For a contract to be formed, there must be:

- **Offer**
- **Acceptance**
- **Consideration**

Without all three, there can be no contract. Each are subject to different rules.

When assessing them:

- The terms are judged by an "objective standard", as established by *Smith v Hughes*.
- There are certain restrictions and aspects that must be judged differently.

The Objective Principle

Whether an agreement is formed, and the terms of that agreement, are based on the objective assessment of what a reasonable person in the position of the party would have been lead to believe by the conduct of the other party.

> *"If, whatever [A's] real intention may be, [A] conducts themselves that a reasonable person would believe that [A] was assenting to the terms proposed by [B] and [B] upon that belief (that [A] had consented to those terms) entered into a contract with [A], then [A] would be bound as if [A] had intended to agree to [B]'s terms" – Smith v Hughes,* per Blackburn J.

Note: If one party is aware that the other is mistaken as to the terms of the contract and is agreeing to a contract on other terms, then that party cannot be reasonably led to believe that the other was assenting to their terms - *Ryledar v Euphoric.*

Offer

Was there a clear offer?

Master of the Offer: the offeror can alter or withdraw it at any point up before it is accepted. Similarly, they can stipulate any means of acceptance they choose (though if it's not clearly the *only* form of acceptance they will take, then it may not be exactly necessary).

Lapse – at either a set time, or in a reasonable time.

What, specifically, was asked in the offer?

Acceptance

Was there acceptance?

- "Mere indication of a particular means of acceptance without prescription that only acceptance in that mode will be binding does not preclude acceptance by any other, not less advantageous mode" – *Allbrite*.

- The mode of acceptance can be specified (master of their offer) such that only acceptance in that particular mode will constitute proper acceptance.

- If the offer stipulates that "a particular action" will be taken as acceptance, then it is likely that this will not be valid (see—accord and satisfaction: *Magnum Photo Supplies* (CA), *Dalgety v Morton* (HC))

Postal Acceptance Rule.

What precisely was asked as a means of acceptance – especially around deadlines?

Consideration

Consider the Benefit / Detriment test.

Consideration must flow *from* the promisee – *Price v Easton, Tweddle v Atkinson*

Does the thing appropriately constitute consideration?

Smith v Hughes

Facts

- Smith and Hughes agreed to sell and buy a specific parcel of oats.
- Smith had new oats, and was selling them knowing that.
- Hughes thought the oats were old, and was intending to purchase old oats.

- They agreed on a price and some relevant particulars.
- There had been no previous dealings between the two of them.

For the purposes of the judgment, it is assumed:

- Smith understood that Hughes believed that the oats were old oats.
    - However, Smith did not do anything to cause that belief.
- Smith did not say anything about the age of the oats.

Crux of the Law:

Objective Principle

> Whether an agreement is formed, and the terms of that agreement, are based on an objective assessment of what a reasonable person in the position of the party would have been lead to believe, by the conduct of the other party.
>
> > *"If, whatever [A's] real intention may be, [A] conducts themselves that a reasonable person would believe that [A] was assenting to the terms proposed by [B] and [B] upon that belief (that [A] had consented to those terms) entered into a contract with [A], then [A] would be bound as if [A] had intended to agree to [B]'s terms" – Smith v Hughes,* per Blackburn J.
>
> Note: If one party is aware that the other is mistaken as to the terms of the contract and is agreeing to a contract on other terms, then that party cannot be reasonably led to believe that the other was assenting to their terms.

Caveat Emptor and Obligations to Correct Mistakes/Not Mislead

> Where a buyer is mistaken as to the goods, there is no obligation for a seller to correct them, even where the seller is aware of that mistake as to the goods. They are free to assess the quality and attributes of the goods, and the other party is free to take advantage of the superior knowledge.
>
> However, where there is a mistake as to the terms of the contract or the conduct of the other party, there is an obligation to correct it.
>
> Exceptions (where there is an obligation to correct):
>
> - Where there is a special relation of trust and confident between the buyer and the seller.
> - Where the seller caused that mistake – the seller cannot induce a mistake or mislead the buyer.
>
> Implications:
>
> - There is no obligation to:
>   - Correct the buyer as to mistakes about the quality of the goods, especially when they had an opportunity to inspect the goods.
>   - Disclose every issue of which the seller is aware.
>   - Correct mistakes that the seller is aware of.

- There is an obligation to:
    - Correct mistakes as to the terms of a contract, or what the seller is communicating or guaranteeing.
    - Mislead the buyer.
    - Tell the truth, if asked.

Sale by Sample

- There is an implied term that the sample will represent the actual goods being sold.
- Where they do accurately represent the goods being sold, then caveat emptor applies.

Reasons

There must be an agreement or "meeting of the minds" as to the terms and an intention to be bound by the same terms. If there is no agreement as to the terms, then there is no contract.

> *"I apprehend that if one of the parties intends t make a contract on one set of terms and the other intends to make a contract on another set of terms, or as it is sometimes expressed, the parties are not ad idem, there is no contract unless the circumstances preclude one of the parties from denying that he has agreed to the terms of the other".*
>
> *"It is essential to the creation of a contract that both parties should agree to the same thing in the same sense"* (Hannen J)
>
> This is from *Raffles v Wichelhaus* (see other case)

- Whether a person is agreeing to the terms is to be judged objectively, by a "reasonable person standard".
    > *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to that other parties terms".*

Caveat Emptor

- Silence will not be enough to avoid a contract, even if that silence injures the other party.
    > *From Justice Story, "The general rule, both of law and equity, in respect to concealment is that mere silence with regard to a material fact which there is no legal obligation to divulge will not avoid a contract, although it operate as an injury to the party from whom it is concealed" (Cockburn CJ)*
    >
    > *"A mere abstinence from disabusing the purchaser of that impression is not deceit or fraud" (Blackburn CJ).*

- There is not obligation to disclose every issue which the seller is aware of, even if the other has made a mistake.
    > *"Under the general doctrine of caveat emptor, he is not ordinarily bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee".*
    >
    > *"The civil law... [has] never gone the length of saying that so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of value".*

- This extends, even where the seller knows the purchaser has made a mistake. If they have made a mistake, the contract is still binding. (Blackburn J)

"Even if the vendor was aware that the purchaser possessed that quality [that in fact it did not] and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless (exceptions around)".

- That is qualified by there being an obligation if "a special trust or confidence" exists, or "can be implied from the circumstances of the case".
  With regard to the "intrinsic circumstances" relating to the goods "nature, character and condition" he points out that "mere silence as to anything which the other party might by proper diligence have discovered and which is open to his examination, is not fraudulent unless a special trust or confidence exist between the parties or by implied from the circumstances of the case.

- This is a question of law, not a "scrupulous morality".
  "It is not a question of "what a man of scrupulous morality or nice honour would do under such circumstances" (Cockburn CJ)
  "Whatever the case may be in a court of morals, there is no legal obligation" (Blackburn J)

However
- There is an obligation to tell the truth if asked.
- There is an obligation to correct any mistake as to the terms of the contract or mistake as to what the seller is intending to communicate or do.
  "If indeed, the buyer, instead of acting on his own opinion had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different.

Misrepresentation

- In this case, the buyer formed the conclusion on his own. The seller did not cause that.
  "The buyer persuaded himself they were good oats, when they were not so; but the seller neither said nor did anything to contribute to this deception" (603).

- The seller may not mislead the purchaser. (Blackburn J)
  "The purchaser is bound... Unless the vendor was guilty of some fraud or deceit upon him"

- Silence will not be enough to avoid a contract, even if that silence injures the other party.
  From Justice Story, "The general rule, both of law and equity, in respect to concealment is that mere silence with regard to a material fact which there is no legal obligation to divulge will not avoid a contract, although it operate as an injury to the party from whom it is concealed" (Cockburn CJ)

  "A mere abstinence from disabusing the purchaser of that impression is not deceit or fraud" (Blackburn CJ).

Sale by Sample

- If there is no warranty, and a person has an opportunity to inspect and for his own judgment, and acts according to that, then "caveat emptor" applies.
  "Where a specific article is offered for sale without express warranty, or without circumstances from which the law will imply a warranty - as where, for instance, an article is ordered for a specific purpose - and the buyer as full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies" (603).

Further Discussion

<u>Not wholly objective:</u>

- While it is the “objective principle” judged by a reasonable person’s standard, it is qualified by the “subjective” “person in the shoes of the party’s involved”.

What if the oats of the sample had been purposely dried out so as to appear old?

This would be a case of “fraudulent concealment”, where the mistake was induced by the conduct of the seller (other party), at which point caveat emptor no longer applies and the mistake is not enforceable.

What if the parties had previous dealings where Hughes had only bought old oats?

In that, it would likely be an “implied term” of the contract that the oats were old and so it would not need to have been explicitly specified to be a term.

In that instance, then the supply of new old oats would not fulfil the contract, and in that, there would be a breach of contract.

> *"It was stated by the defendant's manager that trainers as a rule always use old oats and that his own practise was never t buy new oats if he could get old. But the plaintiff denied having known that the defendant never bought new oats or that trainers did not use them; and on the contrary, asserted that a trainer had recently offered him a price for new oats" (602)*.
>
> It shows he didn't have that requisite knowledge that would have been his undoing.
>
> *"It matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee whether by express words, or be conduct, or previous dealings, or other circumstances"* (610).

What if the sample supplied was a sample of old oats?

It would be an implied term of the contract that the goods sold would correspond with that sample.

In any sale by sample, it is a "condition of the contract" the goods sold must correspond with the sample. If not, the contract can be terminated as there would be never have been a fulfilment of the terms of the contract.

"Condition" is loosely synonymous with "term".
In the case, they use the term "warrantees":

> *Now, we divide terms of the contract into "warrantees" which are minor terms that only give rise to damages and "essential term" where breaching allows the cancellation of the contract.*
>
> *In this case, it is likely the term "warrantee" was loosely used as a "term of the contract".*

This was codified in the Sale of Goods Act 1893 (UK) and then 1908 (UK, in NZ).

What if the oats in the sample had been purposely dried out so as to appear old?

This would have been "fraudulent concealment" and the contract would not have been enforceable.

What if the parties had previous dealings where Hughes had only bought old oats?

It would likely be considered an "implied term" of the contract that the oats were old, and so it would not need to be specified.

If that were in fact the case, then the supply of old oats would not fulfil the contract.

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What if Smith was aware that Hughes believed that he, Smith, was contracting to sell old oats?

There would never have been a "meeting of the mind" by the objective test - that is, Smith would not have been reasonably led to believe that Hughes was contracting to buy those new oats and they were on the same page as to terms.

If Smith is aware that Hughes believes he is selling old oats, then he is aware that, in Hughes' mind, one of the terms of the contract would be "the oats are old".
Where Smith never intends for that to be a term of the contract, there would never be a meeting of the minds as to the terms of the contract.

Smith would never have been reasonably led to believe by the behaviour of the purchaser that the purchaser (Hughes) intended to purchase new oats, so there would never have been that objective meeting of minds with respect to the terms.

We are asking the difference between:

a. "Smith knows Hughes believes that the oats are old"
b. "Smith knows that Hughes believes that Smith is contracting to sell old oats".

First, what is the difference between:

a. "Hughes believes that Smith is contracting to sell old oats"
b. "Hughes believes that the oats are old".

In the first:

An issue of formation arises re: both understanding the terms to be the same. The issue: there is no consensus as to the terms.

If asked the terms, Hughes would answer: "I am contracting to purchase these oats at this price, and a term of that is that these oats are old".

If asked the terms, Smith would answer: "I am contracting to sell these oats at this price and that is the only term".

They would be labouring under misapprehensions as to the terms of the contract.

In the second:

Here, the terms of the contract are clear to both: "I have contracted to sell/purchase these oats".
There is a mistake about the contract but there is not a mistake about the behaviours of each part/intentions of each party/the terms of the contract.

Now, factoring in Smith's knowledge element:

a. "Smith knows that Hughes believes that Smith is contracting to sell old oats".
b. "Smith knows that Hughes believes the oats are old."

In the first:

Smith is aware that Hughes believes one of the terms of the contracts is that the oats are old.

In this instance, if Hughes was contracting to sell old oats, then it is the same as when "one of the parties intends to make a contract on one set of terms and the other intends to make a contract on another set of terms" (there is no ad idem) (607) - there is no agreement there.

Notably, this is judged by the objective test - a reasonable person believes agreement as to terms.

As such, if Smith knew this, by that objective test, a reasonably person in his shoes, with his knowledge, would fail to establish a contract. The principle is that "whatever a man's real intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the other party upon that belief enters into the contract with them, the man thus conducting himself would be equally bound." (607)
It would mean that "Smith believed that the Hughes thought that Smith was making it a term of the contract that the oats were old" (611).

Rather than being mistaken as to the qualities of the oats that were being bought, Hughes was mistaken as to Smith's behaviour. If Smith was aware of that, there is an obligation to remedy it.

What would need to be proved in a situation where:

Smith intends a contract for "the sale of good oats at the stated price", but
Hughes intends a contract for "oats that are warranted to be old, at the stated price".

There is a formation issue.

The parties are not in agreement as to the terms.

Smith intends to sell oats with no term that guarantees they are old.
Hughes intends to buy oats with a term that guarantees they are old.

The question: by Hughes' conduct, was Smith "reasonably led to believe" that Hughes was assenting to the terms he was proposing.

Two factors could prevent this being answers in the affirmative:

1. Did Smith know?
2. Did Smith ought to have known?

They are not "exceptions" to the objective test, they are the logical flow through of the objective test.

In the first, if Smith knew that Hughes was not assenting, he cannot "reasonably believe" that he is.
In the second, it is a "reasonable belief" that makes it "ought to know".

What would need to be proved if Hughes was suing Smith? Hypothetical: Hughes is asserting that Smith is liable to pay damages for the extra sum that Hughes had to pay to acquire old oats that he is claiming "Smith contracted to sell him".

Hughes needs to show that there was a contract under his understanding.

What needs to be established?

Hughes needs to show that Hughes was reasonably led to believe that Smith was guaranteeing the oats were old.

This will likely be difficult if Smith did not expressly describe the oats as old.

What would the position be if Smith had said that he was selling "good old oats"?

What does this mean?
It would be part of the description of the subject matter and with this evidence, Hughes would "reasonably have been led to believe that Smith was selling old oats" and that would be part of the contract.

It would need to be established that the "old" guarantee was a term of the contract.
This would be done if the word was "old".

Hartog v Colin & Shields

Context

- The defendants contracted to sell skins to the plaintiffs.
- In their offer, they quoted a price at “price per pound” instead of those princes at “price per piece” – this was about 1/3 of the price that would be expected.
- In all verbal and written negotiations prior, the reference had always been to price per piece. This was also the ordinary manner of expressing.

- The purchaser accepted the offer and tried to have it enforced at the very low price, quoted “per pound”.

Outcome

There was no contract formed as the party would not have been reasonably led to believe that the quoted price was intended to be that low.

Crux of Law

The intention to form a contract is assessed objectively, by a reasonable person standing in the shoes of the promisor.

The “shoes of the promisor” takes into account all previous knowledge and interactions between the parties, and that colours the understanding.

Reasoning

The defendant set out to prove that the plaintiff knew that it had been a mistake, did not reasonably believe that it was intended as the offer, and simply set out to take advantage of it.

In all of the circumstances, the judge held that the plaintiff knew or ought to have known that there was a mistake in the offer, having regard to:

- All previous interactions where it had been expressed in “price per pound” and this was an absolute difference to anything that had come before (verbal negotiations, all discussions they had ever had, later correspondence).
- It went against common practice.
- The price was very low – almost to the extent that no one could have actually believed that that it was a genuine offer, without having serious doubts about it.

"I am satisfied, however, from the evidence, that the plaintiff must have realised and did in fact realise that a mistake had been made".

"I am satisfied that anyone with any knowledge of the trade must have realised it was a mistake".

"The plaintiff could not reasonably have supposed that the offer contained the offerors' real intention".

Other Discussions

<u>Possible contract formed at the price per pound, as a reasonable person in the shoes of the seller would assume that the buyer had substituted that into the offer and was accepting it on those grounds.</u>

David offers three solutions:

1. Court could have accepted the contract on the plaintiff's term, with the low price.
   This was rejected expressly.
2. Court could have found that there was no contract at all, because there was no objective meeting of minds.
   This was what they did.

And the additional:

3. Court could have found there was a contract according to the Defendant's intention, with price per pound.
    The Court was not called on to consider this.

So, what if the plaintiff's had claimed a contract at the "price per piece" standard offered?

This is quite a contentious point.

This is often footnoted as a question, and DM feels that there is a strong argument that this would have succeeded.

When we unpack the way that the Judge quotes the fact, we can consider that it was not just unusual for it to be quoted "per pound" but it was unusual for it NOT to be quoted "per piece".

When the "buyer knew or ought to have known the mistake", the nature of the interactions and usual way it was conducted the conclusion can also be taken one step forward.

Not only would "the reasonable buyer have known that there was a mistake as to the price being quoted in 'price per pound'" but further, "the reasonable buyer would have known that the price quoted was meant to be at 'price per piece' regardless of what was actually said.

The reasonable seller would have expected the reasonable buyer to substitute in that opinion.

As such, when the reasonable buyer "accepted" the offer, with the understanding that the judgment would be substituted, the seller would have been reasonably led to believe that the offer was accepted as intended.

The comparative is, if the buyer had been unsure and had not substituted in their knowledge, then they would likely have clarified what the intended price was, and also what the total value would have come to.
The only point where they continue without drawing attention to the uncertainty is where they just substitute that view.

It could have been that this thought process and understanding was considered "reasonable", at which point, the contract would have been formed on their terms.

Allbrite Industries Limited v P & C Gill Contractors Ltd

Context

- AllBrite was a recycling processing plant.
- P & C Gill had interest in carriage of recycling.
- They were submitting tenders to get a contract.

- They had undertaken to work together in the tender process such that the final arrangement would be that Gill tenders to get the carriage of goods and All Brite tenders such that they would be the processors.
- They would include one another in the respective offers.

- AllBrite sent a letter to Gill. This was admitted to be an offer.
    - Confirming that a tender including Gill had been submitted.
    - That the agreement would become effective on receiving confirmation from Gill that All Brite would be included as the processor in the tender document, allowing $60,000 per annum for that processing.

- Gill replied to that letter.
    - Confirming that they had tendered and that AllBrite had been included.
    - Confirming that AllBrite would receive the recyclables from them.
    - Indicating that a more formal and detailed contract would be put in place, should the tenders be accepted.

    - It did not explicitly confirm that the allowance of $60,000 for processing had been made, or the other details.

- AllBrite's tender was accepted.
- AllBrite asserted that there was no acceptance of the offer and declined to allow Gill as the subcontractor.

Outcome

There was a contract in place between Allbrite and Gill.

<u>It was clear, by an objective standard, that the offer had been accepted.</u>

> Even though there had been no express mention of the “$60 000” per annum in the letter, as requested, there was no uncertainty.

<u>Mere indication of a particular means of acceptance without prescription that only acceptance in that mode will be binding does not preclude acceptance by any other, not less advantageous mode.</u>

> It can indicate a preferred mode of acceptance, but that does not meant that no mode of acceptance other than that particular one will suffice.

<u>It did not matter that this was preliminary, with a more complicated formal agreement to be agreed at a later date.</u>

> This is just part of doing business – it is not, because of this, a conditional offer.