

PART IV – ACCEPTANCE

I ELEMENTS

A Definition

Definition: acceptance is an unqualified assent to the terms of an offer.

Any variation is a counter-offer, and constitutes rejection of the first.

B Approaches

There are two possible approaches to determining whether an offer has been accepted. Continuing tension between these views is exhibited by contemporary case law:

- 1 *Objective approach*
Determined by the outward manifestation of intention in the conduct of the parties
- 2 *Subjective approach*
Look to the presence of actual consent by each party

The favoured approach is objective (*Taylor v Johnson*).

Exam note: develop an opinion about the consistency of each approach with the tenets of contractual theory. Be prepared to evaluate each.

C Reliance upon the Offer

Unless a person performs the conditions of an offer in reliance upon it, they do not accept that offer and the offeror is not bound in contract.

Crown v Clarke:

Facts

- Clarke was involved in the murder of two policeman
- A reward was offered for information leading to the arrest of the persons who committed the murder
- It was also announced that a pardon would be extended to any accomplice who provided information leading to arrest
- Clarke was arrested for murder; he was aware of the reward and the pardon, and he made a statement that led to the conviction of the murders
- Clarke received his pardon, but claimed to be entitled to the reward

Issue

- Did Clarke provide the information with the intention of clearing his name or receiving the reward?
- Note that Clarke admitted that he had seen the reward notice, but that he made the statement to the police in order to clear his name

Reasoning

- Clarke never accepted or intended to accept the offer for the reward
- Ordinarily, intention is determined objectively
- However, a unilateral contract of this type is an exception to the general rule
 - The outcome would be the same if objective: a reasonable person in the position of the plaintiff would be most concerned about clearing his name, so their intent would not be to accept the offer
- On the facts, Clarke's admission in evidence reduces uncertainty about his intentions
- Estoppel could not be relied upon, because there was no reliance and no detriment

Decision

- The act alleged to be acceptance must be tied to the offer
- Because Clarke's conduct was not related to the offer, it could not constitute valid acceptance

II METHOD OF ACCEPTANCE

A General Rule

A person who makes an offer can stipulate a particular method of acceptance. Any subsequent acceptance must comply with such requirements in order to be effective.

However, acceptance cannot be forced upon the offeree; eg, by stating that unless the offeror hears something to the contrary they will take the offer as accepted (*Felthouse v Bindley*; uncle offers to buy horse from nephew; presumes silence to be acceptance; no contract).

The current test that is applied is: "would a reasonable bystander regard the conduct of the offeree, including his or her silence, as signalling to the offeror that their offer has been accepted?" (*Empirnall Holdings*).

Empirnall Holdings:

Facts

- E retained M as a property manager
- After initial work had been completed, M requested a progress payment and a contract for the work performed
- M was told to submit a progress claim but was informed that E's director 'does not sign contracts'
- Nevertheless, M sent E two copies of a building contract and requested the execution of the contracts
 - Work continued and progress payments continued to be paid
- As no contract had been signed, M wrote again to E stating that it was proceeding on the

basis that the conditions of the contract were accepted by E and that works were being carried out in accordance with those terms

Issue

- Was the contract between E and M validly accepted?

Reasoning

- Silence is generally insufficient to constitute valid acceptance
- However, communication of acceptance is *not* always necessary if other circumstances indicate the offer has been accepted
- Factors to consider include:
 - Customs of the profession or industry
 - The particular course of dealing
 - Any previous relationship between the parties
- This is a question of fact
- The test to be applied is:
 - Would a reasonable bystander regard the conduct of the offeree, including his or her silence, as signalling to the offeror that their offer has been accepted?
- McHugh J draws an analogy with the ticketing cases, where it was pointed out (per Stephen J) that acceptance could be inferred from the offeree after a reasonable time for rejection of the offer had passed but he did not
- This case is unlike *Felthouse*, where there was no custom or previous dealing between the uncle and nephew

Decision

- On the facts, the express statement that the directory ‘does not sign contracts’ should be taken to mean as an objection to the means of accepting a contract, not an objection to its terms
- There was valid acceptance
- The precise moment of formation could be either when:
 - Payments were made; or
 - A reasonable time period had elapsed since M’s final letter to E

Brambles Holdings:**Facts**

- Brambles managed the Council’s Solid Waste Disposal Depot
- The original contract between the parties established certain fees for general commercial waste and prohibited brambles from charging higher fees
- On 20 February 1990, the Council wrote to Brambles saying it was ‘appropriate’ for it to charge 1.1 cents per litre for liquid waste disposal (this amount was higher than contemplated under the original contract)
- On 19 September 1991, the Council wrote to Brambles explaining that it had resolved to increase liquid waste fees to 6 cents per litre, but that Brambles could only retain 1.1 cents
- On 3 October 1991, Brambles responded by denying that the original contract between them covered liquid waste; it also expressed dissatisfaction with the 1.1 cents ‘offered’ by the Council
- However, from this point on brambles proceeded to charge liquid waste fees at 6 cents per litre
- In 1996, the Council sued to recover the retained liquid waste fees (4.9 cents per litre)

Issue

- Was the offer of the 19 September letter accepted?

Reasoning

- The Council had to view the 19 September letter as constituting an offer
 - If they did not, damages under the original contract would be inadequate
 - Though there would clearly be a breach of the initial contract, there would also be no loss suffered by the Council in Brambles' conduct of charging 6 cents per litre
 - If the contract wasn't breached, then the Council would have received the same amount of the fees
- Heydon JA: the offer was accepted
 - The offer had been rejected (on 3 October 1991) and therefore could not be accepted
 - Contractual obligations are nevertheless imposed because of the circumstances of this case
 - Principle: if D had so acted that P was reasonably entitled to believe that D was assenting to the position asserted by P, D will be bound
 - Support for the notion that everyday situations are often difficult to formulate in terms of recognised categories of offer and acceptance, but that, nevertheless, the law is willing to recognise a contract
 - A 'big picture' approach: takes into account previous negotiations and agreements to infer acceptance
 - Similar to the approach of *Empirnall* and the ticketing cases
 - B had time to reject the offer – indeed, they did do so – but they continued to accept the benefit, so their conduct attracts contractual liability
 - They collected precisely 6 cents and, in doing so, did exactly what the offer said
- Ipp JA: the offer was accepted
 - Adopting a more traditional approach, the offer was not rejected; Brambles simply expressed dissatisfaction with the current terms
 - Refuses to reject the offer/acceptance model
 - Their conduct amounted to an implied acceptance of the offer (by charging the 6 cents per litre as specified in the letter)

Decision

- The Council's offer to charge 6 cents per litre (and retain 1.1 cents) was accepted and Brambles is liable in contract to the Council for the additional fees collected

Notes

- The approach of Ipp JA and Heydon JA do not sit comfortably with the classical theory of contract formation
 - Clearly, Brambles did not intend to be bound by the terms of the letter of 3 October 1991
 - Typical objective approach not necessarily all that different; issues of uncertainty resolved by reference to the appearance of conduct to the reasonable bystander
 - Discrepancies between inferred intent and actual intent are a necessary side effect of the use of objective tests in contract law

B *Postal Acceptance Rule*

In *Tallerman v Nathan's Merchandise*, Dixon CJ and Fullagar J noted that

[t]he general rule is that a contract is not completed until acceptance of an offer is actually communicated to the offeror, and a finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be inferred that the offeror contemplated and intended as his offer might be accepted by the doing of that act.

The time at which a contract is formed is when communication of acceptance reaches the offeror (not when communication is sent). However, some exceptions have been recognised to this general principle, such as the postal acceptance rule (*Brinkibon v Stahag*).

Brinkibon v Stahag Stahl:

Facts

- The buyers (an English company) sent a telex to Vienna accepting the terms of sale offered by the sellers (an Austrian company)
- The contract was not performed and the buyers wished to sue the sellers
- The sellers objected to the jurisdiction of the English court, but the buyers wanted to sue in England

Issue

- When was the contract formed? Was it formed in England or Austria?

Reasoning

- The courts recognise the postal acceptance rule as an exception to the rule that a contract is formed when acceptance is communicated to the offeror
 - Normally: contract not completed until acceptance of the offer has been communicated by the offeree to the offeror
 - Of course, this can be varied by the specific terms of the agreement
 - This rule gives way to the express intentions of the parties, with some exceptions (such as silence)
 - Postal acceptance rule: if it looks that parties intend posting a letter should indicate acceptance, then it occurs when the letter is put into the mailbox and not when it is received
 - The postal acceptance rule only applies where parties intend posting a letter to be indicative of their acceptance
 - Lord Wilberforce notes that 'no universal rule can cover all situations' and that they are ultimately 'resolved by reference to the intentions of the parties' (as objectively determined from their behaviour)
 - Need to consider temporality as well as locality
- Factors that may justify departure from the general approach:
 - The message is sent or received through a third party
 - Where it is sent out of office hours
 - Eg, on the weekend
 - Where it forms part of a negotiation process that is known to be drawing to a close, rather than unexpected acceptance
 - Where it is not intended to be read immediately
 - Eg, where the offeror is about to commence travel
 - These are all factual questions; the outcome depends on which factors Court weights in its analysis, and how it construes the facts
- The original justification for the postal acceptance rule was that the risk that an acceptance would not be delivered should lie with the offeror, who allows (implicitly or explicitly) acceptance by method of post

Decision

- ?!

Notes

- The approach does not give adequate consideration to the intentions of the parties as to which Court should have jurisdiction over the contract
 - The offer/acceptance model appears very contrived
 - Perhaps it would be better to look at where the negotiations occurred or where the work would be performed or the services rendered

Note: the postal acceptance rule does *not* apply to revocation. Where an offer is revoked by the offeror, it is not effective until communicated to the offeree.

C *Legislative Response*

Legislation has been enacted to resolve uncertainty about the time and location at which acceptance of a contract takes place.

The *Electronic Transactions Act 2000* (Vic) provides that:

- An electronic communication is despatched when it enters the first information system outside the control of the sender: s 13(1) and s 13(2)
- If the information system is specified for the purposes of communication, the time of receipt is when the electronic communication enters that system: s 13(3)
 - Similar to the postal acceptance rule, where the offeror intends that an electronic communication could constitute acceptance
- If the information system is not specified for the purposes of communication, the time of receipt is when the electronic communication comes to the attention of the addressee: s 13(4)
 - Similar to the general position that acceptance occurs when the offeror is made aware of it

III PROCEDURE

A *Order of Enquiry*

The following analysis may be employed to determine whether there is a valid accession to the terms of a contract, and, if so, when and where it occurred:

- 1 *Was there an offer?*
- 2 *Was the offer revoked?*
- 3 *Was there a counter-offer?*
- 4 *Was there conduct capable of being regarded as acceptance?*

- 5 *When and where did this conduct take place, and what was its mode of communication to the offeror?*
- 6 *If there was a delay between the offeree's conduct and the offeror's receipt of acceptance, was the method of communication used objectively intended to be used for that purpose?*
- If so, the postal acceptance rule may apply
 - If not, acceptance occurs when and where the communication is received
- 7 *What is the effect, if any, of the Electronic Transactions Act 2000 (Vic)?*
- 8 *What is your opinion on the validity of the common law rules of acceptance and their application to everyday circumstances? Do the statutory provisions adequately address ambiguity?*

B *Hypothetical – Exercise 5*

- 1 *Advise Boris*

This requires a general consideration of actions available to that party, and potential barriers to recovery:

a) *Offer*

- Offer is a willingness of a party to enter into contractual obligations
- Not an invitation to treat because it is not uncertain or casual
- But, rather, she explicitly offered to sell for \$4000
- The relevant invitation to treat is the advertisement

b) *Invitation to treat*

- There may have been an ancillary contract in the form of her promise to keep the offer open
- However, there is no consideration for the promise, and therefore no contractual obligations
- Equitable obligations may apply: reliance on representation, loss of banking fees
- It may be opportune to question the requirement of consideration and its impact upon the certainty of contractual dealings

c) *Revocation*

- Revocation: the postal acceptance rule does not apply to revocation (only acceptance)
- The time of revocation is when B receives notice (ie, Thursday)
- If B accepts before Thursday, there has been valid acceptance of A's offer

d) *Acceptance*

- Did A allow electronic acceptance?
 - Her business card, as it appears to the reasonable bystander (objective approach), seems to indicate 'yes', based on the inclusion of an e-mail address
 - UNCITRAL: business card not enough to evidence an intention to accept by e-mail
- The offer was accepted at 3pm, which was when the fax/e-mail was delivered to A's house
 - Regular business hours: not relevant, since not running a business
 - But: business e-mail address provided on business card
- Note Lord Wilberforce: no universal rule for determining acceptance

2 *Relevance of Letter, Holiday*

a) *Letter*

- Depends on whether postal mail was allowed as a valid means of acceptance
- If posted on Wednesday, then A postal acceptance rule would allow for acceptance when the letter of acceptance was posted in the mailbox (no difference)
- If general rule applies, then acceptance would not occur until A receives the letter (ignoring the other modes used by B to communicate acceptance)

b) *Holiday*

- Treating a business card as allowing the specified modes of acceptance seems reasonable
- If an e-mail address is specified on the business card, it may be assumed that it will be checked during business hours
- However, note the ECA provision
 - E-mail not acceptance until read by the offeror (A):s 13(4)1