

Agreement

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“Fifty-five-snakes alive!”

“It is regrettable that I lost my best friend as a result of this quarrel”, said Mrs Robertson. The quarrel that Mrs Robertson was referring to turned on a verbal agreement between her and her bingo partner, Mrs Anderson. The two ladies were neighbours, and had agreed on the way to the bingo hall that they would share their winnings, should they be lucky.

On scooping the main prize of £108,000, Mrs Anderson denied that there had been any agreement with Mrs Robertson, but the courts view of this evidence in 2003 case was that an agreement did exist and that Mrs Anderson was forced to share her prize money.



“Bingo! £100,000 win is all mine”

In 2005, Tania Burnett won £100,000 at her local bingo hall, but two of her colleagues claimed that the three of them had earlier agreed to share any winnings. Ms Burnett denied that this happened, and the Court of Appeal agreed, identifying that there had been only a ‘casual conversation’ which was insufficient for a legally binding agreement.

And what was Ms Burnett’s reaction to the news that she had succeeded in defending the claim of her colleagues? “They can get stuffed!”

Metro online



FACTS OF AGREEMENT

Historic approach

- *consensus ad idium* (a meeting of minds)

Subjective approach: What did the parties actually think at the time of entering into the contract?

X Difficult to implement, since the Courts are neither mind readers or time travellers



Objective test: AGREEMENT



MANCHESTER
CITY COUNCIL

Gibson v Manchester City Council: Even though Gibson thought the council was offering to sell a house to him, the House of Lords decided that, from an objective stand point, the words ‘may be prepared to sell’ did not amount to an offer.

This shows that the objective test for agreement is still relevant

RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010]
“Whether there is a binding contract between the parties...depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations.”



Why is an objective approach important?

- Goodwood Investments Holdings Ltd v Thyssenkrupp Industrial Solutions AG [2018]
- Blue v Ashley [2017]
- Wright v Rowland [2017]

OFFER



Key words

The party making the offer: OFFEROR

The party to whom the offer is made: OFFEREE

OFFER - An expression of willingness to contract on certain terms on which the offeror is prepared to be legally bound following acceptance.

The terms of an offer must be **sufficiently certain**

Nicolene Ltd v Simmonds [1953]

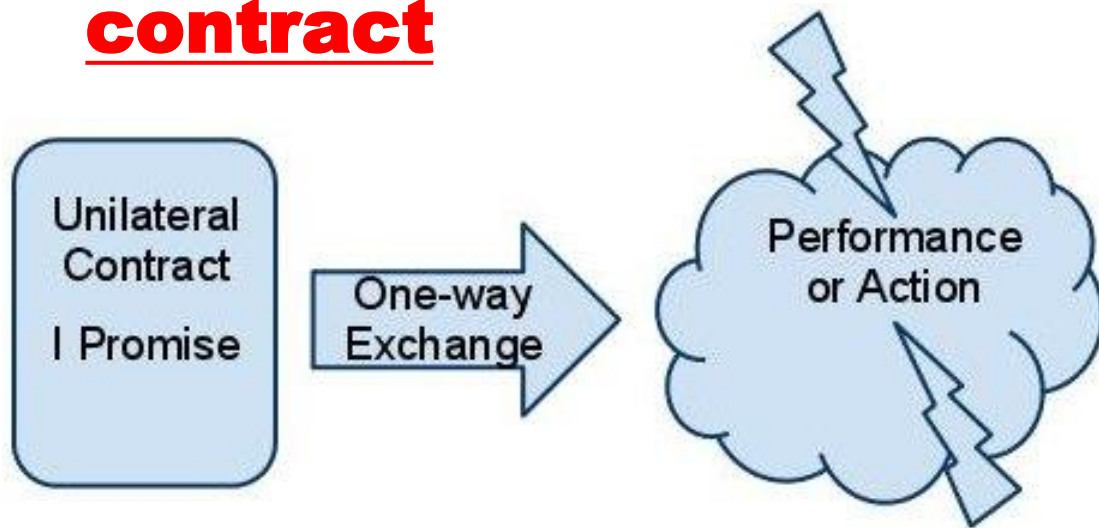
Scammell & Nephew Ltd v Ouston [1941]

Will you buy a
book from me?

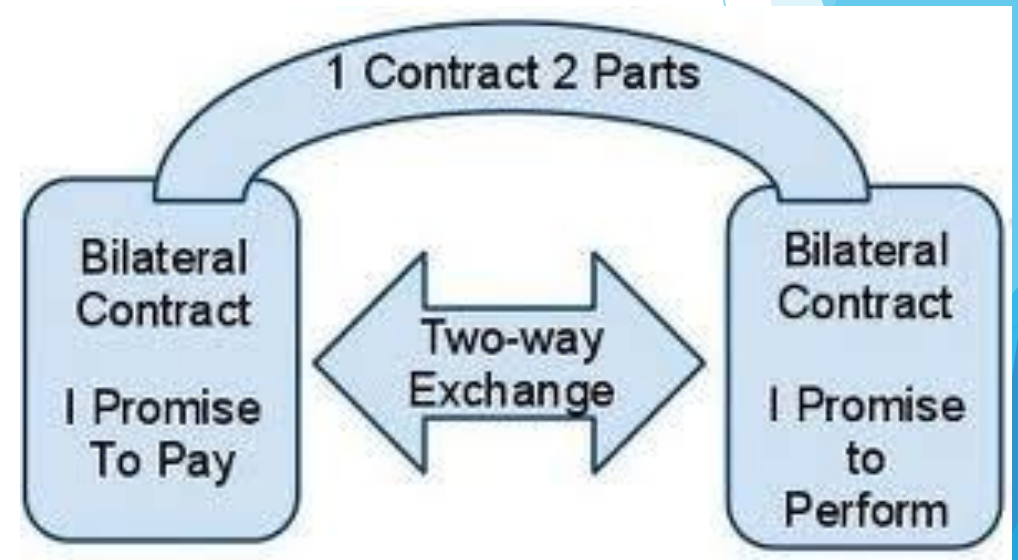


Offers in unilateral and bilateral contracts

Unilateral contract



Bilateral contract



MAKING AN OFFER

Offer can be made ORALLY, IN WRITING or even BY CONDUCT

E.g. When Emma went shopping in her lunch break, she did not actually exchange words with the cashier but it was clear from her actions that she was making an offer to buy (i.e. selecting the goods and taking them to the till).

The offeree must have KNOWLEDGE of the offer

E.g. if Emma had found a cat, recognised it as belonging to her work colleague, and returned it to him without having seen the postern and being aware the reward was available, she could not claim that reward.

RULE = The offer must be successfully COMMUNICATED to the offeree. *Taylor v Laird [1856]*



MAKING AN OFFER

- ▶ An offer is a statement of terms upon which we are willing to be bound
- ▶ An offer can be made to one person or a group of people
- ▶ “world in general” - **Carlill v Carbolic Smoke Ball Co Ltd [1893]**

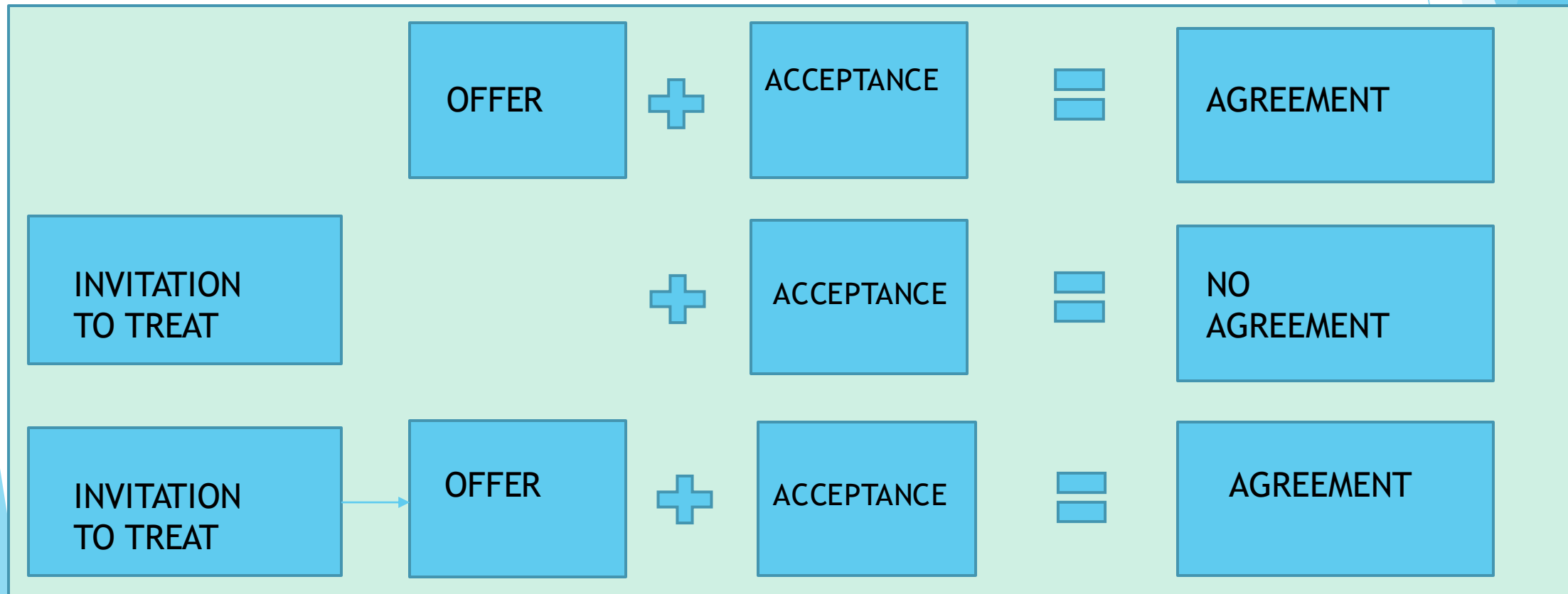


Bowen LJ: “An advert is not a **contract** made with the whole world... it is an **offer** made to all the world”

OFFER DISTINGUISHED FROM INVITATION TO TREAT

Invitation to treat: mere request to others to make an offer, or to open negotiations.

Unlike an offer an ITT cannot be validly accepted.



Invitation to treat: Advertisements

- Advertisements are generally considered to be invitations to treat, with the potential purchaser making the offer to buy.
- **Partridge v Crittenden [1968]**

General rule: Advertisements of a **unilateral** contract (Carlill) = **offer**

Advertisements of a **bilateral** contract (Partridge) = **invitation to treat**

However, an advert may amount to an offer if certain criteria are met. **Carlill v Carbolic Smoke Ball Co [1893]**



Why are advertisements seen as invitations to treat?

“ An iPad 3 for £50? Every little helps...”

“Tesco Direct glitch sells brand new Apple tablet at 90% discount. Hundreds of shoppers crash the website as they raced to buy the iPad 3 which was advertised on the supermarket’s site for £49.99.”

Although lots of consumers were hugely excited by this apparent deal-of-the century, with news spreading fast on social networking sites, they were disappointed after Tesco confirmed that they would not be honouring any of the attempted purchases. As the seller, to whom offers to buy were being made by the consumers, they were entitled to do this.

Mirror online, March 2012.

TESCO
Every little helps



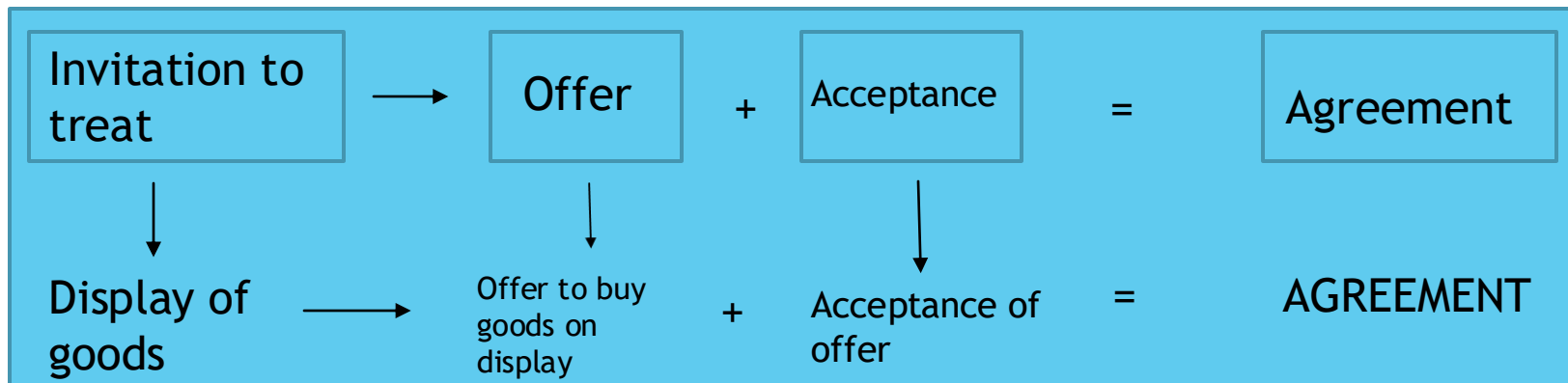
Invitation to treat: displays of goods for sale

- ▶ The courts have made it clear that a display of goods for sale amounts to an invitation to treat.

Fisher v Bell [1960]

A flick knife displayed in a shop window was not ‘offered for sale’ but instead was an invitation to treat. The shop keeper could not be found guilty of ‘offering an offensive weapon for sale’.

Pharmaceutical Society of Great Britain v Boots Cash Chemists [1953]



Invitation to treat: auctions

The bidder makes an offer to buy, which the auctioneer accepts by bringing the hammer down.

Payne v Cave [1789] - if the bid constitutes the offer, the auctioneer is free to accept the bid or not (invitation to treat)

British Car Auctions v Wright [1972]

The Divisional Court decided that an auctioneer was not committing the crime of “offering for sale” an unroadworthy car when it was sold by auction; the auctioneer was simply making an invitation to treat.



Invitation to treat: requests for tenders

Sending out a request for tenders = **invitation to treat**

The firms which respond to that request = **making an offer**

The original requestor is then free to decide which - if any - to accept.

Spencer v Harding [1870]

EXCEPTION

A request for tender could be considered an offer where the requestor makes a specific promise that he will accept the “best” bid.



Invitation to treat: mere statements of price

- ▶ These are usually not regarded as offers.
- ▶ **Clifton v Palumbo [1944]:** “I am prepared to sell my Lytham estate for £600,000” was not an offer but a preliminary statement as to price.

- ▶ **Gibson v Manchester City Council [1979]:**

The HL held that a letter from the council to Mr Gibson saying that it “may be prepared” to sell him his council house at a specified price was an invitation to treat.

Mr Gibson’s formal application to buy the house was an offer to buy and, because the offer was not accepted before the council changed its policy and decided not to sell the house after all, there was no contract.



ENDING AN OFFER

► The main circumstances in which an offer will end are when:

1. Acceptance
2. Revocation
3. Lapse of time
4. Death
5. Rejection



1. Revocation of offer

- Withdrawal of an offer
- Generally, an offeror can revoke or withdraw their offer at any time until it has been accepted.
- They will be liable only if they have bound themselves by a separate, specific promise to keep the offer open for a specified period of time and this is supported by consideration by the offeree (Routledge v Grant 1828).
- Pickfords Ltd v Celestica Ltd [2003] - The making of a second offer by the offeror to the same offeree could impliedly revoke the first offer, though it did not necessarily do so.



Byrne v Van Tienhoven [1880]

- ▶ • 1 October: the defendants posted a letter, making an OFFER to the claimants;
- ▶ • 8 October: the defendants posted a second letter to the claimants REVOKING the original offer;
- ▶ • 11 October: the claimants received the offer letter and immediately sent a telegram to the defendants ACCEPTING their offer;
- ▶ • 15 October; the claimants sent a letter to the defendants , confirming their telegram of acceptance;
- ▶ • 20 October: the letter of revocation was received by the claimants.

WHAT YOU THINK WAS DECIDED IN THIS CASE AND WHY?



Thinkpoint

If an offer can be revoked at anytime before acceptance - Can you see how this may be an issue with unilateral contracts?

E.g. Poster of reward for a lost cat?

Errington v Errington [1952]

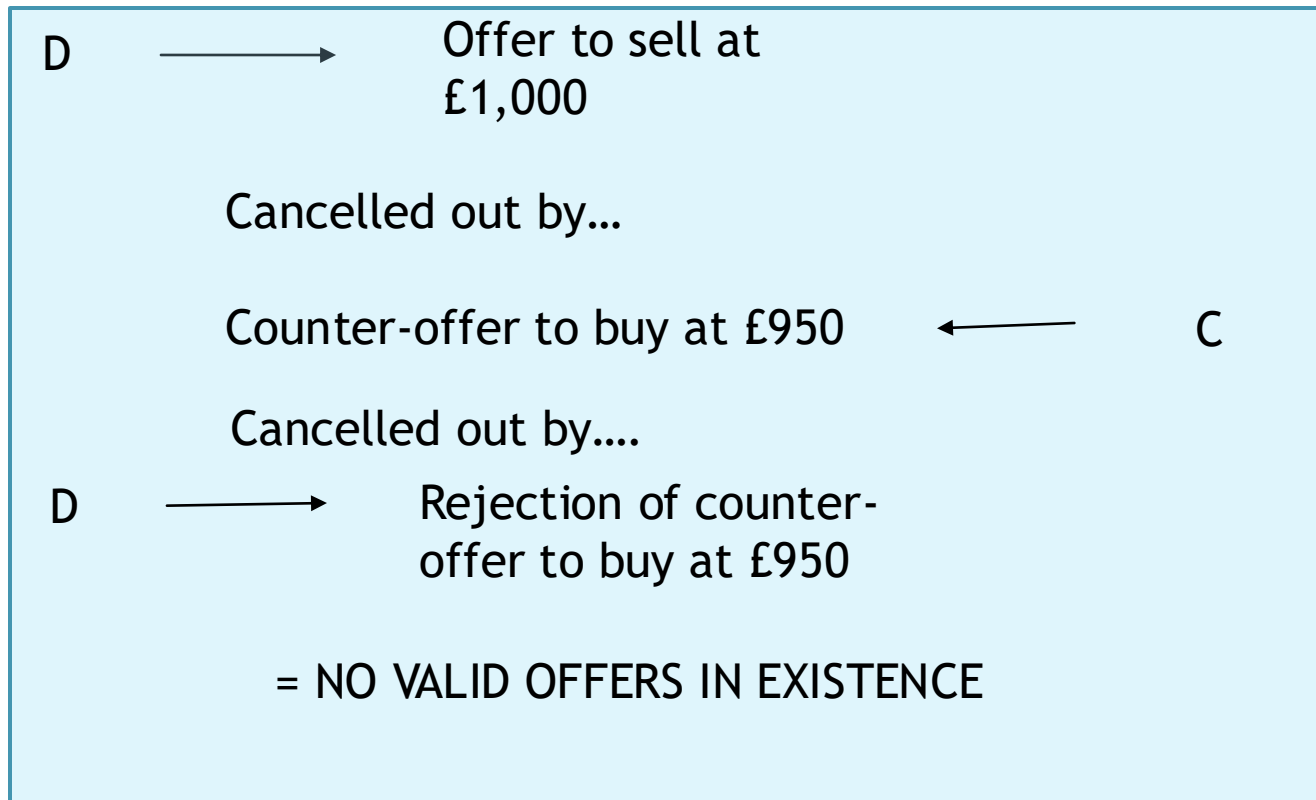
The Court of Appeal held that a unilateral offer might not be able to be revoked once the offeree has started to perform the act requested in the offer.



2. Rejection of offer

- ▶ To reject an offer is to end it.
- ▶ Counter offer - The offeree answers the offer with a new offer containing new terms
 - Has the same effect as rejecting an offer and ends the original offer

Hyde v Wrench [1840]



‘Battle of the forms’



3. Lapse of time

If an offer is said to be open for a specified period of time the contract will end when that period expires.

E.g. The offer to give someone first refusal on a car until 9am the next day will end at that time.

If there is no specified time then the offer will end after a 'reasonable time'.

Ramsgate Victoria hotel v Montefiore [1866]



4. Death

- ▶ The effect of the death of either party in respect of an offer may be terminal.
- ▶ It would appear that the death of the offeree causes the offer to terminate automatically, although there is no clear English authority on this point.
- ▶ Where the offeror dies, the position is not so certain, since the validity of acceptance depends on two factors: the nature of the subject matter and the knowledge of the offeree.



ACCEPTANCE



Mirror image rule

A → Offers to sell B her Contract law book for £5

agrees to buy A's contract law book for £5 ← B

The above response from B completely mirrors A's original offer =
VALID ACCEPTANCE

A → offers to sell B her contract law book for £5

Agrees to buy A's contract law book but only if the price is reduced to £4 ← B

The response from B does not mirror A's original
offer = **NO VALID ACCEPTANCE**



Butler Machine Tool Co Ltd v EX-Cell-O corporation Ltd [1979]

- Provides an example of the battle of the forms scenario
- The sellers offered to sell a machine tool to the buyers for £75,535, delivery in 10 months. This offer included a price variation clause. The buyers responded on their own standard form accepting the offer, but the terms and conditions in this form made no provision for a price-variation clause.
- The buyers' standard form had a 'tear off' slip at the bottom, which the sellers returned and which contained the words "we accept your order on the terms and conditions thereon" and a letter stating that the buyers order was entered into in accordance with the original offer.
- The sellers eventually delivered the machine but claimed an additional £2,892 under the price variation clause. The buyers refused to pay.
- The Court of Appeal held that the contract had been concluded on the buyers' terms and conditions and therefore the sellers were not entitled to the sum claimed. The return of the acknowledgement slip amounted to an acceptance of the buyers' counter-offer, the accompanying letter merely amounting to a confirmation of the price and description of the machine.





www.shutterstock.com - 664150546

TASK:

Can you find out what the term 'subject to contract' means in terms of acceptance?

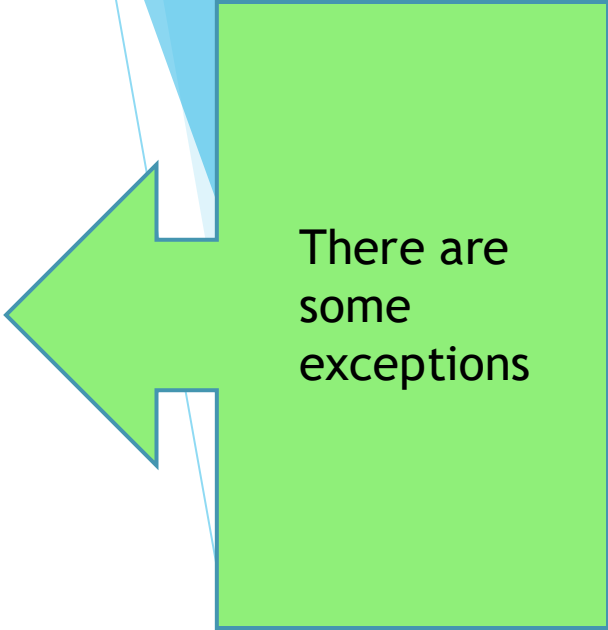


Qualified acceptance and counter-offers

- ▶ If an offeree attempts to accept an offer but adds a new term of their own (qualified acceptance), then there is no valid acceptance.
- ▶ A similar effect arises where the offeree accepts the offer but changes the terms of the offer. This then amounts to a counter offer.
- ▶ *Hyde v Wrench [1840]*

Communication of acceptance

- ❑ **Felthouse v Bindley [1862]** General rule: acceptance must be communicated to the other party.
- ❑ ***Entores v Miles Far East Corporation [1955]***
- ❑ Silence will not amount to acceptance
- ❑ When the offeror requires a specified method of acceptance , the general rule is that acceptance must be given that way - **Eliaison v Henshaw [1819]**
- ❑ Acceptance must be communicated by someone authorised to accept - **Powell v Lee [1908]**



There are some exceptions

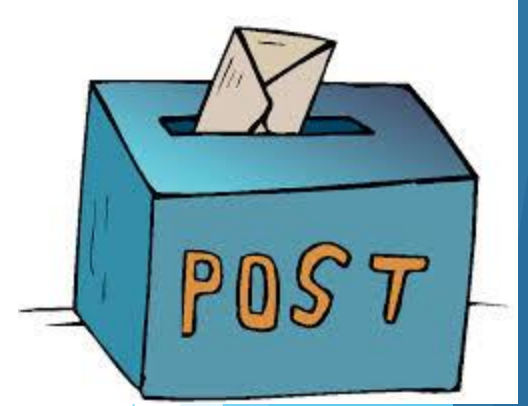


Exceptions to the general rule on communication

Reason for exceptions: the offeror can elect within their offer to waive (set aside) the need for the acceptance to be communicated.

The main accepted situations where this will commonly occur are:

1. Acceptance by conduct
2. Acceptance of unilateral offers;
3. Acceptance by post



1. Acceptance by conduct

- Look at the offerees action
- ***Brogden v Metropolitan Railway [1877]***- example of acceptance by conduct

Pickfords Ltd v Celestica Ltd [2003]

P → 1st quote

cancelled out by

P → 2nd quote

attempted acceptance of 1st quote ← C

IMPOSSIBLE, SO INSTEAD VIEWED AS

counter- offer, based on terms of 1st quote ← C

P → carried out work in accordance with C's counter-offer/p's 1st quote

= ACCEPTANCE VIA CONDUCT



2. Acceptance of unilateral offers

- ▶ Acceptance is completed by performing the requested action e.g. returning a lost cat.
- ▶ How was acceptance illustrated in Carlill v Carbolic Smoke Ball Co Ltd [1893]

ANSWER: Mrs Carlill accepted the offer by using the smoke ball as directed. She did not have to write and tell the company that she was performing the actions that constituted acceptance of its offer.

The way the company had made its offer implied that the need for communication of the acceptance had been waived.

REWARD



LOST CAT

Grey/White Tabby

Lost on December 17th near the corner of Belmont and Fowler Ave. Contact (559) 123-4567 (hm.); (559) 234-5678 (cell); or (559) 345-6789 (wk). Myron is very fearful and may be hiding. If you see him, please call day or night!

CARBOLIC SMOKE BALL

WILL POSITIVELY CURE
COLD IN THE HEAD, COUGHS, BRONCHITIS, SORE THROAT, SORE EYES, HEADACHE, NEURALGIA, CROUP, WHOOPING COUGH, INFLUENZA, MAY FEVER, CATARRH, ASTHMA, LOSS OF VOICE, SNEEZING, HOARSENESS, THROAT, DEAFNESS, SPENDING, RHEUMATISM, GOUT, GRAVEL, SCURVY, AND ALL THE DISEASES MENTIONED ABOVE PROCEED FROM ONE CAUSE, THEY CAN BE CURED BY THIS SMOKE BALL.

£100 REWARD

WILL BE PAID BY THE
CARBOLIC SMOKE BALL CO.
to any Person who restores the following Epidemic,
INFLUENZA,
£1000 IS DEPOSITED
with the LONDON BANK, London, showing no receipt for the same.
Under the first epidemic of INFLUENZA since the outbreak of CARBOLIC



3. Acceptance by post

Postal rule

- ▶ Acceptance is communicated as soon as the letter is posted.
- ▶ Even if the letter is delayed or never reaches the intended party.
- ▶ Established in *Adams v Lindsell* [1818]
- ▶ Applied in *Household Fire Insurance v Grant* [1879]



**WHAT POTENTIAL PROBLEMS CAN
YOU SEE WITH THE POSTAL RULE?**



3. Acceptance by post

EXCEPTIONS TO THE POSTAL RULE:

The postal rule will only apply when the letter is correctly stamped and addressed

The parties can exclude the rule if they want to - ***Holwell Securities Ltd v Hughes [1974]***

It applies only when it is reasonable to use the post - ***Henthorn v Fraser [1892]***

The rule should not be applied if it would lead to manifest inconvenience and absurdity.



Acceptance by modern methods of communication

- ▶ The position is less clear where acceptance is communicated by text-message, answer phone, fax or email that is not read immediately on receipt.
- ▶ **Apple Corps Ltd v Apple Computers Inc [2004]**
- ▶ **Entores v Miles Far East Corporation [1955]**
- ▶ **Brinkibon Ltd v Stahag Stahl GmbH [1983]**
- ▶ **Chwee Kin Keong v Digilandmall.com Pte Ltd [2005]**
- ▶ **Electronic Commerce (EC Directive) Regulations 2002:**
Reg 11: the contract is formed when the customer is able to access the acknowledgement of receipt sent from the seller.



Acceptance via modern methods of communication issue

Acceptance was sent via fax machine, telex, text message, answer-phone message or email BUT NOT READ UPON RECEIPT **Legal rule:**

There is no binding authority in place to govern this situation

Thomas v B P E Solicitors [2010]

The only guidance is to consider the parties' intentions, sound business practice and a judgment on where the risk should lie

Brinkibon [1982] Usual practice

Was the message received during normal office hours? (What amounts to "normal office hours" will depend on the nature of the business involved/ facts of the case)

YES: Message will be deemed to have been communicated upon receipt, regardless of when it is actually read

NO: Message will be deemed to have been communicated at the point when the sender could reasonably expect it to have been read (e.g. when the office re-opens)

Brinkibon [1982]

Summary of rules regarding communication

STAGE IN FORMING AGREEMENT	USUAL RULE re COMMUNICATION	RULE re POSTAL COMMUNICATION
OFFER	Must be fully communicated to be valid: Taylor v Laird [1856]	Communicated on RECEIPT - knowledge of offer required: Taylor v Laird [1856]
REVOCATION OF OFFER	Must be fully communicated to be valid: Byrne v Van Tienhoven [1880]	Communicated on RECEIPT - knowledge of revocation required: Byrne v Van Tienhoven [1880]
ACCEPTANCE	Must be fully communicated to be valid: Entores v Miles Far East corporation [1955].	Communicated on POSTING - postal rule will apply Adams v Lindsell [1818]



Summary

- ▶ For an agreement to be enforceable contract, there must be an intention to create legal relations and consideration
- ▶ The intention to make a binding agreement is normally judged objectively and requires the presence of an OFFER and ACCEPTANCE
- ▶ An offer is a definite promise to be bound on specific terms without further negotiation
- ▶ An offer must be distinguished from an INVITATION TO TREAT. The following are normally only invitations to treat:
 - Requests for bids at an auction;
 - Displays in shop windows;
 - Advertisements
- ▶ An offer must be COMMUNICATED to be effective. It can be accepted at any time before it is revoked. REVOCATION can take place by:
 - Lapse of time
 - Rejection by the offeree
 - Making of a counter-offer by the offeree
 - Death

Summary

- ▶ Acceptance of a valid offer completes the agreement
- ▶ Acceptance must be unqualified and precisely match the offer if it is to be effective; otherwise it will be treated as a COUNTER-OFFER
- ▶ Acceptance must be communicated to be effective:

GENERAL RULE: Acceptance is effective when it is received by the offeror (actual notice)

Silence is generally not acceptance;

Postal acceptances generally take effect on posting (unless the offeror has specified that actual notice is required)

Electronic acceptances (telex, fax, email) may take effect when communicated to the offeror, though it may be enough for them to be made available to the offeror, rather than read;

Contracts made via a website are governed by Regulations - the offer is likely to be made by the person responding to the website

Self- assessment questions

What distinguishes an offer from an invitation to treat?

What are the ways in which an offer can come to an end?

What is the postal rule and what does it apply to?

Use bailii.org to research the following key cases - what key principles can be derived from the cases?

Stevenson
Jacques v
McLean [1880]

Brinkibon v
Stahag Stahl
[1983]

Thomas v BPE
Solicitors
[2010]

Dickinson v
Dodds [1876]

Hyde v
Wrench [1840]

Adams v
Lindsell [1818]

Task 1



- ▶ Logoplat Ltd design plates. Ten thousand dining plates with a 'Le Chat Noir' design on the side have been produced. On 1st May at 9.00am Logoplat Ltd post a note on their website indicating that 'Le Chat Noir' plates are for sale at a price of £1.00 per plate.
- ▶ Sebastian, owner of Le Chat Noir restaurant, sees the advertisement. He emails Logoplat Ltd at 10.00am on 1st May asking to have 500 of the plates at £1.00 per plate or 2,000 at 50p per plate. Logoplat reply at 10.05am saying that they will sell 2,000 at 70p per plate. Sebastian drafts an email at 11.30am confirming the order for 2,000 plates at 70p. When he presses 'send' he is not connected to the internet. As a result his email is stored in his outbox and sent the following morning, 2nd May at 10.30am.
- ▶ The Black Swan Brewery Ltd wants the whole consignment of plates for the launch of their new 'Le Chat Noir' beer. They send a van to the premises of Logoplat Ltd with enough cash to pay at £1 per plate. The van arrives at 4.00pm on 1st May and the plates are loaded and sent on their way by 4.30pm. At 4.54pm Logoplat Ltd email Sebastian withdrawing their offer. Sebastian reads the email at 10.30am on 2nd May when he logs back onto the internet.
- ▶ Advise Logoplat Ltd as Sebastian is claiming that the rules on offer and acceptance mean that an enforceable contract was formed with him prior to the plates being sold to the Black Swan Brewery Limited.

Task 2



At 9am on Monday 13th August, Maurice, a car dealer, sends a telex to Austin offering to sell him a rare vintage car for £50,000. Austin receives the telex at 9:15am and telexes his acceptance at 1pm. Austin is aware that Maurice's office is closed for lunch between 1pm - 2pm. On his return to the office, Maurice does not bother to check whether he has received a telex from Austin and at 2:30pm receives an offer for the car from Ford, which he accepts. At 4pm Austin hears from another car dealer that Maurice sold the car to Ford. He is advised that this will cost him an additional £2,000 to buy a similar car and he immediately sends Maurice another telex demanding that the original car be sold to him. Maurice receives this telex at 5pm, at the same time that he receives the acceptance telex.

Advise Austin of his legal position.

Summary

