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The Barrie Guide to the Law of Contract 2021-2022
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Barrie Goldstone
Head of the School of Law
London Metropolitan University

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PART I: REACHING AN AGREEMENT

1 INTRODUCTION

- 1.1 All commercial law is based on the law of contract. In order to understand how commerce operates, it is therefore vital to have a basic understanding of how contracts work, whether you are concerned with consumer rights, shipping, entertainment, employment, international commerce, the internet, newspapers, music, sports or any other activity which involves the creation and enforcement of binding contracts

2 THE PHENOMENON OF AGREEMENT

A Legally Binding Agreement

- 2.1 A contract is often defined as “a legally binding agreement made between two or more parties”. However, that definition requires some qualification. Although the vast majority of contracts involve the parties in buying and selling goods and services in accordance with their *actual* intentions, when there is a dispute about whether there has been a contractual agreement, and on what terms, the courts do not generally consider what the parties *actually* intended or agreed to do: instead, they ask what a reasonable person, observing the words and actions of the parties, would *think* that they intended – i.e. they look for the “phenomenon” of agreement. This is therefore an objective test.

Dictionary Definition of Phenomenon

- 2.2 The Oxford English Dictionary definition of a phenomenon is as follows:

Phenomenon *n* (*pl* **phenomena**) 1 a fact or occurrence that appears or is perceived, esp one of which the cause is in question. 2 the object of a person’s perception.

Thus, the “phenomenon of agreement” is to do with what the courts perceive, rather than necessarily what the parties intended.

The Objective Test for an Agreement

- 2.3 The test of whether there was a contractual intention to reach an agreement is thus generally an “objective” one: the courts are not looking for a genuine agreement between the parties, but merely “the phenomenon of agreement”. Indeed, it is commonly the case with written contracts, especially those for essential services and internet contracts that require the buyer to click a button to confirm that they have ‘read and understood’ all the terms, that consumers do not bother to read the terms at all: they are still generally presumed to have agreed to them.

- 2.4 ***Smith v Hughes* (1871) LR 6 QB 597**

Smith, a farmer, took a sample of oats to Hughes, who was the manager for a trainer of racehorses. After examining the oats, Hughes agreed to buy fifty quarters for 34 shillings per quarter. However, on delivery Hughes realised that the oats were “new”, when what he needed – and thought he was buying – were “old” oats. As new oats were of no use to him, he insisted that the farmer take them back, but the farmer refused.

Hughes insisted that he had not intended to buy new oats: indeed, he unsuccessfully tried to convince the court that the oats were warranted as old by the farmer. However, the Court of Appeal held that his actual intention was not relevant. There was no fraud by Smith, and apart from the fact that the oats were rather expensive, there was nothing in the conduct of the parties to suggest anything other than that Hughes wished to buy oats from Smith which matched the sample, and that the sample he was given was of new oats.

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." per Blackburn J at p 607

2.5 ***RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 1 WLR 753 (SC)**

M and R had entered into negotiations about R supplying and installing automated packaging machinery for M. Although they had intended that a written contract would set out the terms on which the work was to be carried out, work had in fact begun before the terms were finalised. For the purpose of enabling the work to begin, and while continuing to negotiate the full contract terms, the parties had entered into a contract formed by a letter of intent, which provided for the whole agreed contract price and contemplated that the full contract terms would be based on "MF/1" terms. By 5 July 2005, a draft final contract was produced, which provided that it would not become effective until each party had executed and exchanged a counterpart. That was never done. Rather, all the terms having been agreed, substantial works were carried out and, on 25 August, the agreement was varied in important respects.

The issue was whether, after the expiry of the letter of intent, M and R had entered into a contract and, if so, on what terms. The trial judge held that there was a contract, but it did not include the MF/1 terms; the Court of Appeal held that there was no contract at all; and the Supreme Court held that there was a contract which did include the MF/1 terms.

Lord Phillips noted that the case demonstrated the perils of beginning work without agreeing the precise basis upon which it was to be done, and the moral was to reach agreement before work began. He added this observation about the objective test:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations." per Lord Phillips at para 45

2.6 There is some academic dispute about whether the objective test should be measured from the point of view of an outside observer (sometimes called "detached objectivity"), or from the supposed point of view of one or other of the parties (see Howarth (1984): "The Meaning of Objectivity in Contract", LQR 100).

2.7 ***Lehman Brothers International (Europe) v. Exotix Partners LLP* [2019] EWHC 2380 (Ch)**

Where both a seller and buyer of global depository notes had been mistaken as to their value, so that the buyer obtained a windfall of 1000 times more than their nominal value on selling them on to a third party, the buyer was ordered to pay to the claimant so much of the price it obtained from the on-sale as was attributable to the number by which the claimant had over-delivered.

In the Lehman Brothers administration, the claimant brought proceedings concerning the terms of sale of Peruvian Government global depository notes (GDNs).

The parties had entered into an agreement by a recorded telephone conversation for the claimant to sell its holding of GDNs to the defendant, a securities broker. Prior to entering into the trade, the claimant produced a "sign-off pack" as part of its internal authorisation process which was signed by an employee (R). The sign-off pack included a spreadsheet (the BONY spreadsheet) which listed the value and price of the securities. In one column, the "BONY position" was recorded as 22,955 and in another column the value as 22,580,893. After the sale, the defendant sent the claimant a summary of its terms (VCON) which recorded the trade as being for the sale of 22,955 GDNs at a price of \$7,707, being 91.5% of their nominal value. It transpired that the true value of the GDNs was over £7 million. The defendant sold them to a third party and obtained a windfall.

The defendant accepted that both parties were mistaken as to the value of the GDNs but claimed to have proceeded on the assumption that each GDN was worth PEN 1, not PEN 1,000, and that the price paid was in accordance with the agreement. A

Information known or available - Evidence of knowledge or information actually known to both parties prior to the trade was plainly admissible as part of the factual matrix which should be taken to have informed them in making their agreement. It was necessary to determine the objective intention emerging from the words used, not the parties' subjective intentions or understandings.

Meaning and effect of express terms - It was necessary to interpret the words of the agreement in order to discern the objective intention of the parties. From the telephone recording and the VCON, both the subject matter and the price were identified by reference to the nominal amount stated in terms of a monetary total. The quantity was expressed by reference to a monetary sum and the price was stated as a percentage of that amount. The words used by the defendant seemed to be plain in their intent and there was nothing to warrant imputing to them a different meaning than that which they appeared to convey. Accordingly, the most likely meaning of the agreement was that it was for the sale of GDNs with a face value of PEN 22,955 at a price of 91.5% of nominal value, amounting to \$7,707.

Restitution - In order to reverse the defendant's unjust enrichment, it should pay to the claimant so much of the price it obtained from the on-sale of the GDNs as was attributable to the over-delivered number.

The Subjective Exception

2.8 Despite the general rule of objective analysis, the courts will sometimes consider the actual "subjective" intention of the parties, especially when to ignore it would be to permit a fraud.

2.9 ***Hartog v Collin & Shields* [1939] 3 All ER 566**

The defendants offered to sell the plaintiffs 10,000 Argentine hare skins, winters at 10¹/₄d per lb; 10,000 half hares at 6³/₄d per lb; and 10,000 summer hares at 5d per lb. In fact, Argentine hare skins are never sold by the pound, but always by the piece (a piece being about one-third of a pound). It was clear to all the parties that the offer was a mistake, but the plaintiff "snapped it up" and then sued the defendant for not going through with the deal as plainly stated. The court held that despite the fact that an objective observer might reasonably suppose that the offer was as stated, as the actual parties clearly realised it could not have been meant, there was no contractual agreement.

"The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerer's real intention. Indeed, I am satisfied to the contrary. That means that there must be judgment for the defendants." per Singleton J at p 568

2.10 ***Spring v National Amalgamated Stevedores and Dockers Society* [1956] 1 WLR 585**

In 1939, the Trade Union Congress (TUC) adopted certain recommendations relating to the transfer of members from one union to another. These were collectively known as "the Bridlington Agreement".

In 1955, the NASDS admitted Francis Spring and other Liverpool dockworkers into the union, despite this being in breach of the Bridlington Agreement, under which only existing members of the Transport and General Workers Union could be admitted into the NASDS. Following arbitration by the TUC, NASDS expelled Spring from the union. Spring claimed a declaration that the expulsion was *ultra vires*, illegal and void.

The NASDS contended that there was an implied term in Spring's contract of membership that he would comply with the Bridlington Agreement, and would thus accept that his expulsion was valid.

They claimed that as the Bridlington Agreement was well known to union members, a reasonable observer would objectively suppose that its effect was known to the plaintiff.

However, the court considered the issue subjectively. On the evidence, Spring had not even heard of the Bridlington Agreement until five weeks after he joined the union. On that basis, he could not have intended himself to be bound to it at the time he made the membership contract, and thus there was no implied term to that effect.

2.11 ***Blyth v. Nelsons Solicitors Ltd.* [2019] EWHC 2063 (QB)**

A solicitor's firm and its client concluded a conditional fee agreement in which the costs of taking the matter to a contested trial were estimated at £150,000.

In June 2014, a meeting was held at which, according to the client, an oral agreement was reached to limit their costs liability to the sums set out in the costs budget. The client claimed that that agreement had been confirmed in writing by an email in August in which it was stated that the firm would "honour the original budget".

The litigation settled in March 2015 and the parties agreed that the costs chargeable by the firm would be capped at £400,000, subject to the client's right to seek a detailed assessment.

The firm invoiced the client for their costs on the outstanding balance of £400,000. The client sought a detailed assessment at which the Master concluded that no binding contract had been made in June 2014. In reaching that conclusion, he took the August email into account and interpreted it as meaning that the firm intended to work within the Precedent H budget, which forecast fees of £175,959. Precedent H had been discussed at the meeting of June 2014 and at that time was expected to be adequate.

According to the Master, the fact that that assumption proved to be incorrect did not convert a discussion about procedure into a binding agreement to limit the firm's overall costs liability. Accordingly, he held that the firm was not estopped from recovering costs in excess of the sum set out in the costs budget.

The appellants submitted that the Master had failed to consider the objective meaning of the August 2014 email, basing his findings instead on the subjective intention of the parties, and that the firm should be estopped from charging fees in excess of the costs budget.

HELD:

The email of August 2014 was not part of any contract, but merely evidence of a contract said to have been made orally. Therefore, the usual principles of contractual interpretation did not apply. The Master's task was to weigh the email in the balance of the other evidence about the alleged agreement and then to decide, having regard to its wording, the subjective intention of the solicitor (R) who wrote it and any other relevant evidence as to what, if any, agreement had been reached. On the basis that R's subjective intention was admissible evidence, the points arising from the email of August 2014 were that: (i) the purpose of the email was to give the appellants an "assurance" or "reassurance" that the costs going forward would not exceed the costs budget; (ii) the word "honour" meant "stick to"; and (iii) R's purpose in writing the email was to articulate to the appellants that the firm's costs would not exceed those set out in the costs budget.

Implied Terms

- 2.12 Terms may be introduced into a contract without either the knowledge or consent of the parties. These “implied” terms may arise from the interpretation of the court or be imposed by statute.
- 2.13 Just because a term is implied, it does not mean that the parties would not have expressly agreed to it. Indeed, the opposite is usually true, as terms are usually implied at common law on the basis that the parties must have meant to include them; and under statute on the basis that they make the contract a reasonable one, especially where consumers are concerned (these matters are discussed in detail later on in the course).

Essential Contracts

- 2.14 There are circumstances where one of the parties is obliged to accept the terms imposed by the other even though he does not agree with, know of, or understand these terms. This is particularly the case where a supplier of essential services contracts on his own standard terms. There has been a move in recent years to protect the unwary consumer in such cases through legislation.¹

¹ See for example The Unfair Contract Terms Act 1977 (UCTA 1977) and the Consumer Rights Act 2015 (CRA 2015), which are discussed in detail later in the course.

PART II: THE MEANING OF LEGALLY BINDING

3 LEGAL AND EQUITABLE REMEDIES

- 3.1 Although we typically say that a contract is “legally binding”, it is very unusual for a party in breach of a contract actually to be ordered to perform it. Indeed, the only “legal” (as opposed to equitable) remedy for breach of contract is an award of damages. For the court to order that the contract be performed as agreed (by an award or “decree” of “specific performance” or by an injunction) requires the judge to exercise his or her discretionary “equitable” jurisdiction.

Specific Performance

- 3.2 Traditionally specific performance will only be ordered if the contract is for the sale of goods which are unique, so that an award of money could not compensate the claimant for his or her loss. Even then, it will be refused if it would lead to an injustice. However, recent authority suggests that the courts are becoming less dogmatic about this, and are following the trend from civil law countries, where an award of specific performance is more readily available in the interests of fairness, even for non-unique goods.

3.3 ***Falcke v Gray (1859) 4 Drew 651***

Mr Falcke rented a furnished house from Mrs Gray on a six month lease. Falcke was a dealer in curiosities, and when he saw that there were two valuable vases in the house, he reached a signed agreement with Gray that he would have the option to purchase the vases from her for £40, the vases having been valued by Mr Brend, the estate agent. Gray suspected that Brend had undervalued the vases and she asked an expert – Mr Watson – to give her a second opinion. He offered her £200 for the vases, and she sold them to him.

Falcke then sued both Gray and Watson for specific performance of his contract, demanding he be permitted to take the vases from Watson for £40, even though it was clear that they were worth considerably more. Although the judge considered the vases to be sufficiently rare to justify, *prima facie*, an award of specific performance, it was refused on the grounds of the undue hardship this would cause to the defendants in the face of the unconscionable conduct of the plaintiff.

“In the present case the contract is for the purchase of articles of unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-performance; and I am of the opinion that a contract for articles of such description is such a contract as this court will enforce; and in the absence of all other objection, I should have no hesitation in decreeing specific performance...”

“But...what was the nature of the transaction? It was not a case of a bargain between seller and buyer, the one trying to get the highest, and the other to give the lowest price. The intention of the parties was that a fair and reasonable price should be placed on the articles... Mr Falcke knew that he was contracting on that footing, and he knew that the price put upon the jars by Brend was not a fair price... The question is whether he can come to the court to compel Mrs Gary to sell the jars to him for £40. I admit that this court is not a court of honour, but it appears to me that although Mr Falcke has done nothing he was legally bound not to do, yet, consistently with the authorities and the justice of the case, I must refuse specific performance.”

per Sir RT Kindersley VC at p 658 and p 664

3.4 ***Rainbow Estates Ltd v Tokenhold Ltd [1999] Ch 64***

Rainbow was the freeholder of a grade II listed building called Gaynes Park Mansion. The former freeholder, Venrich Ltd, had granted two leases of the property, one to Tokenhold (of all but the eastern annex) and one to Herskovic (of the eastern annex). The leases contained covenants by the tenants “to keep and maintain the property in good and tenant-like repair”. The tenants did not maintain the property, and the building fell into disrepair.

The judge held that the tenants were responsible for the dilapidation to the property, and despite earlier authorities where it was stated that specific performance could not be ordered in the case of repairing covenants, he held that modern law would permit the remedy whenever it was "appropriate".

"In my judgment, a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances, and there are no constraints of principle or binding authority against the availability of the remedy..."

"Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy. This will be particularly important if there is substantial difficulty in the way of the landlord effecting repairs: the landlord may not have a right of access to the property to effect necessary repairs, since (in the absence of contrary agreement) a landlord has no right to enter the premises, and the condition of the premises may be deteriorating."

per Lawrence Collins QC Sitting as a Deputy High Court Judge at p 72-73

3.5 **Sale of Goods Act 1979, Section 52**

Section 52 is shown below:

- (1) If any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
- (2) The plaintiff's application may be made at any time before judgment or decree.
- (3) The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court.

3.6 **Consumer Rights Act 2015, s.19 and s.54**

The Consumer Rights Act 2015 provides statutory remedies for various breaches of contract, but specifically preserves the right of the consumer to seek specific performance.

PART III: THE FORMALITIES OF A CONTRACT

4 CONTRACTS WHICH REQUIRE NO FORMALITIES

- 4.1 There are, in general, no formalities required to create a contract. All that is required is that two or more parties who have the capacity to make a contract should reach an agreement with the intention that it should be legally binding and which is supported on both sides by consideration.
- 4.2 Where a contract does not have to be in writing (which includes the vast majority of contracts) it is called a 'simple' contract (even though it might be very complex!)
- 4.3 Most commercial contracts are in writing for the sake of certainty, but technically they do not have to be so.

5 CONTRACTS WHICH MUST BE IN WRITING

- 5.1 Despite the general rule that there are no required formalities, some kinds of contract must be written and signed to be valid. These include:
- o All contracts involving the sale or other disposal of an interest in land.
 - o Contracts of hire purchase and other credit transactions. The document must be in the form prescribed by government regulations.
- 5.2 A contract – or contractual variation – will also have to be in writing if that requirement is a term of the agreement made by the parties themselves. They may not even be able to vary this requirement orally, as it would subvert the original clause. This was one of the issues in ***MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 (SC)**, which is discussed in detail later.²

6 ELECTRONIC CONTRACTS

- 6.1 Note that Article 9(1) of the EC Directive on Electronic Commerce (2000/31 OJ L178/1) states:

“Member states shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their being made by electronic means.”

- 6.2 The response to this Directive was:

The Electronic Communications Act 2000, Section 8 – Power to Modify Legislation.

- (1) Subject to subsection (3), the appropriate Minister may by order made by statutory instrument modify the provisions of –
- (a) any enactment or subordinate legislation, or
 - (b) any scheme, licence, authorisation or approval issued, granted or given by or under any enactment or subordinate legislation, in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage

² See also *Williams v Simm* [2021] EWHC 121 (Ch). Note also *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973 at paragraph 11.5 below.

(instead of other forms of communication or storage) for any purpose mentioned in subsection (2).

(2) Those purposes are –

- (a) the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument;
- (b) the doing of anything which under any such provisions is required to be or may be done by post or other specified means of delivery;
- (c) the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed;
- (d) the making of any statement or declaration which under any such provisions is required to be made under oath or to be contained in a statutory declaration;
- (e) the keeping, maintenance or preservation, for the purposes or in pursuance of any such provisions, of any account, record, notice, instrument or other document;
- (f) the provision, production or publication under any such provisions of any information or other matter;
- (g) the making of any payment that is required to be or may be made under any such provisions.

6.3 Although the UK is no longer a Member State, and so not bound by the decree, there is no reason to suppose that this Act will be repealed.

PART IV: TYPES OF CONTRACT

7 UNILATERAL AND BILATERAL CONTRACTS

Bilateral Contracts

- 7.1 Most contracts can be analysed as an exchange of promises between two parties, e.g. X promises to sell his car to Y for £500 and in return Y promises to buy it from X for £500. The contract is made when the promises have been exchanged, even though neither party has yet fulfilled his obligations. The contract is performed when the obligations are fulfilled. This is called a bilateral contract as there are two promisors.

Unilateral Contracts

- 7.2 Alternatively, X may offer something to Y if Y performs a certain act. X is under no obligation to Y unless the act is performed, and Y is under no obligation to do the act, e.g. X offers to pay Y £100 if he paints X's fence. X only has to pay Y if he paints the fence, but Y would incur no liability if he does not.
- 7.3 The contract is made (i.e. the offer is accepted) by the actual performance or the required deed with knowledge of the offer. The motive for accepting the offer is immaterial.
- 7.4 Contracts made in such circumstances are called unilateral contracts, as there has only been one promisor. A typical example of a unilateral offer is an offer of a reward for finding lost property. Such an offer can be *made* to everyone in the world, but it will not be an offer if it could be *accepted* by everyone, as this could not reasonably be supposed to be the intention of the advertiser: no one would sensibly risk being liable to everyone in the world! Thus, a unilateral offer will always have some inherent limitation e.g. 'I will give £100 to the *first person* to walk from London to York'.
- 7.5 It is important to distinguish these two types of contract as some of the rules of offer and acceptance for them differ.

8 EXECUTORY AND EXECUTED CONTRACTS

Executory Contracts

- 8.1 A bilateral contract is usually made by the exchange of promises (an offer met by an acceptance) at which point the agreement becomes binding, even though neither party has yet carried out their promises. e.g. I offer to sell you my antique teapot for £3,000 and you accept. I still have the teapot and you still have the money, but we have made a contract nonetheless. When a contract has been *made*, but the obligations under it have not yet been *performed*, it is said to be 'executory'.

Executed Contracts

- 8.2 Once we have performed the required acts – I have given you the teapot and you have given me the money – the contract is said to have been 'executed'.

PART V: THE ELEMENTS OF A CONTRACT

9 THE CLASSIC FORMULA

9.1 According to the classic formula, there are four vital components to a “simple” contract (i.e. not a deed or covenant). If the parties have capacity to make a contract and the contract is not illegal, the contract will be formed if these four requirements are satisfied:

1. offer (a definite promise made with the intention to be bound on specific terms);
2. acceptance (an unqualified agreement to the offer);
3. intention to create a legal relationship (the objective expectation by both parties that a binding agreement will be formed);
4. consideration (*both* parties promise to provide something, usually money in return for goods or services. This is the price to be paid by both parties).

9.2 Despite the classic formula of “offer and acceptance”, there has been some attempt by certain judges to analyse the phenomenon of agreement rather more liberally, particularly where the transaction is complex and it is not easy to identify the offer and acceptance (see Section 6.2.1 below).

9.3 As well as the four components to a contract, the parties must also have the capacity to make a contract (e.g. there are some restrictions involving minors); and the contract must not be for illegal purposes.

10 NON-TRADITIONAL AGREEMENTS

10.1 The traditional view of a contractual agreement is that it comprises an offer followed by an acceptance. The offer must objectively display an intention to be bound by specific terms should it be accepted; and the acceptance must be an unequivocal response to the offer, displaying an objective intention to be bound by all the terms of the offer.

10.2 Whilst this remains the usual formula for assessing the existence of an agreement, there have been attempts – most notably by Lord Denning – to substitute a more liberal approach to the question, and to ask simply whether, all things considered, the parties may reasonably be said to have reached an agreement, whether or not one can identify an offer and an acceptance.

10.3 Although Lord Denning’s views on this were not adopted by the House of Lords in *Gibson v Manchester City Council* [1979] 1 WLR 294 (HL), *obiter dicta* in this and subsequent cases suggests that such an approach will be legitimate in appropriate circumstances. Thus, where the parties are acting in such a way that it is obvious they think they have a contract, they probably do.

10.4 ***Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 (CA)**

In a complex transaction involving the exchange of standard contract forms, the Court of Appeal found that a contract had been formed on the basis of offer and acceptance. However, Lord Denning attacked this traditional approach.

“In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date... The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points.” per Lord Denning MR at p 404

10.5 **Gibson v Manchester CC [1979] 1 WLR 294 (HL)**³

The Conservative led council sent details to its tenants of a scheme by which they could buy their rented houses at favourable rates. The letter to Gibson said the following:

“The corporation may be prepared to sell the house to you at the purchase price of £2,725 less 20 per cent.”

The tenants were required to fill in and return an application form. When filling out the form, Gibson left the purchase price blank and asked in a covering letter whether the price could be reduced as there were repairs to be done to the property. The council replied that the state of the house had been taken into account when fixing the price. The tenant replied that in that case he wished to proceed with the purchase.

When Labour took over the council in May, they attempted to get out of the sale by claiming, *inter alia*, that Gibson’s first letter had been a counter-offer, which had the effect of nullifying the council’s offer, leaving nothing for the tenant to accept.

Lord Denning in the Court of Appeal [1978] 1 WLR 520 held that it was clear from the correspondence between the council and the tenant that a contract of sale had been agreed, even though there was no distinct offer and acceptance. He duly made an order for specific performance of the contract.

The House of Lords overturned this judgment. It was held that the council had never actually made an offer to the tenants in the first place, so there was nothing for Gibson to accept.

On Lord Denning’s theory, Lord Diplock had this to say:

“Lord Denning MR rejected what I have described as the conventional approach of looking to see whether on the true construction of the documents relied on there can be discerned an offer and acceptance. One ought, he said, to ‘look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material...’

“My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance, but a contract alleged to have been made by an exchange of correspondence between the parties in which successive communications other than the first are in reply to one another is not one of these.

“I see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the council to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson.

“I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.” per Lord Diplock at p 297

³ Compare *Storer v. Manchester CC* [1974] 1 WLR 1403, which centres around the same situation with the sale of council houses in Manchester. In that case the Labour council attempted to avoid a contract of sale on the basis that the contracts had not yet been exchanged, but the Court of Appeal (led by Lord Denning) granted specific performance to the buyer. That case did not go to the House of Lords.

10.6 **Trentham (G Percy) Ltd v Archital Luxfer [1993] 1 Lloyd's Rep 25 (CA)**

There was a dispute between a main contractor and their subcontractor over whether the latter should contribute to a payment for late completion. The subcontractor argued that there was no binding contract because, despite an exchange of letters and phone calls, there had been no clear offer and acceptance.

The Court of Appeal (without Lord Denning, who retired in 1982) held that there was a contract, the evidence for which was the actual performance of the works by the subcontractor:

"In this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance." per Steyn LJ at p 29

10.7 This seems to be at odds with the House of Lords decision in *Gibson v Manchester CC*, but it may be indicative of a new move away from the traditional approach – an approach which does not always accord with commercial reality. The issue was revisited by the High Court in *Apple Corps Ltd v Apple Computer Inc* [2004].

10.8 **Apple Corps Ltd v Apple Computer Inc [2004] EWHC 768 (Ch)**

Apple Corps Ltd (the Beatles' record company) made a contract with Apple Computer Inc (of Macintosh fame) regarding the use of the apple logo and trademark whereby the Corps would use it only in relation to music products and the Computer would use it only in relation to computers and similar equipment (the deal cost Computer around \$26.5 million).

When Computer used the trademark to promote its web-based music business (iTunes) Corps sued them in England for breach of this contract.

Computer argued, *inter alia*, that the English courts had no jurisdiction as the contract was made in America. In fact, the contract was concluded by a transatlantic telephone call after lengthy and complex negotiations, and each side claimed that they had made the final offer which was accepted by the other, thus causing the contract to be made in the offeror's country (see "Communication of Acceptance" below).

On the unclear evidence of who said what in this final conversation, Mann J held that it was at least arguable that the contract was made in England (which was enough for the purpose of jurisdiction), but also stated *obiter* that it was possible that the contract was made simultaneously in both jurisdictions as it was not always necessary to interpret contracts in terms of consecutive offer and acceptance.

"It seems to me that this sort of case is very arguably one of the class contemplated by Lord Diplock (in Gibson v Manchester CC) in which an analysis in terms of offer and acceptance is not appropriate. The parties had, by a long process of negotiation, arrived at agreed forms of agreement which were not to be made binding until both parties indicated that they were. If both parties had met in order to sign and complete in the same place, it might well have been extremely difficult to find anything amounting to an offer and acceptance.

"Where completion takes place at a distance over the telephone, it might well be possible to construct an offer and acceptance analysis (indeed, each party has sought to do so in this case) but it might equally be thought that that analysis is extremely forced and introduces a highly random element. The offer and acceptance may well depend on who speaks first and who speaks second, which is likely to be largely a matter of chance in closing an agreement of this sort. It is very arguably a much more satisfactory analysis to say that the contract was made in both places at the same time."

per Mann J at para 42

In [2006] EWHC 996 (Ch), Mann J ruled that the computer company had used the Apple logo in association with its store, not the music, and so was not in breach. This meant that iPods and iTunes would still be able to carry the Apple name and logo. He said that iTunes was “a form of electronic shop” and not involved in creating music:

“I conclude that the use of the apple logo...does not suggest a relevant connection with the creative work... I think that the use of the apple logo is a fair and reasonable use of the mark in connection with the service, which does not go further and unfairly or unreasonably suggest an additional association with the creative works themselves.”

Apple Corps appealed, but in February 2007, before the appeal was heard, the parties entered a new arrangement whereby Corps transferred its Apple trademark to Computer and it was licensed back in respect of its own business activities.

10.9 A similar issue arose in the case of *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66, where the Court had to decide at what point in an exchange between two parties involving a fax, a phone call and an email they had actually formed a contract. The court applied an objective test to ask at what point a “hypothetical bystander” would presume they were in agreement.⁴

10.10 However, one should not get the idea that the court will strive to find a contract exists when it plainly does not.

10.11 ***Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251 (HL)**

The Oustons wished to purchase a van from Scammell, using their Bedford motor-van in part-exchange. Their order contained the proviso: “This order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over a period of two years.”

Before any such hire-purchase terms had been agreed, Scammell refused to continue with the sale, and Ouston sued them for breach of contract. It was held that there had been no contract made to breach.

“There are in my opinion two grounds on which the court ought to hold that there never was a contract. The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention.

“The object of the court is to do justice between the parties and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation.

“Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words considered, however, broadly and untechnically and with due regard to all just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.”

per Viscount Simon LC at p 268

10.12 ***HTA Architects v Countryside Properties* [2002] EWHC 482**

In July 1997, a competition was announced by John Prescott, the Deputy Prime Minister, for the design and development of a housing project in Greenwich. A firm of architects teamed up with some developers to put in an entry for the competition. A great deal of negotiation went on between the architects and developers in 1997 and 1998, including an agreement to some “heads of terms”, but

⁴ On the matter of telephone contracts, see also *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 (SC) which is discussed later.

in June 1999 the developers pulled out of the deal. The architects claimed that the developers were in breach of contract. The developers claimed that there was no contract at all.

Held: There was no contract, despite the intense negotiations and the apparent agreement on some points. A party still in negotiation is not stuck by what he might agree along the way. Until the moment of final agreement he can retract all or any of what he might up to the point of retraction have agreed.

“The theme of the suggestion that the Court is predisposed to find a contract if it can is that the approach of the Court is, as it were, ‘Contract=Good, No Contract=Bad’, so that the Court should strive to find an agreement and, therefore, a contract. In my judgment, that supposed theme does not exist.” per HHJ Richard Seymour QC at p 62

10.13 In the case of *Jackson v Thakrar* [2007] EWHC 271, the court found at least five reasons why an exchange of business letters between the parties did not form a contract!

PART VI: MAKING AN OFFER

11 THE WORDING OF AN OFFER

11.1 An offer is an indication of an unequivocal intention to be bound on certain terms should the offer be accepted. There are no specific words or actions required. Indeed, most offers are made in silence (by presenting goods to a cashier in a shop or scanning them on the self-service till). The issue is whether, in all the circumstances of the case, a reasonable person would think that an offer had been made.

11.2 **Harvey v Facey (1893) AC 552, 62 LJPC 127, 69 LT 504 (PC – Jamaica)**

The prospective buyers of a property sent a telegraph to the owners saying: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price."

The owners responded: "Lowest price for Bumper Hall Pen £900."

The buyers then replied: "We agree to buy Bumper Hall Pen for £900 asked by you."

Had the owners of the property offered to sell it?

The Privy Council held that the owners had not made an offer to sell, as they had answered only the second question (price) not the first (willingness to sell).

11.3 **Clifton v Palumbo [1944] 2 All ER 497 (CA)**

The defendant buyer was negotiating to purchase the plaintiff seller's estate. On 7 June, without legal assistance, the seller wrote to the prospective buyer:

"I am prepared to offer you my estate for £600,000... I also agree that a reasonable and sufficient time shall be granted to you for examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion."

The seller then informed the buyer that the price was too low and on 16 August the seller's solicitor wrote to the buyer's solicitor to postpone a meeting to prepare the contract until a definite agreement had been made. The buyer was shown this letter, and on 17 August he purported to accept the "offer" of 7 June. The seller sought a declaration that there was no valid contract.

Had the owner of the property offered to sell it on 7 June?

In deciding that the layman's letter of 7 June had not been intended to be a contractual offer, Lord Greene MR made the following comments:

"When parties are beginning to negotiate a transaction of this magnitude it is common experience – and indeed, it is only business – to find that the first thing they begin to think about is the price, because it is quite useless making elaborate investigations and conducting complicated negotiations if it is going to turn out in the end that their views as to price do not agree. What would one expect, therefore, in a transaction of this kind? The very first thing that the parties would set themselves to explore is the possibility of their seeing eye to eye in the matter of price. Anyone who has had experience of transactions in relation to the purchase of land can recall letters written by vendors saying that they agree to sell at a named price, or that purchasers agree to purchase at a named price. The use of the word 'agree' in such a context may or may not involve a contractual result.

“On the other hand, if you say that the price has been agreed when the contract is being negotiated, you do not use the word ‘agree’ in the sense that any binding contract has been entered into. All you mean is that that particular element in the contract which you are negotiating has been decided. You are agreeing that that is the figure which will be put into the contract and then you go on to debate the other matters which fall for discussion.

“Therefore, words like ‘agree’, ‘offer’, ‘accept’, when used in relation to price are not to be read necessarily as indicating an intention to make, then and there, a contract or an offer as the case maybe. Whether they do or do not must depend entirely on the construction of the particular document.” per Lord Greene MR at p 499

11.4 **Bigg v Boyd Gibbons Ltd [1971] 1 WLR 913 (CA)**

Two parties were negotiating the sale of a freehold property called Shortgrove Hall by the exchange of letters. Bigg wrote on 22 December 1969:

“As you are aware that I paid £25,000 for this property, your offer of £20,000 would appear to be at least a little optimistic. For a quick sale, I would accept £26,000 so that my expenses may be covered. If you are not interested in this price, would you please let me know immediately as then I shall open negotiations with some other people.”

Boyd Gibbons replied on 8 January 1970: *“I accept your offer.”*

Bigg replied on 13 January 1970: *“I thank you for your letter...accepting my price of £26,000...my wife and I are both pleased that you are purchasing the property.”*

Boyd Gibbons then claimed that there was no contract as Bigg’s letter of 22 December had not been an offer.

Had Bigg made an offer to sell his property?

“It seems to me that in fact...the defendants were correct in treating the first letter of 22 December 1969, as an offer to sell the property at £26,000 when they wrote ‘I accept your offer’.

“Further than that, it seems to me that the last letter of 13 January is a recognition, an affirmation indeed, that the parties have come to agreement on the sale of the property.” per Russell LJ at p 916

11.5 **Bryen & Langley Ltd v Boston [2005] EWCA Civ 973**

B wished to have some building works done. B’s agent, W, invited L to tender for the work, stating that the contract would be in the form of the JCT Standard Form of Contract 1998. L successfully tendered for the contract and W wrote to L to confirm that the contract would be executed under the JCT terms. The contract was drafted, but B never signed it. L commenced work on the basis that the written contract correctly represented the agreement, including the JCT terms.

Under the JCT terms, a claim for payment could be made to an adjudicator, whose decision would be binding. L made such a claim, and B contended that the adjudicator had no jurisdiction as the JCT terms were not incorporated into the contract. B claimed that as they had not signed the document produced by W the only certain terms of the contract were that L should have the job for the agreed consideration; the other terms had yet to be agreed.

Held: There was a contract which incorporated the JCT terms. W’s tender invitation indicated that the JCT terms would be used, and this was the reasonable understanding of the parties when L’s offer was accepted. Thus, the contract was already made, on those terms, before the written version was drafted.

The mere fact that two parties propose that their agreement should be contained in a formal document to be drafted in the future did not preclude the conclusion that they had already informally committed themselves on exactly the same terms.

12 AUCTION SALES

12.1 Special rules apply to offers made in – or in connection with – auction sales.

12.2 ***The Sale of Goods Act 1979, Section 57(2)***

A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until the announcement is made any bidder may retract his bid.

12.3 ***Warlow v Harrison (1859) 1 E&E 309; 120 ER 925 (Exchequer Chamber)***

An auctioneer advertised a sale of horses as being “without reserve”. Warlow bid 60 guineas for a mare called Janet Pride, but was outbid at 61 guineas by Harrison, who owned the mare (and had paid £130 for it). The mare was knocked down to Harrison, but Warlow claimed that he was entitled to it, as he was the highest *bona fide* bidder.

“The sale was announced by them to be ‘without reserve’. This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not.” per Martin B

12.4 ***Barry v Davies [2000] 1 WLR 1962 (CA)***

At an auction without reserve the plaintiff bid £2,000 each for two engine analysers which marketed new for £14,000 each. Although his was the only bid, the auctioneer refused the sale on the basis that the bid was too low. Held: The auctioneer was bound to accept the bid, and was liable to pay the bidder the difference between the amount bid and the market value.

12.5 ***Harris v Nickerson (1873) LR 8 QB 286 (QB)***

An auctioneer advertised in the London papers that an auction would be held at Bury St Edmunds on a certain day at which certain office furniture would be sold to the highest bidder. The plaintiff attended the auction to bid for the furniture, but it was withdrawn from the sale. The plaintiff sued for his wasted expenditure (£2 12s 6d) in attending the auction. It was held that he was not entitled to it. Advertising an auction did not amount to an offer to hold one.

“This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that anyone who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses.”

per Blackburn J

13 TENDERS

13.1 Tenders are written bids, often used for applying for construction contracts. In general, the advertisement inviting tenders is simply an invitation to treat – the advertiser cannot intend to give the job or the sell the goods to everyone who responds.

13.2 However, if the advertiser promises to sell certain goods to the highest bidder, this may be a unilateral offer as there can only be one “highest” bidder. In that sense, it is like an auction.

13.3 ***Spencer v Harding* (1870) LR 5 CP 561 (CP)**

The defendants sent out a circular in the following terms:

“We are instructed to offer to the wholesale trade for sale by tender the stock-in-trade of Messrs G Eilbeck & Co amounting as per stock-book to £2,503 13s 1d and which will be sold at a discount in one lot.”

The plaintiffs, who made the highest bid, alleged that the circular amounted to an offer and an undertaking to sell to the highest bidder. It was held that the seller was not obliged to sell to the highest bidder, as the circular as written was merely an invitation to treat.

However, Willes J said *obiter*: “*If the circular had gone on, ‘and we undertake to sell to the highest bidder’, the reward cases would have applied, and there would have been a good contract in respect of the persons.*”

13.4 A referential bid will not be treated as valid for these purposes.

***Harvela Investments Ltd v Royal Trust Co of Canada* [1986] AC 207 (HL)**

The owner of shares invited two parties to tender for them, undertaking to accept the highest offer. One party offered \$101,000 in excess of any other offer. It was held that this referential bid was invalid, and the seller was not bound to treat it as an acceptance.

13.5 An invitation for tenders may not be an offer to give anyone the contract, but it may be a unilateral offer at least to consider the bids of those who apply in response to the advertisement.

***Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 WLR 1195 (CA)**

The plaintiff and six other parties were invited by the Council to tender for a concession to operate pleasure flights. The tenders were not to be considered if they were received late.

The plaintiff’s tender was received on time, but was not considered as the letter-box in which it lay was not cleared. The plaintiff sought damages for breach of warranty that their tender would be considered if it arrived on time (which it did).

It was held that there was such a warranty in this case, even though the plaintiffs may not have been awarded the concession even if they had been considered for it:

“Where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority’s invitation prescribes a clear, orderly and familiar procedure...the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered of others are.

“Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been ‘of course’. The law would, I think, be defective if it did not give effect to that.”

per Bingham LJ at p 3

14 TIMETABLES AND PASSENGER TICKETS

14.1 There is no clear authority as to what constitutes offer and acceptance when one buys a travel ticket. Some of the possibilities are as follows:

- The timetable is the offer which you accept by applying for a ticket boarding the bus/train

Wilkie v London Passenger Transport Board [1947] 1 All ER 258

- The carrier makes the offer at the time of issuing the ticket, which is accepted by the conduct of the passenger in keeping it or in embarking on the journey.

Thornton v Shoe Lane Parking [1971] 2 QB 163

The question in his case was at what stage one has a contract with the owners of a car park when one buys a ticket from a machine at the entrance.

Lord Denning suggested that where a travel ticket is bought from a person it is an offer, which the customer can refuse having read the terms on it (though he recognised that this was a fiction since no-one ever has the inclination or the time to read such terms). However, he thought the situation was different where a machine issues the ticket:

“The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine.

The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.” per Lord Denning MR at p 169

- The passenger makes the offer by asking for the ticket. The offer is accepted by the ticket being issued (*The Mikhail Lermontov* [1991] 2 Lloyd's Rep 15).

15 SHOP DISPLAYS AS INVITATIONS TO TREAT

15.1 As a general rule, a display of goods in a shop does not constitute an offer to sell them. The display is merely an invitation to customers to offer to purchase the goods: an “invitation to treat”. An “invitation to treat” is merely an indication by a seller or buyer that they wish to enter negotiations. They create no legal rights, and cannot be “accepted”. However, it is not always easy to distinguish an “invitation to treat” from a “unilateral offer”. The key lies in the intention of the parties, as assessed objectively by the court.

15.2 ***Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1 QB 401 (CA)***

Under the Pharmacy and Poisons Act 1933, certain drugs containing poisons may only be sold “under the supervision of a pharmacist”. The PSGB alleged that Boots had broken this rule by putting supplies of these drugs on open shelves in a self-service shop. They contended that the goods displayed on the shelves were being offered for sale, and that the customers accepted this offer by taking the items off the shelves and placing them in their wire baskets. Thus (they said) the contract was made before the customers reached the cash desk where the pharmacist was present. Boots, however, contended that there was no contract of sale until a customer brought the goods which he had selected to the cash desk and had his offer to *buy* them accepted in the presence of a qualified pharmacist.

When was the contract of sale made? What is the logic of this decision?

In confirming the decision of Lord Goddard CLJ that the display of goods was merely an invitation to treat and not an offer, Somervell LJ made the following observation:

“If the plaintiffs are right, once an article has been placed in the receptacle, the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred.” per Somervell LJ at p 406

15.3 In the American case of *Lasky v Economic Grocery Stores* 65 NE 2d 305 (1946) it was held that shop displays are offers, which are accepted by the customer presenting the goods at the cash desk for payment. Thus, a customer was able to claim for breach of contract when a bottle of tonic water for which she was about to pay exploded at the cash desk. How does this compare to Somervell LLJ's theory?

15.4 ***Fisher v Bell* [1961] 1 QB 294**

James Bell ran a shop called “Bell's Music Shop”. He displayed in his shop window a flick-knife behind which was a ticket reading “Ejector knife – 4 shillings”. He was charged with offering a flick-knife for sale, contrary to the (now repealed) Restriction of Offensive Weapons Act 1959. He argued that it was not an “offer” in the contractual sense, but merely an invitation to passers-by to come in and make a bargain, which he could then refuse.

Was he right? Did he get away with it?

“The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language, it is there inviting people to buy it, and it is for sale; but any statute must, of course, be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. 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.”

per Lord Parker CJ at p 399⁵

⁵ Note: *Wm Morrison's Supermarkets plc v Reading Borough Council* [2012] 2 Cr App R 16 below at 16.6.

16 NEWSPAPER ADVERTISEMENTS

The General Rule

- 16.1 Advertisements are usually treated as invitations to treat rather than offers on the basis that the advertiser could not objectively be supposed to have intended to be bound to everybody who might reply. Note that there is nothing inherent about advertisements that stops them from being offers: it is just that they are usually for a limited supply of goods which are exposed for sale to an unlimited number of people.
- 16.2 ***Grainger & Son v Gough (Surveyor of Taxes) [1896] AC 325 (HL)***
- The issue was whether contracts were made in the United Kingdom when a French wine merchant canvassed clients in the United Kingdom by circulating a price list which invited retailers to send orders to his office in Reims in France. When discussing the nature of such a price list, Lord Herschell made the following observation:
- “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.”* per Lord Herschell at p 334
- 16.3 ***Partridge v Crittenden [1968] 1 WLR 1204 (Case Stated)***
- On 13 April 1967, Arthur Partridge placed an advertisement in the classified ads of “Cage and Aviary Birds”, stating “Bramblefinch cocks, Bramblefinch hens 25s each”.
- Offering to sell these birds is an offence under the Protection of Birds Act 1954 and he was prosecuted by Crittenden on behalf of the RSPCA. Partridge claimed that the advertisement was not an offer, but merely an invitation to treat.
- Applying *Fisher v Bell* (1961), the court held that this kind of advertisement was not an offer but merely an invitation to treat. Lord Parker emphasised that objectively the advertiser could not have intended to make such an offer to the whole world as he would then be obliged to supply a bird to everyone who accepted, whatever his own supply might be!
- “I think that when one is dealing with advertisements and circulars, unless they come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale.”* per Lord Parker CJ at p 424
- 16.4 Note that the various reasons given in these cases for finding that there was no offer by the shops and the advertiser are all based in the supposed intention of the parties within a commercial environment – i.e. they could not have been supposed to make an offer as it would not have made commercial sense to do so. This was the case even though most of these were actually criminal cases, not civil ones, so the commercial aspects were not really relevant.
- 16.5 Such cases may be decided differently these days. If there is in fact no commercial imperative, such defendants may well be found guilty of these criminal offences, especially given the now prevalent purposive approach to statutory interpretation.

Wm Morrison's Supermarkets plc v Reading Borough Council [2012] 2 Cr App R 16 (Case Stated)

Under the Children and Young Persons Act 1933, it is an offence to sell "to a person under the age of 18 years any tobacco or cigarette papers, whether for his own use or not". Reading Borough Council arranged a sting operation, whereby they sent a 15-year old into Morrison's to buy a packet of Benson and Hedges cigarettes. Having been "sold" the pack, the child went into the street and handed them to the enforcement officer outside. Morrison's were charged under the Act and found guilty.

Morrison's appealed on the basis that the child had bought the cigarettes on behalf of the enforcement officer (who was over eighteen) and so the sale was really to the adult principal and not to the child agent. They claimed that the earlier judgments illustrated that even in criminal cases, the court should adopt a technical and literal approach to matters of contract law. As a "sale" by definition involves a passing of title to the property sold, this could not have been a sale to the child as under agency law, title would have gone to the adult principal, not to the agent.

Held: Even supposing that the agency argument was correct, the court was not impressed. The handing over of the cigarettes in return for cash was what most people would regard as a sale, and was certainly what Parliament had in mind when they passed the statute. Morrison's was guilty as charged!

"When one has regard to the mischief at which the legislation is aimed, namely failure to exercise careful judgment regarding the age of a would-be purchaser in the face-to-face transaction, it seems to me that it is irrelevant whether property passes to the young person or as a result of his entering into the transaction to someone else. What matters is that the child or young person enters into a contract for the sale of tobacco and that property passes under that contract... For these reasons I would answer the proposed question 'yes'." per Lloyd Jones J at paras 25 and 26

"I agree and add only this. If Ms Andrews (counsel for Morrison's) were right, then a shop could drive a coach and horses through this legislation by having a sign, drawn to the attention of the purchaser, to the effect that the property did not pass if the purchaser was under the age of 18.

*"Ms Andrews relies particularly in her argument upon two cases which my Lord has already mentioned, namely **Fisher v Bell** and **Partridge v Crittenden**. In **Fisher v Bell**, a shopkeeper displayed a flick knife with its price in his shop window. Charged with offering that flick knife for sale, it was held by a Divisional Court, presided over by Lord Parker CJ, that this was not an offer for sale but an invitation to treat.*

*"**Fisher v Bell** was followed in **Partridge v Crittenden** where the defendant was advertising for sale "cage and aviary birds. A person wrote enclosing a cheque asking for a Bramblefinch hen to be sent to him and that was done. The defendant was charged with offering birds for sale. The Divisional Court held that the defendant had not made an offer for sale but an invitation to treat. Lord Parker mentions in the course of his judgment a criticism of **Fisher v Bell** in the Criminal Law Review suggesting that there might be a different meaning in the criminal law for the words 'offer for sale' than for those words used in the law of contract. Lord Parker did not find that an attractive argument and said that: 'It appears to me to be a naked usurpation of the legislative function under the thin guise of interpretation' to adopt such an argument. The comment written by Professor Smith in the Criminal Law Review to which Lord Parker was referring can be found at [1961] Crim LR 180.*

"It may be that this approach to the interpretation of the words 'offer for sale' may not be adopted given the modern practice to look at, as Lloyd Jones J has done, the mischief sought to be avoided."
per Hooper LJ at paras 27-30

17 UNILATERAL OFFERS

17.1 Exceptionally, an advertisement will objectively show a genuine intention by the advertiser to be bound and be construed as a unilateral offer. This will most often be the case where the advertisement is in the nature of an offer of a reward. In that case, the contract will be made when the reader of the advertisement fulfils the required condition with knowledge of the offer, even though the advertiser does not yet know about it.

17.2 As unilateral offers are accepted by performing the requisite deed, it must be clear from the advertisement exactly what the requisite deed involves.

However, even if an advertisement seems to have clear terms, if it could mean that the advertiser will become bound to an unlimited number of people it will still probably NOT be construed as an offer.

Particular indicators that an advertisement might be a unilateral offer include:

- A clear instruction to the reader as to how to accept (e.g. time-limits);
- No possibility that the advertiser could become bound to unlimited numbers of people (e.g. first person to enter the store...);
- A clear statement of genuine intention, such as was famously found in *Carlill v Carbolic Smoke Ball Co* [1893].

17.3 ***Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA)**

The Carbolic Smoke Ball Co published this advertisement in a newspaper: “£100 reward will be paid by the Carbolic Smoke Ball Co 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. £1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.”

Mrs Carlill bought the ball and duly caught flu. The company (represented by Henry Asquith QC – later the Prime Minister!) refused to pay, saying it was not an offer, but a mere advertising gimmick – “a puff”.

Did the Carbolic Smoke Ball Company have any obligation to Mrs Carlill?

“Was it intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says that £1,000 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.

“But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world – that is, with everybody; and that you cannot contract with everybody. 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 that is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone 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.” per Bowen LJ at p 268

17.4 **Grainger & Son v Gough (Surveyor of Taxes) [1896] AC 325 (HL)**

Lord Herschell stated *obiter* that where a supplier is also a manufacturer his circulars may be an offer to sell, as he could theoretically make any number of the offered goods to order. This sentiment was repeated by Lord Parker CLJ in *Partridge v Crittenden* [1968] 2 All ER 421.

17.5 *Carlill v Carbolic Smoke Ball Co* [1893] was revisited by the Court of Appeal in *Bowerman v Association of British Travel Agents Ltd* (1995) 145 NLJ 1815 (CA).

17.6 ***Bowerman v Association of British Travel Agents Ltd* (1995) 145 NLJ 1815 (CA)**

Miss Bowerman, aged 15, booked a skiing trip organised by her teacher. The tour operator through which the trip was booked was a member of the ABTA (Association of British Travel Agents) protection scheme, and prominently displayed a notice in its premises which described ABTA's scheme of total protection against the financial failure of ABTA members, and included the words:

"Where holidays or other travel arrangements have not yet commenced at the time of failure, ABTA arranges for you to be reimbursed the money you have paid in respect of your holiday arrangements."

The tour operator ceased to trade and the plaintiff had her payments refunded, except for £10 which she had paid as an insurance premium. She sued ABTA for this money, claiming that the notice formed a unilateral offer by ABTA to pay a full refund in the event of the failure of a tour operator. ABTA claimed that the notice was not a contractual offer, but merely gave general information about the scheme.

Waite LJ thought that the facts of *Carlill* were so remote from the current case that it could not be applied here. However, he used the objective test to decide that a reasonable person would indeed construe the notice as an offer to pay a full refund to a customer in the event of the collapse of a member tour operator.

Hobhouse LJ, however, specifically applied Bowen LJ's judgment in *Carlill* in finding for the plaintiff:

"It is accepted that the words of Bowen LJ are apt: '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?' The question is whether the document is simply telling the public about a scheme which ABTA has for its own members or whether it goes further than this and contains an offer which a member of the public can take up and hold ABTA to, should the ABTA member with whom the member of the public is dealing fail financially. I prefer the latter view.

The document has to be read as a whole. It is clearly intended to have an effect on the reader and to lead him to believe that he is getting something of value... It is an inevitable inference that what ABTA is saying is that it, ABTA, will do something for the customer if the member should fail financially.

*In my judgment this document is intended to be read and would reasonably be read by a member of the public as containing an offer of a promise which the customer is entitled to accept by choosing to do business with an ABTA member... In my judgment it satisfies the criteria for a unilateral contract and contains promises which are sufficiently clear to be capable of legal enforcement. The principles in *Carlill* apply." per Hobhouse LJ at p 1815*

17.7 ***Carlill v Carbolic Smoke Ball Co* [1893]** was also applied in the case below.

***Azevedo v IMCOPA (Importação, Exportação E Indústria De Oléos Ltda)* [2015] QB 1 (CA)**

This was a complex case in which a company incorporated in Uruguay had issued \$100 million guaranteed loan notes. In order to restructure their financial obligations, they made an offer to the Noteholders by which they would each be paid a "consent payment" if they agreed to a postponement of interest payments etc.

Under the terms of the trust deed (which had an English jurisdiction clause), such resolutions could be agreed by a 75% majority. The resolution was passed, but Sergio Barreiros Azevedo and Vera Cintia Alvarez, who had invested \$1.2 million in the notes, did not agree, and demanded a refund and damages.

Inter alia, the court had to decide whether the offer by IMOPA amounted to a valid unilateral offer to the Noteholders (including the claimants). The short answer was yes.

“By the consent solicitations made by Imcopa C in the present case, the Issuer made an offer to each member of the class of Noteholders, in the terms of an ‘if’ contract: if you cast the votes that you are entitled to as a Noteholder by giving valid and irrevocable voting instructions to a proxy to vote in favour of the resolution, and if the resolution is duly passed, then I will pay you the stated amount in proportion to the relevant Notes. If a given Noteholder acted on that offer by appointing a proxy in time with valid and irrevocable instructions to vote in favour of the resolution, and if the resolution was passed, then as a matter of English contract law he would be entitled to payment in accordance with the offer, by analogy with such cases as Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256.”

per Lloyd LJ at para 38

- 17.8 Following the principle of *Carlill v Carbolic Smoke Ball Co* [1893], even a newspaper advertisement or shop display offering goods for sale may exceptionally amount to a contractual offer, as seen in this persuasive US case. The point here is that most people would expect a shop having a sale to honour its commitment to give the first person in the queue the opportunity to secure the best bargains: this might therefore be presumed to have been the shop owner’s intention.

Lefkowitz v Great Minneapolis Surplus Stores (1957) 86 NW 2d 689

The defendants published an advertisement in a newspaper on 6 April 1956, stating: “Saturday 9 am sharp; 3 Brand new fur coats, worth to \$100. First come first served, \$1 each.”

A further advertisement on 13 April 1956 stated:

“Saturday 9 am; 2 Brand new pastel mink 3-skin scarfs; selling for \$89.30: Out they go Saturday; Each \$1.00. 1 Black Lapin Stole; Beautiful, worth \$139.50...\$1.00; First come, first served.”

The plaintiff was one of the first three customers at the shop on both Saturdays, but the firm refused to sell him the merchandise, claiming either that these were not binding offers, or, if they were, that they were offers which were only open to women.

It was held that the second advertisement was an offer and was open to both men and women. The advertiser made his intention clear and did not need to have an unlimited supply to honour the offer as it was confined by its own terms to limited acceptances:

“The test of whether a binding obligation may originate in advertisements addressed to the general public is whether the facts show that some performance was promised in positive terms in return for something requested...”

“The authorities emphasise that, where the offer is clear, definite and explicit, and leaves nothing open to negotiation, it constitutes an offer, acceptance of which will consummate a contract and create an obligation in the offeror to perform according to the terms of the published offer.

“Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances... We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite and explicit and left nothing open for negotiation...”

“The defendant contends that the offer was modified by a ‘house rule’ to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer.” per Murphy J

17.9 Although shopkeepers and advertisers are not usually contractually bound to sell their goods at the advertised price, they may find themselves guilty of a criminal offence if they do not do so. Under the Consumer Protection Act 1987, section 20 it was an offence for business to give “an indication which is misleading as to the price at which goods, services, accommodation or facilities are available”. This has been replaced by a regulation with similar effect under the Consumer Protection from Unfair Trading Regulations 2008.

17.10 ***R v Warwickshire County Council, ex parte Johnson [1993] AC 583 (HL)***

Neil Johnson, the manager at a branch of Dixon’s in Stratford-upon-Avon, placed a notice outside the store which said he would “beat any TV, Hi-Fi and Video price by £20 on the spot”. Graham Thomas found a television he fancied in another local shop for £159.95, and so sought to buy the identical set from Dixon’s for £139.95. When Johnson refused to give him this discount, he was prosecuted and found guilty under the CPA 1987, section 20 (he was later acquitted on the basis that he was not the responsible person for the purposes of the Act).

18 WEBSITE CONTRACTS: E-COMMERCE

18.1 Despite several European Directives on electronic contracts, there is no clear authority on whether website advertisements are offers or invitations to treat. The general supposition is that this will depend on the same criteria as for shop-window displays or newspaper advertisements. The fact that there is such a large potential audience for a website makes it unlikely that advertisements of goods will be construed as offers, but the *obiter dicta* in a case from Singapore indicates that it might be possible.

18.2 ***Chwee Kin Keong v Digilandmall.com Pte Ltd [2004] SGHC 71***

On the one hand:

“As with any normal contract, Internet merchants have to be cautious how they present an advertisement, since this determines whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.” per Rajah JC

18.3 On the other hand:

The Electronic Commerce (EC Directive) Regulations 2002 provides as follows:

- “11. (1) Unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider shall-
- (a) acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means; and
 - (b) make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors prior to the placing of the order.
- (2) For the purposes of paragraph (1)(a) above –
- (a) the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them; and
 - (b) the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service.
- (3) The requirements of paragraph (1) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Meaning of the term ‘order’

12. Except in relation to regulation 9(1)(c) and regulation 11(1)(b) where ‘order’ shall be the contractual offer, ‘order’ may be but need not be the contractual offer for the purposes of regulations 9 and 11.”

18.4 This would tend to suggest that the customer makes the offer, so the advertisement must be an invitation to treat.

18.5 There are various Regulations covering specific kinds of contract, such as the recent Public Contracts Regulations 2015: Guidance on Electronic Procurement and Electronic Communication.

PART VII: ENDING AN OFFER

19 INTRODUCTION

19.1 An offer can be ended in one of five ways:

- Acceptance.
- Lapse of time.
- Rejection/counter-offer.
- Death.
- Revocation.

20 ACCEPTANCE

20.1 Once an offer has been accepted, it becomes a contract, so the offer itself no longer exists (which means that it is too late to withdraw it). This is discussed in detail below.

21 LAPSE OF TIME

21.1 An offer which requires acceptance within a specific time will not be open to acceptance after that time. If no time is mentioned, it must be accepted in a “reasonable time”, depending on the nature of the offer.

21.2 ***Ramsgate Victoria Hotel Co Ltd v Montefiore (1866) LR 1 Ex 109***

An offer to buy shares was held to have lapsed when an acceptance was attempted five months later (see also *Hawley v Lumina Leisure plc* [2006] EWCA Civ 30).

21.3 ***Manchester Diocesan Council for Education v Commercial and General Investments [1970] 1 WLR 241***

“It has long been recognised as being the law that, where an offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable time to make a contract.”
per Buckley J. at p.247

22 REJECTION/ COUNTER OFFER

22.1 Once you have turned down a bilateral offer, you have no right to revisit it with an acceptance. The best you can do is to make a new offer. The same applies to a counter-offer, whereby the offeree purports to change the terms of the offer.

22.2 ***Hyde v Wrench (1840) 3 Beav 334***

Wrench offered to sell his farm to Hyde for £1000. Hyde said he would pay £950. Wrench turned down the £950 offer, and Hyde wrote back saying that he accepted the original £1,000 offer. There was no contract. By making a new offer in response to Wrench’s offer, Hyde had in effect rejected the first offer and could not go back and accept it. This is the classic example of a counter-offer, which amounts to a rejection of the original offer. An acceptance to be valid must exactly mirror the offer.

22.3 However, where an offeree merely requests more information from the offeror, this will not be construed as a counter-offer, and will have no effect on the formation of a contract.

22.4 ***Stevenson, Jacques & Co v McLean* (1880) 5 QBD 346**

M offered to sell a quantity of iron to S for cash. S asked whether they could have credit terms. When no reply came, S accepted the terms of the original offer. Meanwhile M had sold the iron elsewhere. S claimed breach of contract. M alleged that S's first letter had been a counter-offer which amounted to a rejection. It was held that there was a contract between M and S as their letter had not been a counter-offer.

"There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer." per Lush J.

22.5 ***Gibson v Manchester CC* [1979] 1 WLR 294 (HL)⁶**

The Conservative council sent details to its tenants of a scheme by which they could buy their rented houses at favourable rates. The letter to Gibson read as follows:

"The corporation may be prepared to sell the house to you at the purchase price of £2,725 less 20 per cent."

The tenants were required to fill in and return an application form. When filling out the form, Gibson left the purchase price blank and asked in a covering letter whether the price could be reduced as there were repairs to be done to the property. The council replied that the state of the house had been taken into account when fixing the price. The tenant replied that in that case he wished to proceed with the purchase.

When Labour took over the council in May, they attempted to get out of the sale by claiming, *inter alia*, that Gibson's first letter had been a counter-offer. It was stated *obiter* that Gibson's letter was merely a request for information, but on the facts the council had not actually made an offer, so there was nothing for Gibson to accept.

22.6 An interesting view of these matters was taken by the Court of Appeal in *Norfolk CC v Dencora Properties* in 1995.

***Norfolk CC v Dencora Properties* [1995] EGCS 173 (CA)**

NCC were the tenants of some offices owned by DP. The offices were used by the Police. The lease contained a clause by which NCC could end the twenty-year lease after ten years by giving 24 months' notice, which would have been by 15 March 1993 at the latest.

In November 1992, the landlords and tenants discussed the possibility of a postponement of the notice date as it seemed likely that the Police were going to relocate to County Hall before the end of the lease in either 1997 or 1998.

On 7 December 1992, the landlords wrote to the tenants: "We are prepared to postpone the notice period to break the lease to 1995 or 1996, but not both. The two-year notice must still remain."

The tenants took this as an offer to vary the lease by allowing them to give notice either in 1995 (to end the lease in 1997) or 1996 (to end the lease in 1998), but as they were still uncertain when they would want to break the lease they replied on 18 February 1993: "I appreciate your assistance to date and agree to the two year notice, but ask if this could be given at any time but not earlier than March 1995."

The landlords replied on 22 February 1993: "I regret this is not acceptable..."

⁶ See 10.5 above.

The tenants replied on 5 March 1993: "The County Council are prepared to accept your offer to be able to break the lease in 1998 by serving notice in 1996."

The landlords contended, *inter alia*, that the tenants had made a counter-offer on 18 February and so could not later accept the original offer to postpone. The tenants said that the letter of 18 February was merely a request for further information and that the offer was still open.

Held: The letter of 18 February was a counter-offer, which rejected the offer of 7 December, and the counter-offer was firmly rejected on 22 February. There was no contract.

"In deciding to the contrary, Popplewell J relied on Stevenson, Jacques & Co v McLean (1880), but there the substance of the offer, namely the price, was not questioned; merely the time at which it was effectively to be paid. I think that case is distinguishable from the present." per Nourse L.J.

"If this court were devising a code of offer and acceptance for the law of contract, there would be something to be said for treating an offer as surviving ordinary efforts to renegotiate it, whether by exploratory enquiry or by counter-offer, until such time as the offer, if not accepted, was withdrawn either explicitly or by the effluxion of a stipulated or a plainly excessive period of time."

*"But for over a century people have arranged their affairs and been advised by their lawyers that they can safely do so on the basis of two propositions: that an offer, to be capable of binding acceptance, has to be explicit and exact; and that such an offer, if met by a counter-offer, lapses and cannot be revived by subsequent acceptance. Although it may be said that neither of the two classic cases which furnish authority for these propositions (**Harvey v Facey** and **Hyde v Wrench**) displays a set of facts which self-evidently explains the resultant doctrine, this court would risk unsettling a settled body of law and practice if it sought to distinguish the present facts from those authoritative cases."*
per Sedley J

22.7 In *Hawley v Luminar Leisure plc* [2006] an offer was ended by revocation, lapse of time and by a counter-offer!

***Hawley v Luminar Leisure plc* [2006] EWCA Civ 30**

Hawley was assaulted by the doorman at a Southend nightclub and was awarded damages against the owners of the nightclub. The doorman's services had been provided by a security company, and the owners of the nightclub sought a contribution from this company towards the damages. A dispute arose concerning the amount of the contribution. The case was to be heard in the Court of Appeal on 16 November.

On 9 November, the insurers of the security company had offered to settle the dispute on the basis of 50:50 division of liability, with each party bearing their own legal costs.

On 14 November, the owners had offered to settle on the basis of one-third liability for them, two-thirds for the insurers.

On 17 November, on the second day of the appeal hearing, the owners offered 60:40 in their favour. The offer was rejected. The insurer's solicitor repeated the 50:50 offer, except that now they said that the owners should pay for the full costs of the appeal. The insurer then instructed its solicitor to withdraw the 50:50 offer completely. They did so by a letter in the following terms:

"We refer to the counter proposal made by you at Court this morning of 60/40 split in liability in your client's favour. We confirm that this proposal is rejected. It follows, therefore, that the 50-50 split on liability is no longer available."

On 22 November, whilst waiting for the judgment, the owners purported to accept the offer of 9 November. They claimed that special rules applied to offers of out-of-court settlements, so the usual contract principles of counter-offers and lapse would not apply.

The court held that the insurer's offer had been explicitly withdrawn by their letter of 17 November, and so could not later be accepted. There was thus no need to decide the case on the basis of either a counter-offer or a lapse in time. However, Brooke LJ said *obiter* at paras 25 and 26:

"If the ordinary rules of offer and acceptance apply in the present context, the first defendants' counter-offer (which would normally be interpreted as meaning 'We reject your 50-50 offer but we offer you a 1:2 split of liability instead') would be readily interpreted as a rejection of the third defendants' offer (see Hyde v Wrench).

"Similarly, it is so well known that the risks inherent on litigation may alter significantly, particularly if an appeal court has pre-read the papers, as soon as a hearing starts and the judge or judges start to get engaged with the issues, that there would be a strong case for saying that there was an implied term of the offer that it was only open for acceptance...until the time when the appeal was opened in court at the hearing." per Brooke LJ.

22.8 **DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors [2016] 4 WLR 184**

The claimant bank brought a claim for professional negligence against the defendant firm of solicitors. In August 2015 the defendant made an offer to settle contained in a without prejudice letter. The claimant responded by making a Part 36 offer but later wrote to the defendant stating that it was accepting the defendant's offer to settle.

It was held that once the claimant's Part 36 offer had been made, the offer in the defendant's August letter was rejected and no longer available for acceptance; and that, accordingly, there had been no settlement of the claim and the matter was to proceed to trial.

The Battle of the Forms

22.9 Where an offer is made on the standard form terms of the offeror and accepted on the standard form terms of the offeree, difficulties can arise as to who has accepted or rejected what. The usual rule appears to be that the contract is made on the terms of whoever got the last offer in before acceptance, though it may not be clear which one that was.

22.10 **Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401 (CA)**

The sellers of a machine offered to supply it for a specified sum, but their written conditions of sale included a price escalation clause by which the price might rise by the date of delivery.

The buyers ordered the machine on their own written terms, which did not include a price-escalation clause. These conditions also contained a tear-off slip which the sellers were to sign, which stated that the order was accepted "on the terms and conditions stated therein".

The sellers did sign this slip, but then tried to rely on the price-escalation clause in their original offer. It was held that they were not entitled to do so. The buyers had made a counter-offer, which the sellers had accepted.

22.11 The issue of the 'last shot' doctrine in relation to jurisdiction has come up in a recent High Court case, which is currently subject to appeal. The Court of Appeal decision may add clarity to the application of the doctrine. Watch this space!

TRW Ltd. V Panasonic Industry Europe GmbH [2021] EWHC 19 (TCC)

23 DEATH

23.1 If the offeror dies and the offeree knows, he cannot accept. If he accepts in ignorance of the death, the contract may still be binding on the estate (unless, of course, it is a personal service contract). If the offeree dies before accepting, there can be no contract.

23.2 **Reynolds v Atherton (1921) 125 LT 690 (CA)**

"An offer made to a living person who ceases to be a living person before the offer is accepted...is no longer an offer at all." per Warrington LJ.

23.3 This statement was made *obiter*, and Treitel suggests that there may be cases where an offer could survive the death of the offeree if it could be construed as an offer to him or his executors.

24 REVOCATION OF BILATERAL OFFERS

24.1 The offeror may withdraw an offer at any time before it has been accepted, provided that the revocation is communicated to the offeree. This is the case even if the offeror has promised to keep the offer open, unless he has been paid to keep the offer open (a so-called "option-agreement").

24.2 **Dickinson v Dodds (1876) 2 ChD 463, 34 LT 607 (CA)**

On Wednesday 10 June, Dodds delivered a signed letter to Dickinson offering to sell his house for £800, "this offer to be left over until Friday, 9 o'clock am, 12 June".

The next afternoon, Berry (Dickinson's agent) told Dickinson that Dodds had offered to sell the house to one Allen. Dickinson then delivered a letter to Dodds to accept the offer, but the house had been sold. Dickinson sued for breach of contract. It was held that there was no contract between Dickinson and Dodds.

24.3 This case illustrates several principles:

- i) An offer can be withdrawn at any time before it is accepted, even if the offeror has promised to keep it open (unless the offeree has paid him to keep it open, in which case there is an "option" agreement).

Routledge v Grant (1828) 130 ER 920

The defendant offered to take a lease of the plaintiff's premises, giving the plaintiff six weeks to decide. After three weeks, the defendant withdrew his offer. The plaintiff's attempt then to accept was not successful.

"If six weeks are given on one side to accept an offer, the other side has six weeks to put an end to it. One party cannot be bound without the other." per Best LJ at 923

- ii) Although revocation must be communicated to be effective, the communication does not have to come from the offeror himself. A reliable third party will suffice.

"If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to someone else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of the opinion that he cannot."

per Mellish LJ at p 474

- iii) Merely sending a revocation will not amount to communication of it.

Byrne & Co v Van Tienhoven & Co (1880) 5 CPD 344

On 1 October, the defendants posted a letter offering to sell 1,000 boxes of tinplates.

On 1 October, the defendants posted a letter revoking their offer.

On 11 October, the plaintiffs telegraphed acceptance.

On 15 October, the plaintiffs confirmed their acceptance by letter.

On 20 October, the defendants' letter of revocation reached the plaintiffs. It was held that there was a contract. The revocation was not effective until actually communicated, and it was not communicated until after the contract had been made.

25 REVOCATION OF UNILATERAL OFFERS

25.1 There is a problem in applying this theory to **unilateral offers** if they have been made to “the world at large” through an advertisement, as it may not be possible to ensure that everyone who read the advertisement is also aware of the revocation.

25.2 There is a solution to this in USA law, which probably would be applied in the UK, if the issue ever arose. If the revocation is advertised “with the same notoriety” as the original offer, this might be effective. This may require publication of the revocation in the same journal as the offer. Note that this case has never been referred to in an English judgment, but that might simply be because the issue has never arisen.

25.3 ***Shuey v United States (1875) 23 L ed 697, 92 US 73***

On 20 April 1865, the Secretary of War published an announcement in the public newspapers offering a reward of \$25,000 for the apprehension of John H Surratt, one of Booth's alleged accomplices in the assassination of President Lincoln. On 24 November 1865, the President issued an order revoking the offer which was published in a similar way. The claimant discovered and identified Surratt in 1866, unaware of the notice of revocation. He was given a reward of \$10,000 and sued for the balance of \$25,000.

The Supreme Court of the United States held that the offer had been revoked, even though the revocation had not actually been communicated to Shuey. Indeed, he was lucky to have been given a reward at all since he had not actually apprehended Surratt, but had merely given information leading to his arrest.

“The same notoriety was given to the revocation that was given to the offer... True, it is found that... he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.” per Strong J at p 699⁷

⁷ John H Surratt (1844-1916) was hidden by a priest in Canada during the trial of Booth and escaped to Europe – where he was captured then escaped again to Egypt – where he was captured and taken to the US for trial. He was reprieved by a hung jury, who believed his claim that he was in Canada on the relevant day. However, by that time he had already spent two years in prison in the US (nothing much changes there then). He later married and had seven children.

Revoking a Unilateral Offer after Performance has Begun

25.4 Unilateral offers cause another difficulty in this area. Acceptance occurs when the performance of the task is complete, and an offeror can normally revoke an offer at any time before acceptance. If you have given someone a task to perform in return for money *on completion*, can you withdraw the offer once he has started to perform the task, but before he has finished? In various cases the courts have said that you must give the other party a reasonable chance to finish once he has started, though the reasons given for this principle have differed. Lord Denning considered that it was a matter of equity.

25.5 ***Errington v Errington and Woods* [1952] 1 KB 290**

A father bought a house for his son and daughter-in-law to live in. He offered to give them the property if they paid the building society instalments of 15s. a week until the mortgage was repaid. They made these payments, but the father died before the mortgage was completely paid, and the executors attempted to revoke this unilateral offer made by the father. It was held that as long as the couple continued to pay the instalments, the offer could not be revoked. Lord Denning seems to have based this judgment on equity – that is, on the basis that it was a fair result.

“The father’s promise was a unilateral contract (sic) – a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed.”

per Denning LJ at p 295

25.6 In ***Daulia Ltd v. Four Millbank Nominees*** [1978], Goff LJ reached the same conclusion as Lord Denning had in ***Errington v Errington and Woods***, but for a different reason: he thought that by beginning performance, the offeree had accepted a collateral, implied offer that the main offer would not be revoked until there had been a reasonable opportunity given to him to complete the performance (and so accept the offer).

25.7 ***Daulia Ltd v Four Millbank Nominees* [1978] 2 WLR 621 (CA)**

The defendants promised the plaintiffs that if they produced a signed contract and a banker’s draft for £41,250 by 10.00 am the next day, the defendants would sell certain properties to them. The plaintiffs did all this, but the defendants refused to go through with the contract. It was held that the defendants were not entitled to withdraw their unilateral offer once the plaintiffs had embarked upon performance. This was based on a supposed “implied obligation” to that effect: in other words, there is a collateral offer to keep the main offer open once performance has started.

“Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition being satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.” per Goff LJ at p 625

25.8 Whilst the Denning analysis seems to have prevailed, the difficulty with both theories is to know what constitutes “beginning performance” of the required act. The issue arose in the following case.

***Soulsbury v Soulsbury* [2008] Fam 1**

Owen and Elizabeth Soulsbury divorced in 1986. The court ordered the husband to pay the wife £12,000 per annum by way of ancillary relief. In 1989, the husband suggested that instead of making further payments, he would agree to leave the ex-wife £100,000 in his will. He changed his will to leave her this money, and in 1993 the couple agreed that in return for him not revoking the will, she would not pursue him for the money.

In 2002, the husband married Kathleen, which had the effect of revoking his will. He died the same day! The first wife (Elizabeth) sued the second wife (Kathleen) for the £100,000 from the estate.

It was held, *inter alia*, that there was a unilateral contract between Elizabeth and Owen. Owen had offered to make provision for Elizabeth to get £100,000 on his death IF until that time she did not sue him for unpaid maintenance. Once she had embarked upon not claiming the money and continued so to refrain, he could not withdraw the offer. She had eventually accepted the offer by not suing him before he died!

*"This is a classic unilateral contract of the **Carlill v Carbolic Smoke Ball Co** [1893] 1 QB 256 or the "walk to York" kind. Once the promisee acts on the promise by inhaling the smoke ball, by starting the walk to York or (as here) by not suing for the maintenance to which she was entitled, the promisor cannot revoke or withdraw his offer.*

"But there is no obligation on the promisee to continue to inhale, to walk the whole way to York or to refrain from suing. It is just that if she inhales no more, gives up the walk to York or does sue for her maintenance, she is not entitled to claim the promised sum." per Longmore LJ at para 49

PART VIII: ACCEPTING AN OFFER

26 ACCEPTANCE OF BILATERAL OFFERS

The Mirror Image Rule

- 26.1 Acceptance is an assent to all the terms of the offer. Any changes to the offer will amount to a counter-offer, which is a rejection (see *Hyde v Wrench* above). An acceptance “subject to contract” is not effective to create a contract.

The Communication Rule

- 26.2 Acceptance may be made by word, by writing or by conduct, but must usually be communicated in some way. It is not usually possible to accept by pure inaction.

Silence as Acceptance

- 26.3 The offeror cannot usually stipulate that silence by the offeree will constitute acceptance.

Felthouse v Bindley (1862) 142 ER 1037

Felthouse offered to buy a horse belonging to his nephew John. Eventually the uncle wrote: “If I hear no more about him, I consider the horse is mine at £30 15s.”

The nephew did not reply, but told Bindley, an auctioneer who had been hired to sell the stock, to reserve the horse and not to sell it. The auctioneer forgot, and sold it at the auction. The uncle claimed that he had a contract of sale and sued the auctioneer in conversion. It was held that even though the nephew wanted to sell the horse to his uncle, there could be no acceptance unless it was actually communicated.

- 26.4 Silence may exceptionally equate to acceptance in business contracts where this is the trade custom (*Minorities Finance Ltd v Afriland Nigeria Ltd* [1995] 1 Lloyd’s Rep 134).

Conduct as Acceptance

- 26.5 Although you cannot accept BY silence, you can accept IN silence (i.e. by silent conduct). This is the usual thing in shops. The conduct in question must objectively display the offeree’s intention fully to accept the specific offer.

- 26.6 ***Day Morris Associates v Voyce [2003] EWCA Civ 189***

A firm of estate agents claimed £17,500 commission on the sale of a house owned jointly by Carol Voyce and her husband Rodney. As the couple was on the verge of divorce, Carol wanted to know the value of the matrimonial home, and was advised by the estate agents to put it on the market to see what was offered. They wrote to Carol to tell her that they had found some potential buyers who were likely to pay about £700,000, and to confirm that should they purchase the property, the agents would take a 2.5% commission.

Although that sale did not go through, the agents then wrote to Carol to tell her that under the sole agency agreement, she would have to pay them 2.5% of the purchase price if she sold the house, even if it was not through their endeavours. Carol did not acknowledge this, but permitted the agents to market the house. An offer was made by Janet Lee to buy the house for £690,000, but this was not accepted and the house was taken off the market at Carol’s request.

In the divorce proceedings, Rodney Voyce was given sole control over the sale of the house. He tracked down Janet Lee and accepted her offer of £690,000. The agents claimed their commission.

The Court of Appeal held that they were entitled to the commission on the basis of the contract made with Carol (who was joint owner of the house) even though in the event she had no control over the sale. She had accepted their offer to act as sole agents for a 2.5% commission by acquiescing in the process of marketing the property, by allowing the agents to give particulars to prospective purchasers and by permitting them to advertise the property.

However, the Court of Appeal urged caution in discovering acceptance by conduct:

“A contractual acceptance has to be a final and unqualified expression of assent to the terms of the offer. Conduct will only amount to an acceptance if it is clear that the offeree did the act in question with the intention of accepting the offer. But the test as to whether there has been such agreement is an objective one. It follows that conduct which demonstrates an apparent intention to accept can be sufficient, despite uncommunicated mental reservations on the part of the offeree. However, it seems to me that for that situation to arise, the conduct in question must be clearly referable to the offer and, in the absence of knowledge of the offeree’s reservations, not reasonably capable of being interpreted as anything other than acceptance.”

per Black J (Mrs Justice Black, now a Justice of the Supreme Court) at para 35

26.7 ***Brogden v Metropolitan Railway (1877) 2 App Cas 666 (HL)***

Brogden had for years supplied coal to the railway company without a formal agreement. Wishing to formalise the arrangement, the company sent Brogden a draft form of agreement. He inserted a term and returned it marked “approved”. The company’s agent did not acknowledge it, but put it in a drawer. For two years, Brogden and the company dealt in accordance with the terms of the written agreement.

A dispute arose, and Brogden claimed that as the company had never acknowledged this altered draft, there was no contract. It was held that there was a contract. The House of Lords confirmed that a mere decision to accept was not effective, but that the conduct of the parties was a sufficient external manifestation of acceptance

26.8 ***Wettern Electric Ltd v Welsh Development Agency [1983] QB 796***

A licensee offered to occupy land on certain terms. It was held that this offer had been accepted by the landlord permitting him to occupy the land.

26.9 ***Westminster Building Company Ltd v Beckingham [2004] EWHC 138***

W agreed to do extensive renovation works for B based on a specification to be prepared by Kirsop & Company, a firm of chartered surveyors. When the work was done, B was sent a bill for £122,409.16, which he refused to pay on the basis that under an agreement he had reached with W before the work started, the amount he was obliged to pay was capped at £300,000 and he had already paid £284,209.90.

W claimed that the actual contract was the one subsequently prepared by Kirsop (in accordance with the original agreement), which incorporated into the contract the JCT standard terms and thereby permitted a claim for these additional costs following adjudication. However, although B had taken receipt of the Kirsop contract, he had never signed it or expressly accepted it.

It was held that although B had never signed the Kirsop agreement, and although it was not presented to either party until after the work had started, B was bound by it anyway. He never made any objection to it and he permitted the work to continue under its terms, resisting it only when he was sent the bill.⁸

⁸ See also *Paul Stretford v The Football Association Limited* [2006] EWHC 479, and *Reveille Independent LLC v Anotech*

26.10 However, one party will not be bound by terms subsequently introduced by the other simply because he does not object to them. There must be some clear indication of acceptance by conduct (which could be an act of permission as in the last two cases discussed).

26.11 ***Jayaar Impex Ltd v Toaken Group Ltd (T/A Hicks Brothers) [1996] 2 Lloyd's Rep 437 (Commercial Court)***

A contract was made orally over the telephone for the sale of Nigerian gum Arabic. The seller sent to the buyer their standard form contract which included the term "IGPA Spot conditions to apply".

The buyers did not sign, date or return the form. There had been no mention of the IGPA conditions in the telephone conversation, but the sellers attempted to rely on these conditions when they were sued by the buyers.

Held: It could not be said that the buyers intended to accept the seller's form of contract. The written contract was never accepted by the buyers, the contract was concluded orally and it was wrong for the sellers subsequently to attempt to substitute a contract which was fundamentally different.

Furthermore, a court will not construe that a contract has been formed by conduct when that was clearly not the objective intention of both parties.

26.12 ***Whittle Movers Ltd v Hollywood Express Ltd [2009] 2 CLC 771 (CA)***

Hollywood Express (a subsidiary of UCI) undertook food and drink distribution and warehousing services for UCI Cinemas and Blockbusters, which it subcontracted to Trailers Ltd under a contract that provided for termination with six months' notice. Following a takeover of UCI, H sought a new subcontractor and invited Whittle Movers to tender, which they did successfully.

The acceptance of W's tender was said to be "subject to contract" and clearly envisaged the execution of a formal, written agreement for a long-term contract. In the meantime, W began providing the services.

Following a dispute, H gave W six months' notice of termination, as they could have done under the old contract with Trailers, claiming that by their conduct W had accepted an interim contract on the same terms as the Trailers contract. W counter-contended that their conduct demonstrated that the full long-term contract had come into force and that they, therefore, could not be given notice to terminate.

The Court of Appeal held that they were both wrong, as from an objective point of view, neither party could be said to have agreed to the terms claimed by the other by their conduct. In fact, no contract had been entered into at all. W were in effect performing services with no contractual obligation to do so, and although H could, therefore, not be obliged to pay them a contractual fee, W could claim *restitution* for any unjust enrichment obtained by H (see also *CN Associates v Holbeton Ltd* [2011] EWHC 43 (TCC)).

International (UK) Ltd [2015] EWHC 726.

Acceptance Without Communication - The Postal Rule

26.13 Where it is reasonable to accept by post, acceptance will take place at the time the letter is posted, rather than at the time it is received, provided that the postal rule has not been excluded.

26.14 ***Adams v Lindsell (1818) 106 ER 250***

Lindsell made an offer by post to sell Adams some wool, asking for a reply “in course of post”. The letter was sent on 2 September, but because it was wrongly addressed did not arrive until 5 September, whereupon Adams posted a letter of acceptance at once. By the time it arrived, Lindsell, assuming the offer to have been rejected, had sold the wool. Adams claimed breach of contract.

The court held that there was a contract as soon as the letter of acceptance had been posted. To hold otherwise would be impractical, as the acceptor would not know that his letter had been received until the offeror wrote back and told him, and so communications could go on *ad infinitum*.

26.15 The postal rule applies even when the letter never arrives at all.

Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) 4 Ex D 216 (CA)

The plaintiffs accepted by post an offer by the defendant to buy 100 £1 shares in the company for which he had paid one shilling per share. The letter of acceptance never arrived, but the defendant was registered as a holder of 100 part-paid shares. The company went into liquidation, and the liquidator sued for the £94 15s due.

Held: The contract had been made when the letter of acceptance was posted. It was immaterial that the letter never arrived.

Limitations on the Postal Rule: Exclusion by the offeror

26.16 The postal rule may be excluded by the offeror either expressly (by saying or writing “the postal rule does not apply” when making the offer); or impliedly (by requiring receipt, knowledge or notice of the acceptance before a contract will be made).

26.17 ***Holwell Securities v Hughes [1974] 1 WLR 155 (CA)***

The defendants granted the plaintiffs an option to purchase certain freehold property. The agreement provided: “The said option shall be exercisable by notice in writing to [the defendant] at any time within six months from the date hereof.”

On 14 April 1972, the plaintiffs sent a letter to exercise the option, but it never arrived. It was held that the requirement that the defendants should be “notified” effectively excluded the postal rule, so there was no contract.

Limitations on the Postal Rule: It only applies to acceptances

26.18 The postal rule only applies to acceptances, not to revocations (*Byrne & Co v Van Tienhoven & Co (1880) 5 CPD 344* above).

Limitations on the Postal Rule: It does not apply to instantaneous communication

26.19 The postal rule does not apply to instantaneous forms of communication, so it does not apply to faxes or telexes. It may apply to emails as these might be considered a modern version of the post, especially since they go through a third party (the server) like letters do. However, recent authority has suggested that emails are more akin to faxes and should not attract the postal rule.

26.20 ***Entores v Miles Far East Corporation* [1955] 2 QB 327 (CA)**

The plaintiffs in London made an offer by telex to the agents in Holland of the defendant company in New York. The offer was accepted by a communication received on the plaintiffs' telex machine in London. The issue rose as to whether the contract was made in England or Holland. The Court of Appeal held that the rule about instantaneous communications was different from the postal rule, and that the contract in such cases is made where the acceptance is received.

26.21 ***Brinkibon Ltd v Stahag Stahl* [1983] 2 AC 34 (HL)**

Where a telex of acceptance was sent from London to Vienna, it was held that the contract was concluded where the telex arrived, not where it was sent from. Lord Fraser expressly approved the decision in *Entores* as it “*seems to have worked without leading to serious difficulty or complaint from the business community.*” per Lord Fraser at p 43

This is a good example of a case in which the court was anxious to give effect to reasonable commercial expectation, which is arguably the basis of the Law of Contract.

26.22 Note that this rule was applied in *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768, though Mann J observed that it was of little use in complex contracts where it was unclear which party had made the final offer and which the final acceptance.

26.23 ***Entores v Miles Far East Corporation*** was discussed in the following case.

***Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 (SC)**

Sir Ian Brownlie and his daughter, Rebecca, were killed in a car accident whilst on a sight-seeing tour of Egypt with Lady Christine Brownlie (Ian's wife) and Rebecca's children. The accident was due to the negligence of the hired tour-driver, Hassan Mohammed Abdullah Salima.

The tour had been arranged before they left England by Lady Brownlie, by way of a telephone conversation with the concierge of the Egyptian hotel where they were staying, part of a Canadian international chain. In suing the hotel company for compensation under the tort of negligence (as executrix of the estate); and under the Fatal Accidents Act 1976 (as a dependent of the deceased) in England, Lady Brownlie needed to establish, *inter alia*, that the tour contract was made in England, not in Egypt.

The High Court held that as the events took place over four years before the hearing, gathering the evidence was somewhat problematic, but the most probable analysis of the telephone conversation was that Lady Brownlie made an offer which the concierge accepted, so the contract was made in England:

“78 *It is common ground that where a contract is made by telephone the contract is made at the place where the acceptance is received (Entores v Miles Far East Corporation).*

79 *This rule is predicated on the law, recognised throughout common law countries, that the formation of a contract takes place where there is an offer made by one party which is accepted by the other. In the case of an oral, or other instantaneous, communication the rule is that the acceptance which concludes the contract must in general be received and understood by the*

party who had made the offer. This is explained by Denning LJ at pages 332–333. At page 334 he added: ‘In a matter of this kind, however, it is very important the countries of the world should have the same rule. I find that most of the European countries have substantially the same rules as that I have stated’...

85 On the basis of this evidence it is not straightforward to analyse the conversation in terms of offer and acceptance. The brief details given in the brochure of ‘Tour 16’ cannot be an offer: that document says nothing about the date, the number of passengers or the price. Further, whatever that document was, as a matter of law, Tour 16 is not the tour which the Claimant agreed with the Concierge. The Tour she agreed with the Concierge was shorter...

87 It seems to me that the most probable analysis of the evidence is the following. The brochure amounts to an advertisement, or at most an invitation to treat. The Claimant in the telephone conversation of 21 December started by informing the Concierge that she was interested in a shortened version of Tour 16, and stating the number and ages of the members of the family whom she wished to take on the Tour. Thus, she invited the Concierge to put forward a proposal or proposals as to a revised itinerary, the timing and the price. I infer that the Concierge did put forward one or more suggestions for a tailor-made itinerary which would enable the Claimant’s party to return to Cairo before rush hour and less than 16 hours after departure. I infer that the Concierge probably mentioned matters not mentioned in the brochure: that there was a requirement for a police escort, that the cost was to be US\$1000 plus US\$100, and that that was to include the cost of the vehicle, the driver, a tour guide together with the police escort and lunch. I infer that, having been told the options available to her (namely the standard 16-hour Tour and the tailor-made Tour, together with other details) the Claimant then told the Concierge that she wished to make a firm booking for one of the options proposed by the Concierge. I take that to be the Claimant’s offer.

I infer that the Concierge accepted by saying yes, or words to the effect that she accepted the booking. On that analysis, the contract was made in England where the Claimant heard the acceptance of the booking.” per Tugendhat J⁹

The High Court decision in this case was partly reversed by the Court of Appeal,¹⁰ on the basis that the English courts had no jurisdiction to hear a case of negligence where the incident had happened outside the UK.

Furthermore, the Supreme Court¹¹ held that because the defendant was a non-trading holding company, which neither owned nor operated the hotel in Cairo, there was no realistic prospect that the claimant would be able to establish at trial that she had contracted with the defendant at all, so the issue of where the contract was made did not arise.

However, Baroness Hale commented *obiter* on the arbitrary nature of the rules about where a contract was made.

“Since Holdings was not party to the relevant contract, it is unnecessary to deal with the question where that contract was made, which may in due course have to be determined as against other parties. But I think it right to draw attention to the artificial nature of the issue as the law currently stands. The argument on the point turned on the question who uttered the words which marked the point at which the contract was concluded and where the counterparty was physically located when he or she heard them. This is the test which has for many years been applied where the contract was made by instantaneous exchanges, e g by telephone: see Entores Ltd v Miles Far East Corpn [1955] 2 QB 327 . It differs from the test applied to contracts made by post, which are complete when and where the letter of acceptance is posted: Adams v Lindsell (1818) 1 B & Ald 681 , Dunlop v Higgins (1848) 1 HLCas 381.

⁹ [2014] EWHC 273 (QB).

¹⁰ [2015] EWCA Civ 665.

¹¹ [2018] 1 WLR 192.

“These rules were adopted for reasons of pragmatic convenience, and provide a perfectly serviceable test for determining whether a contract has been concluded at all. However, their deployment for the purpose of determining when or where a contract was made is not at all satisfactory. It depends on assumptions about the point at which an offer is accepted or deemed to be accepted, which are particularly arbitrary when the mode of communication used is instantaneous (or practically so). It also gives rise to serious practical difficulties. The analysis of an informal conversation in terms of invitation to treat, offer and acceptance will often be impossible without a recording or a total recall of the sequence of exchanges and the exact words used at each stage, in order to establish points which are unlikely to have been of any importance to either party at the time. This may be unavoidable under the current wording of gateway 6(a). But the whole question could profitably be re-examined by the Rules Committee.” per Baroness Hale at para 16

However, she also said at para 34: *“For what it is worth, this is not the place to cast doubt on the longstanding rule in Entores.”*

Limitations on the Postal Rule: Website contracts

26.24 The postal rule does not apply to contracts made on an Internet website as Regulation 11 of the European Commerce (EC Directive) Regulations 2002 requires not only that the acceptance is received by the offeror, but that it is also acknowledged (there are exceptions to this in certain non-consumer contracts).

European Commerce (EC Directive) Regulations 2002

“11 Placing of the order –

- (1) Unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider shall–
 - (a) acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means; and
 - (b) make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors prior to the placing of the order.
- (2) For the purposes of paragraph (1)(a) above–
 - (a) the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them; and
 - (b) the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service.
- (3) The requirements of paragraph (1) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.”

Limitations on the Postal Rule: Email contracts

26.25 There is no doubt that contracts may be concluded by email negotiations. For examples of email contracts see *NBTY Europe Ltd v Butricia International BV* [2005] EWHC 734 and *Trafigura Beheer BV v Yieh Phui Enterprise Co Ltd* [2009] EWHC 2054 (Comm).

26.26 There is some academic debate as to whether the postal rule should apply to emails, which have some of the characteristics of faxes and some of the postal service. The preferred view is that they are “instantaneous” for these purposes, and so do not attract the postal rule. This view has been judicially endorsed in *Thomas and another v BPE Solicitors* [2010] EWHC Ch 306.

26.27 However, where a contract is made electronically through a website, the matter of when and where the contract is made is now settled by Article 11 of the European Directive on Electronic Commerce (COM 1999 427):

“Member States shall lay down in their legislation that...in cases where a recipient (i.e. the purchaser), in accepting a service provider’s (i.e. the seller’s) offer is required to give his consent through technological means, such as clicking on an icon, the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient’s acceptance.”

Limitations on the Postal Rule: Wrongly addressed acceptances

26.28 The postal rule was revisited in the following case which confirmed that it does not apply if the acceptance is wrongly addressed.

***Korbetis v Transgrain Shipping BV* [2005] EWHC 1345**

The action concerned a dispute over whether an arbitrator had been validly appointed under a charterparty. The owners of the *MV Alexia M* chartered the ship to the charterers for the carriage of maize from St Lorenzo in Argentina to Oran in Algeria. The cargo was properly discharged on 24 April 2003, but full payment was not made by the charterers.

Under the terms of the contract (the charterparty), all disputes were to be referred to arbitration. The contract provided that either the parties could agree to a single arbitrator, or, failing that, each would appoint one of its own. If a claimant had not thus appointed an arbitrator within twelve months of the final discharge of the cargo, the claim would be waived and absolutely barred.

On 10 March 2004, the owners, who had their offices in Piraeus in Greece, faxed a letter to the charterers setting out their claim.

On 23 March 2004, they sent a further fax proposing the name of a single arbitrator.

On 31 March 2004, the charterers replied by fax, rejecting the suggested arbitrator, and naming three other people.

On 5 April 2004, the owners sent a fax to agree to one of the proposed names (a Mr Timothy Rayment – if you care). Alas, the person handling the claim for the owners was off sick, so the fax was sent by someone else (John Merrylees) – to the wrong number. (The charterer’s office was in the Netherlands, but Merrylees forgot to include the international code to the fax number. As a result of this, the fax went to someone in Piraeus, who, presumably, binned it.)

On 25 August 2004, having received no response to the fax of 5 April, Merrylees sent a further fax, asking for confirmation of the appointment of the single arbitrator. This also went to the stranger in Piraeus.

On 24 December 2004, the owners contacted Timothy Rayment to ask if he had been sent notice of his appointment. He knew nothing about it, but was glad for the job and sent a fax to both parties – to the correct numbers – to confirm his acceptance.

On 12 January 2005, the charterers responded that:

- they had never received the original fax;
- the arbitrator was not appointed in time, and so the claim was waived.

The owners claimed that the acceptance was made when the 31 March fax was sent, even though it never arrived. The court held that the postal rule did not apply to wrongly addressed letters, so there was no contract.

“As Chitty on Contracts, 29th Edition, paragraph 2-034, states: ‘The general rule is that an acceptance has no legal effect until it is communicated to the offeror’.

“Mr Lewis on behalf of the owners relied on the well-established rule dating back to **Adams v Lindsell** (1818) 1 B&Ald 681, that an acceptance by post is complete as soon as the letter is put into the post-box. But those cases assume that the letter has been properly addressed. If it has been properly addressed, the acceptor commits himself practically as well as legally by posting it. At that moment the die is cast. The likelihood of non-delivery is remote. Mishaps occur, but if such a mishap occurs, it is not the fault of the acceptor. From a pragmatic viewpoint, the rule of law is generally satisfactory, although Chitty accurately comments, in paragraph 2.046, that the rule favours the offeree for reasons which it is unnecessary to elaborate.

“If the letter is wrongly addressed, very different considerations apply. Common sense dictates that it is unfair to the intended recipient that he should be bound by something which he is unlikely to receive because of the fault of the sender. Moreover, if he is to be so bound, such a rule would have the potential to give to the careless would-be acceptor an unfair advantage. Suppose that the would-be acceptor realises that the letter or fax has been sent to the wrong address or number. On the owners’ argument, a contract would already have come into existence. In the practical world, the acceptor would then have an option whether to reveal the contract to the offeror, or to keep silent about it. If the market had moved, this could be a valuable option. The would-be acceptor, in that situation, would also have the opportunity to nurse his option by waiting to see how the market moved before deciding whether to reveal the existence of the contract. Even if the law crafted some form of rule of good faith to prohibit a party from acting in such a way, such a rule could in the nature of things be difficult to enforce. It is not hard to envisage circumstances in which only the would-be acceptor would know when he discovered the true position.

“Mr Lewis submitted that in such situations there should be no firm rule of law, as in the ordinary posting rule, but that it should be for the court to decide on a case by case basis what result most fairly suited the facts. I do not accept that submission. Rules about offer and acceptance ought to be clear, so that parties may know where they stand. A situation in which it is unclear whether or not a contract has been formed until a court decides in the exercise of some form of general discretion whether or not a contract has been formed would be unsatisfactory.”

per HHJ Toulson at paras 10-12

On the issue of passing the deadline, the court did not accept that the arbitrator necessarily had to be appointed by 24 April to comply with the charterparty. It might be enough that the negotiations to appoint him had begun by that date. However, the judge thought that, in the circumstances, by 24 December the offer of 31 March would have ended by lapse of time.¹²

Acceptance Without Communication – The Unread Message

26.29 Apart from the postal rule, when a message of acceptance is sent, it will not generally be effective until it is actually read or heard by the offeror. The fact that it is available to be read is not enough (though see 26.32 below). However, there may be an exception to this rule where it is the offeror’s own fault that the message has not been read, and the offeree reasonably supposes that it has been.

26.30 **Entores v Miles Far East Corporation [1955] 2 QB 327 (CA) (see above)**

Lord Denning delivered a lengthy *obiter dictum* discussing some problems which could arise with uncommunicated acceptances. His theory was that if, due to the offeror’s fault, the offeree has formed the reasonable supposition that his acceptance has been communicated, the offeror will be estopped from denying he has read or heard it and there will be a contract.

¹² Note that this is rather odd decision, as it is clear that the postal rule does not apply to faxes anyway, so the wrong number should not really have been an issue.

“Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound...”

“Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes ‘dead’ so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off because people usually say something to signify the end of the conversation. If he wishes to make a contract he must, therefore, get through again so as to make sure that I heard. Suppose next, that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance.

“The contract is made, not on the first time when I do not hear, but only on the second time when I do hear. If he does not repeat it there is no contract. The contract is only complete when I have his answer accepting the offer.

“Lastly, take the telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance.

“If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus, the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails, or something of that kind.

“In that case the Manchester clerk will not know of the failure, but the London clerk will know of it and will immediately send back a message “not receiving”. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until the message is received that the contract is complete.

“In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So, he must repeat it. But suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for the message to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received.

“The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance – yet the sender of it reasonably believes it has got home when it has not – then I think there is no contract.” per Denning LJ at p 333

26.31 ***Tenax Steamship Co Ltd v The Brimnes (Owners), The Brimnes [1975] QB 929 (CA)***

The defendants hired a ship from the plaintiffs on the basis that the plaintiffs could terminate the agreement if the defendants did not pay the regular hire charge. The defendants failed to pay and the plaintiffs sent them a telex to terminate the contract. It was sent during normal office hours, but the defendants did not see it until the next day. It was held that the withdrawal telex was effective from the time it arrived, not the time it was read.¹³

¹³ Note that *The Brimnes* was a case relating to termination of contracts, not acceptances of offers, but it is a useful analogy.

Acceptance Without Communication – The Received Message

There is some recent Supreme Court authority that suggests that if the offeror has personally received a written acceptance and has simply declined to read it, then the message may be taken to have been constructively communicated.

***Newcastle NHS Foundation Trust v Haywood* [2018] 1 WLR 2073 (SC)**

Sandi Haywood was employed as an associate director of Business Development by the trust from November 2008 to July 2011. She was sent a notice of termination of her employment whilst she was away on leave and did not receive it until her return. It was crucial to her pension rights to know the exact date of the termination.

The Supreme Court held that a notice had to be received before it could take effect, and there was a difference between delivery and receipt: the latter usually occurred shortly after the former. Physical delivery of a notice to the addressee's home gave rise to a rebuttable presumption of receipt, and the evidential burden shifted to the addressee to show that she had not received it. Actual notice of the contents of the notice was not necessary; the addressee did not need to have read or even opened it in order to have received it, but if she had not actually read it, she must at least have had a reasonable opportunity to do so by taking delivery of the letter personally¹⁴.

Acceptance by Unauthorised Means

26.32 It is not always necessary to accept an offer in the way requested by the offeror. There is a presumption that unless the offeror specifies otherwise, the mention of a particular method of acceptance implies that an equally efficacious method will do as well.

26.33 ***Tinn v Hoffman & Co* (1873) 29 LT 271**

Acceptance was requested "by return of post". It was held that this did not exclusively require a reply by letter by return of post. Any equally expeditious method would suffice.

26.34 ***Quenerduaine v Cole* (1883) 32 WR 185**

Where an offer was made by telegram there was an implied requirement that the acceptance should be made by an equally speedy method. Therefore, a posted acceptance was not valid.

26.35 ***Manchester Diocesan Council for Education v Commercial and General Investments* [1970] 1 WLR 241**

It was stated in a request for tenders that acceptance of the winning tender would be sent by letter to the address given on the tender. Acceptance was actually sent via the winner's surveyor. It was held that although an offeror is entitled to insist on acceptance in a particular way, where a method of acceptance is merely **prescribed**, any equally efficient method of acceptance will suffice. If the offeror wants to be bound *only* if the offer is accepted in some particular way, he must make this clear:

"Where the offeror has prescribed a particular method of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of the opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract... If an offeror intends that he shall be bound only if his offer is accepted in some particular manner, it must be for him to make this clear." per Buckley J at p.246

26.36 If acceptance is required to be sent at a particular time, and it is sent early, it will probably be effective from the time it was meant to be sent.

¹⁴ This is not a case about contractual acceptance, but the principles might be analogous.

Galaxy Energy International Ltd v Novorossiysk Shipping Co, The Petr Schmidt [1998] 2 Lloyd's Rep 1 (CA)

A shipping contract required that notice of readiness to load should be telexed to the charterer's office between 06.00 and 17.00. The notice was in fact telexed earlier than 06.00 and the charterer claimed that this rendered the notice a complete nullity.

Held: The telexed notice was not a nullity. Although it was not effective when it was sent, it became effective at 06.00. Notices tendered outside the permitted hours could not be relied on as having contractual effect at the time of tender, but in the present case the tender was at 06.00, whether or not there was previously a tender at the time the telex was sent.

- 26.37 A variant on this is the question of what happens if the acceptance is made by an unauthorised person. This is really a question of agency. If the person who delivers an acceptance does not have the authority to act for his principal in this way, there will be no contract.

Powell v Lee (1908) 99 LT 284

Powell applied for the position of headmaster of the Cranford School. The six managers of the school decided to appoint him, and one of them (Dismore), without the authority of the others, sent a telegram to Powell to tell him of this. The next day, the managers decided to appoint Parker instead. Powell sued for breach of contract, claiming £11/ 5s for loss of salary. It was held that there was no contract as there had been no *authorised* acceptance.

27 WITHDRAWING AN ACCEPTANCE

Is Withdrawal of an Acceptance Possible?

- 27.1 Once an offer has been accepted, there is a contract, but is it possible to withdraw an acceptance once it has been made? This is a particular problem where the postal rule is concerned, for a party wishing to accept may post his acceptance, but then communicate a withdrawal by a quicker method, so that the offeror knows of the withdrawal before he knows of the acceptance. What if the offeror acts on the withdrawal (e.g. by selling his goods to someone else) and is then sued for breach of contract by the original offeree?

Problems and Solutions

- 27.2 Treitel suggests that it should not be possible to withdraw an acceptance as it would allow an offeree to speculate at the expense of the offeror. However, this analysis might prejudice an offeror who wishes to rely on the withdrawal. Treitel has an answer to this:

"Suppose that A offers to sell B a car. B posts an acceptance of the offer and then telexes: 'ignore my letter I do not want the car'. A then sells the car to C. Could B change his mind yet again, and claim damages from A? There are several ways of avoiding such an unjust result. The first is to say that there had once been a contract but that it was rescinded by mutual consent: B's telex was an offer to release A, which A accepted by conduct; communication of such acceptance was deemed to have been waived.

"The second is to regard B's Telex as a repudiation amounting to a breach of contract. This analysis is preferable from A's point of view if the sale to C is for a lower price than that to B, for it would enable A to claim the difference from B as damages." Treitel, Law of Contract p 28

Authorities on Withdrawal of Acceptance

- 27.3 There are three cases normally cited in relation to this problem, but none of them is a satisfactory authority either way.

***Countess of Dunmore v Alexander* (1830) 9 Shaw 190 (Scottish Court of Session)**

Elizabeth Alexander (through Lady Agnew) offered to become a servant to the Countess. The Countess sent a reply (through Lady Agnew) that she accepted, but then sent a withdrawal. Both letters were delivered at the same time. It was held that there was no contract:

"The admission that the two letters were simultaneously received puts an end to the case. Had one arrived in the morning, and the other in the evening of the same day, it would have been different.

"Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recalls by a subsequent letter that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the Post Office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the Post Office. He, therefore, writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal." per Lord Balgray

- 27.4 Note that there is some doubt here as to whether the Countess's first letter was an acceptance at all. It was probably an offer which she simply revoked. Furthermore, Lord Craigie gave a convincing dissent in which he pointed out that as Miss Alexander clearly could not have retracted from the contract once the acceptance was received, it made no sense that Lady Dunmore could do so.

27.5 ***Wenckheim v Arndt* (1873) (NZ) 1 JR 73**

A woman sent a letter to accept a proposal of marriage. Her mother sent a telegram purporting to withdraw the acceptance. It was held that the withdrawal was ineffective, but this was because the mother had no authority to interfere anyway.

27.6 ***A to Z Bazaars (Pty) Ltd v Minister of Agriculture* (1974) (4) SA 392 (C)**

This case supports *Wenckheim v Arndt* though, as a South African case, it is not a strong authority in England. The Minister expropriated land belonging to the plaintiff company, and sent them a letter offering a sum of money as compensation. On 18 February, a director of the company posted a letter accepting the offer. On 23 February, the company sent a telegram withdrawing the acceptance, and the telegram was received by the Minister before the arrival of the letter of acceptance. As the postal rule applies in South Africa, the court held that the contract was made on 18 February and the withdrawal telegram was ineffective.

28 ACCEPTANCE OF UNILATERAL OFFERS

Acceptance by Performance

- 28.1 A unilateral offer is accepted by performing the required act. There is no need to communicate with the offeror (unless that *is* the required act). For example, an offer of a reward for finding missing property may be accepted by finding the property, even though the offeror does not know about this “acceptance” until you turn up at his house with the missing items.

Motive and Knowledge

- 28.2 Notice, however, that although you may accept a unilateral offer by simply performing the required act, you must be performing the act **in response** to the offer. It is not enough that you have coincidentally done what the offer requires. The cases which establish this rule are not entirely convincing!

28.3 ***Williams v Carwardine (1833) 5 C&P 566***

Carwardine offered a reward to anyone giving information leading to the discovery of Williams, who had murdered Carwardine’s brother. Williams beat up his wife, who, believing she was dying, gave information which led to his conviction in order to ease her conscience. She then recovered, and claimed the reward!

It was held that she could claim the reward, even though her reporting her husband was not motivated by her desire for the reward. As long as she knew of the offer, her motive in accepting it was immaterial.

28.4 ***R v Clarke (1927) 40 CLR 227***

The government of Western Australia offered a reward for information leading to the arrest of certain murderers. Clarke, who was one of the gang members, gave information to protect himself from conviction. He admitted that although he had known of the reward, at the time he gave the information his only thought was to protect himself. The court found that although Clarke had known of the offer once, it was not in his mind at the time he gave the information and he was not entitled to the reward!

28.5 ***Gibbons v Proctor (1891) 64 LT 594***

A reward was offered for information given to the police superintendent which led to the arrest of certain criminals. Gibbons, a police officer, gave such information to his colleague Coppin. Coppin gave it to Inspector Lennan and Lennan gave it to Superintendent Penn.

At the time G gave the information to C, he did not know about the reward, but by the time it reached P he had read about it. It was held that the police officer could claim his reward. The judge in *R v Clarke* said that he thought this decision was incorrect, but an Australian judge cannot overrule an English authority.

PART IX: CONSIDERATION

29 THE DOCTRINE OF CONSIDERATION

- 29.1 A simple contract (i.e. not a covenant or deed) is not valid unless both parties agree to do something, or to refrain from doing something, as required by the other. This “price” is known as consideration.
- 29.2 The general rule about what the consideration can be is that it must be “real” but need not be “adequate”. The bargain need **not** be a balanced one. The maxim is “*caveat emptor*” – let the buyer (or seller) beware!

30 THE MEANING OF CONSIDERATION

- 30.1 There are various famous judicial definitions of consideration, though they largely come down to the same thing: the exchange of goods or services for money. There is no requirement that money should be involved in a contract – one might exchange goods for goods or services for services – but it is very unusual in commercial reality to find a contract where the consideration from one side is not financial.

30.2 ***Currie v Misa (1875) LR 10 Ex 153 (HL)***

“A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other.” per Lush J.

30.3 ***Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (HL)***

“An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.” per Lord Dunedin at p.855

31 THE VALUE OF CONSIDERATION

- 31.1 The consideration must be “real”, but it need not be “adequate”. There is no requirement that the bargain should be balanced as between the parties.

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (CA)

“The law does not require us to measure the adequacy of consideration.” per Bowen LJ

31.2 ***Chappell & Co Ltd v Nestlé Co Ltd [1960] AC 87 (HL)***

Chappell owned the copyright in a dance tune called “Rockin’ Shoes”. A firm called Hardy & Co made records of the King Brothers singing it, which they sold to N for 4 pence each. N then sold them to the public for 1/6d, plus the wrappers from three chocolate bars. These were immediately thrown away when received. C claimed a royalty, and the case turned on whether the valueless wrappers could be part of the consideration. It was held that even the most worthless items could be good consideration:

“A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.” per Lord Somervell at p 114

- 31.3 Where a customer overpays a stated contractual price on the basis that ‘no change is given’, then the contractual price (at least for tax purposes) will be whatever he actually paid, even though it was more than was requested (and more than the goods or services were worth).

31.4 **National Car Parks Ltd. v. Revenue and Customs Commissioners [2019] EWCA Civ 854**

Where customers made overpayments for car parking tickets by inserting coins into "pay and display" machines to a value above the specified tariff, and where it was indicated that no change would be given in the event of such overpayments, the amounts accounted for as VAT on those overpaid amounts were not recoverable by the taxpayer.

As a matter of contract, the consideration agreed for parking was that paid by the customer before they pressed the button to obtain a ticket, whether or not that was the stated parking tariff. The extra amount was not a tax-exempt gift to the parking company.

31.5 Even though there is no requirement for the consideration to have any commercial value, disputes have arisen in several cases as to whether there is any "real" consideration at all – and so whether there is a contract.

31.6 **Edmonds v Lawson [2000] 2 WLR 1091 (CA)**

Traditionally, pupil barristers were not paid unless they did some specific money-raising job for their pupil master.

Following the enactment of the National Minimum Wage Act 1998, Rebecca Edmonds, a pupil barrister, sued the Head of Chambers – Michael Lawson QC - claiming that she should be paid a proper wage, as she was providing consideration to her Chambers by being a pupil there and so had an employment contract for her services.

The Chambers argued that they were simply doing her a favour by taking her on as a pupil, and as she was not obliged to provide anything in return, she had not provided any consideration to give rise to a contract of employment. Sullivan J., the judge at first instance held that although this was not a contract for services, it amounted to an apprenticeship, which is expressly covered by s.54 of the Act as attracting the national minimum wage.

The Court of Appeal held that there was both an objective intention by the parties to create legal relations and consideration moving from both sides such as to give rise to a contract.

"Members of chambers have a strong incentive to attract talented pupils, and their future prospects will to some extent depend on their success in doing so. The funding of awards is not an exercise in pure altruism but reflects an obvious (and wholly unobjectionable) element of self-interest. The agreement of the claimant and other pupils to undertake pupillage at chambers such as the defendants' provides a pool of selected candidates who can be expected to compete with each other for recruitment as tenants..."

"Chambers may well see an advantage in developing close relationships with pupils who plan to practise as employed barristers or to practise overseas. On balance we take the view that pupils such as the claimant provide consideration for the offer made by chambers such as the defendants' by agreeing to enter into the close, important and potentially very productive relationship which pupillage involves." per Lord Bingham at para 25

However, the Court of Appeal held that this was not an apprenticeship within the meaning of the Act, nor was it a contract of service, as the pupil was not obliged to do anything that was asked of her. She was not, therefore, a 'worker' who was entitled to the national minimum wage, except possibly for the valuable work she actually did.

R v Attorney General of England and Wales [2003] UKPC 22 (Privy Council, New Zealand)

After the Gulf War in 1991, several members of the SAS Regiment involved wrote thrilling accounts of their own heroism, published under such titles as *Bravo Two Zero* and *The One That Got Away*. Some of these books were highly successful and were made into films. This annoyed other members of the regiment, not only because it was contrary to the ethos of secrecy which surrounds the SAS, but also because the books and films portrayed some of the other soldiers in a fictitious bad light. The response of the Ministry of Defence was not to attempt any suppression of the existing works, but to get all members of the UK Special Forces to sign a binding contract to prevent any future unauthorised disclosure relating to their operations.

R was serving in the SAS at the time, and was told that unless he signed the new confidentiality contract, he would be returned to the regiment from which he joined the SAS. R had formally been a member of the Parachute Regiment – even though he had never actually served with them – and the move would have meant reduction in both status and pay (involuntary return to one's original regiment is normally imposed as a penalty for misconduct). R signed the contract, although not given the opportunity either to read it or have legal advice.

He later left the army, and decided to write up his own experiences of the Gulf War, but the Ministry of Defence claimed an injunction under the contract to prevent publication. R pleaded, *inter alia*, that the contract was not binding upon him because the Ministry had provided no consideration for his promise not to disclose. He claimed that the promise by the MOD not to return him to his regiment had no substance as the MOD has an unfettered discretion to place soldiers anywhere it pleases and cannot be constrained by private contracts. It could, therefore, have legitimately returned him to the Regiment whatever might have been agreed to the contrary.

However, the Privy Council held that there was consideration here in that the MOD did not return R to his regiment, even though it could have done whether or not he signed the contract.

"In the present case the price for which R's promise was bought was the forbearance of the MOD to exercise its power to return him to unit. It could not be a promise that he would not be returned to unit, because, as their Lordships have already observed, the Crown was entitled to move him to another regiment and could not fetter its discretion by a contract having effect in private law. Whether there were any circumstances in which it could have created a legitimate expectation giving rise to rights against the Crown in public law is a matter which their Lordships need not discuss. But the actual forbearance was in their Lordships' opinion sufficient consideration to support the contract."

per Lord Bingham para 31

Leeds Rugby Ltd v Harris [2005] EWHC 1591

Iestyn Harris was the star player for Leeds Rugby League Club, but decided to switch to playing Rugby Union and to play for Wales and a Welsh Rugby Union Club.

Leeds permitted him to leave, in return for a transfer fee, and entered into a contract with him which provided that if Harris stopped playing Rugby Union, he would return to play for Leeds for a year at a remuneration no less favourable than that payable under his contract with the Welsh Rugby Union Club. Harris later claimed that the second contract was void because, *inter alia*, Leeds had provided no consideration for the option to re-employ him. It was claimed that although Leeds had suffered a detriment in permitting Harris to leave, the consideration for this was the transfer fee Leeds had been paid: the option to re-employ Harris was a separate agreement, not supported by consideration.

It was held that there **was** consideration for the option agreement provided by Leeds in permitting Harris to leave as this was of significant benefit to Harris and significant detriment to Leeds. This was a single tripartite arrangement, and it was not necessary that there should be a separate payment to be made by Leeds to Harris in return for the option.

31.9 **Palmer v East and North Hertfordshire NHS Trust [2006] EWHC 1997**

Palmer was a consultant surgeon employed by the Trust. Following concerns that Palmer was operating outside his area of experience and failing to obtain patients' informed consent, the Trust agreed that Palmer should undergo an assessment by the National Clinical Advisory Service, to clarify areas of concern and make recommendations to address them. In return for this, the Trust would not institute disciplinary proceedings.

When the Trust went back on this agreement, they claimed that Palmer had not provided any consideration to make it binding, as his NCAS assessment was of no benefit to them. It was held that Palmer **had** provided consideration by this agreement to submit to a temporary change in workplace and to take part in an assessment for which his consent was obligatory. The consideration was not the benefit to the NHS, but the detriment to Palmer.

31.10 Certain types of consideration which have an obvious value are, even so, considered not to be "real" and so will not be accepted by the court. In particular, there are the following:

- Past consideration.
- Performance of existing legal duties.
- Performance of existing contractual duties.
- Part payment of debts.

32 PAST CONSIDERATION

32.1 The Doctrine of Past Consideration states that you cannot make a contract based on a service you have already performed or money you have already paid. The service which has already been performed at the time you purport to make the contract will be "past consideration" and void.

32.2 **Roscorla v Thomas (1842) 3 QB 234**

Thomas sold a horse to Roscorla for £30. After the sale Thomas promised that the horse was free from vice, which was not true. It was held that Roscorla could not sue on this promise as he had already agreed to pay for the horse when the promise was made.

32.3 **Re McArdle [1951] Ch 669 (CA)**

A document was signed by the beneficiaries under a will in which they promised to give Mrs Marjorie McArdle £488 from the estate to pay for expensive improvements that she had previously made to the McArdle family home, Gravel Hill Poultry Farm. It was held the work done by Marjorie was past consideration and so invalid:

"As the work had in fact all been done and nothing remained to be done by Mrs Marjorie McArdle at all, the consideration was a wholly past consideration, and, therefore, the beneficiaries' agreement for the repayment to her of the £488 out of the estate was nudum pactum, a promise with no consideration to support it. That being so, it is impossible for her to rely upon this document as constituting an equitable assignment for valuable consideration." per Jenkins LJ at p 678

32.4 **Lady Manor Ltd v Fat Cat Café Bars Ltd [2001] 33 EG 88 (West London County Court)**

The claimant was an estate agent who sent an unsolicited letter to the defendant, recommending a property that he thought the claimant might be interested in buying, even though he had not been approached by either the defendant or the owner of the property. The letter stated that if a purchase went ahead, a fee would be payable by the defendant to the claimant. The defendant arranged a viewing through his own estate agent, and bought the property, at which point the claimant demanded a fee.

It was held that where a “cold call” letter is sent containing information which is acted upon by the recipient, that information is past consideration which cannot sustain a contract. However, if the letter offers to provide additional information for a fee, and that is requested by the recipient, then the additional information could be good consideration. That was not the case here, and the claimant was not entitled to any fee.

33 THE RULE IN *LAMPLEIGH v BRAITHWAIT*: The Implied Assumpsit

33.1 There are cases which appear to be past consideration, but which are not. If two people agree that one will provide a service for the other but they do not specifically mention any payment, it may sometimes be implied that they both realised (objectively), at the time they made this agreement, that payment would later be made by the other at a reasonable rate. Thus, when they finally get round to specifying the amount of payment, the service which has already been performed is not past consideration, because the parties had impliedly agreed to the payment at the time of the original agreement – i.e. before the performance of the service had begun. This is called an “implied assumpsit” and is known as the Rule in *Lampleigh v Braithwait*.ⁱ

33.2 Note that the rule in *Lampleigh v Braithwait* is not an exception to the rule of part consideration (as some books wrongly assert) but is a different thing entirely. Where there is an implied assumpsit of consideration at the time the request for the service is accepted, the contract is made before performance of the service. Therefore, performance of the service is not past consideration at all.

33.3 *Lampleigh v Braithwait* (1619) Hob 105

Braithwait had killed a man and asked Lampleigh to do all he could to get him a pardon from the King. Lampleigh did this at great trouble and expense, and Braithwait promised him £100, but then refused to hand it over, claiming that Lampleigh’s actions were past consideration. It was held that Lampleigh was entitled to his money, as he had done the act on Braithwait’s request and it was clear at the time Braithwait asked him for help that he would be paid for his trouble.

33.4 *Lampleigh v Braithwait* was confirmed by the Court of Appeal in *Re Casey’s Patents* [1892] 1 Ch 104, and was clarified by the Privy Council in *Pau On v Lau Yiu Long* [1980].

33.5 *Pau On v Lau Yiu Long* [1980] AC 614 (Privy Council: Hong Kong)

The minority shareholders in a private company agreed to sell their shares to the majority shareholders in return for shares in a public company. They also agreed not to sell 60% of these plc shares for a year, in order not to depress the market. However, they then realised that they might lose out if the market were to rise and they were unable to sell, so they insisted on an indemnity against such loss from the majority shareholders before they would complete the agreement.

The majority agreed to this and bought the shares, but then refused to honour the indemnity on the grounds that it was past consideration. The Privy Council held that it was not past consideration and clarified the three conditions which must be satisfied to invoke the doctrine of *Lampleigh v Braithwait*.

1. The act must have been done at the request of the promisor.
2. The parties must have impliedly understood at the time of the request that a payment was to be made for the service.
3. The contract (had it been made in the normal way) must have been a legally enforceable one.

34 PERFORMANCE OF AN EXISTING LEGAL DUTY

34.1 To agree to do something you are already legally bound to do (i.e. under the general law of the land) will not usually be good consideration as people are expected to obey the law without reward. However, if you go beyond your legal duty in complying with someone's request, this extra element may amount to good consideration. The line can be very fine.

34.2 ***Collins v Godefroy (1831) 1 B&Ad 950***

Godefroy was involved in a law suit, and caused Collins to be subpoenaed to attend. Godefroy offered to pay Collins six guineas as an attendance fee. Held: As Godefroy was legally bound to attend anyway it was not good consideration to do so.

34.3 ***Glasbrook Bros Ltd v Glamorgan CC [1925] AC 270 (HL)***

During a miners' strike, the colliery manager (James) requested the local police superintendent (Smith) to provide extra forces to protect the working men against the strikers. Smith thought that the men were adequately protected by the policemen already available, but on James' insistence provided an extra 70, who remained on the premises until the end of the strike. The colliery owners were then sent a bill for the extra policemen, which they refused to pay on the grounds that the police were only performing their legal duty to protect the public.

It was held that although the police cannot accept extra money for doing their normal statutory duty, when special services are required beyond the normal call of their duty, they are entitled to be recompensed.

34.4 ***Harris v Sheffield United Football Club Ltd [1987] 2 All ER 838 CA***

As a result of the violent behaviour of spectators at Sheffield United's grounds, it became necessary to have a substantial police presence to maintain law and order. The South Yorkshire Police Authority (represented by John Harris) claimed £51,699.54 from Sheffield United in consideration for these "special services". The club denied liability on the basis that in attending the matches the police were merely fulfilling their duty to enforce the law.

It was held that police who were on duty during a football match were providing services beyond those of their normal public duties of maintaining law and order and were, therefore, entitled to claim extra monies. The specific issue of paying extra for police services is now dealt with by statute.

34.5 ***Police Act 1996 – Provision of Special Services***

The chief officer of police of a police force may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the police authority of charges on such scales as may be determined by that authority.

34.6 Lord Denning did not seem to think much of this rule, preferring to enforce agreements on the basis of what seemed fair.

Ward v Byham [1956] 2 All ER 318 (CA)

When the parents of an illegitimate child separated, the father promised to pay the mother £1 a week "provided she will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you". He later refused to pay the money on the grounds that the mother was only doing what she was legally bound to do anyway.

The Court of Appeal thought that he should continue to pay, though the judges were not agreed on the reason. Morris LJ thought that the woman had provided extra consideration by keeping her child well looked after and happy. Denning LJ thought that a promise to perform an existing duty ought to be good consideration anyway!

- 34.7 *Ward v Byham* contrasts interestingly with a case from a century earlier, where a court would not enforce the demands of an unworthy son who sued his late father's estate. Do worthy mothers win whilst unworthy children lose? Does this have more to do with policy than principle?

White v Bluett (1853) 23 LJ Ex 36

William Bluett owed some money to his father, John. William constantly complained to John that he was not treated as well as his brothers and sisters. John promised to let William off the debt if he would stop complaining. It was held that the son had not provided good consideration by keeping quiet, as he had no right to be boring his father with complaints in the first place

35 PERFORMANCE OF AN EXISTING CONTRACTUAL DUTY

- 35.1 It is not good consideration to perform an existing contractual duty for the other contracting party.

Stilk v Myrick (1809) 2 Camp 317

A ship's crew was promised extra pay by the captain if they would continue on a voyage despite the desertion of two of the seamen. It was held that they were not entitled to it as it was part of their contract anyway to continue on the voyage.

- 35.2 It is good consideration, however, to exceed one's contractual duties at the request of the other party. This would amount to an agreed variation.

Hartley v Ponsonby (1857) 7 E&B 872

A ship left England for Bombay with a crew of 36. By the time it arrived en route to Port Philip, only 19 remained of whom only five were able seamen. The captain offered the remaining able seamen an extra £40 for completing the voyage. It was held that the seamen had provided good consideration as what they were now being asked to do was different to what they had agreed to do when there was a full crew.

36 WILLIAMS v. ROFFEY

- 36.1 The distinction between *Stilk v Myrick* and *Hartley v Ponsonby* has become somewhat obscured by the decision in *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991].

***Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA)**

The defendants, who held a building contract, hired the plaintiff (who was a carpenter) as a subcontractor to perform a contract between the defendants and a third party for £20,000. The plaintiff got into financial difficulty because the agreed price was too low for him to operate. The defendants were concerned that they may incur a penalty under the main contract for late performance if the plaintiff did not finish on time and so offered him an extra £10,300 to complete on time. The defendants later refused to make full payment, claiming that the plaintiff had given no consideration as he was merely fulfilling the original contract.

It was held that as there was no suggestion of duress by the plaintiff, he was entitled to the extra money. The court said that the plaintiff had provided consideration in return for the promise to pay him extra in that the defendants received various benefits:

1. They were ensured that the plaintiff would continue to work and not stop in breach of the subcontract.
2. They avoided the penalty for delay.
3. They avoided the trouble and expense of engaging other people to complete the work.

“The present state of the law on this subject can be expressed in the following proposition:

- (i) *if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and*
- (ii) *at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and*
- (iii) *B thereupon promises A an additional payment in return for A’s promise to perform his contractual obligations on time; and*
- (iv) *as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and*
- (v) *B’s promise is not given as a result of economic duress or fraud on the part of A; then*
- (vi) *the benefit to B is capable of being consideration for B’s promise, so that the promise will be legally binding...*

*“If it be objected that the propositions above contravene the principle in **Stilk v Myrick**, I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed e.g. where B secures no benefit by his promise.”* per Glidewell LJ at p 15

Although the court specifically stated that it was not overruling *Stilk v Myrick*, the rule in that case has clearly been severely limited by this decision.

- 36.2 The odd thing about the decision in *Williams v Roffey Bros* is that it permits the consideration to move from someone other than the parties to the contract. It was not the completion of the subcontract that was the consideration (as this was the original contractual duty, as in *Stilk v Myrick*), but rather the incidental benefit of enabling the main contractors to avoid the fine in the main contract – a contract to which the subcontractors were not privy and over which they had no control.

37 WILLIAMS v. ROFFEY EXTENDED

- 37.1 The scope of the decision in *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991] is not clear. Although Glidewell LJ seemed to be limiting it largely – but not exclusively – to time clauses in construction subcontracts, it has been expanded and applied to several other situations.

- 37.2 ***Simon Container Machinery Ltd v Emba Machinery AS* [1998] 2 Lloyd’s Rep 429**

Emba contracted with Technoexport of Moscow to supply machinery to eight cardboard box factories around the USSR. The contract had a value of £30 million. Emba subcontracted the supply of rotary die cutting machines to Simon for £11 million. In pursuance of the subcontract, Simon received various purchase orders from Emba, on the basis of which they sent machinery to Technoexport.

Following the placing of the first purchase order, the political situation in the USSR became unstable, and Simon wished to take out credit insurance. In order to facilitate this, Emba and Simon signed a document headed “Agreement” which included the following terms:

“Whereas Emba have placed [the first purchase order] with Simon for the supply of Rotary Die Cutting Equipment to be supplied to the Agroprom project in the USSR, now it is agreed by both parties that to enable Simon to obtain the requisite credit insurance for the order the following shall be included in the Conditions of the Order...

Emba agree that on the occurrence of a loss to take all steps which may be necessary or expedient or which Simon may at any time require to effect recoveries from the End-buyer (Technoexport of USSR) or from any other person from whom recoveries may be made including if so required the institution of legal proceedings in any country.”

Technoexport became unable to make payments under the contract for machinery already shipped by Emba and Simon. Emba made a successful insurance claim for their loss, which included unpaid invoice representing goods supplied by Simon. Simon claimed the money that Emba had received in respect of those invoices (the claim was based both in contract, trusts and restitution).

On the contract point, Simon relied on an express term in the "Agreement" signed after the first purchase order. Emba claimed, *inter alia*, that this variation for Simon's benefit was not supported by any extra consideration moving from Simon.

Applying *Williams v Roffey Bros*, the court held that the extra consideration provided was the surety that Simon would continue to supply the goods in the adverse circumstances, avoiding Emba the disbenefit of being unable to fulfil its own contractual obligations:

"In my view the principle set out by Lord Justice Glidewell in Roffey applies to these circumstances. Emba in the person of Mr Ekbon had reason to think that Simon might seek to withdraw from the contract constituted by Simon's acceptance of the first purchase order if the additional terms were not agreed. Further, if no agreement was reached in relation to the first purchase order, Emba put at risk Simon's acceptance to such further purchase orders as Emba wished to place. Consideration is, therefore, to be found for the addition to the first purchase order of the terms set out in the additional agreement." per HHJ Raymond Jack QC

37.3 A case which illustrates how far the courts have drifted from the original criteria in *Williams v. Roffey* is *Birmingham City Council v Rose Forde*.

***Birmingham City Council v Rose Forde* [2009] EWHC 12 (QB)**

Rose Forde was a council tenant. She sued the Council under the provisions of the Landlord and Tenant Act 1985 as the premises required substantial works to make them fit for habitation. She hired a solicitor – McGrath – on a conditional fee basis, by which she would only have to pay McGrath if she won. McGrath estimated its fee to be between £1,200 and £2,200, which might be more than Forde's compensation, but the contract capped the amount of the fee at £1,000, or a third of Forde's compensation if it were more than £3,000. If Forde lost, she would have to pay the Council's costs herself.

In the event, the Council offered to settle at £4,500. As Forde was only liable under her contract with McGrath to pay a third of this to McGrath for fees, she could claim no more than £1,500 in costs from the Council. However, McGrath had incurred costs of £15,174 which they wanted to get from the Council via their client.

The solicitors thus attempted to substitute a new version of the contract for the old, the new contract not containing the provision about the cap in fees. McGrath said that this was not to entitle them to claim more from Forde, but to enable them to claim their full fee in costs ("on behalf of their client") from the Council. Forde agreed to this change as there was still work to be done by the solicitors in respect of her claim.

The complex case largely involved the statutory regime of Conditional Fee Agreements, but one of the issues was whether Forde could have made a new contract with McGrath by which she would be liable to pay more than she had already agreed to do for essentially the same service.

Applying *Williams v Roffey Bros*, the court held that McGrath's agreement to continue to act for Forde when it had a good motive to withdraw its services under the terms of the first contract, provided her with an additional benefit which was adequate consideration for the new contract. (In fact, the second contract was not identical to the first. It did provide some slight extra benefits to Forde, so there was arguably "normal" consideration anyway.)

38 WILLIAMS v. ROFFEY DISTINGUISHED

38.1 Other attempts to extend the doctrine have not been successful, but the decisions in those cases do not limit the decision to its own facts as the cases can be distinguished for other reasons.

Cases of Duress

38.2 The doctrine will not be applied where the promise to pay extra has been extracted by threats, fraud or duress.

Adam Opel GmbH and Renault SA v Mitras Automotive (UK) Ltd [2008] Bus LR D55

Adam Opel is an automobile manufacturer. It entered into a joint venture with Renault to produce a van. Mitras was the sole supplier of a part to be used in the manufacture of the van in the UK. (Something to hold the bumper on!) After four years, Opel decided to source the part from a different supplier, and gave Mitras six months' notice of this. Mitras contended that the price of the part took into account the development costs and an assumption that the contract would last at least 12 years to cover these. Mitras insisted, therefore, on an additional payment of £560,000 plus a backdated price increase. O offered only £19,118.

Mitras ceased production of the part and told Opel: "You have a choice of either accepting the price or procuring the goods elsewhere." Mitras also refused to permit Opel's haulier to collect any of the parts already made. Opel was running out of parts, and was unable to get a mandatory injunction against Mitras to force him to deliver. Opel, therefore, capitulated and paid the amount asked for. Mitras then supplied the parts as per the contract.

Opel later brought an action against Mitras to recover £451,021 of the money paid on the basis that either: there was no consideration from Mitras in supplying the parts already contracted for; or the bargain was obtained under economic duress and was, therefore, voidable.

The court held that applied to provide the consideration, since Opel avoided a considerable disbenefit by having the parts delivered, as without them it could not have fulfilled its own very valuable contracts to provide the vans.

However, because of the economic duress, the contracts were voidable, and the claimants were entitled to get their money back.

Part Payment of Debt Cases

38.3 The courts have resisted applying the doctrine to part-payment of debt cases as this would seem to conflict with the House of Lords decision in *Foakes v. Beer*¹⁵. However, the recent decision in *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd [2018]* has thrown even that restriction into some doubt.

38.4 ***Re Selectmove [1995] 2 All ER 531 (CA)***

A company owed substantial amounts of income tax. It reached an agreement with the collector of taxes to repay the arrears by instalments. The company fell behind with the instalments and the Revenue sent a demand for the full amount to be paid. When it was not, the Revenue petitioned to have the company wound up. The company argued, inter alia, that there was a contract between itself and the Revenue by which the Revenue had agreed to accept smaller payments than those due in return for the "practical benefit" of being paid anything at all.

¹⁵ See 49.3 below.

The Court of Appeal held that *Williams v Roffey Bros* could not be extended in this way because to do so would be to overrule the principle in the House of Lords case of *Foakes v Beer* under which part-payment of a debt cannot, without more, discharge the whole debt.

*“If the principle of Williams’ case is to be extended to an obligation to make payment, it would in effect leave the principle in **Foakes v Beer** without any application. When a creditor and a debtor who are at arm’s length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing. In the absence of authority there would be much to be said for the enforceability of such a contract.*

*“But that was a matter expressly considered in **Foakes v Beer** yet held not to constitute good consideration in law. **Foakes v Beer** was not even referred to in Williams’ case, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of Williams’ case to any circumstances governed by the principle of **Foakes v Beer**.”*

per Peter Gibson LJ at p 53

38.5 *Re Selectmove* was applied in the following case.

Corbern v Whatmusic Holdings Ltd [2003] EWHC 2134

Corbern was owed £2,200 in wages by Whatmusic. W claimed to have reached an agreement with C under which he would forgo his money until the company was in a stronger financial position. Although W were not providing any direct consideration to C in return for this promise, they claimed that under *Williams v Roffey Bros*, they were obviating a disbenefit to C in that the company for which he worked would not be forced to close.

Hart J held, *inter alia*, that such an indirect benefit, even if it existed, could not amount to consideration in a debt case.

*“For the reasons given by the Court of Appeal in **Re Selectmove**, it appears to me that such an attempted extension of the principle in **Williams v Roffey Bros** to a situation of the present kind, would be wholly to sterilise the effects of the decision of the House of Lords in **Foakes v Beer**.”* per Hart J at para 6

38.6 The decision in *Re Selectmove* was questioned in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2019] AC 119 (SC)*.

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2019] AC 119 (SC)

The respondent operated managed office space which the appellant occupied as licensee. The appellant was then unable to meet its commitment to pay and incurred arrears of licence fees and other charges. The respondent exercised its right under the licence agreement to lock the appellant out of the premises. The respondent then brought a claim against the licensees for the arrears of rent and damages. The licensees counterclaimed for loss and damage for wrongful exclusion from the premises.

It was the tenant’s case that an oral agreement had been made with the owners to pay the licence fee over a longer period at a reduced rate and that the owners had accepted a down-payment of £3,500 on that basis. The respondent argued that any such agreement would be unenforceable as it lacked consideration: it was the licensees’ contractual duty to pay the full rent unless they were providing an extra benefit to the owners in consideration of paying less.

The Court of Appeal held that even though the owner had effectively just agreed to accept less than it was owed in rent, consideration had been provided by the benefit it would get by having the license agreement continuing – even at a lower rate. This seems to be entirely at odds with the decision in *Re Selectmove*.

“The judge found that the variation agreement would have a number of beneficial consequences for the respondent in that it would recover the arrears and that it would retain the appellant as a licensee so that the property would not be left empty. The appellant's payment of £3,500 and its promise to make further payments conferred a benefit on the respondent which constituted sufficient consideration to support the oral variation agreement. The variation agreement thereupon became binding on the respondent and remained binding for so long as the appellant continued to make the payments in accordance with the revised payment schedule.” per Kitchin LJ

The decision was reversed by the Supreme Court, but on different grounds. The lease contained a clause which prevented any oral variation, so even if there were consideration for the changed terms, it would have been ineffective in view of the fact that the variation had not been made in writing. The Supreme Court left open the question about the application of *Foakes v. Beer* in the light of *Williams v. Roffey*, as this was a matter which needed to be considered in depth in a more appropriate case where the principles laid down would be part of the *ratio decidendi*, not just the *obiter dicta*.

*“That makes it unnecessary to deal with consideration. It is also, I think, undesirable to do so. The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In **Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1** the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in **Foakes v Beer (1884) 9 App Cas 605**. There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in **In re Selectmove Ltd [1995] 1 WLR 474**, and declined to follow **Williams v Roffey**.*

*“The reality is that any decision on this point is likely to involve a re-examination of the decision in **Foakes v Beer**. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than *obiter dictum*”.* per Lord Sumption at para 18

Cases where there was no extra benefit

38.7 **Assi v Dina Foods Ltd [2005] EWHC 1099**

Mahmoud Assi was employed by Dina Foods as its national sales manager. Dina Foods manufactured and sold Middle Eastern delicacies and hired Assi to obtain contracts with other businesses who wished to buy them. The contract with Assi provided that he would be employed for only 12 hours a week at a rate of £5.77 per hour. This was specifically so he would not earn too much to be taken off his Job Seeker's Allowance. When Assi managed to obtain a contract to supply Waitrose with Baklava bread, Dina Foods offered him a £4,000 bonus, but following Assi's acrimonious resignation, did not pay it:

The court found that the £4,000 could not have been meant as commission as it would have taken Assi over the Job Seeker's minimum, which he admitted he was seeking to preserve. In that case, it was just a gratuitous promise given by an employer to an employee out of thanks for a job well done. Was it, therefore, enforceable? The court held that it was not.

"It is trite law that, in order for a promise of this kind to be enforceable, there has to be consideration. In other words, there must have been some benefit to the Defendant (or the avoidance of a detriment) in exchange for the £4,000. Here I find that there was no such benefit. By the time that the promise was made the Waitrose deal had been done, and there was nothing further for the Claimant to do to secure it. There was no benefit whatsoever to the Defendant flowing from the promise to pay the £4,000. There was, therefore, no consideration. It was a gratuitous promise, no more and no less..."

*"I should note that, at the start of the trial, the Claimant relied on the Court of Appeal decision in **Williams v Roffey Bros**. In that case, the Court of Appeal held that a promise to pay a carpenter more money to complete his existing contractual obligations was enforceable, because the promisor avoided the adverse financial consequences that would result from the carpenter's decision to stop work and the consequential delay to the overall building project..."*

*"However, the learned Lord Justice was at pains to make clear that, in his view, this decision was not to be taken as a departure from long-held principles. At p 19D he said: 'For my part I wish to make it plain that I do not base my judgment upon any reservation as to the correctness of the law long ago enunciated in **Stilk v Myrick**. A gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage, arising out of the continuing relationship with the promisee, the new bargain will not fail for want of consideration'.*

"In my judgment, to the extent that Mr Devereux-Cooke still relied on this decision, it does not assist the Claimant. As already noted, Mr Haddad did not make his promise in order to 'gain an advantage arising out of the continuing relationship' with the Claimant. His was a gratuitous promise, pure and simple and is, therefore, not enforceable.

"In any event the decision in Williams does not help the Claimant over his principal difficulty, namely the timing of the promise. In Williams, the carpenter relied on the promise to pay additional sums by carrying on with work which he otherwise would not have performed. In the present case, the Claimant did not, and could not, rely on the promise in any way, because by the time it had been made the Waitrose deal had been concluded." per HHJ Coulson QC, paras 72-76

39 EXISTING CONTRACTUAL DUTIES WITH THIRD PARTIES

39.1 It is good consideration to promise a third party that you will go through with a contract you have already made with someone else.

39.2 *Shadwell v Shadwell* (1860) 9 CB NS 159 (Court of Common Bench)

Lancey Shadwell, who was engaged to be married to Ellen Nicholl, was promised a settlement by his uncle Charles should he go through with the wedding. The uncle died, and the executor stopped the payments on the grounds that as Lancey was contractually bound to marry Ellen anyway, he had provided no consideration to the uncle by doing so. It was held that it is good consideration to promise a third party you will go through with a contract.

39.3 *Scotson v Pegg* (1861) 6 H&N 295 (Court of the Exchequer)

Scotson was engaged to deliver some coal to Pegg, but he was already under a contract with a third party to deliver this coal. It was held that the contract with Pegg was valid.

"The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order." per Martin B

39.4 ***New Zealand Shipping Co Ltd v AM Satterthwaite, The Eurymedon* [1975] AC 154 (PC)**

A was bound under a contract with B to unload goods from B's ship. Some of the goods belonged to C, who promised not to sue A if the goods were damaged during the unloading. It was held that this promise was enforceable, even though A was already bound to unload the goods safely under his contract with B.

40 PART PAYMENT OF DEBT

40.1 At common law, a promise to relinquish some or all of one's rights under a contract ("waiver") is not enforceable unless the other party provides consideration for the promise. Thus, a bare promise to accept part payment of a debt in full satisfaction is not enforceable, and the creditor may later claim the full amount from the debtor. This is simply an extension of the rule that performance of an existing duty cannot be good consideration.

40.2 ***Pinnel's Case: Penny v Cole* (1602) 5 Co Rep 117**

Pinnel sued Cole for a debt of £8/ 10 shillings on November 11th 1600. Cole claimed that at the request of Pinnel, he had already paid him £5/ 2 shillings and 2 pence, which Pinnel had accepted as full payment of the debt. The court held that Cole still owed Pinnel the rest of the money.

"Payment of a lesser sum on the day, in satisfaction of a greater sum, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk, or robe etc. in satisfaction is good. For it shall be intended that a horse, hawk, or robe, etc. might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction."

40.3 ***Foakes v Beer* (1884) 9 App Cas 605 (HL)**

The House of Lords confirmed the decision in *Pinnel's Case*. Mrs Beer was owed £2,090 19s by Dr Foakes, and agreed with him that he should pay it in instalments, after which time she promised she would take no further action. The sum was paid over five years, and Mrs Foakes then sued for £360 interest. It was held that she was entitled to it. Her promise to take no further action was not binding as Dr Beer had given no consideration for it.

40.4 Following the decision in *Williams v Roffey Bros* there was some argument as to whether the decision in *Foakes v Beer* was still good law, for Mrs Beer had got some benefit from being assured payment of her judgment debt and so may have been seen to have received consideration for her promise to forbear from claiming the full amount of her debt.

Such an extension of *Williams v Roffey Bros* to debt cases was ruled out by the Court of Appeal in *Re Selectmove* [1995] 2 All ER 531, as the Court of Appeal could not overrule a House of Lords decision (see above), but see now the decision in ***MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2019] AC 119** (above at para 38.6)

41 LIMITATIONS ON THE COMMON LAW RULE

Disputed Claims

41.1 If there is a dispute in good faith about the actual contract price, and the creditor agrees to accept less than the sum he is claiming, the debtor will be taken to have provided good consideration by paying that amount – i.e. by making an out-of-court settlement. However, the court must be satisfied that in accepting the lesser amount the creditor was intending to accept it as a settlement and was not just taking a first instalment.

41.2 ***Ferguson v Davies* [1997] 1 All ER 315 (CA)**

In February 1992, the plaintiff sold some specialist records to the defendant, who was a dealer. The contract provided that the defendant would either “pay” the plaintiff with £600 worth of records by a certain date, or would pay him £1,700 in cash. The defendant delivered only £143.50 worth of records and £5 in cash to the plaintiff. The plaintiff sued for a further £486.50. The defendant denied the claim, but sent the defendant a cheque for £150, which the plaintiff cashed. The plaintiff then increased his claim to the balance of the £1,700 (plus interest), but the defendant claimed that in cashing the cheque, the plaintiff had accepted a settlement of a lesser amount and could not sue for any more.

Held: The plaintiff had not compromised his position by accepting the cheque. In sending the cheque, the defendant was not necessarily representing this as the whole sum owed. He could simply have been admitting to owing at least £150. The plaintiff was entitled to understand the defendant’s offer in that sense, and so his acceptance of the cheque did not give rise to a settlement which would deny him the possibility of claiming the balance of the debt.

Variation in Debtor’s Performance

41.3 Consideration for a creditor’s promise to accept part payment in full settlement can be provided by the debtor agreeing with the creditor to do any act that he was not previously bound by the contract to do. (e.g. Paying a lesser sum earlier than it was due, or at a different place or by a different method – Pinnel’s case: “A hawk, a horse or a robe”)

41.4 ***Sibree v Tripp* (1846) 15 M&W 23**

“It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is payment only in part; because it is not one bargain, but two; namely payment of part and an agreement, without consideration, to give up the residue... But if you substitute a piece of paper or a stick of sealing wax, it is different, and the bargain may be carried out in its full integrity. A man may give, in satisfaction of a debt of £100, a horse of the value of £5, but not £5. Again, if the time or place of payment be different, the one sum may be in satisfaction of the other.” per Baron Alderson:

41.5 ***Couldery v Bartrum* (1881) 19 Ch D 394**

“According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19 shillings and sixpence in the pound; that was nudum pactum.” per Lord Jessel MR

41.6 Note that payment by cheque rather than cash is not considered to be a variation in performance (***D&C Builders Ltd v Rees* [1966] 2 QB 617 (CA)**).

Payment by a Third Party

41.7 If the creditor agrees that a third party should pay off the debt with a lesser amount, this promise will be enforceable at law.

41.8 ***Hirachand Punamchand v Temple* [1911] 2 KB 330 (CA)**

The plaintiffs were moneylenders in India who were owed 3,600 rupees by Lt RD Temple of the 60th Rifles at Jubbulpore. His father, Sir Richard Temple, offered them 1,500 rupees in full settlement. Drafts were sent for this amount and the plaintiffs cashed them. They then sued the son for the balance. It was held that they had no further claim against the son.

"It is perfectly clear from the previous correspondence that this was an offer made for the full settlement of the claim. The plaintiffs, with knowledge that this was the money of the father, sent to them in full settlement of the claim, took the draft, and cashed it, and kept the money.

"They must be taken to have known that they could only do this rightly, if they agreed to the terms that it should be in full settlement of the debt. Their action was inconsistent with the duty of an honest man, unless, at the time when they took the money, they accepted the terms on which it was offered."

per Fletcher Moulton LJ at p 338

PART X: PROMISSORY ESTOPPEL

42 THE LEGAL PRINCIPLE

- 42.1 When a promise is made by one party to a contract that he will not enforce his rights against the other, in the absence of consideration from that other there is nothing in law to prevent the first party going back on his promise – e.g. where a creditor accepts only part of a debt in full payment, as discussed above. However, if the creditor does attempt to sue, he may be met with the defence of promissory (or “equitable”) estoppel.

43 THE EQUITABLE PRINCIPLE

- 43.1 This doctrine originated in the 1877 House of Lords case *Hughes v Metropolitan Railway*, but having largely been forgotten, was revived by the famous *obiter* of Denning J in *Central London Property Trust Ltd v High Trees House Ltd*.

- 43.2 ***Hughes v Metropolitan Railway (1877) 2 App Cas 439 (HL)***

A tenant was required by his landlord to do certain repairs within six months. During that time, the landlord started to negotiate with the tenant for the purchase of the lease, so the tenant did not do the repairs. The negotiations broke down after the six months had elapsed, and the landlord immediately sued the tenant (for forfeiture) on the grounds the repairs had not been done. In strict law, the landlord was right, but the House of Lords held that it would be inequitable to allow the landlord to enforce this part of the contract when he had led the tenant to suppose he would not do so. He should have given the tenant a reasonable time to do the repairs from the date the negotiations broke down.

Note that the landlord’s rights were merely suspended here, not entirely extinguished. He could still demand that the repairs were done, but he had to give the tenant extra time.

44 THE THREE REQUIREMENTS OF PROMISSORY ESTOPPEL

- 44.1 There are three requirements that have to be satisfied before a court will accept the defence of “promissory estoppel”.

Promise

- 44.2 There must be a clear, unequivocal promise which is intended to affect the legal relationship between the parties, and which indicates that the promisor will not insist on his strict legal rights.

- 44.3 ***Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741 (HL)***

A cocoa contract provided for payment in Nigerian pounds. For the cocoa buyers’ convenience, the seller consented to payment being made in pounds sterling. When the pound sterling was devalued to about 85% of the value of the Nigerian pound, the sellers claimed the difference in value. The buyers claimed that the sellers had agreed to accept payment on the basis of one-pound sterling for one Nigerian pound and that they were estopped from claiming the difference. The sellers claimed that they were merely permitting payment in sterling to the equivalent value of payment in Nigerian pounds. The House of Lords held that if the agreement to accept payment in sterling was too ambiguous to amount to an unequivocal promise it could not give rise to the defence of estoppel.

“To give rise to an estoppel, representations should be clear and unequivocal... If a representation is not made in such a form as to comply with this requirement, it normally matters not that the representee should have misconstrued it and relied upon it.” per Lord Hailsham LC at p 755

44.4 **Baird Textile Holdings Ltd v Marks & Spencer plc [2002] 1 All ER (Comm) 737 (CA)**

Baird supplied clothing to M&S for 30 years until M&S terminated the arrangement without notice. Baird claimed either that there was an implied term that M&S would give reasonable notice of such a termination, or that it was inequitable for M&S to end the contract so suddenly and they should be estopped. It was held that there was insufficient certainty to found either a contractual obligation or a claim based on estoppel.

*“It is also, on authority, an established feature of both promissory and conventional estoppel that the parties should have had the objective intention to make, affect or confirm a legal relationship. In **Combe v Combe**, all three judges, echoing what Denning J had said in **High Trees**, referred to the need for a promise or assurance ‘intended to affect the legal relations between them’ or ‘intended to be binding’ (per Denning LJ at p 220, Birkett LJ at p 224 and Asquith LJ at p 225); see also per Oliver LJ in **Spence v Shell UK Ltd** [1980] 2 EGLR 68, 73E. In *Amalgamated Investment* at p 107B, Robert Goff J touched on the same point, when distinguishing cases where parties had represented a transaction to have an effect it does not have (e.g. *De Tchihatchef*) as follows:*

“Such cases are very different from, for example, a mere promise by a party to make a gift or to increase his obligations under an existing contract; such promise will not generally give rise to an estoppel, even if acted on by the promisee, for the promisee may reasonably be expected to appreciate that, to render it binding, it must be incorporated in a binding contract or contractual variation, and that he cannot, therefore, safely rely upon it as a legally binding promise without first taking the necessary contractual steps.

*“A similar theme is involved in the distinction touched on by Robert Walker LJ in **Gillett v Holt** at p 831G between “a mere statement of present (revocable) intention, and...a promise.*

“As I have already said, the fact that there was never any agreement to reach or even to set out the essential principles which might govern any legally binding long-term relationship indicates that neither party can here objectively be taken to have intended to make any legally binding commitment of a long-term nature, and the law should not be ready to seek to fetter business relationships with its own view of what might represent appropriate business conduct, when parties have not chosen, or have not been willing or able, to do so in any identifiable legal terms themselves. These considerations, in my judgment, also make it wrong to afford relief based on estoppel, including relief limited to reliance loss, in the present context.” per Sir Robert Andrew Morritt VC, paras 92-94

44.5 **Evans v Amicus Healthcare Ltd [2003] 4 All ER 903**

A woman had undergone IVF treatment with her partner, but separated from him before having the embryos implanted. The man withdrew his consent to the treatment continuing, and the woman argued that he was estopped from doing so.

Held: The man was entitled to withdraw his consent. The consent was given for the couple to have IVF treatment together and could not be effective for sole use by the claimant. The man had certainly not given his definite assurance that the woman could use the embryos in any circumstances, so a claim based on estoppel was bound to fail.¹⁶

¹⁶ Note that the claim also failed because under the Human Fertilisation and Embryology Act 1990, either party to IVF has an absolute right to withdraw consent, which cannot be overridden by estoppel.

Under an option agreement, Mrs Jacqueline Brooks was obliged to sell her home to Northstar Land – a property development company – should they exercise the option. Notice to exercise the option within sixty days was issued on 12 August 2003, but nothing happened.

On 16 December 2003, therefore, NL served notice on Brooks to complete within ten working days of service, with a threat that if she did not permit completion within that time, then High Court action would be taken against her.

Brooks thought that meant she would lose her home on Boxing Day, and the local press ran a story about her plight: “Family Faces Boxing Day Eviction!” In fact, ten working days would have taken the transaction to 2 January 2004, but for the sake of their reputation, NL had their (big City) solicitors, Faegre & Benson, send a faxed letter to Brooks’ (small high street) solicitor, Paul Drew, stating that although the expiry date for completion was 2 January 2004, “our clients are prepared to extend the deadline until 9 January 2004 to take account of the Christmas and New year period.”

The fax was not marked urgent, and it had not been read by the time Mr Drew’s firm closed on 23 December for Christmas. Mr Drew, therefore, still supposed that completion had to be done by 2 January 2004, and he broke his holiday to come into the office on that day, together with his clients who had reluctantly packed their bags and were ready to vacate. At 12.13 pm, he emailed Faegre & Benson, NL’s solicitors, to tell them that everything was ready, and when no-one had contacted him by 3.00 pm, he phoned Faegre & Benson to be told that the relevant solicitors were not in the office. Mr Drew emphasised that the matter could not wait until the next day, and at 3.40 pm, one of the solicitors – Susan Albery – phoned Mr Drew to tell him that he had been sent a fax to extend the completion date. This was the first Mr Drew had heard of this and he said he would have to get back to her after consulting with his clients.

In fact, Faegre & Benson were not in a position to complete on 2 January anyway, as they had not arranged the funds, so Mr Drew advised his clients to treat the failure to complete as a fundamental breach of the option agreement – which would, therefore, get them out of it! (Hurrah!) Mr Drew and his clients made a conscious decision, therefore, not to respond to the latest phone call.

NL claimed that Brooks had, by this conduct, agreed to waive the deadline date and was, therefore, estopped from repudiating the contract. The Court of Appeal held that no such thing had occurred.

“Two findings by the judge really lie at the heart of this appeal. They were:

“172. I should at this stage deal with the allegation by the claimants that Mr Drew behaved improperly. In my view, he did not. He said nothing to mislead the claimant. Indeed, he was the person who had alerted Faegre Benson in good time on that day. Subject to acting properly, he had an overriding duty to his clients.

“173. If Faegre Benson had responded promptly to his email at 12.13 pm on 2 January 2004 it is likely that completion could have taken place that day. The problem rested entirely with the claimants’ solicitors, who in addition a) did not seek an immediate response to their email [fax] sent at 4.52 pm on 22 December, the last full working day before Christmas; b) did not themselves get in touch with Drew Jones early on 2 January 2004; c) did not ring back within a few minutes to find out what instructions Mr Drew had received; d) had not placed their client account in funds so that they could complete immediately on 2 January 2004 if this was required.

“The inevitable inference to draw from this evidence was that Mr Drew did not intend Miss Albery to believe that his clients had accepted the offer to extend the period for completion until 9 January, nor could his words reasonably be understood to convey such a promise or assurance. On the contrary, his words were correctly understood to be words of prevarication. His silence and his inaction thereafter could not reasonably convey any other message. His inaction cannot reasonably be said to have induced in Miss Albery the belief that the vendors had accepted the purchaser’s offer to extend time. She should have known from all that was said that afternoon that the vendors were there ready, willing and able to complete. What advantage could there be to postpone vacating the property for one week in those circumstances? The answer is none. The offer of an extension of time had come too late. The sad truth is that Miss Albery had deluded herself.

“When on the afternoon of 22 December, she sent her internal email informing her colleagues that, ‘We are agreeing a revised date of 9 January for when time for completion with the Notice to Complete expires with the owners’ solicitors’, she had already convinced herself that the owners were bound to agree. That is why she did nothing to prepare for completion on the 2nd. That is why she was contemplating the issue of proceedings in anticipation of default on the 9th, not the 2nd. Nothing said or done, or not done, by Mr Drew on the afternoon of 2 January changed the misconception under which she laboured.

“In my judgment the conclusion of the judge that there was no estoppel is unassailable.”

per Ward LJ at 29-31

- 44.7 In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 (SC), the Supreme Court emphasised the importance of there being an unequivocal promise to vary the terms of a contract in order for an estoppel to arise.

***MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 (SC)**

“The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself.” per Baroness Hale at para 16¹⁷

Reliance

- 44.8 The promise must in some way have influenced the conduct of the party to whom it was made, in such a way as to make it inequitable for the promisor to go back on his word. According to Lord Denning, the reliance does not have to have been to the debtor’s detriment (*WJ Alan v El Nasr Export & Import Co* [1972] 2 QB 189) Nor does the debtor have to have performed a positive act different to the way he would otherwise have performed (*Brikom Investments Ltd v Carr* [1979] QB 467) The reliance must, however, be something significant (*The Post Chaser* [1982] 1 All ER 19).

- 44.9 ***WJ Alan v El Nasr Export & Import Co* [1972] 2 QB 189 (CA)**

In a contract between coffee merchants, the price was set at 262 shillings per cwt. The intended currency was Kenyan shillings, but the buyer paid in sterling (UK currency) and this was accepted by the seller. When sterling was devalued, the seller claimed the difference in price between the value of Kenyan shillings and sterling shillings.

¹⁷ This obiter was recently applied in denying an estoppel to the defendants in the case of *BP Oil International Ltd Vega Petroleum Ltd*. [2021] EWHC 1364 (Comm).

It was held that by accepting the sterling shillings in the first place, the seller had impliedly promised to forgo the difference in value and was now estopped from claiming it, even though the buyer could not have been shown to have acted to its detriment in reliance on the promise:

“The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict legal rights cannot afterwards insist on them.” per Lord Denning MR at p 213

44.10 ***Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd: The Post Chaser [1982] 1 All ER 19 (Case Stated)***

A seller agreed to sell palm oil to the buyers, to be shipped on the Post Chaser. In breach of contract, the seller did not make an immediate “Declaration of Ship”.

This important omission would have given the buyers the right to cancel the contract, but they appeared to waive this, and in reliance on this the seller continued with the contract. Shortly afterwards, the buyers did cancel the contract and the sellers claimed that they were estopped from doing so. It was held that although the buyers had impliedly promised by their conduct not to insist upon their strict rights, they had changed their minds so quickly that the reliance by the seller was not significant and was not sufficient to create an inequity when the buyer retracted.

“The fundamental principle is that stated by Lord Cairns LC (in Hughes v Met Rwy) that the representor will not be allowed to enforce his rights ‘where it would be inequitable having regard to the dealings which have thus taken place between the parties’. To establish such inequity, it is not necessary to show detriment: indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights...

“But it does not follow that in every case in which the representee has acted, or failed to act, in reliance on the representation, it will be inequitable for the representor to enforce his rights, for the nature of the action, or inaction, may be insufficient to give rise to the equity, in which event a necessary requirement stated by Lord Cairns LC for the application of the doctrine would not have been fulfilled.”
per Robert Goff J at p 27

Clean Hands/Inequity

44.11 The result of going back on the promise must be inequitable to the defendant: He can only rely on the doctrine of equitable estoppel where it would actually be unfair for the claimant to go back on his promise. Thus, where the promise has been extracted by fraud or duress, there is no reason why the promisor should not retract it. He who comes to equity must do so with “clean hands”.

44.12 ***D and C Builders Ltd v Rees [1966] 2 QB 617 (CA)***

The plaintiffs (Donaldson the decorator and Casey the plumber) had done building work for the defendant and presented an account of which £480 was outstanding. Six months later, the defendant's wife (on his behalf) offered them £300 in full settlement, knowing that the builders were in financial difficulties. The plaintiffs accepted, then sued for the balance. The defendant claimed estoppel. It was held that as the plaintiffs had been forced by the defendant into giving the promise, it was not unfair of them to go back on it. They were entitled to the balance of their money.

"In the present case, on the facts as found by the judge, it seems to me that there was no true accord. The debtor's wife held the creditor to ransom. The creditor was in need of money to meet his own commitments, and she knew it. When the creditor asked for payment of the £480 due to him, she said in effect: We cannot pay you the £480. But we will pay you £300 if you will accept in settlement.

"If you do not accept it on those terms you will get nothing. £300 is better than nothing..." She was making a threat to break the contract (by paying nothing) and she was doing it so as to compel the creditor to do what he was unwilling to do (to accept £300 in settlement): and she succeeded. He complied with her demand... No one can insist on a settlement procured by intimidation."

per Lord Denning MR at p 625

44.13 It might also be equitable to go back on a promise if the situation has radically altered.

44.14 **Williams v Stern (1879) 5 QBD 40**

A creditor promised not to seize the debtor's furniture which had been put up as security for a loan. However, he went back on this promise when he discovered that the debtor's landlord was about to seize the furniture himself to cover unpaid rent. It was held that going back on the promise was reasonable in the circumstances.

45 PART PAYMENT OF DEBT: High Trees

45.1 It was thought that despite the decision in *Hughes v Metropolitan Railway*, that the equitable estoppel principle did not apply where a creditor agreed to accept a lesser sum in full satisfaction of a debt. This seemed to be confirmed by the decision in *Foakes v Beer*, where no such possibility was mooted, despite it being decided in the House of Lords only a few years after *Hughes v Metropolitan Railway*.

45.2 However, the situation changed in 1947, after the case of *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 in which Denning J indicated in an obiter that the doctrine would extend to debt cases. This obiter has subsequently formed the basis of the ratio in several cases and is now a clearly established principle.

45.3 **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130**

In 1937, the plaintiffs let a block of flats to the defendants for 99 years at a rent of £2,500 pa. In 1940, the plaintiffs agreed to reduce the rent to £1,250 pa as many of the flats were unlet because of the war. At the end of the war, the plaintiffs demanded the full rent for the last two quarters of 1945 (and thereafter). Denning J upheld their claim as the agreement was obviously only meant to last during the war. However, he indicated obiter that if the plaintiffs had tried to claim the full rent they had relinquished during the war, they would have been unsuccessful on the basis of *Hughes v Metropolitan Railway*.

*"A promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in **Foakes v Beer**. At this time of day, however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect."* per Denning J at p 135

45.4 It is difficult to reconcile *High Trees* with *Foakes v Beer*, but the principle of equitable estoppel in debt cases has been generally accepted by the courts without overruling *Foakes v Beer*.¹⁸ Indeed, virtually all cases of promissory estoppel have been about part-payment of debts.

¹⁸ n.b. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 (SC) at para 47.4 above, where Lord Sumption remarked that *Foakes v Beer* "is probably ripe for re-examination."

46 THE SUSPENSORY EFFECT OF ESTOPPEL

46.1 There is some debate as to whether estoppel suspends the rights of the promisor or extinguishes them completely. The answer seems to be that the effect is usually suspensory, so that the promisor can demand his full rights after giving reasonable notice of the retraction of the promise. Such notice may be given either expressly or by conduct. However, this right might be lost in circumstances where it would be inequitable to go back on the promise even after giving notice.

46.2 ***Tool Metal Manufacturing v Tungsten Electric* [1955] 2 All ER 657 (HL)**

The appellants granted the respondents a licence to sell certain patented hard metal alloys. If the respondents sold more than a certain amount in a given period, they were to pay an extra sum called "compensation". During the war, the appellants voluntarily agreed to waive these extra payments.

In July 1945, the respondents sued the appellants for breach of contract, and in March 1946, the appellants counterclaimed, amongst other things, for payment of "compensation" as from June 1945.

The counterclaim failed as it was premature, since they had given no notice of their intention to reassert their strict legal rights. On 1 January 1947, they claimed again. It was held that they had now given sufficient notice since their counterclaim of March 1946 constituted notice of their intention to stand on their legal rights. As this was nine months before the present action, the respondents had had ample time to "readjust their position". Viscount Simonds confirmed that the notice given need not specify the precise date from which the rights would be reasserted. It must simply be given a reasonable time before the rights actually are reasserted.

46.3 Thus, in *Hughes v Metropolitan Railway*, the landlords were entitled to have the repairs done eventually. Their rights were merely suspended

46.4 However, the right to revive the rights might be lost in circumstances where it would be inequitable to go back on the promise, even after giving notice.

46.5 ***WJ Alan v El Nasr Export & Import Co* [1972] 2 QB 189 (CA)**

"[The creditor] may on occasion be able to revert to his strict legal rights for the future by giving notice in that behalf, or otherwise making it plain by his conduct that he will insist upon them. But there are cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made."

per Lord Denning MR at p 213

46.6 In particular, it would seem from *High Trees* that money already relinquished cannot be reclaimed, even after the situation has changed: e.g. it was only the full rents arising after the flats were fully let and notice had been given that could be claimed. The rents waived during the war appear to have been lost.

46.7 If this is a general rule (which is by no means certain), it would mean that people who were released from part of a one-off payment would be in a better position than people who were released from part of a periodic payment (such as rent or instalment payments).

46.8 Treitel suggests that such an extinction of rights would only be logical (and equitable) if the promisee has undertaken new commitments in relation to the subject matter in reliance on the promise e.g. if the tenant in *High Trees* had used the rebate to modernise the flats.

46.9 However, one case suggests that the courts may be prepared to adopt a rather more liberal approach to this issue. In *Collier v P & MJ Wright (Holdings) Ltd*, the Court of Appeal held that once the creditor had agreed to reduce the debt of the defendant, the debt could never be revived, suggesting that this should be considered the norm rather than the exception.

46.10 ***Collier v P & MJ Wright (Holdings) Ltd* [2008] 1 WLR 643 (CA)**

By a consent order dated 22 April 1999 in Liverpool County Court Alexander Broadfoot, Vincent Patrick Flute and the applicant, David Anthony Collier, were ordered to pay, in full and final satisfaction of all claims arising out of their joint property transactions, to the creditor company, P & M J Wright (Holdings) Ltd, the sum of £46,800 by calendar monthly instalments of £600.

Collier reached an agreement with the company that if he paid his “share” in regular monthly instalments of £200, then once he had paid off a third of the debt, the creditor would not pursue him for any more. Collier paid off a third in this way, but by that time the other two partners were bankrupt. As the original debt had been a joint one between all three partners, the company sued Collier for the outstanding balance.

Applying *Foakes v Beer*, the court held that a promise by a creditor to accept a third of a debt in full payment from one of three joint debtors was not enforceable in law. However, the creditor would be estopped in equity from making the claim as the three elements of the doctrine were present. Not only that, but – in accordance with *High Trees* – Arden LJ held that the right to make a full claim would be totally extinguished – not just suspended.

“The facts of this case demonstrate that if: a debtor offers to pay part only of the amount he owes; the creditor voluntarily accepts that offer; and in reliance on the creditor’s acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt.

*“For him to resile will of itself be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguishing the creditor’s right to the balance of the debt. This part of our law originated in the brilliant obiter dictum of Denning J in the **High Trees** case. To a significant degree it achieves in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937.”* per Arden LJ at para 42

Longmore LJ was slightly less enamoured of Lord Denning:

“I agree with Arden LJ on the first part of the case, namely that the agreement made between Mr Collier and Mr Wright was merely to accept a lesser sum from Mr Collier than that which was due and that that cannot be a binding agreement in law since it has no consideration to support it. I have found the promissory estoppel point more difficult.

“The first question is: what was the oral promise or representation made by Mr Wright to Mr Collier? Mr Collier says that Mr Wright’s promise was that if Mr Collier continued to pay £200 per month the company would look to Mr Broadfoot and Mr Flute for their share and not to Mr Collier. I agree that it is arguable (just) that that constitutes agreement or representation by Mr Wright never to sue Mr Collier for the full judgment sum. It is also arguable that it is no more than a promise that the company will not look to Mr Collier while he continues to pay his share. One would expect an agreement permanently to forgo one’s rights (especially rights founded on a judgment) to be much clearer than the agreement evidenced in this case.

“The fact that it is impossible to see any benefit to Mr Wright, or detriment to Mr Collier, makes it all the more difficult to construe the agreement as a permanent surrender of Mr Wright’s company’s right to sue for the balance.

“The second question is whether, even if the promise or representation is to be regarded on a permanent surrender of the company’s rights, Mr Collier has relied on it in any meaningful way. The judge could find no evidence that he had. The suggested reliance is that, but for the agreement, Mr Collier would (or might) have pursued his co-debtors. But, as the judge pointed out, there is no evidence that had he done so at the time when the promise or representation was being made to him, he would have been in a better position to do so than when the promise was revoked (or, as it might be, when the promise expired). Mr Flute became bankrupt in 2002 and Mr Broadfoot in 2004. The only realistic inference is that if Mr Collier had taken any action against them in 2001, they would only have become bankrupt earlier.

*“Nevertheless, as Arden LJ points out, it seems that on the authority of **D&C Builders Ltd v Rees** [1966] 2 QB 617 it can be a sufficient reliance for the purpose of promissory estoppel if a lesser payment is made as agreed.*

That does, however, require there to be an accord. No sufficient accord was proved in the D&C Builders case itself since the owner had taken advantage of the builder’s desperate need for money. For the reasons I have given, I doubt if there was any true accord in this case because the true construction of the promise or representation may well be that there was only an agreement to suspend the exercise of the creditor’s rights, not to forgo them permanently.

*“There is then a third question, namely whether it would be inequitable for the company to resile from its promise. That cannot be inquired into on this appeal, but I agree that it is arguable that it would be inequitable. There might, however, be much to be said on the other side. If, as Arden LJ puts it, the ‘brilliant obiter dictum’ of Denning J in the **High Trees case** [1947] KB 130 did indeed substantially achieve in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937, it is perhaps all the more important that agreements which are said to forgo a creditor’s rights on a permanent basis should not be too benevolently construed.*

“I do, however, agree with Arden LJ that it is arguable that Mr Collier’s promissory estoppel defence might succeed if there were to be a trial and that the current statutory demand should, therefore, be set aside. I agree the appeal should be allowed.” per Longmore LJ at paras 44-49¹⁹

47 A SHIELD AND NOT A SWORD

47.1 Promissory estoppel can only be used as a defence. You cannot sue someone who has promised to do something for you if there was no consideration given, even if you have relied on the promise.

47.2 **Combe v Combe** [1951] 2 KB 215 (CA)

A husband during divorce proceedings promised to pay £100 per annum to his wife who, in reliance on this promise, did not apply to the court for maintenance. When he stopped paying her, she sued him on the promise, but it was held that she could not claim estoppel when she was the plaintiff. The doctrine does not “create new causes of action”. It is only a defence.

47.3 *Combe v Combe* was applied in:

Baird Textile Holdings Ltd v Marks & Spencer plc [2002] 1 All ER (Comm) 737 (CA) (discussed above).

It was held that there was insufficient certainty to found a claim based on estoppel, but even if there had been a clear promise by M&S to give reasonable notice of termination, the claimants could not bring an action against M&S based in equity to enforce this, as they would be using equity as a sword and not a shield.²⁰

¹⁹ See also *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366.

²⁰ See also *Evans v Amicus Healthcare Ltd* [2003] 4 All ER 903.

- 47.4 It is interesting to note that in *Walton Stores (Interstate) Ltd v Maher* [1988] HCA 7, the Australian High Court permitted estoppel to be used as a cause of action. However, the English Court of Appeal in *Baird Textile Holdings Ltd v Marks & Spencer plc* declined to apply this persuasive precedent on the grounds that it was bound by the established English principles.

PART 11: INTENTION TO CREATE LEGAL RELATIONS

48 THE GENERAL RULES

- 48.1 Not all agreements with consideration will amount to contracts. There must also be an intention by both parties to be legally bound. Disagreements may arise later as to what the parties did intend. As a general rule, the courts will presume that in a domestic agreement there is no intention to create legal relations, whilst in a business agreement there is. However, it is open to the parties to rebut (disprove) the presumption against them, and an express term in the contract one way or the other may be conclusive.

49 DOMESTIC AGREEMENTS

Husband and Wife Cases

- 49.1 ***Balfour v Balfour* [1919] 2 KB 571 (CA)**

The husband was employed in Ceylon. He and his wife returned to the UK on leave but it was agreed that for health reasons she would not return to Ceylon with him. He promised to pay her £30 per month as maintenance. They later divorced and the wife sued for the money which he was no longer paying. It was held that this was an agreement between a husband and wife which was clearly not intended to have legal consequences at the time it was made. There was no contract.

“The defence to this action on the alleged contract is that the defendant, the husband, entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife... They are not contracts, because the parties did not intend that they should be attended by legal consequences.” per Atkin LJ at p 78

- 49.2 ***Merritt v Merritt* [1970] 1 WLR 1211 (CA)**

The husband had left the matrimonial home, which was owned by him, to live with another woman. The spouses met in the husband's car and he agreed to pay her £40 pm out of which she would keep up the mortgage payments on the house. The wife refused to leave the car until he signed a note of the agreed terms and an undertaking to transfer the house into her sole name when the mortgage was paid off. The wife paid off the mortgage, but the husband refused the transfer. Although this too was an agreement between a husband and wife, there were obvious differences between this and *Balfour v Balfour*. The husband and wife here were not living in amity when the agreement was made, and the surrounding circumstances all suggested that there was an intention to create legal relations. This was a contract. Lord Denning MR distinguished cases such as *Balfour v Balfour*:

"I do not think that those cases have any application here. The parties there were living together in amity. In such cases, their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. Then they bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations."

per Lord Denning MR at p 761

49.3 ***Soulsbury v Soulsbury* [2008] Fam 1**

Owen and Elizabeth Soulsbury divorced in 1986. The court ordered the husband to pay the wife £12,000 per annum by way of ancillary relief. In 1989, the husband suggested that instead of making further payments, he would agree to leave the ex-wife £100,000 in his will. He changed his will to leave her this money, and in 1993 the couple agreed that in return for him not revoking the will, she would not pursue him for the money.

In 2002, the husband married Kathleen, which had the effect of revoking his will. He died the same day! The first wife (Elizabeth) sued the second wife (Kathleen) for the £100,000 from the estate.

It was accepted without question that there was an intention to create legal relations. The case rested simply on whether the agreement amounted to an unlawful attempt to vary an order for ancillary relief made under the Matrimonial Causes Act 1973 (which it was held it did not).

Elizabeth was entitled to her money on the basis that Owen had contracted to give her £100,000 on his demise, and had not made proper provision to do so.

Domestic Agreements: The Friends Cases

49.4 ***Simpkins v Pays* [1955] 1 WLR 975**

A woman, her granddaughter and a paying boarder all took part in a weekly competition organised by the Sunday Empire News which involved placing eight fashion items in order of merit. The arrangements over postage etc. were informal and the entries were made in the grandmother's name. One week they won £750. The paying boarder was denied a third share by the other two. It was held that there was a legally binding agreement that any prize should be divided between all three.

"It may well be there are many family associations where some sort of rough and ready statement is made which would not, in a proper estimate of the circumstances, establish a contract which was contemplated to have legal consequences, but I do not so find here. I think that in the present case there was a mutuality in the arrangement between the parties. It was not very formal, but certainly it was, in effect, agreed that every week the forecast should go in in the name of the defendant, and that if there was success, no matter who won, all should share equally." per Sellers J at p.979

49.5 This famous case now needs to be read in the light of...

***Wilson v Burnett* [2007] EWCA Civ 1170**

Three young women, Tania Burnett, Stacy Wilson and Abigail Stacey went to play bingo in Plymouth. Tania won £135, but on top of that won the national prize of £101,211. The other two women claimed that the three of them had reached a prior contractual agreement whereby if anyone won more than £10, they would share it equally between them.

The trial judge, HHJ Neligan, found that there had been no intention between them to create legal relations, and so no contract could have been formed. He found it significant that whilst they were waiting for the national result, Abigail kept asking Tania if she was going to share the prize if she won it, which she would not have done had there been a contract to this effect.

The Court of Appeal agreed with the judge's conclusion that there was no contract to be enforced:

"I accept the defendant's evidence that there was chat or talk about sharing winnings which went no further than discussion or chat and did not cross and cannot be inferred to have crossed that line which exists between talk and 'meaning business', or an intention to create a legal relationship, that is to share the prize money.

"I do not, therefore, accept the claimants' evidence as proving on a balance of probabilities that a binding agreement existed whereby the defendant, or indeed any of them, was under any obligation to share the winnings."

49.6 **Parker v Clark [1960] 1 WLR 286**

The defendants (Mr and Mrs Clark) were a childless couple in their late seventies. They invited Mrs Clark's niece and her husband, Commander Dudley Parker to live with them in their large four-bedroomed Torquay house, "Cramond". The Parkers said that to do this would involve selling their own cottage "The Thimble" and Clark said that if they did, he would leave them "Cramond" in his will. On the strength of this agreement, the plaintiffs sold their own house and lent money to their daughter to buy her own house.

The Parkers did much domestic work for the ailing Clarks whilst living with them, but fell out when Clark announced his intention to sell Cramond. The atmosphere became unbearable, and the Parkers left, but later claimed that Clark had been in breach of contract and claimed the value of the lost benefits of living at Cramond, and the value of the lost expectation of inheriting the property. It was held that there was an intention to create legal relations, and the Parkers were entitled to damages under both heads.

A Cautionary Tale for Law Students

49.7 **Jones v Padavatton [1969] 1 WLR 328 (CA)**

Mrs Violet Lalgree Jones made an arrangement with her daughter, Mrs Ruby Padavatton, who was a secretary in the USA, that if the daughter would give up her employment in order to read for the Bar in England, the mother would provide her with maintenance. This arrangement was subsequently varied when the mother agreed to provide the daughter with a house to stay in, the rents from which would pay the maintenance. The mother bought a house in Highbury Quadrant, which was conveyed into her own name. The daughter occupied several rooms, and the rest were rented out, with the daughter acting as agent for her mother. The two fell out and the mother gave the daughter notice to quit. The daughter refused to leave, claiming that the mother was in breach of the contract whereby she would study for the Bar if her mother would maintain her. It was held that there was no such contract and the daughter had no defence to the mother's claim for possession.

Dankwerts LJ and Fenton Atkinson LJ considered that in the circumstances there was no intention to create legal relations. Salmon LJ thought that she had made a contract with her mother originally, but as six years had now passed since the original deal, and the daughter seemed no nearer passing her Bar Finals, the arrangement had lapsed.

"I have reached the conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements. Balfour v Balfour was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother." per Dankwerts LJ at p 332

"The parties cannot have contemplated that the daughter should go on studying for the Bar and draw the allowance until she was seventy." per Salmon LJ at p 334

50 COMMERCIAL AGREEMENTS

50.1 There is a presumption that when two parties reach a commercial agreement, they intend to make a contract.

50.2 ***Volumatic Ltd. v. Ideas for Life Ltd.* [2019] EWHC 2273 (IPEC)**

"(1) In the case of an express agreement the onus of proving there was no contractual intention is on the party who so asserts, and the burden is a heavy one: Chitty on Contracts (32nd edn) at 2-168, approved in Edge Tools & Equipment Ltd v Greatstar Europe Ltd [2018] EWHC 170 (QB) (Martin Chamberlain QC) at [19].

"(2) In deciding whether there was an intention to create legal relations:

a. the court applies an objective test: RTS Ltd v Molkerei Alois Muller GmbH and Co KG [2010] 1 WLR 753 at [45] (Lord Clarke); and

b. the lack of certain terms of economic or other significance to the parties having been finalised does not necessarily negate an intention to create legal relations: RTS at [45]."

per Mr. David Stone (Sitting as an Enterprise Judge) at para 11

50.3 However, this presumption will be rebutted if the wording of the agreement indicates that the parties did not intend the agreement to be legally binding.

50.4 ***Edwards v Skyways* [1964] 1 WLR 349**

In a case involving an "ex gratia" payment to redundant pilots, Megaw J emphasised that there is a strong presumption that commercial agreements are meant to be legally binding. He held that in this case the presumption had not been rebutted by the defendants who were, therefore, legally bound.

50.5 ***Rose and Frank Co v J R Crompton & Bros Ltd* [1925] AC 445 (HL)**

A commercial agreement by which A (a British manufacturer) appointed B to be its sole distributor in the USA included the following clause:

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the Law Courts either of the United states or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they honourably pledge themselves."

A terminated the agreement without giving notice as required, and refused to deliver goods ordered by B although A had accepted these orders when placed. The House of Lords upheld the judgment of the Court of Appeal's that the distributorship agreement was not a binding contract, though actually reversed the final decision of the Court of Appeal by holding that the orders actually given and accepted did constitute enforceable contracts of sale.

"Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. the reason for this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean.

"If they clearly express such an intention, I can see no reason in public policy why effect should not be given to their intention." per Scrutton LJ [1923] 2 KB 261

"The overriding clause in the document is that which provides that it is to be a contract of honour only and unenforceable at law." per Lord Phillimore at p 452

50.6 ***Esso Petroleum Ltd v Commissioners of Customs and Excise* [1976] 1 WLR 1 (HL)**

Toy coins depicting the 1970 World Cup squad were given away free with petrol, on the basis of one coin for each four gallons bought.

The Customs and Excise Commissioners claimed that the coins were "engravings...produced in quantity for general sale" and were thus liable to tax under the Purchase Tax Act 1963. The majority of the House of Lords held that if there had been a contract to provide the coins to petroleum purchasers, it would not have been a "contract of sale" as customers were paying for petrol, not for the coins.

However, the Lords were divided on the question of whether there was an intention to create legal relations in regard to the coins at all. Despite the fact that the coins were described on the advertisements as a "gift" the majority took the view that they were the subject of a collateral contract (albeit not a contract of sale).

"I am, however, my Lords, not prepared to accept that the promotion material put out by Esso was not envisaged by them as creating legal relations between the garage proprietors who adopted it and the motorists who yielded to its blandishments. In the first place, Esso and the garage proprietors put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in a setting of business relations. In the second place, it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations. The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage to themselves from the scheme, an advantage to which the garage proprietors also would share." per Lord Simon of Glaisdale at p 5

50.7 ***Jones v Vernons Pools Ltd* [1938] 2 All ER 626 (Liverpool Assizes)**

Jones alleged that he had sent in a winning football coupon to Vernons, who denied that they had received it. The pools company, doubtless to meet such a situation, had printed on its coupon the words "This transaction is binding in honour only". Jones sued for his winnings. It was held that the "honour" clause meant that this was not a contract.

"If it means what I think that they intend it to mean, and what certainly everybody who sent a coupon and who took the trouble to read it would understand, it means that they are all trusted to the defendants' honour, and to the care they took, and that they fully understood that there should be no claim possible in respect of the transactions." per Atkinson J at p 630

The same result was reached a year later in ***Appleson v Littlewood Ltd* [1939] 1 All ER 464.**

50.8 These decisions were confirmed by the Court of Appeal in ***Halloway v Cuozzo* (1999).**

***Halloway v Cuozzo* (1999) Unreported (CA)**

A collector of coupons failed to forward the plaintiff's winning coupon to the pools company. The Court of Appeal confirmed the decision in *Jones v Vernons Pools* and held that the collector was not liable for the plaintiff's loss.

TUTORIAL QUESTIONS

THE PHENOMENON OF AGREEMENT

1. What is meant by the expression 'phenomenon of agreement' in the context of contract law?
2. What is the difference between an 'objective test' and a 'subjective test' of intention?
3. What justification is there for holding someone to be bound to a contract which he or she did not actually intend to make?
4. Can someone be said to have agreed to the terms of a written contract if he has not read it?
5. Is it reasonable for consumers to be bound to the terms of a contract for essential services which they are unable to negotiate?
6. Should the usual remedy for breach of contract be an order for specific performance, rather than for payment of damages?

OFFER AND ACCEPTANCE

7. Read the judgments in the case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401. (Page 113 below.)

What reasons were given for holding that a display of goods in a shop should not normally be considered to be a contractual offer?

8. Read the judgments in the case of *Partridge v Crittenden* [1968] 1 WLR 1204. (Page 110 below.)

What reasons were given for holding that a newspaper advertisement for the sale of goods should not normally be considered to be a contractual offer?

9. Read the judgments in the High Court and Court of Appeal cases of *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484 and [1893] 1 QB 256. (Pages 96 and 101 below.)

How did the judges refute the arguments of the Carbolic Smoke Ball Company?

- i. Why was the advertisement not held to be a mere puff?
- ii. Why could there not have been an infinite number of claimants?
- iii. Why did it not matter that the company could not check whether the claimant had actually used the ball?
- iv. Why did it not matter that the advertisement did not specify how long after using the ball it would keep you safe from influenza?
- v. In what circumstances did the judges hold that a newspaper advertisement might be a contractual offer?

5. **In which of these cases, if any, has a contractual offer been made? Justify your answer with reference to legal principles and decided cases.**

- i. David emailed Edward to say that he was interested in buying Edward's antique camera. The next day he received a letter from Edward: "Lowest cash price on a quick sale of the camera is £2,000. Give me a ring about this."
- ii. At 11.00 am on Tuesday, Mary sends the following fax to Cindy's office: "Hiya Cindy! I've decided to sell that old Doll's House you've always loved. I'll take £50 for it, but if you don't respond by the end of the day, I'll put it on eBay."
- iii. Alfonso wishes to hire a recording studio to make an album with a top recording artist. He sends the details to two studio bosses, asking them to send him tenders.
- iv. Jenny runs a public house called "The Rovers' Return". She places an advertisement in the Weatherfield Gazette stating: "Karaoke Competition night at the Rovers on 1 November. No entry fee. All welcome. Top prize of £1,000."
- v. Dev owns a grocery shop on the same street. He places a notice in his shop which states: "If you are going to enter the Rovers' Karaoke Competition, why not sing my favourite song, 'London Met Rocks'? I will give a year's supply of cornflakes to whoever sings it best."

6. Is there a contract in the following situations? If so, what kind of contract is it?

- i. Andy offers to sell his car to Ben for £500. Ben replies: "I accept". Andy does not deliver the car and Ben does not pay for it.
- ii. Carl offers to sell his watch to Doris for £100. Doris accepts, even though she has no money.
- iii. Enid send a letter to Fred asking how much he wants for his stamp collection. Fred replies: "No less than £300."
- iv. George places a newspaper advertisement, offering £50 to anyone who finds any of his lost dogs, Fido, Rex and Buster.
 - Bill finds Fido and returns him to George, but does not know of any reward that has been offered.
 - Chris reads the advertisement and then finds and returns Rex. Chris admits that he would have returned Rex even had there not been a reward offered.
 - Don finds Buster and takes a photograph of him as proof. He takes the photo – but not the dog – to George.

7. Winnie wished to sell his car and left it outside his house on Thursday January 2nd with a card on the windscreen advertising it as follows: "For sale. £5,000 or nearest offer. Call 0723 492 0128."

On Friday January 3rd Chris was passing the house in the morning and saw the car. He was interested in buying it, and left a note under the wiper saying: "I'll take the car for £4,500." He left his name, phone number and email address.

Winnie found the note at 14:00 on Friday and decided to sell the car to Chris. He sent him an email at 15:00 to confirm this, asking if payment could be made in cash. As the email went to his office and Chris had left early for the weekend, Chris did not see it until Monday January 6th.

Meanwhile, on Saturday January 4th, Winnie met Chris's wife, Kanga. Kanga told Winnie that Chris had just bought a new car from Roo. Winnie, presuming that Chris would not now want the car, sold it on Sunday January 5th to Eeyore for £4,800.

On Monday, January 6th, when Chris read his email, he phoned Winnie and said that he had a cheque for £4,500 ready and that he would pick the car up that evening.

Advise Winnie as to whether he has a contract, and if so, with whom and on what terms.

13. On March 2nd Adam placed the following advertisement on a popular internet group site called 'playthebest.com', which is designed for professional musicians looking for information about top quality instruments: "I must reluctantly part with my Stradivarius violin. It is a genuine 1720 instrument for which I can accept no less than £400,000. If I receive a satisfactory reply by May 1st from a group member, I will sell it. Otherwise, I will put it up for auction at Sothebys." He then gave his email address.

Bert, who is a group member, read the message on March 4th and immediately sent an email to Adam stating that he wanted the violin for £400,000. He headed the email: "Let me have it!" Adam thought it was a pornographic message and deleted it without reading it.

Charles read the message on March 8th and sent an email to Adam stating: "I will give you £350,000 for it, if it is in good condition. Please do not reply to this email address as my wife might read it and wonder where I got the money from! Fax me at my office." He then gave his fax number.

Adam replied at once by email: "The violin is in excellent condition, which is why I can accept no less than £400,000 for it. Let me know!"

On reading this, Charles replied by email: "£400,000 it is, provided it is in its original case. Please don't send me any more emails. Reply by fax after 09:00 tomorrow, March 9th."

At 08:00 the next day, Adam sent a fax to Charles reading: "It's a deal then, including the case. Please send me details of where and when we can meet to carry out the transaction."

At 10:00 that day, Charles's wife, Dawn, was reading his emails and saw the correspondence between him and Adam. She immediately sent an email to Adam reading: "Kindly ignore all message from my worthless husband, Charles. If he has £400,000 to spare, he can buy me a decent house! He is certainly not getting an old violin!"

Adam read this email at 10:30. At 11:00 that day, Charles arrived in his office and saw the fax from Adam.

With reference to relevant cases, discuss the contractual implications of all these events.

14. Dell Trotter decided to sell his 1970 Reliant Regal van.

On February 1st, he placed an advertisement in the Peckham Post, a local newspaper, in the following terms:

“For sale. One yellow 1970 Reliant Regal van, with company livery. Worth at least £500. All reasonable offers made before February 6th 2008 will be considered.”

The advertisement then gave Dell’s email address, fax number, postal address and telephone number.

Boycie read the advertisement on February 2nd, and sent an email to Dell on that day saying: “I will give you £550 for the van.” The email was entitled: “Offer.”

When Dell saw the title of the email, he deleted it without reading the message, as he thought that Boycie must be trying to sell him something, and he always deleted unsolicited offers.

On February 3rd, Raquel sent an email to Dell stating: “I would be willing to pay you £500 for the van, provided that it has at least 6 months road tax and 4 months MOT.”

Dell replied the same day: “The MOT is fine, but the van only has two months tax. £500 it is. Take it or leave it. Please confirm by fax between 8:00 and 13:00 on February 6th.”

On February 4th, Raquel sent a fax to Dell stating: “Okay. We have a deal.” However, the toner had run out in Dell’s fax machine, so the message was not printed.

On February 5th, Trigger offered to pay Dell £700 for the van, which Dell accepted.

Dell then telephoned Raquel to tell her that the van had been sold, but the phone was answered by her 15-year-old son, Damien. Damien took the message from Dell, but forgot to pass it on to Raquel.

At 9.00am on February 6th, Raquel sent another fax to Dell saying: “As I haven’t heard back from you, I presume the van is mine as agreed.” This time, the message was printed properly, and Dell read it immediately.

Advise Dell who is now being sued for breach of contract by both Boycie and Raquel.

15. 'Classical Composer' is a monthly magazine which aims to encourage the composition of new musical pieces in the classical style. It is available to buy in print form from newsagents, or may be downloaded free of charge from a website. A regular feature in the magazine is 'Classical Critic', in which readers are invited to submit works for critical analysis by a panel of experts.

In the January edition, the following advertisement was published: "Classical Composer's D-Day invites readers to compose a D-Day March for our special competition. All entries must be recorded onto a CD and submitted to the editor by June 4th. They will be considered by a panel of expert judges, and the best composition received in time will win a prize of £10,000."

In May, the following announcement appeared in the online version of the magazine only: "Due to the overwhelming response to the D-Day March competition announced in January, we regret that we cannot consider any more entries."

Discuss the contractual situation in the following ALTERNATIVE situations, which all occur in the same year as the advertisement was placed.

- i. Alan had not read the January edition of the magazine in either form. He composed a piece called "The D-Day March" which he recorded on CD and sent on January 21st to the editor for consideration in the 'Classical Critic' section. He then read the magazine and wrote to the editor on February 6th to ask for his piece to be considered in the competition. The editor ignored this request.
- ii. Betty read the magazine in January and composed a new piece for entry into the competition. At great trouble and expense, she hired a recording studio and some professional musicians to create the CD recording, which she completed on April 27th. On May 5th, she read the announcement in the May edition of the magazine, but she sent her CD in the next day anyway. The editor threw it away without listening to it.
- iii. On February 1st, Carlos recorded his composition. He downloaded it onto his computer, and sent it as a sound file by email to the editor. The editor then forwarded it to the judges. Although all the judges had the computer facilities to listen to the recording, they refused to do so.
- iv. On June 3rd, Daisy read a copy of the January magazine in the library. She quickly composed a march, and recorded herself playing it on the tin whistle. She submitted the CD for the competition, and it arrived the next day. She had not seen the online May edition of the magazine as she did not know how to use a computer. Her entry was not considered.

16. On March 20th, Carl placed an advertisement in the magazine "Swimmers Monthly" in the following terms: "I will give £1,000 each to the first three people to swim from the north to the south bank of the Thames within 50 yards of Waterloo Bridge at any time between April 1st and April 30th. The money is lodged at Barrie's Bank.

David completed the swim on April 2nd. David was planning the swim anyway, and had neither read nor heard of the advertisement. However, as he got out of the river a policeman said to him: "I suppose you'll be claiming Carl's £1,000 now."

Elsie read the advertisement, and was pleased because she too was planning the swim anyway. She spent £150 to prepare for it by buying a special costume and some grease to rub on her skin. However, just as she dived in on April 4th, she heard Carl shout to her: "I have changed my mind. There is no point in your continuing with the swim." Elsie completes the swim anyway.

On April 5th, Carl placed a full-page advertisement in 'Swim Weekly', which said that the offer was thereby revoked. Fred, who had read the original offer, but had not seen the revocation, successfully completed the swim on April 14th.

Advise Carl as to his liability, if any, towards David, Elsie and Fred.

17. Every year a Music Festival is held in the village of Betchworth on the first five days of May. Alaric, whose favourite song is 'Unimagined Glory' placed the following advertisement in the Betchworth Gazette on April 1st: "Do you know the song, 'Unimagined Glory'? If so, why not play an instrumental version of it at the Betchworth Music Festival? I will listen out for it every day, and at the end of the Festival I will give £1,000 to whoever has played it best."

Jon did not read the Betchworth Gazette, but was told about the advertisement by a friend on April 2nd. He had never heard of the song, but he went out and bought the sheet music and had special tuition in playing it on his trumpet.

Phil knew nothing of the advertisement, but coincidentally gave a beautiful rendition of the song on his clarinet at the Festival on May 1st.

Koj read the advertisement on April 5th. He had already decided in March to play the song at the Festival on his guitar, and did so on May 2nd. Alaric did not attend on that day.

On May 3rd, Alaric placed the following advertisement in large print on the front page of the daily Festival Programme: "Anyone playing 'Unimagined Glory' at the Festival should be advised that I will be giving no special prizes for it."

On May 5th, Jon, unaware of the second advertisement, played the song on his trumpet at the Festival. He won the prize for 'Best Performance in Any Category'.

Alaric now refuses to give anyone the prize.

Advise the parties as to their rights, if any, in the law of contract.

CONSIDERATION

18. **What is the doctrine and the definition of consideration?**
19. **In which of these cases, if any, has real consideration been provided by both parties?**
- i. Sam never mows his lawn, and his neighbour Roy frequently complains about it as he says it reduces the value of his own property to have such a wilderness next to him. Eventually Sam says to Roy: "Look. If it means that much to you, why don't you mow it yourself?"
 - ii. Roy takes Sam at his word, and one day, whilst Sam is out at work, Roy mows Sam's lawn. When Sam returns, he is so impressed, he says to Roy: "What a great job. I'll give you £20 for doing that!"
 - iii. Tim is a window cleaner. He places flyers through the letter boxes of all the houses on a street advertising his services, but stating no price. The flyer says that if anyone wants their windows cleaned on Monday, they should stick the poster up in their front window. Ruth decides to have her windows cleaned and puts the poster in her window. Tim cleans her windows on Monday, and on Tuesday he knocks on her door, demanding £40 for the service.
 - iv. Joe is staging a concert and asks his sister Mary, a well-known professional poster-artist, to design a poster for him. She does this and then demands payment for her services, although nothing has been mentioned before about paying her. Advise Mary.
 - v. Mavis engages Nora, a landscape gardener, to level her lawn for the purposes of installing a lawn tennis court. Nora agrees to do the job for a fixed fee of £4,000.

However, when she begins to excavate the lawn, Nora discovers the foundations of an old barn, which will need to be removed. This will make the work much more expensive than she thought.

She tells Mavis that she cannot do the job for less than £7,000. Mavis reluctantly agrees to this price as she has already made arrangements to hold a lawn tennis tournament in the summer.

20. Mowgli planned to start a holiday company offering jungle tours in India. He was unsure of the Health and Safety requirements for such a venture, so he invited his brother Bagheera out for lunch to ask for his advice, since he knew that Bagheera used to be an officer with the Health and Safety Executive.

Bagheera brought with him an assortment of relevant pamphlets, and over a two-hour dinner explained in detail the specific steps Mowgli needed to take to ensure that he complied with all the regulations pertaining to jungle holidays. After dinner, Mowgli said to him: "Thanks for all your help. It would have taken me ages to have sorted that out."

Bagheera replied: "Well, that's what I'm paid for - £100 an hour for a private consultation." Mowgli said: "The cheque will be in the post!"

In order to finance the venture, on October 1st 2018 Mowgli borrowed £50,000 from Kaa, to be paid back in instalments of £1,000 plus £100 interest per month.

Mowgli planned to organise his first tour to take place in June 2019. On October 10th 2018, he engaged Baloo to design and print the publicity materials, which were to be distributed to travel agents by February 1st 2019. Mowgli and Baloo agreed on a fixed fee of £5,000 for this service.

On January 2nd 2019 Baloo told Mowgli that the price of printing had massively increased due to new Global Warming tax, and that there was no way he could afford to get the job finished. Mowgli offered him an extra £2,000 if he would ensure that the job was done fully and on time. Baloo accepted this offer, and the publicity materials were completed and distributed according to the contract.

Due to fears of terrorist activities, there was a slump in demand for jungle holidays and by March 1st 2019, Mowgli had received no jungle bookings. Kaa heard of this, and told Mowgli he would accept just £1,000 repayment per month (without the interest) from March 2019 until matters improved.

Mowgli has paid Kaa only £1,000 per month since March 2019. However, Kaa has recently discovered that Mowgli took so many bookings for his holiday tour in May 2019 that he was at full capacity.

Advise all the following parties as to their rights:

- i. Bagheera, who has received no money from Mowgli;
- ii. Baloo, who has been paid only £5,000;
- iii. Kaa, who demands not only that the interest payments should be restored as per the contract, but also that Mowgli should pay all the back interest.

21. In January 2018, Eric commissioned a new Olympic Sports Training Centre, which was to be constructed by Fred's Builders. The building was to cost £10,000,000 and was to be completed by January 2nd 2019, in time for a grand opening ceremony in the presence of the Queen, who had made a space in her diary for this exciting event.

When Eric saw the plans, he was concerned that the building would not be sufficiently secure, and he took the plans round to Gretel, his sister, who ran a large security firm in London. Gretel studied the plans for an hour, and sketched a basic alarm system, which she suggested Eric should adopt to supplement the existing one.

Eric thanked her for her advice, and said: "You have probably saved me a lot of money in insurance premiums. Send me a bill!" The next week Gretel sent Eric a bill for £250.

Because the new security system was going to cost an extra £10,000, Eric wrote to Lord Havalot, the Minister for Sport, to ask if he might sponsor it. Lord Havalot wrote back promising a gift of £5,000 to help cover the cost of the additional alarms. Eric borrowed the other £5,000 from Ivor's Bank to be repaid on February 1st 2009.

In November 2018, Fred's Builders informed Eric that due to increased labour costs, they would not be able to complete the job by January 2016 after all. Eric was desperate because of the advanced plans for the grand opening, and offered to pay Fred's Builders an additional £200,000 if they would complete the job on time. Fred's Builder's agreed.

Once the building was completed (on time), Eric asked Havalot to send him the £5,000 promised for the alarms. Havalot refused.

As this meant that Eric could not repay the loan to Ivor's Bank, he wrote to the manager, asking if they would accept £2,000 in full payment. The manager replied: "I suppose that is better than nothing!"

Advise all the following parties:

- i. Gretel, who has not been paid anything by Eric;
- ii. Havalot, who still refuses to pay any money to Eric;
- iii. Fred's Builders, who have been paid only £10,000,000 for the building work;
- iv. Ivor's Bank, who wish to enforce the full £5,000 loan, plus interest, against Eric.

22. Tom and Barbara Good, who are trying to be entirely self-sufficient, have turned the back garden of their suburban home into a farm. After a bumper vegetable crop, Tom decided to rent a stall at the Surbiton Country Fair on May 5th to sell the surplus, worth about £4,000.

Tom had no experience of country fairs, but he was aware that his neighbour, Margot Leadbetter, regularly organised stalls at such events for local businesses. He therefore asked Margot to come round for afternoon tea, so he could ask for her advice.

Whilst Barbara plied Margot with tea and cake, Tom quizzed her about the best way to maximize his profit at the fair. Margot suggested that he should hire his own marquee – rather than simply having a stall – and spent over an hour with him deciding on the prime location and telephoning various suppliers to get him the best deal. In the end, with Margot’s assistance, Tom booked a marquee from Matt’s Marquees.

As she was leaving, Tom said to her: “That’s marvellous. Margot. That will have upped my profits by thousands.”

Margot replied: “Well don’t forget my fee: £500 or 10% of sales, whichever is higher. I don’t do this for my health, you know!”

The hire of the space at the fair was £100, and the hire of the marquee was £500. As Tom had no spare cash, on April 25th he borrowed £600 from Margot’s husband, Jerry, on condition that it would be paid back in full the day after the fair.

On May 4th, Matt told Tom that, due to the sudden illness of his business partner, he would not be able to erect the marquee the next day as agreed, unless he could hire some extra workers at short notice. He told Tom that these workers would cost an extra £200.

Tom at once offered to give Matt an extra £200 for the job, if could assure him that the marquee would be up on time. Matt accepted this offer, and went away to hire the workers.

Unfortunately, there was torrential rain on the day of the fair, so Tom sold only £300 worth of vegetables. When he told this to Jerry on May 5th, Jerry replied: “Never mind old chap. Just give me the £300, and we can forget about the rest.” Tom accordingly handed over the £300.

However, the next day Tom was able to sell the rest of the vegetables to a local restaurant for £2,000.

Advise all the following parties as to their rights:

- i. Margot, who has received no money from Tom;
- ii. Matt, who has been paid only £500 by Tom;
- iii. Jerry, who wants the balance of his £600 from Tom.

INTENTION TO CREATE LEGAL RELATIONS

23. Horse and Zebra were married in April 2007. By August 2020, they had produced two children, but the marriage had slowly been breaking down and they decided to separate.

They orally agreed that Zebra would look after the children and would continue to live in the matrimonial home. Horse agreed to pay the rent for this home together with the telephone, electricity and gas bills. In addition, she was to pay Zebra £300 per month for maintenance of himself and the children. Having reached this agreement, Zebra asked Horse to put the arrangement into writing and gave her a pen and paper.

Horse wrote: "I agree to pay Zebra £300 per month plus rent etc. in exchange for him looking after the children." She then signed the paper and handed it back to Zebra.

Since January 2021, Horse has refused to pay the telephone and electricity bills and the rent, although she has continued to pay the monthly allowance.

Advise Zebra as to his contractual position.

24. Mr. Dope agreed with his wife that he would give her £100 weekly to spend on clothes for herself so that she would always look smart in his company. Mrs. Dope subsequently left the matrimonial home on the arm of Dr. Bright, saying that she would never return.

Mr. Dope wishes to know if he is bound by the agreement.

25. Wills and his brother Harry were spending a week's holiday together in the Lake District. Wills spent one evening working on a newspaper competition puzzle. Harry watched briefly and made a suggestion towards the solution which Wills accepted and used.

After completing the puzzle, Wills asked Harry for a postage stamp. As he gave Wills the stamp, Harry said: "An answer and a stamp! I think I deserve half the winnings."

Will's entry won a prize of £20,000.

Advise Harry.

**Carlill v. The Carbolic Smoke Ball Company [1892] 2 QB 484
(Queen's Bench Division)**

4 July 1892

Hawkins J.

1892 June 18; July 4.

Gaming—Contract by way of Wagering—Insurance against Disease—8 & 9 Vict. c. 109—14 Geo. 3, c. 48, s. 2.

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

Held, that the above facts established a contract by the defendants to pay the plaintiff £100 in the event which 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.

FURTHER consideration before Hawkins J.

The defendants, who are the proprietors and vendors of a medical preparation called “The Carbolic Smoke Ball,” inserted in the *Pall Mall Gazette* of November 13, 1891, the following advertisement: “£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.

“During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

“One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s. post free. The ball can be refilled at a cost of 5s. Address:

“Carbolic Smoke Ball Company, “27, Princes Street, Hanover Square, London, W.”

The plaintiff, a lady, having read that advertisement, on the faith of it bought one of the defendants' carbolic smoke balls, and used it as directed three times a day, from November 20 till January 17, 1892, when she was attacked by influenza. She thereupon brought this action against the defendants to recover the £100 promised in their advertisement.

The defendants pleaded that there was no contract between the plaintiff and the defendants that the defendants should pay £100 in the event which happened; and that if there was such a contract it was void, either under 8 & 9 Vict. c. 109, as being a contract by way of wagering, or under 14 Geo. 3, c. 48, s. 2, as being a contract of insurance not made in accordance with the provisions of that section, or as being contrary to public policy. The action came on for trial before Hawkins, J., and a jury; but the facts not being in dispute, the learned judge reserved the case for further consideration on the points of law raised in the defence.

Asquith, Q.C. (Loehnis, with him), for the defendants. First, there was no contract between the parties. The advertisement was a mere representation of what the advertisers intended to do in a certain event. The defendants did not by issuing it mean to impose upon themselves any obligation enforceable by law. That this was so is shewn by the wide terms in which it is couched, for the reward is offered to anyone who contracts influenza “after having used the ball”; but they could not have meant to bind themselves to pay the money to persons who contracted the complaint years after they had ceased to use the ball. The case is not like the class of cases of which *Williams v. Carwardine* is the leading

example, in which an action has been held to lie for a reward offered by public advertisement for information leading to the discovery of crime, or to the recovery of lost property. In those cases the performance of the conditions upon which the reward becomes payable is wholly within the power of the person possessed of the information. Here the plaintiff could not by her own act entitle herself to the money, for the money would not become payable immediately upon her using the defendants' smoke ball, but only upon the happening of a further event over which she had no control, namely, her contracting the influenza.

Secondly, if there was a contract it was void, as being a contract by way of wagering, within the meaning of 8 & 9 Vict. c. 109. A wagering contract is one the liability to perform which depends on events beyond the control of the parties. This case is similar to *Brogden v. Marriott*, where an agreement by which the defendant sold the plaintiff a horse, on the terms that the price should be 200l. if within one month after the date of the agreement it trotted eighteen miles in an hour, but one shilling if it failed to do so, was held to be a wager, and void as such, under 9 Anne, c. 14. So, too, in *Rourke v. Short*, a contract for the sale and purchase of goods at a price to be regulated by ascertaining a past fact unknown to the parties at the time of the contract was held to be void as a wager. In *Taylor v. Smetten*, where the defendant sold at a fixed price packets containing a pound of tea and a coupon entitling the purchaser to a prize the amount of which was not determined till after the sale, it was held that the transaction was a gaming transaction, and an offence against the Lottery Act.

Thirdly, if there was a contract, and it was not a wagering contract, then it was a contract by way of insurance, and void under s. 2 of 14 Geo. 3, c. 48, which provides that, "It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons, name or names, interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote."

W. Graham, (*Murphy, Q.C.* and *Bonner*, with him), for the plaintiff. The transaction between the parties amounted to a contract of warranty of prevention of disease with liquidated damages in the event of breach. The advertisement which was issued by the defendants was an offer by them to enter into such a contract, which offer was accepted and converted into a contract upon any person performing the conditions of the advertisement. This view is in accordance with the judgments of Lord Campbell and Wightman, J., in *Denton v. Great Northern Ry. Co.*, who held that the statement by a railway company in their timetables of the times at which their trains would run, amounted to a contract with any person who came to the station and tendered the price of a ticket that the trains would run at the times stated. In *England v. Davidson*, where the defendant offered a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave such information, it was held that he was entitled to recover.

Upon the second point, the case of *Thacker v. Hardy* is conclusive in favour of the plaintiff that the contract in this case was not a wager. There Cotton L.J., says (at p. 695): "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature - that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." Here the plaintiff was to win £100 if she got the influenza, but the defendants were not to win anything if she did not. So in *Caminada v. Hulton*, where the publisher of a book containing information as to horse-races promised to pay a sum of money to any purchaser of the book who correctly prophesied the winning horses in certain future races, it was held that the promise was not a wager, there being no mutuality of gain and loss.

With regard to the contract being a policy of insurance, the cases go to shew that a contract to fall within the Act of Geo. 3 must be shaped in the form of a policy: *Morgan v. Pebrer*, *Cook v. Field*. Here the plaintiff was not merely to pay a premium as in the case of an ordinary policy, but was further to do something, namely, use the smoke ball.

Loehnis, in reply. It is stated in Smith's Leading Cases, 9th ed. vol. ii. p. 311, that the Act of Geo. 3 applies to such contracts "as are ordinarily, and in the common course of business, made by way of policy." That exactly covers the case of an insurance against accident such as this.

Cur. adv. vult.

HAWKINS J.

The facts not being in dispute, I was requested to hear the legal objections discussed on further consideration, and to enter the verdict and judgment as I thought right. I have done so, and I proceed now to deliver my judgment.

Four questions require consideration in determining this case.

1st. Was there a contract of any kind between the parties to this action?

2nd. Was such contract, if any, wholly or partly in writing so as to require a stamp?

3rd. Was the contract a wagering contract?

4th. Was it a contract of insurance affected by statute, 14 Geo. 3, c. 48, s. 2.

As regards the first question, I am of opinion that the offer or proposal in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the £100 upon the happening of the event mentioned in the proposal. It seems to me that the contract may be thus described. In consideration that the plaintiff would use the carbolic smoke ball three times daily for two weeks according to printed directions supplied with the ball, the defendants would pay to her £100 if after having so used the ball she contracted the epidemic known as influenza.

The advertisement inserted in the *Pall Mall Gazette* in large type was undoubtedly so inserted in the hope that it would be read by all who read that journal, and the announcement that 1000l. had been deposited with the Alliance Bank could only have been inserted with the object of leading those who read it to believe that the defendants were serious in their proposal, and would fulfil their promise in the event mentioned; their own words, "*showing our sincerity* in the matter," state as much. It may be that, of the many readers of the advertisement, very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease, the defendants had any intention to fulfil their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it that, to those who shall not find it as surely efficacious as it is represented by him to be he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise.

I notice that in the present case the promise is of £100 *reward*; but the substance of the offer is to pay the named sum as compensation for the failure of the article to produce the guaranteed effect of the two weeks' daily use as directed. Such daily use was sufficient legal consideration to support the promise. In *Williams v. Carwardine* (1833) the defendant, on April 25, 1831, published a handbill, stating that whoever would give such information as should lead to the discovery of the murder of Walter Carwardine should, on conviction, receive a reward of £20. In August, 1831, the plaintiff gave information which led to the conviction of one Williams. The Court, consisting of Lord Denman, C.J., Littledale, Parke, and Patteson, JJ., held, that the plaintiff was entitled to recover the £20 upon the ground that the advertisement amounted to a general promise or contract to pay the offered reward to any person who performed the condition mentioned in it, namely, who gave the information. If authority was wanted to confirm the view I have taken, it is furnished by the case I have just cited.

This brings one to the second question, whether the advertisement, which is the only written or printed document affecting the contract, requires to be stamped as an agreement before it can be admitted in evidence. This depends upon the language of the Stamp Act, 1891 (54 & 55 Vict. c. 39), which requires "an agreement, or any memorandum of an agreement ... under hand only, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument," to be duly stamped.

Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any sense be treated as an agreement, nor could it be treated as a memorandum of an agreement, for there could be no memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document

amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement, unless, indeed, after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered: see *Edgar v. Black*; *Chaplin v. Clarke*; *Hudspeth v. Yarnold*; *Clay v. Crofts*. I think for the reasons I have given, supported as they are by authority, the advertisement does not require to be stamped.

The third question is whether the contract I have found to exist is a contract by way of gaming or wagering within the meaning of statute 8 & 9 Vict. c. 109, s. 18, which renders such contracts null and void, and, therefore, not enforceable by action. I think it is not. It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one: see *Grizewood v. Blane*; *Thacker v. Hardy*; *Blaxton v. Pye*. No better illustration can be given of a purely wagering contract than a bet on a horse-race. A. backs Tortoise with B. for £100 to win the Derby. B. lays ten to one against him - that is, 1,000 to 100. How the event will turn out is uncertain until the race is over. Until then, A. may win £1,000 or he may lose £100; B. may win £100 or he may lose £1,000; but each must be a winner or a loser on the event. Under the wager neither has any interest except in the money he may win or lose by it. True it is that one or both of the parties may have an interest in the property of the horse; but that interest is altogether apart from the bet, and each party is in agreement with the other as to the nature and intention of his engagement. If any one desires to read more upon the subject of wagers he will find the subject fully and clearly treated in Mr. Stutfield's able and learned book. One other matter ought to be mentioned, namely, that in construing a contract with a view to determining whether it is a wagering one or not, the Court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract. Such was the case in *Brogden v. Marriott*, in which under the guise of a contract for the sale by the defendant to the plaintiff of a horse at a price to depend on the event of a trial of its speed and staying power, there was concealed a mere bet of the defendant's horse to £200 that the horse within a month should trot eighteen miles within an hour. The defendant's horse having failed to accomplish the task set him, plaintiff claimed the horse at a nominal price of 1s. The nature of this contract was transparent to any person of ordinary intelligence, and the plaintiff in vain argued that it was a bonâ fide conditional bargain. The Court held it to be nothing more nor less than a mere wagering contract prohibited by the then unrepealed statute 9 Anne, c. 14. In that case the nature of the contract was very clearly to be inferred from the statement of it in the record. Of course, if in any case it is suggested that a contract good on the face of it was a mere device to elude the operation of the statute, the question would be one for a jury to solve: see also *Hill v. Fox*; *Grizewood v. Blane*.

In the present case an essential element of a wagering contract is absent. The event upon which the defendants promised to pay the £100 depended upon the plaintiff's contracting the epidemic influenza after using the ball; but, on the happening of that event, the plaintiff alone could derive benefit. On the other hand, if that event did not happen, the defendants could gain nothing, for there was no promise on the plaintiff's part to pay or do anything if the ball had the desired effect. When the contract first of

all came into existence (i.e., when the plaintiff had performed the consideration for the defendants' promise), in no event could the plaintiff lose anything, nor could the defendants win anything. At the trial it was not even suggested that any evidence could be offered to alter the character of the contract or the facts as deposed to by the plaintiff. I am clearly of opinion that, if those facts established a contract, as I think they did, it was not of a wagering character.

As to the objection that this contract (if any) was one of insurance, and invalid for non-compliance with the statute 14 Geo. 3, c. 48, s. 2, which enacts that "it shall not be lawful to make any policy or policies on the life or lives of any person, or other event or events, without inserting in such policy or policies the person or persons, name or names, interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote," it seems to me that the simple answer to that objection is that the section relates only to a policy which is a written document, and cannot apply to a contract like the present, which is created by a written proposal or offer accepted by the fulfilment by the plaintiff of the conditions attached to the offer. I do not feel it necessary to discuss the question whether the contract is one of insurance, which kind of contract Blackburn J., in *Wilson v. Jones*, thus describes: "A policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to." My present opinion is that it does not amount to such a contract, and certain I am that neither of the parties so intended it.

In the pleadings I find a further defence that the contract was contrary to public policy; but the learned counsel for the defendants was unable to point out to me any grounds for such a contention other than those I have already discussed.

It follows from what I have said that, in my opinion, the plaintiff is entitled to recover the £100. I therefore direct a verdict to be entered for the plaintiff for £100, and judgment accordingly with costs.

Carlill v. The Carbolic Smoke Ball Company [1893] 1 QB 256 (Court of Appeal)

Lindley, Bowen and A. L. Smith L.JJ.

1892 Dec. 6, 7.

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 the 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.

APPEAL from a decision of Hawkins J.

The defendants, who were the proprietors and vendors of a medical preparation called “The Carbolic Smoke Ball,” inserted in the *Pall Mall Gazette* of November 13, 1891, and in other newspapers, the following advertisement:

“£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.

“During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

“One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London.”

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

Finlay, Q.C., and T. Terrell , for the defendants. The facts shew that there was no binding contract between the parties. The case is not like *Williams v. Carwardine*, where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza - an event over which she had no control. The words express an intention, but do not amount to a promise: *Week v. Tibold*. The present case is similar to *Harris v. Nickerson*. The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Anyone who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be impossible to disprove it. *Guthing v. Lynn* supports the view that the terms are too vague to make a contract, there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: *Gerhard v. Bates*. The present case differs from *Denton v. Great Northern Ry. Co.*, for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the

offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*

The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109. Or, if not, it is bad under 14 Geo. 3, c. 48, s. 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

Dickens, Q.C., and *W. B. Alle*, for the plaintiff. [THE COURT intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public - as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in *Brogden v. Metropolitan Ry. Co.*, shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavouring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in *Spencer v. Harding*. *Williams v. Carwardine*. shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.* It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In *Gerhard v. Bates*, Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

Finlay, Q.C., in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay £100 to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*. The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In *Denton v. Great Northern Ry. Co.* the fact was ascertained by a public, not a secret act. The respondent relies on *Williams v. Carwardine*, and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of

persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honour, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: *Lampleigh v. Braithwait*; and here there was no request.

Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

LINDLEY L.J.

[The Lord Justice stated the facts, and proceeded:—] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £100 in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable —

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "£1,000 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 100l. 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.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. 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. That rests upon a string of authorities, the earliest of which is *Williams v. Carwardine*, which has been followed by many other decisions upon advertisements offering rewards.

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 apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required - which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden v. Metropolitan Ry. Co.* - if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, 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.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise - that the vagueness of the language shews that a legal promise was never intended or contemplated.

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. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100l. will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention - that is, the consideration. 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.

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.

We were pressed upon this point with the case of *Gerhard v. Bates*, which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's

judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him.

I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

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.

BOWEN L.J.

I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. The defendants contend next, 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 was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made - that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. 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. Then again it was said: "How long is this protection to endure? Is it to go on for ever, 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. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. 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. Was it intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says that £1,000 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.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world - that is, with everybody; and that you cannot contract with everybody. 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. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in *Spencer v. Harding*. "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. 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 act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in *Harris's Case*, and the very instructive judgment of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*, in which he appears to me to take exactly the line I have indicated.

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.

A further argument for the defendants was that this was a *nudum pactum* - that there was no consideration for the promise - that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors v. Davies* and Serjeant Manning's note to *Fisher v. Pyne*, which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's *Nisi Prius*, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp v. Bryant*, is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." 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.

Then we were pressed with *Gerhard v. Bates*. In *Gerhard v. Bates*, which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that

if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public - a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100l., it seems to me that her using the smoke ball was sufficient consideration.

I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise.

A. L. SMITH L.J.

The first point in this case is, whether the defendants' advertisement which appeared in the Pall Mall Gazette was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or as I might put it in the words of Lord Campbell in *Denton v. Great Northern Ry. Co.*, whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold. The ball will last a family several months, and can be refilled at a cost of 5s." If I may paraphrase it, it means this: "If you" - that is one of the public as yet not ascertained, but who, as Lindley and Bowen, L.J.J., have pointed out, will be ascertained by the performing the condition — "will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you £100 if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? 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, £1,000 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. The defendants have contended that it was a promise in honour or an agreement or a contract in honour - whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and *nudum pactum*; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honour is unless it is one on which an action cannot be brought because it is *nudum pactum*, and about *nudum pactum* I will say a word in a moment.

In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it 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.

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.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of *Williams v. Carwardine*, and before that, down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a *persona designata* and able to sue, when he performs the conditions mentioned in the advertisement.

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 this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

Representation

Solicitors: J. Banks Pittman; Field & Roscoe .

Appeal dismissed. (H. C. J.)

**Partridge v. Crittenden [1968] 1 WLR 1204
(Divisional Court of the Queen's Bench Division)**

Queen's Bench Division DC: Appeal by way of Case Stated

The appellant inserted an advertisement in a periodical, "Cage and Aviary Birds" for April 13, 1967, containing the words "Quality British A.B.C.R. ... bramblefinch cocks, bramblefinch hens ... 25s each," which appeared under the general heading "classified advertisements." In no place was there any direct use of the words "offers for sale." In answer to the advertisement, T. wrote, enclosing a cheque for 25s, and asked that a hen be sent to him. The hen arrived wearing a closed ring which could be removed without injury to the bird.

The appellant was charged with unlawfully offering for sale a bramblefinch hen contrary to section 6 (1) of the Protection of Birds Act, 1954. The justices were of the opinion that the hen, being a bird included in schedule 4 to the Act of 1954, was not a closed-ringed specimen bred in captivity because it was possible to remove the ring, convicted him.

Protection of Birds Act, 1954, s. 6 (1): "If, save as may be authorised by a licence granted under section 10 of this Act, any person sells, offers for sale or has in his possession for sale -- (a) any live wild bird, being a bird included in schedule 4 to this Act of a species which is resident in or visits the British Isles in wild state, other than a close-ringed specimen bred in captivity ... he shall be guilty of an offence against this Act."

On appeal, the appellant contending that his advertisement was merely an invitation to treat and not an offer for sale, and that the mere fact that it was possible to remove the ring from the bird's leg did not mean that it was not of a closed-ring specimen:-

Held, allowing the appeal, that while "close-ringed" in section 6 (1) (a) of the Act meant ringed by a complete ring which was not capable of being forced apart or broken except by damaging it, so that the bird in question was not a closed-ring specimen; the advertisement inserted by the appellant under the title "classified advertisements" was not an offer for sale but merely an invitation to treat; and that, accordingly, the appellant was not guilty of the offence charged.

ASHWORTH J.

This is an appeal by way of case stated from a decision of Chester justices. On July 19, 1967, they heard an information preferred by the prosecutor on behalf of the R.S.P.C.A. alleging against the appellant that he did unlawfully offer for sale a certain live wild bird, to wit a brambling, being a bird included in schedule 4 to the Protection of Birds Act, 1954, of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity, contrary to section 6, subsection (1) of the Act.

The case arose because in a periodical known as "Cage and Aviary Birds," the issue for April 13, 1967, there appeared an advertisement inserted by the appellant containing, inter alia, the words "Quality British A.B.C.R. ... bramblefinch cocks, bramblefinch hens, 25s each." In the case stated the full advertisement is not set out, but by the agreement of counsel this court has seen a copy of the issue in question, and what is perhaps to be noted in passing is that on the page there is a whole list of different birds under the general heading of "Classified Advertisements." In no place, so far as I can see, is there any direct use of the words "Offers for sale." I ought to say I am not for my part deciding that that would have the result of making this judgment any different, but at least it strengthens the case for the appellant that there is no such expression on the page. Having seen that advertisement, Mr. Thompson wrote to the appellant and asked for a hen and enclosed a cheque for 30s A hen, according to the case, was sent to him on May 1, 1967, which was wearing a closed-ring, and he received it on May 2. The box was opened by Mr. Thompson in the presence of the prosecutor, and the case finds that Mr. Thompson was able to remove the ring without injury to the bird, and even taking into account that the

bird had travelled from Leicester in a box on the railway, its condition was rough, it was extremely nervous, it had no perching sense at all and its plumage was rough.

Stopping there, the inference from that finding is that the justices were taking the view, or could take the view, that from its appearance, at any rate, this was not such a bird as a person can legitimately sell within the Act of 1954. The case goes on to find: "The expression 'close-ringed' is nowhere defined nor is there any universally recommended size ring for a bramble finch.

"(g) The ring is placed on the bird's leg at the age of three to 10 days at which time it is not possible to determine what the eventual girth of the bird's leg will be."

Having been referred to the decision of this court in *Fisher v. Bell* the justices nonetheless took the view that the advertisement did constitute an offer for sale; they went on further to find that the bird was not a close-ringed specimen bred in captivity, because it was possible to remove the ring. Before this court Mr. Pitchers for the appellant, has taken two points, first, this was not an offer for sale and, secondly, that the justices' reason for finding that it was not a close-ringed bird was plainly wrong because the fact that one could remove the ring did not render it a non-close-ringed bird.

It is convenient, perhaps, to deal with the question of the ring first. For my part I confess I was in ignorance, and in some state of confusion, as to the real meaning and effect of this particular phrase in the section, and I express my indebtedness to Mr. Havers, for the prosecutor, for having made the matter, as far as I am concerned, perfectly clear. I would say if one was looking for a definition of the phrase "close-ringed" it means ringed by a complete ring, which is not capable of being forced apart or broken except, of course, with the intention of damaging it. I contrast a closed-ring of that sort -- it might take the form, I suppose, of an elastic band or of a metal circle ring -- with the type of ring which sometimes exists which is made into a ring when a tongue is placed through a slot and then drawn back; that is a ring which can be undone and is not close-ringed. In this case what is contemplated, according to Mr. Havers, and I accept it, is that with a young bird of this sort between three and ten days after hatching a closed-ring of the type described is forced over its claws, which are obviously brought together so as to admit the passage of the ring, and it is then permanently on or around the bird's leg, and as it grows, it would be impossible to take that ring off because the claws and the like would have rendered a repetition of the earlier manoeuvre impossible.

Therefore, approaching the matter this way, I can well understand how the justices came to the conclusion that this was not a close-ringed specimen, because they could take the ring off. If that were the only issue, I should not find any difficulty in upholding their decision. But the real point of substance in this case arose from the words "offer for sale," and it is to be noted in section 6 of the Act of 1954 that the operative words are "any person sells, offers for sale or has in his possession for sale." For some reason which Mr. Havers for the prosecutor has not been able to explain, those responsible for the prosecution in this case chose, out of the trio of possible offences, the one which could not succeed. There was a sale here, in my view, because Mr. Thompson sent his cheque and the bird was sent in reply; and a completed sale. On the evidence there was also a plain case of the appellant having in possession for sale this particular bird. But they chose to prosecute him for offering for sale, and they relied on the advertisement.

A similar point arose before this court in 1960 dealing, it is true, with a different statute but with the same words, in *Fisher v. Bell*. The relevant words of section 1 (1) of the Restriction of Offensive Weapons Act, 1959, in that case were: "Any person who ... offers for sale. ... (a) any knife. ..." Lord Parker C.J., in giving judgment said:

"The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think that most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country."

The words are the same here "offer for sale," and in my judgment the law of the country is equally plain as it was in regard to articles in a shop window, namely that the insertion of an advertisement in the form adopted here under the title "Classified Advertisements" is simply an invitation to treat.

That is really sufficient to dispose of this case. I should perhaps in passing observe that the editors of the publication *Criminal Law Review* had an article dealing with *Fisher v. Bell* in which a way round that decision was at least contemplated, suggesting that while there might be one meaning of the phrase "offer for sale" in the law of contract, a criminal court might take a stricter view, particularly having in mind the purpose of the Act, in *Fisher v. Bell* the stocking of flick knives, and in this case the selling of wild birds. But for my part that is met entirely by the quotation which appears in Lord Parker's judgment in *Fisher v. Bell*, that "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation."

I would allow this appeal and quash the conviction.

BLAIN J.

I agree.

LORD PARKER C.J.

I agree and with less reluctance than in *Fisher v. Bell*, and *Mella v. Monahan* I say "with less reluctance" because I think 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 in *Grainger & Son v. Gough* Lord Herschell said 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."

It seems to me accordingly that not only is it the law but common sense supports it.

***Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 QB 401 (Court of Appeal, Criminal Division)**

The defendants' branch shop, consisting of a single room, was adapted to the "self-service" system. The room contained chemist's department, under the control of a registered pharmacist, in which various drugs and proprietary medicines included, or containing substances included, in Part I of the Poisons List compiled under section 17 (1) of the Pharmacy and Poisons Act, 1933, (but not in Sch. I to the Poisons Rules, 1949), were displayed on shelves in packages or other containers, with the price marked on each. A customer, on entering the shop, was provided with a wire basket, and having selected from the shelves the articles which he wished to buy, he put them in the basket and took them to the cashier's desk at one or other of the two exits, where the cashier stated the total price and received payment. That latter stage of every transaction involving the sale of a drug was supervised by the pharmacist in control of the department, who was authorized to prevent the removal of any drug from the premises.

In an action brought by the plaintiffs alleging an infringement by the defendants of section 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933, which requires the sale of poisons included in Part I of the Poisons List to be effected by or under the supervision of a registered pharmacist, it was held that the self-service system did not amount to an offer by the defendants to sell, but merely to an invitation to the customer to offer to buy; that such an offer was accepted at the cashier's desk under the supervision of the registered pharmacist; and that there was therefore no infringement of the section.

SOMERVELL L.J.

This is an appeal from a decision of the Lord Chief Justice on an agreed statement of facts, raising a question under section 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933. The plaintiffs are the Pharmaceutical Society, incorporated by Royal charter. One of their duties is to take all reasonable steps to enforce the provisions of the Act. The provision in question is contained in section 18. [His Lordship read the section and stated the facts, and continued:] It is not disputed that in a chemist's shop where this self-service system does not prevail a customer may go in and ask a young woman assistant, who will not herself be a registered pharmacist, for one of these articles on the list, and the transaction may be completed and the article paid for, although the registered pharmacist, who will no doubt be on the premises, will not know anything himself of the transaction, unless the assistant serving the customer, or the customer, requires to put a question to him. It is right that I should emphasize, as did the Lord Chief Justice, that these are not dangerous drugs. They are substances which contain very small proportions of poison, and I imagine that many of them are the type of drug which has a warning as to what doses are to be taken. They are drugs which can be obtained, under the law, without a doctor's prescription.

The point taken by the plaintiffs is this: it is said that the purchase is complete if and when a customer going round the shelves takes an article and puts it in the receptacle which he or she is carrying, and that therefore, if that is right, when the customer comes to the pay desk, having completed the tour of the premises, the registered pharmacist, if so minded, has no power to say: "This drug ought not to be sold to this customer." Whether and in what circumstances he would have that power we need not inquire, but one can, of course, see that there is a difference if supervision can only be exercised at a time when the contract is completed.

I agree with the Lord Chief Justice in everything that he said, but I will put the matter shortly in my own words. Whether the view contended for by the plaintiffs is a right view depends on what are the legal implications of this layout - the invitation to the customer. Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organized way of doing what is done already in many types of shops - and a bookseller is perhaps the best example - namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying "I want this"? The assistant in 999 times out of 1,000 says "That is all right," and the money passes and the transaction is completed. I agree with what the Lord Chief Justice has said, and with the reasons

which he has given for his conclusion, 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. I can see no reason at all, that being clearly the normal position, for drawing any different implication as a result of this layout.

The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the plaintiffs' contention when he pointed out that, if the plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred. I can see no reason for implying from this self-service arrangement any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that there was supervision in the sense required by the Act and at the appropriate moment of time.

For these reasons, in my opinion, the appeal should be dismissed.

BIRKETT L.J.

I am of the same opinion. The facts are clearly stated in the agreed statement of facts, and the argument on them has been very clearly stated by Mr. Lloyd-Jones. I think that clearest of all was the judgment of the Lord Chief Justice, with which I agree. In view of an observation which I made during the argument, I should like to add that under section 25 of the Pharmacy and Poisons Act, 1933, it is the duty of the Pharmaceutical Society of Great Britain, by means of inspection and otherwise, "to take all reasonable steps to enforce the provisions of Part I of this Act" - that really deals with the status of the registered pharmacist - "and to secure compliance by registered pharmacists and authorized sellers of poisons with the provisions of Part II of this Act." This action has been brought by the Pharmaceutical Society in pursuance of that duty which is laid upon them by statute, and the short point of the case is, at what point of time did the sale in this particular shop at Edgware take place? My Lord has explained the system which had been introduced into that shop in March of 1951. The two women customers in this case each took a particular package containing poison from the particular shelf, put it into her basket, came to the exit and there paid. It is said, on the one hand, that when the customer takes the package from the poison section and puts it into her basket the sale there and then takes place. On the other hand, it is said the sale does not take place until that customer, who has placed that package in the basket, comes to the exit.

The Lord Chief Justice dealt with the matter in this way, and I would like to adopt his words [FN5]: "It seems to me, therefore, that the transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer.'" Then he went on to deal with the illustration of the bookshop, and continued: "Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price. The offer, the acceptance of the price, and therefore the sale take place under the supervision of the pharmacist. That is sufficient to satisfy the requirements of the section, for by using the words 'the sale is effected by, or under the supervision of, a registered pharmacist' the Act envisages that the sale may be effected by someone not a pharmacist. I think, too, that the sale is effected under his supervision if he is in a position to say 'You must not have that: that contains poison,' so that in any case, even if I were wrong in the view that I have taken on the question as to when the sale was completed, and it was completed when the customer took the article from the shelf, it would still be effected under the supervision of the pharmacist within the meaning of section 18." I agree with that, and I agree that this appeal ought to be dismissed.

ROMER L.J.

I also agree. The Lord Chief Justice observed that, on the footing of the plaintiff society's contention, if a person picked up an article, once having picked it up, he would never be able to put it back and say that he had changed his mind. The shopkeeper would say: "No, the property has passed and you will have to pay." If that were the position in this and similar shops, and that position was known to the general public, I should imagine that the popularity of those shops would wane a good deal. In fact, I am satisfied that that is not the position, and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I quite agree with the reasons on which the Lord Chief Justice arrived at that conclusion and which Birkett L.J. has just referred to, and to those observations I can add nothing of my own. I agree that the appeal fails.