Contract Law

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Note About Slides and Video Presentation:

- **Video Slides:** The Video Presentation focuses only on the following slides: 4, 11, 13, 14, 15, 18, 21, 26, 29. 30, 31.
- **Additional Slides:** The other slides are intended to be a source of future reference, giving more detail on specific topics about Contracts than could be covered in this brief Video.
- **Case Summaries:** The Case Summaries at the end beginning at Slide # are included as illustrations of legal reasoning, as well as for general interest.

Introduction: Why Learn About the Law?

- Virtually every aspect of work is carried out within legal constraints
- Not trying to make you into lawyers, but to leave you with some basic understandings so that you will be better prepared to know when to go seek expert legal advice
- There is an old joke that makes a point:
  - Q: What's the difference between a Lawyer and an Engineer?
  - A: The Lawyer doesn't think he/she is an Engineer

Introduction: Why Learn About Contracts?

- Virtually all commercial activity is carried out within a Contract, or more usually a number of Contracts
- A basic understanding of how Contracts work in our legal system is necessary to participate in the business world today

Outline

- What is a “Law”?
- Contract Law is “Private” Law
- Contract Formation: three main elements:
  - Offer
    - Store advertising
  - Acceptance
    - Counter offer/rejection
    - Crossing offers
  - Consideration
- Freedom to Contract – illegal agreements
- Contract Amendments
- A Word on typical Engineering Contracts – Professional Services; Design; Supply; Construction

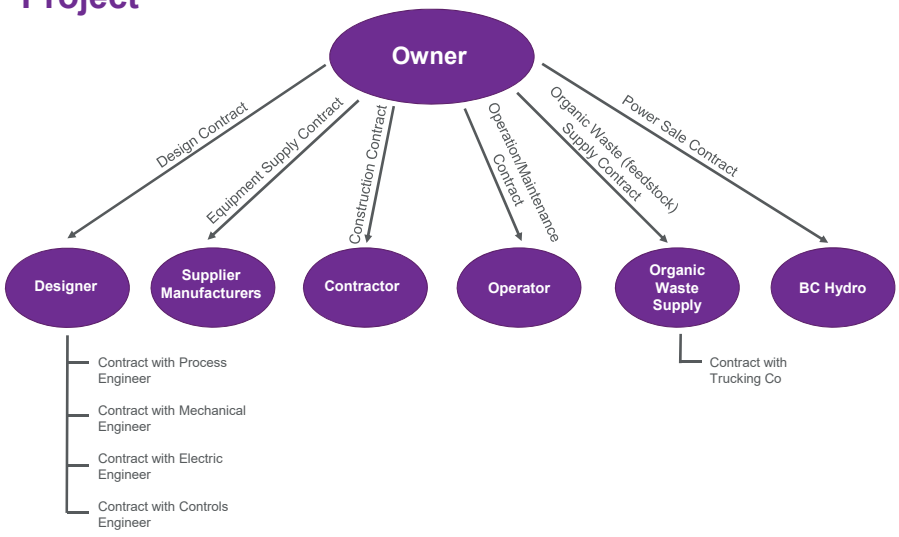
Model Project: Design, Build and Operate an Organic Waste/Biogas Recovery and Power Generation Plant

- For illustration, imagine a proposed new Waste/Biogas Recovery and Power Generation Plant that a government wishes to construct and operate:

Model Project:

- When the Project is first conceived the Project is a Blank Page
  - There will be a set of existing laws and regulations that the Project will need to meet to move forward – for example:
    - Zoning restrictions applying to the proposed site
    - Trucking/transportation rules for transport of organic waste to the site
    - Environmental regulations and Safety rules for handling and storage of Biogas
    - Worksafe BC rules for workers at the site
    - Design and building codes and requirements
    - Operational requirements
    - Regulations related to Utilities
- None of these are in place to help the Project proceed
- So how does a Project come to life? – mostly by the formation and implementation of a number of **Contracts**

Model Project: Schematic of Main Contracts for Project



List of Owner's Main Contracts for the Project:

- **Design Contract**
  - Process Engineering/controls
  - Electrical
  - Mechanical
  - Geotechnical
- **Equipment Supply Contract**
- **Construction Contract**
  - Subtrades: electrical, mechanical, geotechnical, systems
- **Operation/Maintenance Contract:** Subtrades: cleaning; landscaping
- **Organic Waste (feedstock) Supply Contract**
  - Trucking Contract
- **Power Sale Contract**

Numerous Simultaneously-Acting Laws

- Each of these Contracts are separate private "laws" –
  - Each define rights and obligations of people involved in Project, but contracts are not always harmonious with each other and conflicts may arise, especially among parties with differing interests
  - Participants in the contract "ecosystem" need to be aware of how other contracts and relationships may impact their portion of the work
- In addition to the Contract, all of the other laws (criminal; zoning; safety; speeding) continue to apply
- Rule: just because one law or set of laws applies does not mean that other laws don't still apply
  - E.g. OJ Simpson – criminal law and civil law

Contracts are Private Laws

- **Contracts are special laws because, unlike most other laws:**
  - Contract laws are created by two or more persons that want to "do a deal" **(freedom to contract)**
  - Contracts contain one or more "contract laws" or "agreements" between the signing parties (can be simple - one page, or incredibly complex - thousands of pages)
  - The Contract defines the binding rights and obligations of the parties with are applicable to their business relationship– i.e. applicable "laws"
  - Contract laws generally only apply to the Contract parties **(privity of contract)**
  - **But:**
    - If one party to the Contract fails to live up to its obligations then the aggrieved party can go to court and just like the breach of any other law, the courts and the government will enforce the innocent party's rights
    - Another But:
      - Courts are generally reluctant to force a party to do anything (Specific Performance), so most disputes are resolved by the payment of money by one party to the other as compensation for "damages"

Contracts are Private Laws

- The ability for private persons to make up their own Laws, and have them enforced by the courts, is very powerful
- This means that, with knowledge of the rules of Contracts, parties can make the law work to their personal benefit - this allows for flexibility and creativity in the marketplace and the community, as well as certainty around expectations
- Without such knowledge, a party can enter agreements to their detriment, and potentially expose their entire business to significant risk

How are these Project Contracts Formed?

- What are the key principles of Contract Formation?

Contract formation

- Classically a Contract is formed when **three** elements come together:
    1. a person(s) makes an **OFFER** to another person(s) with the intention of forming a Contract;
    2. the OFFER is **ACCEPTED** by the other person(s);
    3. the Offer and Acceptance include the promise of some payment or benefit or performance in exchange for the Offer (**CONSIDERATION**)

Contract formation – the Offer

- Must be a proposal intended as an offer that when accepted will lead to a Contract
  - The offer does not need to include the word “offer”
  - The offer does not need to be in writing
    - Can be in writing
    - Can be oral
    - Can be email
    - Can be combination of some or all of these – e.g. a chain of communications can amount to an offer

Contract formation – Advertisements

- Not all communications about a possible contract are “Offers”
- An Advertisement, even with a price defined, is generally not an offer – it is an invitation for an interested party to make an offer

Contract formation – Acceptance

- A Contract is not formed unless and until the other party accepts the Offer
- In order to be valid the Acceptance must be on the same terms as the Offer:
  - An Offer may specify the method of acceptance - eg require that the Acceptance must be in a prescribed form; or be delivered to a specified address; or be in writing or by email etc. – to be valid the Acceptance must meet the conditions of the Offer
  - The Acceptance cannot be on different terms than the Offer – ie the Acceptance cannot "accept" the Offer but modify any term
  - The Offer must be outstanding at the time of Acceptance

Contract formation – Acceptance – Immediately creates Contract

- An Offer can be withdrawn at any time before it is accepted – but once it is accepted then the Contract is formed, and both parties are bound – it is too late to have second thoughts

Contract formation – Counter Offer

- If an interested party who receives an Offer does not accept it completely but instead changes some of the terms of the Offer, then:
  - The reply is characterized as a “Counter Offer”; and
  - The original Offer is no longer valid and outstanding

Contract formation – Crossing Offers

- In modern commercial negotiations each side is often making offers containing the terms and conditions that it would prefer
- So it is common for each side to be effectively sending “Offers” to the other party simultaneously – responding back and forth with offers will not lead to a finalized Contract
- But if during that exchange at any time one party accepts the others latest Offer then a Contract will spring to life
- If you don’t intend to make offers that might become contracts, be careful to make that very obvious by using appropriate words (e.g. “this is not an offer”)

Consideration – a word

- In most engineering contracts "Consideration" is not an issue because usually the Contract relates to the supply or performance of goods (equipment or materials) or professional services or construction work
- The promise to supply or provide or perform in exchange for payment is sufficient Consideration
- To make sure there is never an issue over Consideration we frequently and routinely insert words at the start of a Contract to "create" no matter what other terms are in the Contract:
  - *"In consideration for the payment of $10.00 and other good and valuable consideration, the receipt and sufficiency thereof is hereby acknowledged, the parties agree as follows:"*

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Freedom to Contract – Capacity, Consent, Lawful Purpose

- While our law gives parties broad freedom to contract on the terms they wish:
  - Each party must have the ability, or **CAPACITY**, to understand the terms and nature of the Contract
    - Anyone with a developmental disability, impaired judgment, or who is under the age of majority in Canada (18 or 19 years) does not have the capacity to enter into a valid contract .
  - Each party involved in the contract must also freely **CONSENT**, or agree, to the terms in the agreement
    - There are some situations that may prevent consent from occurring:
      - misrepresentation
      - mistake
      - undue influence
      - duress
  - Finally, every contract that is negotiated in Canada must have a **LAWFUL PURPOSE** or objective; i.e. no contract can violate any provision of the Criminal Code in Canada or any provincial law or municipal bylaw.
    - (e.g. agreements to commit crimes - human trafficking, money laundering/tax evasion, illegal dumping of waste etc.)

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Misrepresentation

- **Misrepresentation** is a false statement about a material fact that is so important that it causes the other person to enter a contract.
- It makes genuine consent impossible.
- **Innocent misrepresentation** occurs when a person incorrectly believes something to be true. (e.g. a sales clerk repeats a manufacturer's false claim about a product).
- **Fraudulent misrepresentation** occurs when one party tries to deceive the other on purpose. (e.g. a person intentionally lies about his or her car in an effort to sell it.)
- **Both types** of misrepresentation allow a buyer, or offeree, to back out of a contract.

Mistake

- Certain types of mistakes can make a contract unenforceable by law.
- A **common mistake** occurs when an error is made by both parties in the contract.
  - (e.g. an agreement is made to purchase a product that is out of stock indefinitely).
- An **unilateral mistake** is when one party to the contract made a mistake, and the other party knew of it but did not try to correct it.
  - (e.g. buying a product to use for a purpose it was not intended for; the clerk is aware the product will not work for that purpose but does not say anything).
- A **clerical mistake** is an error caused by a clerk or store employee. Clerical mistakes often involve numbers, such as incorrect prices.

Undue Influence & Duress

- When one party applies pressure on the other (e.g. an aggressive salesperson) to form a contract, this is **undue influence**.
- Any contract that is formed with undue influence **lacks proper consent** and will be declared void.
- **Duress** is similar to undue influence. When one party uses threats, such as blackmail, or violence to intimidate the other party into forming a contract, that agreement would also be cancelled.

Contract Amendments

- In the same way that the law gives contracting parties freedom to select the terms of their private Contract, the law also gives contracting parties the freedom to amend their contracts, pretty much as they might choose.
- Once an amendment is agreed by the parties then it is enforceable
- Parties need to be careful not to inadvertently amend
- Amendment can be oral even if original Contract was in writing, EXCEPT if the original Contract specified the form or amendment

Discharging a Contract

- Once a contract has been successfully agreed upon, there can be several different ways to discharge, or end it:
  - Performance
  - Mutual agreement
  - Impossibility of performance
  - Breach of contract

Performance & Mutual Agreement

- The most common way to discharge a contract is through **performance**.
- Simply put, one or both parties fulfill their obligations under the contract.
- A contract may also be discharged if the parties involved **mutually agree** to end it.
- Various factors may exist for the parties to end a contract through mutual agreement. For example, they may agree to terminate the current contract in favour of a newer one with different or additional terms.

Impossibility & Force Majeure

- **Frustration of contract** occurs when the terms of a contract become **impossible** to fulfill.
- Over the years, Canadian courts have excused one or both parties from contracts if it can be proven that certain circumstances prevent them from performing their part of the agreement.
- For example, a music promoter may have to cancel or reschedule a concert if it is rained out.
- Many contracts contemplate what will happen (suspension of schedule, termination, etc.) if a project cannot continue as a result of '**force majeure**' or unforeseeable circumstances or events that prevent a party from fulfilling its obligations
  - (e.g. War, riots, earthquakes, hurricanes, lightning, explosions, energy blackouts, unexpected legislation, strikes and lockouts)

Breach of Contract

- Failing to perform an obligation owed to another party is a **breach of contract**.
- The failure to perform a specific and essential term of a contract is called a breach of condition or a breach of warranty.
- A breach generally allows the innocent party to claim "damages" (extra payment/reduction of price) – sometimes if it is sufficiently severe it may (but not always) allow the innocent party to terminate the contract

Remedies

- If a breach of contract occurs, the following remedies may be available:

1. Damages: awarded to compensate the injured party in the contract. This may take the form of liquidated damages — a sum of money specified in a contract to settle a breach.
2. Specific performance: the court may order a party to fulfill the terms of a contract.
3. Injunctions: the opposite of performance; one party is ordered by the court not to do something.
4. Rescission: the court may order the contract to be cancelled.
5. Other – Schedule extension

Duty of Honesty and Good Faith - *Bhasin v. Hrynew*

- In November 2014, the Supreme Court of Canada released their decision in ***Bhasin v. Hrynew***, setting out a duty of honest performance in contract law.
- **Facts:**
  - Can-am sold education savings plans ("**ESPs**") through its brokers, including B and H, who were contractually engaged with Can-am to sell only Can-am ESPs.
  - H desired to take-over B's business and worked with Can-am toward that goal.
  - H was appointed by Can-am as the individual responsible for auditing its brokers, including B, thus giving him access to private information on B's business.
  - B protested both the merger and H's appointment as auditor and in its responses, Can-am lied to B about the nature of H's role and about its plans for merging B's business with H's.
  - As per the termination provision of the contract between Band Can-am, Can-am elected not to renew by giving notice six months before the 3-year contract was set to expire.
  - B lost nearly the entire value of his business as a result.

New Duty of Honesty Imposed by Supreme Court

- What the new duty is:
  - The Supreme Court found Can-am liable to B by imposing a new general duty of honesty in contractual performance.
  - The newly imposed duty of honesty means that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.
  - This duty applies to all contracts and cannot be excluded by contract, though the parties may expressly agree on the standards to which performance of this duty is to be measured if those standards are not manifestly unreasonable and respect the core duty.
- What the duty is not:
  - This is not a duty of good faith or loyalty, so does not require a party to forego advantages flowing from the contract.
  - It also does not require disclosure of material facts, even relating to a decision to terminate the contract.
- What is the remedy for a breach of the duty?
  - Damages for breach of the duty of honesty will be calculated on the basis of what the injured party's economic position would have been had the duty not been breached.
- Resolution in *Bhasin v Hrynew*
  - As Can-am had lied and misled Mr. Bhasin, in particular in regards to its intentions to renew or not, it had breached its duty of honesty to him about its contractual performance.
  - As a result, Mr. Bhasin was entitled to be put in the position he would have been in had the breach not occurred. In this case, the court found he would have taken steps to protect his business, therefore the damages award was for the value of his business before termination, or $87,000.

Good Faith Recognized as an Organizing Principle Governing Contractual Performance

- Recognition of good faith as organizing principle
  - Principle is that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
  - Principle means that a contracting party should have "appropriate regard" for the legitimate contractual interests of the contracting partner.
  - What is "appropriate regard" depends on the relationship, but it will require a party to not seek to undermine the contracting partner's interests in bad faith.
- Explicit in certain situations (such as tender)
  - The principle currently operates in certain contexts where the law requires honest, candid, forthright or reasonable contractual performance.
  - Current contexts in which such a duty can apply: employment, insurance, tendering.
- Court open to expansion of situations where duty of good faith applies
  - However, the principle is not limited to the above contexts. It can, and likely will, be found to apply to new contexts; as the SCC noted, the duty "should be developed where the existing law is found to be wanting".
  - SCC specifically mentioned long-term contracts of mutual cooperation as a context where the organizing principle of good faith may call for an understanding of what honest and reasonableness require so as to give appropriate consideration to the legitimate interests of both contracting parties.
  - This, coupled with the recognition that the duty to treat tenderers fairly is grounded in this newly defined good faith principle, may indicate that long-term construction contracts will be an area where the Court would be open to the argument that a general duty of good faith should apply.

Some Practical Tips on Contract Formation:

- In most engineering-related Contracts there are three "core" issues that must be addressed:
  - Scope ("what?")
  - Pricing ("how much?")
  - Schedule ("when?")



Scope of Work, Services, and Supply

- What are you doing? Extent of responsibility
- Often part of Technical Specifications
  - Our Project - Design, Build and Operate an Organic Waste/Biogas Recovery and Power Generation Plant in accordance with the owner's technical specification and requirements

Pricing

- Fixed price?
- Cost-plus?
- Unit Price?
- Must consider pricing structure(s) in the context of:
  - Type of the project
  - Scope of the work
  - Scheduling limitations/needs
- Pricing structure can affect the practical implications of delay claims:
  - Impact of a delay claim under fixed-price can be very different than under cost-plus
  - Our Project – Fixed $250m plus $500K /month during the operating period

Schedule

- Too simplistic to just include start and finish dates
- Must identify:
  - Truly critical drop-dead interim dates, if any
  - Any critical interfaces with other activities or related projects (e.g., Olympics)
- Our Project - Sign contract in January 2020; obtain environmental permits, complete design and begin construction by April 2020; complete construction June 2021; operate until end of May 2046
  - Plus Detailed Work Schedule setting out critical path obligations etc.

Multiple Legal Specialties

- In addition to general Contract law considerations, each Contract may incorporate clauses which open up discrete legal issues such as:
  - Tax
  - Intellectual Property
  - Insurance
  - Employment
  - Occupational Health & Safety
  - Environmental Regulatory
  - First Nations Rights
- One advantage of engaging a large international legal firm is access to all the specialized legal knowledge under the same umbrella

Some Observations on Legal "Problem" Points:

- Engineers extrapolate and interpolate – good approach in engineering – usually a bad idea in law – relying on common sense to identifying legal issues and risk is usually not very helpful
- Statutes and Common Law provide the legal framework
  - Law is ever changing
    - The outcome of recent cases or 'precedent'
    - New legislation or amending or repealing of existing legislation
  - There is also a concept called Equity – (Don't ask…)
- Legal interpretation of statutes or cases are subject to complex set of interpretation rules – often to balance competing objectives and interests – (free speech vs libel and slander and hate literature; free use of property vs regulation of tree-cutting)

A Word on Standard Form Contracts

- Canadian Construction Documents Committee (CCDC)
- Association of Consulting Engineering Companies (ACEC)
- Usual to add Contract-specific modifications
  - Savvy owners will hire lawyers to revise or add conditions to standard forms for their benefit
  - You might not be able to depend on getting the standard engineer-friendly form, and may need to push back to protect your interests and limit risk

Merry Christmas from your lawyer...

Contracts 101 Cases

- **Payne v Cave (1789)**
- The defendant made the highest bid for the plaintiff's goods at an auction sale, but he withdrew his bid before the fall of the auctioneer's hammer. It was held that the defendant was not bound to purchase the goods. His bid amounted to an offer which he was entitled to withdraw at any time before the auctioneer signified acceptance by knocking down the hammer. Note: The common law rule laid down in this case has now been codified in s57(2) Sale of Goods Act 1979.
- **Fisher v Bell (1960)**
- A shopkeeper displayed a flick knife with a price tag in the window. The Restriction of Offensive Weapons Act 1959 made it an offence to 'offer for sale' a 'flick knife'. The shopkeeper was prosecuted in the magistrates' court but the Justices declined to convict on the basis that the knife had not, in law, been 'offered for sale'.
- This decision was upheld by the Queen's Bench Divisional Court. Lord Parker CJ stated:
  - "It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract."

- **PSGB v Boots (1953)**
- The defendants' shop was adapted to the "self-service" system. The question for the Court of Appeal was whether the sales of certain drugs were effected by or under the supervision of a registered pharmacist. The question was answered in the affirmative. Somervell LJ stated that "in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed."
- **Partridge v Crittenden (1968)**
- It was an offence to offer for sale certain wild birds. The defendant had advertised in a periodical 'Quality Bramblefinch cocks, Bramblefinch hens, 25s each'. His conviction was quashed by the High Court. Lord Parker CJ stated that when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale. In a very different context Lord Herschell in *Grainger v Gough (Surveyor of Taxes)* [1896] AC 325, said this in dealing with a price list:

  "The transmission of such a price list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited."

- **Carlill v Carbolic Smoke Ball Co (1893)**
- An advert was placed for 'smoke balls' to prevent influenza. The advert offered to pay £100 if anyone contracted influenza after using the ball. The company deposited £1,000 with the Alliance Bank to show their sincerity in the matter. The plaintiff bought one of the balls but contracted influenza. It was held that she was entitled to recover the £100. The Court of Appeal held that:
  a) the deposit of money showed an intention to be bound, therefore the advert was an offer;
  b) it was possible to make an offer to the world at large, which is accepted by anyone who buys a smokeball;
  c) the offer of protection would cover the period of use; and
  d) the buying and using of the smokeball amounted to acceptance.
- **Harvey v Facey (1893)**
- The plaintiffs sent a telegram to the defendant, "Will you sell Bumper Hall Pen? Telegraph lowest cash price".
- The defendants reply was "Lowest price £900".
- The plaintiffs telegraphed "We agree to buy… for £900 asked by you".
- It was held by the Privy Council that the defendants telegram was not an offer but simply an indication of the minimum price the defendants would want, if they decided to sell. The plaintiffs second telegram could not be an acceptance.

- **Gibson v MCC (1979)**
- The council sent to tenants details of a scheme for the sale of council houses. The plaintiff immediately replied, paying the £3 administration fee.
- The council replied: "The corporation may be prepared to sell the house to you at the purchase price of £2,725 less 20 per cent. £2,180 (freehold)."
- The letter gave details about a mortgage and went on "This letter should not be regarded as a firm offer of a mortgage. If you would like to make a formal application to buy your council house, please complete the enclosed application form and return it to me as soon as possible." G filled in and returned the form. Labour took control of the council from the Conservatives and instructed their officers not to sell council houses unless they were legally bound to do so. The council declined to sell to G.
- In the House of Lords, Lord Diplock stated that words italicised seem to make it quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by G's written acceptance of it. It was a letter setting out the financial terms on which it may be the council would be prepared to consider a sale and purchase in due course.

- **Harvela v Royal Trust (1985)**
- Royal Trust invited offers by sealed tender for shares in a company and undertook to accept the highest offer. Harvela bid $2,175,000 and Sir Leonard Outerbridge bid $2,100,000 or $100,000 in excess of any other offer. Royal Trust accepted Sir Leonard's offer. The trial judge gave judgment for Harvela.
- In the House of Lords, Lord Templeman stated: "To constitute a fixed bidding sale all that was necessary was that the vendors should invite confidential offers and should undertake to accept the highest offer. Such was the form of the invitation. It follows that the invitation upon its true construction created a fixed bidding sale and that Sir Leonard was not entitled to submit and the vendors were not entitled to accept a referential bid."
- **Blackpool Aero Club v Blackpool Borough Council (1990)**
- BBC invited tenders to operate an airport, to be submitted by noon on a fixed date. The plaintiffs tender was delivered by hand and put in the Town Hall letter box at 11am. However, the tender was recorded as having been received late and was not considered. The club sued for breach of an alleged warranty that a tender received by the deadline would be considered. The judge awarded damages for breach of contract and negligence. The council's appeal was dismissed by the Court of Appeal.

- **Brogden v MRC (1877)**
- B supplied coal to MRC for many years without an agreement. MRC sent a draft agreement to B who filled in the name of an arbitrator, signed it and returned it to MRC's agent who put it in his desk. Coal was ordered and supplied in accordance with the agreement but after a dispute arose B said there was no binding agreement.
- It was held that B's returning of the amended document was not an acceptance but a counter-offer which could be regarded as accepted either when MRC ordered coal or when B actually supplied. By their conduct the parties had indicated their approval of the agreement.
- **Gibson v MCC (1979)**
- Lord Denning said that one must look at the correspondence as a whole and the conduct of the parties to see if they have come to an agreement.

- **Trentham v Luxfer (1993)**
- T built industrial units and subcontracted the windows to L. The work was done and paid for. T then claimed damages from L because of defects in the windows. L argued that even though there had been letters, phone calls and meetings between the parties, there was no matching offer and acceptance and so no contract.
- The Court of Appeal held that the fact that there was no written, formal contract was irrelevant, a contract could be concluded by conduct. Plainly the parties intended to enter into a contract, the exchanges between them and the carrying out of instructions in those exchanges, all supported T's argument that there was a course of dealing between the parties which amounted to a valid, working contract. Steyn LJ pointed out that:
  a) The courts take an objective approach to deciding if a contract has been made.
  b) In the vast majority of cases a matching offer and acceptance will create a contract, but this is not necessary for a contract based on performance.

- **Hyde v Wrench (1840)**
- 6 June W offered to sell his estate to H for £1000; H offered £950.
- 27 June W rejected H's offer.
- 29 June H offered £1000. W refused to sell and H sued for breach of contract.
- Lord Langdale MR held that if the defendant's offer to sell for £1,000 had been unconditionally accepted, there would have been a binding contract; instead the plaintiff made an offer of his own of £950, and thereby rejected the offer previously made by the defendant. It was not afterwards competent for the plaintiff to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there existed no obligation of any sort between the parties.
- **Stevenson v McLean (1880)**
- On Saturday, the defendant offered to sell iron to the plaintiff at 40 shillings a ton, open until Monday. On Monday at 10am, the plaintiff sent a telegram asking if he could have credit terms. At 1.34pm the plaintiff sent a telegram accepting the defendant's offer, but at 1.25pm the defendant had sent a telegram: 'Sold iron to third party' arriving at 1.46pm. The plaintiff sued the defendant for breach of contract and the defendant argued that the plaintiff's telegram was a counter-offer so the plaintiff's second telegram could not be an acceptance.
- It was held that the plaintiff's first telegram was not a counter-offer but only an enquiry, so a binding contract was made by the plaintiff's second telegram.

- **Butler Machine Tool v Ex-Cell-O Corporation (1979)**
- The plaintiffs offered to sell a machine to the defendants. The terms of the offer included a condition that all orders were accepted only on the sellers' terms which were to prevail over any terms and conditions in the buyers' order.
- The defendants replied ordering the machine but on different terms and conditions. At the foot of the order was a tear-off slip reading, "We accept your order on the Terms and Conditions stated thereon." The plaintiffs signed and returned it, writing, "your official order… is being entered in accordance with our revised quotation… ".
- The Court of Appeal had to decide on which set of terms the contract was made. Lord Denning M.R. stated:
  - In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co Ltd v AM Satterthwaite*. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns L.C. said in *Brogden v Metropolitan Railway Co* (1877):
    - … there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description.
  - Applying this guide, it will be found that in most cases when there is a "battle of forms" there is a contract as soon as the last of the forms is sent and received without objection being taken to it. Therefore, judgment was entered for the buyers.

- **GNR v Witham (1873)**
- GNR advertised for tenders for the supply of stores and W replied 'I undertake to supply the company for 12 months with such quantities as the company may order from time to time'. GNR accepted this tender and placed orders which W supplied. When W later refused to supply it was held that W's tender was a standing offer which GNR could accept by placing an order. W's refusal was a breach of contract but it also revoked W's standing offer for the future, so W did not have to meet any further orders.
- **Lord Denning in Entores v Miles Far East Corp (1955)**
- If a man shouts an offer to a man across a river but the reply is not heard because of a plane flying overhead, there is no contract. The offeree must wait and then shout back his acceptance so that the offeror can hear it.
- **Powell v Lee (1908)**
- The plaintiff applied for a job as headmaster and the school managers decided to appoint him. One of them, acting without authority, told the plaintiff he had been accepted. Later the managers decided to appoint someone else. The plaintiff brought an action alleging that by breach of a contract to employ him he had suffered damages in loss of salary. The county court judge held that there was no contract as there had been no authorised communication of intention to contract on the part of the body, that is, the managers, alleged to be a party to the contract. This decision was upheld by the King's Bench Division.

- **Felthouse v Bindley (1862)**
- The plaintiff discussed buying a horse from his nephew and wrote to him “If I hear no more about him, I consider the horse mine… ” The nephew did not reply but wanted to sell the horse to the plaintiff, and when he was having a sale told the defendant auctioneer not to sell the horse. By mistake the defendant sold the horse. The plaintiff sued the defendant in the tort of conversion but could only succeed if he could show that the horse was his.
- It was held that the uncle had no right to impose upon the nephew a sale of his horse unless he chose to comply with the condition of writing to repudiate the offer. It was clear that the nephew intended his uncle to have the horse but he had not communicated his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff. There had been no bargain to pass the property in the horse to the plaintiff, and therefore he had no right to complain of the sale.

- **Entores v Miles Far East Corp (1955)**
- The plaintiffs in London made an offer by Telex to the defendants in Holland.
- The defendant’s acceptance was received on the plaintiffs’ Telex machine in London. The plaintiffs sought leave to serve notice of a writ on the defendants claiming damages for breach of contract. Service out of the jurisdiction is allowed to enforce a contract made within the jurisdiction. The Court of Appeal had to decide where the contract was made.
- Denning L.J. stated that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received. The contract was made in London where the acceptance was received. Therefore service could be made outside the jurisdiction.

- **The Brimnes (1975)**
- The defendants hired a ship from the plaintiff shipowners. The shipowners complained of a breach of the contract. The shipowners sent a message by Telex, withdrawing the ship from service, between 17.30 and 18.00 on 2 April. It was not until the following morning that the defendants saw the message of withdrawal on the machine.
- Edmund-Davies L.J. agreed with the conclusion of the trial judge. The trial judge held that the notice of withdrawal was sent during ordinary business hours, and that he was driven to the conclusion either that the charterers' staff had left the office on April 2 'well before the end of ordinary business hours' or that if they were indeed there, they 'neglected to pay attention to the Telex machine in the way they claimed it was their ordinary practice to do.'
- He therefore concluded that the withdrawal Telex must be regarded as having been 'received' at 17.45 hours and that the withdrawal was effected at that time.
  - Note: Although this is a case concerning the termination of a contract, the same rule could apply to the withdrawal and acceptance of an offer.

- **Brinkibon v Stahag Stahl (1983)**
- The buyers, an English company, by a telex, sent from London to Vienna, accepted the terms of sale offered by the sellers, an Austrian company. The buyers issued a writ claiming damages for breach of the contract.
- The House of Lords held that the service of the writ should be set aside because the contract had not been made within the court's jurisdiction. Lord Wilberforce stated that the present case is, as Entores itself, the simple case of instantaneous communication between principals, and, in accordance with the general rule, involves that the contract (if any) was made when and where the acceptance was received. This was in Vienna.
- **Adams v Lindsell (1818)**
- 2 Sept. The defendant wrote to the plaintiff offering to sell goods asking for a reply "in the course of post".
- 5 Sept. The plaintiff received the letter and sent a letter of acceptance.
- 9 Sept. The defendant received the plaintiff's acceptance but on 8 Sept had sold the goods to a third party.
- It was held that a binding contract was made when the plaintiff posted the letter of acceptance on 5 Sept, so the defendant was in breach of contract.

- **Household v Grant (1879)**
- G applied for shares in the plaintiff company. A letter of allotment of shares was posted but G never received it. When the company went into liquidation G was asked, as a shareholder, to contribute the amount still outstanding on the shares he held. The trial judge found for the plaintiff.
- The Court of Appeal affirmed the judgment. Thesiger LJ stated that "Upon balance of conveniences and inconveniences it seems to me… it was more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant."
- **Holwell Securities v Hughes (1974)**
- The defendant gave the plaintiff an option to buy property which could be exercised "by notice in writing". The plaintiffs posted a letter exercising this option but the letter was lost in the post and the plaintiffs claimed specific performance. The Court of Appeal held that the option had not been validly exercised. Lawton LJ stated that the plaintiffs were unable to do what the agreement said they were to do, namely, fix the defendant with knowledge that they had decided to buy his property. There was no room for the application of the postal rule since the option agreement stipulated what had to be done to exercise the option.

- **Tinn v Hoffman (1873)**
- Acceptance was requested by return of post. Honeyman J said: "That does not mean exclusively a reply by letter or return of post, but you may reply by telegram or by verbal message or by any other means not later than a letter written by return of post."
- **Yates v Pulleyn (1975)**
- The defendant granted the plaintiff an option to buy land, exercisable by notice in writing to be sent by "registered or recorded delivery post". The plaintiff sent a letter accepting this offer by ordinary post, which was received by the defendant who refused to accept it as valid.
- It was held that this method of acceptance was valid and was no disadvantage to the offeror, as the method stipulated was only to ensure delivery and that had happened.

- **R v Clarke (1927) (Australia)**
- The Government offered a reward for information leading to the arrest of certain murderers and a pardon to an accomplice who gave the information. Clarke saw the proclamation. He gave information which led to the conviction of the murderers. He admitted that his only object in doing so was to clear himself of a charge of murder and that he had no intention of claiming the reward at that time. He sued the Crown for the reward. The High Court of Australia dismissed his claim. Higgins J stated that:
  - "Clarke had seen the offer, indeed; but it was not present to his mind – he had forgotten it, and gave no consideration to it, in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or forgetting it after hearing."
- **Williams v Carwardine (1833)**
- The defendant offered a reward for information leading to the conviction of a murderer. The plaintiff knew of this offer and gave information that it was her husband after he had beaten her, believing she had not long to live and to ease her conscience. It was held that the plaintiff was entitled to the reward as she knew about it and her motive in giving the information was irrelevant.

Thank you

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