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- Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58, [2012] 2 WLR 55 . . . 761
- Edwards v Skyways [1964] 1 WLR 349 . . . 163
- Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage & Towage) Ltd, The Sea Angel [2007] EWCA Civ 547, [2007] 1 CLC 876, [2007] 2 Lloyd's Rep 517 . . . 616, 618, 619–21
- Ee v Kakar (1980) 40 P & CR 223 . . . 27
- EIC Services Ltd v Phipps [2004] EWCA Civ 1069, [2005] 1 WLR 1377 . . . 414
- Elphinstone v Monkland Iron & Coal Co Ltd (1886) 11 App Cas 332 . . . 769
- Else (1982) Ltd v Parkland Holdings Ltd [1994] 1 BCLC 130 . . . 764, 766
- Enrico Furst & Co v WE Fischer [1960] 2 Lloyd's Rep 340 . . . 131
- Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 (CA) . . . 56–7, 58, 61
- Equitable Life Assurance Society v Hyman [2002] 1 AC 408 (HL) . . . 213, 214, 223–4, 226
- Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218 . . . 458, 459, 460
- Erlson Precision Holdings Ltd (formerly GG132 Ltd) v Hampson Industries Ltd [2011] EWHC 1137 (Comm) . . . 445
- Errington v Errington & Woods [1952] 1 KB 290 (CA) . . . 15, 66–8
- Essex CC v UBB (Waste) Essex Ltd [2020] EWHC 1581 . . . 232
- Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269 (HL) . . . 596–8, 599
- Esso Petroleum Co Ltd v Mardon [1976] QB 801 (CA) . . . 174, 178–9, 448, 449, 480–1, 483
- Esso Petroleum Co Ltd v Niad Ltd [2001] All ER (D) 324 (Nov) . . . 801, 802
- Esso Petroleum Ltd v Commissioners of Customs and Excise [1976] 1 WLR 1 (HL) . . . 153–5
- Estor Ltd v Multifit (UK) Ltd [2009] EWHC 2565 (TCC), [2010] CILL 2800 . . . 250
- Euro London Appointments Ltd v Claessens International Ltd [2006] 2 Lloyd's Rep 436 . . . 769
- Evans v Lloyd [2013] EWHC 1725 (Ch), [2013] WTLR 1137, [2013] 2 P & CR DG21 . . . 571
- Evia Luck, The [1992] 2 AC 152, [1991] 4 All ER 871 . . . 518
- Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 . . . 789, 790, 791, 792, 793, 801–2, 805
- Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 WLR 399 . . . 765, 776
- F & B Entertainments Ltd v Leisure Enterprises Ltd (1976) 240 EG 455 . . . 485

1.3 The basics of reading a case

1.3.1 Decide which case(s) to read

The more cases you read entirely, the better, but the most important ones are indicated by your lecturer.

1.3.2 Use the citation to find the report of the case

In January 2001, neutral citations were introduced for decisions of the Court of Appeal and the then House of Lords, e.g. '[2001] EWCA Civ 12': see *Practice Direction (Form of Judgments, Paragraph Marking and Neutral Citation)* [2001] 1 WLR 194 and extended (*Practice Direction (Judgments: Neutral Citation)* [2002] 1 WLR 346) to all judgments given by the High Court in London after 14 January 2002, i.e. 'EWHC [number] (Ch)' for the Chancery Division, 'EWHC [number] (QB)' for the Queen's Bench Division, and 'EWHC [number] (Comm)' for the Commercial Court. Such changes aim to facilitate the publication of judgments on the Internet, and assist in identifying individual judgments on issues involving the same parties. There is a difference between those cases that were reported before 2001–2 and those reported after. (Note, the retrospective neutral citation for cases before these dates invented by the British and Irish Legal Information Institute (online at <http://www.bailii.org/>) is not authoritative and you should avoid using it in written work.) When in doubt about case citation, always consult the case index of a practice volume (e.g. *Chitty on Contracts*) or a reputable student textbook for the correct citations of cases, particularly for historic case law. You will notice on Westlaw that for every case, aside the actual reference as well as where applicable, the case report, an additional reference which starts with WL (see as an example, *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, [2016] 7 WLUK 518). That last reference in bold is NOT an official reference as it only pertains to Westlaw and therefore should not be used in your work.

1.3.3 Note the full case name and court

The full case name and the court in which it was heard are given at the top of the report (for older cases in the English reports, you may have to look back to the first among the cases reported by the particular reporter to identify the court in which they were heard). The court deciding the case is significant, and you must be familiar with the structure of the courts (the civil courts, for contract cases) and the doctrine of precedent.

Note the citation for the case, since you will need to include this in the footnotes of any written work. Following the 2001 and 2002 Practice Directions (1.3.2), all judgments must list the appropriate neutral citation before that of any law report series, e.g. '*Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, [2001] BLR 143'. For a neutral citation, pinpoints should be to paragraphs rather than to page numbers, e.g. '[2001] EWCA Civ 317, [31]–[34]'. It is equally valid to use the abbreviated word 'para' e.g. '[2001] EWCA Civ 317, at paras 31–34'.

Under *Practice Direction: Citation of Authorities* [2012] 1 WLR 780 where a case is reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales (ICLR)—whether Appeal Cases (AC), or cases before the Queen's Bench Division (QB),

the Chancery Division, the name of the court in the official Law Reports (All ER) should also be given. Should other reports

1.3.4 Consider

The presentation of

1.3.4.1 Catchwords

At the top of the headnote. These should correspond to the issues in your lecture notes.

1.3.4.2 Headnote facts

The headnote facts of the case. The decision at first instance. Make notes on what the headnote facts are. If the headnote facts are not in your lecture notes, each case is a decision.

1.3.4.3 Statement of principle

The headnote may contain a statement of principle. Look at the judgment.

1.3.4.4 More detailed statement of principle

A more detailed statement of principle may contain details of the facts in a more readable form, and may contain subheadings within the headnote.

1.3.4.5 Details of the set of counsel

It is useful, especially in light of the actual decision, to know the names of the counsel who appeared for the parties.

1.3.4.6 A judgment

The headnote is helpful in identifying the issue, and the principle of law, and also indicate any dissent. With appeal cases, the headnote may also indicate the case of neutral citation. Note in *Howard Marshall*. If there is any dissent, judgments require paragraphing and dissents.

the Chancery Division (Ch), or the Family Division (Fam)—that source must be used before the name of the court. It is crucial for you to adopt this practice. Where a case is not reported in the official Law Reports, any report in the Weekly Law Reports (WLR) or All England Law Reports (All ER) should be used. Only where there is no report in any of these law report series should other reports be cited.

1.3.4 Consider the presentation of case reports

The presentation of case reports is fairly standardized.

1.3.4.1 Catchwords

At the top of the headnote, a section identifies the issues in the case (so-called 'catchwords'). These should correspond at some point with the legal issues given in the heading or principle in your lecture notes or outline. No need to note them.

1.3.4.2 Headnote facts

The headnote facts can be very brief and too general or comprise full case facts and details of the decision at first instance or previous appeals.

Make notes on whatever facts are relevant to the principle that you are using as your guide. If the headnote facts are brief, then look for further facts in the judgments.

Each case is a decision on its particular facts, so the facts are crucial.

1.3.4.3 Statement of the decision of the court

The headnote may not be detailed enough on the reasons for the decision; if so, you need to look at the judgments themselves to find out.

1.3.4.4 More detailed facts

A more detailed statement of the facts may follow the headnote. Some judgments will also contain details of the facts. Lord Denning was particularly adept at setting out the facts in a readable form, and used headings to helpful effect. It is common practice to find headings and subheadings within judgments in order to separate and identify issues both of fact and of law.

1.3.4.5 Details of the grounds of any appeal and the arguments of each set of counsel

It is useful, especially for moot preparation, to read the arguments of each set of counsel in light of the actual decision given in the headnote.

1.3.4.6 A judgment or number of judgments

The headnote is helpful in indicating the majority, the judgments that require particular attention, and the principles for which you will need to look in reading the judgments. It should also indicate any dissenting judgments.

With appeal cases, the headnote may indicate relevant page numbers (or paragraphs, in the case of neutral citation) within judgments, as you will see shortly when we look at the headnote in *Howard Marine & Dredging Co. Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] QB 574 (1.5).

If there is any difference of opinion on the reasons for a decision or an actual dissent, these judgments require particular examination to determine the reasons given for the differences and dissents.

Ensure that the judgments do, in fact, correspond with the decision stated in the headnote, and use the comments in the judgments to explain and illustrate the decision.

1.3.4.7 Case law applied and distinguished

The names of the important previous cases that the court is purporting to apply and on which it is relying as justification for part or all of its decision should be given. If the court purports to distinguish any case authority, this should also be noted.

1.4 Reading a case in practice

You are required to read *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256, on offer and acceptance.

Find the report of the case in the first volume of the Law Reports Queen's Bench Division for 1893, at p. 256. (There are numerous other reports of this case, e.g. at 62 LJQB 257 or 67 LT 837.)

Make a note of the full case name and the fact that this is a decision of the Court of Appeal. (It may be preferable to list the members of the court when stating the decision.) Remember to note the citation used.

An extract from the judgment follows and the issues are highlighted and explained alongside the relevant text.

① The catchwords help to show that this case about a contract is concerned with an offer by advertisement. This is within your guiding principle of offer and acceptance.

② This case also raises two other issues that are not within your guiding principle of offer and acceptance—namely, wager and insurance. Do not worry about these for the present.

③ The facts given in the headnote are very brief. More details of the facts follow the headnote.

④ The facts are followed by a brief statement of what was decided.

⑤ We are told that the Court of Appeal affirmed the first instance decision of Hawkins J (the citation for this decision is given at the bottom of p. 256 in note (2) as [1892] 2 QB 484). If you are mooting, it is advisable to have full details of this first instance decision to know the arguments presented and those that were accepted on that occasion.

[IN THE COURT OF APPEAL]

CARLILL V CARBOLIC SMOKE BALL COMPANY

Contract—Offer by Advertisement—Performance of Condition in Advertisement—Notification of Acceptance of Offer ①—*Wager—Insurance*—② 8&9 Vict. c. 109–14 Geo. 3, c. 48, s. 2

The defendants, the proprietors of a medical preparation called 'The Carbolic Smoke Ball', issued an advertisement in which they offered to pay 100/. to any person who contracted influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—③

Held, ④ affirming the decision of Hawkins, J ⑤ that the above facts established a contract by the defendants to pay the plaintiff 100/. in the event which had

⑥ The headnote states that the Court of Appeal held that the defendants (the Smoke Ball Company) agreed to pay the plaintiff £100 conditional upon a certain event that subsequently occurred—namely, contracting influenza after having used one of the smoke balls in the specified manner and for the specified period.

⑦ We are also told that it was decided that it was not a wagering contract or a policy of insurance, the plaintiff

happened^⑥; that such contract was neither a contract by way of wagering within 8 & 9 Vict c. 109, nor a policy within 14 Geo 3, c. 48, s. 2; and that the plaintiff was entitled to recover.^⑦

was therefore entitled to the £100. Although, under the Civil Procedure Rules 1998, the term 'claimant' (person bringing the claim) is now used in place of 'plaintiff', this case pre-dates this change, so the term 'plaintiff' remains appropriate.

1.4.1 Note the facts

The facts will help you to understand the judgments. Because the headnote facts are too brief for this purpose, the statement of facts on pp. 256–7 of the report is used:

Carlill v Carbolic Smoke Ball Co.

[1893] 1 QB 256 (CA)

The defendants, who made and sold a medical preparation called 'The Carbolic Smoke Ball', issued an advertisement in a number of newspapers in the following terms:

£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

Relying on this advertisement, the claimant bought one of the balls at a chemist and used it as directed three times a day from 20 November 1891 to 17 January 1892, when she contracted influenza.

She sought payment of the £100, the defendants refused.

1.4.2 Decision at first instance

Hawkins J at first instance held that the claimant was entitled to recover, since the advertisement was intended to attract custom and was supported by the deposit with the company's bank. The company should not have been surprised if it was held to its promise (this information is only found in the report of the first instance decision).

The Court of Appeal purported to affirm the first instance decision; it is therefore unnecessary to make detailed notes on the earlier decision.

1.4.3 Decision of the Court of Appeal

Making a note of the Court of Appeal's decision in this case is difficult since the headnote is a broad statement of result without giving reasons. You must therefore look at the judgments. (There is no indication in the headnote of any dissent, so the three judgments should be saying the same thing.)

On occasions it can be helpful to look at the counsel's arguments. In this case the defendants put forward a number of arguments as to why there should be no binding contract. However, since the Court of Appeal members identify and answer these points in their judgments, it is unnecessary to duplicate them by making notes on the arguments of counsel.

1.4.4 Judgments

Read each judgment and make notes.

1.4.4.1 Judgment of Lindley LJ

Lindley LJ rejects the two arguments that are outside the scope of our directing issue—namely, that it was an unenforceable wagering contract and insurance policy.

LINDLEY LJ: [The Lord Justice stated the facts, and proceeded:] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention. . . .

Lindley LJ considered that there was no doubt that the language used indicated that a binding promise was being made. To be enforceable, the promise must have been intended to give rise to legal relations (4.1). One of the arguments put by counsel for the defendants was that this advertisement was not intended to create legal relations. It was a 'mere puff', or advertising gimmick, which was not intended to be taken literally and which therefore could not be enforced by the plaintiff.

Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: '1000/. is deposited with the Alliance Bank, shewing our sincerity in the matter.' Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter—that is, the sincerity of his promise to pay this 100/. in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it. . . .

He then identified this advertisement as an offer to the world.

The advertisement is an offer to pay a reward to anybody who performs the stipulated act, and performance of that act constitutes the acceptance of the offer. Lindley LJ states that this is a unilateral offer, i.e. a promise to pay money in exchange for an act.

Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay 100/. to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. . . .

A further argument for the defendants was that any acceptance had to be communicated to the offeror, and Mrs Carlill did not notify the company that she intended to use the smoke ball.

But then it is said, 'Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified.' Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? . . . [I] think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance. . . .

Thus, Lindley LJ stated that the nature of the transaction indicated that the offeror had waived the normal requirement of communication of acceptance (although it was necessary, having performed, to notify the offeror of this fact in order to claim the reward).

The advertisement's language was so vague, as argued, that it could not possibly amount to a promise.

Lindley LJ considered that the offer could be construed to apply to any person who contracted influenza within a reasonable time of having used the smoke ball. Clearly, this covered the claimant, who had contracted influenza while using the smoke ball.

The language is vague and uncertain in some respects, and particularly in this, that the 100/. is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which

The company's promise had to be supported by consideration (Chapter 3) provided by Mrs Carlill (i.e. Mrs Carlill had to give something of value in exchange for the company's promise). Consideration was seen as being either a benefit to the offeror (the Smoke Ball Company) and/or a detriment to the offeree (Mrs Carlill). Lindley LJ considered that consideration was present in the sense of a benefit to the offeror company and/or a detriment to the offeree (Mrs Carlill).

Lindley LJ states that the performance of the act specified in the unilateral offer constitutes both the acceptance of the promise and the consideration for it.

will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the 'increasing epidemic' (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. . . .

It has been argued that this is *nudum pactum*—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise. . . .

Lindley LJ concludes his judgment.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

1.4.4.2 Judgment of Bowen LJ

Bowen LJ's judgment is the clearest and most frequently cited judgment, with a most logical order presentation of the issues.

Was the advertisement too vague to be enforced?

Bowen LJ adopted the correct approach of looking at the statement objectively to see what the reasonable man would consider was intended.

BOWEN LJ: The defendants contend, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball . . . It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: '100/. will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks.' And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward.

Bowen LJ differs from Lindley LJ on the question of the length of the immunity. Lindley LJ considered that it should last for a reasonable time after use of the smoke ball, while Bowen LJ confined it to protection during the use of the smoke ball. It did not affect the decision on these facts, since Mrs Carlill had been using the smoke ball when she contracted influenza.

Bowen LJ then addressed the contention that this was a 'mere puff' and that there was no intention to create legal relations.

He then went on to address the argument that this would amount to a contract with the whole world, which was impossible.

Bowen LJ states that *this* advertisement was an offer, whereas advertisements are normally invitations to treat. The unilateral contract is therefore an exception

... Then again it was said: 'How long is this protection to endure? Is it to go on forever, or for what limit of time?' I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball ... I therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

... Was it intended that the 100/. should, if the conditions were fulfilled, be paid? The advertisement says that 1000/. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100/. would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

... It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited

to the general rule in *Partridge v Crittenden* [1968] 1 WLR 1204 (2.3.1), since an advertisement that requests the performance of an act will be an offer. To construe such advertisements to pay rewards as an invitation to treat would have been illogical since the offeror would have the benefit of seeing the stipulated conditions performed without being bound to pay the reward.

Was it necessary that the acceptance be notified?

portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer . . . If this is an offer to be bound, then it is a contract the moment the person fulfils the condition.

. . . One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law . . . to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to action the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification . . .

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other

idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

Finally, in answer to the argument that, since catching influenza was only a condition, the Company's promise was not supported by any consideration from Mrs Carlill, Bowen LJ agreed with Lindley LJ that there was both a benefit to the Company and a detriment to Mrs Carlill.

... Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

1.4.4.3 Judgment of A. L. Smith LJ

This judgment is more general in its presentation of the issues. His Lordship examined the vagueness of the promise.

A. L. SMITH LJ: It comes to this: 'In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100/.' It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000/ is actually lodged at the bank wherewith to satisfy any

possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the 100/. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise . . .

His Lordship neatly avoided having to choose between the construction of Lindley LJ or that of Bowen LJ by stating that it was not necessary for him to do so. There is therefore no clear interpretation of the promise by the Court of Appeal.

. . . [I]t was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

There was no express requirement that acceptance be notified.

This helps since it indicates that if a unilateral offeror does wish to know who is attempting to accept his offer, he must include an express provision requiring this. Interestingly, there is no mention of the need to catch influenza as being the act required for acceptance (see the discussion of condition imposed on a recipient of a gift, at 3.1.2). The other members of the Court of Appeal referred only to performance of the 'conditions named'.

. . . Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

A. L. Smith LJ also recognized that to perform the conditions specified constituted the acceptance and concluded by agreeing that consideration had been provided, since it was a detriment to the offeree to use the smoke ball as requested and a benefit to the company.

... Lastly, it was said that there was no consideration, and that it was *nudum pactum*. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise ...

Counsel for the defendants argued that the terms of the advertisement would enable someone who stole the smoke ball to claim the reward when, clearly, the actions of any thief would not have benefited the defendants by way of increased sales. Lindley and Bowen LJ considered that the benefit was the general increase in sales through improved public confidence, and that this was a sufficient consideration. This definition would allow a thief to claim the reward. Of course, a thief would suffer a detriment in using the smoke ball in the stipulated manner.

1.4.5 Notes on the decision and the judgments

Let us now use the judgments to make a note on the decision and explain it.

The Court of Appeal (Lindley, Bowen, and A. L. Smith LJ) held that the defendants' promise in their advertisement was sufficiently certain and constituted a unilateral offer.

This offer was a promise to pay £100 to anyone who performed the stipulated act, i.e. using the smoke ball three times a day as directed for two weeks and still catching influenza.

The promise was intended to have legal effects, since the defendants had demonstrated their sincerity by depositing £1,000 with their bank.

The claimant when performing the specified act had accepted the offer. In a unilateral contract, the offeror will normally have impliedly waived the requirement communication of the acceptance to be effective. Notification of acceptance is therefore not required.

The performance of the act also constituted the consideration to support the defendants' promise: it was a detriment to the claimant to have to use the smoke ball in accordance with these directions; and it was a benefit to the defendants, since the claimant's use of the smoke ball would indirectly improve its sales through increased public confidence in the product.

Since there was a binding contract, the claimant was entitled to be paid the £100.

NOTE You may wish to add to these notes by including important statements from the judgments and by filling out the notes on the law concerning unilateral contracts. For example, you may wish to record Bowen LJ's statement that this was an

offer to the world and his statement that, in a unilateral contract, there is no requirement to notify the offeror of your intention to accept. Bowen LJ's example of the lost dog is particularly famous and worth noting.

1.4.6 General notes on the legal principles in the case

You should always assess how the case you are reading fits into the general body of case law principles. If it appears out of line with previous authority, you need to question whether the court in question realized this, and if not, why not. If the court did realize the inconsistency, you will need to examine in detail the explanation for the decision in each judgment. You should also ask whether the case adds to the development of principle, and if so, in what way. Is this development a broad one or is it very fact-specific? This is important in terms of precedent.

Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256 is valuable in explaining that a unilateral contract is a contract whereby the offeror makes a promise (in this case, to pay £100) in return for the performance of a stipulated act. Mrs Carlill makes no promise and can decide not to continue her use of the smoke ball at any time.

To summarize, a number of exceptional rules apply to unilateral contracts for which *Carlill v Carbolic Smoke Ball Co.* is authority.

- (a) The general rule is that an advertisement is an invitation to treat (i.e. an invitation to make an offer), so a response to an advertisement can at best be only an offer and there is no binding contract at that stage. However, if the advertisement requests the performance of an act (unilateral), then the advertisement will be an offer. On performance of the requested act, the offer is accepted and a binding contract follows.
- (b) Whereas the general rule is that an acceptance must be communicated to the offeror, the offeror may impliedly waive this requirement and is taken to have done so when the offer is unilateral, unless an express indication of the fact that notification is required.
- (c) In a unilateral contract, the requested act is both the acceptance and the consideration for the promise.

Other legal principles applicable to unilateral contracts must be considered at this point.

- (a) You can only accept a unilateral offer of a reward if you know that it has been made and if you accept in response to it: *R v Clarke* (1927) 40 CLR 227 (2.4.3). The act that is the purported acceptance cannot have been performed before any promise of a reward was made.
- (b) Since the acceptance is the performance of the stipulated act and performing this act may be a continuing act (as in *Carlill*), the general principle should be that the offer may be revoked at any time before the act is completely performed. However, it may not be possible to revoke a unilateral offer once the offeree has started to perform: *Errington v Errington & Woods* [1952] 1 KB 290 (2.5.2).
- (c) The general rule that a revocation of an offer must be communicated to the offeree is impractical in the case of a unilateral offer to the whole world, since it is not possible to identify the potential offerees. The American case *Shuey v United States*, 23 L Ed 697, (1875) 92 US 73 (2.5.3), is authority for the fact that it is sufficient if the revocation is communicated using the same channel used to communicate the original offer, and that if this is done, it is irrelevant if particular offerees did not see or know about the revocation.

? QUESTIONS

1. What was the stipulated act in *Carlill v Carbolic Smoke Ball*? Was it merely using the smoke ball as specified so that catching influenza was only a condition of entitlement to enforce the promise? Or was it using the ball as specified and catching influenza (3.1.2 and 3.1.3)?
2. What do you think the position would have been if, at the time of using the smoke ball, Mrs Carlill's only reason for doing so was to avoid catching influenza?
3. Did the smoke ball have to be purchased by Mrs Carlill?
4. What would the legal position be if, when Mrs Carlill had been using the smoke ball for one week, the Company had issued another advertisement withdrawing its offer, but, because Mrs Carlill did not see this, she had carried on using the smoke ball for the full two weeks and caught influenza?

NOTES

1. For further discussion of the background to the decision in *Carlill v Carbolic Smoke Ball*, see A. W. B. Simpson (1985) 14 JLS 345.

2. In *Bowerman v Association of British Travel Agents Ltd* [1996] CLC 451 (4.1.2), the Court of Appeal majority, relying on *Carlill*, held that a notice would reasonably have been read by the public as an offer by ABTA to give protection to the customer

if the ABTA member were to fail financially. This unilateral offer was accepted by the customer when booking a holiday with the ABTA member.

3. It is increasingly common for the courts to 'imply' unilateral contracts in order to recognize contractual liability: see e.g. *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 (at 2.3.3.2).

1.5 Exercise

Read the judgment and make quick, rough notes. Once you have read the judgment, test your learning by trying to answer the question and compare your comments to the notes that appear at the end of this extract.

Howard Marine and Dredging Co. Ltd v A. Ogden & Sons (Excavations) Ltd
[1978] QB 574 (CA)

See 9.3.2.2. The catchwords and headnote facts in this case are far more detailed than those in *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256, and the headnote decision is divided into four distinct issues: collateral warranty, damages for misrepresentation, the exemption clause, and the possibility of an action in negligence at common law.

Held, (1) that the contractors could not establish any claim in contract for there was nothing in the pre-contract negotiations which could amount to a collateral warranty.

(2) (*Per* Bridge and Shaw LJ) That the plaintiff owners were liable in tort for damages under section 2(1) of the Misrepresentation Act 1967, for the misrepresentation by their marine manager at the pre-contract meeting on July 11, 1974, as the deadweight capacity of the barges was a most material matter on which the contractors had relied in concluding the contract, and was one in respect of which the representor would have been liable had it been made fraudulently; that to avoid liability under the statutory terms the owners had to prove that their marine manager had had reasonable ground to believe and did believe