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3. Offer and Acceptance

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Abstract

This chapter discusses the rules of offer and acceptance that have been laid down by the courts over the years. It states that the rules claim to be of general application and that they purport to give effect to the intention of the parties, albeit their intention objectively ascertained. The chapter also establishes that the rules in practice are often inter-linked. For example, the question whether or not an offer has been accepted may depend in a particular case on whether or not the offer was revoked before it was accepted; a court deciding such a case must decide when both the acceptance and the revocation took effect. The chapter examines the difference between an offer and an invitation to negotiate (or an invitation to treat), particularly in its application to contracts concluded in shops, tenders and contracts concluded at an auction, the battle of the forms, the time at which acceptance takes place when a contract is concluded by post, and acceptance in the case of unilateral contracts.

Keywords: English contract law, offer, acceptance, invitation to negotiate, battle of the forms, postal rule, unilateral contract

Central Issues

1. When deciding whether or not a contract has been concluded the courts generally look for an offer made by one party that has been accepted by the other. Not every contract can be analysed in terms of offer and acceptance and indeed the ‘offer and acceptance’ model has been criticized on the ground that it is too rigid and out of step with commercial practice. These criticisms will be considered in the course of this chapter.

2. An offer is a statement by one party of a willingness to enter into a contract on the terms that he has put forward. An offer is generally contrasted with an invitation to negotiate (or an 'invitation to treat') which is no more than an invitation to the other party to enter into negotiations on the terms proposed. The distinction between an offer and an invitation to negotiate has proved to be a difficult one to draw in certain circumstances, such as advertisements, the display of goods for sale in shops, tenders, and auction sales. The problems experienced by the courts in these contexts are explored in this chapter.
3. An acceptance is a final and unqualified expression of assent to the terms of an offer. The question whether an offer has been accepted has generated a considerable amount of case-law, the outcome of which can be expressed in the form of a number of different rules that are set out in Section 3.4. Some of these rules have given rise to considerable difficulty in practice, particularly in connection with the 'battle of the forms'.
4. An offer can be terminated by revocation, rejection by the person to whom the offer has been made, lapse of time, the occurrence of a stipulated event and, possibly, the death of one or other party to the contract.

3.1 Introduction

It is not always an easy task to decide whether or not a contract has been concluded between two (or more) parties. Uncertainty can exist at a number of different levels. In the first place, it may not be clear whether the
p. 45 parties have entered into a contract at all. For example, the ↵ parties may have been involved in protracted negotiations. These negotiations may have produced agreement on many points but there may remain some outstanding issues between the parties. Does the fact of these unresolved or disputed issues preclude the existence of a binding contract? Secondly, there may be uncertainty as to the precise point in time at which the contract was concluded between the parties. At what point in the negotiation process did the parties cross the line from negotiating parties to contracting parties? Or suppose that the parties have been corresponding through the post. At what point in time do postal negotiations result in the conclusion of a contract? Is it when the final letter, the letter of acceptance, is sent through the post or is it when that letter is actually received (and read?) by its recipient? Finally, there may be uncertainty as to the precise terms of the contract. The agreement between the parties may be expressed in terms that are very vague. Does such vagueness prevent the existence of a contract between the parties? Or what is to be done in the case where there is agreement between the parties on the principal issues but there is disagreement on some minor issues? Does such inconsistency mean that there cannot be a contract between the parties? Or does the court have the power to ignore the inconsistency and select the term that it believes is the most appropriate one to govern the relationship between the parties?

This uncertainty should not be over-emphasized. The vast majority of contracts do not give rise to such difficulties (or, if they do, they do not result in litigation). But when they do arise the law must seek to resolve them. In order to do so, the courts have devised a set of rules that they apply in order to determine whether or not the parties have, in fact, concluded a contract. The principal rules applied by the courts can be stated

relatively briefly. A contract is created by an offer made by one party that has been accepted by the party to whom the offer was made. There are two vital ingredients of this definition. The first is the 'offer' and the second is the 'acceptance'. Both of these words require further elaboration. An offer can be defined as a statement, whether written or oral, of a willingness to be bound by the terms of the statement. Not every statement made in the course of the negotiation process amounts to an offer. The statement may be no more than a representation made by one party to the other that has induced that other to enter into the contract but which has not been incorporated into the contract itself. This issue will be discussed in more detail later (see Chapter 8). The issue that falls to be examined in this chapter is a different one, namely, whether or not the maker of the statement intended to be bound by the terms put forward in his statement (in which case it is an offer) or whether the statement simply reflects his current negotiating position but is not a final commitment to that position (in which case it is an invitation to negotiate or, as lawyers often call it, an 'invitation to treat'). The distinction is easily stated but can be difficult to apply in practice (see further 3.2).

The word 'acceptance' also requires further elaboration. Not everything that purports to be an acceptance is, in fact, an acceptance in the eyes of the law. If the acceptance contains terms which differ from those contained in the offer, it is not treated by the courts as an acceptance but as a counter-offer. Thus, far from amounting to an acceptance of the offer, a counter-offer operates as a rejection of the terms contained in the original offer and is instead a fresh offer to be bound on the new terms put forward (see further 3.3.1). These basic concepts of 'offer' and 'acceptance' have been refined by case-law and the courts have, over time, developed a number of rules in response to the facts of the cases that have come before them. Issues that have arisen before the courts include the following:

(i) when can an offer be revoked or withdrawn?

(ii) how do the rules of offer and acceptance apply to transactions concluded through the post?

p. 46 (iii) can the silence of an offeree amount to an acceptance?

(iv) must an acceptance be communicated to the offeror?

(v) must the person to whom the offer is made comply precisely with the method of acceptance which has been prescribed by the offeror? and

(vi) can a party accept an offer by performing an act which would otherwise amount to an acceptance, when ignorant of the fact that an offer has been made?

These issues will be discussed in greater detail in the course of this chapter. Here it suffices to draw attention to a number of features of the rules that have been laid down by the courts over the years. The first is that the rules claim to be of general application. The second is that the rules purport to give effect to the intention of the parties, albeit their intention objectively ascertained. The third is that the rules in practice are often inter-linked. For example, the question whether or not an offer has been accepted may depend in a particular case on whether or not the offer was revoked before it was accepted; a court deciding such a case must decide both when the acceptance and the revocation took effect. Fourthly, the rules appear to attach considerable significance to the precise moment in time at which the contract was concluded. Finally, the reception of the offer and acceptance rules, as we know them today, is linked with the will theory of contract, a theory that has been the subject of some criticism, particularly in its application to unilateral contracts. Each of these features requires some further elaboration.

3.1.1 General Application

The offer and acceptance rules purport to be of general application; that is to say they are applicable to all contracts and not just to some. The supposed universality of these rules is, in itself, a source of difficulty. Contracts are made in many different ways and it is extremely difficult, if not impossible, to frame rules that can be applied across such a broad spectrum. Contracts can be made in writing or orally; they can be made by letter, email, or text message; they may be the outcome of a period of negotiation or they may not; they may be made by an exchange of promises or they may be made by the conduct of the parties, without any words passing between them. Further, the contract between the parties may be bilateral or unilateral in nature. Most of the contracts discussed in this book are bilateral in nature, that is to say, the two parties to the contract promise to each other that they will carry out their respective obligations under the contract (in other words, they exchange promises). In a unilateral contract, on the other hand, only one party makes a promise to the other. The classic example of a unilateral contract is an offer to pay a reward to someone who finds and returns a piece of lost property. In this situation the promise is made by the party offering to pay the reward but there is no counter-promise made in return. Members of the public do not promise that they will look for and find the lost property. They accept the offer by doing the act stipulated in the offer (in this instance, finding and returning the lost piece of property). As we shall discover (in particular see 3.2.1 and 3.3.6), the rules laid down by the courts require some modification in their application to unilateral contracts.

The attempt by the courts to analyse all contracts in terms of offer and acceptance has been the subject of some criticism. The leading judicial critic has been Lord Denning. ↵ In *Gibson* v. *Manchester City Council* [1978] 1 WLR 520, 523 (the facts of which are set out at 3.2.1) he stated:

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> 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 textbooks 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.[1]

This statement elicited the following response from Lord Diplock when *Gibson* was subsequently appealed to the House of Lords. Lord Diplock stated ([1979] 1 WLR 294, 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 on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the council 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.

Lord Diplock's remark to the effect that cases can be found which cannot 'easily' be accommodated within the offer and acceptance framework echoes a statement made by Lord Wilberforce in *New Zealand Shipping Co Ltd* v. *A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154. After noting that the relationship between the parties to the case was of a commercial character and that the description of one set of promises as gratuitous seemed 'paradoxical and … prima facie implausible', Lord Wilberforce concluded (at p. 167):

> It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g. sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of reward; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that 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.

p. 48 ↵ The classic example of a case that cannot be analysed in terms of offer and acceptance is *The Satanita* [1895] P 248 (CA), affirmed *sub nom Clarke* v. *Dunraven* [1897] AC 59 (HL). Both the plaintiff and the defendant entered their yachts in a regatta. In doing so they agreed to be bound by the sailing rules of the Yacht Racing Association. One of these rules provided that the owner of any 'yacht disobeying or infringing any of these rules … shall be liable for all damages arising therefrom'. In breach of one of the rules of the Yacht Racing Association the defendant's yacht ran into and sank the plaintiff's yacht. The collision occurred without fault on the part of the defendant. It was held that the parties had accepted a contractual obligation not to disobey the sailing rules with the result that the defendant was liable to the plaintiff for the loss suffered as a result of the breach and, further, that the effect of the agreement between the parties was to displace the limitation on liability which would otherwise have been applicable as a result of the application of a statutory provision. It is important to note that the issue in this case was not one between one of the competitors and the organizers of the competition. Rather, it was between two of the competitors and the question for the court was one that related to the terms of the contract concluded between the competitors.

How was this contract formed? No clear answer can be given. Different views were expressed in the Court of Appeal. Lord Esher MR stated (at p. 255) that the competitors were bound when they began to sail and not before then. Lopes LJ concluded (at p. 261) that the contract arose 'directly any owner entered his yacht to sail'. Finally, Rigby LJ stated (at p. 262) that the contract was created when the parties 'actually came forward and became competitors'. The House of Lords did not devote much attention to the precise mechanism by which the contract was created. Only Lord Herschell considered the matter and he did so very briefly. He stated (at p. 63):

> I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.

The difficulty in using the tools of offer and acceptance to explain how the contract between the parties came into being has been expressed by Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 2-077 in the following terms:

> It was held that there was a contract between all the competitors on the terms of the undertaking [to obey certain rules during the race], though it is not clear whether the contract was made when the competitors entered their yachts or when they actually began to race. In either event, it is difficult to analyse the transaction into offer and acceptance. If the contract was made when the yachts were entered, one would have to say that the entry of the first competitor was an offer and that the entry of the next was an acceptance of that offer and (simultaneously) an offer to yet later competitors; but this view is artificial and unworkable even in theory unless each competitor knew of the existence of previous ones. It would also lead to the conclusion that entries which were put in the post together were cross-offers and thus not binding on each other.[2] If the contract was made when the race began,
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> p. 49
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> then it ↵ seems that each competitor simultaneously agreed to terms proposed by the officers of the club, and not that each proposed an identical set of terms amounting at the same time to an offer to the others and to an acceptance of the offers at that instant made by them. Even if the second view of the facts could be taken, the 'offers' and 'acceptances' would all occur at the same moment. Thus they would be cross-offers and would not create a contract. The competitors, no doubt, reached agreement, but they did not do so by a process which can be analysed into offer and acceptance.

What conclusion should we draw from the fact that it appears that not all contracts can be (easily) analysed in terms of offer and acceptance? We could decide either to abandon the offer and acceptance model in its entirety or we could recognize that, while offer and acceptance is the usual means by which a contract is created, it is not the only one. The first of these alternatives is a radical one. Nevertheless, it must be conceded that the offer and acceptance model has been the subject of some criticism. For example, Professor Collins states (*The Law of Contract* (4th edn, Butterworths, 2003), p. 159) that:

> To decide when consent has been given by both parties to a contract, the authors of traditional textbooks devised an intricate set of rules employing the concepts of 'offer and acceptance' to fix the moment of responsibility. These rules typify the formalist qualities of classical law: they are detailed, technical, and mysterious, yet claim logical derivation from the idea of agreement.

As we shall see, the rules are at times detailed and technical and they are susceptible to criticism on the ground that they appear to be rather mechanical and divorced from commercial reality. In many ways, the difficulty lies in formulating an alternative to the rules that are currently applied by the courts. There have been calls for the adoption of a broader approach which focuses on the question of whether or not the parties have reached agreement (see, for example, the approach of Lord Denning in *Gibson* v. *Manchester City Council* extracted earlier). The problem with the latter suggestion is that it tends to create uncertainty, in that it can often be very difficult to determine whether or not the parties have, in fact, reached agreement. There is a need for clear rules so that lawyers and their clients can know where they stand and do not have to resort to

litigation in order to be able to ascertain their rights and liabilities (see, for example, *Tekdata Interconnections Ltd* v. *Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357, at [25]). Thus there is a general reluctance to abandon the old rules in their entirety.

The more likely option is the second one, namely to recognize offer and acceptance as the principal but not the only route by which a contract can be created. However, even here, the courts tend to be reluctant to displace the traditional analysis (see, for example, *Tekdata Interconnections Ltd* v. *Amphenol Ltd*). It is probably true to say that the courts continue to employ the offer and acceptance rule-book but, as Lord Wilberforce put it in the extract from *The Eurymedon*, sometimes force the facts to fit uneasily into the marked slots of offer and acceptance.

An alternative approach is overt recognition of the fact that offer and acceptance are sufficient but not necessary ingredients of a valid contract. Thus Article 2.1.1 of the Unidroit Principles of International Commercial Contracts states that '[a] contract may be concluded *either* by the acceptance of an offer *or by*
p. 50 *conduct of the parties that is sufficient to show agreement*' ↵ (emphasis added). The Principles of European Contract Law arrive at the same conclusion but by a slightly more elaborate route. Article 2:101 provides that:

> [i] A contract is concluded if:
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> (a) the parties intend to be legally bound, and
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> (b) they reach a sufficient agreement
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> without any further requirement.

Section 2 of Article 2 then sets out a number of rules relating to offer and acceptance and, in doing so, recognizes that offer and acceptance is the usual model for the creation of a contract. But Section 2 concludes with the following provision (Article 2:211):

> The rules in this Section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.

At first sight this provision seems rather unhelpful in that it does not tell us what constitutes an 'appropriate adaptation' of the rules otherwise applicable. But it is in fact very difficult to provide more concrete guidance, other than to state that the otherwise applicable rules should be applied by way of analogy to the facts of the case. English law can learn at least two important lessons from the provisions on formation of contracts to be found in the Unidroit Principles and the Principles of European Contract Law. The first is that neither rejects the offer and acceptance analysis. On the contrary, they both recognize that it is the usual mode of analysis but also accept the need for provision to be made for agreements that cannot be accommodated within the offer and acceptance framework. The second is that they both inject greater flexibility into the offer and acceptance rules themselves and also provide some tailor-made solutions to well-known and frequently encountered problems in commercial practice (see, for example, the battle of the forms at 3.3.1).

3.1.2 The Intention of the Parties

The courts frequently declare that they are seeking to give effect to the intention of the parties when applying the rules of offer and acceptance. It is, however, important to understand that the courts do not generally seek to ascertain the subjective intentions of the parties. It is their intention, objectively ascertained, that counts (on which see further 2.1). But there is a problem here and it arises from the fact that the parties may not have had any observable intention one way or the other. Take the case of a couple going into a restaurant for a meal. They look at the menu outside the restaurant and then decide to go in. When they go in a waiter gives them a copy of the menu and awaits their order. They each order their meals. Nothing is said about who is to pay for the meal. At the end of the meal the waiter presents a bill to one or other party and payment is made. At what point in time did a contract come into existence between the customers and the restaurant owner? Was it when the customers entered into the restaurant, when they ordered the food, or when they paid for the meal?
p. 51 Further, how was the contract created? Who made the offer and who accepted it? What is ↵ the status of the menu (either outside or inside the restaurant)? Is it an offer or is it simply an invitation to negotiate (or, as it is more commonly put by lawyers, an invitation to 'treat')? Who has concluded the contract? Is the contract between the restaurant owner and the party who pays the bill, or are both customers party to a contract with the restaurant owner? Reference to the intention of the parties is unlikely to yield many answers to these questions. The average customer in a restaurant is unlikely to have given much thought to the precise process by which a contract is created. He or she intends to eat a meal and to pay for it but, beyond this, is unlikely to have any discernible intention as to the means by which or the time at which the contract is created. It falls to the courts to devise a presumptive rule that can then be applied to the facts of the case at hand. In this way uncertainty and inconsistency can be reduced, if not eliminated. In devising the presumptive rule, the courts attempt to produce a rule which is workable and consistent with what they believe would have been the intention of the parties had they given the matter some thought. Oddly enough, there is in fact no authority on the contractual status of a menu displayed or handed to a customer in a restaurant. The consensus of academic opinion is that a menu amounts to an invitation to negotiate, not an offer.

3.1.3 The Inter-Related Nature of the Rules

It is easy to get the impression that the courts apply the offer and acceptance rules in a rather mechanical fashion. The court first looks for an offer and, having found that, it then moves on to look for a matching acceptance. If it finds an acceptance then a contract is concluded; if not, no contract has been concluded. But it does not follow from this that the rules applicable to offers and those applicable to acceptances exist in splendid isolation. They are vitally inter-related. A simple example is provided by one of the rules relating to the revocability of an offer. As a general rule, an offer can be revoked at any time before it is accepted. Thus a court asked to determine whether an offer has been validly revoked must first decide whether or not the offer has been accepted. If the offer has been accepted, then it cannot be revoked and there is a binding contract in existence between the parties. The readier the court is to find the existence of an acceptance, the less room there is likely to be for the withdrawal of an offer.

A number of cases in this chapter raise issues relating both to the existence of an offer and to the existence of an acceptance. One example is the decision of the Court of Appeal in *Carlill* v. *Carbolic Smoke Ball Company* [1893] 1 QB 256 (see 3.2.1) where the court was asked to decide, first, whether the defendant had made an offer

to the plaintiff and, secondly, assuming that such an offer had been made, whether the plaintiff had validly accepted it. The extracts do not attempt to separate out the issues relating to the existence of an offer from those relating to the existence of an acceptance where they arise within a single case. They are treated together and this is done for the purpose of emphasizing the fact that the issues are inter-related in practice.

3.1.4 The Time at Which the Contract Was Created

It has been argued that the rules of contract law, and in particular the offer and acceptance rules, attach undue significance to the precise moment in time at which the contract between the parties was concluded. They
p. 52 appear to posit a world in which parties suddenly transform ↵ themselves from negotiating parties into contracting parties. Thus Professor Macneil has argued ('Contracts: Adjustments of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854, 864) that:

> classical contract law draws clear lines between being in and not being in a transaction; e.g., rigorous and precise rules of offer and acceptance prevail with no half-way houses where only some contract interests are protected or where losses are shared.

This classical model may not fit with the practice of many commercial parties. Relationships evolve rather than suddenly spring into existence. Thus many contracts may not have a clearly defined beginning because the relationship between the parties gradually develops as the negotiation process unfolds. Equally, they may not have a clearly defined duration because the relationship between the parties will continue to evolve after the conclusion of the contract with the result that the contract itself will undergo a process of modification or adaptation. The offer and acceptance model, it is argued, does not capture the dynamic nature of the relationship between the parties. It presents a static model of contracts that attempts to attribute the rights and liabilities of the parties to one particular moment in time, namely the point in time at which the contract was concluded.

While the moment at which the contract is formed is undoubtedly of importance its significance should not be over-emphasized. It is important in the sense that it identifies the moment in time at which the parties became subject to the duty to perform the obligations as set out in their contract. But it does not follow from this that the parties did not owe each other duties while they remained negotiating parties. As we shall see (Chapter 17) the law does regulate the bargaining process and, while the duties owed by negotiating parties to each other are not as extensive as those owed by contracting parties, they cannot be dismissed as insignificant. Thus it is not as if the parties move suddenly from a world in which they owe each other no duties to one in which they owe each other full contractual duties. The law does reflect the different stages in the evolution of the relationship between the parties by imposing on the parties different obligations at the two principal stages in the evolution of their relationship (namely as negotiating parties and then as contracting parties). It is also important to realize that the contract agreed by the parties can have a substantial degree of flexibility built into it. It is not necessarily static. In the case of a long-term contract the parties are unlikely to be able to anticipate all the future events that are likely to impinge upon the performance of the various obligations contained in the contract. Contracting parties who anticipate that their relationship will endure for a long period of time are therefore likely to have to phrase their contractual

obligations in rather vague, aspirational terms in order to enable them to deal with future but as yet unanticipated problems. Thus it is not necessarily the case that the parties must take all of their decisions at the moment of entry into the contract. They can build into the contract clauses that will enable them to adjust their relationship in order to reflect the altered circumstances that may later confront them.

3.1.5 Offer and Acceptance and the 'Will Theory' of Contract

The offer and acceptance rules, as we know them today, are linked with the will theory of contract, particularly as that theory developed in the nineteenth century. The most influential exponents of the will
p. 53 theory were the French jurist Robert-Joseph Pothier ↵ and the German jurist Friedrich von Savigny. They attributed contractual liability to the agreement or the mutual assent of the parties. The introduction of this theory made a significant change to English contract law. Professor Simpson ('Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247, 257) has put the point in the following way:

> [T]he formation of a contract today is analysed in terms of offer and acceptance, an intention to create legal relations and the doctrine of consideration. If these requirements are satisfied there is a contract and (subject to various provisos) this gives rise to rights in the contracting parties for whose violation the law provides remedies in the form of actions for damages, injunctions and decrees of specific performance. Now way back in the sixteenth century when it all began the form of action for verbal or parol *agreements* (to use a neutral term) was an action for breach of promise, and the essentials involved were neatly stated in *Goldring's Case* (1856) by the then Solicitor General, Egerton: 'In every action upon the case upon a promise, there are three things considerable, consideration, promise and breach of promise'. You will notice the fact that between then and today we have moved from an essentially one-sided conception—a *promise* broken—to an essentially two-sided notion—a *contract* broken. [Emphasis in the original.]

This perception of a contract in bilateral terms, as a product of the meeting of the minds of the two parties, has not been without its critics. Thus Professor Ibbetson has stated (*A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), pp. 221–222) that:

> the great merit of the Will Theory was that it had a measure of intellectual coherence that the traditional Common law wholly lacked, though this coherence had been to some extent bought at the expense of practical common sense. Its greatest demerit was that it was imposed on the Common law from the outside rather than generated from within. It embodied a model of contract law significantly different from the traditional English exchange model, and there was considerable friction between the two theories. The Common law did not—of course—simply discard elements that did not fit neatly into the theory but strained to squeeze them into it. The result was a mess. …
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> As an intellectual construct, the idea that contractual liability was based on the meeting of the parties' minds was reasonably satisfactory, but in practical terms it was rather more problematical. All too often it might occur that what appeared to be a perfect agreement concealed a more ragged mixture of things on which the parties agreed, things on which they disagreed, and things to which one or both of them had given no thought. This was early recognized by Joseph Chitty, who borrowed from Archdeacon Paley the theory of objective agreement, conveniently ignoring the fact that Paley's whole theory of liability was completely at odds with the Will Theory derived from Pothier. … The objective theory obviously sat ill with the theory that contractual liability stemmed from the meeting of the minds of the parties; the difficulty was explained away by treating it as a rule of evidence rather than a rule of substance, parties being estopped from denying that their words meant what they appeared to mean.

p. 54 ↵ The adoption of the will theory posed, and continues to pose, particular challenges for unilateral contracts. Thus Professor Simpson has observed ('Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247, 261–262) that:

> so far as what are now called unilateral contracts are concerned we must note that this category only comes into the limelight when the notion of an action for breach of contract (in *some* sense a two-sided thing) prevails over the older idea of an action for breach of promise—a unilateral thing. When the paradigm becomes bilateral, the one-sided contract attracts notice and attention as anomalous. So it continues to be regarded, and it is easy to find examples of passages in works on contract which seem to deny the existence of contracts binding only one side. The analysis of such transactions in terms of offer and acceptance was first suggested by counsel in *Williams* v. *Carwardine* (1833), a case involving a promise of a reward. Such cases fitted easily into the older model—they were cases involving promises in consideration of an act not yet performed—called a future or executory consideration; the promise to the man who goes to York is first discussed in an assumpsit case in 1572. The application of the offer and acceptance analysis to such promises has never been happy; it only became canonical late in the nineteenth century in the celebrated case of *Carlill* v. *Carbolic Smoke Ball Co* (1892).

The five features of the rules discussed earlier will surface at various points in this chapter and you should bear them in mind when reading the rest of the chapter. It is now time to turn to a more detailed examination of the rules relating to offer and acceptance. We shall proceed in three stages. At the first stage (3.2) we shall

consider whether or not an offer has been made, at the second stage (3.3) we shall discuss what constitutes an acceptance, and at the final stage (3.4) we shall consider whether an offer has been validly withdrawn or terminated.

3.2 Has an Offer Been Made?

The first question that has to be answered when deciding whether or not a contract has been concluded is whether or not an offer was made. The existence or otherwise of an offer will depend upon the intention of the party alleged to have made the offer. Did he intend to be bound by the terms that he has proposed to the other party or not? If he did, then the statement is likely to be an offer. If he did not, then it is likely that he has not made an offer but simply expressed a willingness to negotiate on the terms proposed. The statement that the existence of an offer depends upon the intention of the party alleged to have made the offer must be qualified in two important respects.

The first is that the courts are not generally concerned to ascertain the subjective intention of the party alleged to have made the offer. A judge cannot establish what was actually taking place in the minds of the parties. Rather he will examine the intention of the party alleged to have made the offer, *as that intention appears to others*. In other words, the courts focus attention on the objective intention of the parties, not their subjective intention (on which see further Chapter 2).

Secondly, the party making the statement alleged to constitute the offer may not have had in mind the distinction between an offer and an expression of a willingness to negotiate when making his statement. In such a case the court must endeavour to ascertain, as best it can, the intention of the party who made the
p. 55 statement. In some cases this is a matter ↵ of examining the correspondence that has passed between the parties with a view to determining whether or not an offer has been made. In other cases, where the fact situation is one of everyday occurrence, such as the purchase of goods in a supermarket, the courts tend to lay down what might be termed a prima facie rule of law that they will apply when deciding whether or not an offer has been made. This is not to say that this prima facie rule is invariably applied: it can be displaced by evidence of contrary intent. The reason for the existence of these prima facie rules is probably the need for certainty in commercial transactions. Parties need to know where they stand and they would not be able to do so if the courts embarked upon a fresh inquiry into the intention of the parties in each case involving a purchase of goods from a supermarket. Much better to establish a prima facie rule so that parties can at least know the general rule that is applicable to their case and can plan accordingly (or, as the case may be, settle disputes that have occurred).

In terms of ascertaining whether or not an offer has been made it is perhaps best to separate out those cases in which the court is asked to examine the correspondence that has passed between the parties from the other cases. In the ‘correspondence’ cases the courts tend to have more evidence to work from and their task is to examine the correspondence that has passed between the parties with a view to determining whether or not a statement has been made that amounts to an offer. The outcome of such cases very much depends upon the facts of the individual case.

For example, in *Harvey* v. *Facey* [1893] AC 552 the plaintiffs sent a telegraph to the defendant phrased as follows: 'will you sell us Bumper Hall Pen? Telegraph lowest cash price'. The defendant replied by telegraph stating: 'Lowest cash price for Bumper Hall Pen £900'. The plaintiffs in turn replied by telegraph in which they stated: 'we agree to buy Bumper Hall Pen for £900 asked for by you'. The defendant did not reply to this last telegraph. It was held that no contract had been concluded between the parties for the sale of Bumper Hall Pen. The first telegraph was a mere inquiry in which the plaintiffs simply sought to ascertain whether or not the defendant was willing to sell and, if so, at what price. The defendant's response was not an offer to sell the property but a precise answer to the question that had been asked of him. The mere statement of the lowest price at which he was prepared to sell did not constitute an implied offer to sell at that price to the person making the inquiry. The final telegraph sent by the plaintiffs was therefore an offer, not an acceptance, and, not having been accepted by the defendant, it could not give rise to a contract between the parties.

Another example of this process at work is provided by the decision of the House of Lords in *Gibson* v. *Manchester City Council* [1979] 1 WLR 294. The plaintiff, a council house tenant, alleged that he had entered into a contract with the defendant city council for the purchase of the house in which he lived. The defendant denied that a contract had been concluded for the sale of the house. There had been a number of communications between the parties. The defendant initially sent out a brochure to council house tenants who had previously expressed an interest in purchasing their homes. The brochures contained a detachable form, to be completed by the tenant, which asked the council to inform the tenant of the price at which the council was willing to sell the house and also asked the council to provide tenants with details about mortgage facilities. The plaintiff completed the form and sent it to the defendant. The defendant replied to the plaintiff on 10 February 1971 in the following terms:

> I refer to your request for details of the cost of buying your Council house. The Corporation may be prepared to sell the house to you at the purchase price of £2,275 less 20% = £2,180 (freehold).
>
> p. 56 ↵ The details which you requested about a Corporation mortgage are as follows:—
>
> Maximum mortgage the Corporation may grant: £2,177 repayable over 20 years. ...
>
> This letter should not be regarded as a firm offer of a mortgage.
>
> If you would like to make formal application to buy your Council house, please complete the enclosed application form and return it to me as soon as possible.

The letter was signed by the City Treasurer. The plaintiff completed the application form and returned it. However, he left the purchase price of the house blank. The reason for this was that he wanted to know whether or not the council intended to repair the tarmac paths in the vicinity of the house and, if not, he stated that he was prepared to carry out the work himself provided that an appropriate deduction was made from the purchase price. The council replied to the effect that the price quoted took account of the present condition of the property and that they could not authorize the repair of the paths. The plaintiff replied to this in a letter in which he stated that 'in view of your remarks I would be obliged if you will carry on with the purchase as per my application already in your possession'. Before the council was able to reply to the plaintiff's letter there was a change in the political composition of the council as a result of local elections and the policy of selling council houses was promptly stopped by the incoming Labour administration. The

plaintiff alleged that the defendant council was obliged to sell him the council house on the ground that a contract had been concluded for the sale of the house before the policy of selling council houses had been stopped. The defendant council denied that a contract had been concluded. The plaintiff succeeded before the Court of Appeal but failed in the House of Lords.

The judges in the House of Lords undertook a careful examination of the correspondence which had passed between the parties. Particular attention was paid to the defendant's letter of 10 February. The plaintiff submitted that it was an offer but this submission was rejected for two principal reasons. The first was that the letter did not commit the council to the sale of the property. According to the second sentence of the letter the position of the council was that it 'may' be prepared to sell. This did not amount to a commitment to sell. The second was that the final sentence of the letter invited the plaintiff to make a formal application. It did not invite him to accept the offer contained in the letter. This being the case the council never offered to sell the council house to the plaintiff, nor did it accept any offer made by him to purchase the house. It therefore followed that no contract had been concluded between the parties.

It is possible to criticize the decision on the ground that it focused unduly on a precise construction of the documentation that passed between the parties and failed to pay sufficient attention to their conduct (in particular, the fact that the plaintiff had done 'much work in repairing and improving his house and premises' and the fact that the council had, at one point in time, taken the house off the list of houses being maintained by them and put it on the list of 'pending sales'). Lord Edmund-Davies did, however, address these points. He stated that it was impossible to conclude on the evidence that improvements had been carried out on the basis that the council had already committed itself to sell the property. He also stated that the plaintiff could not place any reliance on the fact that, unknown to him, the council had at one point taken the property off the list of houses for which it was responsible for maintenance and put it on the list of 'pending sales'.

In other cases the courts have evolved prima facie rules of law to be applied to certain standard types of
p. 57 transaction in order to determine whether or not there has been an offer ↵ or an invitation to negotiate. The cases that are discussed in the following sections illustrate four commonplace transactions, namely (a) advertisements, (b) displays of goods in shops, (c) auctions, and (d) tenders.

3.2.1 Advertisements

The general rule applicable to advertisements is that, at least in the case of bilateral contracts, an advertisement constitutes an invitation to negotiate and not an offer. Thus, to take the standard example, suppose that a vendor of goods advertises them for sale in a local newspaper. The advertisement will generally be regarded as an invitation to negotiate and not an offer (see *Partridge* v. *Crittenden* [1968] 1 WLR 1204). The principal reason for this is said to be the need to protect the party placing the advertisement from incurring a liability in contract to every person who is willing to purchase the goods at the stipulated price. Thus in *Grainger & Son* v. *Gough (Surveyor of Taxes)* [1896] AC 325, 334 Lord Herschell considered the case of a price-list distributed by a merchant 'among persons likely to give orders' and concluded that:

> [t]he 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.

While there is obvious force in the point that there is a need to protect the vendor from potential multiple liability, this could have been done in another way. It did not demand that the advertisement be classified as an invitation to negotiate. It could have been done by treating the advertisement as an offer but then implying into that offer a term to the effect that the offer can only be accepted 'while stocks last'. One consequence of choosing to regard an advertisement as an invitation to negotiate rather than an offer is that the party who responds to the advertisement and is willing to purchase the goods at their advertised price cannot compel the advertiser to sell the goods to him at the stated price. He can only make an offer which the vendor can then choose either to accept or to reject. It has also had unfortunate consequences in the context of the criminal law. For example, in *Partridge* v. *Crittenden* [1968] 1 WLR 1204 the defendant was charged with an offence of offering wild birds for sale contrary to the Protection of Birds Act 1954. The advertisement placed by the defendant stated: 'Quality British A.B.C.R ... Bramblefinch cocks, Bramblefinch hens, 25s each'. It was held that he had not committed the offence with which he was charged because he had not offered the birds for sale; the advertisement was simply an invitation to negotiate. Legislators who wish to catch those who advertise certain goods for sale must therefore extend the scope of the offence beyond those who 'offer' goods for sale (thus the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) makes provision for a range of offences which may be committed by a trader who provides misleading information of various types to consumers).

The conclusion that an advertisement is an invitation to negotiate is not, however, an invariable one. Cases
p. 58 can be found in which the courts have concluded that an advertisement ↵ is an offer and not an invitation to negotiate. The leading case, to which we now turn, is an example of a unilateral contract. The inference that an advertisement is an offer rather than an invitation to negotiate will often be more readily drawn in the context of a unilateral contract.

Carlill v. Carbolic Smoke Ball Company
[1893] 1 QB 256, Court of Appeal

The defendants advertised their medicinal product, the now infamous 'carbolic smoke ball', in various newspapers in the following terms:

> 100l. 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. 1000l. is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.
>
> During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.
>
> One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London.

The plaintiff, in reliance upon this advertisement, purchased and used the product as directed but subsequently caught influenza. She sued for payment of the £100 and succeeded before Hawkins J. The defendants appealed to the Court of Appeal but the appeal was dismissed. It was held that the terms of the advertisement constituted an offer, the terms of which were accepted by the plaintiff with the result that she was entitled to recover the promised £100.

Bowen LJ

We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. The defendants contend next, 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 was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made—that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the

p. 59 document shows that no contract whatever was intended. 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: '100l. 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. Then again it was said: 'How long is this protection to endure? Is it to go on for ever, 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. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: 'During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using' (not 'who had used') 'the carbolic smoke ball', and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. 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, [Lord Justice Lindley], 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 100l. should, if the conditions were fulfilled, be paid? The advertisement says that 1000l. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100l. 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.

But it was said there was no check on the part of the persons who issued the advertisement, and that
p. 60 it would be an insensate thing to promise 100l. to a person who used the ↵ smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world—that is, with everybody; and that you cannot contract with everybody. 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 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, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. …

Then it was said that there was no notification of the acceptance of the contract. 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—I say nothing about the laws of other countries—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 act on 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 for 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
> p. 61 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.
>
> ***Lindley*** and ***A.L. Smith LJJ*** delivered concurring judgments.

Commentary

It should be noted that a number of legal issues arose on the facts of *Carlill*, not all of which were concerned with the question whether or not the advertisement constituted an offer. This is not surprising. Most litigation generates more than one point of law. A number of distinct issues of law were raised by the facts of *Carlill*. These issues are: (i) did the defendants intend to be bound by the terms stated in their advertisement? (ii) did Mrs Carlill validly accept the offer contained in the advertisement? (iii) did Mrs Carlill provide any consideration for the promise contained in the offer? One of the arguments advanced by the defendants in support of their submission that the advertisement did not constitute an offer was that it was too vague to be enforceable. This argument was rejected on the facts. But what would have been the position if Mrs Carlill had caught influenza some six months after using the smoke ball? Would the defendants have been liable to pay the £100? Lindley LJ concluded (at p. 264) that the reward was offered to 'any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball', while A. L. Smith LJ stated (at p. 274) that he found it unnecessary to resolve this point. What was the opinion of Bowen LJ on this particular issue?

As Professor Simpson has noted ('Quackery and Contract Law: *Carlill* v. *Carbolic Smoke Ball Company*' in *Leading Cases in the Common Law* (Oxford University Press, 1995), p. 259), *Carlill* has achieved the status of a leading case. He attributes this status in part to 'the comic and slightly mysterious object involved'. This is undoubtedly true. Professor Simpson locates the case in the context of the great influenza epidemic of the 1890s and the 'seedy world of the late nineteenth-century vendors of patent medical appliances'. Thus he records (at p. 274) the verdict of the *Lancet* to the decision of the court at first instance:

> To those amongst our readers who are familiar with the way of the quack medicine vendor the facts proved the other day by Mrs Carlill in the action she has brought against the Carbolic Smoke Ball Company will occasion no surprise. … We are glad to learn that in spite of the ingenuity of their legal advisers the defendants have been held liable to make good their promise.

These factors no doubt played their part in persuading the court to find for Mrs Carlill. However, Professor Simpson is careful to point out that the interest in the case does not lie solely in its rather bizarre facts. He adds (at p. 281) that there:

> were two reasons of a legal character that suggest that it deserves its place in the firmament. The first, which is not always fully appreciated, is historical; it was the vehicle whereby a new legal doctrine was introduced into the law of contract. The second is that the decision could be used by expositors of the law of contract to illustrate the arcane mysteries surrounding the conception of a unilateral or one-sided contract.

p. 62 ↵ In making the claim that *Carlill* introduced a 'new legal doctrine' into the law of contract, Professor Simpson asserts that the case 'clearly recognized the requirement of an intention to create legal relations'. As we shall see (7.2), the case which is generally cited as authority for the existence of the doctrine of intention to create legal relations is the later case of *Balfour* v. *Balfour* [1919] 2 KB 571. However, Professor Simpson points out that counsel for the defendants in *Carlill* submitted that 'the defendants did not by issuing [the advertisement] mean to impose upon themselves any obligations enforceable by law'. Bowen LJ rejected this submission (as did the other judges) on the ground that the advertisement was not a 'mere puff' but was 'intended to be understood by the public as an offer which was to be acted upon'. Professor Simpson then concludes (at p. 282) that 'the fact that the judges found it necessary to make this point entailed their acceptance of the idea that, without an intention to create legal relations, there could be no actionable contract'. This point is perhaps debatable but it is now an academic one given that English contract law clearly recognizes the existence of such a doctrine. But there does appear to be a link between *Carlill* and the doctrine of intention to create legal relations (see, for example, *Bowerman* v. *Association of British Travel Agents Ltd* [1996] CLC 451), although it is probably fair to say that the recognition of the doctrine is implicit in the judgments in *Carlill* rather than explicit.

Professor Simpson is perhaps on safer ground with his second claim, namely that *Carlill* illustrates the 'mysteries surrounding the conception of a unilateral or one-sided contract'. Thus he argues (at pp. 282–283) that:

> most contracts that concern the courts involve two-sided agreements, two-sided in the sense that the parties enter into reciprocal obligations to each other. A typical example is a sale of goods, where the seller has to deliver the goods and the buyer to pay for them. The doctrines of nineteenth-century contract law were adapted to such bilateral contracts, but the law also somewhat uneasily recognized that there could be contracts in which only one party was ever under any obligation to the other. The standard example was a published promise to pay a reward for information on the recovery of lost property: £10 to anyone who finds and returns my dog. In such a case obviously nobody has to search for the dog, but if they do so successfully, they are entitled to the reward. Such contracts seem odd in another way; there is a promise, but no agreement for the parties never even meet until the reward is claimed. Classified as 'unilateral' contracts, such arrangements presented special problems of analysis to contract theorists, whose standard doctrines had not been evolved to fit them. Thus it was by 1892 orthodox to say that all contracts were formed by the exchange of an offer and an acceptance, but it was by no means easy to see how this could be true of unilateral contracts, where there was, to the eyes of common sense, no acceptance needed.
>
> The analytical problems arose in a particularly acute form in the smoke ball case. Thus it seemed very peculiar to say there had been any sort of agreement between Mrs Carlill and the company, which did not even know of her existence until … her husband wrote to them to complain. There were, indeed, earlier cases permitting the recovery of advertised rewards; the leading case here was *Williams* v. *Carwardine*, where a reward of £20 had been promised by handbill for information leading to the conviction of the murderer of Walter Carwardine, and Williams, who gave such information, successfully sued to recover the reward. But this was long before the doctrines which made unilateral contracts problematic had become established, and in any event the case was distinguishable. It concerned a reward, whereas Mrs Carlill was seeking compensation. Furthermore, the Carbolic Smoke Ball Company had no chance of checking the validity of claims, of which there could be an indefinite number; much was made of this point in argument. But the judges were not impressed; their attitude was no doubt influenced by the view that the defendants were rogues. They fitted their
> p. 63 decision into the structure ↵ of the law by boldly declaring that the performance of the condition —using the ball and getting ill—was the acceptance, thus fictitiously extending the concept of acceptance to cover the facts. And, since 1893, law students have been introduced to the mysteries of the unilateral contract through the vehicle of *Carlill* v. *Carbolic Smoke Ball Company* and taught to repeat, as a sort of magical incantation of contract law, that in the case of unilateral contracts performance of the act specified in the offer constitutes acceptance, and need not be communicated to the offeror.

In relation to the existence of a valid acceptance, two principal problems arose on the facts of *Carlill*. The first related to the identification of the acceptance. How and when did Mrs Carlill accept the offer contained in the advertisement? Did she accept the offer when she purchased the smoke ball, when she used it for the first time, or only when she completed the course? Bowen LJ appeared to take the latter view. This issue is important not only in relation to the existence of an offer, but also for the ability of the defendants to revoke the offer contained in their advertisement. As we shall see (3.4), the general rule is that an offer cannot be revoked once it has been accepted. But if acceptance does not take place until the completion of the course then the defendants may be entitled to revoke the offer even in the case where the purchaser has begun to use

the smoke ball. The second problem concerned the communication of the acceptance. As we shall see (3.3.2), the general rule is that an acceptance, to be valid, must be communicated to the party who made the offer. This rule was held not to be applicable to Mrs Carlill because the terms of the offer demonstrated that the need for communication had been waived by the defendants (see to similar effect *Attrill* v. *Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 All ER 607, [98]–[99]).

Finally, it should be noted that the defendants argued that there was no consideration for their promise (the doctrine of consideration is discussed in more detail in Chapter 5). In essence the doctrine of consideration requires the existence of a bargain between the parties. In other words, both parties must have contributed something towards the agreement. The Court of Appeal held that there was consideration on two grounds. The first was the benefit that the defendants gained as a result of the use of the smoke ball in response to the advertisements and the sales produced thereby. The second was that the use by Mrs Carlill of the smoke ball three times daily for two weeks constituted a detriment so that she had provided consideration for the defendants' promise.

3.2.2 Displays of Goods for Sale in a Shop

The general rule in relation to the display of goods for sale in a shop is that the display constitutes an invitation to negotiate and not an offer. The leading case is:

Pharmaceutical Society Of Great Britain v. Boots Cash Chemists
[1953] 1 QB 401, Court of Appeal

Section 18(1) of the Pharmacy and Poisons Act, 1933 provided that:

> it shall not be lawful—(a) for a person to sell any poison included in Part I of the Poisons List, unless—(i) he is an authorized seller of poisons; and (ii) the sale is effected on premises duly registered under Part I of this Act; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist.

p. 64 ↵ The plaintiffs brought an action against the defendants in which they alleged that the defendants had infringed Section 18(1)(a)(iii) of the Act on the basis that the sale of poisons in the defendants' self-service store was not effected by, nor did it take place under the supervision of, a registered pharmacist. The pharmacist was not present at the cash desk. He was stationed close to the poisons section and in view of the cash desks and he was authorized by the defendants to prevent the sale of any drug (although customers were not aware of the fact that he was so authorized). On 13 April 1951 two customers purchased medicines which fell within the scope of the Act and the issue for the court was whether or not these sales were effected by or under the supervision of a registered pharmacist. The Court of Appeal, affirming the decision of Lord Chief Justice Goddard, concluded that they had been so effected.

Somervell LJ

This is an appeal from a decision of the Lord Chief Justice on an agreed statement of facts, raising a question under section 18(1)(a)(iii) of the Pharmacy and Poisons Act, 1933. The plaintiffs are the Pharmaceutical Society, incorporated by Royal charter. One of their duties is to take all reasonable steps to enforce the provisions of the Act. The provision in question is contained in section 18.

[His Lordship read the section and stated the facts, and continued]

It is not disputed that in a chemist's shop where this self-service system does not prevail a customer may go in and ask a young woman assistant, who will not herself be a registered pharmacist, for one of these articles on the list, and the transaction may be completed and the article paid for, although the registered pharmacist, who will no doubt be on the premises, will not know anything himself of the transaction, unless the assistant serving the customer, or the customer, requires to put a question to him. It is right that I should emphasize, as did the Lord Chief Justice, that these are not dangerous drugs. They are substances which contain very small proportions of poison, and I imagine that many of them are the type of drug which has a warning as to what doses are to be taken. They are drugs which can be obtained, under the law, without a doctor's prescription.

The point taken by the plaintiffs is this: it is said that the purchase is complete if and when a customer going round the shelves takes an article and puts it in the receptacle which he or she is carrying, and that therefore, if that is right, when the customer comes to the pay desk, having completed the tour of the premises, the registered pharmacist, if so minded, has no power to say:

> 'This drug ought not to be sold to this customer'. Whether and in what circumstances he would have that power we need not inquire, but one can, of course, see that there is a difference if supervision can only be exercised at a time when the contract is completed.
>
> 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 organized 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
>
> p. 65 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. For these reasons, in my opinion, the appeal should be dismissed.
>
> ***Birkett*** and ***Romer LJJ*** delivered concurring judgments.

Commentary

It should be noted that the claim was not one between a purchaser of goods in a shop and the shop itself. Rather, it was an action between the plaintiffs, the professional association of pharmacists, and the defendant pharmacists and the context was one of an allegation of unlawful conduct by the defendants. Thus the claim made by the plaintiffs was not one of breach of contract but that the defendants had acted in contravention of a duty imposed on them by statute.

In terms of the outcome of the case, the important factor was the place at which the contract was concluded, rather than the precise way in which the contract was concluded. It sufficed for the court to decide that the contract was concluded at the cash-desk and thus under the supervision of the pharmacist. The court could have concluded that the offer was made by the shop in displaying the goods for sale at fixed prices but that the offer was not accepted by the customer until the goods were taken to the cash-desk. In such a case the contract would still have been concluded under the supervision of the pharmacist. But this was not the reasoning that the court chose to employ. It treated the display as an invitation to negotiate and stated that the offer was made by the customer which the defendants could then decide whether to accept or reject. The fullest analysis of the process by which the contract was formed was provided by Lord Goddard CJ at first instance when he said ([1952] 2 All ER 456, 458):

> It is a well-established principle that the mere fact that a shop-keeper exposes goods which indicate to the public that he is willing to treat does not amount to an offer to sell. I do not think that I ought to hold that there has been here a complete reversal of that principle merely because a self-service scheme is in operation. In my opinion, what was done here came to no more than that the customer was informed that he could pick up an article and bring it to the shop-keeper, the contract for sale being completed if the shop-keeper accepted the customer's offer to buy. The offer is an offer to buy, not an offer to sell. The fact that the supervising pharmacist is at the place where the money has to be paid is an indication that the purchaser may or may not be informed that the shop-keeper is willing to complete the contract. One has to apply common sense and the ordinary principles of commerce in this matter. If one were to hold that in the case of self-service shops the contract was
> p. 66 complete directly the ↵ purchaser picked up the article, serious consequences might result. The property would pass to him at once and he would be able to insist on the shop-keeper allowing him to take it away, even where the shop-keeper might think it very undesirable. On the other hand, once a person had picked up an article, he would never be able to put it back and say that he had changed his mind. The shop-keeper could say that the property had passed and he must buy.
>
> It seems to me, therefore, that it makes no difference that a shop is a self-service shop and that the transaction is not different from the normal transaction in a shop. The shop-keeper is not making an offer to sell every article in the shop to any person who may come in, and such person cannot insist on buying by saying; 'I accept your offer'. Books are displayed in a bookshop and customers are invited to pick them up and look at them even if they do not actually buy them. There is no offer of the shop-keeper to sell before the customer has taken the book to the shop-keeper or his assistant and said that he wants to buy it and the shop-keeper has said: 'Yes'. That would not prevent the shop-keeper, seeing the book picked up from 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 a shelf does not amount to an acceptance of an offer to sell, but is an offer by the customer to buy. I feel bound also to say that the sale here was made under the supervision of a pharmacist. There was no sale until the buyer's offer to buy was accepted by the acceptance of the purchase price, and that took place under the supervision of a pharmacist.

In *Fisher* v. *Bell* [1961] 1 QB 394 the defendant was charged with the offence of offering for sale a flick knife, contrary to section 1(1) of the Restriction of Offensive Weapons Act 1959. He had displayed the knife in his shop window with a price ticket behind it which stated 'Ejector knife—4s'. It was held that the defendant had not committed the offence with which he was charged because, in displaying the knife in his shop window, he had not offered it for sale. Lord Parker CJ stated (at p. 400) that he found it 'quite impossible to say that an exhibition of goods in a shop window is itself an offer for sale'.

But it does not follow from these cases that a display of goods in a shop will never be held to amount to an offer. There are cases in which the courts have held that a display of goods, or an advertisement to the effect that goods will be sold at a particular price, constitutes an offer. One such case is the following:

Lefkowitz v. Great Minneapolis Surplus Stores Inc
86 NW 2d 689 (1957) (Supreme Court of Minnesota)

Murphy J

This case grows out of the alleged refusal of the defendant to sell to the plaintiff a certain fur piece which it had offered for sale in a newspaper advertisement. It appears from the record that on 6 April 1956, the defendant published the following advertisement in a Minneapolis newspaper:

'Saturday 9 a.m. sharp

3 Brand New

Fur

Coats

p. 67 ↵ Worth to $ 100.00

First Come

First Served

$ 1

Each'

On 13 April, the defendant again published an advertisement in the same newspaper as follows:

'Saturday 9 a.m.

2 Brand New Pastel

Mink 3-Skin Scarfs

Selling for $ 89.50

Out they go

Saturday. Each ... $ 1.00

1 Black Lapin Stole

Beautiful,

worth $ 139.50 ... $ 1.00

First Come

First Served'

> The record supports the findings of the court that on each of the Saturdays following the publication of the above-described advertisements the plaintiff was the first to present himself at the appropriate counter in the defendant's store and on each occasion demanded the coat and the stole so advertised and indicated his readiness to pay the sale price of $1. On both occasions, the defendant refused to sell the merchandise to the plaintiff, stating on the first occasion that by a 'house rule' the offer was intended for women only and sales would not be made to men, and on the second visit that the plaintiff knew the defendant's house rules.
>
> The trial court properly disallowed the plaintiff's claim for the value of the fur coats since the value of these articles was speculative and uncertain. The only evidence of value was the advertisement itself to the effect that the coats were 'Worth to $100.00', how much less being speculative especially in view of the price for which they were offered for sale. With reference to the offer of the defendant on April 13, 1956, to sell the '1 Black Lapin Stole ... worth $139.50 ... ' the trial court held that the value of this article was established and granted judgment in favor of the plaintiff for that amount less the $1 quoted purchase price.
>
> The defendant contends that a newspaper advertisement offering items of merchandise for sale at a named price is a 'unilateral offer' which may be withdrawn without notice. He relies upon authorities which hold that, where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms ...
>
> There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract ...
>
> p. 68 ↵ The test of whether a binding obligation may originate in advertisements addressed to the general public is 'whether the facts show that some performance was promised in positive terms in return for something requested'. 1 Williston, Contracts (rev. edn) § 27.
>
> The authorities ... emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. The most recent case on the subject is *Johnson* v. *Capital City Ford Co* ... in which the court pointed out that a newspaper advertisement relating to the purchase and sale of automobiles may constitute an offer, acceptance of which will consummate a contract and create an obligation in the offeror to perform according to the terms of the published offer.
>
> Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. ... We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur

> was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.
>
> The defendant contends that the offer was modified by a 'house rule' to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer.

How do the courts decide whether or not a display of goods in a shop amounts to an offer or not? Is it a question of fact in each case? Does it depend solely on the intention of the shopkeeper or does it depend upon policy considerations or value judgments? Consider the following argument (Atiyah's *An Introduction to the Law of Contract* (6th edn, Oxford University Press, 2006), pp. 41–42):

> [T]he question whether a display of goods in a self-service store amounts to an offer is itself a 'conceptual' question. The answer can have no meaning except in some legal context. The most usual context would be that in which a shopkeeper refused to serve a customer (or perhaps refused to sell the goods at the price indicated) and the real question would be whether he was *entitled* to do this. The conceptual method of answering this is to rephrase the issue in terms of concepts. Instead of asking if the shopkeeper is entitled to refuse to serve a customer, or to refuse to sell at a marked price, the courts ask whether the shopkeeper has made or accepted an offer. And this question is answered with little reference to the consequences. One result is that an important social or moral question is never openly discussed by the courts, namely, should a shopkeeper be allowed to refuse to serve a member of the public, or should he be allowed to refuse to sell goods at a marked price?
>
> Another result is that the decisions of the courts often rest on demonstratively faulty reasoning. In
> p. 69 this particular area many of the courts' reasons are shown to be unconvincing by ↵ other legal decisions dealing with a situation in which the right to refuse to serve a member of the public is *denied*, that is, in the case of 'common inns' or hotels ... for example ... much has been made of the difficulties which a shopkeeper may encounter if he receives more acceptances than he has goods to sell. If he is deemed to 'offer' his goods for sale, is he then to be liable to all those customers who 'accept' his offer even though he cannot supply them? But this is an unreal difficulty, as is shown by the law relating to hotel-keepers. If a hotel proprietor is asked for a room when he has no room vacant the courts have had no difficulty in adopting the common sense view that he is not liable.
>
> It will be seen that, if it had been desired to impose liability on a shopkeeper who refused to serve a customer, the relevant legal concepts would not have stood in the way of achieving this result. The courts could have said that a shopkeeper 'impliedly' offers to do business with any member of the public, and therefore that a contract is concluded when a customer 'accepts' the offer by intimating that he wishes to buy something in the shop.
>
> Thus in strict logic the way in which a fact or a particular piece of conduct should be conceptualised by having a legal label attached to it should depend on the result which it is desired to achieve. But it must be recognized that lawyers and courts often reason in a way which suggests that they do not accept the strictly logical position. They frequently attach the label first, and give every appearance of thinking that the selection of the correct label is something which must be done without reference to the result.
>
> In the particular case of self-service shops, legal methods of reasoning probably mean that the law is today out of touch with modern social conditions, and also with public attitudes. Most people would probably be surprised to discover that a shopkeeper is not obliged to sell an article at the price indicated if a customer offers to pay for it, and this public attitude is confirmed by the fact that such behaviour by a shopkeeper would today probably constitute an offence under ... consumer protection legislation.

There is no clear authority on the question whether an advertisement on a website is an invitation to treat or an offer. A court asked to decide this issue is likely to draw on the analogy of a display of goods in a shop window or an advertisement in a newspaper. A good example of this process can be found in the judgment of

Rajah JC in the Singaporean case of *Chwee Kin Keong* v. *Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 when he stated (at [93]) that:

> [w]ebsite advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical. The reach of and potential response(s) to such an advertisement are however radically different. Placing an advertisement on the Internet is essentially advertising or holding out to the world at large. A viewer from any part of the world may want to enter into a contract to purchase a product as advertised. Websites often provide a service where online purchases may be made. In effect the Internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical shopping.

Two points emerge from this paragraph. The first is that the effect of the analogy drawn with shop displays and newspaper advertisements is likely to be to create a default rule to the effect that a website advertisement is an invitation to treat and not an offer. But there may be a need for caution here. The default rule may be displaced rather more easily in the context of internet sales than in the context of the display of goods in a shop window. The range and variety of sales that can take place over the internet may have the consequence
p. 70 that less ↵ weight will be placed on a default rule and more on the words used in the particular advertisement. As Rajah JC observed (at [94]):

> As with any normal contract, Internet merchants have to be cautious how they present an advertisement, since this determines whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.

This suggests that the possibility of there being an electronic equivalent of *Carlill* or *Lefkowitz* is a real one. The second point, which tends in the opposite direction, is that the potential range of liability may in fact make judges reluctant to conclude that an advertisement on a website is an offer. On the other hand, a court could mitigate the possible consequences of such a conclusion by implying into the advertisement a term to the effect that the offer is only open for acceptance while stocks last. However, such an implication was rejected by Rajah JC when he stated that 'the law may not imply a condition precedent as to the availability of stock simply to bail out an Internet merchant from a bad bargain'. This statement is open to the objection that the term is implied not to save the internet merchant from a bad bargain but to give effect to the intention of the parties, objectively ascertained; that is to say the parties to such an internet transaction would be presumed to have had the intention that the seller was not offering to sell a limitless number of goods but was in fact offering to sell its existing stock only. Rajah JC was on stronger ground when he pointed out that the implied term may not work in all cases because, in some cases, such as the supply of information, the supply is potentially limitless. This is true but the response in such a case may be to place the onus on the seller to insert an appropriate protective clause in order to shield himself from a huge exposure to liability. As Rajah JC stated (at [96]):

> It is therefore incumbent on the web merchant to protect himself, as he has both the means to do so and knowledge relating to the availability of any product that is being marketed. As most web merchants have automated software responses, they need to ensure that such automated responses correctly reflect their intentions from an objective perspective.

3.2.3 Tenders

The practice of inviting parties to tender, or to bid, for a particular project is not an uncommon one. It is, perhaps, most frequently encountered in the context of construction projects. The employer will generally invite various contractors to tender or to quote for the work to be done. What is the status of this invitation to tender? Does it amount to an offer or is it an invitation to negotiate? The answer ultimately depends upon the facts and circumstances of the individual case. At common law, the general rule is that the invitation to tender is not an offer but an invitation to negotiate (*Spencer* v. *Harding* (1870) LR 5 CP 561). But, once again, the rule is not an invariable one. Cases can be found in which the courts have concluded that the invitation to tender did in fact contain within it an offer (see, for example, *Blackpool and Fylde Aero Club Ltd* v. *Blackpool Borough Council* [1990] 1 WLR 1195).

It is important to stress in this context that we are here concerned only with the common law rules applicable
p. 71 to invitations to tender. The regulation of the tendering process is not ↵ left entirely to the common law. Statute has increasingly intervened to regulate the tendering process, particularly in the context of public bodies, and, while they are beyond the scope of this book, these regulations assume considerable practical importance for those subject to them.

Blackpool And Fylde Aero Club Ltd v. Blackpool Borough Council
[1990] 1 WLR 1195, Court of Appeal

The appellant council invited tenders for a concession to operate pleasure flights from the local airport. Among the recipients of this invitation was the respondent club which in fact had held the concession since 1975. The invitation stated that:

> 'The council do not bind themselves to accept all or any part of any tender. No tender which is received after the last date and time specified shall be admitted for consideration.'

The date and time stipulated was 17 March 1983 at noon. The club submitted its tender by posting it in the appropriate box on the morning of 17 March. The box was normally checked and cleared each day at noon but on this occasion it was not checked until the following day: 18 March. The council at its meeting later in March refused to consider the club's tender on the ground that it had been received late and the concession was awarded to another party. When the council discovered that the club's bid had in fact been submitted on time it sought to rectify the situation by declaring the initial tenders invalid and by re-scheduling the tendering procedure. But they backed down after being threatened with legal proceedings by the company whose bid had been accepted. The club then brought an action for damages against the council. It was held by the trial judge and by the Court of Appeal that the council was contractually obliged to consider the club's tender and, for breach of that obligation, it was held liable in damages.

Bingham LJ

[set out the facts and continued]

The judge resolved the contractual issue in favour of the club, holding that an express request for a tender might in appropriate circumstances give rise to an implied obligation to perform the service of considering that tender. Here, the council's stipulation that tenders received after the deadline would not be admitted for consideration gave rise to a contractual obligation (on acceptance by submission of a timely tender) that such tenders would be admitted for consideration.

In attacking the judge's conclusion on this issue, Mr Toulson [counsel for the appellants] made four main submissions. First, he submitted that an invitation to tender in this form was well established to be no more than a proclamation of willingness to receive offers. Even without the first sentence of the council's invitation to tender in this case, the council would not have been bound to accept the highest or any tender. An invitation to tender in this form was an invitation to treat, and no contract of any kind would come into existence unless or until, if ever, the council chose to accept any tender or other offer. For these propositions reliance was placed on *Spencer* v. *Harding* (1870) LR 5 CP 561 and *Harris* v. *Nickerson* (1873) LR 8 QB 286.

Second, Mr Toulson submitted that on a reasonable reading of this invitation to tender the
p. 72 council could not be understood to be undertaking to consider all timely tenders submitted.
↵ The statement that late tenders would not be considered did not mean that timely tenders would. If the council had meant that it could have said it. There was, although [counsel] did not put it in these words, no maxim exclusio unius, expressio alterius.[3]

Third, the court should be no less rigorous when asked to imply a contract than when asked to imply a term in an existing contract or to find a collateral contract. A term would not be implied simply because it was reasonable to do so: *Liverpool City Council* v. *Irwin* [1977] AC 239, 253H. In order to establish collateral contracts, 'Not only the terms of such contracts but the existence of an animus contrahendi[4] on the part of all the parties to them must be clearly shewn': see *Heilbut Symons & Co* v. *Buckleton* [1913] AC 30, 47. No lower standard was applicable here and the standard was not satisfied.

Fourth, Mr Toulson submitted that the warranty contended for by the club was simply a proposition 'tailor-made to produce the desired result' (per Lord Templeman in *CBS Songs Ltd* v. *Amstrad Consumer Electronics plc* [1988] AC 1013, 1059F) on the facts of this particular case. There was a vital distinction between expectations, however reasonable, and contractual obligations: see per Diplock LJ in *Lavarack* v. *Woods of Colchester Ltd* [1967] 1 QB 278, 294. The club here expected its tender to be considered. The council fully intended that it should be. It was in both parties' interests that the club's tender should be considered. There was thus no need for them to contract. The court should not subvert well-understood contractual principles by adopting a woolly pragmatic solution designed to remedy a perceived injustice on the unique facts of this particular case.

> In defending the judge's decision Mr Shorrock [counsel for the club] accepted that an invitation to tender was normally no more than an offer to receive tenders. But it could, he submitted, in certain circumstances give rise to binding contractual obligations on the part of the invitor, either from the express words of the tender or from the circumstances surrounding the sending out of the invitation to tender or (as here) from both. The circumstances relied on here were that the council approached the club and the other invitees, all of them connected with the airport, that the club had held the concession for eight years, having successfully tendered on three previous occasions, that the council as a local authority was obliged to comply with its standing orders and owed a fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs and that there was a clear intention on the part of both parties that all timely tenders would be considered. If In these circumstances one asked of this invitation to tender the question posed by Bowen LJ in *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256, 266, 'How would an ordinary person reading this document construe it?', the answer in Mr Shorrock's submission was clear: the council might or might not accept any particular tender; it might accept no tender; it might decide not to award the concession at all; it would not consider any tender received after the advertised deadline; but if it did consider any tender received before the deadline and conforming with the advertised conditions it would consider all such tenders.
>
> I found great force in the submissions made by Mr Toulson and agree with much of what was said. Indeed, for much of the hearing I was of opinion that the judge's decision, although fully in accord with the merits as I see them, could not be sustained in principle. But I am in the end persuaded that [the] argument proves too much. During the hearing the following 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
>
> p. 73 ↵ admittedly received well after the deadline? Mr Toulson 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 invitors (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.

It is of course true that the invitation to tender does not explicitly state that the council will consider timely and conforming tenders. That is why one is concerned with implication. But the council does not either say that it does not bind itself to do so, and in the context a reasonable invitee would understand the invitation to be saying, quite clearly, that if he submitted a timely and conforming tender it would be considered, at least if any other such tender were considered.

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. It must also, in most cases, be able to answer the question posed by Mustill LJ in *Hispanica de Petroleos SA* v. *Vencedora Oceanica Navegacion SA (No 2) (Note)* [1987] 2 Lloyd's Rep 321, 331: 'What was the mechanism for offer and acceptance?' In all the circumstances of this case (and I say nothing about any other) I have no doubt that the parties did intend to create contractual relations to the limited extent contended for. Since it has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way (*White and Carter (Councils) Ltd* v. *McGregor* [1962] AC 413, 430A per Lord Reid), Mr Shorrock 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.

p. 74 ↵ Mr Toulson's fourth submission is a salutary warning, but it is not a free-standing argument: if, as I hold, his first three submissions are to be rejected, no subversion of principle is involved. I am, however, pleased that what seems to me the right legal answer also accords with the merits as I see them.

I accordingly agree with the judge's conclusion on the contractual issue, essentially for the reasons which he more briefly gave.

Stocker LJ delivered a concurring judgment and ***Farquharson LJ*** concurred.

Commentary

Given the general rule that an invitation to tender is an invitation to negotiate and not an offer, it is important to identify the factors upon which the Court of Appeal relied in concluding that this particular invitation to tender amounted to an offer to consider tenders submitted on time. The task of identifying these factors is not, however, an easy one. The court relied upon a number of factors and it would appear that it was their combination that was important. No one factor was decisive. The factors considered by the court included the following:

(i) the invitation to tender was addressed to a small number of interested parties;

(ii) the tender procedure was 'clear, orderly and familiar'; and

(iii) the outcome was, in the opinion of the court, consistent with the 'assumptions of commercial parties'.

Other factors which may have been of significance include:

(iv) the club was the holder of the concession and therefore might be said to have had a legitimate expectation of consideration for renewal; and

(v) the fact that the invitation was issued by a local authority which, it was argued, owed a 'fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs'.

The invitation to tender did not state expressly that the council was subject to a duty to consider all tenders submitted. Indeed, the first sentence of the invitation to tender stated that the council did not bind itself to accept all or any part of any tender. But the fact that the council excluded a duty to accept any tender was held to be insufficient to exclude the duty to consider tenders made. Presumably the council should have gone further and excluded not only a duty to accept a tender but also the duty to consider any tender submitted.

It was not necessary for the Court of Appeal to analyse in any detail the extent of the obligation to consider tenders submitted on time given that the council had not, on the facts, given any consideration to the tender submitted by the club. What would have been the position if the council had considered the tender and rejected it but awarded the tender to a party whose bid was lower than that submitted by the club? Stocker LJ stated that the obligation to consider 'would not preclude or inhibit the council from deciding not to accept any tender or to award the concession, provided the decision was bona fide and honest, to any tenderer'. Thus a bona fide decision to exclude a party from the bidding process (for example, because of a conflict of interest between one of the tenderers and an employee of the party issuing the invitation to tender) may not
p. 75 constitute a breach of the duty to consider tenders ↵ submitted on time (see *Fairclough Building Ltd* v. *Borough Council of Port Talbot* (1993) 62 Build LR 82). This duty to consider is not as onerous as a duty to act judicially. Thus the duty to consider tenders does not require the party inviting the tenders to give a hearing to parties who submit a tender (see *Pratt Contractors Ltd* v. *Transit New Zealand* [2003] UKPC 33).

The Court of Appeal was not asked to consider the measure of damages to which the club was entitled. On the facts, the tender submitted by the club was larger than the one accepted by the council. Notwithstanding this fact it is suggested that the loss to the club was not in fact the loss of the contract (because we cannot be sure

that the club would have been awarded the concession) but the 'loss of a chance' to participate in the tendering process and to have its tender considered (on damages for loss of a chance see *Chaplin* v. *Hicks* [1911] 2 KB 786 at 23.4).

The proposition that an invitation to tender followed by the submission of a tender can result in the creation of a contract between the party inviting the bid and the party making the bid has implications for both parties. In *The Queen in Right of Ontario* v. *Ron Engineering & Construction Eastern Ltd* (1981) 119 DLR (3d) 267 a bidder discovered shortly after the bids had been opened that it had made a mistake in formulating its bid. It sought to withdraw from the process and recover the deposit which it had paid to the party inviting the bids. The basis on which the deposit had been paid was that it would be forfeited if the tender was withdrawn or the tenderer refused to proceed with the contract. The Supreme Court of Canada held that the plaintiffs were not entitled to recover their deposit. A contract had been created by the parties, one of the terms of which was that bidders were not entitled to recover their deposit if they refused to proceed with the contract.

A further example of a case in which an invitation to tender was held to contain within it an offer is the decision of the House of Lords in *Harvela Investments Ltd* v. *Royal Trust Company of Canada (CI) Ltd* [1986] AC 207. The first defendants owned a block of shares in a company. The plaintiff (Harvela) and the second defendant (Sir Leonard Outerbridge) were rival bidders for the shares. The reason for their interest in the shares was that ownership of them would give to the successful bidder effective control of the company. The first defendants sent out an invitation to both Harvela and Sir Leonard in which they invited both parties to submit 'any revised offer which you may wish by sealed tender or confidential telex' to the first defendants' solicitors. The first defendants in turn stated: 'we confirm that if any offer made by you is the highest offer received by us we bind ourselves to accept such offer provided that such offer complies with the terms of this telex'. Harvela submitted a bid of $2,175,000, while Sir Leonard submitted a bid of $2,100,000 'or [Canadian] $101,000 in excess of any other offer which you may receive which is expressed as a fixed monetary amount, whichever is the higher'. The first defendants accepted Sir Leonard's offer, treating it as a bid of $2,276,000, and entered into a contract with the second defendant for the sale of the shares. Harvela issued proceedings against both the first defendants and Sir Leonard in which, among other things, it challenged the validity of Sir Leonard's bid. The House of Lords held that Sir Leonard's bid was indeed invalid and that the first defendant was contractually bound to transfer the shares to Harvela in accordance with the terms of its bid.

It is one thing to describe the outcome of the litigation; it is quite another to explain the reasoning that led to this conclusion. At first sight Sir Leonard appeared to have a strong argument, namely that he was invited to make a 'revised offer' for the shares, he made one, and the first defendants accepted it. Therefore, a contract had been validly concluded for the sale to him of the shares. Lord Templeman (at p. 230) in the House of Lords rejected this submission on the ground that the invitation to bid sent out by the first defendants contained
p. 76 provisions 'which are only consistent with the presumed intention to create a ↵ fixed bidding sale and which are inconsistent with any presumed intention to create an auction sale by means of referential bids' (a referential bid being a bid which is not of a fixed amount but one made by reference to another bid). He held that, as a matter of construction, the invitation issued by the first defendants created a fixed bidding sale. Thus he concluded (at p. 233):

> The invitation required Sir Leonard to name his price and required Harvela to name its price and bound the vendors to accept the higher price. The invitation was not difficult to understand and the result was bound to be certain and to accord with the presumed intentions of the vendors discernible from the express provisions of the invitation. Harvela named the price of $2,175,000; Sir Leonard failed to name any price except $2,100,000 which was less than the price named by Harvela. The vendors were bound to accept Harvela's offer.

But on what basis could it be said that the vendors were bound to accept Harvela's offer given that the general rule is that an offeree is free to decide whether or not to accept an offer? Lord Diplock used the following analysis. In his view (at p. 224), the legal nature of the invitation sent out by the first defendants 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 first defendants did, however, assume a legal obligation to Harvela and Sir Leonard under these two contracts. They assumed an obligation to enter into a contract to sell shares to the promisee who submitted the highest bid in accordance with the terms of the invitation. In this way the unilateral contract concluded with the successful bidder would be transformed into a binding bilateral contract, while the unilateral contract with the unsuccessful bidder would be terminated by the submission of the higher bid. This analysis, involving as it does two unilateral contracts, one of which is transformed into a bilateral contract and the other of which is terminated, is complex, possibly too complex. A simpler analysis might have been to conclude that the invitation was an offer of a unilateral contract. The point has been made in the following way (R Brownsword, *Smith and Thomas: A Casebook on Contract* (14th edn, Sweet & Maxwell, 2021), para 2–015):

> The Royal Trust's telex to Harvela and Sir Leonard was an offer to each of them which could be accepted only by one—the one who made the higher valid bid. The telex was an offer of a unilateral contract, like an offer to give a prize to the one of two entrants for a race who comes first. The 'prize' was a contract for the sale of the shares—the Trust was bound to accept the higher bidder's offer to buy them.
>
> Until that bid was made, no one was under any obligation. The Trust could have withdrawn its offer and the two offerees were under no obligation to bid. While the offer stood, the Trust was, of course, liable to become bound to one of the offerees through the acceptance of its offer, but that is the
p. 77 position of all offerors, so long as their offer remains open to acceptance. ↵ When the higher bid was ascertained, the Trust was bound to accept it. At that moment there was just one contract—a contract by the Trust to accept the higher bidder's offer—a unilateral contract. The bidder was free to withdraw his bid until the Trust accepted it, but when they did he became bound to buy the shares.

3.2.4 Auction Sales

One battleground for the formulation of the rules relating to offer and acceptance has been the auction-house. Many of the cases were decided in the nineteenth century but uncertainty in relation to the rules applicable to an auction without reserve (that is to say an auction where no reserve price is stated for the lot that has been put up for sale) persisted until recently. The legal position is much more straightforward in the case of auctions held with a reserve price. The auctioneer, in inviting bids to be made for the lot offered for sale, makes an invitation to negotiate. The offer is then made by the member of the public who makes a bid for the lot. That bid is not usually accepted immediately. Instead the auctioneer generally invites further bids to be made for the lot. If no other bids are forthcoming the auctioneer will accept the bid on the fall of his hammer (see, for example, *British Car Auctions* v. *Wright* [1972] 1 WLR 1519). It is the case of the auction without a reserve price that has given rise to difficulty. There were dicta in a nineteenth-century case, *Warlow* v. *Harrison* (1859) 1 E & B 309, to the effect that, in the case of an auction held without a reserve price, the auctioneer makes an offer to sell the goods and that the offer is accepted by the person who makes the highest bid at the auction. The difficulty lay in accommodating this analysis within the offer and acceptance framework and a considerable amount of academic ink was spilt on the topic. However, the issue came before the Court of Appeal in the following case:

Barry v. Davies (Trading As Heathcote Ball & Co)
[2000] 1 WLR 1962, Court of Appeal

Customs and Excise put up two engine analysers for sale by auction, without a reserve price. The price of new machines was £14,521 each. The claimant bid £200 for each machine after the auctioneer tried and failed to get bids of £5,000 and £3,000 for each machine. The auctioneer refused to sell the machines to the claimant for such a low price and they were later sold to a third party for £1,500 each. The claimant brought an action against the auctioneer for breach of contract. The claim succeeded on the ground that there was a collateral contract between the auctioneer and the highest bidder. The contract was constituted by an offer by the auctioneer to sell to the highest bidder and it was accepted when the bid was made. The claimant was held to be entitled to recover £27,600 by way of damages, being the difference between the amount that the claimant had bid to purchase the machines and the amount he would have been required to pay to obtain the machines in the ordinary way.

Sir Murray Stuart-Smith

[set out the facts and continued]

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.

p. 78

He also held that this was the effect of condition 1 of the conditions of sale, which was in these terms:

> 'The highest bidder to be the purchaser; but should any dispute arise between two or more bidders the same shall be determined by the auctioneers who shall have the right of withdrawing lots.'

The judge concluded that the first clause meant what it said and the right of withdrawal was conditioned on there being a dispute between bidders, and there was none.

Mr Moran 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, section 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, Mr Moran 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.

Finally, Mr Moran submitted that where an agent is acting for a disclosed principal he is not liable on the contract: *Bowstead & Reynolds on Agency*, 16th ed (1996), p. 548, para 9–001 and *Mainprice* v. *Westley* (1865) 6 B & S 420. If therefore there is any collateral contract it is with the principal and not the agent.

These submissions were forcefully and attractively argued by Mr Moran. The authorities, such as they were, do not speak with one voice. The starting point is section 57 of the Sale of Goods Act 1979, which re-enacted the Sale of Goods Act 1893 (56 & 57 Vict. *c.* 71), itself in this section a codification of the common law. I have already referred to the effect of subsection (2). Subsections (3) and (4) are also 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.'

p. 79 ↵ 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.

The judge based his decision on the reasoning of the majority of the Court of Exchequer Chamber in *Warlow* v. *Harrison*, 1 E & E 309. The sale was of 'the three following horses, the property of a gentleman, without reserve': see p. 314. The plaintiff bid 60 guineas for one of the horses; another person, who was in fact the owner, immediately bid 61 guineas. The plaintiff, having been informed that the bid was from the owner declined to bid higher, and claimed he was entitled to the horse. He sued the auctioneer; he based his claim on a plea that the auctioneer was his agent to complete the contract on his behalf. On that plea the plaintiff succeeded at first instance; but the verdict was set

aside in the Court of Queen's Bench. The plaintiff appealed. Although the Court of Exchequer Chamber upheld the decision on the case as pleaded, all five members of the court held that if the pleadings were appropriately amended, the plaintiff would be entitled to succeed on a retrial. Martin B gave the judgment of the majority, consisting of himself, Byles and Watson BB. He said, at pp. 316–317:

> 'Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. In a sale by auction there are three parties, viz the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them 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; *Thornett* v. *Haines* (1846) 15 M & W 367. 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, or that of a railway company publishing a timetable stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him; *Denton* v. *Great Northern Railway Co* (1856) 5 E & B 860. 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 breach of it, that he has a right of action against the auctioneer. … We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority: but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified.'

The two other members of the court, Willes J and Bramwell B reached the same conclusion, but based their decision on breach of warranty of authority.

Although therefore the decision of the majority is not strictly binding, it was the reasoned judgment of the majority and is entitled to very great respect. …

In *Harris* v. *Nickerson* (1873) LR 8 QB 286 the defendant, an auctioneer, advertised a sale by auction of certain lots including office furniture on a certain day and the two following days. But the sale of furniture on the third day was withdrawn. The plaintiff attended the sale and claimed against the
p. 80 defendant for breach of contract in not holding the sale, seeking to ↵ recover his expenses in attending. The claim was rejected by the Court of Queen's Bench. In the course of his judgment Blackburn J said, at p. 288:

> 'in the case of *Warlow* v. *Harrison* 1 E & E 309, 314, 318, the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest bona fide bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract.'
>
> And Quain J said, LR 8 QB 286, 289:
>
> 'When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow* v. *Harrison*, E & E 309, 314, that a contract is entered into between the auctioneer and the highest bona fide bidder. ...'
>
> In *Johnston* v. *Boyes* [1899] 2 Ch 73, 77 Cozens-Hardy J also accepted the majority view in *Warlow's* case as being good law. ...
>
> So far as textbook writers are concerned both *Chitty on Contracts*, 28th edn (1999), vol 1, p. 94, para 2-010 and *Benjamin's Sale of Goods*, 5th edn (1997), p. 107, para 2-005 adopt the view expressed by the majority of the court in *Warlow's* case.
>
> 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.
>
> As to the agency point, there is no doubt that, when the sale is concluded, the contract is between the purchaser and vendor and not the auctioneer. Even if the identity of the vendor is not disclosed, it is clear that the auctioneer is selling as agent. It is true that there was no such contract between vendor and purchaser. But that does not prevent a collateral agreement existing between the auctioneer and bidder. A common example of this is an action for breach of warranty of authority which arises on a collateral contract.
>
> For these reasons I would uphold the judge's decision on liability.
>
> ***Pill LJ*** delivered a concurring judgment.

Commentary

The contract found to exist on the facts of *Barry* was one between the potential buyer and the auctioneer. It was not a contract of sale between the seller and the buyer. The effect of the auctioneer's action was to prevent a contract coming into being between the seller and the buyer.

At what point in time does the auctioneer make the offer to sell the goods? Is it when the auction is advertised without a reserve price or is it when the auctioneer puts the goods up for sale at the auction? It was not necessary for the Court of Appeal to answer this question on the facts of *Barry*. Academic authority is divided

on this issue. Support can be found for the proposition that the offer is made when the auction is advertised (see Gower (1952) 68 *LQR* 238, 241) and for the proposition that the offer is made when the auctioneer puts the goods up for sale (Scott [2001] *LMCLQ* 334, 335).

On the facts of *Barry* it would appear that there were no other bidders for the lots so that the identification of the claimant as the highest bidder was not problematic. But in other cases the issue may give rise to difficulty, given that there is always the possibility ↵ that another bidder will emerge before the auctioneer finally brings down his hammer. The courts will probably take a pragmatic approach to the resolution of this issue and equate the highest bidder with the party who made the last bid before the lot was withdrawn by the auctioneer.

While an auctioneer can generally withdraw a lot from the auction where the item has been put up for sale subject to a reserve price, it has been argued that the auctioneer can no longer do so once the reserve price has been reached (see Scott [2001] *LMCLQ* 334, 336–337). In other words, it is argued that the position of a bidder at an auction without a reserve price is in this respect the same as a bidder at an auction with a reserve price, where that price has already been reached. This is so unless the owner has reserved for himself the right to bid for the lot in question.

While an auctioneer cannot withdraw the lot simply because it has not reached the reserve price, he may be able to do so where he suspects that the bidder is not bona fide, in the sense that he is a participant in a group that is attempting to depress the price of the lot.

The analysis of the process by which the offer and the acceptance was made cannot be cleanly separated from the issue of whether or not there is consideration for the promise. One of the difficulties in *Barry* lay in identifying the consideration for the auctioneer's promise to sell the lot to the highest bidder. The answer given by the court was that the consideration was to be found in the fact that the auctioneer obtains the benefit of the fact that the price for the lot might be driven up and the bidder might be bound by the bid he makes. The difficulty with this view is that the bid made is a revocable one and this provides an insecure foundation for the finding of consideration for the promise.

One final issue that arose on the facts of the case concerned the claimant's entitlement to damages. It was held that the claimant was entitled to recover £27,600 by way of damages, being the difference between the amount that the claimant had bid to purchase the machines and the amount he would have been required to pay to obtain the machines in the ordinary way. It should be noted that the claim was for the entire difference between the two measures and not simply for the loss of a chance of purchasing the machines and that, perhaps rather oddly (given that the contract between the auctioneer and the claimant was not a contract for the sale of goods), the court relied on section 51(3) of the Sale of Goods Act 1979 when assessing the damages to which the claimant was entitled.

3.3 What Constitutes an Acceptance?

An acceptance has been defined as 'a final and unqualified expression of assent, whether by words or conduct, to the terms of an offer' (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 4–032). This definition appears straightforward. But initial appearances can be misleading. The question whether an offer has been accepted has generated a considerable amount of case-law. Questions that have been asked of the courts include the following:

(i) must the acceptance coincide exactly with the terms of the offer?

(ii) must the acceptance be communicated to the offeror in all cases?

(iii) where an offeror prescribes a particular method of acceptance, can the offer only be accepted by the prescribed method?

(iv) can silence ever constitute an acceptance of an offer?

p. 82 (v) when does an acceptance sent through the post take effect?

(vi) how and when does acceptance take place in the case of a unilateral contract? and

(vii) can a party accept an offer if he was unaware of the offer at the time at which he performed the act which constitutes the acceptance?

Thus the law in this area consists of a number of detailed rules. That said, there appear to be two central principles. The first is that the acceptance must be both final and unqualified and the second is that it must generally be communicated to the offeror. We shall consider these central principles together with the more detailed rules of law in the remainder of this section.

3.3.1 Must the Acceptance Coincide Exactly with the Terms of the Offer?

The general answer is that an acceptance must be an 'unqualified expression of assent' to the terms proposed by the offeror. Thus a purported acceptance which attempts to vary the terms contained in an offer is not an acceptance at all. In fact, it will be interpreted by the court as a rejection of the offer and as a fresh offer (or a 'counter-offer') which is then open for acceptance or rejection by the original offeror. Thus in *Hyde* v. *Wrench* (1840) 3 Beav 334 the defendant offered to sell his farm to the plaintiff for £1,000. The plaintiff offered to buy it for £950 but the defendant refused to do so. The plaintiff then wrote to the defendant and agreed to pay £1,000 for the farm but the defendant never replied to that letter. It was held that no contract had been concluded for the sale of the farm. Lord Langdale stated (at p. 337):

> 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.

It is, however, important to consider the correspondence between the parties with some care because what appears at first sight to be a counter-offer, and hence a rejection, may turn out on closer inspection to be a mere inquiry or request for information. Such was the case in *Stevenson, Jacques & Co* v. *McLean* (1880) 5 QBD 346. The defendants wrote to the plaintiffs stating that they were willing to sell iron to the plaintiffs and stated that the offer was open for a period of time. On the last day of that period the plaintiffs telegraphed to the defendant: 'Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give.' Later that day the defendants sold the iron to a third party and they sent a telegram to the plaintiffs to inform them of this. Before they received the telegram from the defendants the plaintiffs found a buyer for the iron and sent a telegram to the defendants in which they accepted the defendants' offer to sell the iron. The defendants refused to deliver the iron to the plaintiffs and so the plaintiffs sued for non-delivery. One of the grounds on which the defendants sought to deny liability was that the plaintiffs' first telegram was a rejection of the defendants' offer so that their offer was no longer open for acceptance when
p. 83 the plaintiffs purported ↵ to accept it later in the day. Lush J rejected the defendants' argument and their reliance upon *Hyde* v. *Wrench*. He concluded (at p. 350):

> [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*. … Here there is no counter-proposal. The words are 'Please wire whether you would accept forty for delivery over two months, or if not, 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. This ground of objection therefore fails.

The defendants' attempted revocation of their offer was held to be ineffective because the plaintiffs had accepted the offer prior to the revocation being brought to their attention. The plaintiffs were therefore entitled to recover damages for the non-delivery of the iron.

3.3.1.1 The 'battle of the forms': *Butler Machine Tool Company Ltd v. Ex-Cell-O Corporation (England) Ltd*

A rigid insistence on a precise correspondence between the terms of the offer and the terms of the acceptance gives rise to difficulty in modern trading conditions, where businesses frequently make use of their own standard terms and conditions of business. These standard terms frequently differ in major or minor respects and, while these standard terms have advantages in that they have the potential to reduce cost and speed up the process of concluding a contract, they also have the potential to give rise to difficulty. As Coulson LJ observed in *TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558, [29] these 'disputes where each party is seeking to rely on its own terms and conditions, to the exclusion of the other side's terms and conditions, have long been known as the "battle of the forms".' The leading case on the battle of the forms is:

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd
[1979] 1 WLR 401, Court of Appeal

The facts of the case are set out in the judgments below.

Lord Denning MR

This case is a 'battle of forms'. The plaintiffs, the Butler Machine Tool Co Ltd, suppliers of a machine, on May 23, 1969, quoted a price for a machine tool of £75,535. Delivery was to be given in 10 months. On the back of the quotation there were terms and conditions. One of them was a price variation clause. It provided for an increase in the price if there was an increase in the costs and so forth. The machine tool was not delivered until November 1970. By that time costs had increased so much that the sellers claimed an additional sum of £2,892 as due to them under the price variation clause.

The defendant buyers, Ex-Cell-O Corporation (England) Ltd, rejected the excess charge. They relied on their own terms and conditions. They said:

> 'We did not accept the sellers' quotation as it was. We gave an order for the self-same machine at the self-same price, but on the back of our order we had our own terms and conditions. Our terms and conditions did not contain any price variation clause.'

p. 84 ↵ The judge held that the price variation clause in the sellers' form continued through the whole dealing and so the sellers were entitled to rely upon it. He was clearly influenced by a passage in *Anson's Law of Contract*, 24th edn (1975), pp. 37 and 38, of which the editor is Professor Guest: and also by Treitel, *The Law of Contract*, 4th edn (1975), p. 15. The judge said that the sellers did all that was necessary and reasonable to bring the price variation clause to the notice of the buyers. He thought that the buyers would not 'browse over the conditions' of the sellers: and then, by printed words in their (the buyers') document, trap the sellers into a fixed price contract.

I am afraid that I cannot agree with the suggestion that the buyers 'trapped' the sellers in any way. Neither party called any oral evidence before the judge. The case was decided on the documents alone. I propose therefore to go through them.

On May 23, 1969, the sellers offered to deliver one 'Butler' double column plane-miller for the total price of £75,535. Delivery 10 months (subject to confirmation at time of ordering) other terms and conditions are on the reverse of this quotation. On the back there were 16 conditions in small print starting with this general condition:

> '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.'

Clause 3 was the price variation clause. It said:

> 'Prices are based on present day costs of manufacture and design and having regard to the delivery quoted and uncertainty as to the cost of labour, materials etc. during the period of manufacture, we regret that we have no alternative but to make it a condition of acceptance of order that goods will be charged at prices ruling upon date of delivery.'

The buyers replied on May 27, 1969, giving an order in these words: 'Please supply on terms and conditions as below and overleaf'. Below there was a list of the goods ordered, but there were differences from the quotation of the sellers in these respects: (i) there was an additional item for the cost of installation, £3,100 and (ii) there was a different delivery date: instead of 10 months, it was 10–11 months.

Overleaf there were different terms as to the cost of carriage: in that it was to be paid to the delivery address of the buyers: whereas the sellers' terms were ex warehouse. There were different terms as to the right to cancel for late delivery. The buyers in their conditions reserved the right to cancel if delivery was not made by the agreed date, whereas the sellers in their conditions said that cancellation of order due to late delivery would not be accepted.

On the foot of the buyers' order there was a tear-off slip headed:

> 'Acknowledgment: Please sign and return to Ex-Cell-O. We accept your order on the terms and conditions stated thereon—and undertake to deliver by—Date—signed.'

In that slip the delivery date and signature were left blank ready to be filled in by the sellers. On June 5, 1969, the sellers wrote this letter to the buyers:

> 'We have pleasure in acknowledging receipt of your official order dated May 27 covering the supply of one Butler Double Column Plane-Miller. This being delivered in accordance with our revised quotation of May 23 for delivery in 10/11 months, i.e., March/April 1970. We return herewith duly completed your acknowledgment of order form.'

They enclosed the acknowledgment form duly filled in with the delivery date March/April 1970 and signed by the Butler Machine Tool Co.

p. 85 ↵ No doubt a contract was then concluded. But on what terms? The sellers rely on their general conditions and on their last letter which said: 'in accordance with our revised quotation of May 23' (which had on the back the price variation clause). The buyers rely on the acknowledgment signed by the sellers which accepted the buyer's order 'on the terms and conditions stated thereon' (which did not include a price variation clause).

If those documents are analysed in our traditional method, the result would seem to me to be this: the quotation of May 23, 1969, was an offer by the sellers to the buyers containing the terms and conditions on the back. The order of May 27, 1969, purported to be an acceptance of that offer in that it was for the same machine at the same price, but it contained such additions as to cost of installation, date of delivery and so forth that it was in law a rejection of the offer and constituted a

counter-offer. That is clear from *Hyde* v. *Wrench* (1840) 3 Beav 334. As Megaw J said in *Trollope & Colls Ltd* v. *Atomic Power Constructions Ltd* [1963] 1 WLR 333, 337: ' ... the counter-offer kills the original offer'. The letter of the sellers of June 5, 1969, was an acceptance of that counter-offer, as is shown by the acknowledgment which the sellers signed and returned to the buyers. The reference to the quotation of May 23 referred only to the price and identity of the machine.

To go on with the facts of the case. The important thing is that the sellers did not keep the contractual date of delivery which was March/April 1970. The machine was ready about September 1970 but by that time the buyers' production schedule had to be re-arranged as they could not accept delivery until November 1970. Meanwhile the sellers had invoked the price increase clause. They sought to charge the buyers an increase due to the rise in costs between May 27, 1969 (when the order was given), and April 1, 1970 (when the machine ought to have been delivered). It came to £2,892. The buyers rejected the claim. The judge held that the sellers were entitled to the sum of £2,892 under the price variation clause. He did not apply the traditional method of analysis by way of offer and counter-offer. He said that in the quotation of May 23, 1969, 'one finds the price variation clause appearing under a most emphatic heading stating that it is a term or condition that is to prevail'. So he held that it did prevail.

I have much sympathy with the judge'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's Sale of Goods*, 9th edn (1974), p. 84. 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–
p. 86 282, per Lord Pearson; and ↵ the illustration given by Professor Guest in *Anson's Law of Contract*, 24th edn, pp. 37, 38 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.

I would therefore allow the appeal and enter judgment for the defendants.

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 Thesiger 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, to which Lord Denning MR has already referred; 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.'

p. 87 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 [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' counter-offer. 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, as counsel for the sellers 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 a 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.

As I pointed out in the course of argument to counsel for the sellers, if the letter of June 5 which accompanied the form acknowledging the terms which the buyers had specified had amounted to a counter-offer, then in my judgment the parties never were ad idem. It cannot be said that the buyers accepted the counter-offer by reason of the fact that ultimately they took physical delivery of the machine. By the time they took physical delivery of the machine, they had made it clear by correspondence that they were not accepting that there was any price escalation clause in any contract which they had made with the plaintiffs.

I agree with Lord Denning MR that this appeal should be allowed.

Bridge LJ

Schedule 2 to the Uniform Laws on International Sales Act 1967 is headed 'The Uniform Law on the Formation of Contracts for the International Sale of Goods'. To the limited extent that that Schedule is already in force in the law of this country, it would not in any event be applicable to the contract which is the subject of this appeal because that was not a contract of international sale of goods as defined in that statute.

We have heard, nevertheless, an interesting discussion on the question of the extent to which the terms of article 7 of that Schedule are mirrored in the common law of England today. No difficulty arises about paragraph 1 of the article, which provides: 'An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer'. But paragraph 2 of the article is in these terms:

> 'However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.'

p. 88 ↵ For my part, I consider it both unnecessary and undesirable to express any opinion on the question whether there is any difference between the principle expressed in that paragraph 2 and the principle which would prevail in the common law of England today without reference to that paragraph, but it was presumably a principle analogous to that expressed in paragraph 2 of article 7 which the editor of *Anson's Law of Contract*, 24th edn, Professor Guest, had in mind in the passage from that work which was quoted in the judgment of Lord Denning MR. On any view, that passage goes a good deal further than the principle expressed in article 7 of the Act of 1967, and I entirely agree with Lord Denning MR that it goes too far.

But when one turns from those interesting and abstruse areas of the law to the plain facts of this case, this case is nothing like the kind of case with which either the makers of the convention which embodied article 7 of Schedule 2 or the editor of *Anson*, 24th edn, had in mind in the passages referred to, because this is a case which on its facts is plainly governed by what I may call the classical doctrine that a counter-offer amounts to a rejection of an offer and puts an end to the effect of the offer.

The first offer between the parties here was the plaintiff sellers' quotation dated May 23, 1969. The conditions of sale in the small print on the back of that document, as well as embodying the price variation clause, to which reference has been made in the judgments already delivered, embodied a number of other important conditions. There was a condition providing that orders should in no circumstances be cancelled without the written consent of the sellers and should only be cancelled on terms which indemnified the sellers against loss. There was a condition that the sellers should not be liable for any loss or damage from delay however caused. There was a condition purporting to limit the sellers' liability for damage due to defective workmanship or materials in the goods sold. And there was a condition providing that the buyers should be responsible for the cost of delivery.

When one turns from that document to the buyers' order of May 27, 1969, it is perfectly clear not only that that order was a counter-offer but that it did not purport in any way to be an acceptance of the terms of the sellers' offer dated May 23. In addition, when one compares the terms and conditions of the buyers' offer, it is clear that they are in fact contrary in a number of vitally important respects to the conditions of sale in the sellers' offer. Amongst the buyers' proposed conditions are conditions

> that the price of the goods shall include the cost of delivery to the buyers' premises; that the buyers shall be entitled to cancel for any delay in delivery; and a condition giving the buyers a right to reject if on inspection the goods are found to be faulty in any respect.
>
> The position then was, when the sellers received the buyers' offer of May 27, that that was an offer open to them to accept or reject. They replied in two letters dated June 4 and 5 respectively. The letter of June 4 was an informal acknowledgment of the order, and the letter of June 5 enclosed the formal acknowledgment, as Lord Denning MR and Lawton LJ have said, embodied in the printed tear-off slip taken from the order itself and including the perfectly clear and unambiguous sentence 'We accept your order on the terms and conditions stated thereon'. On the face of it, at that moment of time, there was a complete contract in existence, and the parties were ad idem as to the terms of the contract embodied in the buyers' order.
>
> Counsel for the sellers has struggled manfully to say that the contract concluded on those terms and conditions was in some way overruled or varied by the references in the two letters dated June 4 and 5 to the quotation of May 23, 1969. The first refers to the machinery being as quoted on May 23. The second letter says that the order has been entered in accordance with the quotation of May 23. I agree with Lord Denning MR and Lawton LJ that that language has no other effect than to identify the
> p. 89 machinery and to refer to the prices quoted ↵ on May 23. But on any view, at its highest, the language is equivocal and wholly ineffective to override the plain and unequivocal terms of the printed acknowledgment of order which was enclosed with the letter of June 5. Even if that were not so and if [counsel for the sellers] could show that the sellers' acknowledgment of the order was itself a further counter-offer, I suspect that he would be in considerable difficulties in showing that any later circumstance amounted to an acceptance of that counter-offer in the terms of the original quotation of May 23 by the buyers. But I do not consider that question further because I am content to rest upon the view that there is nothing in the letter of June 5 which overrides the plain effect of the acceptance of the order on the terms and conditions stated thereon.
>
> I too would allow the appeal and enter judgment for the defendants.

Commentary

The decision in *Butler* is helpfully discussed by R Rawlings (1979) 42 *MLR* 715. All three judgments have been set out in full and this is for a particular reason. It can often be difficult to discern the *ratio* of a particular case. There can be a tendency to attach primary significance to the judgment that is given first, particularly when it is given by Lord Denning! This is a temptation which must be resisted because closer analysis of the judgments may reveal that Lord Denning's approach did not in fact command the support of the other judges. Where one judge dissents it is easy to spot the differences between the judgments. But it is much more difficult where, as in *Butler*, the judges actually reach the same result but do so for different reasons. In *Butler* the majority approach is in fact that adopted by Lawton and Bridge LJJ. We shall therefore commence our analysis by focusing on their approach (3.3.1.2) and then turn to consider the judgment of Lord Denning (3.3.1.3). From there we shall move to discuss how the battle of the forms may be won (3.3.1.4) before concluding this particular section by discussing various alternative approaches which, it has been suggested, may be deployed when seeking to resolve cases concerned with the battle of the forms (3.3.1.5–3.3.1.7).

3.3.1.2 The approach of Lawton and Bridge LJJ

The approach adopted by Lawton and Bridge LJJ is the traditional one, according to which the court must ascertain whether or not an offer has been made and then whether there has been an acceptance which mirrors the terms of the offer. This is the approach which an English court would be expected to apply to a battle of the forms case (see, for example, *Tekdata Interconnections Ltd* v. *Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357 and *TRW Ltd* v. *Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558).

The advantage of this approach is its apparent certainty. The court must simply work through the correspondence that has passed between the parties in search of a matching offer and acceptance. This approach has led to the creation of what has been called the 'last shot' doctrine, according to which 'the party whose terms and conditions are in play and unanswered at the time that the work is done or the goods delivered is often said to have fired the last shot, with its terms and conditions found to have been accepted by the fulfilment of the substantive contract' (*TRW Ltd* v. *Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558,
p. 90 [29]). However, application of the 'last shot' doctrine is not the necessary outcome of ↵ reliance upon the traditional approach. This is evidenced by *Butler* itself where the battle was won at what might be termed a 'mid-point' in the exchange of correspondence, namely when the sellers signed the buyers' tear-off acknowledgement slip.

A criticism that is sometimes levelled against the traditional approach is that it has the potential to produce the outcome that no contract has been concluded between the parties where the exchange of correspondence fails to produce an offer which is matched by a mirror-image acceptance. Discrepancies can frequently be found between the respective sets of standard terms and conditions (indeed, in *Butler* itself Bridge LJ identified a number of discrepancies between the terms of the sellers and the terms of the buyers) and in such cases the conclusion that no contract has been entered into may run counter to the expectations of the parties who may have acted (possibly for a period of time) in the belief that their relationship was governed by the terms of a contract.

The appearance of certainty can also be deceptive, as *Butler* itself demonstrates. Both Lawton and Bridge LJJ adopted what might be thought to be a rather strained interpretation of the facts in order to reach the conclusion that the parties had in fact reached agreement. An analysis of the documents that passed between the parties appears to suggest a degree of inconsistency in the actions of the sellers. On the one hand, they signed the buyers' tear-off acknowledgement slip (thus indicating their assent to the buyers' terms) but they also referred to their own terms and conditions of business (thus appearing simultaneously to insist that their own terms and conditions governed the parties' relationship). It may be that their intention was to re-instate their own terms and conditions but Lawton and Bridge LJJ were not convinced. In their view, the reference to the sellers' own terms and conditions was no more than a reference to the order. It did not have the effect of over-riding the plain terms of the tear-off acknowledgement slip which the sellers had signed.

3.3.1.3 The approach of Lord Denning

Lord Denning took a very different approach from that taken by Lawton and Bridge LJJ. His approach is, however, a minority one and it does not represent the current state of English law. Lord Denning painted with a broad brush, rejecting as 'out-of-date' the traditional approach based on the need to identify an offer and an

acceptance which mirrors the terms of the offer. In his view, the 'better way' was to examine all the documents passing between the parties, to identify whether or not the parties 'have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them' (see also *GHSP Incorporated* v. *AB Electronic Ltd* [2010] EWHC 1828 (Comm), [2011] 1 Lloyd's Rep 432, where Burton J held that, although the parties had entered into a contract, the terms of the contract were not to be found in the parties' respective standard terms of business and see also *Transformers & Rectifiers Ltd* v. *Needs Ltd* [2015] EWHC 269 (TCC), [2015] BLR 336 where a similar conclusion was reached). The advantage of this approach is said to be its flexibility and its commercial practicality. The negotiation process can often be both complex and protracted and it can be difficult to analyse it in terms of offer and acceptance. Much better, it is argued, to ask the question whether the parties have reached agreement and then to work out the terms of the contract. This involves the judiciary in a two-stage process. At the first stage the court must ask itself whether or not the parties have reached agreement and concluded a contract while, at the second stage, the court must ask what the terms of the contract are. The court has some flexibility at this second stage, as Lord
p. 91 Denning recognizes (he acknowledges that, where the differences ↵ between the terms are irreconcilable, the conflicting terms may have to be 'scrapped and replaced by a reasonable implication').

The difficulty with this view is that it tends to generate uncertainty. For example, Lord Denning states that it suffices for the parties to reach agreement on all 'material points'. When is a point 'material' and when is it not? The price of the goods would appear to be the most obvious 'material' factor, yet the parties in *Butler* failed to agree on the price and were nevertheless held to have concluded a contract (unless it can be argued that the parties did in fact reach agreement on the price and that a distinction must be drawn between the initial agreement as to the price, which is material, and a price-escalation clause, which is not).

3.3.1.4 Winning the battle of the forms

The battle of the forms is frequently encountered in commercial practice but it is not easy to resolve. It is also very difficult for a commercial party to ensure that it always wins the battle. The problem is in large part created by the parties themselves. Commercial parties generally wish to ensure that the contract is made on their own standard terms of business and these standard terms can differ in significant respects. The content of these standard terms differs from industry to industry but the types of clause commonly found in standard terms and conditions of business (using a contract of sale as the typical example) include:

(i) a retention of title clause, under which the seller, in essence, purports to retain title to (or ownership of) the goods until they are paid for by the buyer (on which see further 12.3.2);

(ii) a price-escalation clause, of the type in dispute on the facts of *Butler*;

(iii) a clause making provision for the payment of interest on money owed by the buyer to the seller (on which see further 12.3.4);

(iv) a force majeure clause (on which see further 12.3.5);

(v) a hardship clause (on which see further 12.3.9);

(vi) a choice of law clause, namely a clause which stipulates the law that is to govern the contract. This is a matter of particular importance where the parties to the contract are in different jurisdictions. Both parties are likely to want the contract to be governed by their own law and the negotiations on this particular point can be very difficult (on which see further 12.3.6);

(vii) a jurisdiction clause or an arbitration clause. A jurisdiction clause is a clause which identifies the court system which has jurisdiction to hear any dispute arising out of the contract. Arbitration is a popular method of dispute resolution and parties who do not wish to litigate a dispute in the courts (for reasons of cost, speed, or publicity) may insert an arbitration clause into the contract (on which see further 12.3.7);

(viii) a general clause which states that every contract of sale is subject to the seller's conditions of sale.

Given the significance of these standard terms to a contracting party, how can it ensure that it always wins the battle of the forms? There is no clear answer to this question because there is no silver bullet which will inevitably guarantee success. Indeed, it is often easier to identify how the battle may be lost than to predict how it can be won. *Butler* itself demonstrates this phenomenon. The mistake which the sellers made was to sign the buyers' tear-off acknowledgement slip. Presumably, on this basis, lawyers will in future advise a party
p. 92 not to ↵ sign such a form. But that will only assist in ensuring that the battle is not lost (by acknowledging acceptance of the terms put forward by the other party): it does not ensure that the battle will be won. Parties who continue to rely on their own standard terms, and who decline to accept the terms put forward by the other party, may succeed only in producing a stalemate in which the conclusion is reached that no contract has been concluded between the parties (*BP Oil International Ltd* v. *Glencore Energy UK Ltd* [2022] EWHC 499 (Comm), [2022] 2 Lloyd's Rep 221, [123]).

A more positive attempt to win the battle of the forms can be seen in *Butler* where the sellers included in their standard terms and conditions a clause to the effect that their terms and conditions were to 'prevail over any terms and conditions in the buyer's order'. However, this attempt to ensure victory did not work because the buyers' order was found to be a counter-offer to the sellers' terms, the effect of which was to reject the sellers' terms, including the clause which stated that the terms of the sellers were to prevail. Once the conclusion was reached that the buyers' communication amounted to a counter-offer, all of the sellers' terms were rejected and so no longer open for acceptance.

A different outcome was, however, achieved by the sellers in *TRW Ltd* v. *Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558 where the terms put forward by the sellers contained the following clause:

> 'Even if no reference is made to them in particular cases, the following terms and conditions shall apply exclusively to the entire business relation with us, particularly to all agreements for deliveries and services, unless different conditions, particularly conditions of purchase of the contracting party, have expressly been confirmed by us in writing.
>
> Conditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation.'

In this instance, the terms of the sellers did prevail, notwithstanding the fact that they constituted the 'first shot' in the exchange between the parties and not the 'last shot'. However, an important factor which led to this conclusion was that this term was included in what was called the 'customer file' document which buyers were required to sign when becoming a customer of the sellers. The signing of the 'customer file' document was held to be the 'key event' because it was 'the only time that one party expressly signed something which referred to the other side's terms and conditions'. In the words of Coulson LJ (at [37]), continuing the use of the 'warfare analogy commonly used in these cases', this was 'the only occasion when one side walked across no-man's land, and fraternised with the enemy'. Thus, it was the signature of the buyers attached to the document that led to the conclusion that the contract had been concluded on the sellers' terms. While this approach worked to the benefit of the sellers in this particular case, it does not provide a guarantee of success because it depends entirely upon the willingness of the buyer to sign the document. A buyer who refuses to sign the 'customer file' document will not be bound by its terms, at least in the absence of other evidence of assent to these terms (although in practical terms buyers may have little option but to sign if they wish to do business with the sellers).

More generally it can be said that the courts appear to be more willing to draw an inference in favour of the application of the seller's terms than they are in favour of the terms put forward by the buyer. Thus it has been stated that 'an offer to buy containing the purchaser's terms which is followed by an acknowledgement of purchase containing the seller's terms which is followed by delivery will (other things being equal) result in a
p. 93 contract on the ↵ seller's terms' (*Tekdata Interconnections Ltd* v. *Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357).

3.3.1.5 An alternative view: focus on the conduct of the parties rather than the terms they put forward

An alternative view is that the courts should place greater emphasis on the conduct of the parties: in other words, if the parties have acted as if a contract has been concluded between them, then the law should be slow to turn round and conclude that the parties did not, in fact, conclude a contract.

However, the proposition that the law should presume that there is a contract when the parties have completed performance is not one that commands universal assent. Cases can be found in which the courts have decided that no contract was concluded between the parties, notwithstanding the fact that they had apparently acted on the basis that they were in a contractual relationship. Such was the case in *Mathieson Gee*

(Ayrshire) Ltd v. *Quigley* 1952 SC (HL) 38. The pursuers offered to supply machinery that could be used to remove silt from the defender's pond. The defender replied to this offer saying that he accepted the pursuers' offer to 'remove the silt and deposit from the pond'. The pursuers duly supplied the machinery and some drivers and they removed the deposit from the pond. The defender refused to pay for the work done, claiming that the price was excessive and that the pursuers were in breach of contract. The pursuers sued for £1,129 as being due under the contract. One of the issues before the House of Lords was whether or not the parties had in fact concluded a contract. Lord Reid stated (at p. 43):

> Both parties have throughout contended that these letters constitute a contract between them. No other case is made by either party on record. The main issue between the parties has been what are the terms of this contract. But in the Inner House Lord Carmont, who dissented, held that no contract could be found to have existed between the parties, and before this House Counsel for the appellant supported this view as an alternative to his main argument.
>
> It is necessary, therefore, to consider whether it is open to a Court to decide that there was no *consensus in idem* and therefore no contract when neither party has any plea to that effect. In my opinion, it must be open to a Court so to decide. No doubt if an agreement could be spelled out from the documents, the Court in such circumstances would be inclined to do that and proceed to determine what were its terms. But if it clearly appears to the Court that the true construction of the documents is such as to show that there was no agreement, then it is plainly an impossible task for the Court to find the terms of an agreement which never existed. If authority be necessary for this I find it in the speech of Lord Loreburn, LC, in *Houldsworth* v. *Gordon Cumming* [1910] AC 537, 543, where he said: 'It is not enough for the parties to agree in saying there was a concluded contract if there was none, and then to ask a judicial decision as to what the contract in fact was. That would be the same thing as asking us to make the bargain, whereas our sole function is to interpret it'. I must therefore consider whether any agreement can be found in the terms of these two letters.

Lord Reid considered these letters and decided that no contract had been concluded between the parties. The pursuers had offered to supply machinery, while the defender had purported to accept an offer to remove the silt. The fact that the pursuers had supplied drivers to operate the machinery and remove the silt did not demonstrate the existence of a contract on the defender's terms. Rather it was, in the words of Lord Normand (at p. 42), a case of 'conduct ↵ by the parties inconsistent with the contract alleged by them'. This will strike some as being excessively formalistic. Why not focus on what people do rather than what they promise to do? The answer to this question is to be found in the fact that the basis of contractual obligations is the agreement of the parties and, where that agreement is absent, there cannot be a liability in contract (although there may be a liability to pay for the work done on some other basis, such as the law of unjust enrichment, on which see later in this section).

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3.3.1.6 Modifying the rules of offer and acceptance

An exclusive focus on the conduct of the parties will not provide a solution to all battle of the forms cases. But it may be possible to produce a more acceptable solution to the problems posed by the battle of the forms via a modification of the general offer and acceptance rules. There have in fact been numerous attempts to modify

the rules of offer and acceptance and thereby prescribe a solution to the battle of the forms. In the main, these attempts have sought to provide a more flexible framework that can accommodate within the scope of contract law a degree of inconsistency between the respective sets of standard terms. Thus trivial inconsistencies should not preclude the existence of a contract between the parties, while 'material' or more significant inconsistencies may do so. The difficulty is the obvious one, namely that of distinguishing between an inconsistency which is sufficiently material to prevent a contract from coming into existence and an inconsistency which is not material. The line has been drawn in different places by different people, as can be demonstrated by the provisions dealing with the battle of the forms to be found in the Vienna Convention on Contracts for the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, and the Principles of European Contract Law (see also the references to Article 7 of the Uniform Law on the Formation of Contracts for the International Sale of Goods in the judgments of Lawton and Bridge LJJ in *Butler*). The different solutions proposed are as follows:

- Vienna Convention on Contracts for the International Sale of Goods: Article 19

  A reply to an offer which purports to be an acceptance but contains additions, limitations, or other modifications is a rejection of the offer and constitutes a counter-offer.

  However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

  Additional or different terms relating, among other things, to the price, payment, quality, and quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes are considered to alter the terms of the offer materially.

- Unidroit Principles of International Commercial Contracts: Article 2.1.11—Modified Acceptance

  A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

  However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an
p. 95 acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

- Principles of European Contract Law: Article 2:208—Modified Acceptance

  A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer.

  A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

  However, such a reply will be treated as a rejection of the offer if:

  the offer expressly limits acceptance to the terms of the offer; or

  the offeror objects to the additional or different terms without delay; or

  the offeree makes its acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

- Article 2:209—Conflicting General Conditions

> If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.
>
> However, no contract is formed if one party:
>
> has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or
>
> without delay, informs the other party that it does not intend to be bound by such contract.
>
> General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

It can be seen that there are noticeable similarities between these provisions. They tend to build on one another. But there are also differences between them. For example, Article 19 of the Vienna Convention attempts a non-exhaustive definition of a 'material' alteration, while no such attempt is to be found in the other instruments. The Principles of European Contract Law also differ from the others in that they contain an additional provision dealing with 'conflicting general conditions'.

However, these modifications of the traditional rules of offer and acceptance do not necessarily produce clearer or more predictable outcomes than the traditional rules. This can be seen if one seeks to apply these different Articles to the facts of *Butler* v. *Ex-Cell-O*. It is in fact no easy task to work out how these Articles apply to the facts of *Butler* and, indeed, it may be that they produce different solutions. These difficulties do not inevitably lead to the conclusion that we should not tamper with the traditional rules of offer and acceptance, but they do suggest that the gains from doing so may not be as obvious as some have suggested.

3.3.1.7 A role for the law of unjust enrichment?

It should not be thought that the answer in all cases must be to find the existence of a contract between the parties. There will be cases where the degree of inconsistency between the sets of terms is such that it is not
p. 96 possible to conclude that there is a contract in existence ↵ between the parties. Thus courts may have to resort to other areas of the law, such as the law of unjust enrichment, in order to find solutions to some of the cases that come before them.

An example of this process at work is to be found in the case of *British Steel Corporation* v. *Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504. The parties were involved in negotiations for the supply of steel components. The defendants sent to the plaintiffs a letter of intent which stated their intention to enter into a contract and to do so on their own standard terms. The plaintiffs did not respond to this but went ahead with the manufacture of the components required, expecting a formal offer to follow soon. Negotiations continued between the parties over the specifications of the steel components, but no agreement was reached on matters such as progress payments, and liability for loss arising from late delivery. The defendants refused to pay for the work done and instead informed the plaintiffs that they were claiming damages for late delivery

and that this claim exceeded the plaintiffs' claim for the contract price. The positions adopted by the parties in the litigation were slightly unusual. The plaintiffs contended that no contract had been concluded but that they were entitled to recover the reasonable value of the work done (referred to as a 'quantum meruit' claim) in 'quasi-contract' (or, to use the terminology more commonly used today, the law of unjust enrichment). The defendants, on the other hand, submitted that a contract had been concluded between the parties. It was important for the defendants to establish the existence of a contract in order for them to be able to bring a counterclaim for damages for the loss suffered as a result of the alleged late delivery of the components and their delivery out of sequence.

Robert Goff J decided that no contract had been concluded between the parties. He considered, and rejected, two possible routes to a finding that a contract had been concluded between the parties. The first he termed an 'ordinary executory contract'. He rejected the submission that the parties had entered into an executory contract because he found that the parties had failed to reach agreement on important matters, such as the price, delivery dates, and the applicable terms and conditions. The second he termed an 'if' contract which he defined as 'a contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return, usually remuneration for his performance'. Here the focus was upon the fact that the plaintiffs had carried out work pursuant to the defendants' request. But Robert Goff J found that no 'if' contract had been concluded because of the failure of the parties to reach agreement on issues such as liability for late delivery.

The finding that the parties had not in fact concluded a contract has been criticized. For example, Professor Atiyah (*An Introduction to the Law of Contract* (5th edn, Oxford University Press, 1995), p. 154) argued that 'it is strange to deny that a contract exists when the parties are sufficiently agreed to manufacture and deliver and accept specified goods, even though they have not agreed on all terms'. Indeed, in his view it is 'absurd' to decide that the parties had not concluded a contract. It is important to note that Professor Atiyah focuses attention on the conduct of the parties and seeks to justify the claim that the parties had concluded a contract by reference to their conduct rather than their promises. Robert Goff J, by contrast, examined the conduct of the parties only for the purpose of deciding whether or not they had reached agreement and, finding that they had not reached agreement on a number of issues, held that no contract had been concluded between the parties. In *RTS Flexible Systems Ltd* v. *Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753, [54] Lord Clarke acknowledged that performance was a 'very relevant factor' pointing in the direction of the existence of a contract but did not endorse the proposition that it 'follows from the fact that
p. 97 the work was performed that the parties ↵ must have entered into a contract'. Instead, Lord Clarke (at [47]) affirmed that 'the court should not impose binding contracts on the parties which they have not reached' and, in relation to *British Steel* itself, he concluded (at [53]) that, on the facts:

> there was an unresolved dispute as to whose standard terms were to apply. One set of terms provided no limit to the seller's liability for delay and the other excluded such liability altogether. We can understand why, in such a case, if the buyer asks the seller to commence work 'pending' the parties entering into a formal contract, it is difficult to infer from the seller acting on that request that he is assuming any responsibility for his performance, 'except such responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into.' By the last words, Robert Goff J was not suggesting that there was, in the case before him, any contract governing the performance rendered, merely that the parties had anticipated (wrongly in the event) that there would be.

The finding that the parties had not concluded a contract was of primary significance for the defendants because it left their counterclaim without foundation. The plaintiffs, by contrast, were held to be entitled to recover the reasonable value of the work done on a *quantum meruit* basis. The *quantum meruit* claim identified by Robert Goff J is an independent restitutionary (or unjust enrichment) claim. In order to succeed with such a claim, a claimant must establish three things: first, that the defendant was enriched; secondly, that the defendant was enriched at the claimant's expense; and thirdly, that the enrichment of the defendant was unjust. All three factors were held to have been satisfied on the facts of the case. The difficulty that generally confronts a claimant in bringing a restitutionary claim in a case such as *British Steel* v. *Cleveland Bridge* lies in identifying and measuring the extent of the defendant's enrichment. A claimant will generally seek to establish the existence of an enrichment by proving that the defendant requested performance of the particular services and that those services were performed by the claimant. Where the terms of the request are satisfied no particular difficulties should arise. More problematic is the case where the work is done but it does not conform precisely to the terms of the request. In some cases the non-compliance will not diminish the extent of the defendant's enrichment (as was held to be the case in *British Steel*, where the allegation that the nodes had been delivered out of sequence did not have an impact on the extent of the enrichment). In other cases, where the extent of the departure from the terms of the request is greater (for example, the goods are defective), then the courts are likely to scale down the value of the defendant's enrichment in order to reflect the fact that the defendant has not received the performance which it requested (*Crown House Engineering Ltd* v. *Amec Projects Ltd* (1990) 48 BLR 32).

Where the work is done on a 'subject to contract' basis then it is unlikely that the party carrying out the work will be able to bring a restitutionary claim in order to recover the reasonable value of the work done (*Regalian Properties plc* v. *London Docklands Development Corporation* [1995] 1 WLR 212). The effect of the 'subject to contract' stipulation will generally be that the loss lies where it falls in the event that the parties fail to conclude a contract. At least this is the case where the work done by one party has not been received by the other party. On the other hand, where, as in *British Steel*, the defendant actually takes possession of the work done by the claimant, the fact that the work was done by the claimant on a 'subject to contract' basis will not generally suffice to relieve the defendant of his liability to pay for the work done. It is, however, possible for the parties to waive a 'subject to contract' stipulation. This may occur where the parties continue with
p. 98 performance over a period of ↵ time and do so without continuing to insist that the work is being done on a 'subject to contract stipulation' (*RTS Flexible Systems Ltd* v. *Molkerei Alois Müller GmbH & Co KG (UK Production)*

[2010] UKSC 14, [2010] 1 WLR 753). However, the courts tend to be reluctant to conclude that a 'subject to contract' stipulation has been waived in the absence of clear evidence to that effect (*Joanne Properties Ltd* v. *Moneything Capital Ltd* [2020] EWCA Civ 1541).

3.3.2 Must the Acceptance be Communicated to the Offeror?

The general rule is that an acceptance, to be valid, must be communicated to the offeror. The general rule makes good sense. If it were otherwise, an offeror could be bound by an acceptance of which he was blissfully unaware. The rule that an acceptance must be communicated to the offeror is not without its exceptions. Thus the party making the offer can waive the requirement of communication (on which see *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256, 3.2.1), the rule does not apply when the reason for the lack of communication is attributable to the fault of the offeror (on which see *Entores Ltd* v. *Miles Far East Corporation* below) nor does it apply to communications sent by post (see 3.3.5).

The leading case on the rule that acceptance must be communicated to the offeror is:

Entores Ltd v. Miles Far East Corporation
[1955] 2 QB 327, Court of Appeal

The plaintiffs, a company based in London, made an offer by telex (similar to a fax machine) to the defendants, a company based in Amsterdam who acted as agents for an American corporation. The defendants sent their acceptance of the offer by telex. The plaintiffs applied for leave to serve notice of a writ on the American corporation in New York. Their entitlement to do so turned on the answer to the question: where was the contract made? Was the contract made when the defendants sent their acceptance by telex (i.e., in Amsterdam) or was it made when the telex was received on the plaintiffs' machine (i.e., in London)? It was only if the contract was made in England that the court had jurisdiction to grant leave to serve out of the jurisdiction. It was held that the contract was formed when the communication of the acceptance was received by the plaintiffs in London so that the English courts had jurisdiction and that this was a proper case for service out of the jurisdiction.

Denning LJ

[after setting out the facts continued]

The question for our determination is, where was the contract made?

When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.

p. 99 ↵ The problem can only be solved by going in stages. 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 until 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 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.

In a matter of this kind, however, it is very important that the countries of the world should have the same rule. I find that most of the European countries have substantially the same rule as that I have
p. 100 stated. Indeed, they apply it to contracts by post as well as instantaneous ↵ communications. But in the United States of America it appears as if instantaneous communications are treated in the same way as postal communications. In view of this divergence, I think we must consider the matter on principle; and so considered, I have come to the view I have stated, and I am glad to see that Professor Winfield in this country (55 *Law Quarterly Review*, at p. 514) and Professor Williston in the United States of America (Contracts, Vol. I, section 82) take the same view.

Applying the principles which I have stated, I think that the contract in this case was made in London where the acceptance was received. It was therefore a proper case for service out of the jurisdiction.

> **Birkett LJ**
>
> ... In my opinion, the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by Telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror and that the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.
>
> If a Telex instrument in Amsterdam is used to send to London the notification of the acceptance of an offer, the contract is complete when the Telex instrument in London receives the notification of the acceptance (usually at the same moment that the message is being printed in Amsterdam) and the acceptance is then notified to the offeror, and the contract is made in London.
>
> ***Parker LJ*** delivered a concurring judgment.

Commentary

Denning LJ expressly distinguishes between the case of 'instantaneous communications between the parties' and the case where the means of communication chosen by the parties is the post. As we shall see (3.3.5), the rule that the acceptance must be communicated to the offeror does not apply to postal communications, the general rule being that acceptance takes place when the acceptance is posted, not when it is received.

The reasoning of Denning LJ in the paragraph beginning 'Lastly take the Telex' and the next paragraph appears to be equally applicable to faxes, in that the sender of a fax message will usually receive a transmission report which will indicate whether or not the fax has been sent successfully.

The decision of the Court of Appeal in *Entores* has since been approved by the House of Lords in *Brinkibon Ltd* v. *Stahag-Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34. The issue in *Brinkibon* was the same as that which arose on the facts of *Entores* and the conclusion of the House of Lords was the same, namely that, in the case of communications by telex, the acceptance is effective when it is communicated to the offeror with the result that the contract is concluded in the jurisdiction where the offeror is located (on the facts of *Brinkibon* this was Vienna). Their Lordships expressly declined the invitation to overrule *Entores*. The essence of the reasoning of their Lordships in *Brinkibon* is to be found in the following two passages:

p. 101

Lord Wilberforce

In this situation, with a general rule covering instantaneous communication inter praesentes, or at a distance, with an exception applying to non-instantaneous communication at a distance, how should communications by telex be categorised? In *Entores Ltd* v. *Miles Far East Corporation* [1955] 2 QB 327 the Court of Appeal classified them with instantaneous communications. Their ruling, which has passed into the textbooks, including Williston on Contracts, 3rd edn (1957), appears not to have caused either adverse comment, or any difficulty to business men. I would accept it as a general rule. Where the condition of simultaneity is met, and where it appears to be within the mutual intention of the parties that contractual exchanges should take place in this way, I think it a sound rule, but not necessarily a universal rule.

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: see *Household Fire and Carriage Accident Insurance Co Ltd* v. *Grant* (1879) 4 Ex D 216, 227 per Baggallay LJ and *Henthorn* v. *Fraser* [1892] 2 Ch 27 per Lord Herschell.

The present case is, as *Entores Ltd* v. *Miles Far East Corporation* [1955] 2 QB 327 itself, the simple case of instantaneous communication between principals, and, in accordance with the general rule, involves that the contract (if any) was made when and where the acceptance was received. This was on May 4, 1979, in Vienna.

Lord Brandon of Oakbrook

My Lords, I am not persuaded that the *Entores* case [1955] 2 QB 327, was wrongly decided and should therefore be overruled. On the contrary, I think that it was rightly decided and should be approved. The general principle of law applicable to the formation of a contract by offer and acceptance is that the acceptance of the offer by the offeree must be notified to the offeror before a contract can be regarded as concluded, *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256, 262, per Lindley LJ. The cases on acceptance by letter and telegram constitute an exception to the general principle of the law of contract stated above. The reason for the exception is commercial expediency: see, for example, *Imperial Land Co of Marseilles, In re (Harris' Case)* (1872) LR 7 Ch App 587, 692 per Mellish LJ. That reason of commercial expediency applies to cases where there is bound to be a substantial interval between the time when the acceptance is sent and the time when it is received. In such cases the exception to the general rule is more convenient, and makes on the whole for greater fairness, than the general rule itself would do. In my opinion, however, that reason of commercial expediency does

> not have any application when the means of communication employed between the offeror and the offeree is instantaneous in nature, as is the case when either the telephone or telex is used. In such cases the general principle relating to the formation of contracts remains applicable, with the result that the contract is made where and when the telex of acceptance is received by the offeror.

p. 102 ↵ When is a telex message communicated to the offeror? Is it when the message is received on the telex machine or when it is read by the offeror? The difficulty with the latter possibility is that the sender will generally have no way of knowing when the message was in fact read by the offeror. This being the case, a court is more likely to conclude that the message is communicated at the moment of receipt provided that it has been sent during normal business hours. Where the message is sent outside of office hours then one might expect the court to conclude that it was not communicated until the office re-opened for business, or shortly thereafter (such a conclusion was reached in the context of a notice of withdrawal of a ship under a charterparty in *The Brimnes* [1975] QB 929 and could be applied in this context by way of analogy).

In *Entores* Denning LJ stated that 'it is very important that the countries of the world should have the same rule'. Do you agree? Does this suggest that English law should adopt the Unidroit Principles or the Principles of European Contract Law in an attempt to achieve this level of uniformity?

3.3.3 Prescribed Method of Acceptance

It is open to an offeror to state in the terms of his offer that an acceptance must assume a particular form or be sent to a particular place. In such a case, is the offeror bound by a purported acceptance of the offer that does not comply with the requirements stipulated in the offer? Obviously, it is open to the offeror to waive the requirement that the acceptance assume a particular form, provided that the party sending the acceptance is not adversely affected thereby. But what of the case where there has been no waiver by the offeror and the party who submits the purported acceptance has not complied with the strict terms of the offer? Is the purported acceptance inevitably ineffective? The answer depends upon a proper interpretation of the terms of the offer. If the form of the acceptance is mandatory then a purported acceptance that assumes a different form will not be effective. On the other hand, if it is not mandatory and the method of acceptance adopted differs from that stipulated but is no less advantageous to the offeror then the acceptance may be effective to conclude a contract between the parties. In *Manchester Diocesan Council for Education* v. *Commercial and General Investments Ltd* [1970] 1 WLR 241, 246 Buckley J stated:

> 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, 274, where acceptance was requested by return of post, Honeyman J said:
>
> > '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.

p. 103 ↵ On the facts of the case Buckley J concluded that the prescribed form of acceptance was not the only valid method of acceptance with the result that the offeror was bound by a method of acceptance which differed from the prescribed method but was no less advantageous to it. It is therefore incumbent upon an offeror to state in clear terms that an acceptance must assume a particular form. For the avoidance of doubt it may be necessary for the offeror to go further and state that this form is mandatory or that an acceptance in any other form will not be valid. An offeror who fails to do this may be vulnerable to the argument that the form of acceptance chosen is valid because it is equally efficacious from the point of view of the offeror. When considering whether or not the actual form of the acceptance is no less advantageous to the offeror than the prescribed method, it is necessary to ascertain the object that the offeror had in mind when prescribing the form of the acceptance. For example, the object behind a stipulation that the acceptance must be in writing may be to ensure that the acceptance is in permanent form, in which case an oral acceptance will not suffice. Alternatively, where the object behind the stipulation is to ensure that the acceptance is received within a given time-frame, an alternative mode of acceptance which is just as quick (for example, email rather than fax) may be effective to conclude a contract.

3.3.4 Can Silence Amount to Acceptance?

The general rule is that silence does not amount to an acceptance and the rule is a good one. Were the law otherwise traders would have every incentive to send out offers to sell goods at a particular price accompanied by a statement to the effect that the trader will regard the offer to sell as having been accepted unless the customer informs him to the contrary within a stipulated period of time. The law would be unduly burdensome if it imposed on people an obligation to take positive steps to rejected unwanted offers. Thus it is that the law puts the onus on the person to whom the offer has been made to demonstrate that he has, by

some positive conduct on his part, accepted the offer. Silence does not generally constitute such ‘positive conduct’. It is, by its nature, equivocal; it could be consistent with a rejection of the offer, indifference to the offer, or acceptance of it.

The issue that must be considered is not the validity of the general rule, but whether or not there should be exceptions to it. Take the following example. X sends an offer to Y and states that he, X, will regard the offer as having been accepted unless Y informs him to the contrary within seven days. Y decides to accept the offer but does not communicate his acceptance to X because he believes that there is no need to do so. X subsequently informs Y that, in his view, no contract has been concluded between the parties as a result of Y’s failure to communicate his acceptance to X. Does Y have a claim against X for breach of contract? According to the general rule, he does not because silence does not amount to an acceptance. This seems harsh. If the reason for the general rule is a desire to protect Y from the burden of having to take positive steps to reject the imposition of unwanted contractual obligations, why should we in effect punish Y for this failure to communicate his acceptance when he does in fact wish to conclude a contract? Should the law not recognize an exception to the general rule in order to enable Y to establish the existence of a contract? It would appear that it does not and the reason for this is to be found in the following case:

p. 104 ***Felthouse v. Bindley***

(1862) 11 CBNS 869, 142 ER 1037, Court of Common Pleas

The plaintiff claimed that he had purchased a horse from his nephew. After some negotiations, the plaintiff wrote a letter to his nephew on 2 January 1862 in which he offered to buy the horse for £30 15s. He concluded his letter by stating: 'If I hear no more about him, I consider the horse mine at £30 15s.' The nephew did not reply to this letter. On 25 February the defendant auctioneer, who had been instructed by the nephew to sell his farming stock, sold the stock at auction. The nephew told the defendant that the horse had already been sold but the auctioneer mistakenly included it in the sale and sold it to a third party. The auctioneer acknowledged his mistake in a letter to the plaintiff written on 26 February and the nephew also wrote to the plaintiff on 27 February in which he acknowledged their 'previous arrangement' in relation to the sale of the horse. The plaintiff brought an action for the conversion of the horse. The claim failed on the ground that the plaintiff could not show that he had acquired title to the horse before it was sold by the auctioneer on 25 February.

Willes J

[set out the facts and continued]

It is clear that there was no complete bargain on the 2nd of January: and it is also 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, and therefore that he had no right to complain of the sale. Then, what is the effect of the subsequent correspondence? The letter of the auctioneer amounts to nothing. The more important letter is that of the nephew, of the 27th of February, which is relied on as showing that he intended to accept and did accept the terms offered by his uncle's letter of the 2nd of January. That letter, however, may be treated either as an acceptance then for the first time made by him, or as a memorandum of a bargain complete before the 25th of February, sufficient within the statute of frauds. It seems to me that the former is the more likely construction: and, if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before the 25th of February, and that the letter of the 27th was a mere expression of the terms of that prior bargain, and not a bargain then for the first time concluded, it would be directly contrary to the decision of

> the Court of Exchequer in *Stockdale* v. *Dunlop*, 6 M & W 224, to hold that that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with the property by them in the interim.

p. 105

Keating J

> I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty. But, as between the uncle and the auctioneer, the only question we have to consider is whether the horse was the property of the plaintiff at the time of the sale on the 25th of February. It seems to me that nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.
>
> ***Byles J*** delivered a short judgment in which he expressed his agreement with Willes J.

Commentary

The claim brought by the uncle was a claim in conversion against the auctioneer. Conversion is a tort that is committed by dealing with goods in a manner inconsistent with the rights of the true owner. In order to be able to bring a claim in conversion, the uncle had to prove that he had an immediate right to possession of the horse, and this in turn depended upon whether or not he had concluded a contract with his nephew for the purchase of the horse prior to its sale on 25 February. The Court of Common Pleas concluded that no such contract had been concluded and their decision to this effect was subsequently affirmed by the Exchequer Chamber: (1863) 7 LT 835.

The result in *Felthouse* has been criticized by some commentators. The difficulty with the case lies in the fact that the nephew had told the defendant auctioneer, prior to the sale of the horse by the auctioneer to a third party, that it had already been sold. Professor Miller (‘*Felthouse* v. *Bindley* Revisited’ (1972) 35 *MLR* 489, 491) has criticized *Felthouse* in the following terms:

> The Common Pleas held for the auctioneer on the ground that the plaintiff had no title to sue since at the date of the auction the nephew had not effectively accepted the offer. Given that he had admittedly told the auctioneer that the horse was reserved for his uncle and that the latter had equally assumed that this was so, it is not clear why anything further should have been regarded as essential to the formation of a contract. On balance it is submitted that the approach of the Common Pleas was wrong in principle and that the actual result of the case can only be supported because there had been no delivery, part payment or memorandum in writing to satisfy the requirements of the Statute of Frauds.

Felthouse v. *Bindley* would have been more difficult had the litigation taken place between the nephew and the uncle rather than between the uncle and the auctioneer. Suppose that the nephew had refrained from selling the horse and the uncle then denied that he was bound to purchase it. Could the nephew have brought a claim against the uncle for breach of contract? Given that the uncle had himself stated that he did not expect to hear

from his nephew, any reliance placed by him on his nephew's failure to communicate his acceptance would have been unmeritorious but his entitlement to do so would appear to follow from a strict application of the rule laid down in *Felthouse*.

p. 106 ↵ While silence generally does not amount to an acceptance, it is clear law that the conduct of the offeree can amount to an acceptance (see, for example, *Brogden* v. *Metropolitan Railway* (1877) 2 App Cas 666 and *Reveille Independent LLC* v. *Anotech International (UK) Ltd* [2016] EWCA Civ 443, 166 Con LR 79). What is the difference between conduct (which can amount to an acceptance) and silence (which cannot)? In other words, how much does the law require by way of positive conduct before the line between silence and conduct is crossed? The answer may be that the law does not require much by way of conduct on the part of the offeree. In *Rust* v. *Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334 the issue before the Court of Appeal was whether or not a contract had been concluded between the plaintiff insured and the defendant insurer. On the facts it was held that the defendants had accepted the plaintiff's offer, probably by issuing her with the policy. But, even making the assumption that the policy constituted an offer rather than an acceptance, it was held that the parties were in a contractual relationship. Brandon LJ stated (at p. 340):

> [T]he plaintiff had the policy in her possession at the end of October, 1973. She raised no objection to it of any kind until some seven months later. While it may well be that in many cases silence or inactivity is not evidence of acceptance, having regard to the facts of this case and the history of the transaction between the parties ..., it seems to me to be an inevitable inference from the conduct of the plaintiff in doing and saying nothing for seven months that she accepted the policy as a valid contract between herself and the first defendants.

Rust was later cited with approval by Lord Steyn (who was himself counsel for the defendant insurers in *Rust*) in *Vitol SA* v. *Norelf Ltd* [1996] AC 800, 811 for the proposition that 'while the general principle is that there can be no acceptance of an offer by silence, our law does in exceptional cases recognise acceptance of an offer by silence'. The precise scope of these exceptions has not been judicially established (for further recognition of the fact that there are exceptions to the general rule, albeit that they operate within very narrow limits see *Allied Marine Transport Ltd* v. *Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925, 937).

3.3.5 The Postal Rule

When does an acceptance sent through the post become effective? Is it when the acceptance is posted by the offeree, when it is posted through the letter box of the offeror, or when it is opened and read by the offeror? One might have expected the answer to be that acceptance occurs upon communication of the acceptance to the offeror (whether that communication takes place upon receipt or upon actual reading of the letter) but English law has adopted the former view, namely that acceptance takes place upon posting of the letter of acceptance. This rule has been the subject of considerable criticism and it has not been adopted in many other jurisdictions in the world. Yet the rule is one of some antiquity in English law (the case that is commonly cited as authority for the existence of the rule is *Adams* v. *Lindsell* (1818) 1 B & Ald 681 but its place was not secured until the later decision of the House of Lords in *Dunlop* v. *Higgins* (1848) 1 HLC 381) and is now unlikely to be uprooted judicially. Rather, the courts are likely to widen the exceptions to the general rule and not to attempt to abolish the general rule itself. That this is so can be demonstrated by reference to the following case:

p. 107 ***Holwell Securities Ltd v. Hughes***
[1974] 1 WLR 155, Court of Appeal

Under a contract with the defendant, the plaintiffs were granted an option to purchase land. Clause 2 of the agreement provided:

> 'THE said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof. ...'

The plaintiffs purported to exercise that option by a letter sent by their solicitors on 14 April 1972 but the defendant never received the letter. The defendant refused to accept that the option had been validly exercised. The plaintiffs sought specific performance of the option agreement. Their claim was rejected on the ground that the option had not been validly exercised. The plaintiffs had failed to comply with the requirements of clause 2 of the agreement in that they had failed to give the defendant notice that they were exercising the option.

Russell LJ

It is not disputed that the plaintiffs' solicitors' letter dated April 14, 1972, addressed to the defendant at his residence and place of work, the house which was the subject of the option to purchase, was posted by ordinary post in a proper way, enclosing a copy of the letter of the same date delivered by hand to the defendant's solicitors. It is not disputed that the letter and enclosure somehow went astray and never reached the house nor the defendant. It is not disputed that the language of the letter and enclosure would have constituted notice of exercise of the option had they reached the defendant. It is not contended that the handing of the letter to the solicitor constituted an exercise of the option.

The plaintiffs' main contention below and before this court has been that the option was exercised and the contract for sale and purchase was constituted at the moment that the letter addressed to the defendant with its enclosure was committed by the plaintiffs' solicitors to the proper representative of the postal service, so that its failure to reach its destination is irrelevant.

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 [1973] 1 WLR 757, 764D, 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. We were referred to *Henthorn* v. *Fraser* and to the obiter dicta of Farwell J in
p. 108 *Bruner* v. *Moore* [1904] 1 Ch 305, which latter was a case ↵ of an option to purchase patent rights. But in neither of those cases was there apparently any language in the offer directed to the manner of acceptance of the offer or exercise of the option.

The relevant language here is, 'The said option shall be exercised 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*, 23rd edn (1969), p. 47, 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. Under this head of the case hypothetical problems were canvassed to suggest difficulties in the way of that conclusion. What if the letter had been delivered through the letter-box of the house in due time, but the defendant had either deliberately or fortuitously not been there to receive it before the option period expired? This does not persuade me that the artificial posting rule is here applicable. The answer might well be that in the circumstances the defendant had impliedly invited communication by use of an orifice in his front door designed to receive communications.

Lawton LJ

… I turn now to what I have called the roundabout path to the same result. [Counsel for] the plaintiffs submitted that the option was exercised when the letter was posted, as the rule relating to the acceptance of offers by post did apply. The foundation of his argument was that the parties to this agreement must have contemplated that the option might be, and probably would be, exercised by means of a letter sent through the post. I agree. This, submitted [counsel for the plaintiffs], was enough to bring the rule into operation. I do not agree. In *Henthorn* v. *Fraser* [1892] 2 Ch 27, Lord Herschell stated the rule as follows, at p. 33:

> '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.'

> It was applied by Farwell J in *Bruner* v. *Moore* [1904] 1 Ch 305 to an option to purchase patent rights. The option agreement, which was in writing, was silent as to the manner in which it was to be exercised. The grantee purported to do so by a letter and a telegram.
>
> Does the 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
> p. 109 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*, 3rd edn (1952), p. 43. 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. ...
>
> I would dismiss the appeal.
>
> ***Buckley LJ*** agreed with the judgment of Russell LJ.

Commentary

It can be seen from the judgment of Russell LJ that there are a number of requirements that must be satisfied before the postal rule is applicable. The first is that the parties must have contemplated that the postal service would be used for the purpose of forwarding the acceptance of the offer. In *Henthorn* v. *Fraser* [1892] 2 Ch 27 the plaintiff, who lived in Birkenhead, visited the defendants' offices in Liverpool and, while he was there, the defendants handed to him a written offer to sell to him property in Birkenhead for £750. The offer took the form of an option to purchase within fourteen days. On the following day, between 12.00 and 13.00, the defendants posted a letter to the plaintiff purporting to withdraw their offer to sell. This letter reached the plaintiff's place of business between 17.00 and 18.00 on the same day but not before the plaintiff's solicitor had posted to the defendants a letter accepting the offer to sell the property for £750. The letter of acceptance

was posted at 15.50 and was delivered to the defendants' offices at 20.30, after the offices had closed, with the result that the letter was not opened until the following morning. The defendants maintained that they were not bound to sell the property to the plaintiff because they had validly withdrawn their offer before it was accepted. In particular, they argued that the rule that the contract is complete as soon as the acceptance is posted had no application to the present facts because they had not sent their offer to the plaintiff through the post; they had handed it to him in person. The Court of Appeal rejected this argument. The applicability of the
p. 110 postal rule depends, not on the medium by which the offer is communicated, but upon ↵ whether the parties contemplated that the post might be used as a means of communicating the acceptance. Lord Herschell stated (at p. 33) that:

> although the Plaintiff received the offer at the Defendant's office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of business, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post.

This being the case, the postal rule was applicable with the result that the defendants' revocation was ineffective because it was received by the plaintiff after the contract had been concluded on the posting of the letter of acceptance at 15.50 (on the revocation of an offer by post, see *Byrne & Co* v. *Van Tienhoven & Co* (1880) 5 CPD 344, 3.4, which was applied by the Court of Appeal on the present facts).

Secondly, the parties can, expressly or impliedly, contract out of the rule that acceptance takes place upon posting of the letter of acceptance. Indeed, it was held that the effect of clause 2 of the contract in *Holwell Securities* v. *Hughes* was to exclude the operation of the postal rule because the meaning of the phrase 'notice in writing' to the defendant was to require communication or notification to the defendant and, for this purpose, posting of the letter did not constitute 'notice'.

It might have been thought that the fact that the letter never in fact reached the offeror would have sufficed to prevent the existence of a valid acceptance. But this was not in fact the case. Indeed, Russell LJ expressly accepted that, where the postal rule is applicable, acceptance takes place 'even if the letter goes astray and is lost'. Authority for the latter proposition can be traced back to the decision of the Court of Appeal in *Household Fire and Carriage Accident Insurance Co Ltd* v. *Grant* (1879) 4 Ex D 216. The defendant applied for shares in a company. He was allotted shares but he never received the letter informing him that shares had been allotted to him. The company subsequently went into liquidation and the liquidator sought to recover from the defendant the unpaid balance of the share price. The defendant denied that he was a shareholder but his defence was unsuccessful. It was held that his offer to buy shares was accepted when the notice of allotment was posted to him and the fact that the letter subsequently went astray in the post did not have the effect of discharging the contract that had already been made for the purchase of the shares. Thesiger LJ stated (at p. 223):

> How … 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 offeror, and I can see no principle of law from which such an anomalous contract can be deduced.

Lawton LJ recognizes the existence of a much wider exception to the postal rule. In his view (Russell LJ does not comment on the point) the postal rule 'does not operate if its application would produce manifest inconvenience and absurdity'. In many ways it is difficult to object to the proposition that a rule should not
p. 111 apply when it produces 'manifest inconvenience and ↵ absurdity' but much depends on what is meant by the phrase. If adoption of such a principle requires departure from binding precedent then it must be rejected. The fact that Lawton LJ draws support for his proposition from the judgment of Bramwell B in *British & American Telegraph Co* v. *Colson* (1871) LR 6 Exch 108—which, as he acknowledges, was overruled by the Court of Appeal in *Household Fire and Carriage Accident Insurance Co Ltd* v. *Grant* (1879) 4 Ex D 216 (in which Bramwell LJ (as he had then become) dissented)—suggests that the breadth of his proposed exception should be viewed with some suspicion.

Why has English law adopted the postal rule? Why does acceptance take place at the moment of posting the letter and not the moment of receipt? The competing arguments have been neatly summarized as follows (Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 2-032 (footnotes omitted)):

> Various reasons for the rule have been suggested. One is that the offeror must be considered as making the offer all the time that his offer is in the post, and that therefore the agreement between the parties is complete as soon as the acceptance is posted. But this does not explain why posting has any significance at all: any other proof of intention to accept would equally well show that the parties were in agreement. Another suggested reason for the rule is that the Post Office is the common agent of both parties, and that communication to this agent immediately completes the contract. But the contents of a sealed letter cannot realistically be said to have been communicated to the Post Office, which in any case is at most an agent to *transmit* the acceptance, and not to *receive* it. It has also been suggested that the rule minimises difficulties of proof in that it is easier to prove that a letter has been posted than that it has been received. But this depends in each case on the efficiency with which the parties keep records of incoming and outgoing letters.
>
> The rule is in truth an arbitrary one, little better or worse than its competitors. When negotiations are conducted by post, one of the parties may be prejudiced if a posted acceptance is lost or delayed; for the offeree may believe that there is a contract and the offeror that there is none, and each may act in reliance on his belief. The posting rule favours the offeree, and is sometimes justified on the ground that an offeror who chooses to start negotiations by post takes the risk of delay and accidents in the post; or on the ground that the offeror can protect himself by expressly stipulating that he is not to be bound until actual receipt of the acceptance. Neither justification is wholly satisfactory, for the negotiations may have been started by the offeree; and the offer may be made on a form provided by the offeree, in which case he, and not the offeror, will for practical purposes be in control of its terms. The rule does, however, serve a possibly useful function in limiting the offeror's power to withdraw his offer at will: it makes a posted acceptance binding although that acceptance only reaches the offeror after a previously posted withdrawal reaches the offeree.

The strongest justification for the postal rule is the last one, namely that it places a limit on the offeror's power to withdraw his offer (see *Byrne & Co* v. *Van Tienhoven & Co* (1880) 5 CPD 344, 3.4). But even this consideration does not justify the current rule. It would suffice for the law to conclude that, once the offeree has posted his letter of acceptance, the offeror can no longer withdraw his offer. English law goes too far in laying down the rule that acceptance takes place on posting. It would suffice for the law to say that acceptance takes place when the letter of acceptance is received by, or communicated to, the offeror but that the offeror cannot withdraw his offer once the letter of acceptance has been posted or dispatched. This is, in fact, the position adopted by the Vienna Convention on Contracts for the International Sale of Goods (Article 23), the
p. 112 Unidroit Principles of International Commercial Contracts ↵ (Article 2.1.6(2)), and the Principles of European Contract Law. Thus Article 2:205(1) of the Principles of European Contract Law provides that 'if an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror' while Article 2:202(1) states that 'an offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance … '.

As the House of Lords made clear in *Brinkibon Ltd* v. *Stahag-Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 (3.3.2), the postal rule does not apply to instantaneous forms of communication. As modes of communication become quicker, the practical significance of the postal rule is likely to recede. *Brinkibon* affirmed that the postal rule does not apply to telexes. In the case of faxes, the likelihood is that they will not

be governed by the postal rule given that, in many respects, they resemble telexes (see 3.3.2). In relation to emails there is authority to support the view that the postal rule is not applicable 'at least where the parties are conducting the matter by email' (*Thomas* v. *BPE Solicitors (a firm)* [2010] EWHC 306 (Ch), [2010] All ER (D) 306 (Feb)) and the same conclusion has been reached in relation to communications by WhatsApp (*Eurasia Sports Ltd v Tsai* [2016] EWHC 2207 (QB), [49]). The most detailed judicial consideration of the issue is to be found in the judgment of Rajah JC in *Chwee Kin Keong* v. *Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 in the following terms:

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 … [The] 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 … the parties did not address me on the issue of when the contract was formed … 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.

p. 113 ↵ [He then referred to Article 24 of the Vienna Convention and continued]

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.

The proposition that the receipt rule applies to contracts concluded over the worldwide web would seem to be correct and appears to command general assent (albeit that there is little authority on the point). More difficult is the case of contracts concluded by email, where Rajah JC vacillates between the different options. The balance of academic authority supports the view that the postal rule should not apply to contracts concluded by email and that the general rule requiring communication of the acceptance should apply (see generally D Nolan, 'Offer and Acceptance in the Electronic Age' in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford University Press, 2010), p. 61). Given that the justifications said to underpin the postal rule are weak, there seems to be little justification for extending the rule to a further category of transactions, namely transactions concluded by email.

An alternative explanation for the adoption of the postal rule has been provided by Simon Gardner ('Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 *OJLS* 170). He seeks to place the cases in their historical context. He notes that 1840 was the year in which the uniform penny post was introduced and that the general perception at the time of the new postal system was that it was wonderful. He continues (at p. 180):

> This contemporary perception may have played a substantial part in the decisions in which the courts established the acceptance rule in the 1840s. In these terms, the basis of the rule might have been not a preference for posting over delivery as the dispositive act. It might have been an idea that delivery was self-evidently important, but that in the newly prevailing conditions posting and delivery were little different: that once posted, a letter was as good as delivered. But there is a certain weakness about this. Despite the great improvements in efficiency … equating posting with delivery on purely empirical grounds would have been a little foolish: indeed, the reason why these cases came to court at all was because the equation had failed.
>
> However, some … other innovations added a further dimension to this constructive identification of posting with delivery. One was a dramatic shift towards prepayment of postage. In March 1839, only 14% of letters sent by the London General Post were prepaid, leaving 86% for which payment had to be collected from the addressee. By February 1840 these figures had been precisely reversed. Prepayment was endorsed by none other than Queen Victoria herself, abandoning the privilege of
p. 114 free use of the mail. A year later still, the unpaid ↵ element had fallen further to 8%. A second was the further facilitation of prepayment by the introduction in 1840 of the self-adhesive postage stamp; another measure which entranced the public. Of the February 1841 prepaid total of 92%, 45% comprised letters for which the payment was by this means. A third important innovation was the cutting of letter-boxes in front doors of houses, so that letters no longer needed to be handed to their addressee; this too captured the public imagination.
>
> Taken together, these measures may have great significance. Until 1840, the delivery of a letter typically required that the addressee should manually receive it and pay for it. This was not, of course, a significant practical hurdle, but it sat in symbolic contrast with the new position, whereby the sender had only to affix his stamp and post the letter, and it would go through to its destination without further subvention from outside the system. So these three innovations of 1840 may be seen as predicating a radically new perception of the nature of the post: the notional equation of the posting of a letter with its delivery. They may thus have been a very powerful influence towards the courts affirming the acceptance rule in the way that they did in that decade.

One of the attractions of this rationalization of the postal rule is that it helps to explain the apparent lack of enthusiasm for the postal rule in cases such as *Henthorn* v. *Fraser* (discussed earlier in this section) and *Byrne* v. *van Tienhoven* (3.4) towards the end of the nineteenth century. As Gardner notes (at p. 191):

> Later decisions … have generally drifted away from the equation of posting with delivery. In terms of the present thesis, that would be very understandable. The further one gets from the 1840 reforms, and in particular the more one has access to instantaneous modes of communication such as became available in 1878–80 [the first telephone company began business in London in 1878], the less natural one would find that equation. The development of additional new modes of remote communication has further discredited the old equation of posting with delivery, and it is noticeable that cases dealing with these new technologies increasingly marginalize the postal acceptance rule. The decisions on telex communications, for example, explicitly treat the rule for postal acceptance as artificial, and an exception.

3.3.6 Acceptance in Unilateral Contracts

The rules relating to acceptance must be modified in their application to unilateral contracts. One modification is that the courts may readily imply, as they did in *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256 (3.2.1), that the offeror has waived the requirement that the acceptance be communicated to him. But further difficulties arise. The first relates to the identification of the act that constitutes the acceptance. The general rule must be that the offeror is entitled to require that the offeree perform the requested act in its entirety. A second issue relates to the time at which the offeror can withdraw his offer. A common example cited in the books is the man who promises to pay a sum of money if another walks from London to York. The offeror must be entitled to insist that the other party complete the walk before he makes his claim for payment. But at what point in time does the offeror lose his right to withdraw the offer? It seems rather harsh to allow him to do so at any time before the other party reaches York. This would be to enable the offeror to behave opportunistically. The better rule might be to say that the offeror cannot withdraw his offer once performance
p. 115 has begun but that he is not obliged to honour his promise to make the payment until the ↵ other party has fully performed the act for which payment was promised. This was the view adopted by Goff LJ in *Daulia Ltd* v. *Four Millbank Nominees Ltd* [1978] Ch 231, 239:

> 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.

In *Errington* v. *Errington* [1952] 1 KB 290 a father bought a house for his son and daughter-in-law. The house was bought with the assistance of a mortgage. The father told his son and daughter-in-law that the house would be theirs if they paid off the mortgage on the house. The couple began to pay off the mortgage but were not subject to any contractual obligation to continue to pay off the mortgage (the party who was subject to the obligation to pay was the father). The father died before the mortgage had been paid off. In his will he left the house to his widow and in the present action his widow brought an action for possession of the house against the daughter-in-law. It was held that the widow was not entitled to an order for possession. It was necessary for the court to examine the nature of the relationship between the father and the daughter-in-law in order to establish whether or not the daughter-in-law was entitled to remain in possession of the house. Denning LJ analysed the nature of the relationship in the following terms (at p. 295):

> 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 had 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.

3.3.7 Acceptance in Ignorance of an Offer

The general rule is that performance of the requested act does not amount to an acceptance unless the party performing the act did so with knowledge of the existence of an offer. Were it otherwise, a party could find
p. 116 himself bound to the terms of a contract of which he was ↵ wholly unaware. The difficult case is the unilateral contract. Suppose that a person promises to pay a reward if his lost property is returned to him. The property is subsequently returned by someone who is unaware of the existence of the offer. Can that person claim the reward? The point has not been authoritatively resolved by the courts (the leading English case is probably *Gibbons* v. *Proctor* (1891) 64 LT 594 but the report of that case at 55 JP 616 indicates that the party claiming the reward did have knowledge of the offer of a reward at the time at which the relevant information was passed on to the person named in the advertisement). While the general rule requiring knowledge of the existence of the offer is a sound one, there is a case for making an exception in the case of a unilateral contract, at least where performance of the act cannot subject the performing party to any detriment. Provided that the promisor has obtained the performance for which he promised to pay, it can be argued that the law should impose upon him an obligation to carry out his promise and pay the promised sum.

One further consequence of the need for knowledge of the existence of the offer is that identical cross-offers do not, in themselves, establish the existence of a contract. In *Tinn* v. *Hoffman & Co* (1873) 29 LT 271 Blackburn J stated (at p. 279):

> When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. … The promise or offer being made on each side in ignorance of the promise or offer made on the other side neither of them can be construed as an acceptance of the other. Either of the parties may write and say 'I accept your offer, and, as you perceive, I have already made a similar offer to you', and then people would know what they were about, I think either side might revoke. Such grave inconvenience would arise in mercantile business if people could doubt whether there was an acceptance or not, that it is desirable to keep to the rule that an offer that has been made should be accepted by an acceptance such as would leave no doubt on the matter.

More difficult is the question whether or not the act must have been done with the intention of accepting the offer. It has been stated that 'an act which is *wholly* motivated by factors other than the existence of the offer cannot amount to an acceptance; but if the existence of the offer plays some part, however small, in inducing a person to do the required act, there is a valid acceptance of the offer' (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 4-054, emphasis in the original). However, it has been argued (in reliance upon *Williams* v. *Carwardine* (1833) 5 C & P 566) that English law does not inquire into the motive of the person carrying out the act. Hence, provided that the person was aware of the existence of the offer at the time at which he performed the act that is alleged to constitute the acceptance, he should be held to have accepted the offer. This is so unless it is proved affirmatively that he did not intend to accept the offer when carrying out the particular act (see P Mitchell and J Phillips, 'The Contractual Nexus: Is Reliance Essential?' (2002) 22 *OJLS* 115).

A case which illustrates these issues is the Australian case of *R* v. *Clarke* (1927) 40 CLR 227. The Government of Western Australia publicly offered a reward 'for such information as shall lead to the arrest and conviction of the person or persons who committed the murders' of two police officers. The petitioner was arrested and charged with one of the murders. He gave information that led to the arrest and conviction of those responsible for the murders. In giving this information the petitioner was found to be acting 'exclusively in
p. 117 order to ↵ clear himself from a false charge of murder'. He nevertheless brought a claim to recover the reward. His claim failed. The court held that, in providing the information, the petitioner had not acted on or in reliance upon the offer of a reward and so was not entitled to it. This insistence on the need for reliance upon the offer suggests that knowledge of the existence of the offer is not enough, in itself, to amount to acceptance of an offer. On the facts, the petitioner had seen the offer of a reward, although it may not have been present to his mind at the time at which he gave the information that led to the arrest and conviction of the murderers. In many ways the crucial issue may relate to the burden of proof. Once the person who claims that he has accepted the offer demonstrates that he knew of the offer and that he has performed the act requested by the offeror, must he also show that he performed that act with the intention of accepting the offer or is it for the offeror to prove that he had no intention of accepting the offer at the time at which he performed the act? It is suggested that the latter proposition is the correct one and that *Clarke* is not inconsistent with this proposition, because of the finding that the information was provided by the petitioner 'exclusively' in order to clear himself of the charge of murder. It will generally be a difficult task for an offeror

to prove that the offeree did not intend to accept the offer at the time at which he performed the requested act. But it is not impossible, as can be demonstrated by reference to the following hypothetical example given by Isaacs ACJ in *Clarke* (at p. 235):

> An offer of £100 to any person who should swim a hundred yards in the harbour on the first day of the year, would be met by voluntarily performing the feat with reference to the offer, but would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard on that date and swam the distance simply to save his life, without any thought of the offer. The offeror might or might not feel morally impelled to give the sum in such a case, but would be under no contractual obligation to do so.

3.4 Has the Offer Been Withdrawn or Otherwise Terminated?

The final issue to be considered is whether or not an offer, once made, can be withdrawn or revoked. The general rule is that an offer may be withdrawn at any time before it has been accepted and, for this purpose, the revocation must have been communicated to the offeree prior to his acceptance of that offer. The latter proposition is illustrated by the following case:

Byrne & Co v. Van Tienhoven & Co
(1880) 5 CPD 344, Common Pleas Division

The defendants, who carried on business in Cardiff, offered by letter on October 1 to sell tinplate to the plaintiffs at a fixed price. The plaintiffs were in New York and they did not receive the letter until 11 October. They immediately communicated their acceptance by telegram. There was a surge in the price of tinplate in the first week in October and so on 8 October the defendants sent to the plaintiffs a letter in which they withdrew their earlier offer. This second letter was not received in New York until 20 October. The plaintiffs sued for damages for non-delivery of the tinplate. The defendants
p. 118 denied liability on a number of ↵ grounds, one of which was that they had validly revoked their offer before it was accepted by the plaintiffs.

It was held that the revocation of 8 October was ineffective on that date with the result that the plaintiffs were entitled to accept the offer on 11 October and so they were entitled to recover damages from the defendants.

Lindley J

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: *Routledge* v. *Grant* (1828) 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see *Tayloe* v. *Merchants Fire Insurance Co* 9 How Sup Ct Rep cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr Benjamin. The same view is taken by Mr Pollock in his excellent work on Principles of Contract, edn ii., p. 10, and by Mr Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. 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 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,
>
> p. 119 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.

Commentary

It should be noted that at no point in time were the parties actually in agreement. By the time that the plaintiffs posted their letter of acceptance, the defendants had already posted their letter of revocation.

Why is it that a letter of acceptance is effective from the moment of posting but that a letter revoking an offer does not take effect upon posting but only upon actual communication of the revocation to the other party? Note in this respect that the case was decided towards the end of the nineteenth century at a time when the enthusiasm of the courts for the postal rule appeared to be on the wane (see Gardner 3.3.5).

It was not necessary for Lindley J to decide the moment in time at which the revocation was communicated to the offeree. In *Henthorn* v. *Fraser* [1892] 2 Ch 27, 32 Lord Herschell cited *Byrne* with approval and stated that the revocation, to be effective, must be 'brought to the mind of the person to whom the offer is made'. Thus the general requirement is one of actual communication to the offeree. In the case of businesses this general requirement may require some modification. Where a revocation of an offer is received by a business during normal office hours, a court is likely to conclude that the revocation takes effect from the moment in time at which, according to normal business practice, the revocation would be read. Where the revocation is received outside business hours, then it will not take effect until the resumption of normal business hours (*The Brimnes* [1975] QB 929).

The requirement that the revocation must be communicated to the offeree gives rise to difficulty in the case where the offer has been made to the general public. How can such an offer be withdrawn? Article 2:202(2) of the Principles of European Contract Law states that 'an offer made to the public can be revoked by the same means as were used to make the offer'. A similar conclusion was reached by the United States Supreme Court in *Shuey* v. *United States* (1875) 92 US 73. A proclamation was published on 20 April 1865 offering a reward of $25,000 for the apprehension of a particular criminal. A notice was published on 24 November 1865 revoking the offer. The plaintiff discovered the whereabouts of the criminal in 1866 and notified the authorities. At that time the plaintiff was unaware of the revocation of the offer. It was held that he was not entitled to recover the reward. Strong J stated:

> 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 any thing had been done in reliance upon it.
> p. 120 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 any thing 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.

While the revocation must have been communicated to the offeree, it need not have been communicated by the offeror. In an appropriate case, the revocation can be communicated to the offeree by a third party. The following case illustrates the point:

Dickinson v. Dodds
(1876) 2 Ch D 463, Court of Appeal

On Wednesday 10 June 1974 the defendant (Dodds) sent to the plaintiff (Dickinson) a note in which he stated:

> 'I hereby agree to sell to Mr George Dickinson the whole of the dwelling-houses, garden ground, stabling and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800.'

The note was signed by the defendant and it contained the following postscript: 'This offer to be held over until Friday, 9 o'clock a.m., 12th June 1874.' On the following day, the plaintiff was informed by his own agent, Mr Berry, that the defendant had offered to sell the property to another purchaser, Mr Allan. The defendant in fact signed a formal contract to sell the land to Mr Allan on the afternoon of 11 June for £800. The plaintiff communicated his acceptance to the defendant on the morning of the 12th before 9 a.m. but the defendant refused to accept it on the ground that he had already sold the property to Mr Allan. The plaintiff brought a bill for specific performance but the action failed on the grounds that the defendant was entitled to revoke his offer before Friday the 12th, and that the plaintiff was aware of the revocation prior to his purported acceptance so that his acceptance was not in fact valid and there was no contract between the parties.

James LJ

[after referring to the document of 10 June 1874, continued]

The document, though beginning 'I hereby agree to sell', was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum—'This offer to be left over until Friday, 9 o'clock a.m., 12th June, 1874'. That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the
p. 121 property unsold until 9 o'clock ↵ on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it 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'. This is evident from the Plaintiff's own statements in the bill. ... 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.

Mellish LJ

I am of the same opinion. ... If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, 'I will give you until the day after tomorrow to accept the offer', and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, 'I accept', so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who ↵ has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground. I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson, and even if there had been, it seems to me that the

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> sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.
>
> ***Baggallay JA*** concurred with the judgments of James and Mellish LJJ.

Commentary

Mellish LJ stated that 'in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance'. Taken literally this is difficult to reconcile with the approach taken in the later case of *Byrne & Co* v. *Van Tienhoven & Co* (1880) 5 CPD 344 (earlier in this section), where there was found to be a contract between the parties but there was no 'one time' at which they were in agreement. The judgment of Mellish LJ is also open to criticism on the ground that he appears to adopt a subjective rather than an objective approach to the existence of an agreement (on the difference between the two approaches see further Chapter 2).

The revocation was communicated to the plaintiff by a third party but was nevertheless effective to withdraw the offer. Does notice by a third party inevitably have the effect of revoking the offer or does this occur only where the third party is a reliable source of information? It was not necessary for the Court of Appeal to consider this point on the facts of *Dickinson* because the information was conveyed by the plaintiff's own agent (who was, presumably, reliable). No clear answer can be given to this question as a matter of authority but it is suggested that the courts ought to take account of the reliability of the source of the information. The more reliable the source of the information, the readier the court should be to conclude that the revocation has been effectively communicated to the offeree.

What was the meaning of the postscript? Did Dodds mean merely that Dickinson had to accept by Friday at the latest but that in the meantime he, Dodds, remained free to accept any better offer that he received or did Dodds promise that he would not revoke the offer before Friday? Does it matter which interpretation is adopted of the postscript? Consider the following claim made by Professor Gilmore (*The Death of Contract* (Ohio State University Press, 1974), p. 32):

> It should be noted that the 'restatement' of *Dickinson* v. *Dodds* in terms of consideration theory makes irrelevant what the parties may have intended by the provision that the offer should be 'left over' until Friday. If, apart from the possibility of an offer under seal, all offers are revocable unless supported by what came to be called an 'independent' consideration, then it makes no difference, absent the consideration, in what form of language the offer ↵ may be expressed. 'You may have until Friday to accept but I may revoke the offer at any time before acceptance' comes out exactly the same way as 'You may have until Friday to accept and I also promise that I will not revoke the offer before Friday'. Under the new dispensation the offeror is not bound by what he has said or has intended to say or has been understood to say; he is bound if, and only if, he has received a 'consideration'.

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Dickinson is therefore regarded as authority for the proposition that a promise to keep an offer open for a particular period of time is not binding unless the offeree has provided consideration for the promise to keep the offer open (the doctrine of consideration is discussed in more detail in Chapter 5). In this respect English law stands out from other jurisdictions where 'firm offers' (as such offers are generally known) are binding. Thus Article 2:202(3) of the Principles of European Contract Law provides:

... a revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable; or

(b) it states a fixed time for its acceptance; or

(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

There are other ways in which an offer can be terminated (on which see generally H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), paras 4-114–4-143). For example, a rejection of an offer operates to terminate the offer (see 3.3.1). An offer may also come to an end as a result of the passage of time. Where the offer is stated to be open for acceptance for a particular period of time, the expiry of that time-period will operate to terminate the offer. Where the offer does not contain a time-limit, it will remain open for acceptance for a reasonable period of time (provided of course that it has not been accepted, rejected, or withdrawn in that period of time). More difficult is the question whether or not the death of the offeror or the offeree operates to terminate the offer. In *Dickinson* v. *Dodds* (extracted earlier) Mellish LJ stated that an offer cannot be accepted in the case where the offeror dies before the offer is accepted. But his statement does not appear to have been a considered one and he did not cite any authority to support this proposition. His view is probably correct where the contract is a personal one (in the sense that the identity of the parties is a crucial aspect of the contract) but, in other cases, it is not so clear that the death of the offeror should have the automatic effect of rendering the offer incapable of acceptance, especially in the case where the accepting party was, at the time of the acceptance, unaware of the death of the offeror.

3.5 Conclusion

The rules applied by the courts when deciding whether or not the parties have concluded a contract are now rather complex but the complexity is due in large part to the diverse range of factual situations to which the rules must be applied. In essence the approach of the courts is first to seek out an offer and, having found it,
p. 124 see whether or not there has been a matching ↵ acceptance. In practice of course the process is much more complex as the facts of cases tend not to fit neatly into the rules that the courts have devised. The 'battle of the forms' cases illustrate this point. Yet the difficulty involved in accommodating individual cases within the offer and acceptance framework has not persuaded the judges to throw out the model and seek an alternative (see, for example, *Tekdata Interconnections Ltd* v. *Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357, where Longmore LJ stated (at [11]) that 'the traditional offer and acceptance analysis must be adopted unless the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail'). It is true that Lord Denning did once state that the offer and acceptance approach was 'out-of-date' but he failed to persuade his colleagues of the merits of

his view. Rather than abandon the offer and acceptance analysis in its entirety, the courts have chosen to apply it with a degree of flexibility to the facts of individual cases (as can be seen from cases such as *Butler* v. *Ex-Cell-O Corporation* (3.3.1.1) and *Blackpool and Fylde Aero Club Ltd* v. *Blackpool Borough Council* (3.2.3)).

Finally, it is important to resist the conclusion that the rules of offer and acceptance are rules that are mechanically developed and applied by the courts. For example, there is no obvious answer to the question of the time at which an acceptance sent through the post should take effect. The court must consider the relative advantages and disadvantages of the different options and make its choice. The English courts have chosen the time of posting and not the time of receipt and, as we have seen, this choice has not been universally approved. The initial choice of the rule is not a value-free exercise, even if the application of that rule in subsequent cases can appear to be rather mechanical.

Further Reading

GARDNER, S, 'Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 *OJLS* 170.

MILLER, J, '*Felthouse* v. *Bindley* Revisited' (1972) 35 *MLR* 489.

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NOLAN, D, 'Offer and Acceptance in the Electronic Age' in A BURROWS AND E PEEL (eds), *Contract Formation and Parties* (Oxford University Press, 2010), p. 61.

RAWLINGS, R, 'The Battle of the Forms' (1979) 42 *MLR* 715.

SIMPSON, AWB, 'Quackery and Contract Law: *Carlill* v. *Carbolic Smoke Ball Company* (1893)' in *Leading Cases in the Common Law* (Oxford University Press, 1995), p. 259.

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Notes

[1] To similar effect see his judgment in *Butler Machine Tool Co Ltd* v. *Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401, set out at 3.3.1.1.

[2] The proposition that cross-offers do not suffice to create a contract was established in *Tinn* v. *Hoffman & Co* (1873) 29 LT 271, 3.3.7.

[3] The inclusion of the one is the exclusion of the other.

[4] An intention to contract.

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