

THE FACT OF AGREEMENT – OFFER & ACCEPTANCE

OFFERS OR OTHERWISE

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

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

An offer exists only where a reasonable person would conclude on the facts that the person was willing to be bound in a court of law.

Offers to the world at large are quite capable of being an offer *Carbolic Smoke Ball*

Mere Puff (An exaggerated or unsustainable claims about products)

In deciding whether an advertisement is a mere puff or an offer capable of being accepted and forming a contract, the courts must decide on how a 'reasonable person' in the position of the offeree would interpret the advertisement taking into consideration the vagueness and other details of the advertisement itself.

- Inclusion of Harrier Jump Jet as a prize = PUFF *Pepsico Inc*
- Reward if contact influenza + Deposit = OFFER *Carbolic Smoke Ball*

Supply of Information

A person who is merely supplying information in response to an inquiry is not making an offer.

- *Lowest price for ...* = STATEMENT *Harvey*

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.'

- Advertisement in a Catalogue / Circular *Grainger v Gough*
- Advertisement in a newspaper / Magazine *Partridge v Crittenden*
- Use of the words 'If you would like to make formal application to buy...' *Gibson v Manchester City Council*
- Displays of goods with prices attached *Fisher v Bell*
- Self-service department store *Boots Cash Chemists*
- Auctions with Reserve
- An auctioneer's call for bids *British Car Auctions*
- Call for tenders *Spencer v Harding*

Exceptions

- Auction 'without reserve' *Barry v Davies*
 - Auctioneer becomes the offeror and must sell the goods to the highest bidder
- Specific tenders *Blackpool and Fylde Aero Club*
 - Calls for tenders inc. detailed procedure and form of the submission & limited no.
 - An offer to consider all duly submitted tenders
 - Calls for tenders that promises to accept the highest offer
 - A unilateral contract is created between that party and the tenderers obliging it to accept the highest tender.

TERMINATION

An offer may be terminated at any time before it is accepted. However, once an offer is accepted it becomes irrevocable.

Rejection

If the offeree rejects the offer, the offer is terminated and cannot later be accepted *Hyde*

- Seeking credit terms ≠ REJECTION *Stevenson, Jacques and Co*

Revocation

An offer can be revoked by the offeror any time before it is accepted.

- Revocation must be communicated to and received by the offeree / offeree's agent *Dickinson*
- The offer can be withdrawn where the offeree has partly performed the terms of the offer unless it would be unjust to do so
 - Increased level of sales = BENEFICIAL ≠ UNJUST *Mobil Oil*

Counter-offer

A counter-offer is a new offer which destroys the original offer by modifying terms slightly. Once a counteroffer is made, the original offer cannot be accepted.

Lapse in time

Time stipulated - An offer which is expressed to be open for a particular period of time lapses at the end of that period.

No period is stipulated - The offer will lapse after a reasonable period of time has passed.

- 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)

Death

An unaccepted offer terminates on the death of either the offeror or the offeree

Exception – If the offeree dies, an offeror who is unaware of the death can still accept unless the offer requires personal involvement by the deceased.

Failure of a condition

An offer will lapse if it expressly or impliedly depends on a particular state of affairs that ceases to exist prior to acceptance.

CONSIDERATION

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In order to be enforceable, a promise must, be supported by valid consideration.

- That a benefit or detriment be incurred; and
- That there is a link between that benefit or detriment and the promise it is alleged to support

General

There must be a link between the promise and the consideration said to support it. Accordingly, consideration needs to be a bargained for, or request (whether implied or express).

Unilateral contracts ("I will give you X") = Acts in reliance are not valid consideration

- *Australian Woollen Mills*
 - Promise - Payment of Government subsidy
 - Consideration – Purchasing wool ≠ NOT VALID

Conditional promises ("I will give you X if you do Y") = Performance of Y is valid consideration

- *Carbolic Smoke Ball Co*
 - Promise – Payment of reward
 - Consideration – Purchase of smoke ball + Influenza = VALID

Consideration must move from the promisee

- *Benefit need not move to promisor* *Potential overlap with Doctrine of PRIVITY*
- *Joint promises*
 - If a contract is formed with joint promisees, consideration need only flow from one of the promisees for the contract to be enforceable *Coulls*

Adequacy of Consideration

Consideration must be sufficient but need not be adequate (*Thomas v Thomas* – £1 rent paid to keep the house of the plaintiff's deceased husband in repair; clearly inadequate, but sufficient in the eyes of the law).

Sufficiency of Consideration

There are two main forms of consideration which are insufficient:

- Past consideration

Past consideration is not sufficient to ground a new promise. This rule most commonly arises in situations where, after a contractual transaction has been completed, one of the parties makes an additional promise which the other seeks to enforce.

An exception to the past consideration rule exists in relation to promises to pay for services. Where there has been the performance of an act followed later by a promise to pay for the performance, the promise to pay will be supported by consideration and therefore enforceable if

- Earlier act was done at the promisor's request
 - *** Pao On*
- The parties understood at the time the act was done it would attract some payment or other form of remuneration
 - **** Pao On*
- Payment or other form of remuneration, must have been legally enforceable had it been made in advance of performance of the act
 - *** Pao On*

EQUITABLE ESTOPPEL

(If no consideration given)

Common law estoppel operates in relation to representations based on *actual* conduct.

Equitable estoppel operates in relation to representations or assumptions as to *future* conduct. Its scope of application is substantially wider, because it does not just determine evidence but can be a cause of action.

The effect of equitable estoppel is to prevent the representor from acting inconsistently with the assumption without taking steps to ensure that the departure does not cause harm to the relying party.

E There is no definitive statement on the elements of estoppel. However, three elements clearly must be established:

* Assumption or Expectation

Must be reasonable

- An existing or future legal relationship Brennan J in *Waltons Stores*
- An existing or future legal interest *Giumelli*

* Inducement

Assumption that is induced by the promise NOT the promise

An express promise is not necessary

- Silence and acquiescence *Waltons Stores*

Reliance

A casual link between the assumption and the action or conduct.

- The action or conduct must be reasonable

Knowledge or Intention

Brennan J in *Waltons Stores*

The representor must actually know, or intend, that the relying party will act or refrain from acting in reliance on the assumption

* Detriment

The relying party must be worse off in some way

- Reliance loss i.e. wasted expenditure for demolishing & building *Waltons Stores*
 - NOT expectation loss i.e. loss of expected rent
- Having to pay an amount all at once rather than by instalment *Je Maintiendrai*

The significance of the established detriment is that it is this factor which makes it unconscientious or unjust for the representor to depart from the promise

Failure to avoid detriment

Brennan J - *Waltons Stores*

- Not filling expectation

* Remedy

Equitable relief

The courts aim to do the minimum equity required.

- Reliance based *Waltons Stores*
- Expectation-based *Giumelli*