1 Guidance on Reading Cases

SECTION 1: A Guiding Principle

It is essential to acquire case reading skills for the purposes of legal research, but there is very little point in reading a case if after reading it you do not understand how it relates to the legal principles you will have learnt in lectures. It is important, therefore, to know what issue you should find in the case and use this to give your case reading some direction and context.

Read a case with either a broad heading or a specific principle in mind. The principle or heading will be indicated on your lecture outline, in the lecture itself or in a textbook. If you need to read a recent case and have no indication of the issues involved, you will need to be guided by the catchwords and headnote at the top of the report. An individual case may well be concerned with many different issues which you are not currently studying, and while it is interesting to read about them, pressures of time mean that it is necessary to direct your reading.

Of course, if you have a casebook someone else will have provided the headings and decided what parts of which decisions and judgments are relevant to illustrate this principle. This saves time and can be very helpful indeed while you are still in the process of acquiring the skill of deciding what is relevant.

SECTION 2: Useful Notes

It is not simply a matter of reading a case; you must understand it and will probably wish to keep a note of it. It is advisable to remember that your notes should not be longer than the case itself!

The notes also need to be helpful. Avoid copying too much material (with the exception of the facts and specific statements in the judgments that you may wish to use later) and try to explain the case in your own words. This will ensure that you understand what you are writing and will be able to use it later.

It is also a useful practice to use one side of the paper for lecture notes and to make notes on the relevant cases on the back of the preceding sheet. Some people prefer the use of small cards with an index system.

Check for any case notes or other critical assessments of the case in question and the issues it raises. Try to appreciate the significance of the case to the legal issue involved.

SECTION 3: The Basics of Reading a Case

A: Decide which case or cases to read

The more cases you read properly the better. Many lecturers indicate, sometimes by the use of an asterisk, the cases that they consider to be the most important or the best illustrations of the principle.

B: Use the citation to find the report of the case

As from 11 January 2001, neutral citation was introduced for decisions of the Court of Appeal and House of Lords, e.g. [2001] EWCA Civ 12 (see *Practice Direction (Form of Judgments, Paragraph Marking and Neutral Citation)* [2001] 1 WLR 194). The *Practice Direction (Judgments: Neutral Citation)* [2002] 1 WLR 346 extended neutral citation to all judgments given by the High Court in London, e.g. EWHC [number] (Ch) for the Chancery Division, EWHC [number] (QB) for the Queen's Bench Division, and EWHC [number] (Comm) for the Commercial Court. These changes are designed to facilitate the publication of judgments on the Internet, but will also assist in identifying individual judgments of issues involving the same parties.

C: Note the full case name and court

These are given at the top of the report (in older cases in the English Reports you may have to find the beginning of the reports of that particular reporter to identify the court). The court deciding the case can be significant, and you will need to be familiar with the court structure (civil for contract cases) and the doctrine of precedent.

Also note the reference of the case, since this will be needed for inclusion in the footnotes in any written work.

In accordance with the *Practice Direction (Forms of Judgments, Paragraph Marking and Neutral Citation)* [2001] 1 WLR 194, as from 11 January 2001, all judgments will need to be cited using the neutral citation before the citation of any law report series, e.g. *Watford Electronics Ltd* v *Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, [2001] BLR 143. For the neutral citation, paragraphs should be cited and not page numbers, e.g. [2001] EWCA Civ 317 at [31]–[34].

The *Practice Direction* also makes it clear that where a case has been reported in the official Law Reports published by the Incorporated Council of Law Reporting, that source must be used before the High Court and Court of Appeal. It would therefore be sensible to adopt this practice as a student. Only where a case is not reported in the official Law Reports should other citations be used.

D: Presentation of case reports

This is fairly standardised.

(i) Catchwords

At the top of the headnote there is a section identifying the issues in the case (known as the 'catchwords'). These should correspond at some point with the legal issues given in the heading or principle in your lecture notes or outline. There is no need to note these catchwords.

(ii) Headnote facts

Sometimes these facts will be very brief indeed and too general. On other occasions there will be full case facts and details of the decision at first instance, or previous appeals if the case is now on appeal.

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

Remember that each case is a decision on its particular facts, so the facts are important.

(iii) Statement of the decision of the court

The headnote may not be detailed enough on the reasons for the decision, so you will need to look at the judgments themselves to extract this information.

(iv) More detailed facts

A more detailed statement of the facts may follow the headnote. Some judgments will also contain details of the facts. Lord Denning was particularly adept at setting out the facts in a readable form, and he also used headings to useful effect. More generally, it has become common practice to use headings and subheadings within judgments in order to separate and identify both issues of fact and of law.

(v) Details of the grounds of any appeal and the arguments of each set of counsel

It can be particularly useful to read these arguments in the light of the actual decision given in the headnote. They are also helpful to those who are participating in moots.

(vi) A judgment or number of judgments

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

With appeal cases, the headnote may indicate relevant page numbers or paragraphs (in the case of neutral citation) within judgments, e.g. *Howard Marine & Dredging Co. Ltd* v *A. Ogden & Sons (Excavations) Ltd* [1978] QB 574 (see *pages 15–16*).

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

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

(vii) Case law applied and distinguished

The names of those cases, which the court is purporting to apply and to rely on as justification for part or all of the decision, should be given. If the court is purporting to distinguish any case authority this should also be stated.

SECTION 4: Reading a Case in Practice

Your contract law tutor has advised you to read *Carlill* v *Carbolic Smoke Ball Co.* [1893] 1 QB 256, on offer and acceptance.

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

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

[IN THE COURT OF APPEAL]

CARLILL v *CARBOLIC SMOKE BALL COMPANY*

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

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

Held, affirming the decision of Hawkins, J that the above facts established a contract by the defendants to pay the plaintiff 100/. in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict c. 109, nor a policy within 14 Geo 3, c. 48, s. 2; and that the plaintiff was entitled to recover.

A: Catchwords

The catchwords are helpful in advising that this is a case about a contract and is concerned with an offer by advertisement. This is within your guiding principle of offer and acceptance.

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

B: Facts

The facts given in the headnote are very brief indeed. A more detailed statement of the facts follows the headnote.

C: Decision

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

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

The headnote states that the Court of Appeal held that the defendants (the Smoke Ball Company) agreed to pay the plaintiff £100 in the event which happened (namely, contracting influenza after having used one of the smoke balls in the specified manner and for the specified period).

We are also told that it was decided that it was not a wagering contract or a policy of insurance, so that the plaintiff was entitled to recover the £100. Although under the Civil Procedure Rules 1998, the term 'claimant' is used in place of plaintiff, this case pre-dates this change so that the term 'plaintiff' remains appropriate in this specific context.

D: Note the facts

At this point it is advisable to note the facts to make it easier to understand the judgments. Because the headnote facts are too brief for this purpose, the statement of facts on pp. 256–7 of the report is used:

Carlill v *Carbolic Smoke Ball Co.*

[1893] 1 QB 256 (CA)

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

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

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

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

E: The decision at first instance

Hawkins J at first instance held that the plaintiff was entitled to recover, since the advertisement was intended to attract custom and was supported by the deposit with the Company's bank. The Company should not have been surprised if they were held to their promise. (The only way to find this information is to look at the report of the first instance decision.)

Since the Court of Appeal is purporting to affirm the first instance decision, there is no need in this instance to make detailed notes on it.

F: The decision of the Court of Appeal

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

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

G: The judgments

Read each judgment and make quick, rough notes.

(i) The judgment of Lindley LJ

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

(b) Lindley LJ considered that there was no doubt that the language used indicated that a binding promise was being made. To be enforceable, the promise must have been intended to give rise to legal relations (*page 191*). One of the arguments put by counsel for the defendants was that this advertisement was not intended to create legal relations. It was a 'mere puff' or advertising gimmick which was not intended to be taken literally and which therefore could not be enforced by the plaintiff.

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

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

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

The advertisement is an offer to pay a reward to anybody who performs the stipulated act, and performance of that act constitutes the acceptance of the offer.

Lindley LJ is stating that this is a unilateral offer, i.e. a promise to pay money in exchange for an act.

(d) A further argument on behalf of the defendants was that any acceptance had to be communicated to the offeror, and Mrs Carlill did not notify the Company that she intended to use the smoke ball in response to their advertisement.

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

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

(e) It was argued that the language of the advertisement was so vague that it could not amount to a promise at all.

> LINDLEY LJ: . . . The language is vague and uncertain in some respects, and particularly in this, that the 100/. is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the 'increasing epidemic' (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball.

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

(f) The promise by the Company had to be supported by consideration (*pages 129–81*) provided by Mrs Carlill (i.e. Mrs Carlill had to give something of value in exchange for the Company's promise). At the time of this decision, consideration was seen as being either a benefit to the offeror (the Smoke Ball Company) and/or a detriment to the offeree (Mrs Carlill). Lindley LJ considered that consideration was present in the sense of a benefit to the offeror company and/or a detriment to the offeree (Mrs Carlill).

> LINDLEY LJ: . . . It has been argued that this is nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.
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> But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

Lindley LJ is stating that the performance of the conditions in the unilateral offer constitutes both the acceptance of the promise and the consideration for it.

(g) Lindley LJ concludes his judgment with the following statement:

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

(ii) The judgment of Bowen LJ

This is the clearest of the judgments and the one most frequently cited. The order of presentation of the issues is also the most logical.

(a) Was the advertisement too vague to be enforced?

> BOWEN LJ: . . . The defendants contend, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. . . . It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have,

was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: '100/. will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks.' And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward.

Bowen LJ adopted the correct approach of looking at the statement objectively to see what the reasonable man would consider was intended (see pages 17–19).

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

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

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

BOWEN LJ: Was it intended that the 100/. should, if the conditions were fulfilled, be paid? The advertisement says that 1000/. is lodged at the bank for the purpose. Therefore, it cannot be said that the

statement that 100/. would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

(c) He then went on to address the argument that this would amount to a contract with the whole world, which was not possible.

BOWEN LJ: . . . 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.

Bowen LJ raises the fact that this advertisement was an offer, whereas advertisements are normally invitations to treat (*pages 24–5*). The unilateral contract is therefore an exception to the general rule in *Partridge* v *Crittenden* [1968] 1 WLR 1204 (*page 24*), since an advertisement which requests the performance of an act will be an offer. Had it been construed as an invitation to treat, such advertisements to pay rewards would have made little sense. The offeror would have the benefit of seeing the stipulated conditions performed and yet would not be bound to pay the reward.

(d) Was it necessary that the acceptance be notified?

BOWEN LJ: . . . 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 action the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification. . . .

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow

as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

While it is normally necessary to communicate an acceptance, the offeror may waive this requirement, either expressly or impliedly. In unilateral contracts the offeror will in most instances be taken to have waived the requirement of communication of an intention to accept, so that all that is required is that the requested act is performed.

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

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

(iii) The judgment of A. L. Smith LJ

This judgment is more general in its presentation of the issues:

A. L. SMITH LJ: . . . It comes to this: 'In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100/.' It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000/. is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the 100/. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which

the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise…

(a) A. L. Smith LJ examined the vagueness of the promise.

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

A. L. Smith LJ neatly avoided having to choose whether he preferred the construction of Lindley LJ or that of Bowen LJ by stating that it was not necessary to do so. As a result there is no clear interpretation of the promise by the Court of Appeal.

(b) There was no express requirement that acceptance be notified.

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

This is helpful since it indicates that if a unilateral offeror does wish to know who is attempting to accept his offer, he must include an express provision requiring this.

(c) A. L. Smith LJ also recognised that performance of the conditions specified constituted the acceptance, and concluded by agreeing that consideration had been provided since it was a detriment to the offeree to use the smoke ball as requested and a benefit to the Company.

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

Counsel for the defendants argued that the terms of the advertisement would enable someone who stole the smoke ball to claim the reward when clearly the actions of this thief had not benefited the defendants by way of increased sales. Lindley LJ and Bowen LJ considered that the benefit was the general increase in sales through improved public confidence (see *pages 8* and *11*) and that this was a sufficient consideration. This definition would allow a thief to claim the reward. Of course, a thief would suffer a detriment in using the smoke ball in the stipulated manner.

H: Notes on the decision and the judgments

It is now necessary to use the judgments to state the decision and explain it:

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

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

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

The plaintiff had performed these conditions and therefore had accepted the offer. In a unilateral contract the offeror will normally have impliedly waived the requirement that the acceptance must be communicated in order to be effective so that notification of acceptance is not required.

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

Therefore, since there was a binding contract, the plaintiff was entitled to be paid the £100.

NOTE: You may wish to add to these notes by including any important statements from the judgments and by filling out the notes on the law concerning unilateral contracts. For example, you may wish to record Bowen LJ's statement that this was an offer to the world (see *page 10*) and his statement (see *pages 10–11*) discussing the fact that in a unilateral contract there is no requirement to notify the offeror that you are intending to accept. Bowen LJ's example of the lost dog is particularly famous and worth noting.

I: General notes on the legal principles in the case

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

Carlill v *Carbolic Smoke Ball Co.* has been valuable in explaining the unilateral contract. A unilateral contract is a contract whereby the offeror makes a promise (in this case to pay £100) in return for the performance of a stipulated act. Mrs Carlill makes no promise and can decide not to continue her use of the smoke ball at any time.

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

(a) Whereas the general rule is that an advertisement is an invitation to treat (i.e. an invitation to make an offer), if the advertisement requests the performance of an act then the advertisement will be an offer. This means that on performance of the requested act the offer has been accepted and there is a binding contract. Generally, a response to an advertisement can at best be only an offer so that there is no binding contract at that stage.

(b) Whereas the general rule is that an acceptance must be communicated to the offeror, the offeror may impliedly waive this requirement, and will be taken to have done so when the offer is unilateral unless there has been an express indication of the fact that notification is required.

(c) In a unilateral contract the requested act is both the acceptance and the consideration for the promise.

There are other legal principles applicable to unilateral contracts which it is convenient to consider at this point:

(a) It is possible to accept a unilateral offer of a reward only if you know that it has been made and accept in response to it (*R* v *Clarke* (1927) 40 CLR 227, *page 45*). This means that the act which is the purported acceptance cannot have been performed before any promise of a reward was made.

(b) Since the acceptance is the performance of the stipulated act and performing this act may be a continuing act (as in *Carlill* v *Carbolic Smoke Ball Co.*), the general principle should be that the offer may be revoked at any time before the act is completely performed. However, it may not be possible to revoke a unilateral offer once the offeree has started to perform (*Errington* v *Errington & Woods* [1952] 1 KB 290, *page 62*).

(c) Although the general rule is that a revocation of an offer must be communicated to the offeree, this is impractical in the case of a unilateral offer to the whole world since it is not possible to identify the potential offerees. The American case of *Shuey* v US 23 L Ed 697, (1875) 92 US 73 (*page 66*) is authority for the fact that it is sufficient if the revocation is communicated using the same channel used to communicate the original offer, and if this is done it is irrelevant if particular offerees did not see or know about the revocation.

QUESTIONS

1. What was the stipulated act in *Carlill* v *Carbolic Smoke Ball*? Was it merely using the smoke ball as specified so that catching influenza was only a condition of entitlement to enforce the promise? Or was it using the ball as specified *and* catching influenza? (See *pages 130 – 2*.)
2. What do you think the position would have been if at the time of using the smoke ball Mrs Carlill's only reason for doing so was to avoid catching influenza?
3. Did the smoke ball have to be purchased by Mrs Carlill?
4. What would the legal position be if, when Mrs Carlill had been using the smoke ball for one week, the Company had issued another advertisement withdrawing their offer, but, as Mrs Carlill did not see this, she had carried on using the smoke ball for the full two weeks and caught influenza?

NOTES

1. For further discussion of the background to the decision in *Carlill*, see A. W. B. Simpson, 'Quackery and Contract Law: The Case of the Carbolic Smoke Ball' (1985) 14 JLS 345.
2. In *Bowerman* v *Association of British Travel Agents Ltd* [1996] CLC 451, *page 196*, the majority of the Court of Appeal, relying on *Carlill* v *Carbolic Smoke Ball Co.*, held that a notice would reasonably have been read by the public as an offer by ABTA to give protection to the customer if the ABTA member failed financially. This unilateral offer was accepted by the customer when booking a holiday with the ABTA member.
3. It is increasingly common for the courts to 'imply' unilateral contracts. See, for example, *Blackpool & Fylde Aero Club Ltd* v *Blackpool Borough Council* [1990] 1 WLR 1195, *page 30*.

Exercise

Howard Marine and Dredging Co. Ltd v *A. Ogden & Sons (Excavations) Ltd* [1978] QB 574 (CA) (for the facts see *page 665*).

The catchwords and headnote facts are far more detailed than in *Carlill* v *Carbolic Smoke Ball Co.*, and the headnote decision is divided into four distinct issues namely, collateral warranty, damages for misrepresentation, the exemption clause and the possibility of an action in negligence at common law:

> *Held,* (1) that the contractors could not establish any claim in contract for there was nothing in the pre-contract negotiations which could amount to a collateral warranty.
>
> (2) (*Per* Bridge and Shaw LJJ) That the plaintiff owners were liable in tort for damages under section 2(1) of the Misrepresentation Act 1967, for the misrepresentation by their marine manager at the pre-contract meeting on July 11, 1974, as the deadweight capacity of the barges was a most material matter on which the contractors had relied in concluding the contract, and was one in respect of which the representor would have been liable had it been made fraudulently; that to avoid liability under the statutory terms the owners had to prove that their marine manager had had reasonable ground to believe and did believe up to the time the contract was made that the facts he represented were true; that on an analysis of the evidence that burden had not been discharged for the marine manager had not shown any objectively reasonable ground for disregarding the figure of deadweight capacity in the ship's documents and for preferring the Lloyd's Register incorrect figure; and accordingly the contractors' appeal should be allowed.
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> *Per* Bridge LJ. In the course of negotiations leading to a contract the Act of 1967 imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe (post, p. 596F).
>
> (3) (*Per* Bridge and Shaw LJJ) That the owners could not escape liability by reliance on the exception clause, for, as the judge had held, it was a provision in an agreement which would exclude or restrict any liability to which a party to a contract might be subject by reason of any misrepresentation made by him within section 3 of the Act of 1967, and should therefore be of no effect unless the court in its discretion allowed reliance on it as being 'fair and reasonable in the circumstances of the case'; and accordingly, as it was not 'fair and reasonable' to allow the owners to rely on it, the owners' cross appeal should be dismissed.
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> *Per* Shaw LJ. The contractors also have a cause of action in negligence at common law, for in a business transaction whose nature made clear the importance and influence of the answer to

the question as to the vessel's carrying capacity, the owners were under a duty of care in giving information on matters peculiarly within their knowledge (post, pp. 600F – 601D).

Per Lord Denning MR. The trial judge's decision that the misrepresentation at the July 11 meeting was not negligent showed that he was satisfied that the representor had discharged the burden of proof imposed by section 2(1) and there was no reason for disturbing that decision (post, p. 593C – G). Nor was there any reason why the court should not allow the owners to rely on the exception clause as 'fair and reasonable' under section 3 of the Act of 1967, since the parties to the contract were of equal bargaining power and the contractors could easily have obtained advice that the barges were not fit for the use for which they were intended before concluding the contract (post, p. 594B – F). Further, there was no special relationship between the parties which gave rise to the duty of care at common law; the only duty of the owners' marine manager was to be honest when asked about the dead-weight capacity; he had answered as best he could from memory and the contractors should not have acted on his oral answers without further inquiry (post, pp. 591H – 592C).

Decision of Bristow J reversed in part.

The first part of the Court of Appeal's judgment relates to the contention that the pre-contractual statement was a collateral warranty so that its inaccuracy was a breach of contract. All of the members of the Court of Appeal rejected this, but we do not know the reasons without looking at the judgments.

Secondly, the majority (Bridge and Shaw LJJ) held that the plaintiffs were liable in damages under s. 2(1) of the Misrepresentation Act 1967, and this time full reasons are given. The plaintiffs had failed to show that they had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true. They had failed to show any 'objectively reasonable ground' for their actions. We are informed of a statement by Bridge LJ which goes further and imposes an absolute obligation not to state facts which you cannot prove you had reasonable grounds to believe.

Lord Denning MR (dissenting) considered that the burden in s. 2(1) had been discharged.

You will notice that the headnote contains references to pages and letters in the judgment. These can be very useful indeed in directing the reader to those parts of the judgments dealing with the major points of the decision. The same is true of paragraph numbers following the *Practice Direction* [2001] 1 WLR 194, *page 2*.

QUESTION

There were two other arguments addressed by the Court of Appeal, namely the claim in tort based on breach of a duty of care and the question of whether the exemption clause applied to allow the owners to escape liability. What did the majority of the Court of Appeal decide on these issues and what did Lord Denning decide?

NOTE: If you examine Lord Denning's judgment in this case you will discover that having explained the facts in a very clear and readable way, he then deals with each of the issues under an appropriate heading. At pp. 590–95 of the report, he examines first the collateral warranty argument, then the claim based on the tort of negligent misstatement and the claim under the Misrepresentation Act 1967, before discussing the exemption clause. Look for these same issues in the judgments of Bridge and Shaw LJJ.

Further exercises, and guidance, relating to *Williams* v *Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1 (Chapter 4) and *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679 (Chapter 13) are available on the Companion website.