



The Law of Contract

Introduction. Offer and Acceptance

Reference: CACL Chapters 2 and 3

Approaching legal cases.....

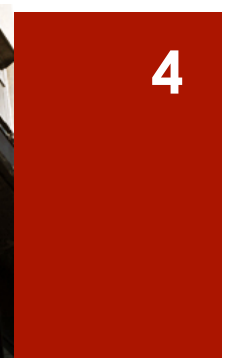
- Today, for the first time in your lives, you will be exposed to legal cases. If you have absorbed the lessons of the first topic you will know why we, in a common law system, rely so much on decisions in past cases. In a nutshell: precedent rules!
- So you need to know what happened in past cases (the facts), what the outcome was (the decision) and the reason for that decision (the legal principle or *ratio*) so you can figure out what to do in the case (or hypothetical problem) that is in front of you.
- So exactly what are you supposed to do? At this stage, I suggest you (and a partner or partners) take the main cases and:
 - agree on the main **facts**,
 - identify the legal **issue(s)** that arise from those facts,
 - make the **argument** that *each side* would have made (in every single case, without exception, there was a case to be made by each side – no-one goes to court (especially an appeal court) without a decent argument!)
 - note what the court said ('the decision') and
 - its reasoning (the legal principle or 'ratio').
- Then you will be able to handle the hypothetical tutorial problem – what are the main facts, what are the issues that arise from those facts, what is the law (as you understand it from your analysis of the cases - may be more than one option here) and how does it apply to your set of facts....
- That's what you do...

■ Introduction (CACL 2.10)

- Contracts are at the core of commercial activity in every developed and developing society (CACL 2.10)

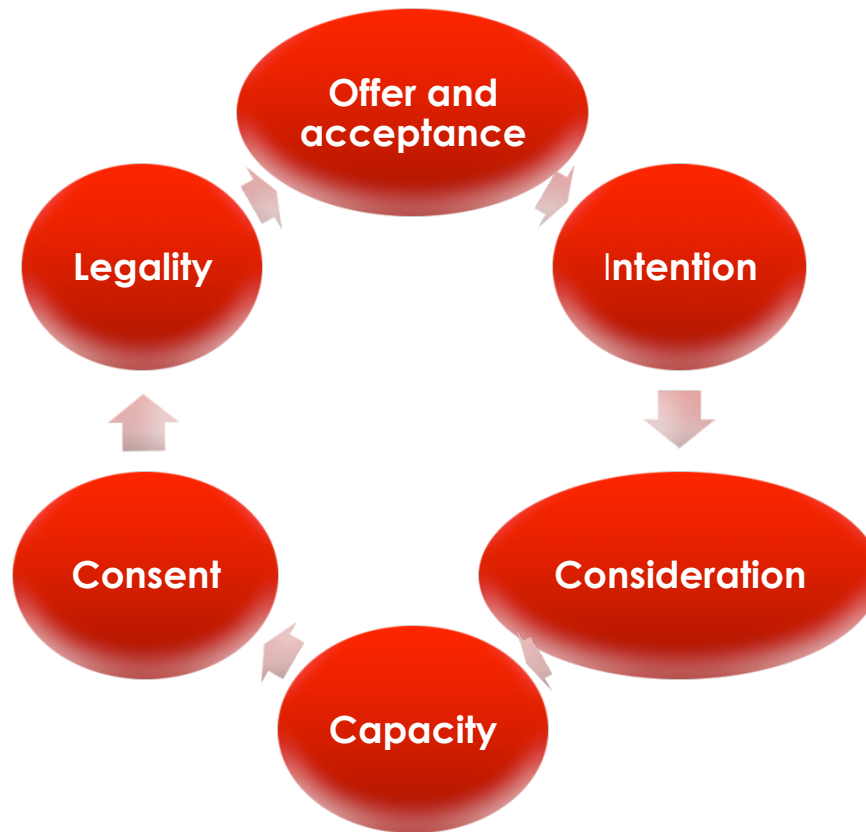
■ Definition (CACL 2.20)

- A contract is an **agreement** between **two or more parties** under which **legal rights and obligations** are created which can be **enforced**, if necessary, in the **courts**.
- Contracts come in all shapes and sizes and degrees of formality – can be written or oral or a mix
 - **see next slide** – before the lecture, think about the contract that might be associated with the object/person:
 - Which are likely to be **one-off (situational)** and which are **long-term (relational)**?
 - Which are likely to be **oral/formed by conduct** and which are likely to be **written or partly written/partly oral**?
 - Of the written ones, which are likely to be **signed by the parties** and which are likely to be **in writing** but **unsigned**?
 - Which are likely to contain both **express** and **implied** terms (**CACL 2.80**)
 - Which are likely to be **bilateral** and which may be **unilateral** (see **glossary and CACL 2.90**)
- Consider **the specimen contract** (p57) and ask the same questions



- **Evolution of contract law** (CACL 2.15)
 - **19th century origins in the common law** (law made by judges in cases) but since **mid-20th century statute law** (legislation made by parliament) is increasingly important. (**CACL 2.15**)
- **Function of contracts** (CACL 2.10)
 - **Planning** (re major contracts) – who does what and when?
 - **Risk** allocator (eg property and investment contracts)
 - Tool for **transfer of ownership** (car, land, shares)
- **Life cycle of a contract**
 - **Formation – Performance – Completion/termination**
 - **We begin with formation – does a contractual agreement exist?**

Formation – the essential elements of an enforceable contract (CACL 2.30)



Offer and Acceptance (CACL Ch 3)

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■ Introduction (CACL 3.10)

- Disputes often arise about whether there is an **agreement** or not. Agreement is the basis of (most) contracts. But it is not always easy to say whether an agreement was made. NB sometimes it's very easy to say there is an agreement but *if it is*, it's not in this topic!

- The first step is to see if there has been an offer and an acceptance.

■ What is an offer? (CACL 3.20) See fig 3.1 (CACL p70)

- In essence – an offer is a **proposal** by one party that is **communicated** to another person that indicates that the person is ready and willing to enter into an agreement if **the other person accepts...**
- In fact, it is sometimes not clear whether a particular communication is an **offer** or a **mere puff** or an **invitation to treat** or a **statement supplying information...** The distinction matters because a person cannot 'accept' a *statement that is mere puffery...or an invitation to treat...or any statement that is not an offer*

Is the communication an offer or something else?

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■ Is it an offer or mere puffery?

- Advertisements may contain statements that are, in effect, offers (eg this product is for sale for \$1000) or that are not to be taken seriously (puffery)
 - See the examples below and *Carlill v Carbolic Smoke Ball Co* (next slide) where the advert said the smoke ball would 'positively cure...'
- Compare *Leonard v Pepsi* (CACL 3.60) – https://www.youtube.com/watch?v=U_n5SNrMaL8
 - on what basis could the facts be **distinguished** from *Carlill*? In other words, why was the decision different?



CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

COLD IN THE HEAD,	COUGHS, CATARRH, ASTHMA,	HOARSENESS, LOSS OF VOICE,	THROAT DEAFNESS, SNORING,	INFLUENZA, HAY FEVER,	CROUP, WHOOPIG COUGH,
COLD ON THE CHEST,	BRONCHITIS,	SORE THROAT,	SORE EYES,	HEADACHE,	NEURALGIA.

As all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy.

£100 REWARD

WILL BE PAID BY THE

CARBOLIC SMOKE BALL CO.

to any Person who contracts the Increasing Epidemic.

INFLUENZA,

Colds, or any Diseases caused by taking Cold, after having used the **CARBOLIC SMOKE BALL** according to the printed directions supplied with each Ball.

£1000 IS DEPOSITED

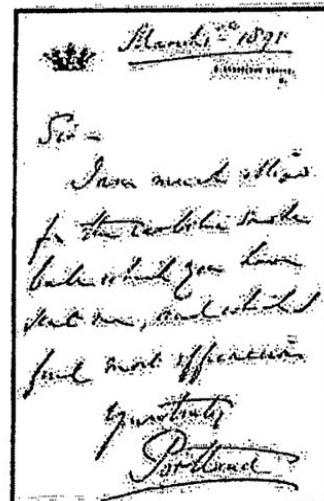
with the ALLIANCE BANK, Regent Street, showing our sincerity in the matter.

During the last epidemic of **INFLUENZA** many thousand **CARBOLIC SMOKE BALLS** were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the **CARBOLIC SMOKE BALL**.

One **CARBOLIC SMOKE BALL** will last a family several months, making it the cheapest remedy in the world at the price—10s., post free.

The **CARBOLIC SMOKE BALL** can be refilled, when empty, at a cost of 5s., post free. Address:

CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.



- **Is it an offer or an invitation to treat** (CACL 3.40-3.56).
 - An **“invitation to treat”** is just an indication of willingness to deal or trade. It is *not* an offer
 - *Gibson v Manchester CC* (CACL 3.35)
 - *Harvey v Facey* (CACL 3.38)
 - Why no contract when Gibson and Harvey ‘accepted’?
- **Shop displays, catalogues, advertisements:**
 - Invitation or offer from the seller? (see next slide).
 - Most advertisements are regarded as invitations to treat BUT it depends on the particular advertisement (eg Carlill)
 - *Pharmaceutical Society of GB v Boots CC* (CACL 3.42) and *Partridge v Crittenden* (CACL 3.43)



- **Auctions and tenders** (CACL 3.50-3.60)
 - **Auction with reserve price**
 - **Analyse the transaction: who is doing what?** invitation to treat – offer – acceptance?
 - *Harris v Nickerson* (CACL 3.140)



- Online auctions (eg eBay):
 - *Smythe v Thomas* (CACL 3.155)



- Tenders:
 - *Harvela* (CACL 3.170)

■ An offer can be made to

- a specific person or persons,
- a particular class of persons,
- to the 'world at large'
- See *Carlill v Carbolic Smoke Ball Co* (CACL 3.40)
 - Explain what a **unilateral contract** is and what issues the case raised about 'offers':
 - Offer or mere puff?
 - Offer to world at large?



■ Offer must be communicated

■ Revocation of the offer

- An offer is revoked when the offeror formally withdraws the offer.
- On revocation, the offer comes to an end and cannot subsequently be accepted.
- The offeror can give notice of the revocation of the offer at any time before acceptance.
- The revocation must be communicated to the offeree.
 - *Byrne v Van Tienhoven* (CACL 3.240) (see next slide)

• Options - need to be paid for ("consideration") or invalid

- *Goldsborough Mort v Quinn* (CACL 3.220)
- *Byrne v Van Tienhoven* (CACL 3.240) "...offer can be withdrawn at any time before it is accepted and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not."
- **Example for lecture** – Vendor (V): "HOUSE FOR SALE" for \$400,000 etc – Potential Buyer (B) – "I love it but I'll have to try to arrange finance." V – "That's fine. I'll keep the offer open to you for one week". B – "Thanks. I'll let you know within a week." V signs a contract with C the next day and informs B. **B seeks your advice**

- *Byrne v Van Tienhoven* (CACL 3.240)
 - 1/10—offer by post from L to NY
 - 8/10—no response. Off'or sends letter of revocation
 - 11/10—offer received by offeree in NY
 - 11/10—offeree cables acceptance-received 11/10
 - 20/10—revocation received.
 - Issue: agreement or not.
 - Answer? Why?

An offer will lapse if:

- not accepted within reasonable time
- not accepted within the time stated
- a *counter-offer* is made –
 - *Hyde v Wrench* (CACL 3.280)
 - compare request for information: *Stevenson Jaques v McLean* (CACL 3.300)
- one party *dies/incapacitated* before acceptance: *Carter v Hyde* (CACL 3.320)

Acceptance (CACL 3.168-320)

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1. **Acceptance must be communicated** (oral, in writing, or by conduct or, in the case of unilateral contracts, performance of an act)
NB postal acceptance rule (slide 19)
2. **Acceptance may be implied by conduct:** see *Empirnall* (CACL 3.350)
3. **Offeror cannot impose silence by offeree as acceptance:** *Felthouse v Bindley* (CACL 3.370)
4. **Offeree must be aware of the offer:** *Rv Clarke* (CACL 3.390)
5. **Unilateral contract** – acceptance is by performance - offeror waives right to communication of acceptance: *Carlill* (CACL 3.40)

6. **Acceptance must be unconditional:** *Masters v Cameron* – ‘**subject to...**’ (CACL 3.420); *Stellard v North Q’ld Fuel* (CACL 3.430) and *Godecke v Kirwan* (CACL 3.440)
7. **Acceptance must follow the conditions (if any) in the offer.** If acceptance must be communicated in writing in French – so be it.
8. **Acceptance can only be made by the party to whom the offer was made.**
9. **Acceptance can be revoked at any time prior to acceptance being communicated** (NB postal acceptance (next slide) or electronic communication (slide 19))
10. **Acceptance must be communicated within time or a reasonable time – NB**
- offers lapse
11. **Electronic communication**
 - common law – *Brinkibon v SSS* – contract is formed where acceptance is received...why relevant?
 - Statute - the *Electronic Transaction Act 1999* (C’tl) (CACL 3.610 – 3.710) and slide 19

■ Postal Acceptance Rule – the exception

- Where **an acceptance by post is contemplated by the parties**, acceptance is complete when the letter of acceptance is **posted** not when it is communicated: *Henthorn v Fraser* (CA 1893).
- Postal acceptance rule only apply to **acceptances** - does *not* apply to offers or revocations.

- **Electronic communications** – CACL 3.370
 - **Common law** – electronic contracting involving **telephone, or email** – the formation of a contract between the parties is governed by the **general rule** that a contract is concluded at the **time** when, and the **place** where, the acceptance is **received**.
 - **Statute** – the *Electronic Transactions Act 1999 (C'th)* (CACL 3.600 – 3.710)
 - Covers all forms of electronic commerce
 - Validity – electronic transactions are valid: **s8**
 - Signature – equivalent of a signature if method of identification and intent is clear: **s10**
 - Time of receipt: received by addressee... 'when capable of being retrieved' by addressee at an electronic address designated by addressee: **s14**

Vagueness, uncertainty, incompleteness

(CACL 3.380)

- If the “contract” is too vague, uncertain or incomplete it will not be enforceable.
- Sometimes difficult to know - if you are negotiating a contract, you need to be aware that once the **essential terms** are agreed to, the contract may be enforceable because the courts will attempt to make the contract work provided the parties have agreed on the essential terms.

Read the following two cases carefully and be ready to explain why the agreement **was enforceable** in the **first** one but **was not enforceable** in the **second**:

- *Council of the Upper Hunter* (CACL 3.730)
- *Crown Melbourne Ltd v Cosmopolitan Hotel* (CACL 3.760)

Summary

- After this week the non-lawyer commercial negotiator should be aware of the following:
 - What a contract is (a legally enforceable agreement) and its true functions in commerce (planning, risk allocation, creating rights and obligations)
 - Contracts can be very formal (deeds), in writing or oral – or a mix of both. Just because the agreement is not in writing does not mean you cannot have a contract.
 - The importance of agreement or consent – without it there is no enforceable agreement.
 - First step is to show there was an offer and an acceptance of the offer
 - Note the particular rules in relation to each
 - **Important cases: see the slides.**