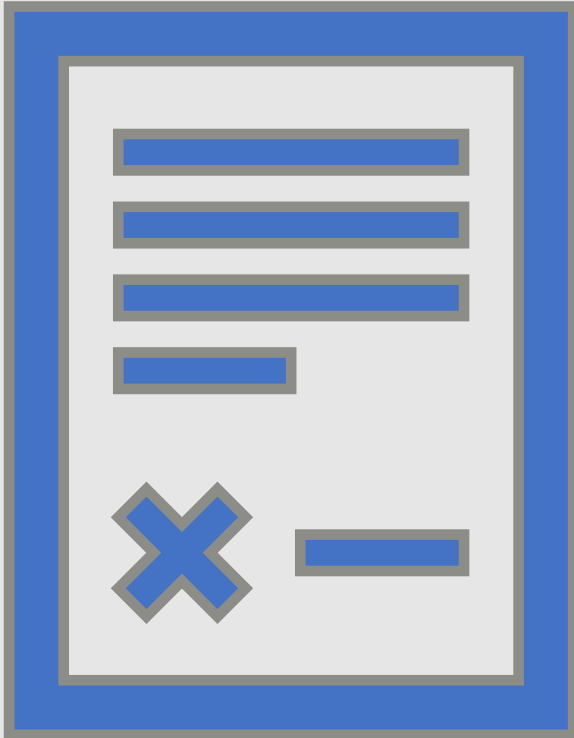


THE LAW OF CONTRACT



HKU | LAW

Lecture 3: Acceptance

Benjamin M. Chen

16 September 2024

Plan for Today

- Acceptance
- Sufficiently Certain and Capable of Being Enforced



Contract Formation

- (1) Offer made by one party
- (2) Offer accepted by the other party
- (3) The parties intended to create a legal relation
- (4) The terms of the contract are sufficiently certain and capable of being enforced
- (5) There is consideration on both sides

Battle of the Forms

The background of the slide is a dark, textured image. It appears to be a reproduction of a painting depicting a chaotic battle scene. In the center, several figures in historical or military attire are engaged in combat. One figure in a red cloak is prominent on the right, while others in dark uniforms are on the left. The scene is filled with movement, suggesting a struggle or conflict. The overall tone is somber and dramatic, with muted colors and visible brushstrokes.

Buyer asks seller for a quotation.

Seller quotes a price, accompanied by a list of terms and conditions.

Buyer places an order, attaching a different list of terms and conditions.

Seller delivers the goods and sends an invoice referencing its list of terms and conditions.

Battle of the Forms

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

Facts

- On May 23, 1969, the plaintiff sellers offered to defendant buyers a machine tool at a price of £75,535, for delivery in ten months. On the reverse of the quotation were 16 conditions, including:
 - *“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.”*
 - *“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.”*



Battle of the Forms

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

Facts

- Buyers replied four days later with an order that asked plaintiffs to “[p]lease supply on terms and conditions as below and overleaf.” The terms and conditions proposed by the buyers were different in various aspects from those of the quotation. In particular, the price variation clause was absent.
- On the foot of the order was a tear-off slip: “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.”



Battle of the Forms

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

Facts

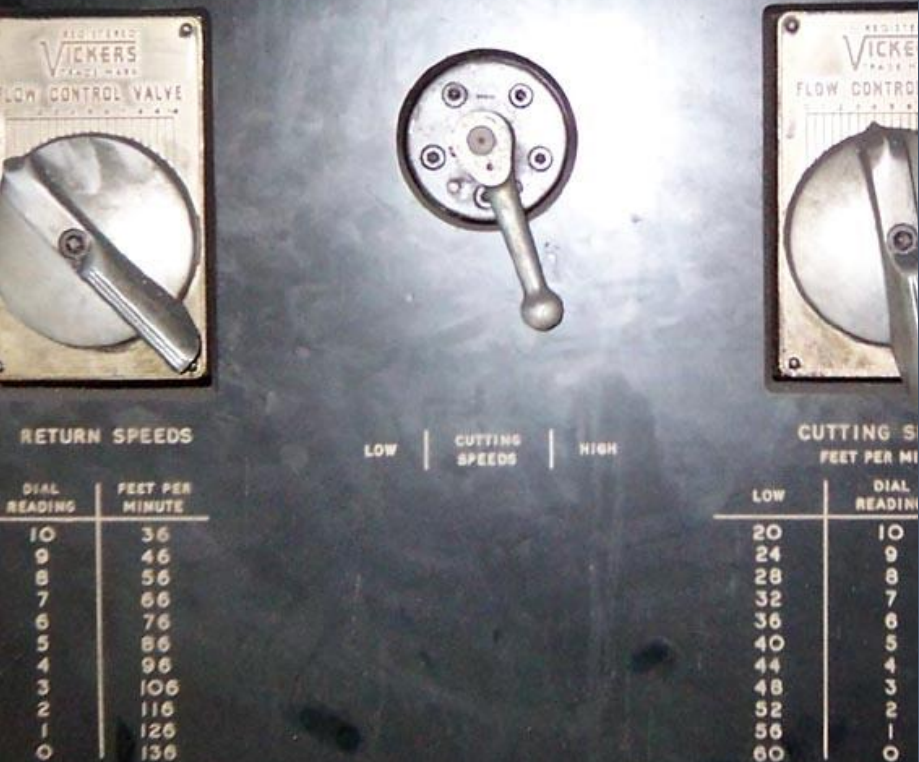
- On June 5, 1969, sellers replied to the buyers: “We have pleasure in acknowledging receipt of your official order dated May 27 covering the supply of one Butler Double Column Plane-Miller. This being delivered in accordance with our revised quotation of May 23 for delivery in 10/11 months, i.e., March/April 1970. We return herewith duly, completed your acknowledgment of order form.”
- The machine was ready around September 1970 and sellers sought to charge buyers an additional £2,892 due to the rise in cost between May 27, 1969, when the order was given, and April 1, 1970, when the machine ought to have been delivered. The buyers rejected the claim.



BUTLER

HYDRAULIC PLANE

8-0 x 2-6 x 2-6



Battle of the Forms

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

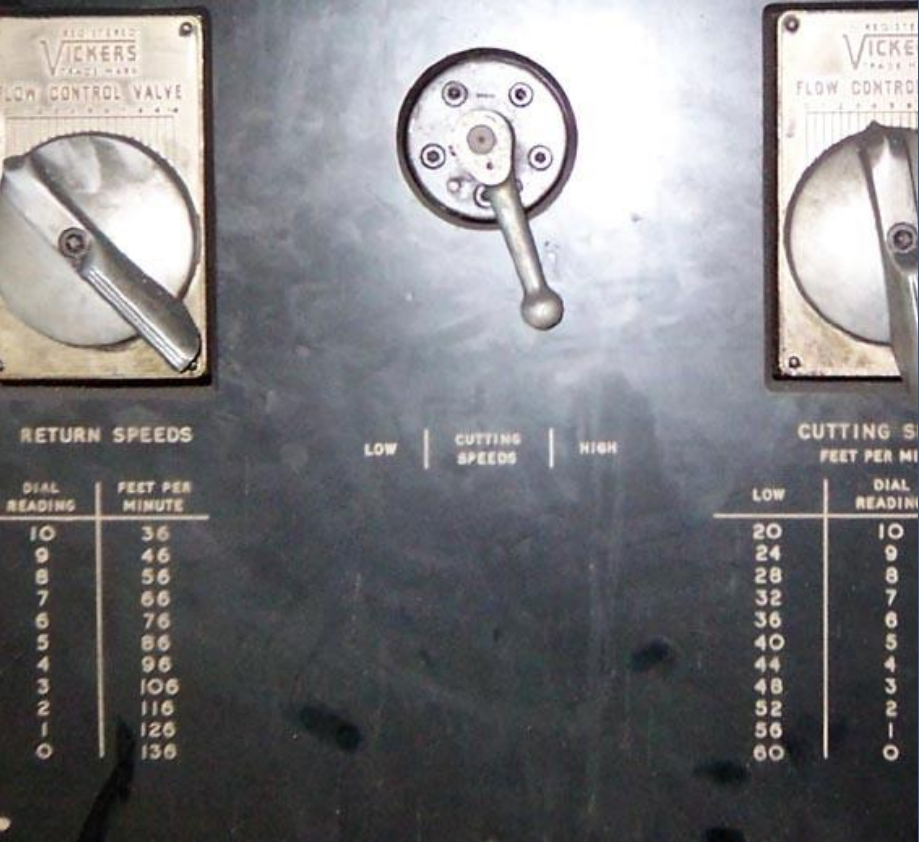
Held

- The contract between the parties was formed on the buyers' terms and conditions and did not include the price variation clause.
- The majority applies the mirror image rule.
- Sellers' quotation of May 23, 1969, was an offer which was rejected by buyers' order of May 27, 1969. This order was accepted in the two letters dated 4 and 5 June 1969, the latter enclosing the formal acknowledgement which said: "We accept your order on the terms and conditions stated thereon."
 - The reference to "[the sellers'] revised quotation of May 23" only identified the machinery and the price.

BUTLER

HYDRAULIC PLANE

8-0 x 2-6 x 2-6



Battle of the Forms

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

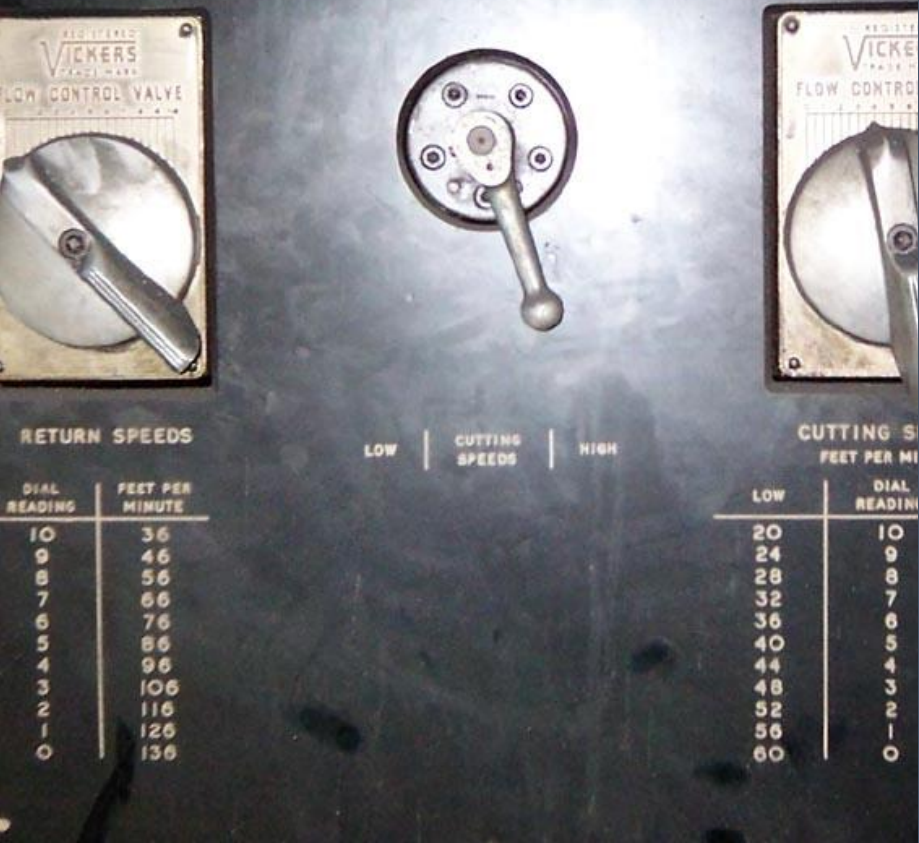
Held

- Denning MR: “[O]ur traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date . . . 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 . . . 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 . . . The difficulty is to decide which form, or which part of which form, is a term or condition of the contract.”

BUTLER

HYDRAULIC PLANE

8-0 x 2-6 x 2-6



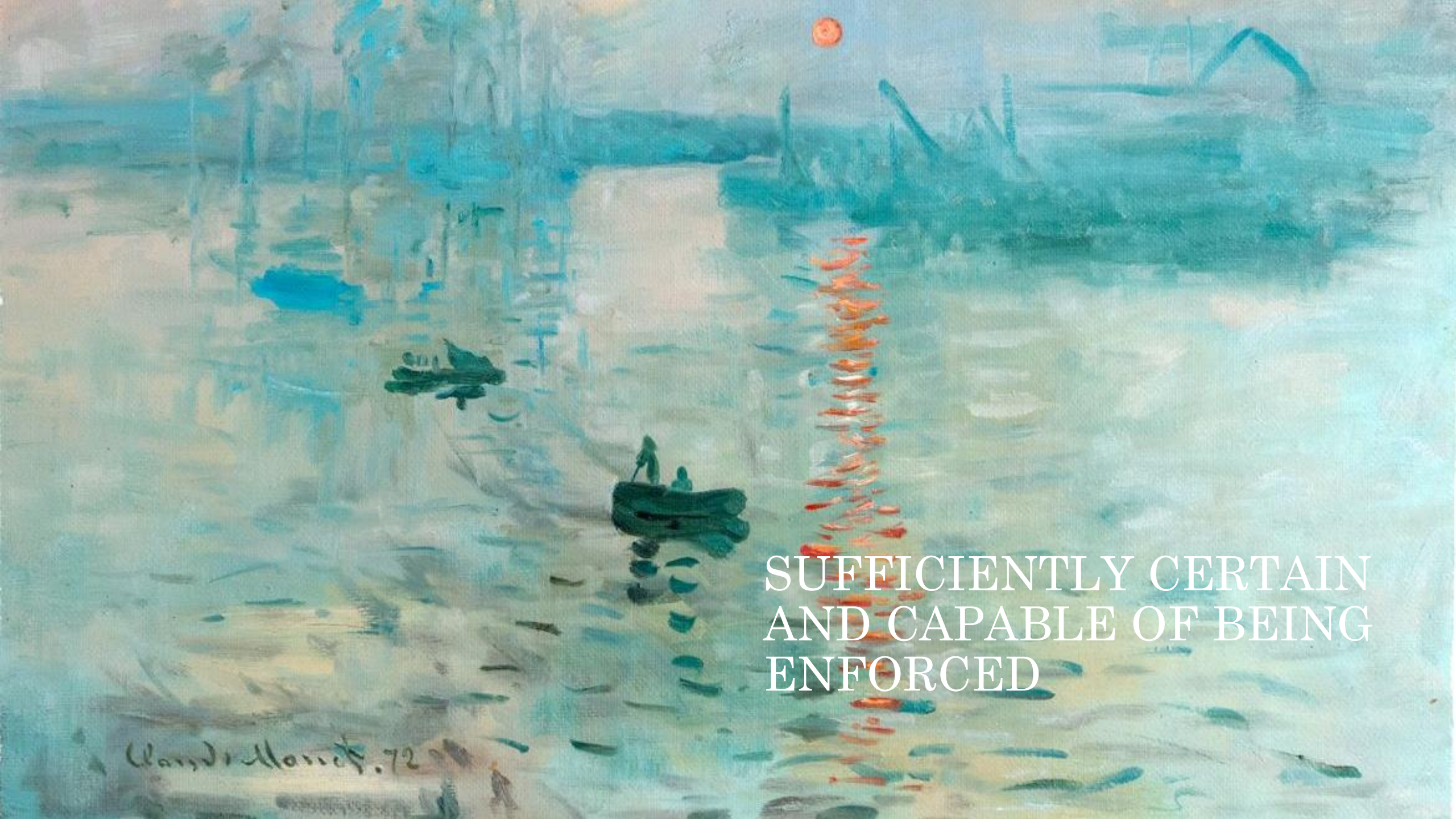
Battle of the Forms

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

Held

■ Denning MR:

- Last Shot: The party that puts forward the latest terms and conditions not objected to by the other party.
- First Shot: A buyer purporting to accept a seller's offer should not be able to impose different terms and conditions "if the difference is so material that it would affect the price" unless the attention of the seller was drawn to such difference.
- Knock Out: The terms and conditions of both parties are to be "construed together." If they cannot be "reconciled so as to give a harmonious result," the conflicting terms do not form part of the contract and any gaps are filled by reasonable implication.



SUFFICIENTLY CERTAIN
AND CAPABLE OF BEING
ENFORCED

J.M.W. Turner. 72

Contract Formation

- (1) Offer made by one party
- (2) Offer accepted by the other party
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Vague, Incomplete or Uncertain Terms

Where parties have omitted or glossed over key terms of their agreement, courts may find there to be no contract. Agreements that are vague, incomplete, or uncertain but have induced performance are especially difficult:

- on the one hand, courts are not keen to make a contract for the parties and impose obligations the parties did not contemplate;
- on the other hand, courts are also reluctant to deny the legal effect of agreements that the parties believed to be binding.

The resolution of such cases is fact-specific.

Too Vague or Uncertain

May and Butcher Ltd v. The King
[1934] 2KB 17, House of Lords



Facts

- Suppliants alleged a contract with Controller of the Disposal Boards for the purchase of used tentage. In a letter dated 29 June 1921, the Controller wrote, stating that in consideration of a deposit of “£1,000 as security for the carrying out of this extended contract,” the Commission confirmed the sale “of the whole of the old tentage which may become available...up to and including December 31, 1921”. Among the terms:
 - ❑ *“The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission”.*
 - ❑ *“It is understood that all disputes . . . will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889”.*

Too Vague or Uncertain

May and Butcher Ltd v. The King
[1934] 2KB 17, House of Lords



Facts

- In a second letter dated 7 January 1922, the Disposals Controller confirmed the sale of tentage that might become available up to 31 March 1923:
“the prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free on rail . . . nearest to the depots at which the said tentage may be lying . . .”
- In August 1922, after suppliants’ proposals were rejected by the Controller, the Disposals Board wrote stating that they considered themselves free of the agreement.
- Suppliants filed a petition of right claiming an injunction against the sale of the remaining tentage and compensation for the damage done to them.

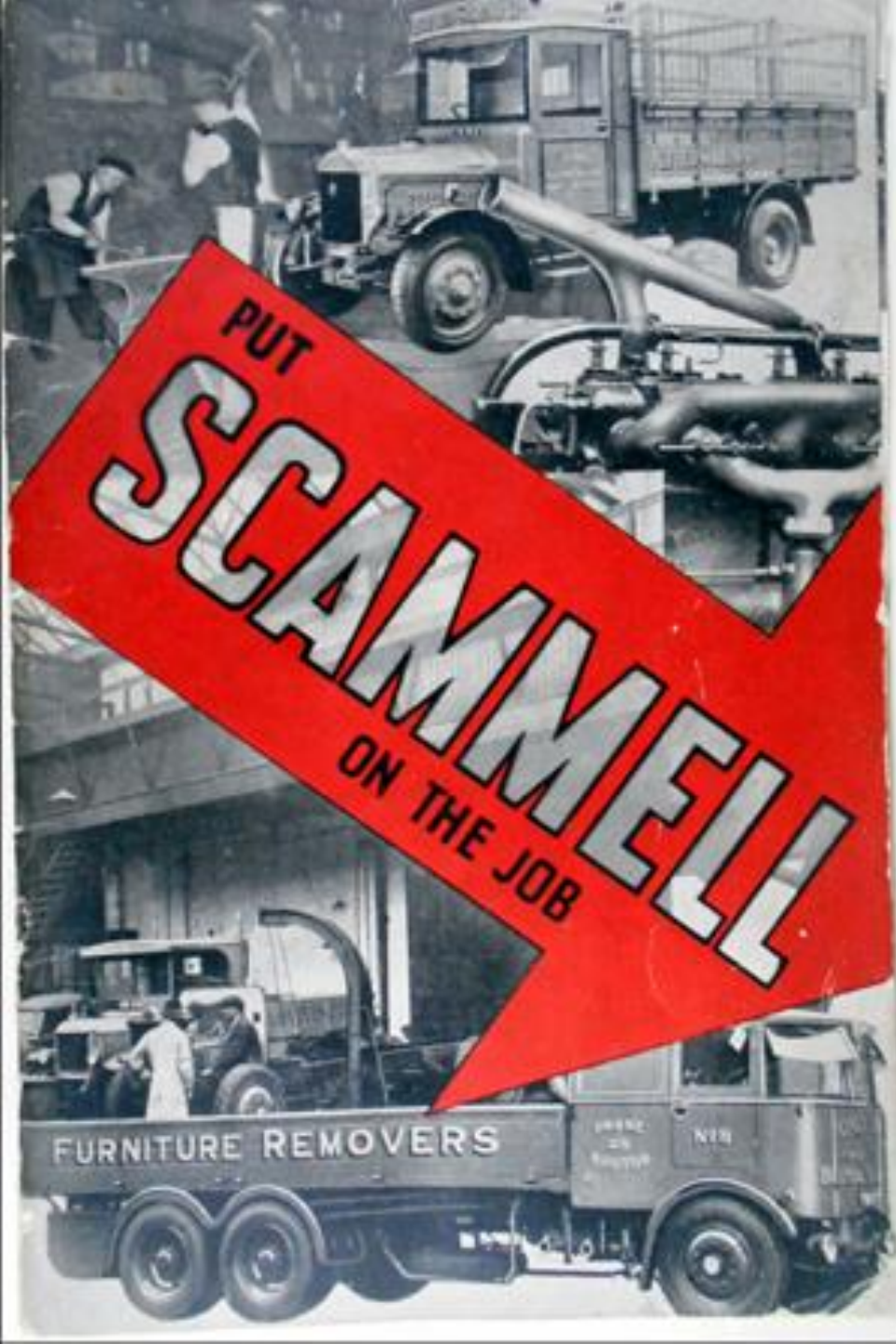
Too Vague or Uncertain

May and Butcher Ltd v. The King
[1934] 2KB 17, House of Lords

Held



- No contract existed because price was an essential term left uncertain.
- If there were no price term, the Sales of Goods Act, 1893, would impute a reasonable price. But here, there was a provision that the parties were to agree.
- The parties could have provided for an arbitrator to fix the price, but they did not. The general arbitration clause applied to disputes arising from the agreement. But here, there was a failure to agree.



Too Vague or Uncertain

Scammell and Nephew Ltd v. Ouston
[1941] AC 251, House of Lords

Facts

- At an interview, defendants agreed to sell plaintiffs a Commer van for £268 and to take plaintiffs' Bedford van at a trade-in value of £100.
- The next day, at defendants' request, plaintiffs formalized this agreement in a letter which stated that "this order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over a period of 2 years".
- The parties later had a disagreement over the condition of the Bedford van which defendants refused to take in part-exchange.
- Plaintiffs claimed damages for breach of contract.

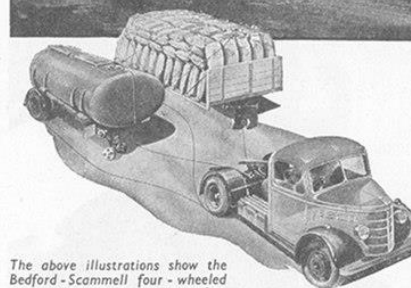
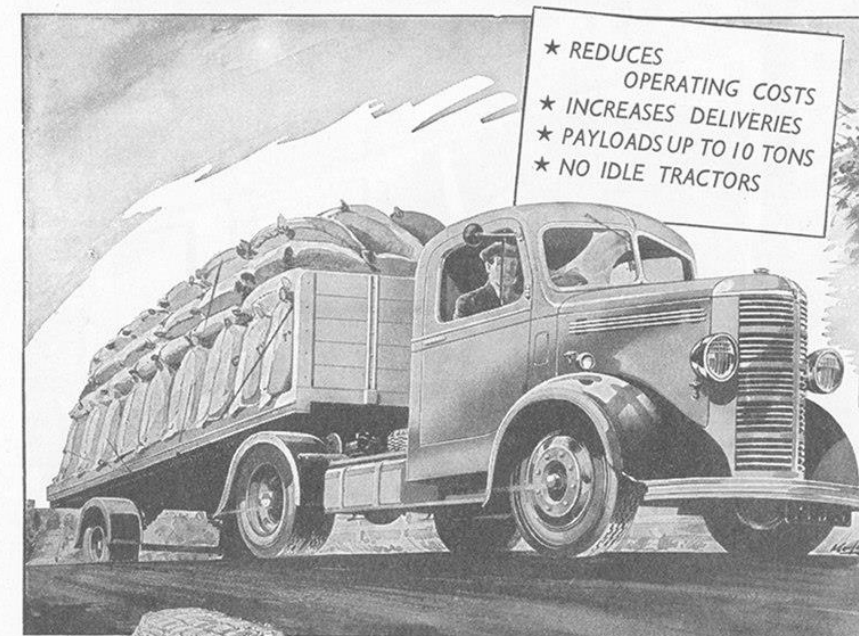
Too Vague or Uncertain

Scammell and Nephew Ltd v. Ouston
[1941] AC 251, House of Lords

Held

- No contract existed because of the vagueness of the hire-purchase term.
- A hire-purchase contract is a contract of hire that gives the hirer an option to purchase if specified conditions are met. It is not a contract of sale.
- In addition, there are many varieties of hire-purchase contracts, differing as to termination, warranty of fitness, duties of repair, interest, etc, and there was no evidence to suggest that there were “well-known ‘usual terms’ in such a contract”.

SCAMMELL INSTANTANEOUS COUPLING SAVES LOADING DELAYS



The above illustrations show the Bedford-Scammell four-wheeled tractor in operation. Think of it, an articulated vehicle which is definitely and literally uncoupled for coupled in a second or two. By this method the tractor is always working and no time is lost while the load is being handled.

Two interchangeable types . . .

Scammell goods vehicles are articulated. They consist of a power unit and semi-trailers fitted with the Scammell instantaneous coupling gear, viz.: the well-known three-wheeled 'Mechanical Horse' for short hauls in built-up areas, and the four-wheeled tractors of approved makes for longer journeys (one tractor being interchangeable with two or more trailers).

★ GET THE
SCAMMELL STORY

SCAMMELL LORRIES LTD
WATFORD, HERTS.

Telephone : WATFORD 5231 Telegrams : Twelfton, Watford

Agreement Too Vague or Uncertain

May and Butcher (Dunedin L.J.): “As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration”.

Kwan Siu Man v. Yaacov Ozer [1999] 1 HKC 150

Facts

- The parties were tenant and landlord engaged in a dispute over possession. In 15 or 16 November 1991, they met by chance in the lift lobby of KY Mansion. Plaintiff agreed to purchase defendant’s flat for HK\$ 4.25 million. No other terms relating to the sale of the property were discussed.
- They were “very clear as to the belief that it was for the lawyers to deal with all other formalities and...expected them to do so”.
- After some correspondence about, among other things, the completion date of the sale, defendant called off negotiations in mid-February 1992. Plaintiff sought to enforce the oral agreement of 15 or 16 November.

Agreement Too Vague or Uncertain

Kwan Siu Man v. Yaacov Ozer [1999] 1 HKC 150



Held (Litton PJ)

- ❑ No “open contract”* arose from the oral agreement between the parties in the lift lobby.
- ❑ “[A]s is common knowledge in Hong Kong, the property market is highly volatile. Whatever might have been the position in England in the last century—when the concept of an “open contract” was first developed in a climate of a stable pound sterling and no inflation—in the Hong Kong of today, the date of completion is an essential term of any contract for the sale and purchase of land...”

Under the Conveyancing and Property Ordinance, contracts for the sale of real property must be memorialized. As explained by Bokhary PJ, an open contract is “one by which the vendor and purchaser simply agree upon the sale of an identified property at a stated price. The general law of property, so the expression goes, would then have to step in to supply all the other terms: including even the date for completion”.

Valid and Binding

Hillas & Co Ltd v. Arcos Ltd
(1932) 147 LT 503, House of Lords

Facts

- In an agreement dated 21 May 1930, appellants agreed to buy from respondents “22,000 standards of softwood goods of fair specification over the season 1930”.
- One of the conditions, clause 9, provided that “Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5% on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before the 1st Jan. 1931”.



Valid and Binding

Hillas & Co Ltd v. Arcos Ltd
(1932) 147 LT 503, House of Lords

Facts

- Appellants purported to exercise the option on 22 December 1930 but respondents had already agreed to sell their entire output for the 1931 season to a third party.
- Appellants claimed breach of contract and damages.



Valid and Binding

Hillas & Co Ltd v. Arcos Ltd
(1932) 147 LT 503, House of Lords

Held (Tomlin L.J.)

- There is a valid and binding contract.
- “[T]he parties were both intimately acquainted with the course of business in the Russian softwood timber trade” and had successfully executed the sale of “22,000 standards of softwood goods of fair specification over the season 1930”.
- As to the goods to be sold under the option
 - Clause 9 does not describe them but the words “softwood goods of fair specification” are necessarily implied.
 - The phrase “of fair specification” is not uncertain “[r]eading the document of 21st May as a whole” and given evidence about the course of trade.



Valid and Binding

Hillas & Co Ltd v. Arcos Ltd
(1932) 147 LT 503, House of Lords

Held (Tomlin L.J.)

- Is clause 9 a mere agreement to agree?
 - The phrases “option of entering into a contract” and “such contract to stipulate” are inartful ways of saying there is no contract until the option is exercised.
 - The word “conditions” in the phrase “to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5%” does not refer to yet-to-be-determined contractual conditions but to prevailing market conditions.



Resolving Uncertainty

Making Use of the Criteria or Machinery Agreed by the Parties

- Resolution by One or Other of the Parties.
 - *Paragon Finance plc v. Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685 (contract gave lenders the power to set interest rates)
- Resolution by a Third Party
 - *Foley v. Classique Coaches* [1934] 2 KB 1 (agreement for coach company to purchase all fuel from filling station carried out for three years and arbitration clause covered price of petrol)
 - *F&G Sykes (Wessex) Ltd v. Fine Fare Ltd* [1967] 1 Lloyd's Rep 53 (agreement acted on and arbitration clause covered number of chicks to be provided to nominated growers after the first year)

Resolving Uncertainty

If the Agreed Machinery Breaks Down

Suppose the agreed machinery breaks down.

- The traditional rule was that the court would not compel the parties to operate the machinery. Neither would it substitute the parties' machinery with its own. The contract would become unenforceable.
- The modern rule looks at whether the machinery agreed by the parties is essential
 - *Sudbrook Trading Estate Ltd v. Eggleton* [1983] 1 AC 444, House of Lords (appointment of parties' valuers not essential because agreement was for sale of the freehold reversions at fair value)
 - *Gillatt v. Sky Television Ltd* [2000] 1 All ER (Comm) 461 (appointment of independent chartered accountant essential because there were several approaches to ascertaining the "open market value" of shares in a private company and the parties intended for the valuation to be determined by the independent chartered accountant, not the court)

Resolving Uncertainty

Intervention of Statute

In Hong Kong, Section 10 of the Sale of Goods Ordinance provides:

- 1) *The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.*
- 2) *Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.*

Resolving Uncertainty

Severance

The court may sever a vague or uncertain term from an agreement to render it enforceable, especially where the term is unimportant.

- *Nicolene Ltd v. Simmonds* [1953] 1 QB 543 (clause that “the usual conditions of acceptance apply” despite lack of such conditions between the parties was meaningless and could be ignored)

Implication of Terms

The court may also imply reasonable terms into an otherwise incomplete agreement especially where the parties have acted on the agreement, evincing consensus on all essential terms.

- *Wells v. Devani* [2019] UKSC 4, [2019] 2 WLR 617 (term that commission was payable on sale implied into oral agreement between estate agent and developer)

SPECIAL ANNOUNCEMENT!

The 1994 SOCRO Claims Convention plans are being developed and we need your creativity. We don't know where. We don't know when. And we don't have a theme. That's where you come in. A contest is hereby announced to create a theme. Here's what you could win:

His and Her's Mercedes.

An all expense paid trip for two around the world.

Additional prize to be announced.

(All prizes subject to availability)

Only two rules apply:

1. The slogan is limited to not more than eight words.
2. All entries must be submitted to Linda McCauley, Regional Office by August 1, 1993.

Put your thinking caps on, get those creative juices flowing, tap the far reaches of your mind. Prior themes are not eligible. As you will remember, our 1991 theme was "Our Moving Force is You." Don't delay. Like Ed McMahon says, you can't win if you don't enter.

Pl. Ex. 1.

Resolving Uncertainty

Mears v. Nationwide Mutual Insurance Company

91 F.3d 1118 (8th Cir. 1996)

Facts

- Plaintiff won a contest in which the stated prize was two Mercedes-Benz automobiles.
- Defendant argued, *inter alia*, that the contract was too indefinite to enforce because the models and conditions of the automobiles were not specified.

Held

- "[W]hen a minor ambiguity exists in a contract, Arkansas law allows the complaining party to insist on the reasonable interpretation that is least favorable to him".
- Plaintiff was owed two new Mercedes-Benz automobiles, of the least expensive make.

Assignments and Readings

- Next Lecture

- Date: 23 September 2024
- Topic: Intention to Create Legal Relations, Consideration
- Readings: McKendrick, pages 260 to 280, 143 to 213