18 Essential requirements of contract (1): offer and acceptance

After studying this chapter, you should be able to:
- Understand offer and acceptance, including the rules of communication and revocation

18.1 The offer

This chapter deals with the idea of agreement in formation of a contract. This requires an offer and acceptance. These, and the relevant rules, are explored in this section of the chapter and evaluated in the next section.

An **offer** is the starting point for a contract. Contract law sets out what amounts to an offer, when the offer comes into existence and when it comes to an end. Once an offer is communicated to the offeree by the **offeror**, the **offeree** can choose whether to accept that offer or not until such time as the offer ends.

Key terms

Offer – a proposal (or promise) showing a willingness to contract on firm and definite terms.

Offeror – the person who makes the offer.

Offeree – the person to whom an offer is made.

The offer must be definite in its terms. Words such as 'might be prepared to' or 'may be able to' indicate uncertainty. Therefore, it is likely that the statement will be an invitation rather than an offer. This can be seen in the case of *Gibson v Manchester City Council* (1979).

***Gibson v Manchester City Council* (1979)**

Mr Gibson was a council tenant. The council wrote to him stating:

> "The Corporation may be prepared to sell the house to you ... If you would like to make formal application to buy your Council house, please complete the enclosed application form."

He completed the application but the council refused to accept his application.

It was decided that the council's letter was not an offer. The reason was that it was not a firm and definite proposal, as it stated that the council 'may be prepared to sell the house', but not that it definitely would. His formal application was the offer that the council could accept or reject.

An acceptance of the offer forms the basis of a valid contract. The difficulty is in deciding whether a statement amounts to an offer or whether it is just a statement preparatory to an offer which is known as an invitation to treat.

18.1.1 An offer or an invitation to treat?

Key term

Invitation to treat – an indication that one person is willing to negotiate a contract with another, but that he or she is not yet willing to make a legal offer.

The law distinguishes between an offer and an **invitation to treat**. An invitation to treat is not an offer and therefore it cannot be accepted to make a contract. It is an invitation by one party to another to make an offer, for example the invitation by the council in the *Gibson* case to the council tenant to make an application to buy his council house. This means that a firm proposal made in response to an invitation to treat amounts only to an offer and cannot be an acceptance so as to create a contract. There are a number of examples of invitations to treat.

Advertisements

Generally, an advertisement cannot be an offer, and is thus only an invitation to treat. This can be seen in the case of *Partridge v Crittenden* (1968).

***Partridge v Crittenden* (1968)**

Crittenden placed an advertisement stating 'Bramblefinch cocks, bramblefinch hens, 25s [£1.25] each'. He was prosecuted for 'offering for sale' a wild bird under the Protection of Birds Act 1954. He was not guilty as the advertisement was not an offer but an invitation to treat. Any offer leading to a contract would be made by the person responding to the advertisement

Exceptionally, if an advertisement contains a clear indication that there is an 'offer' because it is expected to be taken seriously, then the court may well decide it is an offer. This usually occurs in a unilateral rather than a **bilateral contract**.

In a **unilateral contract,** the offeror makes a promise in exchange for an act by another party. If the offeree acts on the offeror's promise, the offeror is legally obligated to perform his or her side of the contract, but an offeree cannot be forced to act because no return promise has been made to the offeror. After an offeree has performed his or her act, only one enforceable promise exists, that of the offeror. A unilateral contract arises only when the offeree completely performs the required act. This is typical in reward cases where, for example, there is a reward offered for someone finding and returning a missing pet. The offer, for example, contained in a reward poster for finding the missing pet is accepted by the person finding it and at that point there is a legal obligation to pay the reward to the finder. There is no obligation to look for the missing pet.

In a bilateral contract, there is an exchange of mutual promises. An example is a contract to buy a loaf of bread for £1. Both parties have an obligation – to provide the bread on one party, to pay £1 on the other party.

Key terms

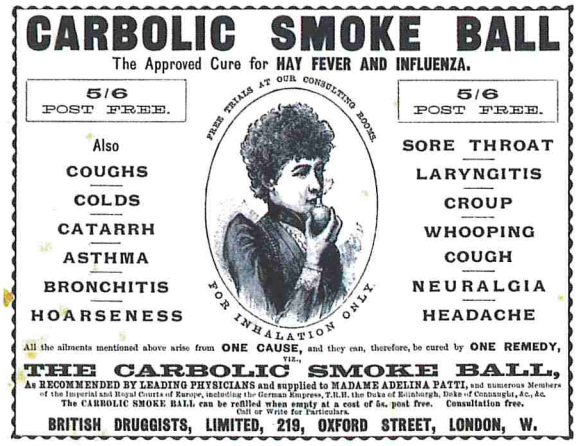
Bilateral contract – this requires both offeror and offeree to do something. Both parties have obligations.

Unilateral contract – an agreement to pay in exchange for performance, if the potential performer chooses to act. There is no obligation to perform the act.

A unilateral contract can be seen in the case of *Carlill v Carbolic Smokeball Co.* (1893).

Carlill v Carbolic Smoke Ball Co. (1893)

The company advertised a patent medicine, the smoke ball. The advertisement stated that if someone (not necessarily the person who bought the product) used it correctly and still got flu, then the company would pay him or her £100. Mrs Carlill did get flu after using the smoke ball as instructed. The court awarded her the £100. The promise was an offer that could be accepted by anyone who used the smoke ball correctly and still contracted the flu as the advertisement was a unilateral offer.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Advertisement from 1897

Goods in a shop window or on a shop shelf

The goods on the shelf are an invitation to treat and remain so when put in the customer's basket. The contents of the basket become an offer when the customer presents them to the checkout operator (or self-service scanner). The shop then accepts or declines the customer's offer through their checkout operator or assistant at the self-service scanner.

Fisher v Bell (1961)

A shopkeeper displayed a flick-knife with a price tag in his window for sale. He was charged with 'offering it for sale', an offence under the Offensive Weapons Act 1959. The display of the knife in the window was an invitation to treat so the knife had not been offered for sale. He was therefore not guilty of the offence.

Lord Justice Parker said:

> "It is perfectly clear that according to the ordinary law of contract 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."

Pharmaceutical Society of Great Britain v Boots Cash Chemists (1953)

Boots were charged with selling controlled pharmaceutical products other than under the supervision of a pharmacist. The shop was a self-service shop where the items that had to be sold by a pharmacist were on a shelf for customers to select. They were found not guilty as the offer was made by the customer at the till where there was a pharmacist present to approve the acceptance of the offer. The approval by a pharmacist was required by the Act controlling such sales.

Figure 18.1 Key facts chart for invitation to treat

Offer or invitation to treat?	Brief legal rule	Case example
An advertisement	An advertisement is usually an invitation to treat, not an offer	*Partridge v Crittenden* (1968)
An advertisement containing an offer	Where there is a unilateral contract, the advertisement may be an offer rather than invitation to treat	*Carlill v Carbolic Smokeball Co.* (1893)
Goods in a shop window	An invitation to treat	*Fisher v Bell* (1961)
Goods on a supermarket shelf	An invitation to treat	*Pharmaceutical Society of Great Britain v Boots Cash Chemists* (1953)
Goods at an auction	Each lot is an invitation to treat; offer made by the bidder	*British Car Auctions v Wright* (1972)
Request for information and reply to the request	An invitation to treat	*Harvey v Facey* (1893)

This principle makes good sense. A seller of goods is not obliged to sell the goods to you. The goods might be a display item (that is, the actual item itself is not for sale), even with a price ticket on the item. There may be none left to sell or there may be legal restrictions on the sale of the goods. Examples include the cases of *Fisher v Bell* (1961) and *Pharmaceutical Society of Great Britain v Boots Cash Chemists* (1953).

Lots at an auction

At an auction the bidder makes the offer that the auctioneer then accepts by banging his or her hammer. This means that the lots available at an auction are an invitation to treat. This can be seen in the case of *British Car Auctions v Wright* (1972).

British Car Auctions v Wright (1972)

In this case, the auctioneers were prosecuted for offering to sell an unfit vehicle at an auction. However, the prosecution failed because there was no offer, only an invitation to treat.

A request for information

A request for information and a reply to such a request is not an offer. This might be just a general enquiry such as when an item displayed for sale does not have a price in it. An example of this is where a person enquires about the price of an item – 'How much is the red dress?' This can be seen in the case of *Harvey v Facey* (1893).

Harvey v Facey (1893)

Harvey wanted to buy Facey's farm and sent a message: 'Will you sell me Bumper Hall Pen [the farm]? State lowest price.'

Facey replied: 'Lowest price acceptable £900.'

Harvey tried to buy the farm for £900 but could not as the reply was merely a reply to the request for information, not an offer.

18.1.2 Who can make an offer?

An offer can be made by anyone. This can be by an individual, a partnership, limited company or other organisation. An offer made other than by an individual is made by an employee of the business or an agent. It can also be made through a notice or a machine as in *Thornton v Shoe Lane Parking* (1971).

Thornton v Shoe Lane Parking (1971)

Mr Thornton put money into a machine and was given a ticket at the entrance to a car park. The offer was made by the machine on behalf of the company owning the car park. The acceptance was made by putting the money into the machine. This was where the contract was made which dictated what terms were in the contract – the terms displayed by the machine.

18.1.3 To whom can an offer be made?

An offer can be made to a named individual as in *Gibson v Manchester City Council* (1979), to a group of people as at an auction, or to the world at large as in *Carlill v Carbolic Smokeball Co.* (1893). An offer can be targeted at particular individuals and may be conditional on another contract being made. An

example of this which had disastrous consequences was the Hoover free flights fiasco.

Here was an offer to give a free flight if you bought a Hoover product costing more than £100. Inevitably, the offer was taken up by many people who realised that this was effectively a flight to the US for £100 with a free hoover product thrown in! Hoover nearly went bankrupt as a result – it sold £30 million worth of its products but had to pay £50 million for the flights!

Hoover's offer of free flights nearly bankrupted the company

18.1.4 How long does an offer last?

An offer can only be accepted while it is open. Once an offer has ended, it cannot be accepted and cannot form the basis of a contract. It is therefore essential to establish when an offer starts and when it ends.

An offer comes into existence when it is communicated to the offeree. Communication requires the offeree to know of the existence of the offer. This can be seen in the case of *Taylor v Laird* (1856).

Taylor v Laird (1856)

Taylor gave up the captaincy of a ship overseas. He needed to get back to England. He worked as an ordinary crew member on the ship in order to get back to England, but received no wages. The ship owner had not received any communication of his offer to work as an ordinary crew member. Therefore no contract could exist for the payment of wages on this voyage.

Exact timing can be critical – this can be seen in the case of *Stevenson v McLean* (1880).

Stevenson v McLean (1880)

On Saturday, the offeror offered to sell iron to the offeree. The offer was stated to be open until Monday. On Monday at 10 a.m., the offeree sent a telegram asking if he could have credit terms, but got no reply. At 1.34 p.m. the offeree sent a telegram accepting the offer, but at 1.25 p.m. the offeror had sent a telegram, 'Sold iron to third party', arriving at 1.46 p.m. The offeree sued for the breach of contract but the offeror argued that the query about credit was a counter offer so there could be no acceptance. It was decided that the query about credit was only an enquiry, so a binding contract was made at 1.34 p.m.

18.1.5 How an offer can end

An offer can come to an end in the following ways:

- revocation
- rejection
- lapse of time
- death
- acceptance.

Revocation

An offer can be revoked (withdrawn) at any time before acceptance. The offeror must communicate the revocation to the offeree before the revocation can take effect, as in *Routledge v Grant* (1828). This can have implication/s where there is an offer to the whole world – the *Carlill v Carbolic Smokeball* type of offer. In these circumstances, the offer can end in three ways:

- by setting a time limit in the offer such as by stating the 'reward' will only be available to be paid until a particular date
- by the expiry of a reasonable time as is discussed later
- by publishing revocation of the offer in the same way as the original offer was made.

Routledge v Grant (1828)

Grant had offered his house for sale, stating that the offer would remain open for six weeks. When he told Routledge that he no longer wished to sell the house, this was effective revocation of the offer, even though it was within the six-week period. Routledge could no longer accept the offer as it had ended.

Tip

Note that an offer is revoked as soon as the revocation is communicated to the offeree. You can exemplify this from *Stevenson v McLean* (1880) as well as *Routledge v Grant* (1828).

However, an offeree can make a separate contract with the offeror to keep the offer open, or only to sell to him or her. This is known as a collateral contract which can be enforced if the offeror refuses to sell within the agreed period or sells the item to someone else.

Communication of revocation does not have to be from the offeror directly if the person communicating the revocation is reliable. There are no particular categories of 'reliable person' but evidence could be given that the communication took place and could be expected to be taken seriously:

- In *Routledge v Grant* (1828), it was the offeror who communicated the revocation of the offer to the offeree.
- In *Dickinson v Dodds* (1876), the offeree heard about the revocation of the offer from a reliable source. This was effective communication of revocation.

Dickinson v Dodds (1876)

Dodds had offered to sell houses to Dickinson. When a reliable person known to both of them told Dickinson that Dodds had withdrawn the offer, this was effective revocation.

Rejection

Once an offer is rejected, it cannot be accepted by the person rejecting the offer as the rejection ends the offer. If the offer is made to more than one person, rejection by one person does not mean the other offerees can no longer accept the offer. The rejection must be communicated to the offeror before it takes effect as in revocation.

One way is specifically responding to the offer by saying 'No'.

The next way is when a **counter offer** is made. A counter offer is not just a price negotiation but anything else that makes a significant difference to the terms of the contract, such as a different delivery date. A counter offer is a rejection of an offer. An example of rejection through a counter offer occurs in *Hyde v Wrench* (1840).

Key term

Counter offer – a response to an offer which makes a firm proposal that materially alters the terms of the offer.

Hyde v Wrench (1840)

Wrench offered to sell his farm for £1000 to Hyde. Hyde replied with a counter offer of £950. Wrench rejected this counter offer. Hyde then replied that he accepted Wrench's earlier offer to sell for £1000. However, the counter offer ended Wrench's original offer, so Hyde could not accept it. Wrench could have accepted Hyde's offer of £1000 but did not do so.

Sometimes there are enquiries during negotiations. As has been seen in *Stevenson v McLean*, these are generally treated as requests for information and not counter offers. Whereas a counter offer operates as a rejection of the offer, a request for information does not. Thus, the offeree can accept the offer following the request for information.

Tip

It is not always easy to decide whether there has been a request for information or a counter offer. One perspective is that a request for information does not seem to imply a rejection of the offer made. A further point is that a request for information is drafted as a question whereas a counter offer is not. Thus, a request for information is not a firm proposal which rejects the offer, whereas a counter offer is. A counter offer ends the original offer, but it isn't always clear when there is a counter offer and when there is just a request for information. This confusion can be seen from the status of an enquiry about credit in *Stevenson v McLean*.

Lapse of time

An offer can come to end by lapse of time. If a fixed period for the duration of the offer is stated, then as soon as that expires there is no offer to accept. The problem arises when no time is set. In this situation the time is a reasonable time. This is clearly going to vary depending on the nature of the offer. You would expect a longer time for the duration of an offer to buy a metal tank than an offer to buy a specific cake. An example is *Ramsgate Victoria Hotel v Montefiore* (1866).

Ramsgate Victoria Hotel v Montefiore (1866)

On 8 June, Montefiore offered to buy shares at a fixed price in the hotel. On 23 November, his offer was accepted but he no longer wanted them as the share price had fallen so he refused to pay. It was held that the long delay between the offer and the acceptance meant the offer had lapsed and could no longer be accepted.

Death

The effect of the death of either the offeror or the offeree depends on which party died and the type of contract involved. If the offeree dies then the offer ends and those dealing with his estate cannot accept on his behalf. The executors or administrators of his estate can make a new offer as can the offeror.

When an offeror dies, acceptance can still take place until the offeree learns of the offeror's death. However, this is obviously not the case where the

Figure 18.2 Key facts chart for duration of an offer

	Brief legal rule	Case example
Offer not communicated to offeree	No offer exists	*Taylor v Laird* (1856)
Offer must exist to be open for existence	The exact timing of the duration of the offer is critical	*Stevenson v McLean* (1880)
Revocation of offer	Can be made at any time	*Routledge v Grant* (1828)
Communication of revocation of offer	Must be effectively communicated, not necessarily by the offeror	*Dickinson v Dodds* (1876)
Offer rejected	Once rejected, the offer ends and cannot be accepted	*Hyde v Wrench* (1840)
Offer lapsed	Lapses after end of fixed time, or if no time, after a reasonable time	*Ramsgate Victoria Hotel v Montefiore* (1866)
Death of one party	Ends the offer when known or if the offer is for personal services by the deceased	

offer is to perform some personal service such as to provide personal tuition.

Points to consider about the ending of an offer

The law can be confusing as to what exactly forms the offer and how long it remains open. There are many ways an offer can come to an end. A counter offer ends the original offer, but it is not clear when there is a counter offer and when there is just a request for information. This confusion can be seen from the status of an enquiry about credit in *Stevenson v McLean*.

If you state the length of time the offer will be open, you can still change your mind, as in *Routledge v Grant*. If you do not state the length of time it will be open, it is for a reasonable time as in *Ramsgate Victoria Hotel v Montefiore*. How long is a reasonable time? The answer is that it depends on the circumstances. This leads to confusion. The balance is between doing what is morally right and losing money or arguing the point and losing goodwill. This seems to be a poor choice for a business.

A counter offer ends the original offer and this may take place on several occasions during negotiations. This seems a perfectly fair rule as an attempt to go back to the original offer is rarely refused during negotiations – the price rarely goes up during negotiations.

Acceptance

Once an offer has been accepted there is agreement, and assuming that the other essential features of a contract have been fulfilled, there is a legally binding contract.

18.2 Acceptance

Acceptance must be positive and unqualified. It must be acceptance of the whole offer and all the terms in it. There is no acceptance if the response to the offer is 'Yes, if ...' or Yes, but ...'. Where there is a 'Yes, if ...' or 'Yes, but ...', this is a counter offer unless it can be seen as just a request for information.

Key term

Acceptance – a final and unconditional agreement to all the terms of the offer.

Acceptance of all the terms in a contract can be seen when you tap on 'I agree' to accept the contract on your phone or computer. This then incorporates all the terms and conditions that you have indicated you have read, whatever they might be.

18.2.1 How do you accept an offer?

Usually, acceptance can be in any form, provided it is unequivocal and communicated to the offeror. It does not have to be in the same format, so an email can be responded to by a text, letter, telephone call, etc. However, acceptance cannot be by silence; there must be some positive act for acceptance. This can be seen in the case of *Felthouse v Bindley* (1863).

***Felthouse v Bindley* (1863)**

There were discussions about the purchase of a horse. The final letter from the offeror stated: 'If I hear no more, I consider the horse mine.' There was no further response, but the court decided there was no contract as an offer could not be accepted by silence or inactivity on the part of the offeree.