contract to sell to the highest bona fide bidder; accepting a bid from the owner breaches that contractual undertaking, so the auctioneer is liable to the second-highest bidder in damages (*Warlow v Harrison*)
- Refusing to knock down two engine analyser machines to the highest bidder in breach of collateral contract between auctioneer and bidder (*Barry v Davies*)
- However, note *AGC (Advances) v McWhister* where it was stated by Holland J there is 'no reason to distinguish between [auctions with a reserve price and auctions without]'
  - Contra *Ulbrick v Laidlaw, Hughes Aircraft Systems International*

### 4 Tenders

Tendering involves one party (who to buy, sell, or have work performed) calling for expressions of interest from other parties in respect of the price at which they are prepared to deal. The first party then reviews the tenders and is at liberty to decide whether any will be accepted.

- Announcement calling for tenders is an invitation to treat; offer comes from the submitter of an individual tender, and each tender is a separate offer (*Spencer v Harding*)

However, a tender, in the presence of the right facts, can amount to an offer, since there may be an ancillary contract existing alongside the tender to accept the most competitive bid.

- If a party calling for tenders promises to accept the highest offer, a unilateral contract is created between that party and the tenderers obliging it to accept the highest tender (*Harvela Investments v Royal Trust of Canada*)

Similarly, if the parties enter into a preliminary contract governing the evaluation of competing tenders, the person calling for tenders is obliged to use the specified procedures and criteria to evaluate the tenders (*Hughes Aircraft Systems International*).

## B *Not Invitations to Treat*

**Definition:** the essential difference between an offer and an invitation to treat is the offeror's intention to be bound by any potential acceptance. Offers embody that intention. Invitations to treat do not.

In determining whether a statement is an offer, the intention of the alleged offeror is determined by reference to three factors:

- i Terminology used
- ii Limitations upon who could accept the offer
- iii Limitations upon what was being offered

In order for a party's conduct to be characterised as being a legal offer capable of acceptance, the facts must suggest that they intended to be bound.

### 1 *Offers to the world at large*

Offers to the world at large are quite capable of being an offer and not just an invitation to treat, provided that is what the offeror intended.

Examples of offers to the world at large:

- Rewards for information about or locating something
- Claims about the efficacy of trustworthiness of their products and rewards to for evidence to contradict these claims

***Carlill v Carbolic Smoke Ball Co:***

Facts

- CSBC offered a £100 reward for anyone who contracted influenza after using its carbolic smoke ball
- They stated that £1000 had been deposited into its bank account to show their sincerity
- Mrs Carlill bought and used their product, but still caught influenza, and sued after her claim for the £100 was rejected

Issue

- Can an advertisement be regarded as an offer to the world at large and not merely an inducement to customers to buy their product?

Reasoning

- An offer can be made to the world at large if that is the objectively determined intention of the offeror
- CSBC contracts will however many of the recipients actually accept it by using their product, falling sick, and claiming the reward
- The specificity of their offer and the deposit of money into their account are sufficient evidence of an intention to be contractually bound

Decision

- CSBC is liable to pay the £100 reward to the plaintiff

## 2 Terminology

In the context of everyday transactions, the term 'offer' does not necessarily imply the existence of a legal offer. Australian courts have shown a willingness to treat the usage of the word in legislation as applying to invitations to treat as well as offers (*contra* English approach).

- The word 'offer' in a legislative term must include invitations to treat (*AG (NSW) v Mutual Home Loan Fund*)
- Ordinary meaning of the word should be used in place of its legal meaning in a statute regulating shopping hours (*Goodwins v Gurry*)

The courts will also examine the language used to describe the alleged offer or conduct giving rise to an offer, if the facts are ambiguous as to whether an offer is being made (*AMP Society v Chaplin*).

## 3 Limiting the offer

If a merchant limits the number of possible acceptors of an offer, the problem of being bound to supply more persons than they have stock disappears. Where the number of persons is restricted to a certain number, the courts may be willing to infer an intention to be contractually bound, and thus recognise the existence of a legal offer.

- Where the number of stock is specified and the price and limitations of the offer clearly stated, what would normally be regarded as an invitation to treat may in fact be an offer to sell (*Lefkowitz v Great Minneapolis Surplus Store*)

If an offer is limited by using words such as 'one per customer' or 'until stocks run out', the words may – depending upon the facts – be taken as evidence of an intention to assume contractual obligations.

### III PUFF

**Definition:** puff is a statement which is so far-fetched that no reasonable person would believe it.

Puff may be used to induce a contract, but a not binding upon the party making them.

- Inclusion of Harrier Jump Jet as a prize in a promotion intended as a joke; no reasonable person would really believe that Pepsi could ever supply one (*Leonard v Pepsico Inc*)
- In determining whether a statement is an offer or just puff, courts will read it as it would be understood by members of the general public, having regard for its context (*Carbolic Smoke Ball Company*)

### IV COMMUNICATION

#### A Requirement

An offer cannot be accepted until the recipient is aware of its existence and content.

- If a plaintiff performs their obligations under a contract but is not aware of the contract when they do, they cannot benefit from the terms of the offer (*Fitch v Snedaker*)
- The motive of the acceptor is not relevant to determining whether they were aware of the offer (*Williams v Carwardine*)
- The offeree's alleged acceptance must be in response to and as a result of the offeree's knowledge of the offer; the offer needs to be in their contemplation at the time of their alleged acceptance (*R v Clarke*)
  - In *Clarke's* case, the plaintiff was arrested in connection with the murder of two police officers; he had heard of the reward for information leading to the murderer's arrest, but forgot about it, and gave the police information and evidence with the intention to clear himself of the murder charge and not to claim the offer, which he subsequently attempted to do (unsuccessfully)

#### B Cross-Offers

Where both parties send offers to one another with similar (or even the same) terms, there are two offers, but no acceptance. Either party is still free to withdraw (*Tinn v Hoffman & Co*).

### V TERMINATION

#### A Available Responses



Upon receipt, of an offer, an offeree can respond in any of several ways:

- Accept of the offer in its current terms;
- Reject the offer;
- Make a counter-offer;
- Ask for more information before making a decision; or
- Do nothing

If the offer is accepted, there is agreement, and thus (potentially) a contract, if the remaining elements (certainty, intention to be bound) are satisfied. If it is rejected, there is no offer and can be no contract.

An offer which is expressed to be open for a particular period of time lapses at the end of that period. If no period is stipulated, the offer will lapse after a reasonable period of time has passed.

If the offeree does nothing, the offer will eventually lapse. Offers must be accepted within a 'reasonable time' (*Denico v Zivanovic; Montefiore*). What is 'reasonable' is determined on the merits of each case, and by reference to the following factors:

- The nature of the contract's terms (whether they are dependant upon time); and
- The means used to communicate the offer (if the offer is transmitted by express means, it may be reasonable to infer that a rapid reply is required)

These factors are canvassed and approved by *Ballas v Theophilos* (No 2), in which a surviving member of a business partnership sought to buy out his partner's share (as provided by the deed) 16 months after his death. The value of the business assets were such as to fluctuate over time, so it was reasonable to expect that this option would be exercised shortly after the other partner's death.

## B Counter-Offers

A counter-offer is a new offer which destroys the original offer by modifying terms slightly. This new offer is then capable of acceptance by the original offerer (now the offeree). Once a counter-offer is made, the original offer cannot be accepted.

- When a counter-offer is made in response to an offer of land for sale, if the counter-offer is refused by the original offeror then the original offeree cannot then accept the original offer (*Hyde v Wrench*)

Inquiries as to whether an offeror might be prepared to modify their offer do not amount to a counter-offer. Mere inquiry is not an acceptance; nor is it a rejection.

- Use of the words 'please wire whether you would accept...' is not a counter-offer, but mere enquiry such as to keep the original offer open (*Stevenson v McLean*)

Where multiple contracts specify different (possibly conflicting) terms, the set of terms submitted last is that which takes precedence over all previous terms (*Butler Machine Tool Co Ltd*).

## C Revocation of an Offer

An offer is revoked when it is formally withdrawn by the offeror, after which point it can no longer be accepted. An offer may be revoked at any time prior to acceptance.

- A bidder is able to withdraw their bid at an auction prior to the fall of the hammer, because their offer has not yet been accepted (*Payne v Cave*)

A promise to hold an offer open is not contractually binding unless consideration is given for that promise (option). Even if the offeror promises to keep the offer open for a particular time, they cannot normally be held to it. If the offer is revoked by the offeror, the offeree cannot bring an action (*Routledge v Grant*).

The exception to this is if the offeree has provided consideration for the offeror's promise to keep the offer open for a certain period.

- 'An option given for value is not revocable' (*Goldsbrough Mort & Co Ltd v Quinn*)

### ***Mobil Oil v Wellcome International:***

#### Facts

- Mobil wanted to implement a 'tenure for performance' scheme
- This scheme was revoked four years later
- Franchisees who had met the performance targets up to the point when the scheme was revoked alleged the discontinuance of the scheme breached a unilateral contract

#### Issue

- Were Mobil's statements sufficient to give rise to a unilateral contract?
- Could Mobil revoke its offer to enter into a unilateral contract when the offeree has partially performed its 'obligations' under the contract?

#### Reasoning

- Trial judge:
  - Mobil had made an offer to enter into a unilateral contract
  - Mobil could not revoke this offer once the franchisees had embarked on performance
- Full Court:
  - No offer made because of vague and qualified nature of statements alleged to form the offer
  - Even if offer was made, it could be revoked unless:
    - An implied ancillary contract no to revoke exists; or
    - If the doctrine of equitable estoppel applies
  - Restitution analysis: both parties are benefiting from the measures undertaken by the plaintiffs; the franchisees have improved their business and service levels, while Mobil has improved its public image
- The Mobil executive's speech mentioned uncertainties and was phrased in terms of possibilities and relatively uncertain language, so could not give rise to an offer
  - But: the 'offer' went on for 4 years – surely uncertainties would have been resolved in this time?
    - No. The offer does not evolve – look at the offer only at the time it was (allegedly) made
    - This approach is perhaps too isolated from the realities of bargaining and the rapidly changing circumstances of modern transactions

- Other factors:
  - Whether or not franchisees undertake part-performance at their risk
  - Whether parties objective intended that the offeror should be able to revoke their offer

#### Decision

- In general, an offer made in return for the performance of an act is revocable like any other; it does not matter whether the offeree has partially performed
- On the facts, an ancillary contract not to revoke is unlikely to exist
- Therefore, Mobil was entitled to revoke the offer

#### Notes

- Consistency of approaches with the theory underlying contract law
  - The Full Court considers the objective intention of the parties
  - The trial judge bases his analysis upon traditional principles of contractual analysis
- Remedies in other areas of law
  - s 52 of the *Trade Practices Act 1974* (Cth) provides for actions by persons who suffer damage as a result of misleading or deceptive conduct
  - Negligent misstatement is a cause available to persons who suffer damage as a result of reliance upon negligent, incorrect statements from persons who assume responsibility for their accuracy
  - Restitution allows for unjust gains obtained by one party at the expense of another to be restored
  - However, the franchisees had lost nothing – though they spent money on improvements, they also earned additional money from them (through increased customer satisfaction, business efficiency, etc)
  - Because no expectation loss can be established, none of the above causes of action would be open to the plaintiffs on these facts

## VI HYPOTHETICAL

- Mention *MacRobertson*, but also look at general principles:
  - Contracts can only be formed when a valid offer is validly accepted
  - *MacRobertson* (Stephen J): notes the difficulty of fitting everyday transactions to the principles of contract law
- Possible times for contract formation:
  - 5 January (when the flight was booked)
    - No certainty (not enough time to consider the terms)
    - No acceptance (by the airline)
  - 9 January (when the letter of confirmation was received)
    - Test for acceptance is objective, so not reading the terms and conditions is irrelevant
  - ~12 January (reasonable time to consider terms)
    - Stephen J: offer is accepted by the passenger by failing to reject its terms within a reasonable period
  - 5 February (boarding the plane)

- Barwick CJ: offer is accepted by the airline company upon accepting the passenger on board the aircraft
- Comment upon these two judicial approaches and conclude which would be applied
  - Perhaps the outcome would be the same – note *MacRobertson*)
- Contractual theory criticism: should these issues really be resolved by reference to offer and acceptance or is it an artificial and problematic framework?
- Atiyah: would favour the approach of Barwick CJ (obligation arises when plane *gives* something to the other party; ie, the flight), but this could result in uncertainty (law and economics movement)
- If there was no contract between 9 January and ~12 January, how can the airline enforce a no refund policy?
  - The terms are clearly displayed, and the passenger has had a reasonable time to consider them since viewing the terms when booking the ticket
  - Ancillary contract: by booking under these conditions, the passenger offers to enter into another *agreement* that no refunds will be available
- Stephen J would allow refunds up until ~12 January (reasonable time to consider)
- Barwick CJ would allow refunds up until 5 February (boarding the flight)