Introduction

It has already been stated that there must be an intention to enter into a binding agreement, and that this intention is usually established by some outward objective indication of the existence of an agreement, rather than a subjective assessment of the actual intentions of the parties. On a practical level, however, the question arises as to what evidence of objective intention the law requires in deciding whether or not an agreement has been entered into.

Two very different approaches have been used to assess the presence of an agreement. The first is a liberal laissez-faire approach under which virtually anything at all could potentially be used in assessing the presence of an agreement. Such an approach almost invariably results in a subjective assessment of the parties’ actions taking place and has the disadvantage of rendering the law uncertain and unpredictable. This approach found favour with Lord Denning who, in Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 All ER 965, stated:

In many cases our traditional analysis of offer, counter offer, rejection, acceptance and so forth is out of date .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.

Similarly, in Gibson v Manchester City Council [1979] 1 All ER 972, he also stated that one ought 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.

In both these cases Lord Denning’s approach was rejected in favour of the second, more traditional, approach which is to find the objective intention of the parties to enter into an agreement by reducing the agreement in terms of offers, counter-offers, acceptances, revocations and rejections. This method of finding whether an agreement has come into existence or not provides a more predictable, certain and objective means of assessment, though one that is artificial. One should always bear in mind that this process of breaking an agreement down into smaller, more manageable units is simply an evidential device and in difficult cases where this process of analysis is not possible the courts may well adopt Lord Denning’s approach. Lord Diplock in the Gibson case certainly considered it
was a legitimate method of analysing a set of circumstances ‘which do not fit easily into the normal analysis of offer and acceptance’. This legitimacy of Lord Denning’s approach has since been affirmed in the following case.

G Percy Trentham Ltd v Archital Luxfer [1993] 1 Lloyd’s Rep 25

The facts of the case were that the plaintiffs (Trentham) were engaged by Municipal Mutual Insurance as main contractors to design and build industrial units in two phases. Trentham employed Archital to design, supply and install the doors and window frames for the development. This work was eventually completed and, indeed, paid for by Trentham. The subcontracts were thus fully executed. Subsequently claims were made against Trentham by Municipal Mutual under the main contract for alleged delays and defects in carrying out the work. In order to obtain an indemnity against the damages that it had to pay out Trentham began proceedings against several subcontractors, including Archital, alleging defects in the window works in both of the phases. In their defence Archital denied that any binding contracts had come into existence between themselves and Trentham. It was common ground in the dispute that no integrated written subcontracts had come into existence; instead there had been a series of exchanges of letters and telephone conversations but no corresponding offer and acceptance. The picture presented, then, was of two parties jockeying for position in a scenario very similar to a ‘battle of forms’ type of situation (see p. 33 below) where the parties both attempt to impose their own terms and conditions on a contract by the use of offers and counter-offers. The case is unusual in that the issue is not one concerning whose standard terms and conditions predominate, but whether any contract at all has come into existence out of the exchange of correspondence. At first instance the judge held that a contract had been formed when the defendant carried out the work, basing his decision on Brogdan v Metropolitan Railway Co. (1877) 2 App Cas 666 (see p. 29 below). In other words, the plaintiff had made an offer which the defendants had accepted by conduct in carrying out the work. Archital appealed from this decision.

In the Court of Appeal the only judgment was given by Steyn LJ, the two other members concurring. Steyn LJ agreed with the judge at first instance that there was a contract in existence. In arriving at this decision Steyn LJ considered that there were four matters which were of importance to the case. First, English law generally adopts an objective test to the issue of contract formation. As we have already seen, the law generally ignores a subjective assessment of the ‘expectations and unexpressed mental reservations of the parties’. He stated that the governing criterion was ‘the reasonable expectations of honest men’, which he translated in the present case as the ‘reasonable expectations of sensible businessmen’. Second, while in the vast majority of cases the presence of offer and acceptance will be the means of deciding the matter of contract formation, ‘it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance’, citing Brogdan v Metropolitan Railway Co. (1877) 2 App Cas 666; New Zealand Shipping Co. Ltd v A M Satterthwaite & Co. Ltd [1974] 1 Lloyd’s Rep 534 at 539; [1975] AC 154 at 167; Gibson v Manchester City Council [1979] 1 All ER 972, as supporting this proposition. Third, he stated that the fact that the contract in the case was executed (i.e. performance of the contract was completed) rather than executory was important since the fact that the transaction has been performed by both parties will make it very difficult for an argument to be sustained that there was no intention to create legal relations or that the contract is void for uncertainty. Indeed, on the specific matter of uncertainty Steyn LJ considered that the fact that the contract was executed ‘makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential’. Fourth, Steyn LJ stated that ‘if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively
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covers pre-contractual performance’ as indicated in *Trollope and Colls Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035.

On the basis of these points Steyn LJ concurred with the decision at first instance that there was sufficient evidence to conclude that there was a binding contract; the parties had clearly intended to create a legal relationship between each other. In arriving at this position Steyn LJ stated that ‘one must not lose sight of the commercial nature of the transaction’, that is one party carrying out work for which he expected to be paid, and this is what had occurred. There was no suggestion that there was a continuing stipulation that a contract would only be created if a written agreement was concluded. Thus Steyn LJ adopted an approach that was very similar to Lord Denning’s in that he looked at the overall effect of what had been said and done by the parties, although he did not refer to Lord Denning’s approach. He stated:

The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trentham’s side created a right to performance of the work by Archital, and on Archital’s side it created a right to be paid on an agreed basis. . . . The Judge [at first instance] analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that 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.

Does this decision suggest an abandonment of offer and acceptance as central pillars in the formation of contracts? The answer to the question is clearly in the negative, since Steyn himself states that ‘the coincidence of offer and acceptance will, in the vast majority of cases, represent the mechanism of contract formation’. What the decision does is to broaden the opportunity to find for a contract by examining the ‘commercial reality’ of the situation coupled with evidence of the parties’ intentions and to this extent a level of uncertainty may have been created as to when a contract has actually been formed.

Despite the decision of Steyn it should be borne in mind that the judge at first instance was able to find for a contract on the basis of offer and acceptance, that is by adopting the classical approach. More often than not, therefore, the courts will continue to go to great lengths to analyse the facts in terms of the classical approach.

As Lord Wilberforce stated in *New Zealand Shipping Co. Ltd v A M Satterthwaite and Co. Ltd* [1975] AC 154:

English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

While one must always bear in mind Lord Denning’s approach, the classical analysis is far more important and has to be considered in a great deal more depth. The basic proposition of the classical analysis may be summed up as:

\[
\text{offer} + \text{acceptance} = \text{agreement}
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**Offer**

**The nature of an offer**

An offer is an expression of a willingness to contract on certain terms made with the intention that a binding agreement will exist once the offer is accepted.
The task of a plaintiff seeking to enforce a contract is to prove the existence of an offer. An offer may be made either orally or in writing, or implied by the conduct of the person making the offer, namely, the offeror. Furthermore, the offer may be made to a specific person or group of persons or to the world at large. In the now famous case of *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256, it was argued that it was not possible to make an offer to the world at large.

**Carlill v Carbolic Smoke Ball Co. [1893] 1 QB 256**

In this case the plaintiff bought a medical preparation called 'The Carbolic Smoke Ball' on the basis that the defendants advertised that they would pay £100 to any person who contracted influenza after using the smoke ball in the prescribed manner and for a specified period. Further, the defendants stated that 'to show their sincerity' they had deposited £1,000 with the Alliance Bank. The plaintiff bought one of the smoke balls and used it in the manner prescribed and promptly caught influenza! She sued for the £100. The defendants contended that there was no agreement between them and used considerable ingenuity in promoting this contention. One of the defences used was that it was not possible to make an offer to the whole world since this would enable the whole world to accept the offer, which was clearly beyond the realms of commercial reality. The Court of Appeal had no difficulty in rejecting this defence. Bowen LJ stated the position very clearly as follows:

> It was also said that the contract is made with the whole 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? . . . 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.

The defendants also contended that the plaintiff had not accepted their offer and therefore there was no *consensus ad idem* and thus no agreement. This defence, which was rejected, exposes the fact that offers may arise in two forms, either bilateral or unilateral. A bilateral offer arises where one party promises to do something in return for a promise made by the offeree. Both parties are agreeing to do something in return for some reciprocal promise from the other. An example of such an offer would be if A promises to sell their car in return for B promising to pay £5,000. The vast majority of offers are of this type.

A unilateral offer occurs where one party, the offeror, promises to pay for the act of another, that is, a conditional promise. The acceptance of the offer takes place when the offeree performs the act in question. The offer here is said to be unilateral because only one party is making a promise. The facts of the *Carlill* case provide an obvious example of such an offer but a modern example of the principle can be seen in the case of *O'Brien v MGN Ltd* [2001] EWCA Civ 1279. The facts of the case were the claimant purchased a Sunday newspaper that contained a ‘scratchcard’ game that related to a competition being held during the following week in the *Daily Mirror*. The claimant’s card revealed two ‘windows’ displaying £50,000 in each. The next week the claimant bought a copy of the *Daily Mirror* and in accordance with the ‘rules’ rang the ‘hotline’ and was told that the prize for that day was £50,000, and the claimant then believed he had won that amount. The court considered that the advertisement in the *Daily Mirror* constituted an offer which was accepted when those with a winning scratchcard rang up to claim their prize.
Two further features of offers to be noted are that the terms of an offer must be clear and that the offer is made with the intention that it should be binding. In connection with the latter requirement, a further defence propounded in the *Carlill* case was that the advertisement was a ‘mere puff’ and not intended to form the basis of a binding agreement. Such ‘puffs’ are very much part of commercial life today, particularly in the advertising industry. Clearly statements that allude to certain soap powders ‘washing whiter than white’ or certain types of beers working untold miracles are not intended to be taken seriously but to ‘puff up’ the propensities of the product to induce the all-suffering public to buy. In the *Carlill* case the allegation that the offer was a ‘mere puff’ was rejected on the basis that the advertisement also stated that the defendants had deposited £1,000 with the Alliance Bank ‘to show their sincerity’. It was clear in this case that this fact indicated that they intended the promise to form the basis of a legal relationship.

So far everything presented is fairly straightforward, but unfortunately the situation is not so simple. There are many types of statement which, on the face of things, appear to be offers but in fact do not so comprise.

### Offers compared with other types of transaction

#### Offers distinguished from invitations to treat

It has been seen that, according to one definition, an offer is an expression of a willingness to be bound by the terms of the offer should the offer be accepted. Clearly the implication here is that the statement of offer is the final statement of an individual who wishes to be bound by those terms; it is a person’s final declaration of their readiness to be bound. It follows that if an individual is not willing to implement the terms of their promise but is merely seeking to initiate negotiations then this cannot amount to an offer, such statements being termed ‘invitations to treat’.

The distinction between an offer and an invitation to treat is not an easy one to make since it very often revolves around that elusive concept of intention. It may be that a statement amounts to an invitation to treat even though the statement is said to make an ‘offer’ and vice versa. The easiest way of making the distinction is by analysing how the law deals with the problem within certain stereotypical transactions, bearing in mind that the courts will look at the surrounding circumstances and the intention of the parties and will not necessarily have regard to the actual wording of the statement.

1. Advertisements and other notices

It has already been seen that the advertisement in the *Carlill* case amounted to an offer, though a unilateral one. In the words of Bowen LJ:

> 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.

The decision in the *Carlill* case that the advertisement was an offer is peculiar to a situation where the statement is a conditional promise, a unilateral offer. A similar situation would result if an individual placed an advertisement offering a reward to the finder of a lost wallet. In such a case there is clearly a conditional promise and the advertisement would amount to an offer.
Most advertisements do not fall into this category and hence they are held not to be offers but statements inviting further negotiations or invitations to treat. An example of such a situation can be seen in the case of *Partridge v Crittenden* [1968] 2 All ER 421, where the appellants placed an advertisement in a periodical for bird fanciers stating, ‘Bramblefinch cocks and hens 25s’. They were charged under the Protection of Birds Act 1954, s 6(1), in that they were unlawfully ‘offering for sale’ a certain live bird, a Bramblefinch, contrary to the provisions of the Act. At first instance the appellants were convicted but on appeal the conviction was quashed by the Divisional Court.

This decision affirms the much earlier decision of *Harris v Nickerson* (1873) LR 8 QB 286, where an auctioneer advertised that certain goods would be sold at a certain location on a certain date. The plaintiff went to the sale but all the lots he was interested in had been withdrawn. He sued the auctioneer for his loss of time and expenses. It was held that the claim must fail as the advertisement of the auction was merely a declaration of intent to hold a sale and did not amount to an offer capable of being accepted and thus forming the basis of a binding contract, that is, that the advertisement merely amounted to an invitation to treat.

The same conclusion was also reached in the case of a price list circulated by a wine merchant (*Grainger and Son v Gough* [1896] AC 325), though a notice declaring that deckchairs were for hire was held in *Chapelton v Barry UDC* [1940] 1 KB 532 as amounting to an offer. The moral of the story is clear that in this type of case, while one can draw on certain generalisations, as in advertisements, one must treat each case on its own merits, assessing the intentions of the parties.

2. Displays of goods for sale

By far the most common example of the occurrence of invitations to treat is in the case of goods displayed either in shop windows or within a shop itself. The issue that arises here is that if the display of the goods in question amounts to an offer then a customer may enter the shop and purport to accept that offer, thus creating a binding obligation on the shopkeeper to sell the goods at the stated price. If, however, the display of goods only amounts to an invitation to treat then it is the customer who makes the offer to the shopkeeper, who is free to accept or reject that offer as they wish. Almost invariably it is the latter approach that is adopted by the courts, though the reasoning behind the general rule is somewhat obscure and lost in the mists of time – some think the rule is a throwback to the time of the marketplace when bargaining and haggling were commonplace, a notion that is not particularly appropriate today. The rule could nevertheless produce some startling effects. For instance, a shopkeeper could refuse to sell the goods to a customer even if they offered certain goods for sale and wrote the words ‘Special Offer’ across the windows. The words ‘Special Offer’ import no specific legal meaning here and do not necessarily mean an offer at law. Such a conclusion may be somewhat unfair, however, if those words had induced a person to wait outside the shop all night, only to be told the next morning that their offer to buy had been rejected. Nevertheless, even if the goods subject to the ‘Special Offer’ were regarded as an offer at law, an offeror in any event is free to withdraw that offer at any time up to acceptance.

The general rule as regards goods displayed in shop windows is well illustrated in the case of *Fisher v Bell* [1961] 1 QB 394, where a price-marked flick-knife was displayed for sale in a shop window. The seller was prosecuted under the now repealed Restriction of Offensive Weapons Act 1961, which made it an offence to offer to sell such items, and was acquitted. Lord Parker stated:
It is clear according to the ordinary law of contract that the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.

A more problematical situation occurred in the following case.

**Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd**  
[1952] 2 All ER 456; [1953] 1 All ER 482

The status of goods on the shelves of a self-service shop was called into question. The facts of the case were that the defendants were being prosecuted under the Pharmacy and Poisons Act 1933, s 17, in that they had allowed the sale of a listed poison to be effected without the supervision of a registered pharmacist. The arrangement in the shop was that a customer on entering was given a basket and he was then free to walk around the shop selecting items from the shelves. When he had selected such items as he required they were taken to the cash desk, where the customer was required to pay for them. Near to the cash desk was a registered pharmacist who was authorised to prevent a customer removing any drug from the shop. The Pharmaceutical Society alleged that the goods on the shelves were offers to sell, which the customer accepted by placing the goods in the basket and that, thus, the sale took place at that point and not at the cash desk under the supervision of the registered pharmacist. In such a situation, it was alleged, Boots were clearly in breach of the provision and had committed a criminal offence. The court, however, decided that the goods on the shelves were only invitations to treat and that it was the customer who made an offer to buy when he presented the goods for payment at the cash desk. At this point the person at the cash desk or the registered pharmacist could accept or reject that offer. The effect of this reasoning was that the sale did take place under the supervision of the registered pharmacist and no criminal offence had been committed.

Some authorities, particularly American ones, dispute such a conclusion as regards the status of goods on display in a self-service shop. In *Lasky v Economy Grocery Stores*, 65 NE 305 (1946), it was stated that the goods displayed constituted offers but that the acceptance took place not on the placing of the goods in the basket, but on the customer presenting them at the cash desk for payment. Alternatively, in *Sheeskin v Giant Food Inc.*, 318 A 2d 894 (1974), it was stated that acceptance took place before the goods were presented at the cash desk, though the customer could cancel his acceptance before payment if he wished. Contradiction also exists in English law though, since in *R v Morris* [1984] AC 320 it was held that the taking of goods from a shelf and changing the price tags amounted to an ‘appropriation’ within the Theft Act 1968.

### 3. Auction sales

The status of the call for bids by an auctioneer was considered in the case of *Payne v Cave* (1789) 3 Term Rep 148. In this case it was decided that a call for bids amounts to an invitation to treat, the bids themselves amounting to offers which the auctioneer is free to accept or reject as they wish. This situation is given implied authority in the Sale of Goods Act 1979, s 57(1), which provides that a sale in an auction is completed by the fall of the hammer and each party is allowed to withdraw up to this time.

Auction sales can take two forms, in that goods may be sold with or without a reserve price. Where the goods are put up for sale with a reserve price, it has been held (in *McManus v Fortescue* [1907] 2 KB 1) that no contract results if the auctioneer purports to accept a bid that is lower than the reserve price. Where the auction is held without
reserve no contract of sale materialises between the owner of the property and the highest bidder if the auctioneer either refuses or otherwise fails to accept the highest bid. In *Warlow v Harrison* (1859) 1 E & E 309 it was stated, *obiter dicta*, that in such a case there is a collateral contract between the auctioneer and the highest bidder, whereby the auctioneer in calling for bids is offering to accept the highest bid and that this offer is accepted by bidding. Thus if the auctioneer refuses to sell to the highest bidder, the auctioneer may be sued for breach of contract. This position was affirmed in *Barry v Heathcote Ball & Co. (Commercial Auctions) Ltd* (2000) *The Times*, 31 August (CA).

In this case the defendant was auctioning two new machines on behalf of the Customs and Excise. The machines were valued at £14,251 each. The defendant was instructed to auction these machines without reserve. At the auction the claimant, who had been told that the sale was without reserve, bid £200 for each machine. When the defendant could not get a higher bid he withdrew the machines from the sale and sold them for £750 a few days later by way of a magazine advertisement. The claimant argued that on the highest bidder rule, the auctioneer was legally bound to accept his bid, since in an auction held without reserve the auctioneer was offering to accept the highest bid.

The Court of Appeal, affirming *Warlow v Harrison*, confirmed there was no contract between the vendors, the Customs and Excise, and the claimant. There was, however, a collateral contract between the auctioneer and the claimant. The measure of damages where a seller refused goods to the buyer was the difference between the contract price and the market price as set out in the Sale of Goods Act 1979, s 51(3). The Court of Appeal held that despite the fact that there was no contract between the vendor and the claimant the same measure of damages would apply. Since the pledge considered that the machines were valued at £14,000 each, he awarded damages of £27,600.

4. Tenders

It was held in *Spencer v Harding* (1870) LR 5 CP 561 that a statement that goods are to be sold by tender is not normally an offer, and that thus no obligation is created to sell to the person making the highest tender. Similarly, an invitation for tenders for the supply of goods or services is not generally an offer but an invitation for offers to be submitted which can be accepted or rejected as the case may be.

In some circumstances, however, an invitation to tender may be held to be an offer.

*Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25

In this case, the Council owned and managed an airport, raising money by granting a concession to an operator to run pleasure flights from the airport. Shortly before the concession was about to expire in 1983 the Council invited tenders for the right to run the concession, invitations being sent to the plaintiffs and six other interested parties. The terms of submission of bids were that they were to be submitted in an envelope provided, which was to bear no mark which could identify the sender. Furthermore, the tender had to be submitted no later than 12 noon on 17 March 1983. The plaintiffs’ tender was put in the Town Hall letter-box at 11 am on 17 March. However, although the box should have been cleared at noon, this did not occur. The plaintiffs’ tender was subsequently marked down as being submitted late and was therefore not considered. The plaintiffs sued the Council for breach of contract on the basis that it had warranted that had a tender been submitted by the deadline it would be considered and that the Council had acted in breach of that warranty. It was held, on appeal, that in certain circumstances an invitation to tender could give rise to binding obligations. This was such an
instance since tenders had been sought from a number of parties, all of them known to the Council, which had also imposed strict rules of compliance on them. It was thus implied that a person submitting a tender in compliance with those rules had the right to have their tender opened and considered along with the others.

Tenders may take two possible forms. They may be specific tenders or standing-offer tenders. The former comprises a tender for a definite quantity of goods to be delivered or sold at a specified time. Here the person requiring or selling the goods makes an invitation to tender, the person wishing to deliver or buy them making the offer, which will be converted into a trading contract when accepted by the first party.

The second type of tender arises when a person invites tenders for the supply of goods or services which may be required within a specified time at some future date. An example of such a tender may be where a company invites tenders for the supply of stationery as and when, or if and when, required. Here acceptance of the tender (i.e. the offer) does not create a binding contract. The supplier whose bid is successful is in fact making a standing offer which is accepted every time an order is placed for stationery. At this point the supplier is obliged to meet the order or be in breach of contract, though the supplier is free to revoke the standing offer at any time prior to an order being placed, though they are bound to fulfil orders already received.

The problem of standing offers was considered in the case of the *Great Northern Railway Co. v Witham* (1873) LR 9 CP 16 where the plaintiffs invited tenders for the supply of goods, including iron, for a period of 12 months. The defendant submitted a tender to supply the goods over the period at a fixed price in such quantities as may be ordered from time to time. The tender was accepted, but before the expiry of 12 months the defendant refused to supply any more goods and was sued for breach of contract. It was held that just as the plaintiffs were not bound to order goods, the defendant was only bound to supply goods actually ordered and that he could revoke his standing offer at any time provided that revocation was communicated to the other party.

The revocation thus only operated to free him from future obligations, not those which had actually accrued by virtue of the placing of an order. The case thus affirmed the earlier decision of *Offord v Davies* (1862) 12 CBNS 748.

In recent years a new development has occurred in the area of tenders, namely, the referential bid. A referential bid occurs in a competitive tender situation where one party attempts to win the order by reference to a bid submitted by another party. An example of a referential bid would be where X offers to pay £100,000 for a concession or £10,000 more than any other offer. The latter part of this bid is a referential bid. The status of referential bids was considered in the following case.

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

An invitation was made to two persons to submit ‘offers’ for the purchase of a quantity of shares. The first defendants, who were disposing of the shares, also agreed to accept the highest offer received provided it met with other stipulated conditions. The plaintiffs bid £2,175,000 while the second defendant bid £2,100,000 or ‘$10,000 in excess of any other offer which you may receive which is expressed as a fixed monetary amount whichever is higher’. The first defendants accepted the second defendant’s offer. The House of Lords held that the referential bid was ineffective and that the fixed bid of the plaintiffs should have been accepted. The reasoning for this decision was that the House of Lords considered that the idea behind a competitive tender was that the bids were to be confidential and that no bidder would know...
the amount bid by the other person. The effect of a referential bid would be to defeat the notion of a confidential competitive tender.

5. Ticket cases

One problem that has recurred time and time again concerns the giving of a ticket during the course of entering into the contract. The problem revolves around whether the ticket is a contractual document, thereby rendering the parties subject to the terms and conditions printed or referred to on the ticket, or not. Two factors can influence the role of tickets in contracts; first, whether it was intended that the ticket should amount to a contractual document and, second, the mode and timing of the issue of the ticket.

Chapelton v Barry UDC [1940] 1 KB 532

In this case, the Court of Appeal considered that a sign by some deckchairs for hire constituted an offer, which the plaintiff accepted when he took two of the chairs. The tickets amounted to no more than mere receipts with the result that the terms and conditions on them formed no part of the contract since they were handed out after the contract was concluded.

With regard to timetables and passenger tickets, however, the law is not at all certain. Tickets have been held to be contractual documents on the basis that the proffering of the ticket by a bus conductor or ticket office clerk is an offer which is accepted by the taking of the ticket, as suggested in Cockerton v Naviera Aznar SA [1960] 2 Lloyd's Rep 450. Another view is that a timetable amounts to an offer which is accepted by a passenger either by applying for a ticket or by boarding the bus. The latter problem was discussed in the case of Wilkie v London Passenger Transport Board [1947] 1 All ER 258. In the Wilkie case Lord Greene considered that on a bus a contract is made when the intending passenger ‘puts himself either on the platform or inside the bus’. The implication here is that the company makes an offer of carriage by running the bus which the passenger accepts by boarding. The fact that a contract arises here despite the fact that no fare has been paid, nor ticket issued, renders the statement open to doubt. A better solution would surely be that the company makes an invitation to treat by virtue of its advertisement or sign on the front, the passenger making an offer when they get on the bus, which is accepted by the conductor’s taking the fare and issuing the ticket. The question then arises as to whether the ticket issued is a contractual document or a mere receipt, but no doubt this is one for the court to answer in the circumstances of a particular case. The question of the status of tickets also arose in the following case.

Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686

This case concerned the issue of a ticket by an automatic issuing machine in a car park. It will be discussed more fully when exemption clauses are analysed later in the book, but in relation to offer and acceptance the case also has a contribution to make. Broadly speaking the facts are that the plaintiff went to park his car in the defendant’s car park. At the entrance there was a sign which set out the charges and which stated: ‘all cars parked at customer’s risk’. As customers drove in, a light changed from red to green and a ticket was ejected from the machine. Lord Denning discussed the transaction as follows:

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 in the
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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 out as being ready to receive the money. The acceptance takes place when the customer puts money in the slot. The terms of the offer are contained in the notice placed on or near the machine, stating what is offered for the money. He [the customer] is not bound by the terms printed on the ticket because the ticket comes too late. The contract had already been made.

The decision in the case is certainly a better solution to the status of tickets than Lord Greene’s statement in the Wilkie case which would appear to be wrong.

6. E-commerce

Most people have heard of the possibility of buying goods via the Internet, even if they have not actually had experience of this commercial phenomenon. But what is the status of a supplier’s website – does it represent an offer or an invitation to treat? Many of the electronic or virtual shopping sites are set out to resemble real stores, so that the potential purchaser browses through the products for sale in much the same way as one would do in a shop or supermarket. As the purchaser finds a product they want to buy they place the item into a virtual shopping basket. When the purchaser has completed their ‘shopping trip’, the purchaser then submits details of the selected products, their identity (if they have shopped there before, otherwise they will have to register) and their credit/debit card details to the seller. The transaction is thus analogous to the situation seen in Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.

The goods on the website will constitute an invitation to treat, as in Fisher v Bell, the offer arising when the buyer submits their details to the seller.

The analysis above is of course dependent on the contents of the website. In appropriate cases it may be possible to argue that the site in fact constitutes an offer, possibly even a unilateral offer of the type seen in Carlill v Carbolic Smoke Ball Co., where the purchaser accepts the offer simply by pressing a button. Clearly website developers have to exercise great care in designing their websites to avoid such a situation from arising.

The sort of difficulties that can arise here can be seen in the recent case involving Argos Stores, where the company inadvertently offered television sets worth £300 for £3. Many customers purported to accept this offer but of course Argos would have argued that the website constituted an invitation to treat and that the purchasers were making an offer to buy. In such a situation, Argos was in a position to reject the offers made in response to the wrongly priced invitation to treat. No doubt this is a correct analysis but Argos might have found themselves in substantial difficulties if their website could have been considered to be a unilateral offer and the response by the purchasers clicking a button on the site to be an acceptance. Such a transaction would clearly not be in the interests of Argos in these particular circumstances. Of course, this would have required the customers to argue that the website constituted an offer. In the Argos scenario some customers had actually had their orders accepted and confirmed by Argos before the mistake was discovered. Presumably, therefore, they were entitled to insist on receiving a television set for £3. Sadly this is not the case since in Hartog v Colin and Shields (1939) 3 All ER 566 it was held that no contract arises where one party makes an offer to another and he is aware that the other party is acting under a fundamental mistake as to the terms of the offer. (See Chapter 10 – unilateral mistake as to the terms of an offer.)

In spite of the fact that there have been a number of European Directives regulating various aspects of the law relating to electronic contracting, none purport to define the status of a website as either an invitation to treat or an offer. Thus reg 12 of the Electronic
Commerce (EC Directive) Regulations 2002 states that an ‘order may be but not need be a contractual offer’, presumably implying that websites would normally constitute invitations to treat.

**Offers distinguished from requests for information**

Very often, particularly in commercial transactions, substantial negotiations may take place before the terms of the contract are agreed by the parties concerned and the contract itself is entered into. During the period of negotiation one of the parties may simply require further information before they can place themselves in the position of being able to enter the contract. Such a situation is very common where negotiations for the sale of land take place since there may be many questions of detail to be investigated before a formal contract can be entered into.

*Harvey v Facey* [1893] AC 552

The appellants sent a telegram to the respondent which read, ‘Will you sell us Bumper Hall Pen? Telegraph lowest cash price’; the respondent replied, ‘Lowest price for Bumper Hall Pen, £900.’ The appellants then telegraphed, ‘We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title deeds in order that we may get early possession.’ The appellants received no reply and thereupon brought an action for specific performance. It was held that the action must fail since the respondent’s reply was not an offer to sell but simply a statement as to the minimum price required should he decide to sell; his reply was a mere response to a request for information. The appellants’ final telegram amounted to the offer to buy, which was not accepted by the respondent.

A similar case is that of *Clifton v Palumbo* [1944] 2 All ER 497, where the defendant was negotiating the purchase of a large estate owned by the plaintiff who wrote, ‘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 the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.’ It was held that, in the circumstances, this letter did not amount to an offer to sell but a mere preliminary statement as to price to enable negotiations to proceed.

So far the distinction between offers and requests for information is fairly straightforward, though one wonders if some of the earlier decisions can be considered correct. Would the decision in *Harvey v Facey*, for instance, be the same today? If A walks up to B and says, ‘How much do you want for your car?’ and B replies, ‘£3,500’, is this not a contract? Surely the situation is likely to be that if B does not wish to sell he will reply, ‘£3,500, but it is not for sale’ or simply, ‘The car is not for sale.’ The surrounding circumstances of the case will be important in this type of situation but on the face of things there would appear to be a binding contract today. The courts in any event are not consistent or predictable in this type of case.

*Bigg v Boyd Gibbons Ltd* [1971] 2 All ER 183

In this case, negotiations were taking place for the sale of some freehold property belonging to the plaintiffs. The plaintiffs wrote to the defendants, stating: ‘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.’ The defendants replied ‘I accept your offer’ and asked the plaintiffs to contact the defendants’ solicitors. In their final letter the plaintiffs said: ‘I am putting the matter in the hands of my solicitors . . . my wife and I are both pleased you are
purchasing the property.’ The plaintiffs alleged that this exchange of correspondence constituted an agreement for the sale of the property and sought specific performance. The Court of Appeal stated that an agreement on price did not necessarily mean an agreement for sale and purchase, nor did the use of the word ‘offer’ always amount to an offer in law; however, on the facts it was clear from the correspondence that the plaintiffs’ first letter constituted an offer, the acceptance of which by the defendants constituted a binding contract. In this case the parties had gone so far down the road of negotiations that a binding agreement had resulted.

Communication of offers

Clearly an offer cannot take effect until it has been received by the offeree, since they cannot accept something of which they are not aware. The principle can be seen in the case of *Taylor v Laird* (1856) 1 H & N 266; 25 LJ Ex 329, where the plaintiff, the captain of a ship, was employed to command a steamer ‘for an exploring and trading voyage up the river Niger . . . at a rate of £50 per month’. The plaintiff took this ship as far as Dagbo, but refused to go further and resigned his command. He later helped to work the ship home and he claimed his wages for this work. It was held that the owners of the vessel were entitled to refuse payment as the plaintiff’s offer to help to bring the ship back to its home port was not communicated to them. In other words, they were given no opportunity to either accept or reject his offer.

The timing of the communication of the offer can be of importance when determining the time within which it can be accepted by the offeree. From the above case it is clear that acceptance can only take place when the offer has been received; however, if the offer specifies some date by which the offer must be accepted and that date has passed when the offer is received, then the offeree is not able to accept the offer. Similarly, it may be that there has been a very long delay in the transmission of the offer to the offeree, and in these circumstances it may well be the case, depending on the subject matter of the offer, that the offer has in fact lapsed, rendering it incapable of acceptance.

One problem that arises in the latter context is what happens where the delay in the transmission of the offer is the fault of the offeror himself. In *Adams v Lindsell* (1818) 1 B & Ald 681, the defendants offered to sell wool to the plaintiffs. Their letter of offer was wrongly addressed so that it reached the plaintiffs two days later than the defendants could, in normal circumstances, have expected it to arrive. The plaintiffs, on receiving the letter, immediately accepted the offer and it was held that they were entitled to do so, creating a binding contract, despite the fact that the defendants had considered that the offer had lapsed by the delay and sold the wool to a third party. It would seem from the case that the significant factor was the negligence of the defendants in addressing the letter and that if the delay had been caused by some other factor then it is possible that the decision could have been the reverse.

Acceptance

The definition of acceptance

Treitel defines acceptance as ‘a final unqualified expression of assent to all the terms of an offer’. The objective test, which was examined above in regard to offers, applies in the same manner to acceptance. In other words, evidence must be produced from which the courts can adduce an intention by the offeree to accept the offer communicated to them.
Two principles evolve from the definition of acceptance and the requirement of its objective existence. First, the expression of intention to assent to the offer must, as seen in *Taylor v Laird* above, be in response to the offer and match the terms of the offer precisely. The acceptance, therefore, must be unequivocal and unconditional. Second, mere acknowledgement of the offer is insufficient, there must be a communication of the acceptance to the offeror.

These two factors can, however, lead to peculiar results in certain types of case, in particular where cross-offers materialise. The problem here occurs when two identical offers cross in the post, as, for example, where *X* offers to buy *Y*’s car from him for £5,000, while at the same time *Y* offers to sell their car to *X* for £5,000. In such an instance no contract will be found to exist since, although the parties may undoubtedly be in subjective agreement, there must be an objective outward indication of the agreement, even if one could say there has been adequate communication of acceptance. In *Tinn v Hoffman and Co.* (1873) 29 LT 271, Blackburn J stated:

> When a contract is made between two parties, there is a promise by one in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion and one having promised in consideration of the promise made by the other – there is an exchange of promises. But I do not think exchanging offers would, upon principle, be at all the same thing . . . The promise or offer made on each side in ignorance of the promise or offer made on the other side, neither of them can be construed as an acceptance of the other.

The American case of *Fitch v Snedaker*, 38 NY 248 (1868) allegedly supports the judgment of Blackburn J. Indeed in that case Woodruff J asked, ‘How can there be consent or assent to that of which the party has never heard?’ Further support is also alleged in *R v Clarke* (1927) 40 CLR 227, where a reward of £1,000 was offered ‘for such information as shall lead to the arrest and conviction of’ the murderers of two police officers. The offer also added that if the information was given by an accomplice, he, not being one of the murderers, should receive a free pardon. Clarke saw the offer and later gave the necessary information and claimed the reward. In attempting to enforce his claim he admitted that at the time he gave the information he acted to save himself and that the reward was not at the forefront of his mind. The High Court of Australia held that his claim must fail. Isaacs CJ stated that Clarke was in the same position as if he had never heard of the reward:

> An offer of £100 to any person who should swim a hundred yards in the harbour on the first day of the year would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard on that date and swam the distance simply to save his life, without any thought of the offer.

Similarly Higgins J stated:

> Clarke had seen the offer, indeed, but it was not present to his mind – he had forgotten it and gave no consideration to it in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer, and ignorance of the offer is the same thing, whether it is due to never hearing of it or to forgetting it after the hearing.

Although these cases seem to support the decision of *Tinn v Hoffman*, Cheshire, Fifoot and Farnston believes that there are significant differences between the cases, pointing out that while the actions of the parties in *Tinn v Hoffman* are not ‘in direct relation to that of the other and that the strict requirements of offer and acceptance are unsatisfied . . . each party does, in truth, contemplate legal relations upon an identical basis, and
each is prepared to offer his own promise as consideration for the promise of the other. Cheshire, Fifoot and Furmston also refers to the need for a coincidence of acts and a unanimity of mind in the case; the problem, however, is that whilst there is communication in the form of the transmission of the offer there is, in truth, no communication that conveys the idea of unanimity between the parties, the result being an absence of agreement in both subjective and objective terms.

The requirements of the transmission of unanimity might seem unduly harsh on the facts of Tinn v Hoffman, though it should be borne in mind that no more than a small act of performance by one of the parties would have been enough to bring about acceptance by conduct. It should also be borne in mind that without such a requirement a large element of uncertainty and confusion would be introduced into the case. Thus in Henkel v Pape (1870) LR 6 Ex 7, the defendant had previously intimated that he would have liked to buy as many as 50 rifles from the plaintiff. He sent a telegram to place an order for three but the telegraph clerk made a mistake and the telegram read, ‘Send . . . the rifles’, whereupon the plaintiff sent 50. It was held that the plaintiff could not recover the price of the extra 47. The acceptance was valid in the form as sent, not in the form as received. Without the requirement of the transmission of unanimity, who is to say what this contract is for, 50 or three rifles? There is no contract in this case since the manifestations of each party’s willingness to enter a contract are not conjoined. The same is also true in Tinn v Hoffman, even though the parties’ intentions are similar.

The fact of acceptance

The mode of acceptance

Acceptance of the offer may be communicated either orally or in writing, or inferred from conduct. Generally speaking the first two methods of accepting an offer present little difficulty; however, where one attempts to infer acceptance by conduct, difficulties arise as to the nature and precise moment of the inferred conduct. It has been held in Weatherby v Banham (1832) 5 C & P 228 that where an offeror offered to supply goods to the offeree by sending the goods to him, acceptance of the offer arose when the offeree began using the goods. Such a set of circumstances must, however, be treated guardedly today. First, under the Unsolicited Goods and Services Act 1971, if an offeror sends unsolicited goods to an individual in certain circumstances, as stipulated by the Act, that individual may treat those goods as a gift and is able to treat the goods as his own, without incurring contractual liability. Second, it was stated in Taylor v Allon [1966] 1 QB 304, in true objective principle terms, that acceptance inferred from conduct can only have this effect if the offeree performed the act in question with the intention of accepting the offer. In that case it was held that an offeree did not accept an offer by an insurance company to provide car insurance merely by taking the vehicle out on the road where there was evidence that the offeree intended to take out insurance with another company. In Pickfords Ltd v Celestica Ltds [2003] EWCA Civ 1741, however, performance of the contract by the offeror following a counter-offer by the offeree was held to be deemed acceptance of the counter-offer.

The main difficulty concerning inferring acceptance from conduct usually arises where there have been protracted negotiations between the parties or where the negotiations have been so tentative that it is difficult to find when or if an agreement has been reached between the parties. Such a situation arose in the following case.
Brogden v Metropolitan Railway Co. (1877) 2 App Cas 666

Brogden had supplied the respondent railway company with coal for a number of years and then suggested that a formal contract should be entered into. A draft contract was submitted to Brogden who completed certain details on it, introduced a new term on it by adding the name of an arbitrator and then signed it, writing 'approved' at the end of the contract before returning it to the respondents. The company’s agent put the contract in a drawer and nothing else was done to execute the contract. For some time afterwards coal was supplied and paid for on the basis of the draft agreement. Eventually a dispute arose and Brogden denied that any binding long-term contract on the basis of the written contract had come into existence. The difficulty facing the court was to determine when, if ever, any mutual assent could be found. Because Brogden had introduced a new term into the contract his signature and return of the agreement could not amount to acceptance since, as we shall see later, qualified acceptance is no acceptance. The return of the contract could, however, amount to an offer on Brogden’s part to supply coal, but where was the acceptance of this offer? Clearly the putting of the document into a drawer could not amount to acceptance by conduct, so where did the contract arise? In fact a court has considerable power to resolve uncertainties and in this case the court decided to exercise this discretion. To find that there was no contract would clearly be wrong since the parties had contracted on the basis of the agreement for a number of years and it was this conduct, which was explicable only on the basis of a mutual acceptance of the terms of the approved contract, that the court relied on. Subsequently the House of Lords held that a contract came into existence either when the company ordered its first load of coal upon the terms of the approved contract or at least when Brogden first supplied the coal on those terms.

One final point must be made in relation to acceptance by conduct and that is that it is found most commonly in unilateral contracts. It has already been seen in Carlill v Carbolic Smoke Ball Co. that Mrs Carlill accepted the company’s offer merely by using the smoke balls in the prescribed manner and subsequently catching influenza. Usually there will be some sort of communication of the fact that acceptance has been performed in order, as in Mrs Carlill’s case, to claim the reward, but this is only notification of the fact that acceptance has taken place. It does not amount to acceptance itself. The act of acceptance must be completely performed for it to be valid. For instance, in Mrs Carlill’s case the mere using of the smoke balls would not be enough – she had to use them in the prescribed manner and catch influenza. This requirement of complete performance was emphasised in Daulia v Four Millbank Nominees Ltd [1978] 2 All ER 557 by Goff LJ, who stated:

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 he has imposed and short of that he is not bound.

A related point is that very often an offer may prescribe a particular mode of acceptance; in such a case conduct cannot amount to acceptance until the mode stipulated is complied with, as stated in Western Electric Ltd v Welsh Development Agency [1983] 2 All ER 629, unless the offeror acquiesces in allowing the conduct to amount to acceptance.

Counter-offers

It has already been stated when defining acceptance that there must be an unqualified expression of assent. It follows that any attempt to introduce a new term amounts not to
an acceptance of an offer, but in fact itself becomes a counter-offer. Such a result is manifestly fair since otherwise the offeror would be bound by a new term which they would not have had the opportunity to peruse and consider. The effect of a counter-offer is to destroy the original offer, that is, it operates as a rejection of the original offer.

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

The defendant offered to sell his farm for £1,000. The plaintiff at first made a counter-offer of £950, but two days later agreed to pay £1,000 and attempted to accept the original offer. The defendant refused to complete the sale and the plaintiff brought an action against him for a decree of specific performance. It was held that no contract existed since by his letter offering £950 the plaintiff had made a counter-offer, the effect of which was to reject and destroy the original offer, so that the latter was therefore not available for him to accept two days later.

Some care needs to be taken when discussing this whole area of counter-offers since the fact that acceptance needs to be unqualified does not by the same token mean that it needs to be precise. Very often communications take place which present themselves as counter-offers in that there appears to be a qualified acceptance when in fact there is nothing of the sort. Examples of such communications are as follows.

**Conditional acceptances**

On the face of things this may seem to be an exercise in pedantry but in fact the law makes a distinction between a conditional acceptance and a qualified acceptance. A conditional acceptance is neither a full acceptance of the original offer nor a counter-offer. Very often before an individual enters into a contract they might wish to consult a third party for advice as to the nature of the contract or the wisdom of entering into a particular contract. Further, in some contracts there are many other ancillary matters to be arranged before an individual feels able to comply with the requirements of the contract. Such a situation commonly occurs in the purchase of a house, which is essentially a contract to purchase land. In this type of contract there are many factors to be considered by a purchaser before they can commit themselves to a formal contract, such as obtaining a surveyor's report on the property, obtaining a mortgage, making land registry or land charges searches, and so on. The result of these circumstances is that any agreement is usually arrived at 'subject to contract'.

The term 'subject to contract' now has a precise legal significance in that it raises a presumption that the parties do not intend to enter a legally binding contract. It is an expression of future intention to enter into a contract provided the offeree is satisfied as to any factors that may be of concern. It renders the entering of a formal contract, usually written, a condition precedent to a legally binding agreement. The words, however, do not invariably have this effect and in *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, the courts found for a legally binding contract despite the use of the expression, though it should be stated that this was an exceptional case.

From time to time attempts are made to adopt other language to indicate that any agreement is merely tentative and not meant to be final. The task facing the court here is to attempt to interpret the intention of the parties from their negotiations, correspondence and other surrounding circumstances of the case. It may be that the court will find that there is no condition precedent intended and that any further document is merely needed to formalise an already legally binding contract.
BRANCA v COBARRO [1947] KB 854

A vendor agreed to sell the lease and goodwill of his mushroom farm. The parties signed a document which contained the terms of their agreement. The document concluded, 'This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed.' The purchaser sued for the return of his deposit and the vendor contended that their agreement was a binding contract despite the use of the expression 'provisional'. The court held that there was an immediately binding contract 'until' the document was replaced by one couched in more precise and formal language. The court commented that the decision would probably have been different if the parties had used the expression 'tentative' rather than 'provisional', though each case had to be decided on its own facts.

This latter point can be seen in the earlier case of CHILLINGWORTH v ESCH [1924] 1 Ch 97, where the plaintiffs agreed to purchase the defendant’s nursery for £4,800 'subject to a proper contract to be prepared by the vendor’s solicitors'. The purchasers then refused to sign a contract prepared by the solicitors and executed by the vendor and failed to complete the transaction. It was held in this case that consent was conditional upon a 'proper contract' being signed and the plaintiffs could therefore recover their deposit.

In commercial contracts the instinct of a judge is to find that the document indicates an intention to be bound, especially where trade usage forms the background to the transaction.

HILLAS & CO. LTD v ARCS LTD (1932) 38 COM CAS 23

In this case, there was an agreement in writing for the supply of wood during 1930, together with an option to buy more wood the following year. The option clause did not specify the kind or size of timber required, nor the ports to which it had to be shipped or indeed the manner of shipment. The suppliers argued that the option clause was not binding and the fact of the absent factors was evidence that it was only to provide a basis for future negotiation and agreement. It was held that as the 1930 agreement had been expressed in a similar way and had been complied with, the option thus showed a sufficient intention to be bound and could create a binding obligation. With regard to the omissions the court held that these could be resolved by reference to the previous dealings between the parties and the trade usage of the timber trade.

The courts will not find for a binding contract if the agreement between the parties is too speculative, usually requiring some sort of previous course of dealings between the parties or some common business practice or usage before exercising discretion. Since the first instinct of the court is to exercise this discretion in commercial transactions it follows that the courts will often allow retrospective acceptance to legitimise past informal arrangements between the parties as illustrated in TROLLOPE and COLLS LTD v ATOMIC POWER CONSTRUCTIONS LTD [1962] 3 ALL ER 1035 and restated by STEYN LJ in G PERCY TRENTHAM LTD v ARCHITAL LUXFER [1993] 1 LLOYD'S REP 25. The approach of the courts is summed up by Lord Tomlin in HILLAS v ARCS where he stated:

The problem for a court of construction must always be so to balance matters that without the violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.
Clarifying the terms of the offer

Just as the courts have difficulty in construing a particular contract, businessmen in lengthy or complex contracts often have similar problems when attempting to arrive at a finite and settled agreement. For this reason there may be many communications between the parties which are intended not to operate as counter-offers but merely as attempts to clarify the extent and terms of the offer, or to ascertain whether the offeror would consider changing certain aspects of the offer. The courts view such correspondence as mere requests for information which do not operate as counter-offers to destroy the original one. A typical such case is that of Stevenson, Jacques & Co. v McLean.

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

In this case, the defendant offered to sell iron to the plaintiffs at 40s per ton. The plaintiffs sent a telegram to the defendant, ‘Please wire whether you would accept forty for delivery over two months, or if not, the longest limit you could give.’ Later that day a further telegram was sent to the defendant by which the plaintiffs accepted the original offer. The defendant maintained, in the action brought by the plaintiffs for breach of contract, that the first telegram amounted to a counter-offer which destroyed the original offer so that it subsequently became incapable of acceptance. It was held that the first telegram was a mere request for information, not a counter-offer. There was no attempt here to introduce new terms into the contract as in Hyde v Wrench, but a genuine inquiry by the plaintiffs to see if the defendant would be willing to modify his terms.

A further refinement of this problem can occur where a person in accepting the offer makes reference to some other term. Ostensibly this would amount to a counter-offer. However, if this term would be implied into the contract in any event by operation of law, there would be a valid acceptance of the offer. Similarly Treitel indicates that where the acceptance ‘adds new provision by way of indulgence to the offeror’, then the acceptance will still be valid. In other words, the acceptance should still be valid provided any new term introduced is by way of benefit or concession to the offeror. He further indicates that should the offeree attempt to introduce a new term, which is not by way of concession to the offeror in their acceptance, that acceptance would still be valid if the offeree makes it clear that they will accept the offer even if the new term is rejected. This proposal was rejected in Global Tankers Inc. v Amercoat Europa NV [1975] 1 Lloyd’s Rep 666, and indeed it is difficult to envisage the courts enabling the offeree to accept an offer once a counter-offer had been made. Clearly on a classical analysis the introduction of the new term must invariably destroy the original offer. In Global Tankers it was suggested that the test as to whether an offeree is replying with a counter-offer or not is whether a reasonable person would regard the ‘acceptance’ as ‘introducing a new term into the bargain and not as a clear acceptance of the offer’. The question is then reduced to one of the chicken or the egg – which comes first, the counter-offer or the acceptance?

The ‘battle of the forms’

It has already been stated that one of the hallmarks of the modern environment of the law of contract is the use made of the standard form of contract. Most companies adopt such forms since it is clearly more efficient and convenient than to have to discuss and negotiate each contract with a customer on an individual basis, quite apart from the
CHAPTER 2 THE FACT OF AGREEMENT

administrative nightmare created by having hundreds, possibly thousands, of individual contracts to supervise. It is not surprising, therefore, that in the offer, acceptance and counter-offer situation conflicts are likely to result when companies attempt to impose on the other party their own standard conditions of contract. This scenario arises when company X offers to, say, sell certain goods to company Y on company X’s standard terms and conditions. Company Y replies, accepting company X’s offer, but on company Y’s terms and conditions – which could be materially different from company X’s. The conflict now arises as to whose terms and conditions the contract is based on.

If the conflict is to be resolved by reference to the classical theory then it is clear, as Megaw J stated in Trollope and Colls Ltd v Atomic Power Constructions Ltd, that ‘the counter offer kills the original offer’. This being the case, the person who wins the ‘battle of the forms’ is the person who last submits the counter-offer which is accepted by the other party. This principle is sometimes referred to as the ‘last shot’ principle. The following case summary is the classic modern case illustrating this conflict.

Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 All ER 965

The facts of the case were that on 23 May 1969, in response to an enquiry by the buyers, the sellers made a quotation offering to sell a machine tool to the buyers for £75,535, delivery to be made in ten months’ time. The terms and conditions given in the quotation contained a price variation clause. The terms and conditions were also stated to ‘prevail over any terms and conditions in the buyers’ order’. On 27 May the buyers replied by placing an order for the machine. This order was subject to terms and conditions that were materially different from those of the sellers, and in particular there was no price variation clause. At the end of the buyers’ order there was a tear-off acknowledgement of the receipt of the order stating, ‘We accept your order on the terms and conditions stated thereon’. On 5 June the sellers completed and signed the acknowledgement and returned it to the buyers with a letter stating that the buyers’ order was entered into in accordance with the sellers’ quotation of 23 May. On delivering the machine the sellers claimed the price had increased by £2,892. The buyers refused to pay and the sellers brought an action for the increase based on the price variation clause. It was held that the buyers’ communication of 27 May was a counter-offer which was accepted by the sellers’ returning the tear-off acknowledgement slip. The contract being thus made on the buyers’ terms and conditions meant that the buyers were not subject to the price variation clause and were consequently not liable to pay the extra £2,892. The letter accompanying the acknowledgement slip, though the ‘last shot’ in the series, did not prevail because the reference in it to the sellers’ original offer was not made with the intention of reiterating the terms and conditions contained in the original quotation/offer, but to identify the subject matter of the contract only.

The decision is clearly correct when analysed on the lines of the classical approach, given the interpretation of the letter accompanying the acknowledgement slip returned by the sellers. At first instance, though, the judge thought the additional moneys were recoverable because of the emphatic statement in the quotation of 23 May that the sellers’ terms and conditions were to prevail. In the Court of Appeal the majority of the judges decided the case on classical lines though Lord Denning expressed sympathy for the views of the judge at first instance. He considered the classic view of offer, counter-offer, rejection and acceptance and so on to be out of date in the high-pressure commercial life of the twentieth century, reiterating Lord Wilberforce’s view in New Zealand Shipping
Co. Ltd v A M Satterthwaite, which we have already considered. Lord Denning thought the better approach was to examine all the documents passing between the parties and glean from them and the conduct of the parties whether agreement exists on the material terms. He thought that very often the end result may be no different, the man who fires the last shot being the winner. He puts forward his terms and conditions which are not objected to by the other, who is thus regarded as having agreed to those terms and conditions. Lord Denning went further, however, and considered that in appropriate cases different approaches may be justified. He stated:

In some cases, however, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back and the buyer orders the goods purporting to accept the offer on an order form with his own different terms and conditions on the back, then, if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller. There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication.

Lord Denning’s approach can clearly be seen to be a subjective one which attempts to find for a consensus between the parties. We have already seen that such a view is not adopted today, the law preferring an objective approach. For this reason the other judges in the Court of Appeal, Lawton and Bridge LJ, decided the case on classical objective lines. Where does the above situation leave the modern businessperson? Clearly, in order to avoid losing the ‘battle of the forms’, it is essential that if they are to take part in a contract based on their own conditions they must ensure that they are the one who fires the last shot. Even here they cannot ensure that they will be the winner because of the possibility of a counter-offer coming from the other party. The only real certainty that can be achieved is a stalemate, and this is not a satisfactory state of affairs since it might be the case that the court will find that there is no contract at all in such a situation! For this reason this approach was rejected in both Johnson Matthey Bankers Ltd v State Trading Corporation of India [1984] 1 Lloyd’s Rep 427 and Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd [1988] 1 All ER 348. While such a solution may be possible where the contract is purely executory with no or only a limited performance having taken place, it is neither desirable nor convenient in executed contracts where, as in the Butler case, an expensive custom-made machine has been produced and delivered. The idea of restitution here, that is a handing back of what has been received by both sides, is clearly nonsensical. In such a case a contract will be found to exist and the courts would then attempt to impose terms and conditions on the parties. This may not be a particularly elegant way for the courts to resolve the problem, but it fulfils an exigency. Such an approach was adopted in the case of British Steel Corporation v Cleveland Bridge and Engineering Co. Ltd [1984] 1 All ER 504. One should also take into account the approach taken by Steyn LJ in G Percy Trentham Ltd v Archital Luxfer [1993] 1 Lloyd’s Rep 25, as examined earlier and Dyson LJ in Pickfords Ltd v Celestica Ltd [2003] EWCA Civ 1741 (see pp. 45–6).

A modern application of the above principles can be seen in the case of Sterling Hydraulics Ltd v Dichtomatik Ltd [2007] 1 Lloyd’s Rep 8 where the judge accepted that
the key to 'battle of the forms' scenarios is to make an analysis of the exchanges between the parties in terms of offer and acceptance. In reaching any conclusion it is necessary to decide the meaning and effect of the rival terms in order to discover if the response of one party is an offer and the response of the other party an acceptance of the offer or a counter-offer, which, as indicated in Trollope and Colls Ltd v Atomic Power Construction Ltd, will ‘kill the original offer’. In order to do this, however, one has to show that the acknowledgement of the offer was in conflict with the terms of the offer itself. Thus where the terms of the acknowledgement were substantially the same as the offer in terms of the date of payment there is no counter-offer but an acceptance of the terms set out in the order. The acknowledgement omitted to contain the defendant’s own terms and conditions and therefore there was no indication that the acknowledgement attempted to introduce fresh terms or to modify or contradict the terms of the order sent by the claimant. As the judge stated, ‘This was not one of those cases where victory goes to the party who fired the last shot. The first shot is the only one that counted. The “battle of the forms” was barely a skirmish’!

A similar stance was also taken in Balmoral Group Ltd v Borealis (UK) Ltd [2006] 2 Lloyd’s Rep 629 where a purchaser had placed an order on its own terms though the purchaser had not supplied a copy of those terms to the supplier. A reference in poor typescript at the bottom of the purchase order was not considered to be a clear reference that the purchaser intended to contract on those terms. On the other hand, the supplier had provided a clear statement of its terms on the back of its invoices and these had been acknowledged by the purchasers by the managing director initialing the invoice. No objection was raised regarding the terms at this time. The court held that the purchasing company had accepted the supplier’s terms.

Another method that can be used to attempt to avoid the ‘battle of the forms’ scenario is for a party to a contract steadfastly to maintain their bargaining proposals come what may. The effect of this can be seen in the case of Nissan UK Ltd v Nissan Motor Manufacturing (UK) Ltd (1994) Independent, 26 October, where the Court of Appeal stated that if one of two contracting parties toing and froing with offers and counter-offers has maintained a proposal to the last, and has received no comeback from the other party, it could naturally be inferred that any subsequent conduct by that other party that was referable to the existence of some contract between the parties denoted the acceptance of the proposal.

No doubt, unless a person has a very clear perception of the different stages of a trans- action, the ‘battle of the forms’ scenario can provide a trap for the commercially unwary. The result of this is that some suppliers have attempted to provide ‘prevail clauses’ among their terms and conditions. The aim of such clauses is of course to make sure that their terms and conditions prevail over the other party’s. A typical ‘prevail clause’ may be as follows:

These conditions form part of this contract entered into to the exclusion of all other terms and conditions, including those terms and conditions which the purchaser purports to apply in any purchase order, letter of confirmation or any other communication with this supplier.

Such clauses invariably have no legal effect since to be effective the purchaser would have to accept the clause. This is highly unlikely since the whole point of the battle of the forms is that the purchaser is attempting to impose their own terms and conditions, which would not include the ‘prevail clause’ set out by the supplier. Indeed, in such circumstances it is highly likely that the purchaser will include their own ‘prevail clause’!
The communication of acceptance

The general rule

A further aspect of our analysis of the definition of acceptance is concerned with the communication of acceptance. The general rule here, as restated in *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155, is that some objective or external manifestation of acceptance must be communicated to the offeror. The principle is also well illustrated in the case of *Powell v Lee* (1908) 99 LT 284, where the defendant decided to appoint the plaintiff as headmaster of a school. The terms of the appointment were never communicated to the plaintiff. It was held that there was no contract since the defendant’s acceptance of the plaintiff’s offer of service had not been communicated to him.

The need for communication of acceptance has raised several problems in this area of the law, to the extent that one really wonders why English law insists on such a requirement. One does not have to go very far to find compelling reasons for its need. First, substantial hardship would result for the offeror if they were to be held to be bound by the terms of their offer without first knowing that their offer had been accepted. It should be noted that communication of acceptance to the offeror’s agent would be sufficient, provided that the agent has the authority to receive the acceptance, even though the offeror was unaware of that communication. On the other hand, communication, whether to the offeror directly or to their authorized agent, will not be effective if it was made by an agent of the offeree who had no authority to communicate such acceptance, this being expressed in the case of *Powell v Lee*, above. Second, as a simple matter of practical expediency, some outward sign of acceptance has to be present in order for it to be possible to decide whether a contract exists or not. Since this outward sign, of necessity, has to be measured in objective terms, it is easier to prove such existence by requiring the assent of the offeree to be communicated to the offeror.

It should be noted that acceptance has to be not only communicated to but also received by the offeror. In *Entores v Miles Far East Corporation* [1955] 2 QB 327, Lord Denning illustrated this principle by describing a situation where A shouts an offer to B across a river and A does not hear the reply because of the noise of an aircraft flying overhead. In such a situation there is no contract. A similar state of affairs could also exist if a person’s reply was so indistinct that the offeror could not hear or understand what was being stated. This position does have to be qualified, however, since, if the acceptance would have been communicated and received by the offeror but this has not occurred because of the conduct of the offeror, they will be precluded from denying that they received the acceptance. In the *Entores* case, which will be examined in more detail later, Lord Denning explained the rule by stating that an offeror cannot deny receipt of the acceptance if ‘it is his own fault that he did not get it’, for example, ‘if the listener on the telephone does not catch the words of acceptance but nevertheless does not . . . ask for them to be repeated’. Presumably the same principle applies if a message of acceptance is sent by telex but this is unread by the offeror, although Cairns LJ in *The Brimnes* [1975] QB 929 denied this. So far the general rule is fairly straightforward, but unfortunately such rules are rarely so simple and this aspect of acceptance is no exception to that principle.

The exceptions to the general rule

1. The effect of silence

Is it possible to impose contractual liability on an individual, within the terms of the offer, by not requiring them to communicate their acceptance before becoming a party
to the contract? On the basis of the general rule the answer to this question must be in the negative. Such a conclusion can be seen in the following case.

**Felthouse v Bindley (1862) 11 CBNS 869**

The case is rather unusual since it was based not on an action in contract but on an action in tort. The facts of the case were that the defendant was an auctioneer who had been instructed to sell the farming stock of John Felthouse. John’s uncle was interested in one of the horses that was being sold and some negotiation took place between the parties. During the course of the negotiations a misunderstanding arose as to the price of the horse, namely whether it was for sale for £30 or 30 guineas. The uncle then wrote to John offering to split the difference and concluded: ‘If I hear no more about him, I consider the horse mine at £30 15s.’ John did not reply but instructed the defendant to withdraw the horse from the auction. By mistake the horse was put up for sale and sold. The uncle began an action against the defendant for the tort of conversion and failed. The court held that the uncle had no property in the horse as the silence of his nephew could not amount to acceptance of the uncle’s offer. As Cheshire, Fifoot and Furmston state:

Silence is usually equivocal as to consent and the uncle’s letter did not render the nephew’s failure to reply unequivocal since failure to reply to letters is a common human weakness.

Such a view found later support in **Allied Marine Transport Ltd v Vale Do Rio Doce Navegação SA, The Leonidas D** [1985] 2 All ER 796 where, in the Court of Appeal, Goff LJ stated:

In the absence of special circumstances, silence and inaction by a party to a reference [to arbitration] are, objectively considered, just as consistent with his having inadvertently forgotten about the matter; or with his simply hoping that the matter will die a natural death . . . If so, there should, on ordinary principles, be no basis for the inference of an offer. Exactly the same comment can be made of silence and inaction of the other party, for the same reasons, there appears to be no basis for drawing the inference of an acceptance in response to the supposed offer, still less of the communication of that acceptance of the offeror . . . it is difficult to imagine how silence and inaction can be anything but equivocal.

It is an over-simplification to say that silence can never amount to acceptance since, as Goff LJ indicates, there may well be ‘special circumstances’ that will render silence as constituting acceptance of the offer. Treitel also discusses certain exceptions to the rule, arguing that:

if an offer has been solicited by the offeree, the argument that he should not be put to the trouble of rejecting it loses much of its force, especially if the offer is made on a form provided by the offeree and that form stipulates that silence may amount to acceptance.

Further, he states that a previous course of dealing between the offeror and offeree might also give rise to acceptance by way of silence. An example of the operation of such a course of dealing may be seen in the American case of **Ammons v Wilson, 176 Miss 645 (1936)** where the offeror regularly ordered certain goods from the offeree. His order was usually given to the offeree’s representative who would transmit the order to his head office, at the same time giving the offeror a booking. A dispute arose when the offeror was given a booking but not told until some 12 months later that the offeree had not accepted his order. The court held that a contract had been created since, given the
previous course of dealing, it was reasonable that the offeree should notify the offeror if he did not intend to accept.

While English courts might be willing to adopt such a stance it would be essential for there to be a previous course of dealing present since any attempt to render an offeror liable for a contract for goods or services which are not requested by the offeror amounts to a criminal offence under the Unsolicited Goods and Services Act 1971, and indeed, such goods or services can be enjoyed as an outright gift provided the provisions of the Act are complied with.

Although an offeror cannot impose liability on an offeree by not requiring them to communicate acceptance, subject to the exceptions discussed, it is possible for the offeror to waive the need for acceptance so that they run the risk of having contractual liability thrust upon themself. This waiver of the need to communicate acceptance may be express or implied from the circumstances of the case. Such a situation occurs in the case of unilateral contracts. Thus in *Carlill v Carbolic Smoke Ball Co.* there was no need for Mrs Carlill actively to communicate her acceptance of the company's offer. The company assumed such liability by Mrs Carlill's purchasing the smoke balls, using them in the prescribed manner and subsequently catching influenza. The company had impliedly waived the need for communication of acceptance. Similarly if one offers £100 to anyone who finds a certain lost dog, everyone who reads the advertisement does not have to write to the owner and accept the offer. The owner has impliedly waived the need for such communication and anyone who finds and returns the dog is regarded as having accepted the offer, imposing a contractual obligation on the owner, whether or not acceptance has been communicated.

2. The postal rule

The rule that acceptance must be communicated to the offeror is overturned when acceptance is sent via the post since here the rule is that acceptance takes place as soon as the letter is validly posted.

*Adams v Lindsell* (1818) 1 B & Ald 681

In this case, the defendants wrote to the plaintiffs on 2 September offering to sell them some wool on certain terms and requested a reply 'in course of post'. The letter containing the offer was wrongly addressed and only received on 5 September. As a result the letter of acceptance was received on 9 September, two days later than it should have been reasonably expected by the defendants. On the day before the letter of acceptance was received the defendants sold the wool to a third person, no reply having been received from the plaintiffs. The question which arose was whether a contract of sale had been entered into before 8 September when the wool was sold to the third party. Clearly if the acceptance was effective only when it arrived at the address or, at the latest, when it was brought to the attention of the defendant, then no contract would have been entered into, revocation of the offer being effected at that time by the later sale to the third party. The court held, however, that the offer had been accepted as soon as the letter of acceptance had been posted. The contract was thus in existence before the sale of the wool to the third party even though the letter of acceptance had not been received by the defendant, who was thus liable for breach of contract.

*Adams v Lindsell* was one of the earliest cases in this area of the law but any doubts as to its correctness or not were dispelled in *Household Fire and Carriage Accident Insurance Co. v Grant* (1879) 4 Ex D 216 where the defendant applied for shares in the
plaintiff’s company. The shares were allotted to him but the letter of allotment was never received. The company then went into liquidation and the liquidator claimed the balance of the purchase moneys from him. The defendant disputed the fact that he was a shareholder on the basis that he had not received an acceptance, in the form of the letter of allotment, to his offer to purchase the shares. It was held that the contract had been entered when the letter of allotment had been posted to him despite the fact that it had never arrived.

Today it has become firmly established in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH* [1983] 2 AC 34 that acceptance is effective when it is placed in the control of the Post Office, that is, put into a postbox or handed to an officer of the post authorised to receive or collect letters. A postman delivering letters is not so authorised and the handing of a letter of acceptance to such an individual would take effect only when actually communicated to the offeror, as stated in *Re London and Northern Bank* [1900] 1 Ch 220. One conclusion that may be drawn from the above is that the letter must go into the postbox to be effective and if one arrives at the postbox just as it is being emptied it would not be a valid posting to place the letter directly into the postman’s bag – they are not authorised to receive mail in this way. The letter must go into the box to be valid, even if this means that the postman simply has the door open and catches it as it falls in and places it in the bag! It also seems that the rules as regards letters apply equally to a telegram, the acceptance being valid as soon as its wording is communicated to a person authorised to receive it for transmission to the offeror. Treitel also suggests that the same rules apply to telemessages since there is nothing to doubt why these should be treated any differently.

Both Treitel (2003) and *Cheshire, Fifoot and Furmston* (2006) put forward theories to justify the existence of the rule but do not fully and conclusively provide an answer. One theory is that the rule prevents an offeree from accepting by post and then nullifying acceptance by communicating rejection of the offer by a quicker means of communication, such as telex, thereby preventing the letter of acceptance from being effective on receipt by the offeror. Another theory is that without the rule an offeree would not be able to know for certain whether they had actually entered into a contract or not. The truth of the matter is that the rule is one of expedience since whatever approach is adopted one of the parties is bound to suffer hardship. The law, by taking a particular stance, is merely providing for certainty, though in *Holwell Securities Ltd v Hughes* it was stated that the rule would have no application if this would result in ‘manifest inconvenience and absurdity’.

One theory often promoted as a reason for the existence of the postal rule is that if the offeror, either expressly or impliedly, indicates that postal acceptance is sufficient then they should bear the consequences of the postal rule. This proposition leads us on to a discussion of whether it is possible for the offeror to circumvent the operation of the rule.

In *Henthorn v Fraser* [1892] 2 Ch 27 it was stated that the postal rule applied only where it was reasonable for the offeree to use the post as a means of communication. Indeed, in the case of *Queneduaine v Cole* (1883) 32 WR 185, the view was taken that an offer by way of telegram was an indication that an equally expedient mode of acceptance was required, so that acceptance by post was held not to be valid. In these cases the required mode of acceptance was inferred from the prevailing circumstances of the offer, but in the earlier case of *Household Fire and Carriage Accident Insurance Co Ltd v Grant* Bramwell LJ considered that the postal rule could be avoided by the prudent offeror saying, ‘Your answer by post is only to bind if it reaches me.’ The position has been supported in modern times by *Holwell Securities Ltd v Hughes* where there was an
option said to be exercisable only by ‘notice in writing’. It was held that these words were sufficient to negate the effects of the postal rule, so that a letter of acceptance posted but not received by the offeror was insufficient to form a contract.

From the latter cases it is clear that the offeror may also prevent the operation of the postal rule by expressly prescribing a particular mode of communication. The leading case in this area is *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 159, where Buckley J stated:

An offeror may by the terms of his offer indicate that it may be accepted in a particular manner . . . an offeror, who by the terms of his offer insists on acceptance in a particular way is entitled to insist that he is not bound unless acceptance is effected or communicated in that precise way, although it seems probable that, even so, if the other party communicates his acceptance in some other way, the offeror may, by conduct or otherwise, waive his right to insist on the prescribed method of acceptance. Where, however, 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 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.

The position, then, is that if the offeror requires acceptance by a particular mode and stipulates that only that mode will be sufficient, the offeree must comply with that stipulation, though the offeror can waive this requirement if they so wish. Where, however, the offeror merely asks for acceptance by a particular mode, an acceptance by the offeree will be sufficient even if it is by a different mode, provided that mode is more expeditious than (or equally as expeditious as) the method requested by the offeror. The latter position occurred in *Tinn v Hoffman and Co*. (1873) 29 LT 271 where the offeree was asked ‘to reply by return of post’ and the court held that an equally expeditious method would suffice.

3. Instantaneous forms of communication

The postal rule as an exception to the general principle requiring communication is confined to communications through the post, telegrams and probably also tele-messages. Modern technology, however, provides other methods of communication which are instantaneous in their operation to the extent that the parties are, as it were, in each other’s presence. Such was the reasoning in *Entores v Miles Far East Corporation*. 

*Entores v Miles Far East Corporation* [1955] 2 QB 327

The plaintiffs were a company based in London who were dealing with the defendants, an American company, with agents in Amsterdam. Both parties possessed telex equipment. The plaintiffs offered to buy goods from the defendants’ agents using the equipment. The agents accepted the offer also by telex. Subsequently a dispute arose between the parties and the plaintiffs wished to serve a writ on the defendants alleging breach of contract. This was only possible if the contract had in fact been made in England and it was this question that arose before the court. The Court of Appeal held that the parties were in the same position as they would have been if they had been in each other’s presence. The consequence of this was that the contract was entered into when the acceptance by the agents was received in London by the plaintiffs, not when the telex was sent in Amsterdam, which would have meant that the
contract would be subject to Dutch law. Lord Denning confirmed, *obiter*, that the same principles also apply to acceptances by telephone.

The decision in the *Entores* case was confirmed in *Brinkibon Ltd v Stahag Stahl GmbH* where the facts were very similar, except that the offer was made by telex in Vienna and accepted by telex sent in London. It was held that the contract was made in Vienna. In the two cases both the telex messages were sent during ordinary office hours but what would happen if the acceptance had been sent out of office hours? Would the acceptance take place when received at the offeror’s office or when it was read the next morning or the next time the office was open? Similarly if the acceptance had been sent by telephone and recorded on an answering machine, would the acceptance take place when received or when the recording was next played back? What would happen if the recording was accidentally erased?

In *The Brimnes* the Court of Appeal held that a notice of withdrawal that had been sent during office hours, but not seen by the office staff until the next Monday, was effective when received. One factor that may have influenced the decision here was a possibility of negligence on the part of the office staff. Such a solution may be appropriate where the erasing of a message on the telephone-answering machine could be regarded as a negligent act of the offeror or the offeror’s agents/servants.

The decision in *The Brimnes* has been reinforced in *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* [1995] CLC 1011. The case revolved around the issue as to when a telex notice of an intention to withdraw a ship from a charter for non-payment of the hire, sent by the ship owners to the charterers, was effective. The telex was sent at 23.41 hours on Friday 2 December 1994, and received instantaneously. Was it effective at that time or from the commencement of business the next working day, Monday 5 December? This was crucial since the charterers were entitled to tender payment at any time before midnight on Friday 2 December. If this notice took effect immediately at 23.41 it would have been invalid since the charterers were not in default of the terms of the charterparty at that time. If, however, the notice did not take effect until the start of business on Monday 5 December, it would have been valid and the shipowners would have been entitled to withdraw the ship from the charter. It was held that this notice was effectively communicated on the next working day and the owners were thus entitled to withdraw the ship. Gatehouse J stated:

> What matters is not when the notice is given/sent/despatched/issued by the owners but when its content reaches the mind of the charterers. If the telex is sent in ordinary business hours, the time of receipt is the same as the time of despatch because it is not open to the charterers to contend that it did not in fact then come to their attention.

This statement gives further clarification where a communication is sent outside normal business hours; however, it is no panacea to the problems associated with modern-day communication systems. These problems were discussed by Lord Wilberforce in the *Brinkibon* case, where he stated:

> Since 1955 the use of telex communications has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or fault at the recipient’s end which prevents
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receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.

In this electronic age of instantaneous communications, whether one talks of telephones, telexes, electronic mailing systems or facsimile and telephone-answering machines, it is regrettable that Lord Wilberforce did not address more precisely the problem of when acceptance is effective. The result is that at the present time the law in this area is in a state of uncertainty.

4. E-commerce

The imprecision that can be seen in certain types of electronic means of instantaneous communication is not repeated when considering the nature of contracts made via the Internet. The way offers arise in this medium was examined earlier in this chapter (see pp. 23 and 24), where it was stated that the website would usually amount to an invitation to treat, as in *Fisher v Bell*. Once the purchaser has placed the required items in a virtual shopping basket, they click on a button or icon and proceed to the ‘checkout’. Just as seen in the *Boots Cash Chemists* case, the purchaser can decide to change their mind at this point and not proceed with the purchase. However, if they do proceed with it, they will normally be asked to confirm their identity, or, if this is a first purchase from the website, they may be asked to register with the seller. The purchaser will then be asked to provide credit/debit card details or at least asked to confirm that the purchase will be made with a card that has previously been used. Assuming everything is in order at this stage the seller will provide the purchaser with the details of the order and they will then be asked to confirm those details and that they wish to continue with the transaction. At this point the offer is transmitted to the seller, who may or may not accept the offer; for instance, the seller may consider that the credit card details are inaccurate or not acceptable. If everything is in order then the seller will normally display another screen confirming the receipt and acceptance of the order. Usually this is followed up by an e-mail to the purchaser.

There are two issues at this point. First, the confirmation/acceptance of the order by the seller is often generated electronically and thus the seller has to ensure that the information supplied on the website is correct. In the example of Argos Stores referred to above (at p. 24), if the purchasers had submitted their offers based on the television sets being sold for £3 instead of £300 then, prima facie, a contract would have arisen once the confirmation/acceptance of the order had been sent by the seller notwithstanding the further complication of a unilateral mistake as to the terms of the offer. Second, the problems already highlighted in *Brinkibon* as to determining the time at which the confirmation/acceptance is received also apply here. For example, can the purchaser revoke the offer prior to the confirmation/acceptance screen being communicated to them? Does the acceptance still take place if the confirmation screen is not seen or the confirming e-mail ignored? No doubt such issues would have to be dealt with on the facts, as indicated by Lord Wilberforce in *Brinkibon*, as discussed above. These problems do not arise, however, where the seller’s website constitutes an offer or where the confirmation screen itself is considered to be an offer that requires the purchaser to click on an icon to accept the offer. Just as the Electronic Commerce (EC Directive) Regulations 2002 do not help in deciding the status of the website as an invitation to treat or an offer,
as seen earlier, neither does it define what constitutes an acceptance. Regulation 11(1),
however, provides that unless the parties are businesses who have agreed otherwise:

\[
\ldots \text{where the recipient of the service [the purchaser] places his order through technol-}
\text{ogical means, a service provider [the seller] shall –}
\]

(a) acknowledge receipt of the order to the recipient of the service without undue delay
and by electronic means . . .

Regulation 11(2), importantly, then states:

(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 . . .

Thus the provision seems to imply that acceptance only takes place when the acknow-
ledgement of the receipt is actually received. Such an approach is in accordance with the
normal rules regarding instantaneous communication in that the acceptance is only
valid when received. It should be noted that the above provisions do not apply to e-mail
communications (reg 11(3)) which continue to be plagued with the problems associated
with cases like \textit{Entores} and \textit{Brinkibon}, above.

The termination of offers

So far it has been seen that, for a legally binding agreement to arise, an unconditional
acceptance must be communicated and there must be the intention of being legally
bound. It follows, therefore, that if the offer has ceased to exist there can be no such
acceptance. In this section relating to the fact of the agreement we examine the ways
in which an offer ceases to exist. It should also be borne in mind that, apart from the
methods examined here, acceptance of an offer also terminates the offer, though to some
extent this depends on the nature of the offer. Clearly, however, if \(A\) offers their car for
sale to members of their office and \(B\) accepts that offer, no other member of the office
can accept the offer. An offer ceases to exist in the following circumstances.

Revocation

Bilateral contracts

In \textit{Payne v Cave} (1789) 3 Term Rep 148, it was first established that it is possible to
revoke an offer at any time before the offer is accepted since no legal obligation exists
until this event occurs. Any attempt to revoke an offer after acceptance must of necessity
be a prima facie breach of contract. Furthermore, there is no obligation on an offeror to
keep his offer open for or until a specified date or time. Thus in \textit{Routledge v Grant} (1828)
4 Bing 653, it was held that where a defendant made an offer to purchase the plaintiff’s
house and gave him six weeks to accept the offer, he was free to revoke and withdraw
his offer before the six weeks had passed. The only way the plaintiff could have held
the defendant to his promise was if he had actually purchased an option, whereby the
defendant would be bound by a separate, binding contract to keep his offer open for the
stipulated period. Any attempt to revoke within the period in this instance would give
rise to an action for breach of the option contract.

In order for the revocation to be effective, notice of the withdrawal of the offer must
be communicated to the offeree. It should be noted that the postal rule as seen in the
context of acceptance has no application here.
THE TERMINATION OF OFFERS

Byrne v Van Tienhoven (1880) 5 CPD 344

In this case, the defendants posted a letter in Cardiff on 1 October offering to sell a quantity of tinplate to the plaintiffs in New York. The offer was received by the plaintiffs on 11 October, and they immediately accepted it by telegram and confirmed their acceptance by a letter posted on 15 October. On 8 October the defendants had posted a letter withdrawing their offer but this was not received by the plaintiffs until 20 October. It was held that a contract had come into existence when the telegram was sent on 11 October and that the letter of revocation sent on 8 October had no effect on the validity of the contract since it was only effective when received on 20 October, after a legally binding contract had already come into existence.

This rule relating to communication of revocation clearly flies in the face of the earlier thinking of judges since here a contract has come into existence when the parties are patently not in agreement. The rule, nevertheless, is correct, as otherwise no one would be able to rely on any offer since it might have been revoked before it had been received by the offeree, a result which would undoubtedly lead to inconvenience and uncertainty.

There are two principal exceptions to the rule that revocation must be communicated to the offeree. First, the rule may be overturned where the revocation would have been received by the offeree but for their being negligent in some way, as, for example, by the offeree failing to inform the offeror of a change of address. This exception also raises the spectre of when communication takes place, that is, when received or when actually read by the offeree. It would be a nonsense for the offeree, for instance, knowing that a letter might contain a revocation to ignore opening that letter and reading it until they had actually sent their letter accepting the offer. The logic contained in The Brimnes, as already discussed, is clearly appropriate here in that communication of the revocation would be deemed to have taken place when the letter was opened in the ordinary course of business, or would have been so opened and read if the normal course of business had been followed.

A second exception occurs where an offer has been made to the general public. For example, if an offer had been placed in a newspaper it would be clearly impossible to communicate the revocation to every person who had read the offer. In these circumstances it would seem that revocation will be effective if the offeror takes all reasonable steps to bring the notice of the revocation to all those who potentially may have read the offer. In the case of our example of the offer in the newspaper it might be that a similar sized notice in the same newspaper on the same day might well pass this test of reasonableness. Unfortunately no English authority exists at this point but such was the decision in the American case of Shuey v US, 92 US 73 (1875).

Can an offer be terminated by the offeror sending a second offer prior to the offeree accepting the first? This point was dealt with in the Court of Appeal in the following case.

Pickfords Ltd v Celestica Ltd [2003] EWCA Civ 1741

The facts of the case were that Celestica Ltd ['Celestica'] was an information technology company which carried on business in Stoke on Trent. It wished to move its place of business to Telford and approached Pickfords Ltd ['Pickfords'] to carry out the removal process. Pickfords sent a fax on 13 September 2001 stating that it estimated that a total of 96,000 cubic feet of workshop and office equipment needed moving and that this would require 96 pantechnicon vehicle loads. The 'cost for the crew, fuel, vehicle etc. to pack, load transport and unload from Stoke to Telford during a weekday will be E890'. The cost for the packing of the effects was to be £2.50 per unit and that 500 units of antistatic packs and cartons would be required. The
fax then stated, ‘Therefore we have an estimated budget figure to include all the above at £100,000.’ [This figure included VAT.] This could be described as the ‘first offer’. Pickfords then conducted a survey over a three-day period. This culminated in the sending of a second document on 27 September 2001. This was a far more detailed document and set out the process involved in managing the move. It stated that on acceptance of this offer an experienced Move Manager would be appointed. The document also stated that Pickfords undertook to do the work for a fixed price of £98,760 (plus VAT). This could be described as the ‘second offer’.

The defendants then sent a fax dated 15 October 2001 stating that an invoice had been raised with reference to the fax of 13 September 2001. It stated at the bottom ‘[not to exceed 100K]’. Pickford’s case was that a contract arose with respect to the second offer and the fax of 15 October. Celestica claimed that the contract related to the first offer and the fax of 15 October.

Pickfords claimed that the first offer was not capable of being accepted and that the second offer operated as a rejection of the first. Both these contentions were rejected at first instance. The court also held that the fax of 15 October amounted to an acceptance of the first offer since it referred back to the fax of 13 September, the first offer. On appeal Pickfords contended that the judge at first instance should have held that the second offer revoked the first offer and the judge was wrong to find that the fax of 15 October operated as an acceptance of the first offer.

Dyson LJ in the Court of Appeal stated that the only fact relied upon by Pickfords as evidence of the withdrawal of the first offer was the sending of the second offer. He considered the veracity of this contention depended on the nature between the two offers and the circumstances in which they are made. He used the example of a person asking for a quotation for work to be done and being quoted a figure of £200 per day. The offeree then asks for a fixed-price quotation and is quoted £1,500 to complete the work. Dyson LJ considered that here there were two offers and the offeree had a choice of accepting one or the other. The second quotation in the absence of something more does not operate to revoke the first. The two offers are inconsistent only in the sense that they cannot both be accepted. He considered, however, that in the case in question this was not merely a case of a difference in price and that the second offer did in fact revoke the first.

But which offer did the fax of 15 October accept? He considered that the answer to this question could only be decided by examining the three documents. He did not consider that the contents of the fax of 15 October related to the second offer. In particular the words ‘[not to exceed 100K]’ did not make any commercial sense if the fax was to operate as an acceptance of the second offer since this was a fixed-price offer and the two expressions are clearly inconsistent with one another. The words pointed to an acceptance of the [first] offer since it referred to a budgetary ceiling of £100,000. The problem now remained that the fax of 15 October purported to accept an offer that had been revoked. On this basis this fax operated as a counter-offer to accept the services of Pickfords on the terms of the first offer and since the work had been carried out this counter-offer had been accepted by Pickfords. It should be noted that even if the first offer had not been revoked, the fax of 15 October would have constituted a counter-offer in any event since the words ‘[not to exceed 100K]’ introduced a material new term to the contract. The case therefore comes down to a classic ‘battle of the forms’ scenario, as described earlier.

A final point relating to communication of revocation is that while the revocation must be communicated to the offeree it is thought that it need not be communicated by the offeror. For revocation to be effective in such circumstances, however, the revocation
must be communicated to the offeree via a reliable third party. Notice of the revocation would not be effective if it came to the offeree's attention by way of mere rumour or supposition. The case often quoted as being the authority for this principle is that of *Dickinson v Dodds*.

**Dickinson v Dodds (1876) 2 Ch D 463**

On 10 June the defendant offered to sell his house to the plaintiff for £800 adding, 'This offer to be left over until Friday 12th June, 9 am'. On Thursday 11 June the defendant sold the house to someone else and that evening the plaintiff was informed of that sale to another individual named Berry. That same evening the plaintiff delivered a formal letter of acceptance to the defendant's house and followed this up with a duplicate at 7 am the next morning, that is, before the 9 am deadline. When the defendant failed to complete the contract the plaintiff sued him for a decree of specific performance. It was held by the Court of Appeal that the plaintiff should fail in his application since he was aware at the time that he accepted the offer that Dodds, the defendant, no longer intended to sell the house to him. The principle established in the case places a substantial onus on the offeree to decide whether the source of the revocation is reliable or not, or indeed the precise time at which the revocation is deemed to have been communicated to him. To a large degree the case reflects the traditional and defunct consensus approach to establishing a legally binding agreement, but therein lies an anomaly, since there would be no consensus even if the withdrawal of the offer had not been communicated to him. A further weakness lies in the case in that the third party, Berry, subsequently became the agent of Dickinson, thus calling into question the notice of revocation being communicated by an independent third party. Perhaps, as Treitel suggests, the rule should simply be that the revocation must be communicated to the offeree by the offeror.

**Unilateral contracts**

It has already been seen earlier in this chapter that a unilateral contract occurs where a person, the promisor, binds himself to perform a stated promise when the promisee fulfils some condition stipulated by the promisor, such being the situation in our example of *Carlill v Carbolic Smoke Ball Co*.

In the context of the revocation of offers, unilateral contracts present particular difficulties because of the fact that acceptance takes place when the condition is completed. It has been established in our study of revocation that it is possible to revoke an offer at any time until it has been accepted by the offeree. In terms of unilateral contracts this rule can lead to abuse and injustice. For example, A may make an offer stating that they will pay £1,000 to anyone who walks from Manchester Town Hall to Nelson's Column in Trafalgar Square arriving on 6 June. B sets out and arrives in Trafalgar Square on 6 June but just as B is about to touch Nelson's Column, A revokes the offer. On the basis of the general rule relating to revocation of offers A is entitled to do this, since, as Goff LJ stated in *Daulia Ltd v Four Millbank Nominees Ltd* [1978] 2 All ER 557:

> the true view of the unilateral contract must in general be that the offeror is entitled to require full performance of the condition that he has imposed and short of that he is not bound . . .

Such an approach is undoubtedly intolerable and unjust; and indeed, this has been recognised as such in a number of cases.
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108

An owner of a piece of land promised to pay an estate agent £10,000 commission if he introduced someone who was willing to purchase the property. The agent did in fact introduce someone and a sale was agreed subject to contract. While the third party was always ready and willing to purchase the property the owner decided not to proceed with the sale. The result of the decision was that the agent could not complete the act he was employed to do. He nevertheless claimed the £10,000 which the owner refused to pay. The agent then brought an action for breach of contract alleging that there was an implied undertaking that he would not do anything to prevent completion of the sale. The House of Lords held that the owner could revoke his offer at any time up to exchange of contract and, therefore, the agent’s action failed since the commission only became payable on completion. On the face of things the case supports the proposition that an offer in a unilateral contract is freely revocable by the offeror until performance by the offeree. The House of Lords, however, was not so definite in its judgment, preferring to decide that in the circumstances of the case it would not be proper to infer an undertaking on the part of the owner not to withdraw from the sale and thereby revoke his offer. Presumably, however, if such an undertaking could be implied in a particular case the court would find such an implication justifiable and the undertaking would be binding on the offeror. In the Luxor case, for instance, the House of Lords would not imply such an undertaking, on the basis that the reward was very substantial for comparatively little effort on the part of the agent and therefore the agent was taken to have assumed that it was possible that the offeror would wish to withdraw from the sale. If, to effect the sale, the agent had been required to undertake an obligation or task that was substantial and onerous in comparison to the fee level promised, the House of Lords might have been prepared to imply such an undertaking.

In Errington v Errington and Woods [1952] 1 KB 290, a father purchased a house in his own name and then allowed his son and daughter-in-law to live in the house provided they paid the mortgage instalments. He told them that the house would be theirs when the mortgage was paid off. The couple lived in the house and paid the instalments. They were not contractually obliged to do this, though if they did, the house would be theirs. The father eventually died and his widow claimed possession of the house. It was held that the agreement amounted to a contract which could not be revoked, provided the couple continued to pay the instalments. Lord Denning summed the situation up as follows:

The father’s promise was a unilateral contract – a promise of a house in return for their act of paying the instalments. It could not be revoked by him once the couple entered a performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done . . . They have acted on the promise and neither the father nor his widow, his successor in title, can eject them in disregard of it.

While the above view was supported in Daulia Ltd v Four Millbank Nominees Ltd, the basis of the decisions in all three cases is conceptually elusive. Not surprisingly Lord Denning, very much the father of the modern doctrine of promissory estoppel, tends to rely on this as justification for the rule. The doctrine of estoppel, however, cannot provide a complete answer since its application is deficient in that there needs to be an existing legal relationship for it to apply. Very often such a relationship is not present where an offer of a unilateral contract is being revoked. Another justification for disallowing revocation of the offer once the offeree has begun to perform their side of the agreement can be found in the idea of collateral contracts. In other words, in fact two offers are presented in the offeror’s statement. The first is the one which expressly presents itself to the offeree, and in which the offeror promises to pay once the offeree has performed the
act in question. The second offer is an implied one, namely that the offeror shall not withdraw his offer once the offeree has begun to perform the act in question. If the offeror attempts to revoke his first offer he will be in breach of the second collateral contract. Such a view finds much favour in Cheshire, Fifoot and Farnston. Treitel, however, tends to favour the idea that acceptance of the offer takes place when the offeree begins to perform the act required by the offeror, thus rendering any attempt at revoking the offer impossible. The main flaw here is that a binding contract will materialise and the offeree will be in breach of contract if they fail fully to perform the act in question. It is submitted that such a consequence would be unacceptable to the offeree.

Different arguments can be found justifying the rule and it may be that there is a degree of probity in all of them. It is regrettable that the courts have been so reluctant to define the theoretical basis behind the rule that the courts will treat an offer of a unilateral contract as irrevocable once performance by the offeror has commenced.

**Rejection**

The rules relating to rejection have largely been dealt with in our discussion of counter-offers since these operate as a rejection of the original offer, as seen in Hyde v Wrench.

On the matter of communication it would seem that a rejection is ineffective until it is communicated to the offeror. Treitel suggests that, this being the case, it is possible for an offeree to post a letter of rejection and subsequently accept the offer – provided the communication of the acceptance is brought to the attention of the offeror before he receives the letter of rejection. Such a conclusion would seem fair, though it would also seem to be valid to apply the postal rule to a letter of acceptance sent subsequent to the sending of the letter of rejection. Such a conclusion, however, while being legally correct, would be grossly unfair to the offeror who might, while relying on the letter of rejection received by the offeror, sell the goods (for instance) to someone else, being unaware that in fact there was a valid contract between themself and the original offeree. The point is undecided to date.

**Lapse of time**

An offer cannot last indefinitely and a point must arise at some time when the offer ceases to exist. It may be that the offer is expressed to last only for a certain period and that if not accepted within that period the offer will lapse. Where no express provision is contained in the offer it will in any event lapse after a reasonable time. What constitutes a reasonable time depends largely on the subject matter of the offer. For example, an offer to sell a quantity of perishable goods, say tomatoes, would lapse after a fairly short period of time compared to the time reasonable for a quantity of steel. Some items, while they are not perishable in that sense, may, nevertheless, be highly volatile in other respects and this again would cause the offer to lapse in a fairly short period of time. An example may be seen in the case of Ramsgate Victoria Hotel Co. Ltd v Montefiore (1866) LR 1 Ex 109 where the defendant applied for shares on 8 June but none was allotted to him until 23 November. It was held that the company could not accept the defendant's offer to purchase the shares since that offer had lapsed. Any acceptance had to take place within a reasonable time and in the case of a highly volatile commodity such as shares lapse occurred after a comparatively short period of time. The delay from June to November...
was unreasonable and therefore the action for breach of contract for failure to accept and pay for the shares failed.

**Failure of a condition precedent**

Apart from an offer only being effective for a stated or reasonable period of time, as discussed above, the offer may only be effective while certain conditions exist. An offer may expressly provide that it will determine on the occurrence of some condition. Any acceptance subsequent to the occurrence of the stated condition will therefore be ineffective. Such conditions precedent may also be implied in an offer. For example, it is implied in an offer to purchase goods that they will remain in substantially the same condition as they were in when the offer was first made.

**Financings Ltd v Stimson [1962] 3 All ER 386**

The defendant, having seen a car at the premises of the dealer, decided to buy it on hire purchase. He signed a form supplied by the dealer which stated that the hire purchase agreement became binding only when signed by the plaintiffs, the finance company. The defendant paid a first instalment of £70 and took the car away on 18 March. On 20 March the defendant returned the car, dissatisfied with its performance, and stated to the dealer that he no longer wished to purchase it. On 25 March the plaintiffs signed the agreement, thereby purporting to accept the offer of the defendant. On the night of 24/25 March the car was stolen from the premises of the dealer and badly damaged. The plaintiffs eventually sold the car and claimed damages from the defendant, who counter-claimed for his first instalment of £70. It was held that the defendant would succeed since by returning the car to the dealer the defendant had revoked his offer and there was thus no concluded contract between the parties. Further, on the facts of the case, there was an implied condition in the offer of the defendant that the car would remain in substantially the same condition until the time of acceptance. Since the damage occurred before acceptance the plaintiffs were not in a position to accept the offer which had lapsed due to the fact that the implied condition had not been complied with.

**Death**

The effect of death on an offer is, unlike death itself, not quite so certain, at least where it concerns the death of the offeror. Where the contract requires the personal services of the offeror then death will automatically terminate the offer. Thus an offer by a film star to open a gala will clearly lapse on the death of the film star. Where, however, the contract does not require the personal services of the offeror then it may be the case that the personal representatives will have to employ some other person to carry out those services. What is a relevant consideration here is whether notice of the death of the offeror was brought to the attention of the offeree. If the death of the offeror was brought to the attention of the offeree prior to acceptance of the offer then the offer will cease to exist. Where the offeree has no notice of the death of the offeror then, on acceptance, the offeror’s estate will be bound by the ensuing contract.

The principles in relation to the death of the offeror can be found *obiter dicta* in **Bradbury v Morgan (1862) 1 H & C 249**. No authority exists, however, in the case of the death of the offeree, though in the context of a bilateral contract it would seem reasonable to suggest that very often the terms of the offer apply specifically to a particular offeree, and that as a result the death of the offeree terminates the offer.
Certainty of terms

Despite the fact that one can find a valid offer and acceptance leading to an agreement, the courts may nevertheless fail to find for a binding contract between the parties. Such a conclusion may be reached where one party has raised, as a defence to an action for breach of contract, the fact that some essential element has been omitted from the agreement, or that some terms are so vague that the contract as a whole is rendered unenforceable. Not surprisingly this problem is all too common since the vast majority of contracts are negotiated and entered into by businesspeople with no legal knowledge. It is, of course, for this very reason that standard-form contracts have been, and continue to be, so popular. Where such a device is not used the businessman is more concerned with the general round of negotiating and obtaining a contract in principle, leaving certain issues such as pricing or delivery arrangements to be negotiated at a later date.

It is the loosely drafted contract that creates the problem and here the courts are faced with a difficult task. The judge must do all they can to preserve the contract, if indeed there is one, but what they must not do is to write the contract for the parties. The question as to whether the contract is enforceable or unenforceable largely revolves around the level of vagueness, ambiguity or incompleteness in the contract for it is this which, combined with the uncertainty of the willingness of the judge to save or sacrifice the contract, creates substantial uncertainty for the parties. With this level of overall uncertainty it is impossible to draw up a precise set of rules since each case revolves very much on its own facts. It is nevertheless possible to develop a broad set of guidelines which may give some indication as to the possible direction a judge might opt for in any particular case.

The contract is uncertain but has yet to be performed

The attitude of the courts here may be seen in the case of Scammell and Nephew Ltd v Ouston [1941] AC 251, where the respondents agreed to purchase a new van from Scammell. The order was given ‘on the understanding that the balance of purchase price can be had on hire purchase terms over a period of two years’. Scammell accepted the offer though the term ‘hire purchase terms’ was never determined. It was held that no precise meaning could be attributed to the clause as hire purchase agreements varied widely and there was thus no contract. The level of vagueness here was such as to render the contract unenforceable, since it was impossible for the court to determine either the meaning or intention of the parties with regard to the expression ‘hire purchase terms’. There was, for instance, no previous course of dealings between the parties to rescue the contract, nor was there any performance of the contract which might have given the court guidance as to the meaning of the term.

Where there is no performance of the contract the courts, in the absence of any aids, will much more readily find that the contract is unenforceable. A further example of this attitude can be found in May & Butcher v R [1934] 2 KB 17n.

The contract is uncertain but performance has commenced

In this situation, the courts, as a matter of expediency, are much more likely to uphold the contract as enforceable. Perhaps it is an over-simplification of the process to suggest that expediency forces the arm of the courts to find for a contract, since very often the
courts will have more information on which to resolve the uncertainty within the contract once some performance has been rendered. Nevertheless, the reluctance of the courts to unravel a contract that is partly, or perhaps even substantially, performed should not be underestimated either.

In *Hillas & Co. Ltd v Arcos Ltd* (1932) 38 Com Cas 23, the facts of which have already been considered, the court was able to determine the meaning of the option clause by reference to the previous course of dealings of the parties in the contract of which the option clause was part and parcel. Further, the position of the court was aided by the existence of well-established trade usage.

A more striking example can be seen in the following case.

**Foley v Classique Coaches Ltd [1934] 2 KB 1**

The plaintiff, who was a retail dealer in petrol, contracted to supply the defendants, who ran a coach business, with all the petrol they required ‘at a price to be agreed by the parties in writing and from time to time’. No such agreement as to the price was ever concluded and three years later the defendants purported to repudiate the contract. It was held that they were not entitled to do so since in the absence of an express agreement a term would be implied that the petrol supplied by the plaintiff should be of reasonable quality and sold at a reasonable price. Undoubtedly, the fact of the contract having been performed was a major factor in the Court of Appeal’s decision.

An interesting modern example of the issues arising in these cases can be seen in the following case.

**Baird Textiles Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274**

The claimant had been a principal supplier of garments to the defendants for some 30 years. In October 1999 the defendant terminated all supply arrangements with the claimant from the end of the then current production season without warning. The claimant contended that the defendant was precluded from terminating the arrangements without reasonable notice based on the fact that there was an implied contract to acquire garments from it in such quantities and at such process prices which in all the circumstances was reasonable. There was no express contract between the parties although it was well understood between the parties that Marks & Spencer deliberately chose not to enter an express contract. The reasons for this were that Marks & Spencer did not wish to regulate any continuing or future business that would impose on them an obligation to place orders in the future or have to give reasonable notice of termination.

Judge LJ concluded that it would be unusual to imply a contract between the parties when it was clear that Marks & Spencer had deliberately avoided entering into such a contract. Morritt VC also stated that in any event the obligation on Marks & Spencer to supply a reasonable quantity of clothes at a reasonable price was uncertain: ‘... there are no objective criteria by which the court could assess what would be reasonable either as to quantity or price’. He pointed out that this was not a case where there was a contract between the parties where the court is seeking to construe the terms of the contract in order to create certainty. It was in fact a case where the lack of certainty confirms the fact that there was no intention to create legal relations between the parties. It cannot be said that the conduct of the parties is consistent with the existence of a contract; indeed, the contrary was true in that the conduct of the parties pointed to the absence of an agreement. The Court of Appeal thus held that Baird Textiles had no claim in contract. The position is that all there is between the parties is a
long-term business relationship but this cannot be extended any further into a contractual relationship. The basis of the contractual arrangements is based on individual orders and sales – nothing more. The relationship is only as good as the last order. There is no objective evidence of a wider relationship which the courts would have to see to establish the wider contract.

A further factor that is often taken into account by the courts in resolving problems of uncertainty is the provision for arbitration or some other means of resolving disputes within the contract. Such a clause existed in the Foley case and was another factor taken into account by the Court of Appeal in coming to its decision. Such a provision is always prudent if any terms, such as price or terms of delivery, are to be left open by the parties. In the past the machinery set up by the parties for resolving disputes or such matters has nevertheless also been held to be ineffective because of the machinery itself being vague, ambiguous or defective in some other way. In Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444, the House of Lords adopted a means whereby such decisions should now be reduced. In the case there was an agreement by which a tenant could purchase his premises ‘at such a price . . . as may be agreed upon by two valuers’. One valuer was to be appointed by the tenant and one by the landlord. The tenant decided to purchase his premises and appointed his valuer according to the agreement. The landlord refused to appoint the other valuer, thus nullifying the provision. The House of Lords interpreted the provision as being an agreement to sell at a fair and reasonable price to be assessed by the valuers. Since the landlord, by his conduct, had rendered this process ineffective and inoperable, the court was able to assess a price by reference to expert opinion as to what might be regarded as a fair and reasonable price.

The fact that there has been some degree of performance of the contract or that the contract contains a means of resolving any uncertainty within it does not necessarily mean that the courts will invariably treat the contract as enforceable.

**British Steel Corporation v Cleveland Bridge and Engineering Co. Ltd [1984] 1 All ER 504**

A contract was entered into concerning a major construction project, work on the project started before all the terms had been agreed, though negotiations proceeded in the expectation that a full and final agreement would eventually be forthcoming. At the heart of the negotiations were matters relating to delivery, price and certain other terms. Eventually a dispute broke out whereby BSC claimed a reasonable price for the items delivered so far, whereas CBE counter-claimed for damages for non-delivery of certain items. BSC’s claim was based on a claim in quantum meruit and since it alleged that there was no contract between the parties, the effect would be to preclude CBE’s claim. The court held that, despite the fact that substantial performance had taken place and the fact that there was a submission on CBE’s part that a letter of intent sent to BSC constituted a subcontract, there was no contract in existence. It was stated that there was so much left unsaid that one could not find that a contract had been formed and, consequently, BSC could claim a reasonable sum for work done on a quantum meruit basis. As Cheshire, Fifoot and Furmston (2006) points out, the decision creates difficulties in that either party could have abandoned the project with impunity without giving notice to the other party since there was no contract – no matter how ‘commercially unacceptable’ the result. Further it is pointed out that the finding of no contract could present difficulties in determining whether goods delivered and accepted, but later found to be defective, could be rejected or not. Despite these difficulties and the cases already examined with regard to certainty, the case indicates that the courts still retain substantial discretion to find for no
contract despite performance of the contract where the terms are uncertain. However, in *Percy Trentham Ltd v Archital Luxfer* [1993] 1 Lloyd’s Rep 25 Steyn LJ suggested that, where a transaction is executed, it is easier to imply a term resolving any uncertainty, or alternatively make it possible to treat as non-essential a matter not finalised in negotiations.

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**Summary**

This chapter deals with the fact of agreement and the elements necessary for establishing an agreement.

**Offers**

- Definition of an offer: An offer is an expression of willingness to contract on certain terms made with the intention that a binding agreement will exist once the offer is accepted.

**Two types of offer**

- Unilateral offers: capable of being made to the world as a whole.
- Bilateral offers: made to a specific individual or group.

**Offers and invitations to treat**

- Adverts: most advertisements are an invitation to treat (*Partridge v Crittenden; Harris v Nickerson*).
- Display of goods for sale: shop windows (*Fisher v Bell*); self-service displays (*Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd*).
- Auction sales.
- Tenders.
- Ticket cases.

**Offers distinguished from requests for information**

- Negotiations for the sale of land (*Harvey v Facey*).
- Preliminary statements (*Clifton v Palumbo*).
- In some circumstance the words ‘I would accept . . .’ can amount to an offer (*Bigg v Boyd Gibbons Ltd*).

**Communication of offers**

- An offer must be fully communicated to the offeree.
- An offer must be received by the offeree (*Taylor v Laird*).
- An offer will lapse after the passing of a reasonable period of time.

**Acceptance**

- Definition: ‘a final unqualified expression of assent to all the terms of an offer’ (Treitel).
- Two principles:
  - Acceptance must be unequivocal and unconditional.
  - The acceptance must be communicated to the offeror.
The fact of acceptance
The mode of acceptance
- An offer can be accepted in writing or verbally.
- Acceptance can be implied by conduct (Brogden v Metropolitan Railway Co. Conversely see Weatherby v Banham).
- NB: Unilateral contract and acceptance thereof by conduct (Carlill v Carbolic Smoke Ball Co.).
- An offer may state a particular requirement that must be complied with in order for acceptance to have taken place (Western Electric Ltd v Welsh Development Agency).

Counter-offers
- A counter-offer destroys the original offer (Hyde v Wrench).

Conditional acceptance
- Conditional acceptance is not full acceptance or a counter-offer.
- The parties have no intention to be legally bound until a condition has been fulfilled, e.g. ‘Sold, subject to contract’.

Clarifying the terms of the offer
- Seeking clarification of the terms by making a genuine enquiry will not amount to a counter-offer (Stevenson, Jaques & Co v McLean).

The battle of the forms
- The last form submitted wins (Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd).

Communication of acceptance
General rule
- Acceptance must be communicated to the other party (Powell v Lee). See Lord Denning, Entores v Miles Far East Corporation.

Exceptions to the general rule
- The effect of silence:
  - A party normally cannot accept a contract by remaining silent (Felthouse v Bindley).
  - NB: Ammons v Wilson, where the examination of the conduct of the parties establishes that acceptance by silence was possible.
  - NB: Unilateral offer and acceptance thereof by conduct (Carlill v Carbolic Smoke Ball Co.).
- The postal rule:
  - Acceptance takes place immediately the letter is validly posted (Adams v Lindsell; Household Fire and Carriage Accident Insurance Co v Grant).
  - Valid posting is when the letter is placed into a post box or handed to a person authorised to receive or collect letters (Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH; Re London and Northern Bank).
  - The postal rules can be excluded (Household Fire and Carriage Accident Insurance Co v Grant; Holwell Securities Ltd; Manchester Diocesan Council for Education v Commercial and General Investments Ltd).
CHAPTER 2  THE FACT OF AGREEMENT

- Instantaneous forms of communication:
  - Telex – acceptance occurs at the place when the telex was received (*Entores v Miles Far East Corporation*).
  - A notice of withdrawal sent during office hours is effective the next working day (*The Brimnes; Mondial Shipping and Chartering BV v Astarte Shipping Ltd*).
- E-commerce:
  - Websites normally amount to an invitation to treat.

**The termination of offers**
- Acceptance of an offer also terminates the offer.

**Revocation**

**Bilateral contracts**
- An offer can be revoked at any time prior to acceptance.
- The offeror does not have to keep his offer open for or until a specified date or time (*Routledge v Grant*).
- The rule: for revocation to be effective, it must be communicated to the offeree (*Byrne v Van Tienhoven*).
- Exceptions to the rule:
  - Where revocation would be received subject to the offeree's negligence.
  - Where an offer has been made to the general public (*Shuey v US*).

**Unilateral contracts**
- Once a unilateral offer is made, the courts *may* imply an undertaking that the accepter would be given a reasonable opportunity to perform the contract (*Luxor (Eastbourne) Ltd v Cooper; Errington v Errington and Woods*).

**Rejection**
- Occurs when a counter-offer is made (*Hyde v Wrench*).
- Rejections are not effective until communicated to the offeror.

**Lapse of time**
- An offer will lapse after the passage of a reasonable amount of time (*Ramsgate Victoria Hotel Co. Ltd v Montefiore*).

**Death**
- The deceased's representative should be able to accept/reject or enforce a contract that is not for the deceased's personal service.
- A contract for personal services will terminate automatically on the offeror's death.

**The contract is uncertain but has yet to be performed**
- Vague terms will render the contract unenforceable (*Scammell and Nephew Ltd v Ouston*).

**The contract is uncertain but performance has commenced**
- Vague terms are more likely to be enforced by the courts.
FURTHER READING

Further reading

Adams, 'The Battle of the Forms' (1979) 95 Law Quarterly Review 481
Beale, Bishop and Furmston, Contract – Cases and Materials, 4th edn (Butterworths, 2001)
Evans, 'The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence' (1966) 15 International and Comparative Law Quarterly 553
Gower, 'Auction Sales of Goods Without Reserve' (1952) 68 Law Quarterly Review 457
Winfield, 'Some Aspects of Offer and Acceptance' (1939) 55 Law Quarterly Review 499

Visit www.mylawchamber.co.uk/richards to access exam-style questions with answer guidance, multiple-choice quizzes, live weblinks, an online glossary, and regular updates to the law.

Use Case Navigator to read in full some of the key cases referenced in this chapter:

Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH [1982] 1 All ER 293
Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 All ER 965
Byrne & Co. v Leon Van Tienhoven & Co. [1880] 5 CPD 344
Cartill v Carbolic Smoke Ball Co. [1893] 1 QB 256
Entores Ltd v Miles Far East Corporation [1955] 2 QB 327
Gibson v Manchester City Council [1977] 1 WLR 520
Henthorn v Fraser [1892] 2 Ch 27
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433
Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] 1 All ER 482