

# TALBOT SAYER NOTEPOOL

## LAWS2111 – Contracts A (Weeks 1–5)



## Offer:

- **Offer:** an expression of willingness to be contractually bound, on certain terms, without further negotiation
- Use an **objective test** – would a *reasonable* person in the shoes of the person addressed understand the communication to evince a *serious commitment to be bound*

Case	Facts	Rule
<i>Harvey v Facey</i>	Declaration of lowest cash price, H agrees to buy, but F refuses to sell	NO CONTRACT – nominating a lowest cash price is not an offer
<i>Gibson v Manchester CC</i>	‘may’ sell house ‘if’ you complete formal application of attached form	NO CONTRACT – use of conditional language suggests no intention to be bound
<i>Boulder v Tangaere</i>	Suggestion to keep in touch re. lot; 3 months later, T selects lot; B refuses sale	NO CONTRACT – too tentative, exploratory, non-committal for intention

## Two Contract Analysis:

- **Invitation to treat:** attempt to induce an offer (e.g. auction/tender, newspaper ad, price list/catalogue, priced goods on display)
- Leads to two possible contracts:
  - **Process contract:** *unilateral* offer to abide by a particular process, accepted by the performance of submitting an offer to the main contract
  - **Main contract:** *bilateral* offer of a price for services/goods/land, expressly accepted

Case	Facts	Rule
<i>Leftkowitz v GMSS</i>	GMSS advertises sale, L abides by conditions but is refused the fur coat (not a woman)	CONTRACT – unilateral offer, containing a promise on positive terms upon performance of conditions
<i>Carlill v Carbolic Smoke Ball</i>	Smoke ball case	CONTRACT – unilateral ‘offer to the world’; showed intention to be bound on performance, overriding need for communicating acceptance; sincere intent
<i>Markholm v Wellington</i>	Sale of land by ballot promised; failed to hold such ballot	CONTRACT per two contract analysis: Process contract to hold ballot & select Main contract to sell land
<i>Harvela Investments</i>	Fixed price (FPB) and referential bids (RB)	NO CONTRACT for RB - intention was to consider FPB only, and RB inconsistent with promised process contract

<i>Blackpool</i>	'pleasure flight' licence to be tendered; tender submitted but D's staff failed to clear in time; P's tender rejected	CONTRACT – to consider all tenders that conformed to conditions (limited to specific case facts)
<i>Hughes v Airservices</i>		CONTRACT – two contract analysis affirmed, esp. because public body

## Terminating Offers:

### Revocation:

- **Revocation:** express negation of the power of acceptance that was created by the offer
- An offer may be withdrawn or revoked at any time before it is accepted, provided the offeree is informed that the offeror no longer wishes to proceed with the proposed transaction

Case	Facts	Rule
<i>Dickinson v Dodds</i>	Offer to sell house open till a date, but when P attempts to accept, D already sold it to third party, and D knew	NO CONTRACT - revocation occurs any time before acceptance; notification need not come from offeror personally
<i>Byrne v Van Tienhoven</i>	Letter/telegram miscommunication	CONTRACT – revocation inoperative because it was received after acceptance (occurs when actually communicated)
<i>Shuey v US</i>	US govt. posted offer of reward for apprehending criminal; revocation similarly offered, after which P acted in response to offer	NO CONTRACT – offer revoked before acceptance; communication in unilateral offer must be of same channel and notoriety; ignorance of revocation irrelevant
<i>Great Northern Railway v Witham</i>	W offered to supply all GNR stores; GNR orders some	CONTRACT – new contract formed for each order, W can revoke <b>standing offer</b> for future but not past orders

### Termination by Effluxion of Time:

- When there is a fixed/stated duration, offer lapses upon expiry of the stated period
- When there is indefinite duration, general rule is offers to be accepted within 'reasonable time' (question of fact), after which offer is lapsed or impliedly rejected

Case	Facts	Rule
<i>Manchester Diocesan v CGI</i>	Extended period of communication – P decided to sell by tender – D sent tender offer, P accepts (but needed D.Ed. approval), D.Ed. approves, D denies contract, P sends formal acceptance, D declines	CONTRACT – method of acceptance prescribed in tender not mandatory; acceptance via equally effective method; if method is mandatory, need explicit statement of this
<i>Barrick v Clark</i>	B offered to sell land to C for 15K, C went on hunting trip and wife wrote to B to request offer be kept open till C returned; C returned and accepted purchase, but B had sold to third party	Reasonable time = <ul style="list-style-type: none"> <li>- Nature and character of transaction</li> <li>- Circumstances of offer</li> <li>- Normal and usual course of business</li> <li>- Conduct of parties during negotiations</li> <li>- 'reasonable contemplation/expectation' of offeror</li> </ul>

### Rejection and Counter-Offers:

- Rejection can be express or implied; counter-offer is a form of implied rejection
- Objective test: would reasonable person apprehend the unequivocal intention to reject offer through presenting 'materially different terms' (those that affect price)
- Mere request for information is not a counter-offer, or rejection

Case	Facts	Rule
<i>Hyde v Wrench</i>	D offered to sell farm to P; P posed different price, which D refused; P then accepted original offer; D refused	NO CONTRACT – P posing different price is a rejection of the original offer, so P cannot revive what he destroyed
<i>Gibson v Manchester CC</i>	Left price blank when returning house purchase application but in cover letter requested additional terms	CONTRACT – cover letter contained no cover-offer, 'merely exploratory of the possibility of a reduction in price'
<i>Powierza v Daley</i>	-	
<i>Financings v Stimson</i>	-	

## Acceptance:

- **Acceptance:** a clear declaration of assent to the transaction proposed by the offeror in their offer – three elements:
  - Knowledge: did the offeree know of the offer and act *on the faith* of it?
  - Mirror image rule: did the offeree accept the offer *unconditionally and in total*?
  - Communication: was acceptance *actually and unequivocally* communicated?

## Knowledge:

- Acceptance cannot be coincidental or accidental
- Need **intention to accept**, as this presupposes knowledge of offer
  - Exception: unilateral contracts; acceptance assumed on performance (*Carlill*)

Case	Facts	Rule
<i>Williams v Carwardine</i>	P who initially withheld info on trial; ad for info released; P abused by husband; gave evidence to incriminate him to 'ease conscience'; D refused to give \$\$\$	Knowledge assumed on basis of performance of ad conditions (providing info), even if <i>motive</i> was not to get \$\$\$ (similar to <i>Carlill</i> )
<i>R v Clarke</i>	P gives info re. murder in exchange for plea deal, but then sues for reward published in ad	P's <i>intention</i> was to get out of jail, not acting on basis of \$\$\$ - offer must motivate the action (intention different to motive)

## Mirror Image Rule:

- Need full and unconditional acceptance; any attempt to renegotiate will amount to a counter-offer and is non-binding
- *Butler Machine Tool v Ex-Cell-O*
  - Standard forms sent to each other, but containing differing clauses and prices
  - 'battle of the forms' – the person who makes the last manifestation of the terms, to which the other party agrees, is the official agreement

## Communication:

- Need actual and unequivocal communication, because the nature of an agreement – voluntary assumption of responsibility – requires actual communication
- **Silence is not acceptance**, as it's evidentially equivocal, consistent with offer rejection (*Felthouse v Bindley* – horse case)
- Exceptions:
  - Implied acceptance, by conduct, where assent is inferred (lack of *pure* silence)
    - *Empirnall Holdings* ('boss never signs contracts'): an objective consideration of circumstances infers E's agreement – reasonable bystander test
  - Dispensing with the need for notification of acceptance
    - Offeror free to prescribe the manner of acceptance, but must be explicit (*Manchester Diocesan*)

- E.g. unilateral offers (*Carlill*); clear indication of dispensing requirement
- *Latec Finance v Knight*:
  - D signed standard form hire-purchase agreement for TV (offer), P signed as acceptance internally but no evidence of communication to D
  - D not bound by 'agreement': did not use TV enough to constitute contract by course of conduct, and form did not have 'very clear' language displacing need for actual communication of acceptance
- **Postal acceptance rule:** when parties decide that post/telegram is the manner of communication, acceptance is complete as soon as it's posted (*Henthorn v Fraser*)
  - Rule of convenience only; can be expressly displaced (*Wardle v ARF*)
- *Entores*: telephone acceptance equivalent to face-to-face acceptance; general rule applies
- No universal rule with emails, texts etc.: rely on intentions of parties, sound business practice, risk allocation (ability to control risk) □ *Brinkibon*

## Certainty and Completeness:

- Paradox: want to uphold a contract decided between two parties, but don't want to uphold any contract that is ambiguous
- **Intention to be immediately bound**, beyond the stage of negotiation, is vital
- Requires **sufficient certainty regarding legal essentials** – parties, subject matter, principal undertakings, price (*Hall v Busst*)

### So, what is uncertainty?

- Uncertainty in two ways:
  - **Unclear:** vague, ambiguous or meaningless language used for essential term
  - **Incompleteness:** lacks determination of an essential term
- Meaning of an agreement determined **objectively**, part performance makes enforcing agreements more likely
- Courts can assume meaning, but will not spell out to an unacceptable degree what the parties have themselves failed to agree upon (*Biotechnology v Pace*, per Kirby P)

### How do you establish certainty?

- For unclear agreements:
  - Use of objective test, including implication and deduction from express terms
  - Appeals to **external** or 'reasonableness' **standards**, proved and authorised by parties
  - Any subsequent action (to prove intention to be bound)
- For incomplete agreements:

- o Intention to be immediately bound
- o Stated **machinery/formula** that is bound to work if parties fail to agree
  - Machinery = arbitrator, independent valuation
  - Formula = mathematical ways of determining price
- o Implied terms
- Can sever an invalid term from the contract if the parties' intentions seem to indicate this is possible, and term is NOT essential □ allows rest of contract to remain enforceable, leaving invalid term ignored (see *Fitzgerald v Masters*; *Whitlock v Brew*)

### Key Cases:

Case	Facts	Rule
<i>Biotechnology v Pace</i>	'I confirm...the option to participate in the company's...equity sharing scheme' – P knew this didn't exist; when fired, P sued under this term	UNCERTAIN – no enforceable right; promise illusory, devoid of meaning and uncertain of content (no actual promise of implementing scheme); lacking external standard
<i>Fitzgerald v Masters</i>	'usual conditions of...REI NSW'; mistake of word 'inconsistent' When P sued for specific performance of farm sale, D claimed uncertainty	UNCERTAIN, but SEVERABLE – absurd to conclude lack of contract given expressions of agreement; must have intended to accept reading as 'consistent', but clause unessential
<i>Meehan v Jones</i>	Agreement re. sale of land on which oil refinery was built – 'satisfactory' quantity of oil and finance	CERTAIN – clause read as leaving it to purchaser alone to decide satisfactoriness (purpose of clause to benefit purchaser)
<i>Whitlock v Brew</i>	Agreement re. sale of land – 'upon such reasonable terms as commonly govern a lease' + arbitration clause; B paid deposit but declined to complete purchase, wanted deposit back	INCOMPLETE – no means for calculating lease period; no ascertainable reasonable terms; arbitration clause too narrow; inseverable as too essential a term – would alter nature of agreement
<i>Scammell &amp; Nephew v Ouston</i>	Van's hire-purchase agreement never settled – 'hire-purchase terms'; failed to agree; S refused to supply van	UNCERTAIN – language too obscure to attribute any contractual intention; parties never moved beyond negotiating (incomplete); cannot have bare agreement to agree
<i>Fletcher v ENCZ</i>	Negotiating for natural gas supply; signed agreement but some provisions expressly marked 'to be agreed'	INCOMPLETE – no intention to be bound; two-step process = (1) intention to be immediately bound; (2) agreement/means of achieving agreement on every essential term or term that parties regarded as essential
<i>Hall v Busst</i>	Island purchase: fixed price plus 'value of all additions and	UNCERTAIN – price not clearly fixed, but court cannot imply reasonable price (in



	improvements', less the deficiencies and depreciation; B sold land to someone else, H sued	sale of land) + need 'ascertainable objective fact' for valuation ('reasonable price' insufficient)
<i>Sudbrook v Eggleton</i>	P granted options to purchase land at price 'no less than 12,000', to be fixed by valuers appointed by parties; D refused to appoint	UNCERTAIN but resolved? – lack of identified valuers made machinery 'non-essential'; if it breaks down, then the court can substitute own machinery to ascertain the price (for business efficacy)
<i>Nelson v Cooks</i>	P agrees to sell grapes to D, with price-setting clause incl. purchasing committee that wasn't established + 2 <sup>nd</sup> wide arbitration clause; though never got to this stage previously, one year failed to agree; arbitration clause not utilised	INCOMPLETE – no machinery exists for determining price, and courts could not supply alternative machinery because it's essential aspect of the agreement; intention was to allow people with specific knowledge to decide, court weren't these people (applied <i>Sudbrook</i> )
<i>Booker v Wilson Parking</i>	WP leased premises to B, lease can be renewed at an agreed price or by arbitrator appointed by QLS; WP asked to do this but B refused, ejected WP	CERTAIN – both parties would do all that is 'reasonably necessary' to secure nomination by QLS, so WP entitled to <i>limited</i> specific performance ( <i>Brennan J</i> prepared for <i>full</i> specific performance)

### Agreement to Negotiate:

- **Traditionally**, courts have not accepted as valid a 'contract':
  - o to make a contract
  - o to 'negotiate' a later agreement

Case	Facts	Rule
<i>Walford v Miles</i>	Negotiating to buy M's business & premises, but terms of process 'subject to contract'; created a 'lock-out' agreement; M decided to sell to third party; W claimed that 'lock-in agreement' should be implied for business efficacy	INCOMPLETE – lock-in agreement devoid of legal content, so cannot be policed; <i>Lord Ackner</i> : 'concept of duty to carry on negotiations in good faith is inherently repugnant to adversarial position of parties... is inconsistent with position of negotiating party... no obligation to negotiate'
<i>United Group Rail v Rail Corp</i>	UGR contracted to construct rail for RC; dispute to be resolved by senior rep who would 'meet and undertake genuine and good faith negotiations' to solve	BREACH – Express agreements to negotiate in good faith are enforceable, to promote 'efficient dispute resolution'; bad faith = threatening future breach; pretending to negotiate, refusal
<i>Strzelecki v Cable Sands</i>	S wanted to buy land from CS but it was contaminated by radioactive tailings; agreement clause said 'if parties acting in good faith fail to	NO BREACH – <b>Good faith</b> : 'within the framework of fidelity to the bargain'; examination of self-interest is subjective



	conclude contract within 30 days, this agreement ceases'; S claimed breach of C on this	
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## Intention to Create Legal Relations:

- Parties must intend that their relation be attended by *legal consequences*
- Intention determined *objectively* as an inference of fact, considering:
  - o Subject matter of agreement
  - o Status of parties to it and their relationship
  - o Other surrounding circumstances
- Two rebuttable presumptions:
  - o No intention to create legal relations with family members
  - o Strong intention to create legal relations in commercial agreements
- BUT modern courts have cautioned against reliance on this: 'At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof...'; only distracts from the basic principle (*Ermogenous v Greek Orthodox Community*)

## Social, Family and Domestic Agreements:

- Number of factors that courts have considered relevant to determining contractual intention:
  - o **Amicability** e.g. *Balfour v Balfour*, *Jones v Padavatton*, cf *Popiw v Popiw*
  - o **Formality** e.g. *Popiw v Popiw*
  - o **Uncertainty** e.g. *Jones v Padavatton*, *Australian Woollen Mills v Cth*, *Ashton v Pratt*
  - o **Reliance** e.g. *Jones v Padavatton*, *Riches v Hogben*

Case	Facts	Rule
<i>Balfour v Balfour</i>	H agreed orally with W to pay her an allowance	