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Offer and acceptance I: General principles

SUMMARY

This chapter deals with the traditional 'offer and acceptance' required for formation of a contract, introducing the principle of objectivity in contractual formation and contrasting bilateral and unilateral contracts. Offers are contrasted with invitations to treat and standard commercial situations are analysed. Likewise the requirements of acceptance and of communication of acceptance are explored, as is revocation and the battle of the forms.

2.1 Traditionally, we require an offer and acceptance in order to form a contract. An offer is an indication of one party's willingness to enter into a contract with the party to whom it is addressed as soon as the latter accepts its terms, and an acceptance is an agreement to the terms of the offer. For example, if I am a car dealer and I say to you, 'Will you buy this rare sports car for £100?', I am indicating my willingness to enter into a contract to sell my car to you, and that I intend this contract to arise as soon as you agree to the terms of my offer. If you reply that you would be delighted to do so, you have agreed to the terms of my offer, and a contract is formed between us.

2.2 The offer and acceptance requirement suggests that a contract is an agreement. Taking this one stage further, the requirement suggests that the parties' *intentions* determine whether a contract is formed and what the contents of this contract are (what obligations it places on the parties and what rights it gives each party against the other). So in our car example, the contract of sale is formed because both parties intend to enter into such a contract. I am placed under an obligation to give you the car and am given a right to the £100 from you in return. Conversely, you are placed under the

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obligation to pay me the £100 and are given the right to have the car transferred to you by me. These rights and obligations arise because the parties intend them to.

2.3 All of this seems unproblematic, perhaps even intuitive. Indeed, many take the view that, by and large, it is (for example, Burrows (1983) and Birks (1983)). However, matters are not always so simple: sometimes we are happy to say that there is a contract despite it being extremely difficult to identify an offer and acceptance, and often we do not focus exclusively on the parties' actual intent.

2.4 First, as Atiyah (1986) points out, we often have an incorrect view of what constitutes a 'typical contract' and what features such a contract has. We tend to think that, typically, parties sit down and negotiate until they reach a clear agreement, which they often then write down. It is at this point that we tend to think that a binding contract arises, before the parties have started to perform the contract. So we form the view that a contract is formed by a clear agreement between the parties. They agree first and perform later. However, in many everyday contracts, the parties do not sit down and reach complete agreement before performing or focus on legal niceties like offer and acceptance. Therefore, it is often artificial to try to find an implied offer and acceptance. As Lord Wilberforce points out by way of example in *The Eurymedon* (1976), it is difficult to break down a simple purchase of goods in a supermarket into an offer and an acceptance, principally because we do not pay much regard to such legal concepts when doing the shopping! *The Satanita* (1897) provides another good example. There, the defendant entered a yacht race. It was held that by entering the race, he made a contract with the other competitors that he would be bound by the rules of the race in return for their being equally bound. However, it is hard to find an offer and acceptance between the competitors: in agreeing to enter the race, each competitor dealt only with the yacht club, not the other competitors.

2.5 Second, in order to ascertain whether a contract has been formed, and if it has, what its terms are, we often do not focus on the parties' *actual* intentions. Instead we focus on what each party's intention reasonably *appeared to be* to the other party. In order to work out whether there was a valid offer in our car example, we ask whether it should have appeared to you that I was offering to sell my car, not whether it was my actual intention to do this. This is known as the principle of 'objective intention' and is discussed further below. So a party might be bound by a contract even though this is the last thing he intends.

2.6 Third, in working out whether there is a valid offer and acceptance, the courts sometimes appear to take into account factors other than the apparent intention of the parties. We shall see this later in this chapter (see para **2.20**), when examining the distinction between an offer and an invitation to treat, and in Chapter 3 when examining the doctrine of intention to create legal relations.

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Third, in working out whether there is a valid offer and acceptance, the courts sometimes appear to take into account factors other than the apparent intention of the parties. We shall see this later in this chapter (see para 2.20), when examining the distinction between an offer and an invitation to treat, and in Chapter 3 when examining the doctrine of intention to create legal relations.

2.7 Fourth, in some contexts we are happy to impose duties and bestow rights upon the parties that they have not agreed to. For example, we imply terms into a contract, despite the fact that the parties have not agreed to such terms (see Chapter 8). Take our car example: while we might not have agreed that the car will be of a certain quality or even thought about the matter at the time of entering the contract, a term will be implied into the contract placing me under an obligation to provide a car of a satisfactory quality. Similarly, in some circumstances, statute permits us to strike down terms of the contract that seem unfair, despite the fact that the parties have agreed to such terms (see Chapter 9). Moreover, contract law is happy to give one party various remedies against the other party when the latter breaches a term of the contract, despite the fact that the parties have not agreed to any such remedies (see Chapters 19–21).

2.8 Finally, if we take such a strict approach, by always requiring an offer and acceptance, the result will often be that no contract will be found between the parties. This is problematic, because the law is very unclear as regards when one party will have to pay for work done by the other, if there is no contract between them (see Chapter 5 for more on this). Moreover, if there is no contract, one party cannot recover for loss caused to him by the other party because there is no contract between them to be breached.

2.9 The following lessons can be drawn from the discussion above. The first is that there is no conceptual reason why a contract must consist of an offer and acceptance. A contract is a legal concept that we invent to help us explain the law, so we can give it whatever meaning we want. We can adopt a narrow view, by focusing solely on the parties' intent and always requiring offer and acceptance, or a broader approach, by not always requiring an offer and acceptance and more generally, by looking at factors other than the parties' intent in determining what duties and rights (if any) they should have under the law of contract. The issue is whether it is *helpful* to explain a particular situation in terms of contract. Does it help to explain the law better? Are the consequences of doing so desirable?

2.10 The second lesson is that 'offer and acceptance' is a helpful way of analysing many situations and the presence of an offer and acceptance is certainly *sufficient* to establish a contract (providing the requirements discussed in Chapters 4 and 6 are also fulfilled). However, it is not a *necessary* ingredient of a contract, so while acceptance is a helpful tool for working out whether there should be a contract, we do not need to try to fit all situations into an offer and acceptance framework in order to find a contract. This point will be demonstrated later in two specific contexts (see discussion of the 'battle of the forms' at para **2.78** and 'work done in anticipation of a main contract that fails to materialise' in Chapter 5).

2.11 A final, more general lesson is that there is nothing wrong with taking into account factors other than the parties' intent when working out whether there should be a contract and what rights and duties it should give rise to. We shall see at various

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A final, more general lesson is that there is nothing wrong with taking into account factors other than the parties' intent when working out whether there should be a contract and what rights and duties it should give rise to. We shall see at various

points in the book, including this chapter, that this is something that the courts do all the time without controversy.

Two preliminary points

2.12 Two important points must be made before we can embark upon an examination of the specifics of offer and acceptance. The first has already been touched upon above: the principle of 'objective intention'. A clear definition of the principle is put forward by Spencer (1973):

> Words are to be interpreted as they were reasonably understood by the *man to whom they were spoken*, not as they were understood by the *man who spoke them*.

The matter was famously put in the following terms by Blackburn J in *Smith v Hughes* (1871):

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

So if A makes a statement to B, we work out whether the statement is an offer (or acceptance) and if it is an offer, what its terms are, by asking how things would appear to a reasonable person in B's position, rather than by looking at A's actual intent.

2.13 The scope of the principle is a matter of some controversy. It is often referred to as a general, universal principle (for example, Smith (1979)) but it is submitted that its ambit is more restricted. To determine its proper ambit, we must first understand its purpose, which is to protect B, the party to whom the offer or acceptance in question is made, by allowing him to rely on A's apparent intent. It prevents A from turning around and saying that he did not have the intent which he appeared to have, that secretly he had a different intention. So it guards against surprise. Going back to our car example, say that my offer to sell you the car was just a joke on my part, but you had no way of telling this. If you sought to enforce the contract, but I denied that I had made an offer because I was only joking, then the court would hold that I had made an offer because *it reasonably appeared that way to you*.

2.14 From this rationale we can begin to articulate the circumstances in which the principle applies. The following conditions are necessary for its application:

- B must be seeking to hold A to A's apparent intent. B must be saying 'A appeared to mean this, so he should be held to this meaning.'
- B must have actually believed that A's apparent intent represented A's actual intent (see for example, *The Agrabele* (1987)). Indeed, this emerges from the quotation set out

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above from *Smith v Hughes*. The purpose of the principle is to protect B by allowing him to assume that A means what he says. Therefore, there is no need to protect B in this way where B does not believe or assume that A means what he says (see Vorster (1987)).

- It must be possible to work out what the apparent intent of A was.
- It must not be B's fault that A appeared to agree to something that he did not actually intend to (*Scriven v Hindley* (1913), on which see Spencer (1973)). If B's offer was confusing in some way, A should not be bound by his apparent intent. If B has relied on A's apparent intent, he has only himself to blame: he should have framed his offer more clearly.
- If the purpose of the principle is to allow B to rely on A's apparent intent, it has been suggested that it should be necessary to show that B has relied in some way: see Atiyah (1986a). English law has generally not explicitly required this (although see *The Hannah Blumenthal* (1983)) and it is submitted that its stance is correct. In the commercial world particularly, it is extremely important that A knows if, at what moment and on what terms he becomes legally bound. Accordingly, it is undesirable for A to have to keep B's actions under review in order to be able to spot if and when B has relied, and so tell if, when and on what terms a contract has been formed with him.

2.15 Let us take three examples to illustrate how these conditions operate in practice. In *Moran v University of Salford* (1993), the University of Salford sent a letter to Mr Moran offering him a place on the Physiotherapy course, which Mr Moran accepted. However, the University claimed that it did not mean to offer him a place and that the offer was the result of a clerical error. The Court of Appeal held that at the very least there was a strong and clear case for saying that a contract had been formed. The University's apparent intent was clearly to offer Mr Moran a place, and this is the way that Mr Moran interpreted the letter.

2.16 In *Raffles v Wichelhaus* (1864) the parties agreed a sale of 125 bales of cotton, to be delivered from Bombay on a particular ship, the *Peerless*. Unfortunately, there were two ships with this name, leaving Bombay at different times. One party thought the agreement referred to the ship leaving in October, but the other thought it referred to the ship leaving in December. The claimant brought an action for the price. It was held that the fact that the meaning of the agreement was ambiguous was capable of giving a defence. While little reasoning was given by the court, its approach appears to have been as follows. It was not possible to work out what the apparent intent of the defendant was, so the objective principle did not apply and the court had to look at the actual intent of the parties. If the actual intention of one party was different from that of the other (as appeared to be the case in *Raffles*), there would be no contract.

Finally, in *Scriven v Hindley* (1913), the claimant was selling bales of hemp and bales of tow at auction. However, he did not make clear which lot was the hemp and which lot was the tow. The defendant, thinking he was bidding for the lot that contained the

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hemp, actually bid for the tow. It was held that there was no contract for the sale of the tow, because the defendant's apparent intent (to bid for the tow) had been caused by the claimant's carelessness in not making it clear which lot was which. Therefore, because the objective principle did not apply, the court looked at the parties' actual intention. The defendant's intention (to buy the hemp) did not coincide with the claimant's intention (to sell the defendant the tow) so there was no contract.

2.17 The second preliminary point is that a distinction must be drawn between two types of contract: *unilateral* contracts and *bilateral* contracts. The key difference is that only the latter type of contract places obligations upon and grants rights to *both* parties. Say I promise to pay you £100 if you run the London Marathon but make it clear that at no stage would you be under an obligation to do so. You take me up on my offer by running the marathon. What makes this a unilateral contract is that you make no promise so you are under no contractual obligations. You do not promise to run the marathon, so at no stage are you obliged to perform your side of the deal. Similarly, I have no right to have you run the marathon. In contrast, if both sides make promises, there is a bilateral contract. So if I promised to give you £100 if you promised to run the marathon, and you promised to do so, there would be a bilateral contract. You would be under a contractual obligation to run the marathon and I would have a right to have you run the marathon. So to decide whether the contract is a unilateral or a bilateral one, we must enquire whether both parties are promising to do something, or whether only one is doing so.

Is there an offer?

2.18 As discussed at the start of the chapter, an offer is an indication of one party's willingness to enter into a contract with the party to whom it is addressed, as soon as the latter accepts its terms. It has two key features. First, it indicates that the offeror intends to be legally bound providing that the party to whom the statement is addressed takes certain steps. Second, it contains not only a promise to do something, but also lays down what the offeree must do in return.

2.19 A number of consequences flow from the first feature. One is that, as long as the offeror evinces an intention to be legally bound, it does not matter how many people he makes the offer to. Therefore, a party can make an offer to the whole world if he so desires. In *Carlill v Carbolic Smoke Ball Co* (1893), the defendants were the proprietors of a medical preparation called the 'carbolic smoke ball'. They inserted an advertisement in the newspapers which included the following wording: '£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold after having used the ball three times daily for two weeks according to the printed directions

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supplied with each ball. £1,000 is deposited with the Alliance Bank Regent's Street, showing our sincerity in the matter.' The advertisement then went on to describe the efficacious qualities of the smoke ball, stating that one ball would last a family several months and that they cost only ten shillings each. Mrs Carlill, the plaintiff, bought a smoke ball at her local chemists on the faith of this advertisement. She used it as directed three times a day from 20 November 1891 to 17 January 1892, when she was attacked by influenza. She sued the Company for £100. The Company, no doubt because they had a considerable number of other such claims, contested that the advertisement could not give rise to any legal liability on their part.

One of the arguments made on the Company's behalf was that holding that there was a contract with the claimant would mean that the Company had contracted with everybody in the world, because the advert was addressed to the whole world. This argument was given short shrift by the Court of Appeal:

> 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? (per Bowen LJ).

It was held that a reasonable member of the public reading the advert would believe that the Company intended to be bound by the terms stated in the advert, so the advert was a valid offer.

2.20 A further consequence is that a distinction is drawn between *offers* and *invitations to treat*. Whereas the former demonstrates an intention on the part of the person making the statement to be automatically legally bound if the other party accepts the terms of the statement, the latter does not: it contemplates further negotiations taking place before any contract is formed. In our car example at the start of the chapter, I ask you if you would buy the car for £100. I am clearly indicating my willingness to be legally bound to sell you my car if you agree to the terms of my statement, so I am making an *offer*. Varying the facts, say that instead I tell you 'if you are interested in my car, you can make me an offer for it'. Here, I do not intend to be automatically legally bound if you comply with the terms of my statement, by offering me a price for the car. I envisage further negotiations taking place between us to decide what price the car should be sold for before any contract will be concluded, so my statement is only an *invitation to treat*: I am inviting you to make an offer, not making an offer of my own.

Let us take an example of this distinction in operation. While negotiating, one party may make a provisional bid or the parties may reach a provisional agreement. However, they do not intend to be legally bound by the terms of the bid or the contents of the agreement and contemplate further negotiations to work out the terms of the final contract. Therefore, they will often make clear that the initial bid or agreement is 'subject to

supplied with each ball. £1,000 is deposited with the Alliance Bank Regent's Street, showing our sincerity in the matter.' The advertisement then went on to describe the efficacious qualities of the smoke ball, stating that one ball would last a family several months and that they cost only ten shillings each. Mrs Carlill, the plaintiff, bought a smoke ball at her local chemists on the faith of this advertisement. She used it as directed three times a day from 20 November 1891 to 17 January 1892, when she was attacked by influenza. She sued the Company for £100. The Company, no doubt because they had a considerable number of other such claims, contested that the advertisement could not give rise to any legal liability on their part.

One of the arguments made on the Company's behalf was that holding that there was a contract with the claimant would mean that the Company had contracted with everybody in the world, because the advert was addressed to the whole world. This argument was given short shrift by the Court of Appeal:

> 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? (per Bowen LJ).

It was held that a reasonable member of the public reading the advert would believe that the Company intended to be bound by the terms stated in the advert, so the advert was a valid offer.

A further consequence is that a distinction is drawn between offers and invitations to treat. Whereas the former demonstrates an intention on the part of the person making the statement to be automatically legally bound if the other party accepts the terms of the statement, the latter does not: it contemplates further negotiations taking place before any contract is formed. In our car example at the start of the chapter, I ask you if you would buy the car for £100. I am clearly indicating my willingness to be legally bound to sell you my car if you agree to the terms of my statement, so I am making an offer. Varying the facts, say that instead I tell you 'if you are interested in my car, you can make me an offer for it'. Here, I do not intend to be automatically legally bound if you comply with the terms of my statement, by offering me a price for the car. I envisage further negotiations taking place between us to decide what price the car should be sold for before any contract will be concluded, so my statement is only an invitation to treat: I am inviting you to make an offer, not making an offer of my own.

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contract' to emphasise clearly that they do not intend to be legally bound at this stage (e.g. *Carlton Communications and Granada Media plc v The Football League* (2002)).

Unfortunately, in many situations, it is not clear whether and if so at what stage each party intends to be legally bound. For example, if goods are displayed in a shop window, it may be hard to tell whether the shop is making an offer or just inviting customers to make an offer to buy the goods. This is problematic, because clarity is important in such everyday situations. Therefore, in standard situations like these, the law lays down general rules to help solve the problem. In doing so, it seems that the courts look to factors other than the parties' intent, as was hinted at in the discussion at the start of the chapter.

Display of goods for sale

2.21 The general rule here is that the display only constitutes an invitation to treat, whether it is a display in a shop window (*Timothy v Simpson* (1834)) or on a shelf inside the shop (see below). Therefore, it is the customer who makes the offer to buy the goods and the shop has a choice whether to accept this offer or not (subject to anti-discrimination legislation).

For example, *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* (1953) concerned section 18(1)(a)(iii) of the Pharmacy and Poisons Act 1933, which prohibited the sale of poisons except where the sale was effected by or under the supervision of a registered pharmacist. The claimant was the Pharmaceutical Society, which had a duty to take reasonable steps to enforce the Act. The claimant argued that the display of the drug on the shelf in the self-service shop was an offer which was accepted when the purchaser put the drug in his basket, so the sale was carried out without any involvement of the pharmacist, contrary to the Act. The Court of Appeal held that the display was merely an invitation to treat, and it was the prospective purchaser who made the offer by presenting the goods at the cash desk, so the Act was not infringed. A similar approach was taken in the context of a display in a shop window in *Fisher v Bell* (1961).

2.22 Is this general rule correct? A number of reasons have been put forward to justify it. Unger (1953) argues that were the display to constitute an offer, there might be a larger number of customers accepting the offer than the shopkeeper would be able to supply. However, as many have noted, there is an easy solution to this problem: the offer could be construed as only being open while stocks last or imply a term to this effect (see Chapter 8). Second, it is sometimes argued that if a display were an offer, the customer would accept the offer by putting the goods in his basket, so a contract would be made at this point and the customer would not be able to change his mind and put the goods back (see Lord Goddard CJ at first instance in *Boots* and a similar

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argument by Somervell LJ in the Court of Appeal). However, this is not the case. We could equally say that if the display is an offer, the customer only accepts it when he presents the goods at the cash desk. Indeed, putting the goods in your basket could not be an acceptance because the customer reserves the right to change his mind, so he does not demonstrate an unequivocal intention to accept the offer at this stage.

A better objection is that holding the display to constitute an offer removes the shop's freedom to decide which of its customers it wants to sell its goods to: as Winfield (1939) commented, 'a shop is a place for bargaining, not for compulsory sales'. However, this view is becoming increasingly out of date, as the law increasingly focuses on the protection of consumers. A consumer would probably be surprised to learn that a shopkeeper was generally not obliged to sell him goods at the marked price (see Atiyah (2006)). Indeed, if we look closely at the *Boots* decision, its force as a precedent is slightly diminished by the particular context of the case, a statutory prohibition. As Somervell LJ commented, '[i]t is right that I should emphasize, as did the Lord Chief Justice, that these are not dangerous drugs'.

As a final point, it should be noted that this general rule can be departed from when it is clear from the display that the shop intends to be bound if the customer accepts the terms of the display. For example, say the display read 'Try our new chocolate bar. It's yours as soon as you present it at the cash desk with your 50p.' This would indicate a clear intent to be legally bound as soon as a customer presented the chocolate bar at the checkout with the money.

Advertisements

2.23 The same general rule unsurprisingly applies to advertisements (*Partridge v Crittenden* (1968)). Again, this general rule will be displaced if the advert indicates a willingness to be automatically bound to those who perform the acts stated in the advert. For example, in *Carlill* (the facts of which are set out above at para **2.19**), it was held that the advert indicated that the £100 would be paid to those who fulfilled the conditions set out in the advert. One factor that weighed particularly heavily with the Court of Appeal was the fact that the advert said that £1,000 had been deposited with the bank for the purpose of paying those who fulfilled the conditions, indicating the seriousness of their willingness to pay the money.

2.24 *Carlill* was applied in *Bowerman v Association of British Travel Agents Ltd* (1996), where the issue was whether a notice displayed in the offices of members of the Association of British Travel Agents ('ABTA') stating that ABTA would reimburse holiday makers in certain circumstances created a contract between ABTA and people who had booked holiday with ABTA members. The Court of Appeal held that it did, Hobhouse LJ commenting that the arguments put forward by ABTA 'echo in almost every respect those rejected by the Court of Appeal more than a century

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ago [in *Carlill*]'. He regarded the wording of the notice as clear and imposing an unqualified obligation on ABTA. Moreover, there is a well-known risk in the travel industry that operators will become insolvent, so that a statement that the ABTA would protect holiday makers in such situations would be very important to those booking holidays and choosing the agent or operator through which they should book. Realising this, ABTA had made it a cornerstone of the promotion of their members to emphasise how ABTA would protect holiday makers, and the words 'ABTA promises' were often used by ABTA's president in interviews.

Similarly, in the well-known decision of the Supreme Court of Minnesota in *Lefkowitz v Great Minneapolis Surplus Stores Inc.* (1957), the defendant published the following advert in a newspaper: 'Saturday 9.a.m. sharp, 3 Brand New Fur Coats Worth to $100.00, First Come First Served, $1 each'. It was held that 'the offer by the defendant of the sale of the Lapin fur was clear, definite and explicit, and left nothing open to negotiation' and therefore constituted an offer rather than an invitation to treat.

Chitty (2008) makes the interesting point that while advertisements of unilateral contracts are commonly held to be offers (as in *Carlill* and *Bowerman*, for example), the courts are less willing to find that an advertisement of a bilateral contract will constitute an offer. Two reasons are offered for this. First, the latter sort of advertisement is often intended to lead to further bargaining. For example, if I advertise that my house is for sale (an advert to enter into a bilateral contract, a contract of sale), then I probably envisage that there may be negotiation over the price before a contract is entered into. Second, a bilateral contract requires the offeree to promise to do something, so the offeror will naturally wish to assure himself that the offeree is able, financially or otherwise, to perform the contract. If an advert of a bilateral contract were held to be an offer which would automatically create a contract when accepted by the person receiving it, the offeror would not be able to do this: he would be bound regardless.

Rewards

2.25 An advert offering a reward for doing some act, like finding my lost dog, will often be construed as an offer (for example, see *Gibbons v Proctor* (1891)). This situation is discussed further below at paras **2.44–2.47**.

Tenders

2.26 The general rule is that if someone invites parties to tender or bid for a particular project, this indicates that he is inviting the parties to make offers for him to consider. Therefore, his statement is generally an invitation to treat, not an offer. In *Spencer v Harding* (1870) the defendants sent out a circular saying that '[w]e are instructed

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Is there an offer? I 19

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