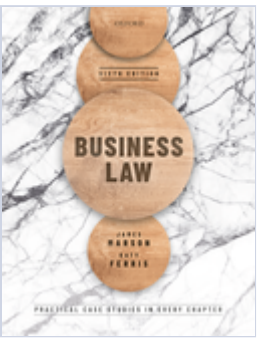

Business Law (6th edn)
James Marson and Katy Ferris

p. 91

5. Establishing an Agreement: Offer and Acceptance

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Abstract

This chapter identifies the essential features necessary in the establishment of a legally binding contract. Most contracts need not be given in writing, and a contract could be regarding as something as simple as buying a newspaper or a cup of coffee. In fact, many contracts that are established are not done so in writing, even if a receipt is received. However, each of the essential features noted in this chapter is present in forming those contracts. Before the essential features are considered, it is important to note that contracts can be established by the parties exchanging promises, or by one party promising to perform an act in return for some action by the other. In the latter scenario, the second party has no obligation to take any action unless it wishes to enter into a contract.

Keywords: legally binding contract, writing, receipt, promises, essential features

What makes an agreement a legally enforceable contract? When you contract on behalf of your business, will you have any rights against the other party if they fail to complete the agreed obligations? What is the legal status where an item is advertised in a newspaper or a shop window—is it an offer by the shopkeeper to sell the item? Can you force the sale of an item that displays an incorrect price on the tag? These are just a few questions the answers to which businesses must be aware of before trading, and this chapter and **Chapter 6** provide the answers.

Business Scenario 5

Alpha wrote to Beta offering to sell a 3D printer for £30,000—the letter arriving on Tuesday. Alpha and Beta had engaged in business transactions previously and consequently, even having received the offer by letter, Beta contacted Alpha by telephone to discuss the 3D printer and the offer, with an intention to accept. The conversation went well, but as part of the discussion, Alpha requested that due to the nature of the item, its value and for reasons of certainty, Beta would have to confirm the acceptance through written evidence. This evidence was required by 12pm on Wednesday and as such, Alpha agreed to keep the offer open until then.

Beta duly posted the letter of acceptance, along with a cheque for the full amount, at 6pm on Tuesday. This letter arrived with Alpha at 11.30am on Wednesday.

Shortly after the initial telephone call on Tuesday, Alpha received an offer of £35,000 for the 3D printer from Charlie, which it accepted immediately. At 7pm on Tuesday night, Alpha wrote to Beta informing it that the offer was no longer in existence due to the contract with Charlie, and was being revoked. This letter did not arrive with Beta until Friday morning at 9am.

How might your assessment of Alpha and Beta's position differ if Beta had heard from an officer of Charlie that it had completed the contract for the sale of the 3D printer from Alpha prior to Beta posting the letter of acceptance?

Learning Outcomes

- Identify the nature and essential elements of a legally enforceable agreement (**5.4–5.4.2.2**)
- Differentiate between an offer and an invitation to treat (**5.4.1–5.4.1.1**)
- Understand the implications of counter-offers terminating an offer (**5.4.1.2**)
- Identify when true acceptance has taken place (**5.4.2–5.4.2.2**).

p. 92

5.1 Introduction

This chapter identifies the essential features necessary to establish a legally binding contract. It is important to note at the outset that most contracts need not be reduced in writing and indeed most of the contracts you have established today—buying a newspaper or cup of coffee—were not established in writing, even if you received a receipt. However, each of the essential features noted in this chapter and **Chapter 6** are present in forming those contracts. Before the essential features are considered, it is important to briefly note that contracts can be established by the parties exchanging promises, or by one party promising to perform an act in return for some action by the other. In this later scenario, the second party has no obligation to take any action unless they wish to enter the contract.

5.2 Unilateral and bilateral contracts

It is important to identify whether the contract made is unilateral or bilateral. Bilateral contracts are those where one of the parties offers to do something in return for an action by the other party—they exchange promises. Each of the parties in this type of contract has an obligation to perform some action. For example, one person agrees to wash the other's car in return for having their lawn mowed. A unilateral contract is one where the first party promises to perform some action in return for a specific act, although the second party is not promising to take any action. *Carlill v Carbolic Smoke Ball Co*. is an example of a unilateral contract. There is no obligation on the person to buy the advertised smoke ball, but where they do and, as with Mrs Carlill, contracts influenza, they can claim the £100 advertised as the contractual obligations will have been completed. This case is fully discussed at **5.4.1**.

5.3 Void and voidable contracts

The main focus of this chapter and **Chapter 6** is to identify the essential features required to make an enforceable (valid) contract. Some contracts, however, do not obtain the status of a valid contract because the law will not recognize the agreement or it may miss one of the essential features and so not amount to a contract.

- *Void contracts:* A **void contract** is not a contract that the law will recognize and so has no legal effect. In law such an agreement was never a valid contract and consequently there are no obligations on either party.
- *Voidable contracts:* A **voidable contract** is one where the injured party has the option to affirm the contract (they can continue with the agreement and bring about an enforceable contract) or they can avoid the contract (and the contract is terminated). The key element here is that it is for the injured party to decide if they wish to proceed with the agreement or have it set aside. This must be performed within a reasonable time to be fair to each party (in contract and torts law the word 'reasonable' is often used. In the absence of specific instruction from legislation or a principle from case law this word is interpreted with regards to the facts of a particular case. In any respect, in this situation the party should act as quickly as is possible).

p. 93

5.4 The essential features of a valid contract

Having identified what a contract is, it is then important to establish how a legally enforceable contract is created. The term 'legally enforceable' contract is important because in the absence of one or more of the following requirements the courts will not acknowledge that a legally recognizable contract is in existence. This text contends that the essential features can be subdivided into five categories, and once it is satisfied that the parties have the legal capacity to contract, the following are the most relevant and important features of a valid contract (**Figure 5.1**).

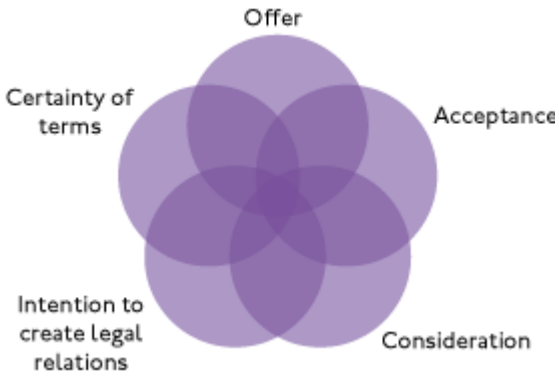

Figure 5.1 The essential features of a valid contract

- *Offer:* The statement from the **offeror** to the **offeree** identifying the terms by which they are willing to be bound. This must be distinguished from an invitation to treat, which is a situation whereby offers are invited. Offers can be unilateral or bilateral.
- *Acceptance:* The full and unconditional acceptance by the offeree of the terms identified in the offer. If any other terms are included by the offeree then the response is said to be a counter-offer that terminates the first offer and will not constitute acceptance.
- *Consideration:* The legal element to ensure the contract is a bargain (the law will not enforce a 'bare' promise). The consideration only has to be sufficient, not adequate.
- *Intention to create legal relations:* The parties must intend that their agreement is to create legal responsibilities on both sides, resulting in possible legal consequences if one party fails or defaults on their obligations. This goes beyond the scope of 'social agreements' and intends to establish the availability of a legal remedy in the case of breach.
- *Certainty of terms:* The terms of a contract have to be sufficiently clear and certain to enable the courts to enforce the contract.

Consider

Alpha is writing to Beta with an offer to sell. There is no discussion needed here between whether an offer is made or if this is the start of negotiations (an invitation to treat). The key issue is about the rules of communication applicable.

p. 94

5.4.1 Offer

An offer is simply an identification of the terms by which the offeror is willing to be bound. This offer is made to the offeree, who may be an individual, company, group of people, or even the entire world. The offeror is the party that establishes the terms by which they are willing to be bound and therefore they have the choice of

what terms are contained and to whom the offer is made. Only the offeree may accept the offer and they must accept in the method expressed (if stipulated) by the offeror.

Carlill v Carbolic Smoke Ball Co. (1893)

Facts:

The defendants were proprietors of a medical preparation—the 'Carbolic Smoke Ball'. The company was so confident in its product that it advertised in newspapers that anyone who used the ball three times daily for a two-week period and contracted influenza would be rewarded with £100. It further identified in the advert that to demonstrate the company's sincerity, it had deposited £1,000 in a local bank to satisfy any claims. The claimant, Mrs Carlill, on the faith of this advertisement, bought one of the balls and used it as directed. However, she contracted influenza, and claimed her 'reward', although, as could be expected, the Carbolic Smoke Ball Company did not wish to pay the £100 and argued to the court why the advertisement did not constitute a contract.

The Court of Appeal held that there was a valid contract. The £1,000 being placed in the bank demonstrated the company's sincerity in paying the £100 identified in the advertisement. Carlill's acceptance was evidenced through her using the product (her conduct), and there was nothing in the advertisement that required a specific form of acceptance to be notified to the company. As such, the advertisement could be accepted by anyone who saw the advert and purchased and used, as directed, the product.

Authority for:

(In relation to this aspect of the case—as *Carlill* is authority for many propositions.) It is possible to make an offer to the entire world, and it may therefore be accepted by those persons.

5.4.1.1 Offer v invitation to treat

An 'invitation to treat' is the term used when a party invites offers (essentially the party with the goods/services to trade invites offers which they are able to accept or decline). In this context, the word 'treat' means to negotiate, hence it is an invitation to negotiate for a good or service. Cases that have established the general rule of where an invitation to treat exists did so in light of traders selling goods, advertisements, auctions, and negotiations. It should be noted that for businesses, it may be wise to sell goods under 'invitation to treat' rather than 'offers', as this provides the company with flexibility in its sales strategy.

- *Goods displaying price tags:* Goods displayed in shop windows or on the shelves in retail outlets, and those goods advertised in newspapers/on television, and so on may be offers to sell or invitations to treat. To identify which is applicable, the common law has developed the following precedents.

Pharmaceutical Society of Great Britain v Boots Cash Chemists (1953)

Facts:

Boots Chemists established shops that began to operate a 'self-service' system whereby customers could select items displayed in the shop, place them in their basket, and present these at the till to complete the purchase. On the shelves were various products, with a price marked on the packaging, and these products included various drugs and proprietary medicines that could only be sold in the presence of a registered pharmacist. The customer would select goods and present these to the cashier at a till-point, where the transaction would take place. At each till-point was a registered pharmacist who was in control of the department. The Pharmaceutical Society of Great Britain brought an action against Boots. It alleged that a 'sale' took place when a customer placed items from the shelves into their shopping basket (hence not in the presence of the pharmacist and contrary to the legal requirements). The Court of Appeal disagreed. The customer offered to purchase their selected goods at the till-point (in the presence of the registered pharmacist) where the retailer either accepted or declined the offer. Therefore, no infringement of the law had taken place.

Authority for:

Items displayed on the shelves of shops with a price tag attached are invitations to treat not offers to sell.

The Court of Appeal established the precedent that items in a shop with a price tag attached did not constitute an offer to sell, binding the shopkeeper to sell to whoever entered the shop and selected an item. This is necessary to prevent a shop from displaying goods with an incorrect price tag on and then being compelled to proceed with the contract on the basis of an innocent mistake. This precedent established in the *Boots* case was corroborated in *Fisher v Bell*.

These cases identified that the courts will generally consider goods advertised in shop windows or those with a price tag attached to constitute an invitation to treat. Whilst this is true in the widest sense, there have been instances where an item in a shop window with information regarding the price has constituted an offer, not an invitation to treat. The following case was heard in the USA (and because it is not in this jurisdiction it has limited authority as a precedent), but due to the similarities of the legal systems (the common law) it could provide evidence of how an English court may apply law in a case with similar facts:

Leftkowitz v Great Minneapolis Surplus Stores (1957)

Facts:

The company placed an advertisement in a Minneapolis newspaper regarding a sale that was to take place on a Saturday morning, 9am sharp, where two mink scarves and a stole were to be sold for $1 each (significantly below the usual retail price). Mr Leftkowitz presented himself at the appropriate
p. 96 counter in the store and demanded the item for $1 ↵ and was refused. He was informed that he could not avail himself of the special price due to a 'house rule' that stipulated the offer was only available to women. When Leftkowitz brought an action for damages the company contended that the advertisement was an invitation to treat, not an offer to sell, and hence it was within its rights to reject the offer to purchase the goods for $1. The court, however, stated that the circumstances in this case would constitute an offer to sell, which the customer was within his rights to accept.

Authority for:

An advertisement in a newspaper, or shop window, may be elevated from an invitation to treat to constitute an offer to sell if the offer is clear, definite, and explicit, and it leaves nothing open for negotiation.

This case demonstrated an alternative view to the general rule of advertisements being an invitation to treat, and demonstrates the importance of the correct drafting, and the legal significance, of advertising materials. It was the level of detail in the advertisement that established it as an offer rather than an invitation to treat. The more definite the detail and description of what is for sale and under what terms the sale will take place, the more likely the court will hold the advertisement as an offer.

Note that when prices are displayed, under the case law identified in this chapter, these are generally invitations to treat and so the trader has no obligation to sell at the displayed price. However, if a price is displayed and is done so where the trader is not prepared to sell (and in essence is deceiving the purchaser) then this is a breach of the Consumer Protection from Unfair Trading Regulations 2008 and the trader may face prosecution.

- *Advertisements:* Advertisements are a potentially problematic area often because the words used can lead buyers to assume an offer has been made. This is frequently not the case and you must exercise care to apply the law, not customer relations policies in such circumstances:

Partridge v Crittenden (1968)

Facts:

Arthur Partridge had placed an advert in the *Cage and Aviary Birds* magazine that read 'Quality British bramblefinch cocks, bramblefinch hens … 25s each'. Mr Thompson responded to the advert, sending payment, and he received a bird. The bramblefinch hen that was sent had a closed-ring around its leg identifying that it was bred in captivity and hence legal to sell, but it was possible to remove the ring and consequently Partridge was charged with unlawfully offering for sale a bird contrary to the Protection of Birds Act 1954. Partridge claimed the advertisement was not an offer to sell but an invitation to treat. The Divisional Court agreed.

Authority for:

Following the previous authorities, an advertisement in a newspaper, a magazine, a billboard, on television, and so on will be considered an invitation to treat.

p. 97 ↵ The courts will often interpret advertisements in newspapers, magazines, and journals as an invitation to treat. With advertisements generally, whether these are through television, radio, or the Internet, the same rules apply.

- *Auctions:* The auction is a typical example of an invitation to treat. The auctioneer invites bids to the goods as advertised and can then decide to accept or decline, with completion being achieved on the fall of the hammer:

Payne v Cave (1789)

Facts:

Mr Cave made the highest bid for goods at an auction held by Mr Payne. However, before the fall of the auctioneer's hammer, Cave withdrew his bid. The question for the court was whether Cave possessed the right to withdraw a bid at an auction.

Authority for:

There was no contract. The auctioneer's request for bids is an invitation to treat. Therefore, a bid at an auction is merely an offer which may be withdrawn by the bidder at any time until acceptance.

There have also been cases concerning auctions which advertised the sale of particular items which were subsequently not included in the sale. Whether individuals who intended to offer on the (non-presented) items can claim their expenses back was considered in the following case:

Harris v Nickerson (1872–73)

Facts:

Mr Nickerson was an auctioneer who had advertised an auction (to include office furniture) to be held by him for three days. Mr Harris was a broker and travelled to the auction with the intention of bidding on the furniture. On the third day of the auction, when the office furniture was to be auctioned, all the lots were withdrawn without prior notice. Harris claimed breach of contract and attempted to recover his losses of time and expenses incurred (railway fare and his board and lodgings) as he contended the advertisement was an offer to sell those lots and as he had travelled to the auction to purchase and accept that offer. The High Court held that Harris could not recover his losses, as the advertisement was a mere declaration of intent that could not amount to an offer capable of acceptance.

Authority for:

Auctions are examples of invitations to treat. Simply advertising products in auctioneering literature does not create any obligations that those items will be included or that any subsequent offers will be accepted.

p. 98 ↵ The case confirmed the previous rulings by the courts that an advertisement in the press will not, of itself, create any contract with a reader until the acceptance has been recognized in law. In the present situation, that would be that the highest, genuine, bidder at the auction makes an offer accepted by the auctioneer and forms a valid contract.

- *Tenders:* It had traditionally been considered that an invitation to tender is an invitation to treat. The party that submits the tender is making an offer and the party inviting the tender has the option to accept or decline. However, whilst this position provides the party inviting the tender with great power and seemingly little in the way of obligations to the party submitting the tender, those inviting tenders may have an obligation to 'consider' the tender:

Harvela Investments Ltd v Royal Trust Co of Canada Ltd (1986)

Facts:

Shares in the defendant company were to be sold through a sealed competitive tender (the shares being sold to the highest of two invited bidders). Harvela offered $2,175,000 and the second tender offered '$2,100,000 or $101,000 in excess of any other offer, whichever was higher'. The second tender was accepted (on the basis that it in effect constituted a bid of $2,276,000) and this led to Harvela's claim.

Authority for:

The House of Lords held that Harvela's bid had to be the one accepted. The nature of the tender, whilst only an invitation to treat, was based on fairness, and also on the basis of the reasonable expectation of the parties. The parties had invested time and effort in preparing the tender, they were invited to submit the tender, and it was reasonable for the decision to be made on the criterion described—that is, that the tenders were to be 'fixed bids'.

This element of reasonable expectation to consider a tender was followed in *Blackpool and Fylde Aero Ltd v Blackpool BC*:

Blackpool and Fylde Aero Ltd v Blackpool BC (1990)

Facts:

The company had operated flights from an airport under the control of the council. They were invited to bid for a new concession and submitted their tender on time. Despite it being the highest bid, it was not opened until after the deadline for submission had passed and because it was deemed late, it was not considered. The tender was offered to another bidder. When the council discovered this error, they argued for the bidding process to be reopened but this was objected to by the winning bidder. The Court of Appeal had to determine whether there was a legal requirement to consider all conforming tenders.

Authority for:

Whilst there is no obligation to accept a specific tender, a call for tenders does establish a collateral (separate) contract for it to be considered.

p. 99

- *Negotiations:* Negotiations occur between parties in the contract process. Questions of item, price, quantity, and the terms surrounding any possible contract may come under consideration. This can lead to disagreements as to when an offer may have been made which is capable of acceptance. The courts have had to look to the parties' statements and other evidence to ascertain their true intentions:

Harvey v Facey (1893)

Facts:

Mr Facey and his wife owned a property named Bumper Hall Pen. They received a telegram from Adelaide Harvey which read: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' Facey responded with 'Lowest price for Bumper Hall Pen £900' and Harvey followed this with a further telegram: 'We agree to buy Bumper Hall Pen for £900 asked by you.' Facey did not reply or sell the property to Harvey who, as a result, brought an action for breach of contract and requested an order for specific performance (specific performance is a remedy (dealt with in **Chapter 10**) whereby the contract is ordered to be completed by the party in breach. Typically such an award is made where damages are not an adequate remedy and the subject matter of the contract is a unique item (land, property, antiques, and so on)). The Privy Council found that there was no contract established as no offer had been made to sell the property—only an offer to buy and acceptance of this had to be expressed and could not be implied.

Authority for:

There has to be a clear offer of a willingness from the offeror to be bound (a genuine offer to sell) for an acceptance to be possible and hence create a valid contract.

Mere negotiations between parties are insufficient to create a contract and the courts will not imply an offer in these situations. It is further demonstrated in the following case the necessity of distinguishing an offer to sell from an enquiry of an interest in purchase.

- *Request for information:* Requesting additional information with regard to a negotiation will not provide a valid acceptance of an offer nor defeat the offer through a counter-offer. Negotiations are an important element of forming a contract and the sharing of information is necessary to identify the scope of the obligations involved:

Gibson v Manchester CC (1979)

Facts:

Robert Gibson was a tenant and occupier of a council house under the control of Manchester City Council and had been actively interested in purchasing the house. In 1970 the Council undertook to offer for sale various Council-owned properties to sitting tenants and wrote to Gibson informing him that it may be prepared to sell the house to him for a price of £2,725 less 20 per cent (freehold). On 18 March 1971 Gibson wrote to the Council requesting the purchase of the house, but in May 1971 political
p. 100 control of ↵ the Council changed, along with the policy of selling Council-owned properties, and only those houses where a legally binding contract had been established would be sold. The Council notified Gibson that the sale of the house would not be proceeding and he claimed breach of contract. The House of Lords held that as the Council had never offered to sell the property valid acceptance was not possible. All that had occurred in this case were the first steps towards negotiations for a sale which never reached fruition.

Authority for:

A request for information is not an offer capable of acceptance.

An invitation as to a willingness to enter a contract or a party's potential interest in forming a contract will not be considered an offer capable of acceptance. Negotiations have to proceed to a stage when a formal offer is made before a contract can be established:

Storer v Manchester CC (1974)

Facts:

The Council had sent the claimant information regarding the possibility of tenants purchasing their Council-owned property. Storer completed the application form and the Council had replied with a letter requesting that the applicant sign an enclosed agreement for sale of the property and the Council would return the agreement as signed. Storer did complete and return the form but the Council did not reciprocate as promised before the control of the Council changed political parties.

Authority for:

The Court of Appeal held that a contract was formed as the letter from the Council was a firm intention to proceed with the sale when Storer returned the application form. As such, the Council was obliged to conclude the contract.

At this stage, it is possible to identify whether an offer or invitation has been created, or if negotiations are in progress rather than a formal offer having been established. However, for how long does the offer last—is it indefinitely or until acceptance has taken place? Or is some other method developed by the courts? In order for the offeror to have control over the length of time that the offer remains in existence, they may wish to incorporate methods of terminating an offer.

Consider

Alpha has communicated an offer to Beta, but following an offer from Charlie of an additional £5,000 on the asking price, Alpha wishes to retract the offer. If they wish to terminate the offer, they must communicate the termination before the acceptance has taken place.

p. 101

5.4.1.2 Termination of an offer

It would not be prudent to make an offer and then have that offer last for an indefinite time. The offeror can incorporate whatever terms they wish into the contract, but because many contracts are not in writing (and contracts of sale need not be—see Sale of Goods Act 1979, s. 4) this 'time-scale' issue may not have been fully considered. Any offer which has been withdrawn before acceptance takes place stops any true acceptance. As a corollary, where an offer is accepted before it is withdrawn the other party must continue with the contract.

Termination can occur in a variety of ways, such as:

- *The death of the offeror:* If the offeror has made an offer that has not been accepted before their death, then the offer dies with them. If the offer has been accepted and then the offeror dies, where practicable the contract must still be performed (by the dead person's estate or executors). However, if the contract requires some element of personal service by the offeror (such as in contracts of employment) the contract will come to an end under the doctrine of frustration.
- *Expiry of a fixed time limit:* As stated previously, the offeror may incorporate any terms into a contract by which they are willing to be bound. This may include a time limit for acceptance which must be adhered to (as acceptance is full and complete acceptance of the offeror's terms). If the time limit for acceptance expires, then the offer dies and cannot be later accepted.

Consider

Alpha has informed Beta that the offer for the purchase of the 3D printer will remain open until 12pm on Wednesday, with a written answer to be provided. This is Alpha's offer and therefore they may identify the terms for acceptance. Note, however, that simply because Alpha has informed Beta of the offer remaining open until 12pm Wednesday does not oblige Alpha to keep the offer open. There is no

consideration (see **Chapter 6**) from Beta to make this term enforceable.

- *Acceptance must be within a reasonable time:* The parties can incorporate terms into the contract, such as for time limits when an offer will expire, but where no such clause has been included, a reasonable time may be implied into the contract. What is reasonable, in this sense, is dependent upon the individual circumstances of a case:

Ramsgate Victoria Hotel v Montefiore (1865–66)

Facts:

Montefiore applied to purchase shares in the hotel in June but shares were not issued until November. Due to the time delay between his application and the issue of the shares, Montefiore refused to accept the shares and an action was raised for non-acceptance. It was held that whilst his offer of purchase did not contain any provision for expiry, the court considered that allotment must take place within a reasonable time, and this had not been achieved. As such Ramsgate's action failed.

p. 102

Authority for:

In the absence of any specific provision for the expiry of an offer the court will imply one which is reasonable in the circumstances. This will vary depending upon the item being contracted for—for example shares will have a relatively short time for an offer to be accepted; perishable goods such as fruit and vegetables will possibly have an even shorter time.

- *If the offer is rejected:* The offeree can inform the offeror that they do not wish to accept on the offer made, which will reject the offer and destroy it. Rejection can be explicit in this manner and it can be through the actions of the party (such as making a counter-offer).
- *If a counter-offer is made:* In the negotiations of contracts the offeror establishes the terms by which they are willing to be bound, but where the offeree does not accept but alters the terms of the offer to suit themselves, this is a counter-offer. The positions of the parties (as offeror and offeree) are reversed. The legal significance of contractual negotiations is that any counter-offer destroys the original offer and means that the previous offer cannot later be accepted. The stages of offers/counter-offers can be seen in **Figure 5.2** in relation to the negotiations in *Hyde v Wrench:*

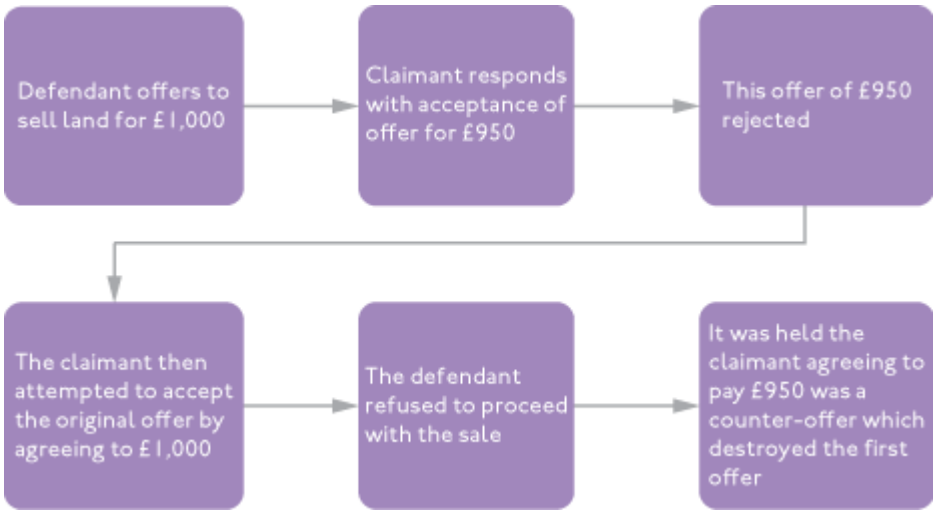

Figure 5.2 *Hyde v Wrench*

Hyde v Wrench (1840)

Facts:

On 6 June Wrench offered to sell land for £1,000 to Hyde. On 8 June Hyde replied, expressing 'acceptance' at a purchase price of £950. Wrench rejected the offer of £950 and later Hyde contacted Wrench stating he would accept the original offer and pay £1,000 for the land. Wrench declined to proceed with the sale. The court held that if Hyde had unconditionally accepted Wrench's offer to sell at £1,000 a binding contract would have been established that the court would enforce. However, by Hyde making his own offer of £950 he had (implicitly) rejected the first offer, which made it impossible to accept it at a later date.

Authority for:

A counter-offer terminates the original offer.

Care has to be taken when involved in negotiations. If a party attempts to obtain the best terms and reject an offer through their counter-offer, they will be unable to accept on that previous offer unless the other party offers it again.

- *Revocation of the offer:* The offeror has the right to revoke their offer at any time until acceptance has taken place. This is true even where the offeror has promised to keep the offer open for a specific period of time (*Dickinson v Dodds,* covered later). The exception to this general rule is where the offeree has provided some consideration for the 'benefit' of the offer remaining available. The stipulation to this rule is that the onus is on the offeror to inform those to whom they have made the offer that it has been revoked. As such, it is incumbent on the offeror to effectively communicate the revocation to the offeree (*Payne v Cave*, see **5.4.1.1**).

p. 103 ↵ When communicating through the post, revocation is not effective until it has been communicated and hence received, by the offeree:

Byrne & Co. v Leon Van Tienhoven & Co. (1879–80)

Facts:

The case involved the sale of tin plates. An offer was sent to the claimant on 1 October with a revocation of this on 8 October. However, the claimant received the original offer on 11 October and confirmed its acceptance by telegram. It further sent a letter of acceptance on 15 October. On 20 October, the claimant received the defendant's letter of revocation and brought an action for breach of contract.

Authority for:

The postal rule differs when considered in relation to revocation. It is not sufficient to post a letter of revocation for it to be effective, it must be communicated.

This is unlike the postal rule on acceptance where acceptance takes effect on posting whether this is received or not.

Consider

Alpha's letter retracting their offer of the 3D printer to Beta would therefore only be effective when received (9am on Friday), not when posted. However, let us refer to the second element of the question about Beta's knowledge of the completed contract prior to Beta posting the letter of acceptance. Revocation must be communicated and if Beta knew before posting their acceptance of the 3D printer no longer being available for sale, this would satisfy the requirement of effective communication.

p. 104 ↵ Revocation of an offer is also effective where this has been communicated to the offeree by a reliable third party rather than the offeror:

Dickinson v Dodds (1875–76)

Facts:

On 10 June 1874 Mr Dodds provided a document to Mr Dickinson stating that he would agree to sell his houses to Dickinson for £800 and the offer would remain open until 9am, 12 June. Dickinson had decided on the morning of 11 June to accept the offer but did not signify this to Dodds, as he believed he had until 9am the following day to communicate his acceptance. In the afternoon of 11 June Dickinson was informed by an agent for Dodds that Dodds had agreed to sell the property to another person (and hence had implicitly revoked the offer to Dickinson). On hearing this news Dickinson sought to accept the offer through a formal letter. However, Dodds proceeded with the sale to the third party. Dickinson attempted to have this agreement rescinded and have his 'contract' enforced. The Court of Appeal held that the document sent to Dickinson was an offer that could be withdrawn at any time before it was accepted insofar as the revocation was communicated to the offeree.

Authority for:

Revocation of an offer can be effective through express words and also some act inconsistent with the continuance of the offer (in the present case selling it to another person).

In situations of 'unilateral' contracts (whereby one party makes an offer which can be accepted by a member of a class of persons to whom the offer has been made—for example *Carlill v Carbolic Smoke Ball Co*., covered at **5.4.1**) the option to revoke the offer may be more difficult. In *Carlill*, it would be quite unrealistic to communicate the revocation to every person who may have seen the advertisement in a newspaper, but taking reasonable steps (such as another advertisement in the same newspaper revoking the offer) may be acceptable. Revocation can occur at any time *until* it has been accepted, but if the acceptance includes the performance of an act, once that act has been started (as acceptance through conduct) it may not be revoked:

Errington v Errington and Woods (1952)

Facts:

Mr Errington wished to provide his recently married son with a home and so purchased a house through a building society by paying a lump sum and leaving the balance on the mortgage to be paid by weekly instalments. The father kept the title to the house but promised that if his son and daughter-in-law paid the instalments he would transfer the ownership to them. The father died before the debt on the house was fully repaid and left all his property, including the house, to his widow. The widow brought an action for possession of the house against the daughter-in-law but this failed as the father had created ↵ a contract and once this had been accepted, although incomplete of full

performance, it could not be revoked. The father had made a promise to his son and daughter-in-law and only if the son and daughter-in-law had failed to continue with the payments on the mortgage (the acceptance) would revocation be possible.

Authority for:

Once acceptance has begun (albeit here incompletely) it cannot be subsequently revoked.

5.4.2 Acceptance

Having established that an offer has been made, the offeree has the option to accept or decline. This creates the agreement that will begin the process of substantiating the essential features of a legally binding contract. Agreement may be relevant when considering the issue of mistake to a contract and how this impacts on the enforceable contract.

5.4.2.1 Unconditional and full acceptance

The offeror establishes the terms by which they are willing to be bound, and as such, acceptance of those terms must be unconditional. In many cases this may constitute a 'yes' or 'no' reply to an offer made. There are situations where such a simple exercise may not be possible and it requires the courts to give direction as to how acceptance may be established:

- *The battle of the forms:* The 'battle of the forms' is commonly referred to when organizations use standard form contracts. The most common example of standard form contracts is where you purchase an item from a high-street retailer. The contract you receive has already been drafted and you must either accept these terms, or decline them and (usually) obtain the item elsewhere. This method is adopted to save time for both parties and to stop protracted negotiations at the store. When two businesses are trading and each has its own standard form contract then problems can arise. How can the courts settle disputes between them when there is disagreement as to which contract is to be used?

British Road Services v Arthur Crutchley Ltd (1968)

Facts:

The claimants delivered a consignment of whisky to the defendant's warehouse and the claimant's delivery driver handed the defendants a note to be signed that contained, among other things, the claimant's terms and conditions. This note was stamped by the defendants as 'received under Arthur Crutchley Ltd's conditions' and handed back to the driver. It had to be decided on which terms the contract was based as the consignment of whisky was stolen.

Authority for:

The court held that by stamping the delivery note, this established a counter-offer that was impliedly accepted by the driver delivering the consignment. Therefore, the contract had been made on the defendant's conditions.

p. 106 ↵ The Court of Appeal was faced with a similar case, and established the concept of the 'first/last shot approach' to determining on which of the parties' standard terms a contract was based:

Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd (1979)

Facts:

In May 1969 Butler, sellers of machine tools, were contacted by Ex-Cell-O to supply a machine. Butler provided in the quotation for a price of £75,535 and delivery to be made in 10 months. The terms set out in the quotation contained a provision for a price variation clause whereby the goods would be charged at prices at the date of delivery. Ex-Cell-O replied with an order on its terms and conditions (including a 'tear-off' acknowledgement strip) that did not include a price variation clause. This was completed and returned by Butler. Various communications passed between the companies but none settled the 'dispute' over the acceptance or otherwise of the price variation clause. The machine was ready for delivery in September 1970 and Ex-Cell-O accepted delivery in November. Butler, when invoicing Ex-Cell-O, invoked the price variation clause and requested a further £2,892 in addition to the quoted price. It was held that the parties had established an agreement, but it had not been fully expressed. Hence, to determine which was the effective contract and thus the terms binding the parties, reference had to be made to whatever documents were present. As Ex-Cell-O had included an acknowledgement strip that Butler signed and 'accepted', the contract was based on these terms, without the price variation clause.

Authority for:

In agreements between businesses using standard form contracts, the 'first' or 'last shot' approach may be adopted by the courts when identifying the operative contract.

Butler v Ex-Cell-O identified the 'first/last shot approach' adopted by the courts. During the negotiations between the parties the issue of the incorporation of the price variation clause had not been settled. However, a machine had been produced and delivered to one party, and used by the other, and the courts had to determine which contract to use. It would be unfair of the courts to state that, having studied the facts, no contract was present. It would be very difficult to identify with any certainty the benefit gained by the party

using the product to apportion and distribute that value. Consequently, the court had to determine which was the operative contract. As Butler had signed the 'tear-off' acknowledgement of Ex-Cell-O's order, and the terms of this order were to prevail, this 'first shot' was the operative contract.

Tekdata Interconnections Limited v Amphenol Ltd provided further evidence of the significance of the first/last shot approach. This ensures that the party which 'fires the last shot' in commercial transactions will have the contract established on its terms.

5.4.2.2 Communication of acceptance

Outward evidence of the offeree's intention to accept an offer has to be demonstrated and communicated in order for effective acceptance to occur. As such, where the offeror ↵ identifies silence as a means of acceptance, this will generally not be effective. The presumption is that if the offeree wishes to be bound by the contract, they will at least go to the trouble of making some outward sign/gesture to indicate the acceptance. Insofar as the rule on silence is adhered to, the offeror may insist on how acceptance is to be achieved. If included in the offer, then it must be complied with to provide effective acceptance:

p. 107

Yates Building Co. Ltd v R J Pulleyn & Sons Ltd (1975)

Facts:

The defendant issued the claimant with an option to purchase land and stipulated that the response must be made through recorded or registered post. The claimant sent the acceptance through ordinary mail which the defendant rejected, referring the claimant to the requirements for acceptance. A claim was made for breach of contract.

Authority for:

There was no enforceable contract. As the offer established clear terms by which the manner of acceptance was to be made, even an equally effective method of acceptance was not sufficient.

The general rule, however, in the absence of specific forms of communication of acceptance is that where acceptance deviates from that stipulated in the offer but it is as quick, or quicker, than that required in the offer, this will generally be accepted as a valid method of acceptance.

Consider

Alpha has required acceptance to be through written evidence. A letter will be sufficient for this purpose and this was communicated by the expiry of the time limit imposed by Alpha.

The overriding element for acceptance to be established is that it must be communicated. Examples of the communication of acceptance may be through written reply, an oral statement, or implied through conduct. Conduct has already been demonstrated as acceptance in *Carlill*.

Alexander Brogden v Metropolitan Railway Co. (1877)

Facts:

p. 108

The directors of the Metropolitan Railway Company (MRC) brought an action against Brogden & Co. for a breach of contract, a contract that Brogden denied was even in ↵ existence. Brogden were colliery owners in Wales and had supplied MRC with coal and coke for use in their locomotives. A draft agreement was created to formalize the arrangement but no further action was taken on it, although orders continued on the basis of the terms stated in the document. Several orders passed between the companies and in these the document was frequently referred to. Problems began in the supply between the companies, including deficient supplies of coal and excuses for lack of orders, until December 1873 when Brogden declined to continue the supply of coal. This led to the breach of contract claim.

Authority for:

A long-term relationship between parties could amount to evidence of an agreement (although formal written acceptance of a contract was missing). The parties' conduct was evidence of acceptance of contractual terms.

The postal rule of acceptance also applies even where that letter never reaches the offeror (subject to certain rules—see *Re London and Northern Bank, ex parte Jones* [1900]):

Dunlop v Higgins (1848)

Facts:

An offer for the sale of pig iron was accepted through the posting of a letter. However, bad weather delayed the delivery of the letter and led the seller to reject the 'acceptance' as being out of time. A breach of contract claim was made.

Authority for:

The court held that the contract had been established on the posting of the letter. This applies even if the acceptance never reaches its destination due to outside factors (such as weather, the fault of the post office, and so on).

- *Acceptance through conduct:* The House of Lords had to decide whether a completed contract had been established in *Brogden*. There was an assertion that the document was merely an intention to create a contract that would have meant no contract was in existence. However, it was held that a valid contract had been established between the parties due to their actual conduct. A contractual document had been drafted by the principals of the relevant companies and was used in negotiations between the parties, and whilst it had not been signed, the intentions from the parties' actions enabled an agreement to be deduced. Therefore, the breach of contract claim was successful.

The case was important in that a formal, written contract is not required to establish a valid contract. The parties' intentions may identify a contract and if a period of time establishes a pattern of behaviour which
p. 109 may place obligations and expectations on the parties, then this may 'harden' an agreement into a contract:
↵

Novus Aviation Limited v Alubaf Arab International Bank BSC(c) (2016)

Facts:

The parties were involved in discussions whereby Alubaf would provide funding for the purchase of an aircraft to be leased to Malaysian Airlines. A commitment letter and a management agreement were established before Alubaf pulled out of the deal—before the aircraft had been purchased. A space for signatures was included in the commitment letter, which Alubaf had signed but Novus had not, although the parties continued to advance the transaction evidenced by the incorporation of new companies, the opening of bank accounts, and the appointment of directors. Novus argued that a legally binding agreement had been established and Alubaf's withdrawal was a repudiatory breach.

Authority for:

The Commercial Court heard arguments from Alubaf as to why a binding contract was not established, including that its Head of Treasury and Investment did not have the authority to bind the company (through signing the commitment letter). The arguments were rejected and Novus was awarded damages. The case illustrated the acceptance of the contract through conduct. There was no express stipulation that the signature strip on the letter had to be signed and the parties' conduct was sufficient evidence of acceptance. More careful drafting of the documents could have avoided this problem—express stipulations will override inferences based on conduct.

- *Silence as acceptance:* The offeror may not have stipulated a specific form which acceptance must take, and consequently the courts may consequently decide a 'reasonable' method. It must be noted, however, that, as a general rule, the offeror cannot dictate the offeree's silence as a valid acceptance:

Felthouse v Bindley (1862)

Facts:

Mr Felthouse's nephew had placed several horses for sale by auction. Before the auction took place, Felthouse wrote to his nephew stating that he wished to purchase one of the horses and included the following in this communication 'If I hear no more about him, I consider the horse mine at £30.15s.' The nephew intended to sell the horse to his uncle, and made no reply. The nephew approached the auctioneer (Mr Bindley) and informed him that the horse was not to be included in the auction. The auctioneer, by mistake, did sell the horse and Felthouse attempted to stop the 'sale'. However, Felthouse only had the right to sue if he actually owned the horse and the court concluded that he did not as there had been no acceptance of his offer to buy the horse. The court held that the acceptance must be communicated clearly and could not be interpreted from the silence of the nephew.

Authority for:

Silence is not effective acceptance of an offer.

p. 110 ↵ This case is relevant to the necessity for an outward sign of acceptance and for the offeree to positively communicate their acceptance. This is because the offeree should not be placed under the burden of a rejection every time an offer is forwarded to them and if the offeree does intend to accept an offer, they can make the effort to fulfil this requirement without undue inconvenience. However, it is possible to infer acceptance from silence between businesses, and it may be allowed if requested by the offeree. In the event that unsolicited (not requested by the recipient) goods are sent to a business, then s. 2 of the Unsolicited Goods and Services Act 1971 provides that a subsequent demand for payment constitutes a criminal offence. Protection is also given to consumers who are sent goods that they have not ordered through the Consumer Protection (Distance Selling) Regulations 2000.

Consider

Alpha have been communicating with Beta through the post and have asked for acceptance of their offer to be evidenced in writing. As such, if the postal rule of acceptance is applicable, did Beta's acceptance take place at 7pm on Tuesday (when the letter was posted) or 11.30am on Wednesday (when received)?

- *Acceptance by post:* A contract may be created through an exchange of documents via the post. Where offer and acceptance takes place through written communication rather than face-to-face negotiations, there exists the possibility that such communication may be lost, undelivered, or delayed through postal strikes or public holidays. The general rule established with the post (where it is a valid means of acceptance) is that acceptance is valid on posting:

Adams v Lindsell (1818)

Facts:

The parties were contracting for the sale of wool and were communicating by means of the post. In the course of these communications the defendant misdirected the letter of acceptance and it was subsequently delayed. Due to this delay, the acceptance was not received before the defendant, not receiving the anticipated acceptance by the due date, sold the wool to another party. The court held that as a matter of business efficacy, acceptance was effective when posted. This established the 'postal rule' of acceptance.

Authority for:

Where the post is a valid means of acceptance (usually because the offer has been made through the post or the offeror asks for the post to be the means of acceptance) then acceptance is binding upon posting, not upon the receipt of the acceptance.

The postal rule applies insofar as the correct address and postage were included in the sent letter:

p. 111

Re London and Northern Bank, ex parte Jones (1900)

Facts:

Dr Jones made an offer in a letter and handed this to a postman to be delivered. The postman had no authority to receive letters, only to deliver them. Despite an attempted revocation later the same morning, the bank attempted to accept on the offer. Was there a contract?

Authority for:

The general rule of contract law—that acceptance of an offer is effective on posting—does not apply where that letter has been posted incorrectly (not posted in a postbox, handed to the post office, correctly addressed, safely sealed, postage paid and so on).

The court was adamant that this was fair. It hypothesized that if the offeror was not bound under a contract until the acceptance by the offeree had been received, then the offeree should not be bound until he received notification that the offeror had received his acceptance and assented to it. This system could not enable businesses to carry out their operations with any certainty and consequently the decision was based on business efficacy. Even if the letter was delayed, where this is not the fault of the offeree, there was still valid acceptance:

The Household Fire and Carriage Accident Insurance Company v Grant (1878–79)

Facts:

Mr Grant had applied to purchase shares in the claimant company. Whilst his application was accepted and his name added to the list of registered shareholders, his share certificates were not sent nor was any letter confirming the issue received by Grant. Grant did not pay for his shares but dividends were credited to his bank account. When the company went into liquidation the liquidator sought payment from Grant for his shares. Grant objected but the court held there was a valid contract and he owed the payment for his shares.

Authority for:

The postal rule was effective and despite a letter of acceptance not reaching Grant, the contract was effective on posting. The judges held there was value in the postal rule, and its advantages outweighed any disadvantages.

The postal rule is not effective, however, in situations where the express terms of the contract state that the acceptance must be received and in writing. Nor does it apply, per Lawton LJ in the following case, where the
p. 112 rule would 'produce manifest inconvenience and absurdity'. ↵

Consider

Would *Holwell Securities v Hughes* alter your answer to the earlier 'Consider' point about when acceptance will be deemed to have been effective? If Alpha wants evidence of acceptance in writing, this would suggest it became effective when received at 11.30am on Wednesday.

Holwell Securities v Hughes (1974)

Facts:

Dr Hughes granted to Holwell a six-month option to purchase a property with notice to be provided in writing. Five days prior to the end of the six-month period, Holwell attempted to exercise the option through the posting of a letter. Hughes claimed this was not received and refused to proceed with the sale. Holwell argued the postal rule applied and acceptance was valid on posting.

Authority for:

The postal rule was still 'good law' but it did not displace the general principle of contract law of communication of acceptance. Where the parties required 'notice in writing,' this overrode the postal rule and required actual notice of acceptance.

- *Instantaneous forms of communication:* Compared with the postal rule and its 'business efficacy' decision, the courts have traditionally reverted to the common rule of acceptance being effective when communicated and received (in cases involving instantaneous forms of communication):

Entores v Miles Far East Corporation (1955)

Facts:

Entores, based in London, made an offer on 8 September 1954 to agents (based in Holland) of Miles Far East Corporation by telex for the purchase of 100 tons of copper cathodes. This offer was accepted on 10 September through telex received in Entores' offices in London. Entores claimed a breach of contract and sought to serve notice of a writ on Miles Far East but could only do so if the contract was created in England and therefore came under the jurisdiction of English law. Miles Far East alleged the contract was made in Holland and was consequently not within the jurisdiction of the court. The Court of Appeal held that due to the instantaneous means of communication in this case, acceptance was effective (and the contract concluded) in London—and within the jurisdiction of the English court.

Authority for:

With instantaneous means of communication, the 'postal rule' of acceptance is departed from and acceptance is effective when received, not when posted.

p. 113 ↵ This ruling can be extended to other forms of instantaneous forms of communication such as a telephone, fax, email, and text message.

Conclusion

This chapter has sought to identify the importance of the common law in the development and evolution of the rules underpinning contract law. Offer and acceptance are essential features in the formation of an agreement, and these are furthered by the requirement of consideration, intention to create legal relations, and to have certainty of terms. These last three elements are considered in **Chapter 6**.

Summary of main points

- Offer and acceptance are the first stages in establishing an agreement that may form a legally binding contract.

Offer

- An offer is the statement of terms by which the party is willing to be bound.
- The offer can be made to a person, group, or even the entire world.
- An offer has to be distinguished from an invitation to treat (which is an invitation to negotiate).
- Items on display on the shelves in a shop, advertisements in newspapers, items displaying a price tag in shop windows, and information in auction catalogues have traditionally been held to be invitations to treat.
- Where detailed information is provided on the quantities of items and the time and date of their limited availability, the courts have been more willing to hold these as offers rather than invitations to treat.
- An offer may be accepted until it is terminated.
- Termination can occur by a party's express words, actions, through a counter-offer, lapse of time, or through some other consistent action.
- The offeror can revoke the offer at any time until acceptance takes place but this must be communicated and received by the offeree.

Acceptance

- Acceptance can only be made by the offeree or their agent.
- Where standard form contracts are used, the 'battle of the forms' is decided by the 'first' or 'last shot' approach.
- There must be outward evidence of acceptance. Silence, generally, will not constitute valid acceptance.
- The 'postal rule' establishes that where the post is a valid means of acceptance, acceptance is effective upon posting, not when the letter is received.
- With instantaneous forms of communication, the standard rule of acceptance being effective when received remains.

Summary questions

Essay questions

1. ‘The “battle of the forms” when applied to businesses trading using their own standard term contracts may be resolved through the “first shot” or “last shot” approach. This is a wholly unsatisfactory situation and must be remedied through legislative action.’

   Discuss the statement with reference to case law and judicial pronouncements.

p. 114

2. At what point does a display in a shop window become an offer to sell rather than an invitation to treat? Compare and contrast the cases of *Pharmaceutical Society of Great Britain v Boots Cash Chemists*, *Fisher v Bell*, and *Leftkowitz v Great Minneapolis Surplus Stores*.

Problem questions

1. Jack is considering selling his prized collection of comedy books to Diane. On Monday Jack writes to Diane offering to sell the collection for £100 and he further provides that he will keep the offer open until Thursday at 5pm. On Tuesday, following a change of mind, Jack sends a fax to Diane revoking the offer; however, Diane’s fax machine is out of paper and she does not receive the message until Wednesday morning.

   On Tuesday, Diane had already posted to Jack her acceptance of the offer. Jack never received the letter of acceptance and as such at 6pm on Thursday Jack sold the collection to Bill.

   Advise the parties of any legal rights and liabilities.

2. Mortimer wished to sell his antique gold watch. He therefore sent his chauffeur with a note to Randolf offering to sell him the watch for £50,000 and asking Randolf to give his reply to the chauffeur.

   Being undecided, Randolf did not give his reply to the chauffeur and sent him back to Mortimer. One hour later Randolf posted a letter to Mortimer accepting his offer.

   Has a valid contract come into existence?

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-5-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further Reading

Books and articles

Jackson, B. S. (1979) ‘Offer and Acceptance in the Supermarket’ *New Law Journal*, Vol. 129, p. 775.

Rawlings, R. (1979) ‘The Battle of the Forms’ *Modern Law Review*, Vol. 42, No. 6, p. 715.

Unger, J. (1953) ‘Self-Service Shops and the Law of Contract’ *Modern Law Review*, Vol. 16, No. 3, p. 369.

Twitter links

#contractlaw

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A very useful link to debate, commentary, and analysis regarding all aspects of domestic and international contract law—*note*, this source is not regulated in the same way as are journals, books, and official law firm webpages. As such, exercise caution as to the veracity of the information presented.

Online Resources

Visit the online resources *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-05>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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