Offer & Acceptance

At a glance: A valid offer is made when there is a meeting of the minds as to the terms of a contract and something of value is exchanged (consideration).

Harvey v Facey: Plaintiff telegraphed asking to buy a property. Defendant's replied "lowest cash price £900." Plaintiffs later agreed to the price but the offeror's (defendants) changed their mind. Plaintiff's wanted to enforce the deal. The plaintiff's lost.

- A mere quotation of price is not an offer, it is only an invitation to treat.

Canadian Dyers Association Ltd v Burton: Dyers asked for the lowest cash price for a property. Burton responded "16,500." Dyers asked if Burton would go lower and Burton replied that their previous quote was as low as they would go. Dyers sent a deposit and asked for title (implicit acceptance). Burton then sent a draft deed. Later Burton changed their mind and said there was no agreement. Dyers sued, asking to have the original deal enforced. Dyers won the case, Burton had to sell.

- The circumstances in which an a statement of price is made and the facts surrounding it are considered when deciding if an offer was made. The fact that Burton sent a draft deed in response to the deposit showed a recognition that their quote was an offer.

Pharmaceutical Society of Great Britain v Boots Cash Chemists: UK law at the time stated that controlled substances must be sold "by or under the supervision" of a pharmacist. Boots was a self-serve pharmacy. Several customers came in and bought controlled substances by simply taking them from the shelf over to the cashier. Boots held that displaying goods was only an invitation to treat (not an offer) and that the creation of the contract to sell happened at the register, supervised by a pharmacist. Boots won based on their argument.

- A display of goods is only an invitation to treat. A seller can refuse an offer even after a buyer has taken physical possession of what they intend to buy.

Unilateral Contract

At a glance: A promise for an act, the acceptance of which consisting of the performance of the act requested, rather than the promise to perform it. In other words: the two parties don't negotiate and agree, the offeree simply accepts the contract by doing what was asked of anyone who would do it.

Carlill v Carbolic Smoke Ball: Carbolic sold a cure-all 'smoke ball.' They posted an ad in the paper that they would pay £100 to anyone who used their product and got still sick. Carlill used the smoke ball as instructed by the ad and still got sick. When Carlill tried to collect, Carbolic claimed the ad was "mere puffery." Additionally, Carbolic claimed there could be no meeting of the minds since they didn't know Carlill at the time she "accepted." Carlill won the case.

- This case created the concept of a **Unilateral contract.** Carbolic made a valid offer to anyone that would accept, including Carlill.

Goldthorpe v Logan: Logan owned an electrolysis hair removal service advertising "guaranteed results." Mrs. Goldenthorpe used the service to remove facial hair. Goldenthorpe went to the clinic and agreed to pay for the treatment, it didn't work. Goldenthorpe held that the ad was a unilateral contract and that it was not superseded by a later bilateral contract at the clinic. Goldenthorpe won.

- A unilateral contract can exist where a person both sees an ad and interacts with the offeror.

Law of Tenders

At a glance: When a firm wants to build something substantial, they submit a call for tenders. The tenderers submit their building plans and a deposit. The offeror then accepts the (usually lowest) tender of one of the contractors. The rest of the tenderers get their deposits back and then the firm and the tenderer create a binding contract for doing the work. After Ron Engineering, the tenders are considered a binding contract separate from the building contract.

R v Ron Engineering & Construction (Eastern) Ltd: Ron Eng. submitted a tender to the government for a building project. When tenders opened but BEFORE the government accepted a tender, Ron Eng. realized they had made a mistake. Ron Eng. forgot to include labour costs which made their tender far lower than market price. The government refused to accept their retraction and kept the deposit. The government won and was allowed to keep the deposit.

- Tenders are a valid and enforceable contract. The deposit is paid in exchange for the right to negotiate a second contract.

Mistake

At a glance: When there is a mistake in facts there may still be an enforceable contract. Where there is a mistake about the terms there can be no meeting of the minds so there is no contract. An offeree cannot accept an offer when they know it includes a mistake (think missing zeros on a quote).

In other words: mistake applies when due to miscommunication, the two parties have different ideas of what is being agreed to.

Ron Engineering continued: The court found that there was no mistake in the tender. Ron Eng. intended to tender at the price they gave. Mistake would only apply if there was an error in printing, compiling or otherwise creating the tender (Contract A). For example, mistake would have applied if Ron Eng. Accidentally missed a zero, quoting sixty-thousand rather than six hundred-thousand; this hypothetically error would have been apparent had it been pointed out at the time.

- Mistake only applies where the mistaken party would have known they were mistaken at the time.

MJB Enterprises Ltd v Defence Construction (1951) Ltd: Defence Construction (the govt.) called for tenders to build a water distribution system. The tender call had two important clauses, that the govt. was not bound to accept the lowest tender, and that the tenders could not include contingent pricing. Sorochan made the lowest offer by submitting a tender with contingent pricing. MJB had the second lowest bid and followed the rules of the tender call. MJB said that their contract A (tender agreement) implicitly provided that the government would accept only a valid tender. MJB won partially. The supreme court found that there was an implied term that only valid tenders would be accepted, however, the privilege clause means MJB's tender would not necessarily have been chosen regardless. Still, MJB was awarded damages.

- There can be implied terms:
  - Based on custom or usage
  - Based on the type of contract
  - Based on the presumed intentions of the parties when they contracted
- Officious bystander test: If an officious bystander asked the parties "did you mean to include this term" and they would reply "of course" then the term is implied.

Formation

At a glance: For a contract to form, an offer must be acceptance. Acceptance is unqualified. If a reply to an offer is qualified (varies the terms), it is a counteroffer and no contract is formed unless the counteroffer is accepted. In other words: "yes" means there is a contract, "yes but…" means there is no contract.

Livingstone v Evans: Evans offered to sell land to Livingstone for $1800. Livingstone responded "Send lowest cash price. Will give $1600 cash." Evans responded "cannot reduce price." Livingstone then tried to accept the original offer for $1800. Evans no longer wanted to sell and Livingstone sought specific performance to enforce the original deal. Evans argued that the counter-offer killed the original deal. Livingstone won.

- Though the original deal was killed by the counter-offer, "cannot reduce price" revived it. More simply, there were three offers: Evans(1800) was rejected, Livingstone(1600) was rejected, Evans(1800) was accepted.
- Note: a simple request for information does not kill an offer, only a counter-offer. The fact that Livingstone included a price meant that he made a counter-offer.

Battle of the Forms

At a glance: There are situations where the classic mirror principle and meeting of the minds cannot strictly apply. When two parties send contracts with revisions back and forth and eventually complete some sort of deal there is a question as to whose contract really applies. If neither party formally agrees to the other party's contract it cannot simply be stated there is no contract; the parties both believe they agreed to *something*. There are therefore several different ways of deciding how to deal with these cases. In general though, the first contract to be accepted under the normal understanding of contracts will prevail over later unsigned/unrecognized contracts. In Canada, the classic, last-shot, first-shot, and shots on both sides approaches are used depending on the context.

Butler Machine Tool Co Ltd v Ex-Cell-O Corp: Ex-cell asked to purchase a custom machine tool from Butler. Butler sent a standard form contract with a price variation clause and invited Ex-cell to accept. Ex-cell sent a purchase order stating that the order would be placed without price variation. Butler "accepted" the offer by sending back the completed order form with a note stating that the order would be fulfilled with a price variation clause. The machine was built and delivered and Butler sent an invoice with an increased price, Ex-Cell refused to pay. Ex-cell won.

- In a battle of the forms there are three rules that may apply:
  - First-shot rule: the first contract which is "accepted" rules
  - Last-shot rule: the last form submitted is enforced
  - Shots on both sides (lord denning): the two positions should be combined

Tywood Industries Ltd v St Anne-Nackawic Pulp & Paper Co Ltd: Tywood agreed to sell raw materials to St. Anne. St Ann sent invitations to tender, Tywood responded with a quote, St Ann sent purchase orders along with another contract with an arbitration clause. St Ann asked tywood to sign the new contract and deliver the goods. Tywood sent the goods but did not sign the contract. The two got into a dispute and Tywood took St Anne to court. St Anne argued that there was an arbitration clause in the contract so the proceedings must be stayed. Tywood won, the proceedings were not stayed.

- Material changes to a contract should be brought to the attention of both parties and agreed to. Simple conduct is not enough to radically shift the nature of a contract.

Acceptance

At a glance: Acceptance can be inferred through conduct. An offeror is the master of their own offer.

The flagpole problem: In a unilateral contract, the contract is enforceable once the contract is completed. This leads to the problem that an offer can be revoked right before the act is completed. If I agree to pay you 100 dollars to climb the flagpole, under standard contracts interpretation, I can revoke my offer right before you make it to the top.

ProCD v Matthew Zeidenberg and Silken Mountain Web Services Inc: ProCD sold a database of phone numbers to commercial and consumer users. The database could only be viewed after opening the shrinkwrap on the CD. The license stated that the database could not be redistributed. Zeidenburg bought the physical CD and resold the database. Zeidenberg argued that the license was not binding since he couldn't see it before he purchased the CD. ProCD won.

- The offeror is the master of their own offer. ProCD was free to specify the terms under which users could use their software and it was unreasonable to expect ProCD to find another way to communicate the terms.

Dawson v Helicopter Exploration Co: Dawson discovered a mineral-rich area in BC and staked a claim to exploit the land. Dawson later informed Springer at Helicopter Co. about the land after his claim had lapsed. Springer agreed to give Dawson a 10% stake in the land for leading him there **IF** Springer could get a helicopter (unilateral contract). Springer later told Dawson that he couldn't get a helicopter. Springer's company then found the land themselves and tried to take all the profit for themselves. Dawson sued for damages and won.

- There are implied subsidiary obligations on both parties in unilateral contracts to try to bring about the contingent conditions.
- The court tries to avoid a flagpole problem in cases of unilateral contract by finding a way to interpret the contract as bilateral. This was one of those cases. The court found that Springer impliedly agreed not to retard Dawson's efforts in return for Dawson's help.

Felthouse v Bindley: Felthouse wanted to buy his nephew's horse. Felthouse sent a letter to his nephew stating that if he received no more response he would consider the horse sold to himself. The nephew was auctioning off farm animals and told the auctioneer to leave his horse aside as it was already sold to his uncle. The auctioneer forgot the instructions and sold the horse. Felthouse sued the auctioneer. The question is whether the statement "if I heard nothing more" can create a valid contract which was broken by the auctioneer. Felthouse lost on appeal.

- The need for communication of acceptance can be waived; but the waiver itself must be communicated. At the time the horse was sold the nephew had not legally sold the horse, he could have backed out of the offer at any time.

Saint John Tug Boat Co v Irving Refinery Ltd: Irving needed to bring in shipments of crude oil with tug boats at the St. John's harbour. SJ Tug boat provided tug boats to Irving. SJ wrote to Irving that SJ would need to subcontract more boats if Irving needed more than two, Irving agreed. SJ continued to provide the extra boats after the contract period. SJ sent invoices and Irving refused to pay as they never extended the contract. SJ won and Irving had to pay for the extra boats after the contract period.

- Acceptance of a contract from conduct is based on a legal test. If a firm's actions reasonably display acceptance then they have accepted a contract, regardless of their hidden intentions. A reasonable person would not believe that they were getting a tug-boat service for free.

O'Neil v Kings County Construction: O'Neil made a deal to have his land developed for blueberry production in return for a share of his profits once harvesting began. O'Neil originally made the payments but then sold the land, leaving Kings county out to dry. Kings county was awarded damages.

- The same principle as St. John's. The principle was clearly stated by the judge: "If someone knows the thing is done for their benefit with an expectation of payment, then accepting the act and taking its benefit will implicitly count as requesting that it be done, and that will be seen as a promise to pay."

Eliason v Henshaw: Buyers contacted the seller asking to purchase flour and asked for a response by wagon. The sellers received the letter and sent an acceptance via mail rather than wagon. By the time the mail arrived, the buyers had given up on the sellers and purchased their flour elsewhere. The sellers sent the flour anyway and the buyers refused to take it. The sellers demanded payment. The buyers won, there was no contract.

- The offeror is the master of his own offer. Any variation of terms in "acceptance" is a counteroffer.

Communication of Acceptance

At a glance: In general: an offer is not accepted until one party communicates acceptance and it is actually received. Execptions to the rule are the postal acceptance rule and unilateral contracts.

Household Fire & Carriage Accident Insurance Co v Grant: Grant made deal with a representative of Household Fire to buy shares in the company. Grant agreed to pay a 5 pound deposit on 100 shares and pay for the rest within a year of the shares' allotment. Household Fire sent a confirmation of the allotment but it was lost in the mail. The shares credited to Grant payed dividends of 5 pounds so this payment was accepted as the deposit without notifying Grant. The company went bankrupt and the receiver wanted Grant to pay the full price for the shares allotted to him. Grant claimed that he was not notified of acceptance. Household fire won.

- In cases where any of the parties do not explicitly state that the post cannot be used to communicate acceptance, the post is an agent of the parties. Giving notification to the post office is therefore equivalent to notice even if the letter never reaches its destination.

At a glance: An option contract is a contract to keep an offer for a further contract open. The optionee offers to hold open an offer but is not bound to make the further contract come into existence if the optioner decides they want to contract.

Holwell Securities Ltd v Hughes: Hughes gave Holwell an option to purchase real estate. Holwell sent a letter saying they wanted to exercise the option but the letter never reached Hughes. The option contract specified that option could only be exercised "by notice in writing." Hughes won. There was no notice in writing.

- The postal acceptance rule does not apply since the contract requires notice. "Notice" means actually being made aware.

Instantaneous Communication

Brinkibon Ltd. v. Stahag Stahlund Stahlwarenhandelsgesellschaft mbH: Brinkibon formed a contract to purchase steel from the Austrians. Brinkinbon accepted the Austrian's deal via telex (basically fax). The Austrians failed to deliver and Brinkibon must prove that the contract was formed in England to sue the Austrians in English court. Brinkibon argues that the deal was formed in England when the telex was sent according to the postal acceptance rule. Brinkibon lost.

- The postal acceptance rule does not apply to instantaneous communication.
- The postal acceptance rule may apply IF the failure to receive acceptance was due to the offeror's own error.

At a glance: Fine print may be included in contracts. A contractee is not bound by fine print unless the term in fine print is specifically brought to their attention.

Rudder v Microsoft Corp: Rudder initiated a class action lawsuit against Microsoft for taking unauthorized payment from MSN users in Ontario. The 'scroll-down-and-agree license' stated that all disputes could only be heard in Washington state. Rudder argued that MSN users could not see the jurisdiction clause without scrolling down and therefore it was 'fine print.' Rudder lost.

- Electronic standard form contracts are enforceable in toto. It is a reasonable expectation that a user knows how to scroll down and read the entire document.

Revocation

At a glance: An offer is of no force or effect once withdrawn. An offer can be revoked any time prior to acceptance even (even if the offeror promises not to do so). Revocation must be actually communicated. Communication of revocation occurs whenever the offeree learns that the offer cannot be accepted (whether or not this information comes from the offeror). An offer lapses if it not answered in a reasonable time.

Dickinson v Dodds: Dodds offered to sell Dickinson his land. Dodds specified that the offer would remain open until the following Friday at 9:00AM. Dickinson heard that Dodds was selling to Allan instead. The following day, Dickinson sent written acceptance but it failed to get to Dodds. Dickinson, hearing nothing, tracked down Dodds at 7:00AM on Friday and handed over written acceptance. Dodds informed Dickinson that the property was already sold. Dickinson sued to force Dodds to sell to himself over Allan. Dickinson lost.

- A promise to hold a contract open is not binding. There was consideration for the promise to make it a contract
- Even indirect revocation is valid to squash an offer. When Dickinson heard that the land was sold to Allan the offer was revoked.

Byrne v Van Tienhoven: Van Tienhoven mailed an offer to the plaintiff to sell a shipment of tin plates. Prior to the letter being received, the defendant's mailed a revocation. The plaintiff's received the offer and accepted immediately and contracted to resell the plates. After receiving the revocation mailed prior to acceptance, the plaintiff's sued for breach. The plaintiff's won.

- A revocation is not effective until it is actually communicated.

- The postal acceptance rule does not apply to revocation.

Errington v Errington and Woods: Errington Sr. bought his son and daughter in a law a house with a mortgage. Errington Sr. promised that he would transfer the title of the house once the couple finished paying off the mortgage. When Errington Sr. died, his estate tried to back out of the deal to avoid transferring title once the mortgage was paid. The estate lost and the couple was allowed to keep the home if they continued making payments.

- There is an implicit term that the couple would not have the deal revoked as long as they made the payments.
- An offer cannot be revoked if the offeree has begun, but not finished, fulfilling the terms.

Barrick v Clark: Clark offered to purchase land from Barrick for $14,500. Barrick sent a counteroffer for $15,000 but Clark was away and did not receive it. While Clark was still away, Hohmann struck a deal to buy the property from Barrick. A week later, Clark returned from his trip and purported to accept the counteroffer. The next day Clark learned of the deal and sent a frantic letter to Barrick for clarification. Barrick replied that Clark took too long to respond and the property was sold. Clark sued to have the land sold to him over Hohmann. Clark lost.

- An offer lapses if it is not accepted within a "reasonable time."
- The economic realities of the property sale meant that Clark's delay of 20 days was unreasonable.

Certainty

At a glance: An agreement cannot be a contract if it is too uncertain or obviously incomplete. There can be no meeting of the minds if the terms cannot be understood by the parties. Incompleteness is far more likely to result in no contract than vagueness. To make terms more certain, the courts will try to assume reasonableness. There are two balanced principles in the law of certainty:

- The court should not impose a contract on parties who did not agree to contract.
- If something can be interpreted as a valid contract it should be.

R v CAE Industries: The government wanted to sell an airfield without sacrificing the jobs it provided. The government offered to sell the field to CAE to continue running it. The government sweetened the deal by promising to contribute labour to updating the airfield. The wording of the deal said that the government would secure at least 40-50 thousand hours of work but would employ "best efforts" to secure 700 thousand hours. The government failed to exceed even 50,000 hours. CAE sued, claiming breach. CAE won.

- "best efforts" is vague, but not incomplete. It doesn't directly bind the government to supply a definite number of hours but it does bind them to do something proactive; they didn't.
- There is still a contract because "best efforts" can be interpreted as a binding contract.
- Best efforts means "leave no stone unturned"

May & Butcher Ltd. v R: May and Butcher formed a contract with the government to purchase unused tentage from the military. The agreement stated that prices "are to be agreed upon from time to time" and that any disputes would be subject to arbitration. May sued over a dispute about the cost of tentage. May argued that the contract implicitly binds the government to offer tentage at a reasonable price or a price determined by arbitration. May lost.

- A mere agreement to agree is not a contract.
- The terms in the contract were so incomplete that in reality, no contract was ever formed.
- The arbitration clause is meaningless as it only comes into effect after the contract is formed; and no contract was formed.

Sudbrook Trading v Eggleton: Sudbrook Trading contracted to lease land from Eggleton. The contract stated that prices would be set by agreement between two valuers. Eggleton and Sudbrook would each appoint a valuer to act on their behalf. Eggleton then refused to appoint a valuer and Sudbrook sued. Sudbrook won.

- The mechanism for enforcing a contract is replaced by a reasonable alternative to achieve the same end if the specified mechanism cannot be used.
- The court held that the end goal of the agreement was to come to a reasonable price: therefore the court determined a reasonable price based on market value.

At a glance: Sudbrook is distinguished from May. In May, there was no underlying agreement for a reasonable price. The future agreement (the mechanism) was essential the the validity of the contract in May.

Hillas v Arcos: Arcos agreed to sell softwood to Hillas in 1930. The contract stated that Hillas would have the option to renew the contract for the 1931 season and pay 5% less than the price specified in the official price list. In other words: in return for buying wood in 1930, Hillas would be given a slight edge over its competitors in 1931. Arcos then contracted to sell all of its softwood to another company in 1931. Arcos claimed that the contract was too uncertain as it gave no specific price. Hillas sued for breach. Hillas won.

- Verba ita sunt intelligenda ut res magis valeat quam pareat: words should be construed in a way such that their purpose may be carried out.

- This was not an agreement to agree: Hillas would purchase wood now (consideration) in return for the right to purchase again at an objectively set price (based on the price list).

Foley v Classique Coaches: Foley owned a gas station and an adjacent plot of land. Foley agreed to sell the land to Classique in return for Classique agreeing to buy all the gas for its coaches from Foley's gas station. The agreement specified that the price of gas would be agreed "from time to time," and included an arbitration clause. Classique fulfilled the terms for three years and then sought to buy gas elsewhere. Classique argued that the contract was incomplete and therefore there was no agreement. Foley sued for breach. Foley won.

- The court will interpret a contract as valid when it is manifest that the parties believed that they had formed a valid contract.
- Classique acted as though they were bound for three years.
- Classique only wants to void one portion of the contract. They don't want to give back the land. The court considered that this fact shows disingenuous motivation (it's not really about uncertainty).

Agreements to Negotiate

At a glance: An agreement to negotiate is not the same as an agreement to agree. An agreement to negotiate is an agreement to engage in the (good faith) **process** of coming to an agreement. An agreement to agree is aimed at the substantive agreement which would result from the process.

Empress Towers Ltd. v Bank of Nova Scotia: Scotia leased office space from Empress. The terms of the lease included a renewal clause (agreement to negotiate) for market value at the time of renewal. The lease was set to expire August 31. On May 25 Scotiabank indicated a desire to exercise the renewal clause for five more years. On June 23 Scotiabank offered to increase their rent payment to $5,400/mo (from ~$3,000). Scotia followed up on June 26 and August 23 but still received no reply. On Aug 31 (the deadline) Empress offered $5,400/mo plus a $15,000 renewal fee. Scotiabank sued, claiming the renewal fee was outside "market value." Scotiabank won.

- "Market value" is objective and therefore enforceable.
- The court also found that good faith was an implied term; and that Empress did not negotiate in good faith.

Mannpar Enterpises Ltd v Canada: Mannpar received a contract with the Canadian government to remove sand an gravel from the Shxwháy reserve. The contract included a renewal clause. Mannpar attempted to renew at the end of the first term but the government refused. The government had a fiduciary responsibility to act in the best interests of those on the reserve. Mannpar sued for breach, claiming the renewal clause obligated the government to negotiate. Mannpar lost.

- Mannpar lost firstly on the ground that the renewal clause was too broad to be given any meaning and was therefore void.
- Case was distinguished from Empress as there was no objective measure. Empress included "market value," no such measure was included in this agreement.
- Mannpar also lost because there was an implied term that Canada would act in the best interest of the Shxwháy people. The Shxwháy did not want a renewal.

At a glance: Mannpar determined the test for validity of an agreement to negotiate. The agreement is valid if:

- There is a contract between the parties
- A duty to negotiate in good faith is consistent with the parties' intent (meeting of the minds)
- There is an objective benchmark to asses whether any party is in breach of the agreement (certainty)

Anticipation of Formalization

At a glance: Anticipation of formalization occurs where parties expect to be bound by a formal document which has yet to be created. This is important in cases where the parties seemingly agree as to all of the terms but expect to formalize these terms later. These agreements can be enforceable so long as the parties intend to be bound at once in relation to the future document. These agreements are not enforceable if the parties only intend to be bound once the document is completed.

Bawitko Investments Ltd. v Kernels Popcorn Ltd: Kernel sought to open new locations. Bawitko approached Kernels to obtain a franchise. Kernels sent a draft agreement. Bawitko met to discuss several alterations to the standard-form contract. The meeting ended with a Kernel's representative stating "you've got a deal." The formal contract was not completed and Bawitko sued for breach of the verbal agreement. Bawitko lost.

- The statement "you've got a deal" does not form a valid contract where there is anticipation of formalization.
- In this case, the parties did not act like they were already bound after the meeting. The two continued to negotiate over the paper contract. There was therefore no meeting of the minds as the two parties did not consider themselves bound.