

Casebook on Contract Law

12th Edition

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A contract is an agreement that is legally enforceable. This chapter deals with how we determine the existence of the agreement.

SECTION 1 Subjectivity versus objectivity

A) Objectivity prevails

Smith v Hughes

(1871) LR 6 QB 597

BLACKBURN J: 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 the other party's terms...

Robert Goff LJ, in *Allied Marine Transport Co's v Vale do Rio doce Navegacao SA, The Leonidas D* [1985] 1 WLR 925, 936G–H, put the matter thus:

[I]f one party, O, so acts that his conduct, objectively considered, constitutes an offer, and the other party, A, believing that the conduct of O represents his actual intention, accepts O's offer, then a contract will come into existence, and on those facts it will make no difference if O did not in fact intend to make an offer, or if he misunderstood A's acceptance, so that O's state of mind is, in such circumstances, irrelevant.

B) Subjectivity has some relevance

Although the offeror's subjective intentions are irrelevant if the offer is reasonably, and objectively, understood in a particular way by the offeree, the offeree must believe that the offer represents the actual intentions of the offeror. To this extent, the offeree's subjective intentions are relevant. If the offeree **knows or ought reasonably to have known** at the time of the purported acceptance that the offeror has made a mistake relating to the terms of the offer, the offeree cannot purport to accept that offer.

Hartog v Colin & Shields

[1939] 3 All ER 566

The defendants contracted to sell 30,000 Argentine hare skins to the plaintiff, but by mistake offered them at a price per pound instead of per piece. In the pre-sale negotiations, reference had

always been made to the price per piece and never to the price per pound, and there was expert evidence that Argentine hare skins were generally sold at prices per piece.

Held: Since the plaintiff could not reasonably have supposed that the offer contained the offerors' real intention, there was no binding contract.

NOTES

1. Thus it is first necessary to examine how the offeror's words and conduct might reasonably have appeared to the offeree. The offeree cannot then accept if he knew, or it can be established that he ought reasonably to have known, that the offeror was making a mistake. In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502, the Singapore Court of Appeal regarded what the offeree 'ought reasonably to have known' as evidential factors or reasoning processes in reaching the conclusion that there was, in fact, knowledge of the mistake in the sense of actual knowledge, e.g. if the price of goods on an Internet site 'is so absurdly low in relation to its known market value, it stands to reason that a reasonable man would harbour a real suspicion that the price may not be correct or that there may be some troubling underlying basis for such a pricing' (quoting the judge at first instance: [2004] SLR(R) 594, [145]). In *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259 (see page 117), actual knowledge was considered to extend to 'wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make' (category (iii) actual knowledge or 'Nelsonian blindness').

2. In *Centrovincial Estates plc v Merchant Investors Assurance Co. Ltd* [1983] Com LR 158, the defendants accepted a figure of £65,000 per annum during a rent review, where the original rent had been £68,320 and the rent review clause stated that in no circumstances should the rent be reduced below the rent payable immediately before the review. This figure had been offered in error and the correct figure offered should have been £126,000. The defendants sought to hold the plaintiffs to the £65,000 figure, claiming that there was a binding agreement to this figure. The Court of Appeal agreed that there was a binding agreement at £65,000, since there was no proof that the defendants either knew or ought reasonably to have known of the plaintiffs' error at the time when they purported to accept it.

Therefore, although we might think that the defendants should have known of the plaintiffs' (offerors') mistake given the terms of the rent review clause, the burden of proving the defendants' subjective intentions and that the defendants knew that the plaintiffs did not intend to be bound by the £65,000 figure rested with the plaintiffs, and that burden had not been discharged on the facts. It also appears that it would not be discharged if the defendants had simply not addressed any thought to the question of what the plaintiffs intended at the time.

This burden of proof was also explained at first instance in *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475, in which it was considered that, on an objective assessment, the parties had indicated an intention to be bound to a funding agreement. The defendants failed to show that the claimants did not believe that the defendants intended to be bound.

ANDREW SMITH J: 228. However, there are circumstances in which the parties to what would objectively be held to be contractual are not legally bound by it under English law. If the other parties actually and reasonably believed that the defendants intended to make a contract, there would be a concluded contract, but not if the other parties knew or would reasonably have believed that that was not the defendants' intention and not, in my judgment, if the other parties had simply formed no view one way or the other as to whether the defendants so intended. That is the opinion expressed by Professor Sir Gunter Treitel in *Chitty on Contracts*, (2008) 30th Ed at para 2-004, and I agree with it. The defendants submit that they are not contractually bound even if on an objective assessment they and the claimants evinced an intention to be bound.

229. Thus the defendants' argument depends upon them showing that the claimants did not believe that the defendants intended to be bound...or at least that they would not reasonably have so believed. They have not shown this...

SECTION 2 The criteria to determine agreement

Traditionally, the courts have required that agreement be demonstrated by an offer made by one party and by complete acceptance of that offer by the other party. However, Lord Denning, in particular, took the view that the circumstances as a whole should be examined in an attempt

to discover whether there was agreement: *Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 (see *page 36*).

The majority of the Court of Appeal in the following case (Lord Denning and Ormrod LJ) had also adopted this approach.

Gibson v Manchester City Council

[1978] 1 WLR 520 (CA)

The facts of this case appear at *page 21*.

LORD DENNING MR: To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the text books it has been the custom to do so: but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms—which was intended thenceforward to be binding—then there is a binding contract in law even though all the formalities have not been gone through: see *Brogden v Metropolitan Railway Co.* (1877) 2 App Cas 666.

It seems to me that on the correspondence I have read—and, I may add, on what happened after—the parties had come to an agreement in the matter which they intended to be binding...

∴ NOTE: Although this approach was rejected by the House of Lords, [1979] 1 WLR 294, Lord Diplock stated at 297:

My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer by the corporation to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

Adams and Brownsword, *Understanding Contract Law*, 5th edn (Sweet & Maxwell, 2007), p. 53, conclude that 'in *Gibson* the consumer-welfarists were outvoted by formalists and market-individualists who refused to derogate from the general rule'. For an explanation of this terminology, see Adams and Brownsword, pp. 36–44 and ch. 8.

In *New Zealand Shipping Co. Ltd v A. M. Satterthwaite & Co. Ltd, The Eurymedon* [1975] AC 154 (PC), 167E, Lord Wilberforce expressed some dissatisfaction with the traditional approach when he stated:

English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

It appears that a contract may be found to exist, despite the fact that it cannot be analysed precisely into an offer and corresponding acceptance, where the terms have been fully agreed and executed by the parties.

Trentham Ltd v Archital Luxfer

[1993] 1 Lloyd's Rep 25 (CA)

Trentham was a main contractor employed to design and build industrial units. This work included 'window works', i.e. the supply and installation of aluminium windows and doors. The defendants, Archital, were manufacturers, suppliers, and installers of these products, and had carried out this work for Trentham and been paid. Trentham then alleged that the defendants' work was defective and that they were therefore in breach of binding subcontracts between them. The defendants denied that any binding subcontracts had ever come into existence.

Held: Binding subcontracts had been concluded for the window works.

STEYN LJ: Before I turn to the facts it is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v Metropolitan Railway* (1877) 2 AC 666; *New Zealand Shipping Co. Ltd v A.M. Satterthwaite & Co. Ltd* [1974] 1 Lloyd's Rep 534 at p. 539, col. 1; [1975] AC 154 at p. 167 D-E; *Gibson v Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd v Novinex* [1949] 1 KB 628, at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1963] 1 WLR 333 ... The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trentham's side created a right to performance of the work by Archital, and on Archital's side it created a right to be paid on an agreed basis. What the parties did in respect of phase 1 is only explicable on the basis of what they had agreed in respect of phase 1. The Judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. And it does not matter that a contract came into existence after part of the work had been carried out and paid for. The

conclusion must be that when the contract came into existence it impliedly governed pre-contractual performance...

NOTES

1. The significant fact was that the arrangement was executed by the parties. Steyn LJ (with whose judgment Ralph Gibson and Neill LJ agreed) accepted the decision of the judge at first instance, which was based on offer and acceptance, but was also prepared to conclude, by relying on the decision in *Brogden v Metropolitan Railway Co.* (1877) 2 App Cas 666 (see page 34), that a contract can come into existence as a result of performance of an executed contract.
2. Compare this decision with *British Steel Corporation v Cleveland Bridge & Engineering Co. Ltd* [1984] 1 All ER 504 (see page 78), in which, despite the fact of performance, it was concluded that there was no binding contract.



Question

Can the distinction in result between *Trentham v Luxfer and BSC v Cleveland Bridge* be explained on the basis of the different remedies being sought and the certainty or uncertainty of terms?

In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] Bus LR 776, [2010] 1 WLR 753 (SC) (see page 81), the Supreme Court noted that performance does not always equate with a finding that there is a binding contract. However, it is an important factor in supporting a finding in instances in which there is agreement on all material terms.

SECTION 3 Offer distinguished from invitation to treat

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If the statement-maker clearly intends to be bound by acceptance of the stated terms, the statement will amount to an offer and, on acceptance, there will be a binding contract. However, if there is no such intention, the statement will be part of the negotiating process (an invitation to treat) and any response to it will at best be no more than an offer.

Much depends upon whether the language used indicates 'a definite promise to be bound' without more.

Gibson v Manchester City Council

[1979] 1 WLR 294 (HL)

The Council adopted a policy of selling council houses to tenants. The respondent tenant applied on a printed form for details of the price and mortgage terms. The city treasurer wrote to the respondent that the Council 'may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2,180'. The letter gave details of the mortgage likely to be made available and stated: 'If you would like to make a formal application to buy... please complete the enclosed application form and return it to me as soon as possible.' The respondent completed the application form and returned it. Before contracts were prepared and exchanged, political control of the Council changed and the Council decided to proceed only with those sales for which contracts had already been exchanged. The respondent sought specific performance of an alleged contract to purchase his council house, claiming that he had accepted the offer in the city treasurer's letter.

Held: There was no binding contract because no offer capable of acceptance had been made by the Council. The statements in the city treasurer's letter that the Council '*may be prepared to sell*' and inviting Mr Gibson 'to *make a formal application to buy*' did not constitute an offer to sell, but only an invitation to treat.

LORD DIPLOCK: My Lords, the words I have italicised [see the facts above] seem to me, as they seemed to Geoffrey Lane LJ, to make it quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by Mr Gibson's written acceptance of it. The words '*may be prepared to sell*' are fatal to this; so is the invitation, not, be it noted, to accept the offer, but 'to make formal application to buy' upon the enclosed application form. It is, to quote Geoffrey Lane LJ, a letter setting out the financial terms on which it may be the council will be prepared to consider a sale and purchase in due course.

Storer v Manchester City Council

[1974] 1 WLR 1403 (CA)

The Council decided to sell council houses to tenants and devised a simple form for quick agreements, which dispensed with legal formalities. The plaintiff applied to buy his council house and, on 9 March 1971, the town clerk wrote to him: 'I understand you wish to purchase your council house and enclose the Agreement for Sale. If you will sign the Agreement and return it to me I will send you the Agreement signed on behalf of the [Council] in exchange.' The enclosed 'Agreement for Sale' had been filled in with details that included the purchase price, the amount of the mortgage, and the monthly repayments, although the date on which the tenancy was to cease and the mortgage repayments to begin had been left blank. On 20 March, the plaintiff signed and returned this Agreement for Sale, but before the town clerk had signed the Agreement on the Council's behalf, the Council changed political control and discontinued such sales unless already contractually bound. The plaintiff sought specific performance alleging a binding contract.

Held: A binding contract had been concluded. The Council's intention was to become contractually bound when the plaintiff had signed the Agreement and returned it.

LORD DENNING: [Mr Storer] had done everything which he had to do to bind himself to the purchase of the property. The only thing left blank was the date when the tenancy ceased.

...The corporation put forward to the tenant a simple form of agreement. The very object was to dispense with legal formalities. One of the formalities—exchange of contracts—was quite unnecessary. The contract was concluded by offer and acceptance. The offer was contained in the letter of March 9 in which the town clerk said:

I enclose the agreement for sale. If you will sign the agreement and return it to me I will send you the agreement signed on behalf of the corporation in exchange.

The acceptance was made when Mr Storer did sign it, as he did, and return it, as he did on March 20. It was then that a contract was concluded. The town clerk was then bound to send back the agreement signed on behalf of the corporation. The agreement was concluded on Mr Storer's acceptance. It was not dependent on the subsequent exchange.

I appreciate that there was one space in the form which was left blank. It was No. 7 for 'the date when your tenancy ceases'. That blank did not mean there was no concluded contract. It was left blank simply for administrative convenience...

The final point was this: [counsel for the corporation] said that the town clerk did not intend to be bound by the letter of March 9 1971. He intended that the corporation should not be bound except on exchange. There is nothing in this point. In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.



Question

Lord Denning stated that Mr Storer 'had done everything which he had to do to bind himself to the purchase of the property'. Could the same be said of Mr Gibson? In *Gibson v Manchester City Council*, there was no firm offer of a mortgage by the Council, and it is unlikely that Mr Gibson would have intended to bind himself in the absence of a firm commitment on this matter.

A) Advertisements

Generally, advertisements are invitations to treat.

Partridge v Crittenden

[1968] 1 WLR 1204 (QB)

The plaintiff had placed an advertisement in a periodical, which read 'Bramblefinch cocks, Bramblefinch hens, 25s each'. The plaintiff was charged with unlawfully offering for sale a wild live bird contrary to s. 6(1) of and Sch. 4 to the Protection of Birds Act 1954.

Held: The advertisement was an invitation to treat, not an offer for sale. It followed that the plaintiff could not be guilty of the offence charged.



Question

It is argued that if an advertisement is an offer, then the trader will have to supply the quantity ordered when the stock available to do so is limited. In *Grainger & Son v Gough* [1896] AC 325, 334, Lord Herschell said:

The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.

What would the position be if the advertisement were specifically to state that supplies were:

1. unlimited?
2. limited, e.g. goods in a sale?

NOTES

1. A unilateral advertisement (requesting performance of an act as the acceptance) is an offer: see *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 (see page 13). If a shop advertises 'Sale—15 digital cameras at the

knock-down price of £60 each. First come first served', the wording may convert this advertisement into a unilateral offer requiring the performance of an act—namely, being the first person at the sale to offer to purchase one of these digital cameras at the knock-down price. There is American authority that this type of advertisement amounts to an offer: *Lefkowitz v Great Minneapolis Surplus Store*, 86 NW 2d 689 (1957).

2. A notice that detailed the Association of British Travel Agents (ABTA) scheme of protection was held by a majority of the Court of Appeal in *Bowerman v Association of British Travel Agents Ltd* [1996] CLC 451 (see page 177), to be a unilateral offer that customers accepted by booking a holiday with an ABTA member (performance of an act). The result was a unilateral contract between the customer and ABTA.

3. In *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] CLC 33, the advertisement of a newspaper scratch-card game with a prize of £50,000 was held to be a contractual offer, which was accepted when those with eligible cards rang the telephone hotline (performance of an act).

4. The question of how to determine whether the advertisement is unilateral is discussed in Poole, *Textbook on Contract Law*, 12th edn (Oxford University Press, 2014), 2.3.2.1.

B) Display of goods

Fisher v Bell

[1961] 1 QB 394 (QB)

A shopkeeper displayed a flick knife in his shop window with a ticket stating 'Ejector knife—4s'. He was charged with offering the knife for sale contrary to s. 1(1) of the Restriction of Offensive Weapons Act 1959.

Held: A display of goods in a shop window with a price ticket attached was merely an invitation to treat and not an offer for sale, so that no offence had been committed.

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd

Boots was charged with an offence under the Pharmacy and Poisons Act 1933, s. 18, which required that sales of poisons in Pt I of the Poisons List take place under the supervision of a registered pharmacist. Boots operated a self-service system and a pharmacist at the cash desk was authorized to prevent the removal of any drug from the premises. The factor determining whether an offence had been committed was the point at which the sale in this self-service shop took place. The Court of Appeal agreed with Lord Goddard CJ.

Held: Boots had not committed the offence. The display of goods on a supermarket's shelves was merely an invitation to customers to make offers to buy.

[1952] 2 QB 795 (Court of Queen's Bench)

LORD GODDARD CJ: I think that it is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. I do not think I ought to hold that that principle is completely reversed merely because there is a self-service scheme, such as this, in operation. In my opinion it comes to no more than that the customer is informed that he may himself pick up an article and bring it to the shopkeeper with a view to buying it, and if, but only if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. In fact, the offer is an offer to buy, and there is no offer to sell; the customer brings the goods to the shopkeeper to see whether he will sell or not. In 99 cases out of a 100 he will sell and, if so, he accepts the customer's offer, but he need not do so. The very fact that the supervising pharmacist is at the place where the money has to be paid is an indication to the purchaser that the shopkeeper may not be willing to complete a contract with anybody who may bring the goods to him.

Ordinary principles of common sense and of commerce must be applied in this matter, and to hold that in the case of self-service shops the exposure of an article is an offer to sell, and that a person can accept the offer by picking up the article, would be contrary to those principles and might entail serious results. On the customer picking up the article the property would forthwith pass to him and he would be able to insist upon the shopkeeper allowing him to take it away, though in some particular cases the shopkeeper might think that very undesirable. On the other hand, if a customer had picked up an article, he would never be able to change his mind and to put it back; the shopkeeper could say, 'Oh no, the property has passed and you must pay the price.'

It seems to me, therefore, that the transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer.' I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says 'Yes.' That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I cannot let you have that book; it is the only copy I have got and I have already promised it to another customer.' Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price. The offer, the acceptance of the price, and therefore the sale, take place under the supervision of the pharmacist.

[1953] 1 QB 401 (CA)

SOMERVELL LJ: I agree with the Lord Chief Justice in everything that he said, but I will put the matter shortly in my own words. Whether the view contended for by the plaintiffs is a right view depends on what are the legal implications of this layout—the invitation to the customer. Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organised way of doing what is done already in many types of shops—and a bookseller is perhaps the best example—namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying 'I want this'? The assistant in 999 times out of 1,000 says 'That is all right,' and the money passes and the transaction is completed. I agree with what the Lord Chief Justice has said, and with the reasons which he has given for his conclusion, that in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed. I can see no reason at all, that being clearly the normal position, for drawing any different implication as a result of this layout.

The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the plaintiffs' contention when he pointed out that, if the plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred. I can

see no reason for implying from this self-service arrangement any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that there was supervision in the sense required by the Act and at the appropriate moment of time.

NOTES

1. Lord Goddard and the Court of Appeal assumed that if they held that the display were an offer, the acceptance would be the customer's act of placing the goods selected in the wire basket. However, the acceptance might be the customer's act of handing the goods to the cashier. See Jackson (1979) 129 NLJ 775 and the American case *Lasky v Economy Grocery Stores* 163 ALR 235 (1946), in which it was held that the display was an offer, but that acceptance did not take place until the goods were handed to the cashier.

2. Incorrect pricing may give rise to criminal liability under the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg. 5 (actions misleading consumers). These Regulations are due to be amended—see the draft Consumer Protection from Unfair Trading (Amendment) Regulations 2013—to provide for a right to civil redress in such circumstances, assuming that the misleading price is a significant factor in the consumer's decision to purchase the goods. In practical terms, the remedy would be restricted to the right to a refund (which shops tend to offer anyway in this situation) where the consumer has paid more for the goods as a result of the misleading pricing. It is difficult to envisage a situation in which, in addition, damages would be payable, since there would need to be additional financial losses (i.e. not remedied by the refund) that would not have occurred had the misleading pricing not taken place. In any event, no damages would be payable if the mispricing resulted from a mistake that the retailer had taken all reasonable precautions to avoid.



Questions

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1. Both Lord Goddard and the Court of Appeal considered that the offer must come from the customer and that acceptance must be by or on behalf of the shopkeeper, but what did they say would constitute the offer and what act would be the acceptance? Montrose (1955) 4 Am J Comp Law 235 argued that the offer occurs when the customer hands the goods to the cashier, as opposed to when they are placed in the wire basket, because until that point the customer has not evinced a definite intention to be bound.

2. What is the position if there is a non-self-service counter inside a supermarket? For example, if I request that a joint of beef be cut to my specifications, but before I reach the cash desk, I change my mind, has a contract of sale already been concluded? See Poole, *Textbook on Contract Law*, 12th edn (Oxford University Press, 2014), 2.3.2.2.

3. In *Chapleton v Barry Urban District Council* [1940] 1 KB 532 (see page 215), the Court of Appeal held that a pile of deck chairs accompanied by a notice indicating the hire charge and stating that tickets should be obtained from the attendants amounted to an offer. If automatic machines represent standing offers—*Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (see page 217)—why are goods on supermarket shelves not classified as a standing offer? See Unger (1953) 16 MLR 369.

4. If goods are advertised or displayed on a retailer's website, does this website constitute an invitation to treat or an offer? See the detailed discussion in Poole, 2.3.2.3.

Regulation 12 of the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, suggests that a website may be an invitation to treat, since it provides that an order 'may be but need

not be the contractual offer'. Owing to the ambiguity of reg. 12, it does not follow that the supplier's acknowledgement of receipt of the order will constitute formal acceptance; indeed, it is often expressly provided that acceptance is delayed until the point at which the goods are dispatched. However, if the acknowledgement of receipt of order constitutes the acceptance, the contract will be concluded when the purchaser is able to access that acknowledgement (reg. 11(2)(a)). These Regulations relate to information to be supplied to customers where contracts are made via the Internet, and they allow the service provider to specify when and where a contract will be concluded online, since reg. 9 requires the service provider to communicate in advance 'the different technical steps to follow to conclude the contract'.

c) Tenders

A request for tenders is an invitation to treat and each tender is an offer. The requestor is free to accept or reject any tender to purchase goods, even if it is the highest bid.

Spencer v Harding

(1870) LR 5 CP 561 (CP)

WILLES J: The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

i) What if the invitation to tender contains an express undertaking to accept the highest (or lowest) bid?

Harvela Investments Ltd v Royal Trust Co. of Canada (CI) Ltd

[1985] Ch 103, [1986] AC 207 (HL)

The plaintiff and the second defendant (Sir Leonard) were rival offerors for a parcel of shares belonging to the first defendants (Royal Trust). Royal Trust invited both parties to submit a sealed

offer or confidential telex by a stipulated date. The company stated in the invitation to tender that it bound itself to accept the highest offer received that complied with the terms of the invitation. The plaintiff tendered a bid of \$2,175,000, and the second defendant's bid was \$2,100,000 or \$101,000 in excess of any other offer. Royal Trust accepted the second defendant's bid as being \$2,276,000 and entered into a sale contract. The plaintiff argued that the second defendant's bid was invalid. At first instance, Peter Gibson J held that the invitation to bid constituted an offer to be bound by the highest bid. This offer was unilateral in that it requested the performance of an act—submitting the highest bid—and performance of this act constituted the acceptance of that offer. The plaintiff's bid was the only valid bid, so that there was a contract with the plaintiff. The Court of Appeal agreed, but refused to imply a term excluding referential bids.

Held (in the House of Lords): Referential bids were invalid, so that the only valid bid was the plaintiff's and Royal Trust was bound to accept it. Lord Diplock confirmed the analysis of Peter Gibson J on the effect of the invitation to tender.

LORD DIPLOCK: The construction question turns upon the wording of the telex of 15 September 1981 referred to by Lord Templeman as 'the invitation' and addressed to both Harvela and Sir Leonard. It was not a mere invitation to negotiate for the sale of the shares... Its legal nature was that of a unilateral or 'if' contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisor and Sir Leonard was promisee. Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors; under neither of them, did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or refrain from doing anything.

The vendors, on the other hand, did assume a legal obligation to the promisee under each contract. That obligation was conditional upon the happening, after the unilateral contract had been made, of an event which was specified in the invitation; the obligation was to enter into a synallagmatic contract to sell the shares to the promisee, the terms of such synallagmatic contract being also set out in the invitation. The event upon the happening of which the vendors' obligation to sell the shares to the promisee arose was the doing by the promisee of an act which was of such a nature that it might be done by either promisee or neither promisee, but could not be done by both. The vendors thus did not by entering into the two unilateral contracts run any risk of assuming legal obligations to enter into conflicting synallagmatic contracts to sell the shares to each promisee.

The two unilateral contracts were of short duration; for the condition subsequent to which each was subject was the receipt by the vendors' solicitors on or before 3 pm on the following day, 16 September 1981, of a sealed tender or confidential telex containing an offer by the promisee to buy the shares for a single sum of money in Canadian dollars. If such an offer was received from each of the promisees under their respective contracts, the obligation of the promisor, the vendors, was to sell the shares to the promisee whose offer was the higher; and any obligation which the promisor had assumed to the promisee under the other unilateral contract came to an end, because the event the happening of which was the condition subsequent to which the vendors' obligation to sell the shares to that promisee was subject had not happened before the unilateral contract with that promisee expired.

Since the invitation in addition to containing the terms of the unilateral contract also embodied the terms of the synallagmatic contract into which the vendors undertook to enter upon the happening of the specified event, the consequence of the happening of that event would be to convert the invitation into a synallagmatic contract between the vendors and whichever promisee had offered, by sealed tender or confidential telex, the higher sum...

NOTE: This is an example of an 'implied' unilateral contract based on the express promise to accept the highest bid. The invitation to tender was a unilateral offer to accept the highest bid. This was accepted by everyone who bid. It was then followed by a synallagmatic (bilateral) contract with whoever was the highest bidder. If the person inviting tenders did not comply with the offer terms, then he would be in breach of the unilateral contract and would be liable in damages.

ii) In some circumstances, there may be a binding contractual obligation to consider tenders conforming to the bid conditions

Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council

[1990] 1 WLR 1195 (CA)

The Council invited the plaintiff club and six other parties to tender for a concession to operate pleasure flights from Blackpool airport. Tenders would not be considered if they were received after 12 noon on 17 March 1983. The club's tender was put in the town hall letterbox at 11 a.m. on 17 March, but the letter box was not cleared, as it should have been, at 12 noon. The club's tender was not considered on the basis that it was received too late. On discovering what had happened, the Council decided to carry out the tendering exercise again. However, when the successful tenderer threatened to sue, the Council retracted. The club sought damages for breach of warranty, arguing that the Council had warranted (promised) that the tender would be considered if it was received by the deadline. However, there was no express promise to this effect.

Held: An invitation to tender could give rise to an implied binding contractual obligation to consider tenders conforming to the conditions of tender in these circumstances—namely, that:

- (a) the tenders had been solicited by the Council from specified parties who were known to the Council; and
- (b) there were absolute conditions governing submission including an absolute deadline.

BINGHAM LJ: During the hearing the questions were raised: what if, in a situation such as the present, the council had opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded? Or if the council had considered and accepted a tender admittedly received well after the deadline? [Counsel] answered that although by so acting the council might breach its own standing orders, and might fairly be accused of discreditable conduct, it would not be in breach of any legal obligation because at that stage there would be none to breach. This is a conclusion I cannot accept. And if it were accepted there would in my view be an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties, both tenderers... and inviters (as reflected in the immediate reaction of the council when the mishap came to light).

A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest or, as the case may be, lowest. But where, as here, tenders are

solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that...

I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for... [Counsel for the club] was in my view right to contend for no more than a contractual duty to consider. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance.



Question

If the remedy available for breach of such a contractual obligation to consider tenders is to be damages, how might those damages be measured? Should damages be limited to the recovery of wasted expenses or would loss of chance damages be more appropriate? See the discussion of measures of damages at pages 371–401, Chapter 9, sections 1–4, and *Fairclough Building v Port Talbot Borough Council* (1992) 62 Build LR 82, 33 Con LR 24 (note 4).

NOTES

1. This decision can be analysed as an example of an implied unilateral contract, i.e. an offer to consider conforming tenders, which is accepted by submitting a conforming tender. However, it differs from *Harvela* in that, in that case, the obligation forming the basis for the implied unilateral contract was an express promise rather than one implied from the circumstances. It follows that *Blackpool* is the more radical decision.
2. Bingham LJ refers to this decision as avoiding 'an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties', i.e. the club would not have bothered to tender unless its tender was to be considered and, on discovering its failure to consider the club's tender, the Council had declared the tendering process invalid until the successful tenderer had threatened legal action.
3. For further discussion of this case, see Adams and Brownsword (1991) 54 MLR 281, McKendrick [1991] LMCLQ 31, or Phang (1991) 4 JCL 46.
4. In *Fairclough Building Ltd v Port Talbot Borough Council* (1992) 62 Build LR 82, 33 Con LR 24, the Court of Appeal also recognized the existence of a contractual obligation to consider tenders from contractors on a council shortlist 'unless there were reasonable grounds for not doing so'. On the facts in *Fairclough*, the Council did have reasonable grounds for removing the plaintiffs from the shortlist, so that there was no breach of contract and *Blackpool* was therefore distinguished. The Court of Appeal in *Fairclough* also suggested that, had there been a breach, damages would be based on the loss of a chance to be considered.
5. The *Blackpool* analysis was applied by the Northern Ireland High Court in *J. & A. Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85 in order to conclude that there was an implied obligation to conduct the tendering procedure in accordance with a code of practice. The defendant had breached this unilateral contract based on the code by inviting those who had submitted tenders to reduce their bids. However, the Court awarded full expectation loss to the plaintiff that, but for the reduced bids, would have submitted the lowest bid. This appears to be because the Court considered that, but for the breach of the code, the plaintiff would otherwise have been awarded the contract, i.e. that this was a loss of a certainty rather than a loss of a chance.

D) Auction sales

An auctioneer's request for bids is an invitation to treat. The bid is the offer, which the auctioneer can accept or reject. The Sale of Goods Act 1979, s. 57(2), provides that acceptance occurs on the fall of the hammer and that any bidder may withdraw his or her bid before that time.

Harris v Nickerson

(1873) LR 8 QB 286 (QB)

The defendant auctioneer advertised that lots, including certain office furniture, would be sold by him at Bury St Edmunds on specified days. The plaintiff had a commission to buy this furniture and travelled from London for the sale. However, the lots were withdrawn from sale. The plaintiff brought an action against the defendant to recover for his loss of time and expenses.

Held: He had no such right of action. The advertisement was only an invitation to treat and did not amount to a promise that all of the articles advertised would be put up for sale.

What if the auction is advertised as being 'without reserve' (i.e. there is to be no reserve price and the property will be sold to the highest bidder)?

Warlow v Harrison

(1859) 1 E & E 309, 120 ER 925 (Exchequer Chamber)

The defendant, an auctioneer, advertised the sale without reserve of a horse by public auction. The plaintiff attended the sale and bid 60 guineas. The horse's owner bid 61 guineas. The plaintiff refused to make any further bid and the defendant (who it appears, did not know that the bidder was the owner) knocked down the horse to the owner for 61 guineas. The plaintiff claimed that the horse was his since he was the highest bona fide (genuine) purchaser at an unreserved sale. In his pleadings, the plaintiff alleged that the defendant was the plaintiff's agent to complete this contract.

Held: On the pleadings, the plaintiff had no claim, since there was no agency relationship between the plaintiff and the defendant. The pleadings required amendment.

MARTIN B [obiter]: The sale was announced... to be 'without reserve.' This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward... Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer.

NOTE: There were two agreements. First, there was the bilateral sale agreement determining the purchaser of the goods. In this context, the plaintiff's bid was an offer, but since his bid was not accepted, he was not entitled to the horse that was knocked down to the owner. However, there was a second agreement, since the advertisement of an auction sale without reserve is a unilateral offer by the auctioneer that no reserve will be applied. Martin B indicates that only the highest bona fide bidder can accept this unilateral offer. The plaintiff clearly accepted *this* offer and the auctioneer would be liable in damages for breach of his promise that there would be no reserve. (Compare this with the analysis of invitations to tender agreeing to accept the highest bid in *Harvela Investments Ltd v Royal Trust Co. of Canada Ltd*, at page 27.)

... The two contracts are explained in the summary in Poole, *Textbook on Contract Law*, 12th edn (Oxford University Press, 2014), 2.3.2.5.



Questions

1. Might it be argued that the unilateral offer to hold an auction without reserve could be accepted by all those who bid at such an auction, but that only the highest bona fide bidder would suffer loss in the event of breach and be entitled to recover damages? See the discussion in the notes relating to the decision of the Court of Appeal in *Barry v Davies* [2000] 1 WLR 1962 (below).
2. The *obiter* statement in *Warlow v Harrison* was set in the context of the position of the highest genuine bidder at an auction without reserve, where the owner is permitted to bid. However, what is the position if the auctioneer, having received one or more bids at an auction without reserve, then withdraws those goods and does not allow the hammer to fall? The Court of Appeal applied *Warlow v Harrison* in answering this question in the following case.

Barry v Davies (t/a Heathcote Ball & Co.)

[2000] 1 WLR 1962 (CA)

At an auction without reserve, the plaintiff had made the only bid (of £200 each) for two engine analysers. The auctioneer considered this bid to be too low (on the basis that each machine was worth about £14,000) and withdrew the engine analysers from the sale. They were sold privately a few days later for £750 each.

The plaintiff sought damages alleging breach of contract by the auctioneer, since he was the highest bidder at an auction without reserve. The plaintiff claimed damages of £27,600, being the difference between the value of both machines (£28,000) less the total amount of his bid (£400).

Held: The auctioneer was liable. Following *Warlow v Harrison*, at an auction without reserve there was a collateral contract between the auctioneer and the highest bidder based on the auctioneer's undertaking to sell to the highest bidder. By withdrawing the machines from the auction, the auctioneer was in breach of this contract, and was liable to pay the highest bidder the difference between the bid amount and the market price at the date of the auction of the goods withdrawn. The only evidence of market price was the manufacturer's list price for new machines—namely, £14,000 each.

SIR MURRAY STUART SMITH LJ: The judge held that it would be the general and reasonable expectation of persons attending at an auction sale without reserve that the highest bidder would and should be entitled to the lot for which he bids. Such an outcome was in his view fair and logical. As a matter of law he held that there was a collateral contract between the auctioneer and the highest bidder constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made. In so doing he followed the views of the majority of the Court of Exchequer Chamber in *Warlow v Harrison* (1859) 1 E & E 309...

[Counsel] on behalf of the defendant criticised this conclusion on a number of grounds. First, he submitted that the holding of an auction without reserve does not amount to a promise on the part of the auctioneer to sell the lots to the highest bidder. There are no express words to the effect, merely a statement of fact that the vendor has not placed a reserve on the lot. Such an intention, he submitted, is inconsistent with two principles of law, namely that the auctioneer's request for bids is not an offer which can be accepted by the highest bidder (*Payne v Cave* (1789) 3 Durn & E 148) and that there is no

completed contract of sale until the auctioneer's hammer falls and the bidder may withdraw his bid up until that time (Sale of Goods Act 1979, s. 57(2), which reflects the common law). There should be no need to imply such a promise into a statement that the sale is without reserve, because there may be other valid reasons why the auctioneer should be entitled to withdraw the lot, for example if he suspected an illegal ring or that the vendor had no title to sell.

Secondly, [counsel] submitted that there is no consideration for the auctioneer's promise. He submitted that the bid itself cannot amount to consideration because the bidder has not promised to do anything, he can withdraw the bid until it is accepted and the sale completed by the fall of the hammer. At most the bid represents a discretionary promise, which amounts to illusory consideration, for example promising to do something 'if I feel like it'. The bid only had real benefit to the auctioneer at the moment the sale is completed by the fall of the hammer. Furthermore, the suggestion that consideration is provided because the auctioneer has the opportunity to accept the bid or to obtain a higher bid as the bidding is driven up depends upon the bid not being withdrawn...

The authorities, such as they were, do not speak with one voice. The starting point is s. 57 of the Sale of Goods Act 1979...

Subsections (3) and (4) are... important. They provide:

(3) A sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. (4) Where a sale by auction is not notified to be subject to the right to bid by or on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person.

Although the Act does not expressly deal with sales by auction without reserve, the auctioneer is the agent of the vendor and, unless subsection (4) has been complied with, it is not lawful for him to make a bid. Yet withdrawing the lot from the sale because it has not reached the level which the auctioneer considers appropriate is tantamount to bidding on behalf of the seller. The highest bid cannot be rejected simply because it is not high enough...

[Sir Murray Stuart Smith LJ then discussed *Warlow v Harrison* as being authoritative on the question of the collateral contract and continued:]

As to consideration, in my judgment there is consideration both in the form of detriment to the bidder, since his bid can be accepted unless and until it is withdrawn, and benefit to the auctioneer as the bidding is driven up. Moreover, attendance at the sale is likely to be increased if it is known that there is no reserve...

For these reasons I would uphold the judge's decision on liability.

NOTES

1. The second (unilateral) contract is referred to as a collateral contract.
2. It appears from this decision that a bid at an auction without reserve can be withdrawn at any time before the hammer falls. This suggests that the unilateral (collateral) offer—to apply the reserve and not to allow the owner to bid—cannot be accepted by every bidder at an auction without reserve. If the acceptance of the offer can be made only by the highest bona fide bidder, that person's identity will not be revealed and acceptance will not occur until the hammer falls or the goods are withdrawn from the sale. Such an analysis preserves the ability to withdraw bids at an auction without reserve.
3. The Court of Appeal rejected the argument that the measure of damages should be restricted to £1,500, which the defendant alleged was the value of the machines, having sold them for this figure. In his judgment, Pill LJ makes it clear that the plaintiff was 'fortunate' in relation to the damages award, because there was no evidence of value other than the manufacturer's list price. Normally, there will be evidence of second-hand market value, which will be applied in fixing the damages award.

SECTION 4 Acceptance

A) The mirror image rule

i) Counter-offers

Hyde v Wrench

(1840) 3 Beav 334, 49 ER 132 (Rolls Court)

On 6 June, the defendant offered to sell his farm for £1,000 and, in reply, the plaintiff offered to buy it for £950. On 27 June, the defendant refused the plaintiff's offer of £950 and, on 29 June, the plaintiff, by letter, agreed to pay £1,000. However, the defendant did not indicate any agreement to the offer to pay £1,000.

Held: There was no binding contract for the purchase of the farm.

LORD LANGDALE MR: I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract. Instead of that, the plaintiff made an offer of his own to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties...

ii) A counter-offer (or offer) can be accepted by conduct

Brogden v Metropolitan Railway Co.

(1877) 2 App Cas 666 (HL)

Brogden had suggested that the Railway Company should enter into a formal contract for the supply of coal. The Company sent terms of agreement. Brogden added the name of an arbitrator to settle any differences, before writing 'approved' and signing the document. The agreement was returned to the Company's manager, who put it in his desk. The manager then ordered and received coal on the basis of the arrangements in this document. When disputes arose, Brogden denied that there was any binding contract.

Held: By inserting the name of an arbitrator, Brogden had rejected the offer and made a counter-offer. This counter-offer had been accepted by the Company when it ordered and had taken delivery of coal upon the terms of the agreement. There had therefore been acceptance by conduct.

LORD BLACKBURN: I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer...

But when you come to the general proposition which [the judge at first instance] seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that...

But my Lords, while, as I say, this is so upon the question of law, it is still necessary to consider this case farther upon the question of fact. I agree, and I think every Judge who has considered the case does agree, certainly Lord Chief Justice Cockburn does, that though the parties may have gone no farther than an offer on the one side, saying, Here is the draft,—(for that I think is really what this case comes to,)—and the draft so offered by the one side is approved by the other, everything being agreed to except the name of the arbitrator, which the one side has filled in and the other has not yet assented to, if both parties have acted upon that draft and treated it as binding, they will be bound by it...

NOTE: In *Pickfords Ltd v Celestica Ltd* [2003] EWCA Civ 1741, the Court of Appeal considered that a purported acceptance fax was, in fact, a counter-offer since it purported to accept the first price offer, although this first-price offer had been revoked by a second-price offer on different terms. The 'acceptance' fax therefore represented an offer on the terms of the first-price offer with the addition of a cap of £100,000 (a material new term added in the counter-offer). This counter-offer had then been accepted by conduct when the claimant carried out the removal work under the contract.

iii) Does the correspondence amount to a counter-offer?

- (a) A request for further information before the offeree makes up his mind is not a counter-offer.

Stevenson, Jacques & Co. v McLean

(1880) 5 QBD 346 (QB)

The defendant wrote to the plaintiffs giving 40s. net cash per ton as the lowest price at which he could sell iron and stating that he would hold the offer open until the following Monday. The plaintiffs telegraphed: 'Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you could give.' The defendant did not reply. One of the issues before Lush J was whether this telegram amounted to a counter-offer, thereby rejecting the defendant's offer to sell at 40s. net cash per ton.

Held: The telegram was not a rejection of the defendant's offer, but merely an inquiry as to whether the defendant would modify the terms of his offer.

LUSH J: [T]he form of the telegram is one of inquiry. It is not 'I offer forty for delivery over two months,' which would have likened the case to *Hyde v Wrench* (1840) 3 Beav 334, where one party offered his estate for 1,000/., and the other answered by offering 950/. Lord Langdale, in that case, held that after the 950/. had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, 'Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give.' There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer.

- (b) What is the position if the offeree purports to accept in one document, but attaches a covering letter asserting that he will not be in a position to comply with the terms of

that acceptance? Does this make the acceptance conditional and hence ineffective as an acceptance?

The Court of Appeal in *The Society of Lloyds v Twinn* (2000) 97 (15) LSG 40, The Times, 4 April 2000, recognized that there were circumstances under which an offeree might wish to accept even though he was unable to perform at that time. The inclusion of an apparently inconsistent covering letter might be regarded as collateral to the concluded contract rather than as rendering the acceptance conditional. The effect of the covering letter would need to be judged objectively depending on the language used and the surrounding circumstances. In the case at hand, the agreement was regarded as concluded despite the existence of the covering letter.

iv) Battle of forms and the counter-offer analysis

Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd

[1979] 1 WLR 401 (CA)

On 23 May 1969, the sellers issued a quotation offering to sell a machine tool to the buyers for £75,535, delivery to be in ten months' time. The offer was stated to be subject to certain terms and conditions, which 'shall prevail over any terms and conditions in the buyer's order'. The conditions included a price variation clause providing for the goods to be charged at the price on the date of delivery. On 27 May, the buyers replied by placing an order for the machine. The order was stated to be subject to certain terms and conditions, which were materially different from those put forward by the sellers and which, in particular, made no provision for a variation in price. At the foot of the buyers' order, there was a tear-off acknowledgement of receipt of the order stating: 'We accept your order on the Terms and Conditions stated thereon.' On 5 June, the sellers completed and signed the acknowledgement, and returned it to the buyers along with a letter stating that the buyers' order was being entered in accordance with the sellers' quotation of 23 May. When the sellers came to deliver the machine, they claimed that the price had increased by £2,892. The buyers refused to pay the increase in price and the sellers brought an action claiming that the price variation clause contained in their offer entitled them to the increased price. The buyers contended that the contract had been concluded on the buyers' terms and was therefore a fixed price contract.

Held: The contract had been concluded on the buyers' terms. The majority, Lawton and Bridge LJ, held that the buyers' order was a counter-offer, which the sellers had accepted by completing and returning the acknowledgement.

LAWTON LJ: The modern commercial practice of making quotations and placing orders with conditions attached, usually in small print, is indeed likely, as in this case to produce a battle of forms. The problem is how should that battle be conducted? The view taken by Theisiger J was that the battle should extend over a wide area and the court should do its best to look into the minds of the parties and make certain assumptions. In my judgment, the battle has to be conducted in accordance with set rules. It is a battle more on classical 18th century lines when convention decided who had the right to open fire first rather than in accordance with the modern concept of attrition.

The rules relating to a battle of this kind have been known for the past 130-odd years. They were set out by Lord Langdale MR in *Hyde v Wrench*, 3 Beav 334, 337, ... and, if anyone should have thought they were obsolescent, Megaw J in *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1963] 1 WLR 333, 337 called attention to the fact that those rules are still in force.

When those rules are applied to this case, in my judgment, the answer is obvious. The sellers started by making an offer. That was in their quotation. The small print was headed by the following words:

General. All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the buyer's order.

That offer was not accepted. The buyers were only prepared to have one of these very expensive machines on their own terms. Their terms had very material differences in them from the terms put forward by the sellers. They could not be reconciled in any way. In the language of article 7 of the Uniform Law on the Formation of Contracts for the International Sale of Goods (see Uniform Laws on International Sales Act 1967, Schedule 2) they did 'materially alter the terms' set out in the offer made by the plaintiffs.

As I understand *Hyde v Wrench*, 3 Beav 334, and the cases which have followed, the consequence of placing the order in that way, if I may adopt Megaw J's words [*Trollope & Colls Ltd v Atomic Power Constructions Ltd*] [1963] 1 WLR 333, 337, was 'to kill the original offer.' It follows that the court has to look at what happened after the buyers made their counter-offer. By letter dated June 4, 1969, the plaintiffs acknowledged receipt of the counter-offer, and they went on in this way:

Details of this order have been passed to our Halifax works for attention and a formal acknowledgment of order will follow in due course.

That is clearly a reference to the printed tear-off slip which was at the bottom of the buyers' counteroffer. By letter dated June 5, 1969, the sales office manager at the plaintiffs' Halifax factory completed that tear-off slip and sent it back to the buyers.

It is true, [counsel for the plaintiffs] has reminded us, that the return of that printed slip was accompanied by a letter which had this sentence in it: 'This is being entered in accordance with our revised quotation of May 23 for delivery in 10/11 months.' I agree with Lord Denning MR that, in business sense, that refers to the quotation as to the price and the identity of the machine, and it does not bring into the contract the small print conditions on the back of the quotation. Those small print conditions had disappeared from the story. That was when the contract was made. At that date it was a fixed price contract without a price escalation clause.

Lord Denning also allowed the appeal, but came to his conclusion by a different route.

LORD DENNING: I have much sympathy with [Thesiger J]'s approach to this case. In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date. This was observed by Lord Wilberforce in *New Zealand Shipping Co. Ltd v A.M. Satterthwaite & Co. Ltd* [1975] AC 154, 167. The better way is to look at all the documents passing between the parties—and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points—even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns said in *Brogden v Metropolitan Railway Co.* (1877) 2 App Cas 666, 672:

... there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description;...

Applying this guide, it will be found that in most cases when there is a 'battle of forms', there is a contract as soon as the last of the forms is sent and received without objection being taken to it. That is well observed in *Benjamin [on Sale of Goods]*. The difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases the battle is won by the man who fires the last

shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them. Such was *British Road Services Ltd v Arthur V. Crutchley & Co. Ltd* [1968] 1 Lloyd's Rep 271, 281–2, per Lord Pearson; and the illustration given by Professor Guest in *Anson's Law of Contract* when he says that 'the terms of the contract consist of the terms of the offer subject to the modifications contained in the acceptance'. In some cases the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back: and the buyer orders the goods purporting to accept the offer—on an order form with his own different terms and conditions on the back—then if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller. There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable—so that they are mutually contradictory—then the conflicting terms may have to be scrapped and replaced by a reasonable implication.

In the present case the judge thought that the sellers in their original quotation got their blow in first: especially by the provision that 'these terms and conditions shall prevail over any terms and conditions in the buyer's order'. It was so emphatic that the price variation clause continued through all the subsequent dealings and that the buyers must be taken to have agreed to it. I can understand that point of view. But I think that the documents have to be considered as a whole. And, as a matter of construction, I think the acknowledgment of June 5 1969, is the decisive document. It makes it clear that the contract was on the buyers' terms and not on the sellers' terms: and the buyers' terms did not include a price variation clause.



Questions

1. Lord Denning's approach separates the issue of formation from the question of content of the contract. Is there any empirical evidence to support Lord Denning's assessment that businessmen pay no attention to fine print and consider that they have a deal when the major terms are agreed? See Beale and Dugdale (1975) 2 Br J Law & Soc 45, 49–51.
2. What does Lord Denning mean when he refers to the parties reaching agreement 'on all material points'? What difficulties exist with his categorization of terms? See Rawlings (1979) 42 MLR 715.

NOTE: The contemporary relevance of Lord Denning's approach in *Butler Machine Tool* of separating the formation of a contract from a determination of its content has been considered in recent decisions. First, in *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep 8, the judge concluded that there was a binding contract on the basis of all of the correspondence passing between the parties. Secondly, in *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2009] 2 CLC 866, [2010] 2 All ER (Comm) 302, the judge at first instance had relied on Lord Denning's approach, had analysed the parties' relationship, and had concluded that the buyer's terms prevailed because that had been the parties' intention all along. It was left to the Court of Appeal to restore and apply the traditional approach.

Tekdata Interconnections Ltd v Amphenol Ltd

[2009] EWCA Civ 1209, [2009] 2 CLC 866, [2010] 2 All ER (Comm) 302 (CA)

In a long-term contracting arrangement, Tekdata bought parts for its cable harnesses from Amphenol; in turn, Tekdata supplied its cable harnesses to a company, which supplied the engine

control systems to Rolls Royce. Tekdata (the buyer) would send purchase orders containing its terms and conditions, and Amphenol (the seller) would acknowledge these orders by sending a statement that its own terms and conditions, which included an exemption clause, would prevail. Tekdata alleged a breach of contract in relation to an order, but Amphenol claimed that its terms governed, so that it could rely on exemption clauses to protect it from liability. The judge at first instance analysed the parties' relationship and concluded that it had been the parties' intentions that Tekdata's terms would prevail.

Held (in the Court of Appeal, allowing the appeal): Amphenol's terms governed. The Court of Appeal considered that, in general, the traditional analysis would prevail and, on these facts, this meant that Amphenol's acknowledgement was the last shot, which had been accepted by conduct when the goods were delivered and accepted by Tekdata.

LONGMORE LJ: 20. In paras 2-110 and 111 of *Chitty on Contracts* (30th ed) Professor Sir Guenther Treitel points out that the traditional offer and acceptance analysis is not always without its difficulties. Having referred to three specific cases of (1) multilateral contracts, (2) references to third parties and (3) sale of land, he cites the words of Lord Denning MR in *Butler* and his similar words in the earlier case of *Gibson v Manchester City Council* [1978] 1 WLR 520, 523. He then says of these comments:

But such an outright rejection of the traditional analysis is open to the objection that it provides too little guidance for the courts (or their parties or their legal advisers) in determining whether an agreement has been reached

and I might add 'on what terms'. The fact that *Gibson* was reversed by the House of Lords [1979] 1 WLR 294 adds considerable force to this comment...

21. So, although I am not saying that the context of a long term relationship and the conduct of the parties can never be so strong as to displace the result which a traditional offer and acceptance analysis would dictate, I do not consider the circumstances are sufficiently strong to do so in this present case. Indeed I think it will always be difficult to displace the traditional analysis, in a battle of forms case, unless it can be said there was a clear course of dealing between the parties. That was never proved...

DYSON LJ [expressing agreement with the judgment of Longmore LJ]: 23. The so-called 'last shot' doctrine has been explained in *Chitty on Contracts* (30th edition) at para 2-037 as meaning that where conflicting communications are exchanged, each is a counter-offer, so that if a contract results at all (eg from an acceptance by conduct) it must be on the terms of the final document in the series leading to the conclusion of the contract. This doctrine has been criticised in *Anson's Law of Contract* (28th edition) at p 39 as depending on chance and being potentially arbitrary as well as on the ground that, unless and until the counter-offer is accepted, there is no contract even though both buyer and seller may firmly believe that a contract has been made...

25. In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the 'traditional offer and acceptance analysis', ie that there is a contract on B's conditions. I accept that this analysis is not without its difficulties in circumstances of the kind to which Professor Treitel refers in the passage quoted at [20] above. But in the next sentence of that passage, Professor Treitel adds: 'For this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance'. I also accept the force

of the criticisms made in *Anson*. But the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships.

Pill LJ agreed with both Longmore and Dyson LJ.

NOTES

1. The 'traditional offer and acceptance' analysis was subsequently approved and applied by Gloster J in *Claxton Engineering Services Ltd v TXM Olaj-és Gázkutató Kft* [2010] EWHC 2567 (Comm), [2011] 2 All ER (Comm) 38, [2011] 1 Lloyd's Rep 252. Coulson J, in *Trebor Bassett Holdings Ltd v ADT Fire and Security plc* [2011] EWHC 1936 (TCC), [2011] BLR 661, confirmed that the traditional analysis would be applied unless there was a clear course of dealing indicating a common intention that other terms should prevail. On the facts, there was no such course of dealing. ADT had sent a quotation to design, supply, and install a fire suppression system on its own terms, which contained a limitation of liability, but the 'last shot' (Trebor's purchase order referring to its terms, which did not contain any limitation of liability) had been accepted by conduct when ADT had commenced the contract work without objecting to Trebor's terms. It followed that the total loss of £110 million could be recovered.

2. By comparison, Burton J in *GHSP Inc v AB Electronic Ltd* [2010] EWHC 1328 (Comm), [2011] 1 Lloyd's Rep 432, applied Lord Denning's 'formation and content' analysis in what must be regarded as an exceptional decision. Burton J had to determine which parties' standard terms of business prevailed when both parties had been clear during negotiations that they were not prepared to agree to the terms of the other. The contract concerned the supply of vehicle pedal sensors. The supply terms purported to exclude liability for consequential loss or damage and restricted liability to rectification or repair. The negotiations had revolved around the claimant's standard terms, which contained no limitation on liability. The supplier was clear that it was not prepared to contract without a cap on its liability and no agreement had been reached on this point. The problem was that the parties were agreed that they had a contract. The goods had been manufactured and supplied, so that this contract had been performed. Burton J's solution, as argued by counsel for both parties, was to regard the terms of the contract as the implied terms in the Sale of Goods Act 1979, which would be implied in any event. It follows that the parties' own terms had no part to play.

B) Offeror prescribes the method of acceptance

Manchester Diocesan Council for Education v Commercial & General Investments Ltd [1970] 1 WLR 241 (Ch D)

Condition 4 of a request for tenders stated that the person whose tender was accepted would be informed by letter sent to him at the address given in the tender. On 15 September 1964, the plaintiff wrote to the defendant company's surveyor, stating that the sale to the company had been approved, but it was not until 7 January 1965 that the plaintiff's solicitors wrote to the defendant company at the address given in the tender giving formal notification of acceptance of its offer. It was alleged that the offer in the tender had lapsed, so that it was necessary to decide when the contract had been concluded.

BUCKLEY J: Condition 4, however, does not say that that shall be the sole permitted method of communicating an acceptance. It may be that an offeror, who by the terms of his offer insists on acceptance in a particular manner, is entitled to insist that he is not bound unless acceptance is effected or communicated in that precise way, although it seems probable that, even so, if the other party communicates his acceptance in some other way, the offeror may by conduct or otherwise waive his right to insist on the prescribed method of acceptance. Where, however, the offeror has prescribed a particular method of

acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract. Thus in *Tinn v Hoffman & Co.* (1873) 29 LT 271, where acceptance was requested by return of post, Honeyman J, said at p. 274:

That does not mean exclusively a reply by letter by return of post, but you may reply by telegram or by verbal message or by any means not later than a letter written and sent by return of post.

If an offeror intends that he shall be bound only if his offer is accepted in some particular manner, it must be for him to make this clear. Condition 4 in the present case has not, in my judgment, this effect.

Moreover, the inclusion of condition 4 in the defendant's offer was at the instance of the plaintiff, who framed the conditions and the form of tender. It should not, I think, be regarded as a condition or stipulation imposed by the defendant as offeror upon the plaintiff as offeree, but as a term introduced into the bargain by the plaintiff and presumably considered by the plaintiff as being in some way for the protection or benefit of the plaintiff. It would consequently be a term strict compliance with which the plaintiff could waive, provided the defendant was not adversely affected. The plaintiff did not take advantage of the condition which would have resulted in a contract being formed as soon as a letter of acceptance complying with the condition was posted, but adopted another course, which could only result in a contract when the plaintiff's acceptance was actually communicated to the defendant.

For these reasons, I have reached the conclusion that in accordance with the terms of the tender it was open to the plaintiff to conclude a contract by acceptance actually communicated to the defendant in any way; and, in my judgment, the letter of September 15 constituted such an acceptance...

Yates Building Co. Ltd v Pulleyn & Sons (York) Ltd
(1975) 237 EG 183, (1975) 119 SJ 370 (CA)

The defendants granted the plaintiffs an option to buy building plots for £18,900 'exercisable by notice in writing ... between 6 April and 6 May 1973 ... to be sent by registered or recorded delivery post' to the defendants or their solicitors. The option was exercised by a letter of 30 April 1973 sent by ordinary post, but the defendants refused to accept it as a valid acceptance.

Held: Because the method was not clearly stated to be mandatory, any acceptance that was communicated to the offeror by any other no less advantageous method would conclude the contract. The provision for registered or recorded post was for the benefit of the plaintiffs, and they could waive the requirement and take the risk of ordinary post.

c) Acceptance must be made in response to the offer

An offer is not 'accepted' by doing the required act in ignorance of the offer. However, if the offeree responds with knowledge, his or her motive in so doing is irrelevant.

R v Clarke
(1927) 40 CLR 227 (High Court of Australia)

A reward was offered by the government of Western Australia for information leading to the arrest and conviction of the persons who committed the murders of two police officers. Clarke gave this information after he had been arrested for this crime, and it was found as a fact that his only intention was to save himself from an unfounded charge, so that he had not acted on the faith of, or in reliance upon, the offer. In reaching the conclusion that he could not recover, the High Court had

to distinguish *Williams v Carwardine* (1833) 5 C & P 566, 172 ER 1101, in which the plaintiff had given the information requested because she thought that she was dying. It was held in that case that she could recover the reward that had been offered, because she knew about the reward. Her motive in supplying the information was not material because she had acted on the offer.

HIGGINS J: That case [*Williams v Carwardine*] seems to me not to deal with the essential elements for a contract at all: it shows merely that the *motive* of the informer in accepting the contract offered (and the performing the conditions is usually sufficient evidence of acceptance) has nothing to do with his right to recover under the contract. The reports show (as it was assumed by the Judges after the verdict of the jury in favour of the informer), that the informer *knew* of the offer when giving the information, and meant to accept the offer though she had also a *motive* in her guilty conscience.

... The reasoning of Woodruff J in *Fitch v Snedaker* [38 NY 248 (1868)] seems to me to be faultless; and the decision is spoken of in *Anson* as being undoubtedly correct in principle:—‘The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard?’ Clarke had seen the offer, indeed; but it was not present to his mind—he had forgotten it, and gave no consideration to it. In his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or to forgetting it after hearing. But for this candid confession of Clarke’s it might fairly be presumed that Clarke, having once seen the offer, acted on the faith of it, in reliance on it; but he has himself rebutted that presumption.

Gibbons v Proctor

(1891) 64 LT 594

On 29 May, the defendant had offered a reward of £25 to the person who gave information, leading to the conviction of the perpetrator of a particular crime, to police Superintendent Penn. The plaintiff, a police officer, had already communicated the required information to a colleague, named Coppin, with instructions to forward it to Superintendent Penn. Coppin had communicated the information to his superior, Inspector Lennan, who had passed it on to Superintendent Penn. The information reached Penn on 30 May.

Held: The plaintiff was entitled to the reward. Coppin and Lennan were the plaintiff’s agents for the purposes of conveying the information. The terms of the offer required the information to be given to Penn. The acceptance was the supply of the information to Penn, and at that time the plaintiff knew that a reward had been offered.

NOTES

1. Hudson (1968) 84 LQR 503 argued that, on grounds of policy, the law should encourage rather than penalize people who do not know about a reward and who act under a sense of moral duty.
2. It is also objectionable to allow the offeror of a reward to escape liability on his promise when he has had the benefit of seeing his conditions fulfilled. (Avoidance of this situation is the very reason for holding such a promise to be an offer and not an invitation to treat.)

D) Communication of the acceptance to the offeror

i) Implied waiver of the need to communicate

Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256 (see *Chapter 1*) is authority for the general principle that, in a unilateral contract, the performance of the act is the acceptance and there is no need to communicate the attempt to perform it. The circumstances may also indicate that there is a

waiver of the need to communicate acceptance. For example, in *Dresdner Kleinwort Ltd v Attrill* [2013] EWCA Civ 394, [2013] 3 All ER 607, the employer had announced that it would pay a guaranteed employment bonus to its employees. This promise was clearly beneficial to the employees and nobody hearing the announcement would expect that an employee could benefit only if he positively accepted the offer. The usual requirement to notify acceptance was therefore dispensed with.

As a general rule, however, silence in a bilateral contract will not constitute acceptance.

Felthouse v Bindley

(1862) 11 CB (NS) 869, 142 ER 1037 (CP)

During negotiations for the sale of a horse, the plaintiff wrote to his nephew stating: 'If I hear no more about him, I consider the horse is mine at £30 15s.' The nephew did not respond, but did instruct the defendant, an auctioneer, to reserve the horse in question because it had already been sold. By mistake, the defendant put the horse up for sale and it was sold. The plaintiff sued the auctioneer for the conversion of the horse (which meant that he had to show that the horse was his property at the time that it was sold).

Held: The plaintiff did not have property in the horse.

WILLES J: [I]t is clear that the uncle had no right to impose upon the nephew a sale of his horse for 30/15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him; the uncle might also have retracted his offer at any time before acceptance. It stood an open offer, and so things remained until the 25th of February, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named, —30/15s.; but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant. It appears to me that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff...



Questions

1. Why had the nephew not accepted by his act of informing the auctioneer that the horse had been sold?
2. What would the position have been had the nephew been trying to enforce the sale contract against his uncle based upon the uncle's statement that silence would constitute acceptance?

∴ **NOTE:** For a discussion of exceptional situations in which silence may constitute acceptance in a bilateral contract, see the discussion in Poole, *Textbook on Contract Law*, 12th edn (Oxford University Press, 2014), 2.4.5.1.

ii) The postal rule of acceptance

If the post is the proper method to communicate acceptance, then the acceptance is deemed complete as soon as the letter of acceptance is posted.

Adams v Lindsell

(1818) 1 B & Ald 681, 106 ER 250 (KB)

On 2 September, the defendants wrote to the plaintiffs offering to sell them certain fleeces of wool and requiring an answer by post. The defendants misdirected this letter, so that the plaintiffs did not receive it until 5 September. The plaintiffs posted their acceptance on the same day, but it was not received until 9 September. Meanwhile, on 8 September, the defendants, not having received an answer by 7 September as they had expected, sold the wool to someone else.

Held: There was a contract on 5 September when the plaintiffs posted their acceptance. In answer to the argument that the acceptance had to be communicated, the court said that if that were so, no contract could ever be completed by post. If the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound until after they had received the notification that the defendants had received their answer and assented to it, and so it might go on *ad infinitum*. The court stressed the fact that the delay in notifying the acceptance was solely the result of the defendants' mistake and 'it therefore must be taken as against them, that the plaintiffs' answer was received in course of post'.

The following case considers the question of when the post is a proper method for communicating acceptance.

Henthorn v Fraser

[1892] 2 Ch 27 (CA)

The facts of this case appear at *page 56*.

LORD HERSCHELL: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

∴ **NOTE:** The offer in this case had not been made by post. The offeree had been handed an option to purchase by the offeror in Liverpool. The offeree lived in Birkenhead. Therefore it was held that acceptance by post must have been within the parties' contemplation. The method need only be 'a' possible method given the context and circumstances.

Household Fire and Carriage Accident Insurance Co. (Ltd) v Grant

(1879) 4 Ex D 216 (CA)

The defendant applied for shares in the plaintiff company. The company allotted the shares to the defendant and posted a letter addressed to him containing the notice of allotment, but he never received the letter.

Held (Thesiger and Baggally LJJ; Bramwell LJ dissenting): The defendant had become a shareholder. Acceptance was complete when the letter of allotment was posted and it was irrelevant that it never arrived.

THESIGER LJ: An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case* (1867) LR 4 Eq 9, when in the course of his judgment he said: '*Dunlop v Higgins* (1848) 1 HLC 381 decides that the posting of a letter accepting an offer constitutes

a binding contract, but the reason of that is, that the post office is the common agent of both parties.' Alderson, B., also in *Stocken v Collin* (1841) 7 M & W 515, a case of notice of dishonour, ... says: 'If the doctrine that the post office is only the agent for the delivery of the notice were correct no one could safely avail himself of that mode of transmission.' But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? ... The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden v Directors of Metropolitan Ry. Co.* (1877) 2 App Cas 666, 'put it out of his control and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound.' How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law: it is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Bramwell LJ delivered an important dissenting judgment.

BRAMWELL LJ [dissenting]: That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would

be sent on receipt of a post office order. Is it enough to post the letter? If the word 'receipt' is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorised by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled...

NOTES

1. Evans (1966) 15 ICLQ 553 and Winfield (1939) 15 LQR 499 contain criticisms and justifications of the postal rule. These are discussed in Poole, *Textbook on Contract Law*, 12th edn (Oxford University Press, 2014), 2.4.5.2. See also Gardner (1992) 12 OJLS 170.

2. One justification for the postal rule is the fact that it prevents the offeror revoking his or her offer once the offeree has posted an acceptance. However, the UNIDROIT Principles of International Commercial Contracts (PICC) advocate a 'receipt' rule for any postal acceptance (Art. 2.1.6(2)), but provide protection for the offeree who posts his acceptance, since a revocation will be effective only if it reaches the offeree before the offeree has posted his acceptance (Art. 2.1.4). This is also the position in the Principles of European Contract Law (PECL), Art. 2:205 and 2:202, the Draft Common Frame of Reference (DCFR) II-4:205(1) and 4:202(1), and the Common European Sales Law (CESL), Arts 35(1) and 32(1).

iii) Avoiding the postal rule

The offeror can always require actual communication of the acceptance to him or her, which will oust the operation of the postal rule. This leads to fine distinctions between words requiring actual communication and those that do not.

Holwell Securities Ltd v Hughes

[1974] 1 WLR 155 (CA)

On 19 October 1971, the plaintiffs were granted an option by the defendant 'exercisable by notice in writing to [the defendant] at any time within six months from the date hereof'. On 14 April 1972, the plaintiffs wrote to the defendant, giving notice of the exercise of the option, but the letter did not arrive. The plaintiffs sought specific performance of the option agreement, arguing that it was complete on 14 April when the acceptance was posted.

Held: The option had not been validly exercised because actual communication was required.

RUSSELL LJ: It is the law in the first place that, prima facie, acceptance of an offer must be communicated to the offeror. Upon this principle the law has engrafted a doctrine that, if in any given case the true view is that the parties contemplated that the postal service might be used for the purpose of forwarding an acceptance of the offer, committal of the acceptance in a regular manner to the postal service will be acceptance of the offer so as to constitute a contract, even if the letter goes astray and is lost. Nor, as was once suggested, are such cases limited to cases in which the offer has been made by post. It suffices I think at this stage to refer to *Henthorn v Fraser* [1892] 2 Ch 27. In the present case, as I read a passage in the judgment below..., Templeman J concluded that the parties here contemplated that the postal service might be used to communicate acceptance of the offer (by exercise of the option); and I agree with that.

But that is not and cannot be the end of the matter. In any case, before one can find that the basic principle of the need for communication of acceptance to the offeror is displaced by this artificial concept of communication by the act of posting, it is necessary that the offer is in its terms consistent with such displacement and not one which by its terms points rather in the direction of actual communication...

The relevant language here is, 'The said option shall be exercisable by notice in writing to the intending vendor...', a very common phrase in an option agreement. There is, of course, nothing in that phrase to suggest that the notification to the defendant could not be made by post. But the requirement of 'notice...to', in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, referred to by *Anson's Law of Contract*... as 'acceptance without notification'.

It is of course true that the instrument could have been differently worded. An option to purchase within a period given for value has the characteristic of an offer that cannot be withdrawn. The instrument might have said 'The offer constituted by this option may be accepted in writing within six months': in which case no doubt the posting would have sufficed to form the contract. But that language was not used, and, as indicated, in my judgment, the language used prevents that legal outcome...

LAWTON LJ: Does the [postal] rule apply in *all* cases where one party makes an offer which both he and the person with whom he was dealing must have expected the post to be used as a means of accepting it? In my judgment it does not. First, it does not apply when the express terms of the offer specify that the acceptance must reach the offeror. The public nowadays are familiar with this exception to the general rule through their handling of football pool coupons. Secondly, it probably does not operate if its application would produce manifest inconvenience and absurdity. This is the opinion set out in *Cheshire and Fifoot, Law of Contract*... It was the opinion of Lord Bramwell as is seen by his judgment in *British & American Telegraph Co. v Colson* (1871) LR 6 Exch 108, and his opinion is worthy of consideration even though the decision in that case was overruled by this court in *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) 4 Ex D 216. The illustrations of inconvenience and absurdity which Lord Bramwell gave are as apt today as they were then. Is a stockbroker who is holding shares to the orders of his client liable in damages because he did not sell in a falling market in accordance with the instructions in a letter which was posted but never received? Before the passing of the Law Reform (Miscellaneous Provisions) Act 1970 (which abolished actions for breach of promise of marriage), would a young soldier ordered overseas have been bound in contract to marry a girl to whom he had proposed by letter, asking her to let him have an answer before he left and she had replied affirmatively in good time but the letter had never reached him? In my judgment, the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject matter

under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other. In my judgment, when this principle is applied to the facts of this case it becomes clear that the parties cannot have intended that the posting of a letter should constitute the exercise of the option.

? Questions

1. What form of wording will suffice to oust the postal rule and ensure that any acceptance must be actually communicated? Will 'Let me know your answer' suffice?
2. Lawton LJ states that the postal rule will not apply where its application 'would produce manifest inconvenience and absurdity'. What situations would this cover and are the examples that he gives appropriate?

∴ NOTE: The Contracts (Rights of Third Parties) Act 1999, s. 2(2)(b), requires actual receipt and expressly ousts the postal rule in the context of third party assent to a term that will operate to prevent the parties from cancelling or varying that contract term without that third party's consent.

iv) May a postal acceptance be retracted or overtaken before it reaches the offeror?

Countess of Dunmore v Alexander

(1830) 9 S 190 (Court of Session)

The Countess wrote to Lady Agnew asking for a reference for a certain Elizabeth Alexander. Lady Agnew replied. On 5 November, the Countess wrote to Lady Agnew, asking her to engage Betty Alexander. This was forwarded to Alexander. In the meantime, on 6 November, the Countess wrote another letter to Lady Agnew, stating that she no longer needed Alexander. The second letter was forwarded to Alexander by express and both were delivered at the same moment to Alexander. Alexander argued that there was a concluded contract.

Held: There was no concluded contract.

LORD BALGRAY: The admission that the two letters were simultaneously received puts an end to the case. Had the one arrived in the morning and the other in the evening of the same day, it would have been different. Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recalls by a subsequent letter, that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the Post Office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the Post Office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal.

LORD CRAIGIE [dissenting]: Every letter between the principals, relative to an offer or an acceptance respectively was, as soon as it reached Lady Agnew, the same as delivered for behoof of the party on whose account it was written. I hold, therefore, that when Lady Dunmore's letter reached Lady Agnew, the contract of hiring Alexander was complete,—the offer on the part of Alexander being met by an intimated acceptance on the part of the Countess. No subsequent letter from the Countess to Lady Agnew could annul what had passed by the mere circumstance of its being delivered, at the same time with

the first, into the hands of Alexander. I do not think the servant could have retracted after the first letter reached Lady Agnew; and if she was bound, it seems clear that the Countess could not be free.

NOTES

1. The case is of questionable authority in support of the proposition that it is possible to overtake a postal acceptance because the Court appears to treat the letter from the Countess on 5 November as an offer and the letter of 6 November as a valid revocation of that offer.
2. Allowing a letter of acceptance to be withdrawn once posted is contrary to the postal 'rule' and would give the offeree the best of both worlds, i.e. on posting, he could decide whether to hold the offeror to the contract or to recall his acceptance. However, Evans (1966) 15 ICLQ 553 argued in favour of allowing a revocation to overtake a postal acceptance, and it is clear that Bramwell LJ in *Household Fire* (see pages 44–46) supported this position. See also Hudson (1966) 82 LQR 169, who argued that there is no disadvantage to the offeror, since the offeror will act on the first communication that he receives.

v) Instantaneous methods of communicating and non-instantaneous messages

Are acceptances by telephone, telex, and fax subject to the postal rule?

Where an acceptance is instantaneous, receipt is required and the postal rule does not apply. Problems have arisen in defining exactly what is meant by 'receipt'.

Entores Ltd v Miles Far East Corporation

[1955] 2 QB 327 (CA)

An English company received a telex offer from a Dutch company and made a counter-offer, which the Dutch company accepted by telex. The English company needed to establish that the contract was made within the English jurisdiction.

Held: Since the acceptance was received in England, the contract was made within the jurisdiction.

DENNING LJ: Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound...

Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes 'dead' so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off: because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next, that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly, take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send

his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails, or something of that kind. In that case, the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message 'not receiving'. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or if the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract.

My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received.

NOTE: *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep 335, confirms that, by analogy with *Entores v Miles Far East Corporation* (telex machine), the same principle applies in the case of an acceptance sent by facsimile (fax), so that the contract was made in the jurisdiction where the fax acceptance was received. Colman J noted, at [75]:

A fax is a form of instantaneous communication: if a message has not been received, the sender is informed by his machine. Most machines also indicate to the sender whether the message has been effectively, as distinct from only partly, received.

However, it does not necessarily follow that the fax message received will be legible.

When is an acceptance sent by an instantaneous method actually 'received' (communicated)? Is it when it is received by the machine or does it have to be read by the intended recipient?

Where the message was sent to a business, this depends on whether it was sent within or outside office hours, since the recipient business can be expected to supervise its machines during office hours.

In *Tenax Steamship Co. Ltd v The Brimnes (Owners), The Brimnes* [1975] QB 929, a telex withdrawal had appeared on the charterers' telex machine between 17:30 and 18:00 (held to be within office hours) on 2 April, but it was not noted until the following day. The Court of Appeal held that the withdrawal was received when it appeared on the machine rather than when it was actually read the following day. The owners, having sent their message within office hours, had done all that they could be expected to do to transmit their message, and they would not know that it was not actually read until the following day. Megaw LJ said, at 966H–967A:

I think that the principle which is relevant is this: if a notice arrives at the address of the person to be notified, at such a time and by such a means of communication that it would in the normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal businesslike manner in respect of taking cognisance of the communication so as to postpone the effective time of the notice until some later time when it in fact came to his attention.

By analogy, if an acceptance were sent during office hours, it would be received when it was received by the telex or fax machine. There is support for this view in the judgment of Lord Fraser in *Brinkibon Ltd v Stahag Stahl GmbH* [1983] 2 AC 34 (HL) (see below).

It appears that the position will be different if the communication is sent **outside office hours**. Such a communication will inevitably be ‘non-instantaneous’.

Brinkibon Ltd v Stahag Stahl GmbH

[1983] 2 AC 34 (HL)

A telex acceptance was sent from London to Vienna. The English company could commence a claim for breach of contract against the Austrian company only if the contract was made in England.

Held: Approving *Entores v Miles Far East*, the contract in question had been concluded where the telex acceptance had been received: in Vienna.

LORD FRASER: I have reached the opinion that, on balance, an acceptance sent by telex directly from the acceptor’s office to the offeror’s office should be treated as if it were an instantaneous communication between principals, like a telephone conversation. One reason is that the decision to that effect in *Entores v Miles Far East Corporation* [1955] 2 QB 327 seems to have worked without leading to serious difficulty or complaint from the business community. Secondly, once the message has been received on the offeror’s telex machine, it is not unreasonable to treat it as delivered to the principal offeror, because it is his responsibility to arrange for prompt handling of messages within his own office. Thirdly, a party (the acceptor) who tries to send a message by telex can generally tell if his message has not been received on the other party’s (the offeror’s) machine, whereas the offeror, of course, will not know if an unsuccessful attempt has been made to send an acceptance to him. It is therefore convenient that the acceptor, being in the better position, should have the responsibility of ensuring that his message is received. For these reasons I think it is right that in the ordinary simple case, such as I take this to be, the general rule and not the postal rule should apply. But I agree with both my noble and learned friends that the general rule will not cover all the many variations that may occur with telex messages.

LORD WILBERFORCE [*obiter*]: Since 1955 the use of telex communication has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time. There may be some error or default at the recipient’s end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases: they

must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie...

NOTE: Lord Brandon expressed agreement with Lord Wilberforce on this point, and Lord Wilberforce's *obiter* comment was relied on by Gatehouse J in the following case.

Mondial Shipping and Chartering BV v Astarte Shipping Ltd

[1995] CLC 1011

The issue in the case was whether a telex notice of intention to withdraw the vessel for non-payment of hire, sent by the shipowners to the charterers late on the evening of Friday 2 December 1994 (at 23:41 hours), was received instantaneously or at the start of business on the next working day. This was important on the facts because payment of the hire could lawfully have been made at any time before midnight on Friday 2 December and, if the notice took effect at 23:41 on Friday 2 December, the charterers would not have been in default at the time that the notice was served. On the other hand, the notice would have been valid if it had not taken effect until the next working day, Monday 5 December.

Held: The notice was communicated at the start of business on the next working day—namely, Monday 5 December. Accordingly, it was not served before the charterers were in breach of the charterparty, which occurred at midnight on the Friday night. (However, the notice was nevertheless invalid because it did not indicate the action required of the charterers.)

GATEHOUSE J: It was not in dispute in the present case that a notice under cl. 27 is not effective until it is actually received by the charterer—the 'postal rule' referable to the conclusion of a contract has no application. The crucial question is what is meant by 'received'? The charterers contended that this must be the moment when it was printed out on their telex machine; that this occurred before the time when they would be in default under cl. 27, and accordingly the notice was premature and invalid for that reason, apart from its want of proper form. The owners contended that the moment of receipt was when the telex message was, or must be taken to have been, first read by a responsible member of the charterers' organisation, i.e., at or shortly after 9 am on Monday 5 December; that the charterers were by then in default of their duty of punctual payment: accordingly the notice was not then premature...

There is no authority on this. The question has not arisen in any reported decision. In *The Afovos* [*Afovos Shipping Co. SA v R. Pagnan and F. Illi, The Afovos* [1983] 1 Lloyd's Rep 335] and other similar cases of instantaneous transmission the message was sent during ordinary business hours so the time of sending the notice by the owners and its receipt by the charterers was identical. It is therefore not significant that various judges have referred to the time when the notice was 'sent', or 'issued'...

What matters is not when the notice is given/sent/despached/issued by the owners but when its content reaches the mind of the charterer. If the telex is sent in ordinary business hours, the time of receipt is the same as the time of despatch because it is not open to the charterer to contend that it did not in fact then come to his attention (see *The Brimnes* per Brandon J [1973] 1 WLR 386 at p. 406, and per the Court of Appeal [1975] QB 929).

The problem has, of course, been referred to. See the well-known passage in the speech of Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 at p. 42. [Gatehouse J went on to consider this *obiter* statement (see page 51–2).] Brandon J also referred, in passing, to an out-of hours telex in *The Brimnes*...

The charterers in order to found their contention that the telex message was premature, are in fact contending for a universal rule for telex communications which, they say, has the commercial advantage

of certainty. But I propose to follow Lord Wilberforce's words and resolve this issue by reference to the particular circumstances. His Lordship's words, ... were spoken with reference to where a contract is to be regarded as having been concluded: hence, as I think, his reference to the intentions of the parties and in some cases, where the risks should lie (both the cases cited were concerned with the risks which arise from a postal acceptance). A notice such as the one with which I am concerned is clearly of a quite different type and does not involve any consideration of the mutual intentions of contracting parties or of where the risks should lie. But I think the tribunal were entitled to find ... that a notice which arrives at 23.41 on a Friday night is not to be expected to be read before opening hours on the following Monday, and that was a conclusion of fact arrived at by the arbitrators as a matter of commercial common sense.

Why the telex was sent when it was is not explained. It may be that the owners or their agents, forgetful of the midnight rule (or, more likely, wholly ignorant of it) assumed that as the vessel had been delivered at 23.00 hours that was the moment each successive 15 days after which hire became overdue. If they had waited a further 20 minutes this problem would not have arisen.

In my judgment the tribunal were right to find that the notice under cl. 31 was not received by charterers until the opening of business on 5 December, and was not premature.



Questions

1. This decision clarifies the position on communication where the message is very evidently sent 'outside ordinary business hours'. However, this expression is not defined. In *The Brimnes* [1975] QB 929, a message received between 17:30 and 18:00 was considered to be received within 'ordinary business hours'. Blair J, in *Thomas v BPE Solicitors (a firm)* [2010] EWHC 306 (Ch), [2010] All ER (D) 306 (Feb), [90], considered that an email sent at 18:00 was sent within office hours given the context of the parties' negotiations. This indicated that, on the basis of the previous emails, the transaction could have been completed that evening. In fact, the recipient had gone home at 17:45 on a Friday evening in late August and the office did not reopen until the following Tuesday because of the bank holiday. It is also possible to imagine a situation arising in which a message is sent within the communicator's business hours, but outside the recipient's official business hours.

Should 'ordinary business hours' be judged by reference to the parties' own hours and knowledge of their respective practices or by some general objective understanding?

2. Would it be preferable to adopt a clear and certain definition of what will constitute receipt? The PICC contain a definition of 'receipt' in the context of non-oral communications, such as fax, telex, or computer, as occurring when there is delivery at the offeror's place of business or mailing address (Art. 1.10(3)). See also Art. 1:303 PECL, DCFR I-1:109(4), and Art. 10(4) CESL, which also states that electronic mail 'or other individual communication' is received when it can be accessed by the addressee (Art. 10(4)(c)). In *Pickfords Ltd v Celestica Ltd* [2003] EWCA Civ 1741, Arden LJ considered that where the communication was intended for an organization, it would be sufficient if notice was received by the organization, as opposed to an individual employee.

3. When are messages left on telephone answering machines communicated? See the arguments of Coote (1971) 4 New Zealand UL Rev 331.

vi) Does the postal rule apply to acceptance messages sent by electronic mail?

There is a detailed discussion of this question in Poole, *Textbook on Contract Law*, 12th edn (Oxford University Press, 2014), 2.4.5.4. Given the many variables, it would seem advisable to avoid the

postal rule expressly and to require actual receipt. In *Thomas v BPE Solicitors (a firm)* [2010] EWHC 306 (Ch), [2010] All ER (D) 306 (Feb), [86], in *obiter* comments, Blair J agreed, considering that where contracts are made by exchange of email, the receipt rule applies (by analogy with the telex case law and *Entores v Miles Far East Corporation* [1955] 2 QB 327). Responsibility for getting the message through to its destination should lie with the communicator.

There is further support for the application of the receipt rule in the decision of the High Court of Singapore in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] SLR(R) 594.

V. K. RAJAH JC: 97 Different rules may apply to e-mail transactions and worldwide web transactions. When considering the appropriate rule to apply, it stands to reason that as between sender and receiver, the party who selects the means of communication should bear the consequences of any unexpected events. An e-mail, while bearing some similarity to a postal communication, is in some aspects fundamentally different. Furthermore, unlike a fax or a telephone call, it is not instantaneous. E-mails are processed through servers, routers and Internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient accesses the e-mail, but in this respect e-mail does not really differ from mail that has to be opened. Certain Internet service providers provide the technology to inform a sender that a message has not been properly routed. Others do not.

98 Once an offer is sent over the Internet, the sender loses control over the route and delivery time of the message. In that sense, it is akin to ordinary posting. Notwithstanding some real differences with posting, it could be argued cogently that the postal rule should apply to e-mail acceptances; in other words, that the acceptance is made the instant the offer is sent... acceptance would be effective the moment the offer enters that node of the network outside the control of the originator. There are, however, other sound reasons to argue against such a rule in favour of the recipient rule. It should be noted that while the common law jurisdictions continue to wrestle over this vexed issue, most civil law jurisdictions lean towards the recipient rule. In support of the latter it might be argued that unlike a posting, e-mail communication takes place in a relatively short time frame. The recipient rule is therefore more convenient and relevant in the context of both instantaneous or near instantaneous communications. Notwithstanding occasional failure, most e-mails arrive sooner rather than later.

99 Like the somewhat arbitrary selection of the postal rule for ordinary mail, in the ultimate analysis, a default rule should be implemented for certainty, while accepting that such a rule should be applied flexibly to minimise unjustness. In these proceedings, it appears that the purchases made by the sixth plaintiff were not accompanied by a corresponding receipt of acceptances, as his e-mail inbox was full. Notwithstanding, the defendant does not take issue with this as the sixth plaintiff's orders were received and the appropriate automated responses generated. In light of this, the parties did not address me on the issue of when the contract was formed, though this appears to be a relevant issue depending on which rule is adopted. In the absence of proper and full arguments on the issue of which rule is to be preferred, I do not think it is appropriate for me to give any definitive views in these proceedings on this very important issue...

100...The Vienna Sales Convention ('the Convention') applies in Singapore...Article 24 of the Convention states:

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

It appears that in Convention transactions, the receipt rule applies unless there is a contrary intention. Offer and acceptances have to 'reach' an intended recipient to be effective. It can be persuasively argued that e-mails involving transactions embraced by the Convention are only effective on reaching the recipient. If this rule applies to international sales, is it sensible to have a different rule for domestic sales?

101 The applicable rules in relation to transactions over the worldwide web appear to be clearer and less controversial. Transactions over websites are almost invariably instantaneous and/or interactive. The sender will usually receive a prompt response. The recipient rule appears to be the logical default rule. Application of such a rule may however result in contracts being formed outside the jurisdiction if not properly drafted. Web merchants ought to ensure that they either contract out of the receipt rule or expressly insert salient terms within the contract to deal with issues such as a choice of law, jurisdiction and other essential terms relating to the passing of risk and payment. Failure to do so could also result in calamitous repercussions. Merchants may find their contracts formed in foreign jurisdictions and therefore subject to foreign laws.

102 Inevitably mistakes will occur in the course of electronic transmissions. This can result from human interphasing, machine error or a combination of such factors. Examples of such mistakes would include (a) human error (b) programming of software errors and (c) transmission problems in the communication systems. Computer glitches can cause transmission failures, garbled information or even change the nature of the information transmitted. This case is a paradigm example of an error on the human side. Such errors can be magnified almost instantaneously and may be harder to detect than if made in a face to face transaction or through physical document exchanges. Who bears the risk of such mistakes? It is axiomatic that normal contractual principles apply but the contractual permutations will obviously be sometimes more complex and spread over a greater magnitude of transactions. The financial consequences could be considerable. The court has to be astute and adopt a pragmatic and judicious stance in resolving such issues.

103 The amalgam of factors a court will have to consider in risk allocation ought to include:

- (a) the need to observe the principle of upholding rather than destroying contracts,
- (b) the need to facilitate the transacting of electronic commerce, and
- (c) the need to reach commercially sensible solutions while respecting traditional principles applicable to instances of genuine error or mistake.

It is essential that the law be perceived as embodying rationality and fairness while respecting the commercial imperative of certainty.

As indicated in the context of Singapore, if the receipt solution is adopted, it may also be helpful to define what will constitute 'receipt' for this purpose. This might be when the recipient is able to access the message—by analogy with the position under reg. 11(2)(a) of the Electronic Commerce Regulations 2002 (see *page 27, section 3B*), and see also Art. 10(4)(c) CESL and discussion at *page 53 (section 4Dv)*.

∴ **NOTE:** Contracts made by exchange of email messages are expressly excluded from the operation of the
 ∴ Electronic Commerce (EC Directive) Regulations 2002, regs. 9(4) and 11(3), which apply to Internet contracts
 ∴ made via websites.

SECTION 5 Revocation of an offer

An offer can be revoked at any time before it is accepted.

A) Communication of the revocation

A revocation of an offer must be received by the offeree in order to take effect. The postal rule applies only to acceptances and not to revocations.

Henthorn v Fraser

[1892] 2 Ch 27 (CA)

A withdrawal of an offer had been posted at midday, but it was not received until 5 p.m. In the meantime, an acceptance had been posted at 3.50 p.m.

Held: There was a binding contract at 3.50 p.m. on posting the acceptance.

LORD HERSCHELL: If the acceptance by the Plaintiff of the Defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn...

KAY LJ: Then what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord Bramwell in the *Household Fire and Carriage Accident Insurance Company v Grant* (1879) 4 ExD 216. A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord Bramwell that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor..., has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

Byrne & Co. v Van Tienhoven & Co.

(1880) 5 CPD 344 (CP)

On 1 October, the defendants in Cardiff wrote to the plaintiffs in New York offering to sell goods. The plaintiffs received this offer letter on 11 October and accepted it by telegram on the same day. On 8 October, the defendants posted a revocation of their offer, which reached the plaintiffs on 20 October. The plaintiffs brought an action for non-delivery.

Held: A revocation of an offer is not effective until it is communicated to the offeree. The offer was therefore available for acceptance until 20 October. Since the postal rule applied to the telegram acceptance, a binding contract was entered into on 11 October when the acceptance telegram was sent.

LINDLEY J: It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: *Harris' Case* (1872) LR 7 Ch App 587; *Dunlop v Higgins* (1848) 1 HLC 381, even although it never reaches its

destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

Stevenson, Jacques & Co. v McLean

(1880) 5 QBD 346

The defendant had made an offer to sell iron at 40s. net cash per ton to the plaintiffs and stated that he would hold the offer open until the following Monday. On the Monday, the defendant sold the iron and informed the plaintiffs of this by a telegram sent at 1.25 p.m. Before this arrived (at 1.46 p.m.), the plaintiffs sent an acceptance telegram to the defendant at 1.34 p.m. The plaintiffs brought an action for non-delivery.

Held: Although the defendant was free to revoke his offer before the close of the day on Monday, any revocation would not have effect until it reached the plaintiffs. Consequently, the defendant's offer was still open when the plaintiffs accepted it at 1.34 p.m. (on sending the acceptance telegram).

The revocation need not be communicated by the offeror himself.

Dickinson v Dodds

(1876) 2 Ch D 463 (CA)

On Wednesday 10 June 1874, the defendant offered to sell his house to the plaintiff, stating that: 'This offer to be left over until Friday 9 am.' On the Thursday afternoon, the plaintiff was informed by Berry that the defendant had been offering or agreeing to sell the property to Allan. The plaintiff therefore went to the house where the defendant was staying and left a formal written acceptance there (the evidence was that the defendant did not receive this document). On the Friday, at 7 a.m., Berry, who was acting as agent for the plaintiff, found the defendant at the railway station, handed him a copy of the plaintiff's acceptance, and stated its contents. In fact, the defendant had sold the property to Allan on Thursday 11 June.

Held: The offer might be withdrawn at any time before acceptance, since there was no consideration for the promise to keep the offer open until 9 a.m. on the Friday. Had it, in fact, been withdrawn?

JAMES LJ: [I]t is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer.'

... It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

NOTES

1. Unless the promise to keep an offer open for a stated period is supported by consideration, the offeror is free to revoke the offer at any time before acceptance. *Routledge v Grant* (1828) 4 Bing 653, 130 ER 920. This may be harsh where the offeree has relied on 'his firm offer' promise. See the proposals of the Law Commission Working Paper No. 60, *Firm Offers* (1975).
2. Peel, *Treitel's The Law of Contract*, cites *Dickinson v Dodds* as authority for the proposition that there is sufficient communication if the offeree knows from 'any reliable source' that the offeror no longer intends to contract with him. What problems might exist in deciding who is a 'reliable source'?
3. Although this decision appears to suggest that it is not necessary to communicate a revocation, it is based on a subjective approach to contract formation and is now incorrect on this point.
4. In *Pickfords Ltd v Celestica Ltd* [2003] EWCA Civ 1741, [32], Arden LJ noted that '[t]he revocation of an offer must be communicated to the offeree, but where the offeree is an organisation, it is sufficient if the organisation receives notice of the withdrawal', as opposed to an individual employee.

B) Revocation of a unilateral offer

Since the acceptance is the complete performance of the act in unilateral contracts, if—to use the classical example of a unilateral contract quoted by Brett J in *Great Northern Railway Co. v Witham* (1873) LR 9 CP 16, 19—I offer you £100 if you will walk to York, I could revoke my offer at any time before you reached York.

It is now accepted that, in English law, the offer *may* contemplate that it is not possible to revoke once the offeree has started to perform.

Errington v Errington & Woods

[1952] 1 KB 290 (CA)

A father purchased a house, and promised his son and daughter-in-law that if they continued in occupation and paid all of the mortgage instalments in relation to the house, he would transfer

the house to them. They duly paid the instalments, but when the father died, he left the house to his widow, who sought possession. The issue in the judgments is whether the couple were tenants at will or had a contractual licence to occupy.

Held: They were contractual licensees.

DENNING LJ: It is to be noted that the couple never bound themselves to pay the instalments to the building society; and I see no reason why any such obligation should be implied. It is clear law that the court is not to imply a term unless it is necessary; and I do not see that it is necessary here. Ample content is given to the whole arrangement by holding that the father promised that the house should belong to the couple as soon as they paid off the mortgage. The parties did not discuss what was to happen if the couple failed to pay the instalments to the building society, but I should have thought it clear that, if they did fail to pay the instalments, the father would not be bound to transfer the house to them. The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done. If that was the position during the father's lifetime, so it must be after his death. If the daughter-in-law continues to pay all the building society instalments, the couple will be entitled to have the property transferred to them as soon as the mortgage is paid off; but if she does not do so, then the building society will claim the instalments from the father's estate and the estate will have to pay them. I cannot think that in those circumstances the estate would be bound to transfer the house to them, any more than the father himself would have been.

... [I]t is clear that the father expressly promised the couple that the property should belong to them as soon as the mortgage was paid, and impliedly promise that so long as they paid the instalments to the building society they should be allowed to remain in possession. They were not purchasers because they never bound themselves to pay the instalments, but nevertheless they were in a position analogous to purchasers. They have acted on the promise, and neither the father nor his widow, his successor in title, can eject them in disregard of it...

NOTES

1. What do you think is the basis of the decision in *Errington*? Are the words 'acted on the promise' significant? (See the discussion of promissory estoppel at pages 152–72, Chapter 4, section 2.) What difficulties would exist in using promissory estoppel as the basis of this principle?

2. McGovney (1914) 27 Harv L Rev 644, 659, suggested that there are two separate offers in the unilateral offeror's statement—namely, an express offer to pay on performance of the act, and an implied offer not to revoke once the offeree starts to perform. This implied offer is accepted by beginning performance, and if the offeror were to attempt to revoke, he would be liable for breach of this promise. The problem with this analysis is that it would not prevent revocation, but would mean only that damages would be payable for breach of the implied offer not to revoke. *Errington*, however, appears to be based on the view that revocation is not possible once the offeree has started to perform.

3. In *Soulsbury v Soulsbury* [2007] EWCv Civ 969, [2008] 2 WLR 834, there was an agreement that if the ex-wife did not seek to enforce the county court order for maintenance, the ex-husband would leave her £100,000 on his death. Longmore LJ (with whose judgment Ward and Smith LJJ agreed) considered this to be a unilateral offer.

LONGMORE LJ: 48... [A]ny enforcement of the order of the court would not have been a breach of contract. It would just mean that she would not be entitled to the £100,000 which her husband had promised to leave her by will.

49 This is a classic unilateral contract of the *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 or the 'walk to York' kind. Once the promisee acts on the promise by inhaling the smoke ball, by starting the walk to York or (as here) by not suing for the maintenance to which she was entitled, the promisor cannot revoke or withdraw his offer. But there is no obligation

on the promisee to continue to inhale, to walk the whole way to York or to refrain from suing. It is just that if she inhales no more, gives up the walk to York or does sue for her maintenance, she is not entitled to claim the promised sum.

50...[Longmore LJ considered the facts to be analogous to *Errington v Errington* and continued:] The present case is stronger than *Errington's* case since on Mr Soulsbury's death, Mrs Soulsbury had completed all possible performance of the act required for enforcement of Mr Soulsbury's promise.

4. The other suggested explanation (*Pollock on Contract*) is based on the fact that, in a unilateral contract, performance of the act requested is both the acceptance and the consideration. Acceptance is stated to occur when the offeree starts to perform so that revocation is no longer possible, but the consideration is the completion of the act and, until that time, no reward is payable. This is somewhat difficult to justify since, at the point of starting to perform, the offeree would also be bound to perform, which defeats the very nature of the unilateral contract. Lord Denning may well have supported this approach (i.e. acceptance on starting to perform). See his comments in *Ward v Byham* [1956] 1 WLR 496 (see pages 131–2). However, in his judgment in *Errington*, Lord Denning very clearly states that the couple were not under any obligation.

The *Pollock* explanation (acceptance on starting to perform) has also received recent support in *obiter* comments in *Schweppe v Harper* [2008] EWCA Civ 442, [2008] BPIR 1090 (CA), in which there was a proposal by the defendant to pay the claimant a fee of £50,000 if the claimant secured an annulment of the defendant's bankruptcy and secured finance to rescue properties held by the trustee in bankruptcy. The claimant had been acting to secure this aim when the defendant instructed him to stop. On appeal, the claimant alleged that the judge had been wrong to conclude that the defendant had been free to revoke the offer at any time. However, the majority of the Court of Appeal (Waller LJ dissenting) considered that it was not necessary to consider whether this was a unilateral offer that was capable of being revoked, before acceptance, because the terms of the 'offer' were too uncertain. Accordingly, only Waller LJ (dissenting) considered this question. He appeared to equate 'starting performance' with 'part performance' and treated it as acceptance that precluded withdrawal of the unilateral offer. Waller LJ went further on the facts, considering (at [48]) the part performance to give rise to 'a contract' entitling the claimant to the fee.

WALLER LJ: 29.... I propose first to consider whether on the basis that Mr Schweppe did not promise to do anything there came into existence what is called a unilateral contract.

30. If Mr Schweppe was not promising to do anything then his entitlement to a fee would depend on whether there was an offer by Mr Harper to pay a fee if Mr Schweppe performed some task, and either he had performed that task or, if not, [and this does not appear to have been considered as a possibility by the judge] whether he had by conduct performed the task to such an extent that a contract came into existence precluding Mr Harper from withdrawing the offer.

31. That requires to be considered first, precisely for what task Mr Harper was offering to pay £50,000 to Mr Schweppe and second, since it is common ground that Mr Schweppe did not complete performance following termination of his instructions, whether a contract ever came into being as a result of part performance, so as to preclude Mr Harper being entitled to withdraw the offer other than for breach or abandonment of the task by Mr Schweppe...

36. It would not, I think, be disputed that if Mr Schweppe achieved the annulment he would be entitled to his fee. I would furthermore add that I do not think it would be disputed that if it was a condition precedent that Mr Schweppe obtain third party finance, if he did so he would be entitled to his fee. Thus an offer was being made which was capable of acceptance.

37. However that leaves the critical question as to whether whatever offer was being made for whatever task it could be withdrawn at any time prior to completion of the task, i.e. whether there came into existence prior to completion of any task a unilateral contract...

[Waller LJ considered relevant paragraphs of *Chitty on Contracts*, 29th edn, including para. 2–077, supporting the *Pollock* approach that there is acceptance when the offeree has 'made an unequivocal beginning on the requested performance'.]

43. The real point which seems to me to arise is whether the parties would have intended that Mr Harper would have a '*locus poenitentiae*', i.e. a right to withdraw his offer at any time, even if Mr Schweppe had performed much work towards achieving completion of the task or tasks. I say that is 'the real point' because the arguments for there being intended to be such a right encompass other points which could be said to arise. In order for Mr Schweppe to achieve the annulment he needed the co-operation of Mr Harper. If Mr Schweppe negotiated third party finance it still had to be acceptable to Mr Harper. If it was contemplated that Mr Harper was to be completely free to turn down third party finance however good the offer obtained by Mr Schweppe and/or if it was contemplated that at any time right up to the moment of obtaining the annulment he could act in a way which prevented the annulment being obtained, there would be some force in the argument that he was at all times to be free to withdraw instructions and thus the offer.

44. If Mr Schweppe had not in fact done any work and thus not provided any consideration for the offer, I can accept that Mr Harper should be entitled to withdraw the offer, but what I cannot accept is that Mr Harper should be free to watch Mr Schweppe work once the offer has been made, take advantage of the work done, continue to seek an annulment and in those circumstances withdraw the offer...

45. The law surely should not countenance what would in effect be sharp practice unless driven to do so. If one takes the simple example, if A offers to pay £1000 if B walks from London to York, A should not be entitled to withdraw that offer once it is realised B is within very few miles of York. Furthermore, if as part of the offer A says 'once within 10 miles you will have to paint the mile stones in a colour acceptable to me', A should not be entitled to act unreasonably in relation to the selection of colours so as to make completion of the task impossible.

46. Where there is an offer to pay for the performance of a certain task, part performance can produce a contract under which that offer cannot be withdrawn. That should be the more so where there has not only been part performance but there is a real benefit being accepted by the offeror from that part performance. In such a case the court should be reluctant to find that the offeror has reserved a right to withdraw the offer after part performance.

47. It seems to me that in this case Mr Schweppe had performed much of the work required to achieve annulment by February 2004; he was within a very few miles of York. Even if in addition it was a condition that he should find finance, he had not been given an opportunity to provide finance, i.e. finance which, if acting reasonably, Mr Harper would have been bound to accept. In my view therefore even if there was no bilateral contract as at November 2003 there was thus by February 2004 a contract under which Mr Schweppe was entitled to continue do what he could to achieve the annulment of Mr Harper's bankruptcy and under which Mr Harper was bound to cooperate to enable that to be done.

48. If it were necessary to do so I would find that even if the obtaining of finance was a condition precedent to receipt of a fee that Mr Harper was not free to withdraw instructions and terminate what by then was a contract as at February 2004.

49. It follows, as it seems to me that Mr Harper's conduct in seeking to terminate at will was a repudiatory breach of contract.

5. The crucial question is how the courts will determine when an offeree 'enters on performance of the act'. Will it cover preparation to perform, e.g. when walking shoes are purchased in preparation for the walk to York?

There is *obiter* support for the decision in *Errington* in the Court of Appeal's decision in the next case, although the approach taken appears to support McGonney's analysis.

Daulia v Four Mill Bank Nominees Ltd

[1978] Ch 231 (CA)

The plaintiffs wished to purchase property. They were told by the defendants that if they attended the next day at 10 a.m. with a banker's draft for the deposit, and a signed and engrossed contract, the defendants would exchange contracts. The plaintiffs did this, but the defendants refused to exchange because they had found another purchaser at an increased price.

Held: The promise amounted to a unilateral offer, and since the plaintiffs had fulfilled the conditions, they had accepted the offer.

GOFF LJ: Was there a concluded unilateral contract by the... defendants to enter into a contract for sale on the agreed terms? The concept of a unilateral or 'if contract' is somewhat anomalous, because it is clear that, at all events until the offeree starts to perform the condition, there is no contract at all, but merely an offer which the offeror is free to revoke.

Doubts have been expressed whether the offeror becomes bound so soon as the offeree starts to perform or satisfy the condition, or only when he has fully done so.

In my judgment, however, we are not concerned in this case with any such problem, because in my view the plaintiffs had fully performed or satisfied the condition when they presented themselves at the time and place appointed with a banker's draft for the deposit, and their part of the written contract for sale duly engrossed and signed and there tendered the same, which I understand to mean proffered it for exchange. Actual exchange, which never took place, would not in my view have been part of the satisfaction of the condition but something additional which was inherently necessary to be done by the plaintiffs to enable, not to bind, the... defendants to perform the unilateral contract.

Accordingly, in my judgment, the answer to the... question must be in the affirmative.

Even if my reasoning so far be wrong the conclusion in my view is still the same for the following reasons. Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.

Does the offer contemplate that the unilateral offeror should be free to revoke at any time before the complete performance of the act? If so, no restriction can be implied on the offeror's ability to revoke before that time.

Luxor (Eastbourne) Ltd v Cooper

[1941] AC 108 (HL)

The owners of two cinemas orally agreed with the agent that if he were to introduce someone who purchased these cinemas for at least £185,000, they would each pay him £5,000 *on the completion of the sale*. He produced purchasers who were willing to pay the price but a sale did not take place. The agent brought an action claiming the £10,000 commission or alternatively £10,000 in damages for breach of the implied term by which the owners undertook not to do anything to prevent him from earning his commission.

Held: Because the commission was payable only on completion, the nature of the offer contemplated that the offeror reserved the right to revoke at any time before completion. The House of Lords refused, in the circumstances of the case, to imply a term that the owners had undertaken not to prevent the sale.

LORD RUSSELL: A few preliminary observations occur to me. (1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of it.

I do not assent to the view, which I think was the view of the majority in the first *Trollope* case [1934] 2 KB 436, that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a quantum meruit or (b) as damages for breach of a term to be implied in the commission contract. As to the claim on a quantum meruit, I do not see how

this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim...

As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced.

I can find no safe ground on which to base the introduction of any such implied term. Implied terms, as we all know, can only be justified under the compulsion of some necessity. No such compulsion or necessity exists in the case under consideration. The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through, if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. In the case of the plaintiff his contract was made on September 23, 1935; his client's offer was made on October 2, 1935. A sum of 10,000/ (the equivalent of the remuneration of a year's work by a Lord Chancellor) for work done within a period of eight or nine days is no mean reward, and is one well worth a risk. There is no lack of business efficacy in such a contract, even though the principal is free to refuse to sell to the agent's client.



Questions

1. On the facts, the House of Lords refused to imply a promise not to revoke (prevent the sale). Does this support McGovney's analysis and indicate that the implication of a promise will turn on what is contemplated by the wording of the offer?
2. Is Lord Russell suggesting that if the reward is great compared to the actual effort needed to earn it, then the offeree must take the risk of the offer being withdrawn?

... NOTE: Waller LJ in *Schweppe v Harper* [2008] E.W. CA Civ 442 stated that a court 'should be reluctant' to find that the offer contemplates the ability to revoke at any time before acceptance in circumstances under which the offeree has gone beyond starting performance and there is 'part performance', with a 'real benefit being accepted by the offeror from that part performance'.

c) Communication of revocation of unilateral offers

A unilateral offer to *unascertained offerees* can be revoked through the same channel as the offer was made.

Shuey v United States

23 L Ed 697 (1875), 92 US 73 (US Supreme Court)

A proclamation dated 20 April 1865 had been published offering a reward of \$25,000 for the apprehension of a particular criminal. On 24 November 1865, a notice revoking the offer was published. In 1866, the plaintiff discovered the criminal and informed the authorities. He was unaware that the offer of the reward had been revoked.

Held: He had not actually apprehended the criminal as required by the terms of the offer. Strong J also made the following statement on the revocation.

STRONG J: The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon

it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published Proclamation, he should have known that it could be revoked in the manner in which it was made.



Questions

1. What do you think would be covered by the expression 'withdrawn through the same channel in which it was made'? If I were to advertise a reward in a particular national newspaper, but issue a notice of revocation in a different national newspaper, would this be revocation through the same channel?
2. Could this authority be distinguished where the offeree has taken steps to perform (i.e. has relied upon the offer) before the publication of the revocation? See Strong J's reference to 'before anything had been done in reliance upon' the offer. Does this amount to an acceptance of Pollock's analysis (see *page 60, section 5B, note 1*)?