Contract Law

Premium Notes

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1. Contract Formation

1.1 Introduction

Mirror Approach

For a contract to be formed, there must be an offer made by one party and a corresponding acceptance by another: *Gibson v Manchester City Council* [1979] 1 WLR 294

This is the conventional approach to determining contract formation and is referred to as the 'mirror approach' as the acceptance must 'reflect' the offer, i.e. the terms of acceptance must correspond to the terms in the offer.

What if there is no Contract?

The claimant can seek a quantum meruit (reasonable price) in restitution from the defendant for services rendered.

However, the claimant may prefer to prove that there was a binding contract if the price for his services under the contract exceeds the quantum meruit.

1.2 Offer

Definition

A proposal of terms of the exchange and an expression of willingness to be bound as soon as the offeree accepts.

Examples

While the typical offer would be in the form of explicit verbal or written communication, there are be some atypical forms of offers found in case law.

1. A ticketing machine that is ready for use can constitute an offer to the user, such offer being accepted when the user pays the ticketing machine: *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163

2. Certain displays of products and advertisements (see below).

What are not Offers?

Mere communication

Communication refers to a mere request for or supply of information.

In *Harvey v Facey* [1893] UKPC 1 it was held that the supply of information without any communication of intention to be bound did not amount of an offer and hence there was no contract.

Invitation to Treat

See 1.3 below.

Invitation to Tender

In general, these are construed as invitations to treat by the courts, however, in certain cases they might be construed as offers of unilateral contract by the invitor to the invitees. See 1.4.

Referential Bids

Referential bids are bids that offer a specified sum higher than the highest bid.

A referential bid is not a valid offer as it is contrary to the business purpose of a unilateral contract to accept the highest offer imputed by the court into an invitation to tender: *Harvela v Royal Trust* [1986] AC 207

Revocation of Offer

A revocation of offer need not be directly communicated by the offeror to the offeree, so long as it is alerted to the offeree, for example through a third party: *Dickinson v Dodds* (1876) 2 Ch. D 463

The postal rule is not applicable to revocation of offers: *Byrne v Van Tienhoven* (1880) 5 C.P.D 344

Where the offeror indicates a deadline before which the offer must be accepted, this does not impose any obligation on them not to revoke the offer prior to the deadline: *Stevenson v Maclean* [1880] 5 QBD 346

1.3 Invitation to Treat

Definition

An expression of willingness to embark on negotiations.

They are not offers.

What are invitations to treat?

Store displays

In *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401, the court reasoned that if a display is deemed as an offer, it could lead to the following complications:

- the seller would be dealing with multiple contracts he cannot supply;
- the customer cannot change his mind after 'accepting' by putting an item in his basket; and
- the seller is deprived of freedom not to deal and cannot bargain with buyer.

Instead, an offer to buy is made when a customer brings an item to the counter and acceptance is made by the cashier.

Advertisements

Partridge v Crittenden [1968] 1 WLR 1204: An advertisement for Bramblefinch cocks and hens was held to be an invitation to treat.

Invitation to make an offer

Gibson v Manchester City Council [1979] 1 WLR 294: A letter from the council to Gibson stated that it should not be 'regarded as a firm offer of a mortgage' and that Gibson had to make a 'formal application'. The letter was held to be an invitation to treat.

Exceptions

Displays can sometimes be offers

Chapelton v Barry UDC [1940] 1 KB 532: A display of deck chairs for hire on a beach amounted to an offer, accepted by the customer taking a chair. The ticket issued thereafter to the customer with a clause excluding liability for injury was not part of the contract.

Advertisements can sometimes be offers of unilateral contract

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256: An advertisement for a medicine contained a promise to compensate whoever contracts a flu while using such medicine. It was treated as an offer of unilateral contract to perform the promise to whoever who 'accepts' such offer by falling sick while using the medicine.

Rationalising the inconsistencies

The above examples of invitations to treat and their exceptions may seem very inconsistent. They are a result of the courts taking a flexible approach to finding if an offer arises at a particular point of time to reach the desired result in each case. In other words, there is some backward reasoning involved.

1.4 Invitation to Tender

Definition

In ordinary parlance, putting something out to tender means inviting offers to supply goods or services at a fixed price.

General Rule

The general rule is that an invitation to tender will be construed by courts as an invitation to treat: *Harvela v Royal Trust* [1986] AC 207

Exceptions

Invitations to tender can sometimes be construed as unilateral contracts, as in the two cases below.

Invitation to tender as a unilateral contract to accept the highest offer

Harvela v Royal Trust [1986] AC 207

- The invitation to tender stated 'we bind ourselves to accept [the highest] bid'.
- The court held that the invitation to tender was a unilateral contract to accept the highest bid.
- The unilateral contract was converted into a mutual contract when the condition was met by the highest bid while other unilateral contracts with other parties were terminated.

- If the invitor/offeror did not accept the highest bid, there would be a breach of contract, but the offeror would be liable only to the offeree with the highest bid.

Invitation to tender as a unilateral contract to consider all bids submitted before deadline

Blackpool & Fylde Aero Club Ltd v Blackpool BC [1990] 3 All ER 25

- The court *implied* a unilateral contract to consider all conforming bids before the deadline despite an express clause stating that the invitor is not bound to accept any offer.
- While there was no obligation to accept, there was an obligation to consider.
- Stocker LJ: The obligation to consider requires a decision to reject any tender to be bona fide and honest.
- Factors that led the court to find an *implied* unilateral contract was as follows:
    1. the invitation to tender was addressed to a small number of interested parties all of them known to the invitor;
    2. there was a clearly defined and orderly tender procedure;
    3. the outcome was consistent with the 'assumption of the commercial parties';
    4. the claimant invitee was the existing holder of the concession and had a legitimate expectation of consideration for renewal; and
    5. the Council owed a fiduciary duty to taxpayers to act with financial prudence.

1.5 Acceptance

Definition

An unequivocal expression of consent to the offer that immediately binds both parties to the contract provided that it is:

1. in correspondence with the offer;
2. made in response to the offer;
3. made by an appropriate method; and
4. communicated to the offeror (this fixes the time of contract formation).

Each of the above requirements are described in more detail below:

Correspondence with Offer

Correspondence means that the acceptance must reflect a willingness to be bound by the exact terms contained in the offer. Therefore, the acceptance cannot be conditional, qualified or propose a different set of terms.

Counteroffers

A counteroffer, which contains a different set of terms to the original offer, is not a valid acceptance and kills off the original offer, such that the original offer can no longer be accepted after a counteroffer was made: *Hyde v Wrench* (1840) 3 Beav. 334

Battle of forms

In a battle of forms where parties purport to conclude a contract by an exchange of documents containing incompatible terms, the court will use the last shot approach: the contract terms are determined by the last set of terms that are sent and received without objection: *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401

Made in response to the Offer

This means that the acceptance must be made with knowledge of the offer.

Two identical cross offers made without knowledge of the other by the offerees do not constitute offer and acceptance: *Tinn v Hoffman* (1873)

The case of *Gibbons v Proctor* (1891) 64 LT 594 is an exception. A police officer was ignorant of an offer for reward when giving information leading to the arrest of a criminal to another officer but was aware by the time information reached the superintendent. It was held that he had effectively accepted the offer for reward.

However, note that in the Australian case *R v Clarke* [1927] HCA 47, it was held that there was no valid acceptance when the person claiming a reward had forgotten about the offer of reward when he provided information. This case should be cited as a caveat on *Gibbons v Proctor*, showing that it might no longer be good law should English courts follow the Australian approach.

Is made by an Appropriate Method

If there is a mandatory method of acceptance stipulated in the offer, acceptance must be in that method or any other equally effective method to be binding: *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593

An offer may be impliedly accepted by conduct, such as when parties have acted on a draft contract without formal acceptance: *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666

Communication of Acceptance

General rule

The general rule is that the acceptance must be communicated to and received by the offeror to be effective and the contract is formed when and where the acceptance is notified to the offeror: *Entores v Miles Far East Co* [1955] 2 QB 327

An offeror cannot waive the requirement of communication in his offer and silence is cannot be valid acceptance, even when the offeree had intention to accept: *Felthouse v Bindley* (1862) 11 CB (NS) 869

Acceptance communicated by instantaneous communications (e.g., call, internet messaging or email) follow the general rule: *Entores v Miles*

Fault/Risk Exception

In *Entores v Miles*, it was held that an acceptance which was made through instantaneous communications but was not received by the offeror will still be effective provided that:

1. there was fault on the part of the offeror for not receiving the message; and
2. the offeree had reasonable belief that message was received.

Examples of fault by the offeror include:

1. the offeror's fax machine runs out of ink; or
2. the offeror could not hear properly on the phone and he did not tell the offeree to repeat.

In *Brinkibon v Stahlag Steel* [1983] 2 AC 34, it was held that acceptance may be effective despite non-communication where the risk of non-communication lay with the offeror. Where the risk laid would depend on:

1. the intention of the parties;
2. business practice; and/or
3. a value judgment by the court.

Examples where the risk laid with the offeror include:

1. a telex is received by servants of the offeror with no authority to contract; or
2. messages are received by the offeror through machines operated by third parties who fail to notify the offeror.

Entores v Miles takes a fault-based approach while *Brinkibon v Stahlag* takes a risk-based approach, although the differences are not significant since the fault tends to lie with the party that holds the risk but did not take reasonable precautions.

Postal Rule Exception

The postal rule states that when the offeree delivers his acceptance by post, the acceptance is effective the moment the offeree posts his acceptance: *Adams v Lindsell* (1818) 1 B & Ald. 681

Risks of delay or loss of the letter containing the acceptance lies for the offeror, thus acceptance is effective even if the letter is delayed or lost: *Household Fire Insurance v Grant* (1879) 4 Ex D 216

For the postal rule to apply, acceptance by post must be within reasonable contemplation of the offeror: *Henthorn v Fraser* [1892] 2 Ch. 27

In Henthorn v Fraser acceptance by post was deemed reasonable as the parties were living in different towns. Today, acceptance by post might rarely be reasonably expected when are contracts often being concluded over the phone or email.

Can postal acceptance be retracted before delivery?

This law is not clear on this.

Bramwell LJ commented in his dissenting judgment in Household Fire Insurance Co v Grant that such revocation would be effective.

If the doctrinal basis of the postal acceptance rule is that the post office is the agent of the *offeror*, as suggested by Thesiger LJ in Household Fire Insurance Co v Grant, then withdrawal will not be effective since acceptance will legally have been delivered to the offeror at the time of posting.

However, if the postal acceptance rule is purely based on a normative consideration to provide certainty to the offeree, also suggested by Thesiger LJ in the same case, then the withdrawal might be effective, unless the offeror was detrimentally affected by the retraction.

1.6 Unilateral Contracts

Definition

A unilateral contract is an exchange of a promise for a completed act. The promise specifies an act that must be completed by the promisee as a condition for the promise to become binding on the promisor (the 'stipulated act').

The contract is unilateral as only one party, the offeror/promisor, is making a promise that will be binding, provided that the specified act is completed by the offeree/promisee.

Example: A promises B that A will pay B £100 if B does a backflip. If B does the backflip, A will be bound to pay £100 to B.

Contrast to Mutual Contracts

Conventional contracts are mutual, meaning that they are an exchange of promises. Each party's promise is consideration for the other party's promise.

	Unilateral Contract	**Mutual Contract**
Exchange		
Consideration	Completed act (to the offeror) Promise (to the offeree)	Promise by the other party
Form of acceptance	Completed act	Communication of acceptance
When can offer be revoked?	Before performance of the act has started.	Before the offer is accepted.

Acceptance of Unilateral Contracts

The general rule is that performance of the stipulated act amounts to acceptance in and of itself, communication of acceptance is expressly or impliedly waived by the unilateral contract: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256

Revocation of Offer of Unilateral Contract

Although the offer of a unilateral contract is only accepted upon complete performance of the stipulated act, once performance starts there is an implied obligation on the offeror not to revoke the offer: *Soulsbury v Soulsbury* [2007] EWCA Civ 969

The implied obligation can be explained by a collateral contract between the offeror and offeree not to revoke the main unilateral contract in return for the offeree beginning performance of the stipulated act.

Furthermore, as soon as the offeree starts to perform the stipulated act, there is an implied obligation on the offeror not to prevent full performance of the condition he has imposed from being satisfied: *Daulia v Four Millbank Nominees Ltd* [1978] Ch. 231

However, if notice is provided that the offer is clearly intended to be revocable even once performance of the stipulated act has commenced, it can be so revoked: *Luxor (Eastbourne) v Cooper* [1941] A.C. 108

1.7 Uncertainty and Incompleteness

Incompleteness

An agreement that is incomplete leaves out critical terms. Such a contract would be void as a whole: *May & Butcher Ltd v R* [1934] 2 KB 17

The price for services or goods rendered is a critical term and in common law, a contract without an agreed price would be void: *May v Butcher*. However, there are statutory provisions that allow a contract to remain valid despite the lack of an agreed price:

1. Section 8(1) Sale of Goods Act 1979: Parties can leave the price to be decided in a manner specified in the contract or by the course dealings between the parties.
2. Section 8(2) Sale of Goods Act 1979: If the contract is silent on price the court can imply a reasonable price based on the circumstances.
3. Section 15(1) Supply of Goods Act 1982: Where price is not determined, left to be determined in a manner specified or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.

Note that the Sale of Goods Act deals with contracts of sale of goods between businesses, while the Supply of Goods Act deals with contracts of sale of goods between businesses (the supplier) and consumers.

Uncertainty

The general principle is that terms that are too uncertain will be deemed void by the courts.

However, the courts will take a broader approach to dealing with uncertainty in recognition of the fact that businesspeople often record agreements in crude fashion: *Hillas & Co v Arcos Ltd* (1932) 147 LT 503

Courts can look at previous dealing and trade custom when interpreting contractual terms that have uncertain meaning on its face: *Hillas & Co v Arcos*

Agreement to Agree

In *May & Butcher*, an agreement to agree on price in the future was held to be too uncertain to be valid and resulted in the contract as a whole to be deemed void. Note that today section 8(1) Sale of Goods Act 1979 or section 15(1) Supply of Goods Act 1982 would apply to such a situation.

Agreement to Negotiate in Good Faith

In *Walford v Miles* [1992] 2 AC 128, it was held that the court could not ***imply*** a 'lock in' provision which requires that the parties agree to negotiate in good faith as the concept of good faith is too uncertain to be enforceable in English law as per Lord Ackner.

However, there are signs that the courts have become more comfortable with the concept of good faith:

- In *Compass Group v Mid Essex NHS* [2013] EWCA Civ 200, the court held that it would enforce an ***express*** term to perform the contract in good faith.
- In *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111, Legatt J held in obiter that the courts can imply a term to ***perform*** a contract in good faith (note that this is to be distinguished from *negotiating* an agreement).
- Under section 62(4) Part 2 of the Consumer Rights Act 2015, a good faith requirement is implied in consumer contracts.

Agreement not to Negotiate with Other Parties

Commonly called 'lock-out' clauses, these clauses are legally enforceable provided that a specified time limit is included: Walford v Miles

1.8 Intention to Create Legal Relations

Objective Test

Whether the parties had an intention to create legal relations ("ICLR") depends on an assessment of the communication and conduct between the parties according to the expectations of a reasonable honest businessman: *RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH* [2010] UKSC 14

Presumption of ICLR in Commercial Contexts

General Rule

In agreements in commercial contexts, there is a presumption of ICLR: *Esso Petroleum v Commissioners of Custom & Excise* [1976] 1 WLR 1

The presumption can be rebutted by express language indicating that an agreement is not intended to be legally binding.

Examples of non-binding agreements in commercial contexts including comfort letters and letters of intent.

Comfort Letters

Comfort letters are letters from accountants to underwriters that the borrower can repay a loan and are not expressed to be legally binding.

In *Kleinwort Benson Ltd v Malysian Mining Corp* [1989] 1 All ER 785 it was confirmed that the presumption of ICLR does not apply to comfort letters, provided that the language of the comfort letter includes only statements of fact and do not express any undertaking.

Letters of Intent

Letters of intent are entered into when the parties are still in discussion and contain a 'subject to contract' clause.

In general, there is no ICLR for letters of intent, but when the parties have begun performance without a contract, whether there is ICLR depends on the circumstances:

- Where negotiations are ongoing and essential terms such as price and quantity are left undecided, there is no ICLR and no binding agreement even if the parties had begun performance: *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504

- Where the material terms such as price and quantity are agreed upon and there was substantial performance, there is ICLR: *RTS v Molkerei*

Presumption against ICLR in Non-Commercial Contexts

General Rule

In agreements in non-commercial contexts (such as agreements between family or spouse), there is a presumption against ICLR.

Examples

A promise by husband to pay an allowance to wife was unenforceable due to lack of ICLR: *Balfour v Balfour* [1919] 2 KB 571

A promise to provide daughter with house and money if she studied for the bar was unenforceable: *Jones v Padavatton* [1969] 1 WLR 325

A promise of a commercial nature that was made in a social context, with vague language, in anger or jest was unenforceable: *Blue v Ashley* [2017] EWHC 1928 (Comm)

- In *Blue v Ashley* a promise was made in a pub by a business owner to his banker that he would pay him £15M provided he get an offer for the company above a certain price was held to be unenforceable.

Exception

Pre-nuptial and post-nuptial agreements are presumptively valid unless they are not freely entered into, entered into without informed consent, or unfair: *Radmacher v Granatino* [2010] UKSC 42