

BUSINESS LAW IN PRACTICE

VIVIEN CAMPBELL

JUNE 2010 EXAMINATION

FIRST MAILING: CONTRACT AND AGENCY LAW

INTRODUCTION

Contract

Unit One:	The scope of contract
Unit Two:	Offer and acceptance
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Unit Six:	The terms of a contract & The Unfair Contract Terms Act
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Agency Contracts

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Mock examination questions weeks 1, 2 & 3.

VIVIEN CAMPBELL: DISTANCE LEARNING

ICSA DIPLOMA IN BUSINESS PRACTICE: BUSINESS LAW IN PRACTICE

JUNE 2010 EXAMINATION

INTRODUCTION TO THE COURSE

Welcome to the Business Law in Practice distance learning course for the JUNE 2010 examination. I do hope you enjoy your studies with me.

At the outset I would like to restate that I am on the end of the phone or email if you get stuck. The idea behind this distance learning course is that you learn what is necessary to pass the Business Law examination. To this end the core material that you must know is identified in the UNITS. These are divided into manageable elements which allow you to read, digest and recall in short concentrated bursts. Use the accompanying references to the ICSA recommended text book to supplement your understanding.

Each mailing contains the units ending with mock examination questions. **At the end of this section are three questions I would like you to try**, one a week, based on the new exam paper. Please post or fax through to me: I will mark and return with helpful comments and tips.

Do not worry about keeping strictly to the regime as I will always mark your assignments whenever you send them.

THE FORMAT OF THE EXAM

This exam is **three hours long**.

The exam paper consists of Two Sections, Section A and Section B.

Section A of the examination paper. Total Mark: 25

Section A consists of **two questions** which are **compulsory**.

Question 1 is divided into 5 parts carrying **2 marks each** making a total of 10 marks.

Question 2 is divided into 5 parts carrying **3 marks each**, making a total of 15 marks.

These questions are compulsory, and do NOT follow the pre seen case that you will be given.

Section B of the examination paper. Total Mark: 75

Section B consists of **5 questions from which you must answer 3**. Each question carries 25 marks making 75 in total. Many of these questions are split into parts.

In Section B your three answers MUST follow the pre seen case.

In my long experience of lecturing I have seen this type of examination paper many times. In fact this was also the method that I had to answer when I qualified. One of the best tips is to do the obvious and answer the high markers first, such as Section B questions (25 marks each) followed by the Section A (2/3 mark questions), this will gain you the most marks. DO NOT waste time answering a section A question when you do not know the answer!!

For those of you studying law for the first time do not worry. I will correct you and help you develop your style when I receive your answers. Now let's get down to the course itself. Good luck!

Vivien

UNIT ONE

THE SCOPE OF CONTRACT

RECOMMENDED TEXT READING:

For this first booklet the relevant sections **Business Law in Practice** by **TOM MORTIMER** are **Chapters 4, 5 and 6.**

DEFINITION: A contract is an agreement giving rise to obligations which are recognised or enforced by law.

Most people think that a contract is a formal written document, which must be drawn up by a lawyer and is then signed in the presence of witnesses! This is far from the truth. Some business contracts of course have to be formally written, but around 99% of contracts do not. Can you imagine going to your local supermarket and for every item you purchased you were faced with this formality!! Thus the vast majority of contracts are entered into quite informally, with most parties being unaware of any legal significance. Consider the agreements you may have entered into in the past few days, contracts for the purchase of rail tickets, food, utilities, telephone calls, dry cleaning and much more. So when do we know that a contract has been formed? The answer to this is when all the legal requirements have been fulfilled.

I see the following as ingredients/recipe of a cake, if one is missing then there is no cake!

There are FIVE elements required for an agreement to be recognised by law. These are:

- a) **Offer and acceptance, or in other words; agreement.**
- b) **Consideration**
- c) **Intention to create legal relations**
- d) **Form**
- e) **Capacity**

A contract possessing all these elements is said to be valid.

This agreement can be reached in one of three ways:

- a) **Orally** e.g. Buying food in a shop
- b) **In writing** e.g. Opening a bank account
- c) **By implication** e.g. by putting petrol in a car

The actual contents, or obligations of the agreement are called the **TERMS** of the CONTRACT. These can be either EXPRESS or IMPLIED.

THE OPERATION of the CONTRACT may be **VITIATED** by any of the following problems:

Here we have our perfect cake but something comes along and ruins it! I.e. the decoration goes wrong! Vitiating means to “**spoil.**”

- a) Misrepresentation
- b) Mistake
- c) Duress or Undue Influence
- d) Restraint of Trade
- e) Illegality

When a contract comes to an end it is said to be **DISCHARGED**. This will occur in one of the following ways:

- a) By performance
- b) By agreement
- c) By frustration
- d) By breach of contract

Should the contract be discharged by breach or frustration the law will provide a remedy for the injured party.

UNIT TWO

AGREEMENT IS BOTH OFFER AND ACCEPTANCE

OFFER

AN OFFER IS AN EXPRESSION OF WILLINGNESS TO CONTRACT ON CERTAIN TERMS WITH THE INTENTION THAT IT SHALL BECOME BINDING AS SOON AS IT IS ACCEPTED.

This can be made to a specific person, a group or indeed to the whole world.

Thus is **Carlill v. Carbolic Smoke Ball Co. (1893)**, the defendant advertised that they would pay £100 to anyone who contracted flu after using their smoke ball for ten days. Mrs Carlill did as the instructions directed, unfortunately she contracted influenza. She claimed the reward. The defendants argued that it was not possible to make an offer to the whole world. This was rejected by the court, which held that an advertisement that constituted an offer could be made to the whole world. This offer was accepted by Mrs Carlill when she purchased the smoke ball and used it as directed.

INVITATION TO TREAT

Care must be taken to distinguish an offer from an invitation to treat. **An invitation to treat is an 'invitation to make an offer'. The person holds himself out ready to receive offers.**

Essentially the distinction will be made on the facts of each case but the following rules have been established:

(a) **DISPLAY OF GOODS IN SHOPS**

The display of goods in a shop, whether with price tags or not, in a window or on the shelves of a supermarket. Is an invitation to the customer to make an offer which the shopkeeper can accept or reject. The shopkeeper is under no obligation to sell his goods to a particular customer.
Boots v Pharmaceutical Society of Great Britain (1953)

(b) **TENDERS**

The invitation to tender is an invitation to treat. The person submitting the tender makes the offer. There are special circumstances with standing tenders (sometimes called standing offers): the person inviting the tender **ONLY** accepts the offer every time an order is placed. The bidder can withdraw at any time provided there is no specific order placed.
Great Northern Railway v Within (1973)

(c) **AUCTION SALES**

The offer is made by the bidder and not the auctioneer.

(d) **ADVERTISEMENTS**

Care must be taken to distinguish an offer from an advertisement.

Generally advertisements are invitations to treat. They invite customers to make offers.

The display of goods in a catalogue is not an offer:
Partridge v Crittenden (1968)

However if the advertisement is precise and lays down a method of acceptance it will change and become an **OFFER TO THE WORLD AT LARGE.**

This is well illustrated in the case of *Carlill v Carbolic Smoke Ball Co.*

(e) **COMPANY PROSPECTUSES**

When a company wishes to raise capital by selling shares the public, it issues a prospectus, which is an invitation to treat, inviting the public to make an offer to purchase the company shares. The directors will then decide when they receive the appropriate completed forms (which constitute the offer), who to allot the shares to, this will be the acceptance.

RULES CONCERNING OFFER

Having distinguished an offer from an invitation to treat, we must consider the rules developed by the courts to decide disputes over the meaning of offer.

(a) **A statement of price is not an offer.**

Harvey v Facey (1893)

(b) **An offer must be certain and clear.**

Scammell v Ouston (1941)

(c) **If an offer is uncertain but the parties have had previous dealings, the courts will refer to the previous dealings in order to clarify the offer.**

Hillas v Arcos (1932)

THE TERMINATION OF AN OFFER

An offer will come to an end in any of the following circumstances:

(a) **ACCEPTANCE.**

(b) **REVOCAION.**

Revocation must be communicated to be effective. It is not necessary for the offeror himself to tell the offeree that the offer has been revoked, provided that the information is communicated by a reliable third party, and that no acceptance has taken place.

Dickenson v Dodds (1876) Dodds offered to sell his house to Dickenson, and promised to leave the offer open for three days, although there was no consideration given for this promise. The plaintiff had decided to accept this offer for the house, before he could communicate this to Dodds. A Mr Berry an apparently reliable person informed him that the house had been sold to another. The plaintiff then attempted to communicate his acceptance, and stated that the three days were not yet expired. The Court of Appeal held that the manner in which the revocation of the offer took place was acceptable as Dickenson had been informed that revocation had taken place by a reliable third party, before he accepted the offer.

(c) **REJECTION.**

This constitutes an outright "no thank you"! But a counter offer also acts as a rejection.

Hyde v Wrench (1840)

(d) **LAPSE OF TIME.**

The offeror can set a definite time limit, which can expire. If no time limit is set, the offer will expire after a reasonable period.

Ramsgate Victoria Hotel Co. v Montefiore (1866)

(e) **DEATH.**

Death affects the offer in a number of ways. If it is an offer for personal services, the death of the offeror terminates the offer. In other cases if the party accepting knows the offeror has died, the acceptance is invalid. If neither of the two above, the offer remains open and can be accepted.

(f) **KEEPING AN OFFER OPEN**

A promise to keep an offer open can be legally enforceable provided a separate contract is entered into agreeing to do this, and that some form of consideration is given for this option.

ACCEPTANCE

AN ACCEPTANCE IS THE FINAL EXPRESSION OF ASSENT TO THE TERMS OF AN OFFER.

Acceptance must be unconditional. If the acceptance is qualified, e.g. a new condition is imposed; there is no acceptance but a counter-offer.

In the case **Hyde v Wrench (1840)**, Wrench offered to sell his farm to Hyde for £1000. Hyde replied with a counter offer of £950, which was refused. Hyde then said that he was prepared to meet the original offer price of £1000. It was held that no contract had been formed. The "counter-offer" of £950 had in effect been a rejection of the original offer.

Acceptance may take any form. It can be given orally, by conduct or in writing.

But if the offer lays down the method of acceptance this must be followed in order for the acceptance to be valid.

However one method of acceptance that can never be imposed is **silence**. This is shown in two situations:

- 1) **Felthouse v Bindley (1863)** where the courts refused to accept a term stating that silence constituted agreement.
- 2) **UNSOLICITED GOODS & SERVICES ACT 1971**. If unwanted and unrequested goods are sent to a person, he has two options:
 - a) **DO NOTHING** and if the goods are not collected within six months they become his property, OR
 - b) **INFORM THE SUPPLIER** and if the goods are not collected within thirty days they become his property.

Acceptance must be communicated.

There are **two 'exceptions'** to this rule:

Entores v Miles Far East Corp (1955).

- (a) **An offer to the world at large** is accepted by performance;
- (b) **The Postal Rule**. When using letters and telegrams, acceptance is complete on posting in an official letterbox or handing the telegram to the counter clerk. (Unless otherwise agreed)
Household Fire Insurance v Grant (1879)

The Electronics Communication Act 2000 states that (unless the parties agree otherwise) any electronic order and acknowledgement of that order "are deemed to be received when the parties to whom they are addressed are able to access them". This would indicate that with e-mail communications, receipt will occur when the message has been downloaded from the server and is therefore capable of being accessed.

Regarding internet contracting, there are usually various buttons to press when placing an order, the retailer then checks his stock, ensures that the goods ordered are in stock and sends a confirmation. Hence the offer is made by the customer when he presses the appropriate button and the acceptance takes place with the confirmation e-mail.

An acceptance is conditional on the offer remaining constant.

Financings v Stimson (1962)

Whether the words used by the parties constitute acceptance is in the final analysis, a question of construction for the courts. *Branca v Cobarro (1947)*. The words "Subject to contract" are used in negotiations involving the sale of land. These words usually mean that the parties do not want to be bound at this stage until searches and surveys are completed. (Or any other legal matters sorted out before the purchase). The advantage to the contracting parties is that they are able to withdraw at any time, but the problem is that until the contract is formally signed; expenses incurred may be considerable if ultimately one of the parties decides not to continue.

Walford v Miles (1992)

The Battle of the Forms

Butler Machine Tool v Ex-Cell-O Corporation [1979]

Butler quoted a price for a machine tool with a ten-month delivery date. The quotation contained terms stating that Butler's terms were to prevail over any terms in the buyer's order. Butler's terms contained a price variation clause.

Ex-Cell-O ordered the machine on their order form, which stated that Ex-Cell-O's terms were to prevail. These terms provided for no variation in the contract price and included a "tear-off" strip which said: "Acknowledgement: please sign and return to Ex-cell-O. We accept your order on the terms and conditions stated therein- and undertake to deliver by date signed".

Butler signed the form. By the time Ex-Cell-O took delivery of the machine, Butler's Costs had risen and Butler claimed an extra £2892 under the price variation clause. Ex-Cell-O refused to pay the extra.

Whose terms were to prevail?

- a) Butler's terms were an offer.
- b) Ex-Cell-O's reply was a counter-offer.
- c) By signing the slip Butler had accepted Ex-Cell-O's terms.
- d) **Ex-Cell-O's terms prevailed despite the statements in Butler's original quotation.**