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OFFER AND ACCEPTANCE

Topics covered

- Requirements of a valid offer
- Recognising an offer
- Termination of an offer
- Requirements of a valid acceptance
- Communication of acceptance – general rules
- Communication of acceptance – exceptions

Summary

A contract is based on the agreement or mutual consent of the parties involved. This chapter examines both the offer and the acceptance which lead to binding agreement.

1. The first essential of a valid contract is the agreement or mutual assent of the parties involved. In the event of a dispute about such agreement, the courts seek to discover whether there was *consensus ad idem* (agreement as to the essential point), i.e. whether the words and conduct of the parties are sufficient to lead a reasonable person to assume that they had reached agreement with respect to the same subject matter. The court may examine the negotiations surrounding the transactions to see if there was a definite ‘offer’ made by one party which was clearly accepted without qualification by the other party.

• Requirements of a valid offer

2. An offer exists where the offeror undertakes to be contractually bound if the offeree makes a proper acceptance. It is a definite promise to be bound on certain specific terms. The essentials of a valid offer are as follows:

- (a) *The terms of an offer must be clear, certain and complete.* It cannot be vague. Otherwise, the court may hold that there was a failure to make a complete agreement.

Case: Gunthing v. Lynn (1831)

The offeror promised to pay a further sum for a horse if it was ‘lucky’.

Held: The offer was too vague. The court was unable to give effect to the alleged agreement, because no clear meaning could be determined.

- (b) *The offer must be communicated to the other party.* An offer can be communicated to a particular person, a group of persons or to the public at large. It can be accepted by anybody who comes within the terms of the offer.

Case: Carlill v. Carbolic Smoke Ball Co. (1893)

The defendants undertook, in various advertisements, to pay £100 reward to anyone who caught influenza after having sniffed a smoke ball three times daily for two weeks. The plaintiff used the smoke ball as prescribed, and caught influenza after more than two weeks' treatment, and while still using the smoke ball. She then claimed her £100 reward.

Held: It was an offer to the public at large which the plaintiff could accept, and had accepted, by performance of the conditions in the offer. While an advertisement in a newspaper is not normally an offer but an invitation to treat (see para. 6), in this case, a sum of money was lodged in the bank by the company as a sign of their good faith, thereby providing consideration to support the offer.

- (c) *The offer must be made by written or spoken words, or be inferred by the conduct of the parties.* It may be communicated by letter, telephone, telex or any means of communication which is appropriate and reasonable in the circumstances.
- (d) *The offer must be intended as such before a contract can arise.* If it is not made with a view to a legal relationship, e.g. if the offer excludes recourse to the courts for its enforcement, then it will not constitute an offer.

- **Recognising an offer**

3. Only an offer in the proper sense, i.e. made with the intention that it shall become binding when accepted, may be recognised so as to form a binding contract. An offer must be distinguished from the following, which are not offers:

- (a) the answer to a question or the supplying of information;
- (b) an invitation to treat;
- (c) a statement of intention;
- (d) an option.

The answer to a question or the supplying of information

4. An offer must not be confused with the answer to a question or the supplying of information.

Case: Harvey v. Facey (1893)

The plaintiff telegraphed to the defendant 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'. The defendant telegraphed in reply 'Lowest price for Bumper Hall Pen £900'. The plaintiff regarded this as an offer and telegraphed 'We agree to buy Bumper Hall Pen for £900 asked by you'. The defendant made no further reply.

Held: No contract had been made. The second telegram was merely a statement of the price which the defendant would sell for, if and when he chose

to sell his property. It was not an offer which the plaintiff could accept, but the supply of information in response to a question.

5. If, however, in the course of negotiations for a sale, the seller states the price at which the item will be sold, that statement may be an offer which can be accepted.

An invitation to treat

6. An invitation to treat is an invitation to another person to make an offer. An 'offer' can be converted into a contract by acceptance, provided the other requirements of a valid contract are present, but an 'invitation to treat' cannot be 'accepted'.

7. To advertise goods or to exhibit goods for sale in a shop window or on the open shelves of a self-service shop is to invite customers to make offers to purchase, or an 'invitation to treat'.

Case: Fisher v. Bell (1961)

A shopkeeper was prosecuted for 'offering for sale' offensive weapons by displaying flick-knives in his shop window.

Held: Although he had exhibited the flick-knives, accepted buyers' offers and sold the goods, he had not offered them for sale, because goods on display are not on offer for sale, but an invitation to treat.

Case: Minister for Industry and Commerce v. Pim Bros Ltd (1966)

A coat was displayed for sale in the defendants' shop window. It had a notice of the cash price and a weekly sum attached to it. The minister brought an action against Pim Bros Ltd on the grounds that they were in breach of the then legislation which made it an offence to offer for sale goods on credit terms without specifically stating these terms.

Held: This did not constitute an offer to sell which could be made a contract of sale by acceptance. It was simply an invitation to treat for the sale of the article with an indication that credit facilities were available.

Case: Pharmaceutical Society of Great Britain v. Boots Chemists (1952)

By statute, certain drugs containing poisons could only be sold 'under the supervision of a qualified pharmacist'. Boots operated a self-service shop, with the drugs displayed on open shelves and with a qualified pharmacist located at the check-out. The Pharmaceutical Society brought an action against Boots Chemists for being in breach of their supervisory requirements.

Held: The display of goods was only an invitation to treat – the selection and presentation of the goods by the customer was the offer and the taking of money by the pharmacist at the cash desk was the acceptance. Therefore, Boots Chemists did not commit an offence, because the sale took place at the check-out.

8. The publication of a prospectus by a company in respect of the issue of shares is an invitation to the public to make offers. The company has only a limited number of shares and cannot intend to allot whatever number the public may apply for.

9. The advertisement of an auction, or the putting up of items for bids, is an invitation to treat and not an offer to sell to the highest bidder. The offers come from successive bidders, and the fall of the auctioneer's hammer is the acceptance. A bidder may retract the bid until this happens. However, if the auction is advertised as being 'without reserve', this constitutes a firm offer to sell to the highest bidder.

10. A tender is an estimate submitted in response to a prior request. An invitation for tenders to supply goods or services is not an offer but an invitation to others to make offers. The tenders made, however, are normally recognised as legal offers which may lead to a binding contract if accepted. A tender must be accepted as tendered or there may be no agreement.

A statement of intention

11. If a person states that they intend to perform some act, and ultimately they do not carry out the stated intention, no rights may be conveyed on another party who may suffer loss due to non-performance. For example, were a father to state that one of his sons or daughters would be a beneficiary of his estate, this alone would not confer any contractual rights on the respective party.

An option

12. An option is the right to buy or sell something at a specified price. It is, in effect, a conditional contract. The person who is offered the option is not bound to take it up, i.e. they can fail to exercise their option. The person offering the option, however, is legally bound by it in the event of the option being exercised.

• **Termination of an offer**

13. There must be some duration for which an offer or counter-offer stands and is open to acceptance by the offeree leading to a contract. This duration must be at least long enough to give the offeree an opportunity to reply to the offer. An offer, however, does not continue indefinitely and can be terminated without maturing into a contract in any of the following circumstances:

- (a) if the offeror has revoked (withdrawn) it;
- (b) if it has expired by lapse of time;
- (c) if the offeree has rejected it or made a counter-offer;
- (d) if there is a failure of an express or implied condition;
- (e) if the offeree or offeror dies.

Revocation

14. The offeror may revoke (withdraw) the offer at any time before it has been accepted. This is true even when the offeror undertakes that the offer shall remain open for acceptance for a specified time, unless by a separate contract (an 'option') the offeror is given consideration in return for keeping the offer open for the whole of the specified time.

Case: Routledge v. Grant (1828)

The defendant, in an offer to buy the plaintiff's house, laid down a requirement of his offer being accepted within six weeks. Within that period, he withdrew his offer.

Held: The offeror was entitled to revoke his offer at any time prior to acceptance because no option agreement existed.

15. Revocation of an offer is only effective if it is communicated to the offeree, either by the offeror or by any third party who is a sufficiently reliable informant.

Case: Dickinson v. Dodds (1876)

The defendant offered by letter to sell property to the plaintiff for £800, saying that 'this offer to be left open until Friday, 12 June, 9.00 a.m.' On Thursday, 11 June, the plaintiff delivered a letter of acceptance to an address at which the defendant was no longer residing so that the defendant did not receive it. The defendant sold the property on Thursday, 11 June, to another buyer. A Mr Berry, who had been an intermediary between the plaintiff and the defendant, informed the plaintiff of this sale. Mr Berry, nevertheless, delivered a duplicate of the plaintiff's letter of acceptance to the defendant at 7.00 a.m. on Friday, 12 June.

Held: There was no contract, the offer having been revoked before acceptance and communication by a third party being valid. An offer to sell a particular item is revoked by implication, therefore, if the item is sold to another person.

16. Revocation communicated by post only takes effect from the time of receipt and not from the time of posting.

Case: Byrne v. Van Tienhoven (1880)

The defendant, who resided in Cardiff, offered by letter dated 1 October to sell goods to the plaintiff, who resided in New York. On 8 October, the defendant wrote to the plaintiff revoking his offer. The plaintiff received the letter of offer on 11 October and telegraphed his acceptance of the offer. He confirmed this acceptance by letter dated 15 October. The letter of revocation was received by the plaintiff on 20 October.

Held: The letter of revocation had no effect until received; it could not revoke the contract made by acceptance of the offer on 11 October.

Lapse of time

17. An offer will terminate at the end of the time specified in the offer, or if no time-limit is specified, it will terminate after a reasonable time. What is reasonable depends on the nature of the contract and the circumstances of a particular case (on what is usual and to be expected).

Case: Walker v. Glass (1979)

The defendant offered to sell his house to the plaintiff, the offer to remain open until a specified date. The defendant wrote to the plaintiff before that date revoking the offer.

Held: The defendant was free to revoke his offer at any time before acceptance by the plaintiff.

Case: Ramsgate Victoria Hotel Co. v. Montefiore (1866)

The defendant offered in June 1864 to take shares in the plaintiff's hotel, and paid a deposit to the company's bank. The plaintiff did not reply, but in November 1864 the company sent him an acceptance by issue of a letter of allotment. The defendant refused to take the allotted shares and to pay the balance due on them, contending that his offer had expired and could no longer be accepted.

Held: The defendant's offer was for a reasonable time only. The courts considered that five months was much more than that. The refusal to take the shares was justified, therefore, since the plaintiff's delay had caused the defendant's offer to lapse.

Rejection of the offer or a counter-offer

18. An offer may be terminated if outright rejection is communicated to the offeror or if a counter-offer is made by the offeree. An attempt to accept an offer on terms, other than those contained in the offer, is a rejection accompanied by a counter-offer. A rejected offer cannot subsequently be accepted.

Case: Butler Machine Tool Co. v. Ex-Cell-O Corp. (1979)

The plaintiff, on request, sent a standard form offering to sell a machine to the defendant at a specified price, subject to a price variation clause to take account of inflation should there be a delay. The defendant placed an order for the machine on its own standard form, which excluded any price variation clause. When the machine was delivered, the defendant refused to pay an extra sum based on the price variation clause, and the plaintiff sued for payment of the full amount.

Held: The sending of the second standard form by the defendant represented a rejection of the original offer and the making of a counter-offer, which the plaintiff had accepted by delivering the machine. The price variation clause, therefore, was not a term of the contract between the parties.

Case: Hyde v. Wrench (1840)

The defendant offered to sell his farm to the plaintiff for £1,000. The plaintiff made a counter-offer in writing of £950, which the defendant rejected. The plaintiff then wrote accepting the original offer of £1,000. The defendant refused to sell, and the plaintiff sued for breach of contract.

Held: The counter-offer of £950 terminated the original offer of £1,000. Therefore, when the plaintiff purported to accept at £1,000, there was no offer in existence to be accepted, and no contract could be formed.

19. A request as to whether or not additional terms would be acceptable does not constitute a counter-offer and, therefore, does not, by itself, terminate an offer.

Case: Stevenson v. McLean (1880)

The defendant offered to sell iron to the plaintiff at £2 per ton cash. The plaintiff wrote and asked whether the defendant would agree to a contract providing for credit facilities. On receiving no reply, the plaintiff accepted the offer as made.

Held: There was a contract, since the enquiry was not a counter-offer but a request for information as to a variation of terms. It was not a rejection, and did not terminate the defendant's offer.

Failure of an express or implied condition

20. An offer cannot be validly accepted if it is made subject to an express or implied condition, and this condition fails.

Case: Financings Ltd v. Stimson (1962)

The defendant, who wished to purchase a car, signed a hire-purchase form on 16 March. The form stated that the agreement would only become binding when the plaintiffs signed the form. The car was stolen from the plaintiffs' premises on 24 March, and was recovered badly damaged. The plaintiffs signed the form on 25 March.

Held: The defendant was not bound contractually to take the car. There was an implied condition in the defendant's offer that the car would remain in the same condition until the moment of acceptance. The condition had failed.

Death of the offeree or offeror

21. Death of the offeree probably terminates an offer, because an acceptance can only be made by an offeree or an authorised agent.

22. Death of the offeror terminates the offer unless the offeree accepts it in ignorance of the offeror's death, and the offer is not of a personal nature requiring the skills of the deceased, e.g. singing in a concert. If the offer, therefore, can be completed equally well by the deceased's personal representatives, then they will probably be obliged to fulfil it upon acceptance by the offeree.

• Requirements of a valid acceptance

23. An acceptance takes place when an offeree unqualifiedly accepts an offer made by an offeror. In most cases there is little difficulty in deciding whether an offer is accepted. Where negotiations are complicated, however, the courts may be called upon to examine the correspondence and surrounding circumstances in order to establish whether, on a true construction, the parties agreed to the same terms.

The essentials of a valid acceptance are as follows:

- (a) *Acceptance may be oral, written or implied from conduct.* An example of acceptance being implied from conduct would be the dispatching of goods in response to an offer to buy.
- (b) *Acceptance must be clear and unqualified and must exactly match the offer.* A counter-offer or a conditional assent is insufficient and causes the original offer to lapse.

Case: Neale v. Merrett (1930)

The defendant made an offer to sell land to the plaintiff for £280. The plaintiff replied accepting the offer, enclosing £80 and promising to pay the balance in four monthly instalments.

Held: The proposal for deferred payment was a variation of the terms implicit in the offer. Since the normal terms of a contract for the sale of land are that the entire price is payable as a single sum at completion, it was held that there had been no acceptance.

- (c) *Acceptance must be communicated to and received by the offeror.* Otherwise, no enforceable agreement will exist between the parties.

• Communication of acceptance – general rules

24. Acceptance must be communicated by the offeree, or by someone with their authority, to the offeror.

Case: Powell v. Lee (1908)

The plaintiff applied for the post of headmaster of a school. After being interviewed, the management passed a resolution appointing him, but made no decision as to how the appointment was to be communicated. One of the managers, without authorisation, informed the plaintiff that he had been appointed. The management subsequently appointed another candidate. The plaintiff sued for breach of contract.

Held: Since acceptance had not been properly communicated to the plaintiff, there was no valid contract.

25. The offeror may expressly or impliedly stipulate the method of communicating acceptance, but unless the offeror states that this is the only

adequate method of acceptance, the offeree may accept by some other method, so long as the offeror suffers no disadvantage.

Case: Yates Building Co. v. R J Pulleyn & Sons (1975)

The defendants called for acceptance of their offer by registered or recorded delivery letter. The plaintiffs sent an ordinary letter containing their acceptance. This arrived without delay.

Held: The acceptance was valid, since the defendants had not stipulated that this was the only method of acceptance which sufficed. The method selected by the plaintiff was equally advantageous to the defendant.

26. There must be some act on the part of the offeree to indicate acceptance. The offeror cannot impose a condition, without the offeree's consent, that silence shall constitute acceptance.

Case: Felthouse v. Bindley (1862)

The plaintiff offered by letter to buy a horse stating that 'If I hear no more about him, I consider the horse is mine at £30 15s'. No acceptance was communicated, but the owner told the defendant, an auctioneer in whose possession the horse was at the time, not to sell the horse. When the horse was sold by mistake at auction to someone else, the plaintiff sued the defendant for conversion (a tort alleging wrongful disposal of the plaintiff's property).

Held: The offeror could not impose acceptance merely because the offeree had not rejected the offer. There had been no contract of sale and the plaintiff did not own the horse. Hence, the case for conversion failed.

27. Acceptance is not effective if communicated in ignorance of the offer. Acceptance may be effective, however, even though the offer was not the sole reason for it being made.

Case: R v. Clarke (1927)

The defendant offered a reward to anyone who found and returned his lost property. The plaintiff, not knowing about the offer, found the property and returned it of his own free will. He subsequently discovered the reward offer and sued to recover it.

Held: The plaintiff was not accepting the defendant's offer, since he was unaware of it. There was no contract and, therefore, there could be no contractual obligation to pay the reward.

Case: Williams v. Carwardine (1833)

The plaintiff, an accomplice in a crime, provided information which led to the arrest of criminals. She had been aware of the existence of a reward for the provision of such information, but was motivated primarily by remorse at her own part in the crime.

Held: A contract had been formed, even though the motive for acceptance was different than that contemplated by the offeror.

• **Communication of acceptance – exceptions**

28. Although as a general rule there cannot be a binding contract unless acceptance has been communicated to the offeror by the offeree, two exceptions to this general rule apply:

- (a) where performance of an act or the conduct of a person is deemed to constitute acceptance;
- (b) where acceptance is made by post, telegram or cable and such communication is lost or delayed.

Where performance or conduct constitutes acceptance

29. A 'unilateral contract' may be established whereby the offeror includes in the offer a term providing that complete performance or conduct by the offeree will constitute complete acceptance. There is no need to give advance notice of acceptance to the offeror.

Case: Kennedy v. London Express Newspapers (1931)

The publishers of an English newspaper offered a free accident insurance scheme to its registered readers. The plaintiff's wife had registered with a newsagent and on her being killed accidentally by a bus, her husband claimed the sum payable under the insurance scheme.

Held: The offer of the free insurance scheme represented a unilateral offer made to the world at large. Registration by the plaintiff's wife brought a valid contract into existence, and the publishers were legally bound by it.

Acceptance by letter or telegram

30. Whereas an offer only takes effect if and when received, an acceptance by letter takes effect when posted and an acceptance by telegram takes effect when given to the post office for transmission. Acceptance by telephone or telex follows the normal rule and is effective from the time received.

Case: Household Fire Insurance Co. v. Grant (1879)

The defendant applied for shares in the plaintiff company and enclosed a deposit for those shares. The company accepted his offer by posting a letter of allotment, which never arrived, to the defendant. The company later went into liquidation and the liquidator called upon the defendant to pay the balance due on the shares.

Held: The subscriber for shares was bound by an acceptance in a letter of allotment although the letter was never delivered.

31. S.19 of the Electronic Commerce Act 2000 provides that acceptance of an offer or any related communication (including any subsequent amendment,

cancellation, revocation or acceptance of an offer) may, unless otherwise agreed by the parties, be communicated by means of electronic communication.

IMPORTANT CASES

Numbers in brackets refer to paragraphs of this chapter

Gunthing v. Lynn (1831)	(2)
Carlill v. Carbolic Smoke Ball Co. (1893)	(2)
Harvey v. Facey (1893)	(4)
Fisher v. Bell (1961)	(7)
Minister for Industry and Commerce v. Pim Bros Ltd (1966)	(7)
Pharmaceutical Society of Great Britain v. Boots Chemists (1952)	(7)
Routledge v. Grant (1828)	(14)
Dickinson v. Dodds (1876)	(15)
Byrne v. Van Tienhoven (1880)	(16)
Walker v. Glass (1979)	(17)
Ramsgate Victoria Hotel Co. v. Montefiore (1866)	(17)
Butler Machine Tool Co. v. Ex-Cell-O Corp. (1979)	(18)
Hyde v. Wrench (1840)	(18)
Stevenson v. McLean (1880)	(19)
Financings Ltd v. Stimson (1962)	(20)
Neale v. Merrett (1930)	(23)
Powell v. Lee (1908)	(24)
Yates Building Co. v. R J Pulleyn & Sons (1975)	(25)
Felthouse v. Bindley (1862)	(26)
R v. Clarke (1927)	(27)
Williams v. Carwardine (1833)	(27)
Kennedy v. London Express Newspapers (1931)	(29)
Household Fire Insurance Co. v. Grant (1879)	(30)

IMPORTANT STATUTES

Electronic Commerce Act 2000

PROGRESS TEST

Numbers in brackets refer to paragraphs of this chapter

1. Identify the essentials of a valid offer. (2)
2. Is (a) a statement of the prices of goods, or (b) a display of goods, an offer which becomes a contract if accepted? (4, 7)

3. List five methods by which an offer may be terminated. (13)
4. When will lapse of time terminate an offer? (17)
5. Outline the essentials of a valid acceptance. (23)
6. What effect does the stipulation by the offeror of the method of communicating acceptance have? (25)
7. Is acceptance effective if communicated in ignorance of an offer? (27)
8. Explain the significance of (a) unilateral contracts, and (b) the postal rule. (29–30)