

## Overall checklist

### Formation?

- Agreement
  - Offer
  - Acceptance
- Consideration
- Intention
- Certainty and completeness
- Capacity or formalities

### Misleading and deceptive conduct?

### Equitable remedies

- Part Performance
- Common intention constructive trust

### Estoppel?

### Unjust enrichment and restitution?

## Agreement

**Issue:** Is there an agreement?

**Rule:** Agreement satisfied when an offer is made and accepted prior to being revoked

**Sub-issue:** Has an offer been made?

**Sub-rule:** State the law (Executory? Gibson. Unilateral? Carlill.)

**Sub-application:** Apply to facts, considering:

- Is language of the offer clear? (Gibson, Mobil)
- Is it just an invitation to treat? (Gibson)
- Does it use the language of commitment? (Gibson, Mobil)
- Does it use the language of command? (Brambles)
- Is it mere puffery? (Carlill)
- Was it an announcement of policy? (AWM)

**Sub-conclusion:** Offer/no offer based on facts

**Sub-Issue:** Does the offeree's conduct amount to acceptance?

**Sub-application:** Apply to facts, considering:

- Unqualified assent? (Gibson)
- Have they communicated acceptance in the manner specified by offeror? (ETA)
  - Unilateral contract, performance (Carlill)
- Silence/ambiguity: manifestation of acceptance by conduct? (Brambles/Empirnall)

**Sub-Issue:** Was the offer revoked prior to acceptance?

**Sub-application:** Apply to the facts, considering:

- Has revocation been communicated to the offeree?
- Was acceptance communicated before withdrawal?
- Unilateral? May revoke before completion of performance (Mobil)
  - Unless implied ancillary contract

**Conclusion:** Overall conclusion- was there an agreement?

## Consideration

**Issue:** Has the consideration requirement been satisfied?

**Rule:** Each party needs to give something valuable in exchange for a contract to be binding

Sub-Issue: Has the **benefit/detriment** requirement been satisfied?

Sub-Rule: Valuable consideration must consist of a benefit or detriment (Currie v Misa)

Sub-application: Apply facts to rule above. Consider:

- Was it past consideration? (Roscorla)
- Was it a promise to perform an existing legal duty? (Stilk) If so, is it an exception to the rule?
  - Was promise part of a bona fide compromise? (Wigan)
    - Is there a disputed claim?
    - Is the claim frivolous or vexatious (or made in good faith)?
  - Does practical benefit exception apply? (Musumeci)
    - Agreement exists
    - Reason to doubt A can complete
    - B promises an additional payment or concession
    - B obtains practical benefit, or A suffers a detriment
    - B's promise was not result of duress, fraud, undue influence
  - Was promise made to a third party?
  - Has contract been terminated/replaced?
  - Has there been fresh consideration? (Brambles)
- Is it something the law doesn't see as valuable? (e.g. love/affection)
  - Kirby J, Beaton: For B's benefit, akin to domestic/social arrangement

Sub-Conclusion: Conclude based on application to the facts of the case

Sub-Issue: Has the bargain/exchange requirement been satisfied?

Sub-Rule: Must be element of quid pro quo between promise and act (AWM)

Sub-application: Apply facts of the case to rule above. Consider:

- Was there a quid pro quo relationship? (AWM)
- Was it merely a conditional gift?
- Was there explicit/implicit request? (Carlill, AWM)
- Reliance is *not* valid consideration (Beaton, AWM)

Sub-Conclusion: Conclude based on the application to the facts

Conclusion: Was the consideration requirement met?

## Certainty

### A SAFE APPROACH:

- (1) Identify the OFFENDING TERM, and write it out in full (underlining the particularly uncertain terms).
- (2) Describe what the ISSUE is (incomplete, unclear, illusory, agreement to agree?)
- (3) Is the term ESSENTIAL? (If so, the contract is likely in danger. If not, it may still survive).
- (4) CHARACTERISE the contract's objective meaning. Can meaning be supplied (third parties, extrinsic materials, other terms)?
- (5) If the term is meaningless or subject to 'an agreement to agree', can the term be SEVERED OR WAIVED?

**Issue:** Is there sufficient certainty?

**Rule:** unless parties' essential obligation can be clearly articulated, there is no contract

Sub-issue: Is the agreement (or term) incomplete (or, is there omission)?

Sub-rule: A contract must contain all the essential elements of the transaction

Sub-application: Consider:

- Court can imply terms which are non-essential
- Where price omitted, ascertained by a 'reasonable price' (s13 Goods Act)

Sub-conclusion: Conclude based on the facts

Sub-issue: Is there an 'agreement to agree' (deferment)?

Sub-rule: Where essential terms are to be decided by one of the parties themselves, contract is uncertain (unless expressly vested with determinative authority at formation)

Sub-application: Consider:

- Court cannot 'fill gaps,' replacing the term and undermining parties' intentions (BT)
- Essential terms may be decided by third parties (Godecke)
  - Walsh J, Godecke: required to act reasonably and consistently w contract
  - Acceptable if third party is your solicitor (possibly not others?)
  - Gibbs J, Godecke: If third party refuses/unable, court may substitute
- If only one party has to agree, it is not deferment (Meehan)

Sub-conclusion: Conclude based on the facts

Sub-issue: Is a provision too vague/unclear to be enforceable?

Sub-rule: Contract may fail because a particular term is too vague or imprecise to attribute any meaning (Whitlock)

Sub-application: Consider:

- If capable of meaning, court will endeavour to give meaning to the term (UH)
- Court cannot give meaning to terms incapable of one (Whitlock, Gibbs in Meehan)
- Fact-based analogous analysis
  - Whitlock: no 'reasonable' terms discernable
  - Upper Hunter: terms not incapable of meaning- external standard of reasonableness
  - Biotech: no way to quantify 'reasonable' equity sharing scheme

Sub-Conclusion: Conclude based on the facts