CONTRACT LAW NOTES

1. Formation
2. Terms and Interpretation (+ Case Summaries)
3. Privity, Agency and Assignments
4. Termination
5. Misinformation
6. Unconscionability
7. Remedies (Common Law and Statutory)
8. Estoppel
FORMATION

Elements of a binding contract
A. Intention to create legal relations
B. Agreement
C. Consideration
D. Certainty & completeness

A. Intention to Create Legal Relations

1. Commercial Dealings
   Step 1: In order to ascertain whether the parties have manifested an intention to be legally bound to the agreement, the courts will assess each party’s words and conduct from the viewpoint of a reasonable person standing in the other party’s place.
   Step 2: It is traditionally said that intention to create legal relations is presumed to exist for commercial dealings.
   - However, in Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95, 106 the HC court held that if there is a dispute as to the intention of the parties, presumptions should not be used to establish intention, rather, the party who seeks to sue must establish intention.
   - However, in Shahid v Australasian College of Dermatologists (2008) 168 FCR 46 at [211], the use of the presumption that legal relations are intended in commercial agreements was reaffirmed.
   Step 3: The presumption can be rebutted if
   - There is contrary intention: parties to a commercial deal expressly provide that their agreement is binding in honour, not in law Rose & Frank Co v J R Crompton & Bros Ltd [1925] AC 445.
     ○ This only provides that there is NO contract and does not exclude the jurisdiction of the court.
   Step 4:
   - Intention found: Given that... a reasonable person would consider that the agreement has the objective appearance of a contract.
   - No intention: Based on the fact that... a reasonable person could not consider the agreement to have the objective appearance of a contract.

3. ‘Private’ or ‘Domestic’ Arrangements
   Step 1: It is generally presumed that domestic arrangements are not intended to have legal effect Balfour v Balfour [1919] 2 KB 571 (English case); affirmed in Australia thorough Sion v NSW Trustee Guardian. But according to, Ermogenous v Greek Orthodox Community intention must always be proven.
   Step 3: The onus rests on the person seeking to enforce an agreement to prove that the parties manifested an intention to be legally bound.

<p>| Financial relations | Agreements between | Other arrangements | Commercial arrangements |</p>
<table>
<thead>
<tr>
<th>between spouses</th>
<th>spouses who have/ are separating</th>
<th>between family members</th>
<th>between family members</th>
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| No binding contract. No legal consequence intended. *Balfour v Balfour* | British courts have been more willing to find intention. *Merritt v Merritt* | *Todd v Nichol*  
- Intention found when agreement contemplated a permanent arrangement.  
- Degree of reliance by the P on the agreement (P moved from overseas to live with D in Aust after D promised the family home to her. Agreement fell apart). | *Roufos v Brewster* (1971) 2 SASR 218  
- Intention found when parties entered into an agreement in pursuit of their independent commercial interests.  
- Whole arrangement is commercial rather than social or domestic.  
- Commercial flavour |
| *Sion v NSW Trustee & Guardian*  
- The presumption applies with diminishing force the more remote the family relation.  
- The vaguer the language of an arrangement and the greater its formality, the more difficult it will be to rebut the presumption | *Riches v Hogben* [1986] 1 Qd R 315  
- Binding when a reasonable person would regard it as so. |
**Step 4:**

- **Intention found:** Given that... a reasonable person would consider that the agreement has the objective appearance of a contract.
- **No intention:** Based on the fact that... a reasonable person could not consider the agreement to have the objective appearance of a contract.

**B. Agreement (prerequisite): Offer and Acceptance** (method of determining acceptance- doesn’t need to be linear)

**Memorandums of Understanding- Preliminary Agreements:** when parties have clearly reached an agreement, but contemplate formalisation

- **Masters v Cameron** (1954) 91 CLR 353
  1. Immediately binding as a contract, but parties will draw up a further, formal version (eg: Stirnemann v Kaza Investments Pty Ltd [2011] SASCFC 77).
  - Bound immediately whether or not a formal document is ever signed.
  2. Immediately binding as contract, Bound to bring the formal document into existence, but **no performance** required until agreement is formalised.
  3. **No binding contract** until agreement is formalised. Not bound unless a formal document is signed.
  4. **Lucke v Cleary** (2011) 111 SASR 134 Fourth possibility: agreement is binding as a contract, but parties will draw up a further, formal version with terms as agreed

**Offer**

1. **Offer** occurs when one party has **stated their terms**; and **indicated their readiness to be bound** when the other party accepts them. Alleged offer must be intended to lead to contract if accepted; Possible to have an offer to the whole world.

**Carlill v Carbolic Smoke Ball Co** [1893] 1 QB 256; **Australian Woollen Mills Pty Ltd v Commonwealth**

- **ASK: would a reasonable person would take the reward seriously?**: Deposit sentence of $1000 showed that the reward was not a mere puff in Carll; but the policy announcement in *Australian Woollen Mills*, was subject to change, hence a reasonable person would not understand this as an offer which was intended to lead to a contract.
- Straight forward application of facts. Offer because... OR no offer because... (see below)
1.1. Unilateral contracts *Carlill; Australian Woollen Mills Pty Ltd v Commonwealth* (1955) 93 CLR 546

- For a unilateral contract to exist, there must be a relationship of *quid pro quo* (this for that). 3 ways to establish
  1. Has the offeror expressly or impliedly
  2. Has the offeror stated a price that the offeree must accept for the promise?
  3. Was the offer made in order to induce the doing of an act?

1.2. Invitation to treat (indication of willingness to receive offers) is not an offer:

- Display of goods is an invitation to treat, not an offer because the customer can change their mind after taking the goods off the shelf; Customer offers to buy when they take the goods off the shelf; the acceptance is at the point of sale (register) *Pharmaceutical Society of GB v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401

- Presumption that a proposal to form a contract made through a generally accessible electronic communication (website etc) is an invitation to treat, not an offer. *Electronic Transactions Act 2000* (SA) s 14B

1.3. Auctions and Tenders

- **Auctions**: Calling for bids= invitation to treat; Submitting a bid= offer; fall of hammer= acceptance by auctioneer of offeror's offer. *Payne v Cave* (1789) 3 TR 148
  - Sale of goods by auction is complete when the auctioneer announces its completion and, until such announcement, a bid may be retracted *Sale of Goods Act 1995* (SA) s 57

- **Tender**: Invitation to treat. Each application is an offer which can be rejected.

- **Process contract (multiple contracts)** *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151
  - EG: Tender is announced, but details are included stating how each tender will be addressed= 2 contracts
    1. Process contract between person calling for tenders and everyone who puts in a tender;
    2. Contract to complete tender when offer made and accepted
      - Can sue under process contract if the tenderer rejects an offer for the tender which complied with the terms of the process contract. But cannot sue under the tender contract as this was rejected (ie-no contract)

1.4. Online Auctions

- **e-Bay**: *Smythe v Thomas* (2007) 71 NSWLR 537
  - 3 contracts
    1. Party A’s contract with Ebay to advertise and bid on goods
    2. Party B’s contract with Ebay to advertise and bid on goods
    3. Advertiser and purchaser make a contract between one another for the sale of goods
Acceptance is an unqualified assent to the terms of the offer which is communicated to the offeror. Two requirements:

1. **Fact of acceptance**: has the offeree actually accepted?
2. Has the acceptance been communicated to the offeror?

### 1. Fact of Acceptance

#### Forms
- Must be by method (if any) indicated by an offeror *Carlill v Carbolic Smoke Ball* above
- May be inferred from conduct *Empirical Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523
- Not from mere silence alone *Felthouse v Bindley* (1862) 142 ER 1037
  - Prohibition of ‘inertia Selling’ (imposition of a contract-seeking payment for unsolicited goods or services) *Australian Consumer Law (Competition and Consumer Act 2010 (Cth) Sch 2) ss 39–43; Fair Trading Act 1987 (SA) Pt 3*

#### Counter-offers or requests for information
- Counter offer is a rejection; mere request for info is not *Stevenson Jacques & Co v McLean* (mere enquiry)

#### No acceptance when (O & A does not correspond)
- Offeree introduces a new term (counter-offer which rejects the offeror’s offer) *Stevenson Jacques & Co v McLean* (1880) 5 QBD 346
- The offeree accepts subject to contract (no intention to be bound until the formal contract is signed) *Masters v Cameron*
- Offer was previously rejected without being renewed *Fletcher v Minister for Environment & Heritage* (1999) 73 SASR 474

#### Unilateral contracts
- **Acceptance** of an offer occurs when one party preforms the actions requested by the offeror (reward for doing an act - ie Finding a dog) *Carlill v Carbolic Smoke Ball*.
- **Presumption** that performance of an act with knowledge of offer indicates intention to accept *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (‘The New York Star’) (1978)* 139 CLR 231 at 271
  - Rebuttable when facts suggest there was no intention to accept (other motives) *R v Clarke* (1927) 40 CLR 227

### 2. Communication of Acceptance

2.1. Not effective until communicated (*Brinkbon*) Acceptance normally effective only when received by offeror *Carlill v Carbolic Smoke Ball*.

#### Exception: postal acceptance rule
- If parties contemplated acceptance by post, effective when sent, even if receipt is delayed or never happens *Stevenson Jacques & Co v McLean*
- Inapplicable to instantaneous forms of communication
  - Telephone
2.2 The battle of the forms

- When two companies send different contracts/standard forms to each other. Which contract is used?
  - English approach: the last form send is seen as a counter offer and will destroy the previous offer. *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 All ER 965
  - Not all contracts fit into the offer/acceptance style agreements
  - Where no offer and acceptance can be identified, need to ask whether an agreement can be inferred, whether mutual consent has manifested, and whether a reasonable person in the position of each party would think there was a concluded bargain. *Brambles Holdings Ltd v Bathurst City Council*

### Termination

Offer is terminated when it is **revoked, lapses** or is **rejected** by the offeree

### Revocation

- An offer remains open for acceptance for any period unless specified by the offeror, or otherwise for a reasonable time, unless revoked by the offeror. *Fletcher v Minister for Environment & Heritage*.
  - Offeror can revoke any time before acceptance by offeree. Revocation only effective on receipt.
  - Promise to keep an offer open is gratuitous promise which is unenforceable and can be broken. Unless the offeree gives consideration - creates a separate contract to keep offer open.

- **Unilateral**
  - Can revoke before the offeree performs the act
  - Offeror’s revocation of offer after the offeree has commenced performance is revocable at any time. Offeror will only be prevented from revoking the offer where there is an implied contract not to revoke or an estoppel. *Mobil Oil Australia v Lyndel Nominees Pty Ltd* (1998) 81 FCR 475

### Lapse

- Offer may lapse after a certain period of time expressly mentioned. If no mention of time, it will lapse after a reasonable period of time. *Fletcher v Minister for Environment & Heritage*.

### Rejection by offeree

- Counter-offer is a rejection
  - No rejection if reply is a mere enquiry. *Stevenson Jacques & Co v McLean*

### Revocation of Acceptance

- Only permissible if the acceptance has not been received by the offeror