

Chapter 2: Agreement

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 2 Understand the rules for establishing whether a valid offer and acceptance have taken place

2.1 Introduction

There can be no contract unless the parties are in **agreement** and this is therefore the usual starting point in establishing whether there is a valid and enforceable contract.

It is important to remember that agreement alone is not proof of the existence of a valid contract – consideration and an intention to create legal relations will also have to be found. These concepts are discussed in more detail in **Chapter 3**.

This chapter will discuss:

- the differing approaches taken by the courts in order to establish the fact of an agreement;
- the requirements for a valid offer to exist, and the ways in which an offer can be terminated; and
- the legal meaning of acceptance, together with the rules governing communication of that acceptance.

2.2 The fact of agreement

The historic approach to establishing agreement was for the courts to look for *consensus ad idem* – or a meeting of minds – between the parties. However, this **subjective** approach (i.e. an approach that focused upon what the parties themselves actually thought at the time of entering into the contract) was very difficult to implement, since the courts are not mind readers or time travellers!

Today, the courts apply an **objective** test of agreement – they do not attempt to investigate what was actually in the minds of the parties, but will judge things by outward appearances.

In ***Butler Machine Tool Co Ltd v Ex-Cell-O Corporation Ltd [1979]*** and ***Gibson v Manchester City Council [1979]***, Lord Denning suggested that a relaxed approach to this objective test should be followed, with the focus simply on establishing whether there was **any** evidence of an agreement between the parties.

This approach has been rejected, though, and the courts generally focus upon finding an **offer** from one party that is then **accepted** by the other. Although this approach does not cover all possible situations of agreement, it is a rule that generally works well in practice. Offer and acceptance can therefore be seen as the factual indicators of an agreement.

The way in which the objective, offer-and-acceptance approach is applied can be seen in ***Gibson v Manchester City Council [1979]*** (the facts of this case are set out at **2.3.3.4**). Even though Gibson subjectively thought the Council was offering to sell a house to him, the House of Lords decided that, from an objective standpoint, the words “may be prepared to sell” did not amount to an offer. Without an offer, one of the vital elements of an agreement was missing, and there could therefore be no legally binding contract.

The objective approach to agreement was confirmed in the recent case of ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010]***, where Lord Clarke set out what he described as the “general principles” in this area of law:

“Whether there is a binding contract between the parties . . . depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations.”

Applying this approach to ***Robertson v Anderson***, the agreement could have occurred following an **offer** by Mrs Anderson that the two women should share any money that they won at bingo that night, which Mrs Robertson then **accepted**. Other examples of agreement from everyday life include:

- the customer who asks if he can have a T-shirt on sale in a shop is making an **offer** to buy which the shop assistant **accepts** by agreeing to sell it to him;
- the interviewer who asks the job applicant whether he would like the job may be making an **offer** which the candidate can either **accept** or reject.

2.3 Offer

The party making the offer is called the **offeror** and the person to whom the offer is made is called the **offeree**.

An **offer** is a statement of terms by which the offeror is prepared to be legally bound. This means that the terms of an offer must be sufficiently **certain**; if they are not, then the offeree could not be absolutely sure about what he was agreeing to.

For example, if I say to you, “I will sell you my book”, the term “my book” is uncertain. Which of my books are you agreeing to buy from me? Further, in the bingo scenario, if Mrs Anderson had said to Mrs Robertson, “I’ll share any winnings with you tonight, unless I win big”, this could also be viewed as an uncertain offer, as there is no clarity on how much a “big” win might be.

If one of the terms of the agreement is meaningless, the court may simply ignore it, as the Court of Appeal did in ***Nicolene Ltd v Simmonds [1953]***. It decided that a statement by the defendant that “the usual conditions of acceptance apply” was meaningless because there were no “usual conditions of acceptance”. The rest of the contract made sense and so it could be enforced.

On the other hand, if the uncertain term is a central part of the contract, the whole contract may fail if the court is unable to “resolve” the uncertainty. This happened in *Scammell & Nephew Ltd v Ouston [1941]*, in which the House of Lords found that an agreement that a van should be acquired “on hire purchase terms” was void because “hire purchase terms” was too vague a term to have any meaning and the contract made no real sense without this detail.

2.3.1 Offers in unilateral and bilateral contracts

Contracts can be categorised as being unilateral or bilateral.

A **unilateral contract** results from a unilateral offer, which is in the form of the offeror saying to the offeree, “**if** you do something then I promise to do something in return”. The important word here is “if”: the offeree does not have to do what is requested, but if he does he will receive a benefit. Contracts offering a reward (e.g. for the return of a lost dog) will generally be of this kind; the offeror does not know if anyone is going to accept the offer, and those seeing the advert are under no obligation to act upon it, but if anyone completes the requested act, he will be able to enforce the contract and claim the reward.

A **bilateral contract** is one where both parties have obligations – for example, “I will build your extension in exchange for your promise to pay me £10,000.” The difference between these two types of contract can be seen in the following example:

- If A says to B, “I will pay you £30 **if** you dig my garden next week” and B makes no promise to do so at the time, this is a **unilateral** offer. If B **does** dig the garden he will be entitled to claim the £30, but he has no commitment to do so.
- If A says to B, “Will you dig my garden next week for £30?” and B had responded immediately, “Yes, I promise that I will”, this would be a **bilateral** contract, with both A and B being bound immediately.

Most enforceable agreements made between parties take the form of bilateral contracts – for example, where A agrees to purchase B’s car, or C agrees to erect a conservatory for D. The agreement in the example bingo case of *Robertson v Anderson* would have been a bilateral contract.

2.3.2 Making an offer

An offer can be made **orally, in writing**, or even **by conduct**, as long as it indicates that the offeror is willing to be bound if his terms are accepted. When shopping, for example, you may not actually exchange any words with the sales assistant but it will be clear, from your actions, that an offer to buy is being made. It would seem that the offer in *Robertson v Anderson* had been made orally.

Further, the offeree must have **knowledge** of the offer, as a party clearly cannot accept something of which he is not aware! For example, a person who returns a lost dog without knowing that a reward is being offered cannot claim a right to the reward. This means that the offer must be successfully **communicated** to the offeree.

This can be seen in ***Taylor v Laird [1856]*** in which a ship's captain formally resigned from his post (i.e. terminated his employment contract) but then assisted the crew in working the ship back home (i.e. started to work again, under a possible new contract). As he had not communicated his offer to continue to work on the ship to his employers, and they therefore could not choose to accept (or reject) it, there was no contract between the two parties. The employers were not contractually obliged to pay him for his actions.

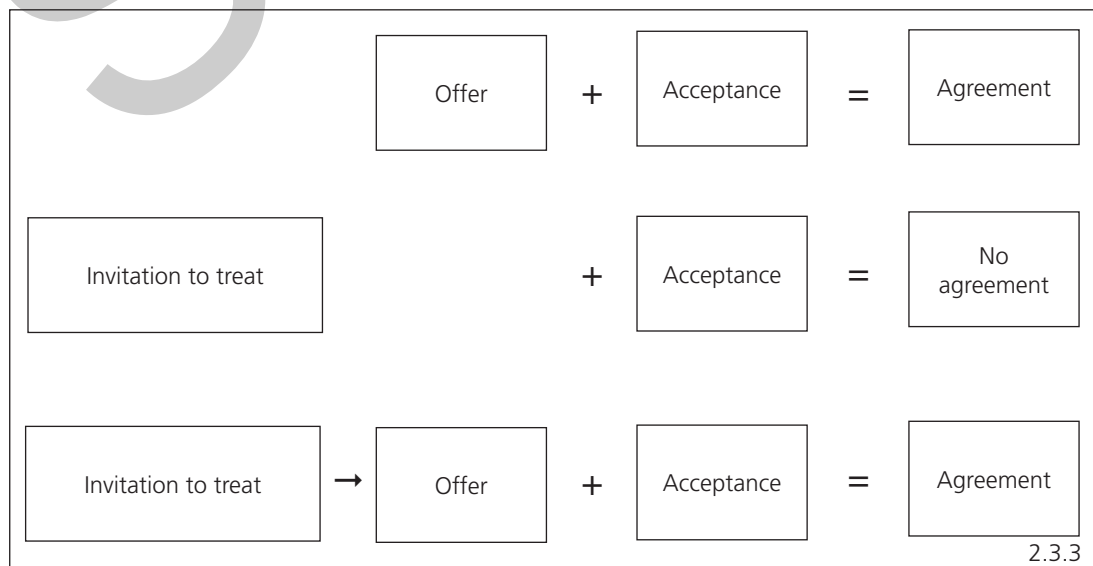
As well as being made to one person, an offer could also be made to a **group**, or to the "***world in general***", an expression used in ***Carlill v Carbolic Smoke Ball Co [1893]***. ***Carlill*** is one of the leading cases in contract law, and is a good example of a unilateral contract.

The defendants in this case were the makers of a medicine called a smoke ball which, they claimed, could cure and prevent a number of illnesses, including influenza. They promised a reward of £100 to anyone who used the smoke ball as directed and caught influenza and said that, to show their good faith, they had put £1,000 in the bank to pay any claims. Mrs Carlill used the smoke ball as directed and developed influenza, but the defendants refused to pay the reward claiming, among other things, that there was no contract because it was impossible to have a contract with the whole world. This is how Bowen LJ dealt with this point in the Court of Appeal:

"It was also said that the contract is made with 'all the world' – that is, with everybody; and that you cannot contract with everybody. 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?"

2.3.3 Offer distinguished from invitation to treat

It is important to be able to distinguish between an offer and an **invitation to treat**, which can be seen as merely a request to others to make an offer, or to open negotiations. This is a necessary part of commercial relations, since the parties may want to negotiate before committing themselves to formal contractual obligations. However, the distinction between the two concepts is important as, unlike an offer, an invitation to treat cannot be validly accepted.



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