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.

Although there can be any form of acceptance, providing it is effectively communicated, the offeror can require a specific method for acceptance. For example, the acceptance must be made personally. If the offer requires a particular manner of acceptance, that must usually be complied with if there is to be a valid acceptance. There can sometimes be a waiver of the requirement stated. This can be seen in the case of *Yates v Pulleyn* (1975).

Yates v Pulleyn (1975)

An option to purchase land was required to be agreed by notice in writing 'sent by registered or recorded delivery post'. When a letter was sent by ordinary post it was argued that there was no acceptance. This argument was rejected as it was a convenience for the offeree, sent by registered post to ensure certainty that the acceptance had arrived. Lord Denning made the distinction between the requirement being mandatory and being directory. A mandatory instruction would have to be followed exactly (acceptance must be registered post). A directory instruction only requires completion within the time frame set – so any form of post would do.

18.2.2 When does acceptance take place?

As we have seen in *Stevenson v McLean*, the actual time of revocation of an offer is critical. This is equally important with acceptance. The general rule is that acceptance takes place when the acceptance is communicated to the offeror. There are three ways of accepting an offer that need special attention. These are:

- acceptance by conduct
- acceptance by use of the post – the postal rules
- electronic methods of communication.

Acceptance by conduct

This has been seen in *Carlill v Carbolic Smokeball Co.* The case of *Reveille Independent LLC v Anotech International (UK) Ltd* (2016) reflects what occurs quite often in business contracts – the job proceeds before the formal contract is agreed in all its detail, with numerous offers and counter offers.

Reveille Independent LLC v Anotech International (UK) Ltd (2016)

In common with many potential contracts, there was a written offer document which stated that it was not binding until signed by both parties. The offeree made some alterations and signed the document but the alterations amounted to a counter offer and the document remained unsigned by the offeror. However, there was performance by one party of the 'contract' in accordance with its terms. The dispute concerned whether a binding contract came into existence. It was claimed that Reveille agreed to integrate and promote products in three episodes of Season 2 of MasterChef US, as well as other matters. The promotions took place but the document remained unsigned.

The counter offer had been accepted by conduct, because the prescribed mode of acceptance was said to have been waived by the original offeror. Acceptance was by the conduct of the offeree, as, objectively, it was intended to be acceptance.

Acceptance by use of the post – the postal rules

The postal rules were developed in the nineteenth century to deal with the problem of when a contract came into existence and, should a letter not be delivered correctly, where the loss should fall. The rule also adapted the idea that once you have posted a letter you cannot get it back.

The rules only apply to letters of acceptance, not to offers or counter offers.

The rules are:

1. The rules only apply if post is the usual or expected means of communication.
2. The letter must be properly addressed and stamped.
3. The offeree must be able to prove the letter was posted.

If the rules apply, acceptance takes place at the moment the letter is properly posted.

The rules were set out in the case of *Adams v Lindsell* (1818).

Adams v Lindsell (1818)

Lindsell wrote to Adams offering to sell them some wool and asking for a reply 'in the course of post'. The letter was delayed in the post. On receiving the letter Adams posted a letter of acceptance the same day. However, because of the delay Lindsell assumed Adams did not want the wool and sold it to someone else. However there was a valid contract because acceptance took place as soon as the letter was placed in the post box and there had been no communication about revoking the offer.

Electronic methods of communication

The law has struggled to deal with the issues arising from modern methods of communication. The principle is that acceptance, apart from the postal rules, occurs when the offeror is aware of the

acceptance. This can be seen in the statement of Lord Denning in *Entores v Miles Far East* (1955):

> "If a man shouts an offer to a man across a river but the reply is not heard because of a plane flying overhead, there is no contract. The offeree must wait and then shout back his acceptance so that the offeror can hear it."

The case of *Brinkibon Ltd v Stahag Stahl* (1983) dealt with the problem of out-of-hours messages. These are only effective once the office is reopened. Fax, text and email are more modern forms of communication and the same problems and the same principles very often apply.

The Consumer Protection (Distance Selling) Regulations 2000 give consumers a number of rights in addition to those within the Consumer Rights Act 2015. If the obligations with respect to providing key information to the consumer are omitted, then no contract is formed. The Regulations apply to telephone, fax, internet shopping, mail order, email and television shopping.

Article 11 of the Electronic Commerce (EC Directive) Regulations 2002 states that where a buyer is required to give his or her consent through technological means (such as clicking on an icon), the contract is made when the buyer has received from the service provider electronically an acknowledgement of receipt of the acceptance. Thus many online businesses state, 'Your order has been received and is now being processed' or words to that effect, rather than 'Your order has been accepted'. This ensures that online sellers are not required to accept the order at this point.

In *Bernuth Lines Ltd v High Seas Shipping Ltd* (2006), it was stated that clicking on the 'send' icon still raised questions of there being effective acceptance. For example, the email must be sent to the email address of the intended recipient. It must not be rejected by the system or otherwise delayed. If the sender does not require confirmation of receipt he or she may not be able to show that receipt has occurred. There may be circumstances where, for instance, there are several email addresses for a recipient, or different devices will only receive emails to particular addresses. Even if it is received, is the device being used by the intended recipient or a colleague or merely a family member?

The law continues to fail to address the problems with respect to modern communications methods. The case of *Thomas and Gander v BPE Solicitors* (2010) demonstrates this. Here the question was whether an email acceptance is effective when it arrives, or at the time when the offeror could reasonably be expected to have read it, which was not straightforward.

Thomas and Gander v BPE Solicitors (2010)

An email of acceptance was received at or close to 6 p.m. on 24 August 2007, a Friday night before a Bank Holiday. The email was available to be read at that time but was not in fact read until the Tuesday morning. The question is whether the defendants were correct in their submission that acceptance was not effective from the moment the email was received because it was sent after working hours.

The court stated that it must be resolved 'by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie' as had been stated in the case in *Brinkibon*. In the context in which the 6 p.m. email was sent – this was a transaction that could have been completed that evening – the court did not consider that 6 p.m. was outside working hours. The email was available to be read on a portable device within working hours, despite the fact that the recipient had in fact gone home. So there was a valid acceptance.

The effect of *Thomas and Gander* is that each case is decided on its particular facts. Given the prevalence of mobile phones with email capabilities being a normal part of business communications today and the use or otherwise of automated messages indicating an email or text has been read, it appears that the courts will look at each case on the basis of its particular facts and the business practices that have been in use in the negotiations. Thus the result might be different for booking a restaurant table, buying a car or selling a business.

Silence and acceptance

The courts claim the law on formation of contracts will consider what the parties intended to do. This is a subjective approach. In practice, an objective test is often applied disguised as a subjective judgment. In *Felthouse v Bindley* both parties wanted there to be a contract. The court said that from an objective viewpoint there was no evidence of an acceptance from the nephew. In fact the nephew had contacted the auctioneer holding the horse to remove it from the auction which might contradict that view.

However, for the court to decide there is a valid contract, there should be clear and identifiable evidence. The offer has to be communicated and so, logically, must the acceptance.

Figure 18.3 Key facts chart for acceptance of an offer

	Brief legal rule	Case example
Acceptance by conduct	Valid Particularly in unilateral contracts	*Carlill v Carbolic Smokeball Co.* (1893)
Prescribed method of acceptance may be waived	Acceptance by a different method to that in the offer may be permitted	*Reveille Independent LLC v Anotech International (UK) Ltd* (2016)
Postal rules	If they apply, acceptance takes place at the moment of posting the letter	*Adams v Lindsell* (1818)
Electronic methods of communication	Acceptance occurs when the offeror is aware of the acceptance	Electronic Commerce (EC Directive) Regulations 2002), Article 11

The Unsolicited Goods and Services Act 1971 states that, for example, where goods are received without request there can be no contract unless the acceptance is communicated to the sender. So the individual may benefit and the business may lose out and be prosecuted, but is it moral to keep the goods?

Of course, the need to communicate an acceptance may be said to have been waived, as in *Carlill* and *Reveille*.

Tip

When considering offer and acceptance cases, you need to adopt a logical and precise approach. Consider and reference authority – usually decided cases. See Figure 18.4.

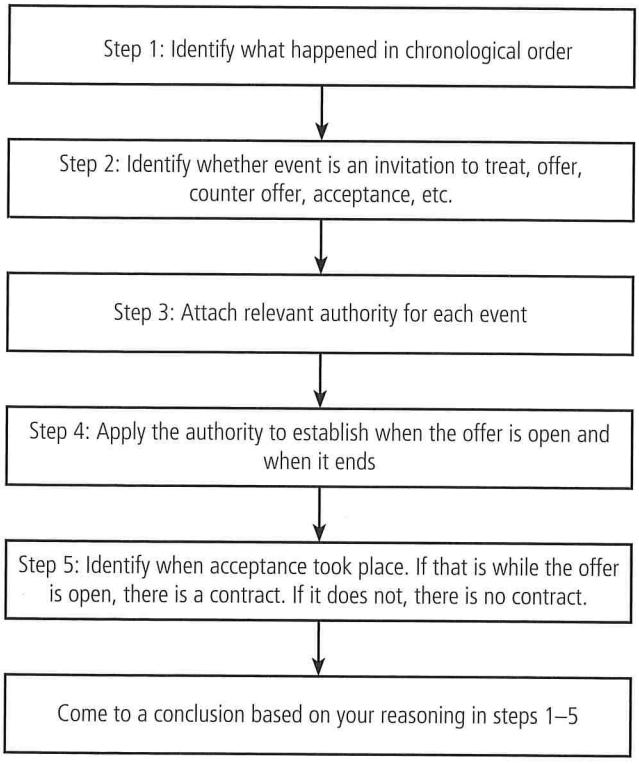

Figure 18.4 Steps to take to decide whether an offer has been accepted

Tip

How to work out an offer and acceptance problem in order to establish whether there is a contract or not

Consider the facts of *Adams v Lindsell* (1818). Assume that A found out (from L or a reliable source) that L had sold the wool on 9 September:

2 Sept L wrote to A offering to sell wool
5 Sept A received the letter
5 Sept A sent a letter of acceptance
8 Sept L sold the goods to X
9 Sept L received the letter of acceptance

The offer opened when A received the letter. The offer ended when A learned the wool had been sold (9 September). The acceptance took place when the letter of acceptance was posted. The contract was therefore made on 5 September between A and L.

A slightly more complicated case is *Byrne v Van Tienhoven* (1880):

1 Oct V T posted a letter offering goods for sale
7 Oct Letter of 1 Oct arrived with B
8 Oct V T revoked the offer in a letter
11 Oct B accepted the offer by telegram
15 Oct B posted a letter confirming acceptance
20 Oct Letter of revocation arrived with B

Here, the revocation was not effective until it was received on 20 October. This was too late, as the contract was made on 15 October when the letter of acceptance was posted or when the telegram arrived, whichever is earlier.

Activity

Look at the case of *Stevenson v McLean* (1880) and follow the same techniques as shown in Figure 18.4 to decide when the contract was made.

Figure 18.5 Key cases chart for offer and acceptance in contract law

Case	Judgment
Gibson v Manchester City Council (1979)	An offer must have definite terms, not vague such as 'may be prepared to'
Partridge v Crittenden (1968)	An advertisement is usually an invitation to treat and not an offer
Carlill v Carbolic Smoke Ball Co. (1893)	Here the advertisement contained promises that were intended to be taken seriously so it was an offer leading to a unilateral contract
Fisher v Bell (1961)	Goods in a shop window are an invitation to treat
Pharmaceutical Society of Great Britain v Boots Cash Chemists (1953)	Goods in a self-service shop are an invitation to treat
British Car Auctions v Wright (1972)	The bidder makes the offer at an auction; the auctioneer accepts it
Harvey v Facey (1893)	A request for information and the response to the request are not an offer
Thornton v Shoe Lane Parking (1971)	In a vending machine or ticket machine the offer is made by the person inserting the coin
Taylor v Laird (1856)	An offer only comes into existence when it is communicated to the offeree
Stevenson v McLean (1880)	Exact timing of the offer and acceptance are critical in deciding when a contract comes into existence
Routledge v Grant (1828)	An offer can be revoked at any time, providing revocation is communicated to the offeree
Dickinson v Dodds (1876)	Revocation can be via a reliable source rather than directly communicated
Hyde v Wrench (1840)	Once an offer is rejected it cannot be accepted
Ramsgate Victoria Hotel v Montefiore (1866)	An offer ends through lapse of time when a reasonable time has elapsed
Felthouse v Bindley (1863)	Acceptance cannot be made through silence
Yates v Pulleyn (1975)	A mandatory method of acceptance by a particular method must be complied with
Reveille Independent LLC v Anotech International (UK) Ltd (2016)	A directory method of acceptance by a particular method does not have to be complied with
Adams v Lindsell (1818)	If the posting rules apply, acceptance takes place at the moment of posting
Entores v Miles Far East (1955)	With non-postal acceptance, acceptance takes place when the offeror is aware of the acceptance
Brinkibon Ltd v Stahag Stahl (1983)	Acceptance takes place when a message is opened
Byrne v Van Tienhoven (1880)	An example of the working of offer and acceptance issues in negotiations