LECTURE– "How Binding Agreements Are Formed: An Introduction to English Contract Law and Legal Problem Solving"

Introduction:

- Contract law provides the rules for recognising when a set of promises amounts to an agreement, and for deciding whether that agreement should be legally enforceable as a contract.
- To legally recognise an agreement as a contract, four key elements must be present: **Offer; Acceptance; Intention to create legal relations and Consideration.**
- In this lecture, we will focus on the rules that govern how contracts are formed. Specifically, we will examine the first three elements: offer, acceptance, and intention to create legal relations.

1) What is a contract? How are they relevant to our lives?

Lecture case study

In Contract Law, we often test the students' knowledge and understanding of the law through problem questions. You are often given a factual scenario in which someone has encountered a problem, and your task is to work out what the solution to that problem is and which legal rules you need to use to get there. Give this one a read for now and we will attempt to solve it later in the workshop.

Isaac is the owner of two cars, one red and one blue. He decides to sell both cars. On one Saturday in January, he places an advert in the Headbook Marketplace giving details about both cars and stating:

FOR SALE: red car: £1,000.

FOR SALE: blue car: £2,000.

Isaac then gives his email address for further information. Masood messages Isaac on the following Monday saying "I am very interested in buying your red car. Would you be prepared to accept £900 for it?" Isaac replies that he would not accept £900 but would accept £950. The following day, Masood decides to buy the car at this price. Experiencing problems with Headbook Marketplace app, he writes a letter to Isaac, saying that he will buy the car for £950. Unaware of Isaac's address, he sends it to Gelato Village an ice cream parlour where Isaac works according to his Headbook profile, marking it for the attention of Isaac. Isaac never receives the letter.

Sophia messages Isaac on Wednesday saying, "I would like to buy the red car that you advertised for £1,000". Isaac replies by saying "OK: I'm glad to hear it". However, Isaac then immediately sends another message saying that the car is no longer available, having now changed his mind altogether about selling the red car at so low a price.

Jan wants to buy the blue car. He emails Isaac saying, "I will buy your car for £1,500." Thinking that Jan was referring to the red car, Isaac replied and agreed.

Both Masood and Sophia claim to have contracts to buy the red car. Jan now claims to be entitled to buy the blue car for £1,500.

Advise Isaac.

2) Offer and Acceptance

i) What is an offer?

The words must convey a very precise meaning to be an "offer".

Legal definition:

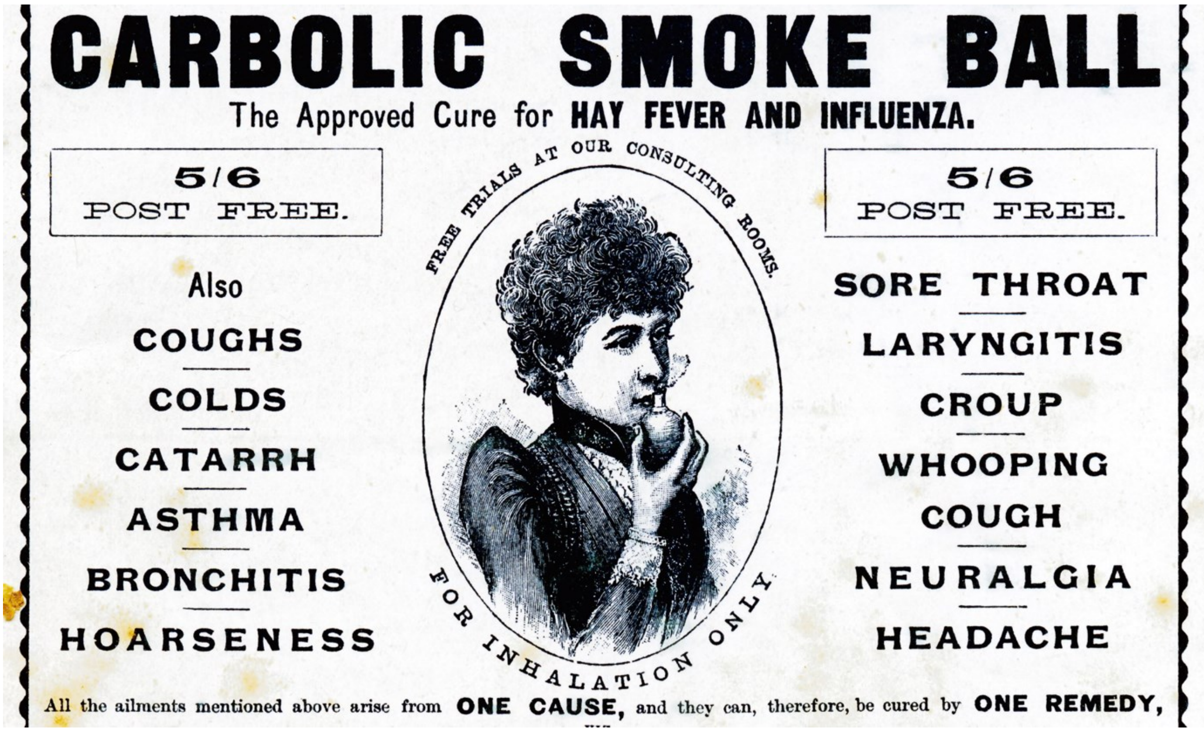
"An offer is an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made": EG *Chitty on Contracts* (32^{nd} ed., 2015), cited *Blue v Ashley* (below), para.52.

What are some key ideas in this definition?

Cases on offer

***Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, Court of Appeal**

- CSBC issued an advert for its Smoke Ball.



- Advert stated:
  - If anyone bought the smoke ball and used it 3 times a day for two weeks, as directed, and they still caught the flu the Company would pay them £100.
  - In order to show its sincerity, the company deposited £1,000 with the Alliance Bank, Regent Street.
- Mrs Carlill bought a Smoke Ball, used it in accordance with directions, and caught flu. She claimed £100 from CSBC.
- Legal question –The Court of Appeal had to decide whether a contract been formed here. There would have to have been an offer that Mrs Carlill accepted.
  - Was there an offer? Yes, the advert showed an intention to be bound (note unusual for adverts) and certainty of terms.
  - Had Mrs Carlill accepted the offer? Yes she had, accepted by her conduct in buying the ball and using it in accordance with the directions

***Harvey v Facey* [1893] AC 552 PC**

- Harvey telegraphed to Facey: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price".
- Facey responded: "Lowest price… £900". This wasn't an offer, they were just responding to a question, no intention to be bound, no precise terms, merely stating what the lowest price was.
- Harvey responded, attempting to "accept" and then argued that they had a contract to purchase the land.
  - Question for the court: Was there a contract?
  - Facey's answer was only a response to request for information. Not an offer – no details, or precise terms, or intent to be bound to sell. Merely stating what their lowest price was.
  - Because there was no offer, Harvey could not have accepted and there was no contract.

***Blue v Ashley* [2017] EWHC 1928:**

This case features the importance of contractual intention. One businessman alleged that another had contracted (in a pub) to pay him £15m. The court had to decide whether this was an enforceable agreement.

- Mr Blue was a specialist in investment banking and corporate finance.
- He worked for Mr Ashley's company, Sports Direct, as strategic adviser.
- Mr Blue suggested Mr Ashley meet other specialists, to get them to work on behalf of Sports Direct. They all met in the *Horse and Groom*, January 2013.
- A lot of drinking - then the parties discussed Sports Direct's share price, which was £4, and whether Mr Blue could raise it to £8 by working on Sports Direct's growth.
- There was jokey banter about what incentive Mr Ashley should pay Mr Blue:

> Ashley: If the shares go up to £8, I'll be so wealthy – how about £10million?
> Others – should really be £20 million;
> Ashley: let's call it £15 million if price gets to £8 in the next three years.

- Mr Blue took the conversation seriously and worked hard on Sport's Direct.
- 25th February 2014: Sports Direct's share price hit £8.
- Mr Blue sued Mr Ashley for £15million.

Reasoning in the judgment:

No intention to be bound: The purpose of the occasion was not to enter into a contract. The pub/drinking context was very informal and there was jokey banter.

> "They all thought it was a joke. The fact that Mr Blue has since convinced himself that the offer was a serious one, and that a legally binding agreement was made, shows only that the human capacity for wishful thinking knows few bounds:" Per Leggatt J, para.142.

The purpose of the occasion.

The pub/drinking context and jokey banter.

The terms were not certain enough: What did Mr Blue have to do in terms of work?

There were no performance measurement standards: How long did the share price have to stay above £8?

The amount of £15million fixed arbitrarily and casually.

Mr Ashley would not have committed to this amount in this way.

There was no commercial sense to the offer – far too high for the work involved.

A reasonable businessperson would have confirmed the arrangement in writing.

ii) Offer is different from an "invitation to treat"

A communication might be an *invitation to treat*, i.e. a statement or advert that is only an opening gambit in negotiations. It is not an offer but only shows a willingness to receive offers.

- Advert: "Car for Sale: offers around £10,000".

  Mat responds: "I'll buy the car for £10,000".

- Contract?

- Mat's response is not an acceptance because there was no offer. Although Mat may be taken as making an offer.

a) Advertisements

The law generally presumes that a statement made in an advert is an invitation to treat.

Partridge v Crittenden **[1968] 1 WLR 1204:**

- Advert in magazine for sale of birds – invitation to treat.
- Otherwise, there could have been large numbers of people accepting: i.e. it would have been commercially unworkable.

Lefkowitz v Great Minneapolis Surplus Store Inc. **(1957) 251 Minn. 188, 86 N.W.2d 689 (Supreme Court of Minnesota)**

- Advert: "3 fur coats for $1 each: first come – first served".
- This was held to be an offer and not an invitation to treat.
- Showed a clear intention to be bound and the terms were very clear.

Why else might we say that Lefkowitz v Great Minneapolis Store is different from Partridge v Crittenden?

b) Displays in a shop

***Pharmaceutical Society of Great Britain v Boots Cash Chemists* [1952] 2 QB 795.**

- When is a contract formed in a self-service shop?
- Is the display of items on the shelves of the shop an offer? No this would be impractical.
- The display of goods is an invitation to treat only.
- When the customer presents the item at the till, this is the "offer".
- Offer is "accepted" by cashier.

3. Responses to offer: *rejection, counter-offer, acceptance*

i) Rejection - An offer is "dead" if rejected.

A-B: "I offer to sell you my car for £1,000."

B-A: "No thank you". The offer is now DEAD and B cannot then accept it by saying "actually… I've changed my mind".

ii) Counter-offer - *Hyde v Wrench* (1840) 3 Beav 334; 49 ER 132

A counter-offer changes the terms of the original offer and bounces it back for the other to accept.

- W offered to sell his farm to H for £1,000. H responded offering £950.
- H heard nothing from W and then said that he would buy at £1,000.
- W's original offer was dead and H could not accept it.

iii) Request for information - Does not kill the original offer.

A request for information should be differentiated from a counter-offer: It does not kill the original offer. Example:

A: "I offer to sell you my car for £1,000"

B: "Does that include the Satnav?" Is this a counter-offer or request for information?

iv) Acceptance

Once there is an acceptance of an offer, there is a contract (assuming the other elements, e.g. consideration, are present).

DEFINITION = an absolute, unconditional and unequivocal assent to the terms of the offer. Acceptance must be a "mirror image" of the offer.

v) Communication of acceptance

What type of communication should be used?

The offeror can stipulate the method of acceptance: e.g. "Please reply by email", and the offeree will then have to use that method, but it is not necessary to stipulate a method.

> If no method of accepting an offer has been stipulated, the offeree can use any reasonable method of communcating their acceptance.

Communication problems can arise:

What if communications don't work!

When will acceptance be held by law to have been communicated?

The relevant rule to apply depends on the mode of communication used to accept. The law divides this into two categories:

- Instantaneous communication: e.g. face-to-face, email.
- Non-instantaneous communication, e.g. the post

i) Instantaneous communication: receipt rule

In cases of instantaneous communication, acceptance occurs at the point the offeror **receives it.**

It is often clear when words and messages have been received. But how do we apply the receipt rule when technology fails!

> For example, an email acceptance is sent which never arrives; a faxed acceptance is sent, but the machine the other end is broken.
>
> > What does the law say when the offeree has made every reasonable effort to communicate their acceptance?

***Entores v Miles Far East Cpn* [1955] 2 QB 327**

- If offeree knows that the offeror has not heard the words of acceptance, or has not received the message, then offeree must send it again.
- Electronic acceptance: Acceptance occurs when the telex, fax, email is received at the other end, e.g. when email lands in the inbox.
- It does not have to have been read. This particular point illustrated by the following cases:

  The Brimnes: Telex acceptance received in machine at 5.45pm. Offeror left office early without checking the machine. Acceptance at 5.45pm.

  Thomas v BPE Solicitors (a firm) (2010): Email received in inbox at 6pm. Effective acceptance at 6pm even though offeror had not read it: working hours.

- ***Entores v Miles Far East Con*: How would this apply to technology failures?**

  If the offeror did not receive the message because of their own fault (fail to access emails; fail to repair a computer/machine; knows emails are not working), and if the offeree reasonably believed acceptance had been communicated, there is acceptance.

ii) Non-instantaneous communication: The postal rule.

If acceptance is made by posting a letter, the postal rule applies. The acceptance is deemed communicated at the point of *posting* the letter.

> The postal rule came from *Adams v Lindsell* (1818)106 ER 250

***Holwell Securities Ltd. v Hughes* [1974] 1 WLR 155** Offeror may exclude postal rule.

- Offer said that acceptance must be by "notice in writing".
- Why did this wording exclude the postal rule?
- Postal rule will not apply where it would lead to "manifest inconvenience or absurdity".

***Brinkibon Ltd. v Stahag Stahl und Stahl gmbh* [1983] 2 AC 34**, per Lord Wilberforce:

> "No universal rule can cover all such cases: they 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."

iii) Not possible to accept by silence

A person makes an offer (e.g. to supply goods) and says "if I don't hear from you in three days, I will assume you accept".

Will a contract arise after three days in this situation? Generally, it is not possible to accept by "silence".

***Felthouse v Bindley* (1862) 142 ER 1037**

- Negotiations between uncle and nephew for sale of a horse.
- Nephew wrote to uncle saying that he understood that the uncle wished to buy his horse for 30£, but he would not take less than 30 guineas.
- Uncle replied to the nephew saying that he would "split the difference" and would pay 30£ and 15shillings: "If I hear no more about him, I consider the horse mine at 30£ 15s".
- The nephew made no reply. No contract to sell the horse to his uncle.
- Otherwise, the uncle would be effectively imposing a contract on the nephew.

iv) Acceptance by conduct

If one party has *acted* on an offer as if there was a contract – using no words of formal "acceptance" - it may be possible to say that they have accepted the offer by their conduct.

This appears to reflect the realities of commerce, where it is often difficult to detect the precise time of the formal "offer" and "acceptance".

However, the line between acceptance by silence (not allowed) and acceptance by conduct (allowed) does appear difficult to draw at times.

***Brogden v Metropolitan Railway Co.* (1877) LR 2 App Cas 666**

- Brogden offered to sell coal to the Railway Company (Brogden was their regular coal supplier).
- They sent the draft contract to the Railway Company.
- The Railway Company put it away and forgot all about it.
- The parties then proceeded to carry out the agreement (delivering coal) and this conduct was held to be an offer and an acceptance.

***Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334:**

- Contract for a life insurance policy – no formal offer and acceptance.
- The parties had acted on the contract.
  - ✓ It could have been when the claimant had asked for the policy (offer) and the defendants had simply issued her with it (conduct acceptance).
  - ✓ It could have been that she "acted on it" by allowing it to continue for several months.

Re Selectmove Ltd **[1995] 1 WLR 474**

- Silence may **exceptionally** amount to an acceptance, possibly:
    - if both parties agree to it in advance;
    - or where two businesses have an established practice of dealing with each other (but would probably be more like acceptance by conduct).

- Court of Appeal said the situation **might** be different if it is the offeree (rather than the person making the offer) who uses silence as an acceptance

> EXAMPLE: "if you don't hear from me by Friday assume that I accept." Here the person doing the "accepting" is imposing the contract on himself and not on the other party.

4. Termination of an offer

i) Revocation

Can a person take back an offer they have made (change their mind)?

Another question we must consider: I make an offer to you and promise to keep it open for you for a week. Is this promise enforceable so that I am obliged to sell to you if you "accept" during this time?

Dickinson v Dodds **(1876) LR 2 Ch. D 463: Close-up on revocation case**

- Dodds made an offer to sell land to Dickinson and promised to keep the offer open until 9:00am on Friday.
- Dodds wanted to revoke the offer he made to Dickinson. Had he done so?
- Thursday: Dickinson told by his agent that Dodds had sold the property to someone else. Was this a proper "revocation"?
- After this, Dickinson tried to accept the offer before the deadline by handing Dodds a letter of acceptance.
- Legally this would only make a valid contract if Dodds' offer was still open.
- HELD: Dodds had revoked his offer because he had communicated it to Dickinson.

> Offeror can revoke an offer **at any time before acceptance**, provided they communicate the revocation to the offeree. This can be through a third party (the agent in this case).

- What about the promise Dodds made the keep the offer open for Dickinson until Friday?
- Promises to keep an offer open are not enforceable, unless contained in a deed (a formal document-needs to be signed witnessed delivered) or when supported by consideration.

ii) Time lapse

- An offer may prescribe a time limit for acceptance.
- The offer lapses if not accepted by the time stipulated.
- If there is no set time limit, offer lapses after a *reasonable* time, which depends on the context.

iii) Rejection and counter-offer (as above)

5. *Consensus ad idem* (Meeting of the minds)

For a valid contract, there must be a "meeting of the minds" (*consensus ad idem*), in addition to offer and acceptance. The parties must agree to the same thing.

How does this problem manifest?:

***Smith v Hughes* (1871) LR 6 QB 597**

- Farmer was negotiating for sale of oats to a racehorse trainer (horses eat the oats).
- They agreed to sell and buy the oats, and agreed on a price.
- When the farmer delivered the oats to the racehorse trainer, the trainer saw they were "new oats" and refused to pay - He thought he was buying "old oats" (better quality).
- Farmer sued for breach of contract.
- The racehorse trainer argued that there was no contract, i.e. no consensus ad idem.

The objective test

> HELD: in cases such as this, in order to determine whether the parties had a "meeting of the minds", it is necessary to apply an objective test.
>
> > The objective test: Would the reasonable observer, looking at external appearances, think that the buyer had agreed to the seller's terms?

Applying the objective test

- ➢ When the farmer had visited the trainer offering to sell oats, he had left a sample of the oats he was selling (new oats).
- ➢ Buyer agreed to purchase the oats after having had the sample for two days.

- The buyer did not look at the sample - assumed the oats were going to be old.

- From all of these facts, would the reasonable bystander conclude that the parties had agreed to buy and sell new oats?

Centrovincial Estates plc v Merchant Investors Assurance Co. **[1983] Com LR 158**

- Commercial lease: Landlord mistakenly entered a significantly lower figure on the lease for the rent: £65,000 (intended rent was £126,000).

- The court applied the objective test, i.e. what the external appearances suggested to the reasonable bystander.

- There was no evidence that the buyers were aware, or ought reasonably to have been aware, that this was a mistake. Contract upheld.

Exceptions to the objective test:

1. One party is aware (or ought to have been aware) that the other party has made a mistake: *Hartog v Colin and Shields* [1939] 3 All ER 566.

2. The seller causes the buyer to make a mistake: *Scriven Brothers & Co v Hindley & Co* [1913] 3 KB 564.