Offer and invitation to treat – auction sales

47 *Harris* v *Nickerson* (1873) LR 8 QB 286

The defendant, an auctioneer, advertised in London newspapers that a sale of office furniture would be held at Bury St Edmunds. A broker with a commission to buy furniture came from London to attend the sale. Several conditions were set out in the advertisement, one being: 'The highest bidder to be the buyer.' The lots described as office furniture were not put up for sale but were withdrawn, though the auction itself was held. The broker sued for loss of time in attending the sale.

Held – he could not recover from the auctioneer. There was no offer since the lots were never put up for sale, and the advertisement was simply an invitation to treat.

Comment (i) A sensible decision, really. The statement, 'I *intend* to auction some office furniture' is not the same as an offer for sale, and in any case there seems to be no way of accepting the 'offer' in advance of the event.

(ii) In *British Car Auctions* v *Wright* [1972] 3 All ER 462 the auctioneers sold an unroadworthy vehicle. An attempt to charge them with the offence of 'offering' the car for sale contrary to road traffic legislation failed. The bidder made the offer and not the auctioneer (and see *Partridge* v *Crittenden* (1968)).

Invitation to treat: price indications, circulars, etc.

48 *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401

The defendants' branch at Edgware was adapted to the 'self-service' system. Customers selected their purchases from shelves on which the goods were displayed and put them into a wire basket supplied by the defendants. They then took them to the cash desk where they paid the price. One section of shelves was set out with drugs which were included in the Poisons List referred to in s 17 of the Pharmacy and Poisons Act 1933, though they were not dangerous drugs and did not require a doctor's prescription. Section 18 of the Act requires that the sale of such drugs shall take place in the presence of a qualified pharmacist. Every sale of the drugs on the Poisons List was supervised at the cash desk by a qualified pharmacist, who had authority to prevent customers from taking goods out of the shop if he thought fit. One of the duties of the Society was to enforce the provisions of the Act, and the action was brought because the claimants alleged that the defendants were infringing s 18.

Held – the display of goods in this way did not constitute an offer. The contract of sale was not made when a customer selected goods from the shelves, but when the company's employee at the cash desk accepted the offer to buy what had been chosen. There was, therefore, supervision in the sense required by the Act at the appropriate moment of time.

Comment (i) The fact that a price ticket is not regarded as an offer is somewhat archaic, being based, perhaps, on a traditional commercial view that a shop is a place for bargaining and not a place for compulsory sales. However, because currently there is a return to bargaining in some areas of purchase, e.g. cars, white goods and electrical goods, the price ticket is perhaps rightly regarded in those areas as an invitation to treat; a starting point for the bargaining.

(ii) Although a trader can *refuse to sell* at his wrongly advertised price, he commits a criminal offence under ss 20 and 21 of the Consumer Protection Act 1987 for giving a misleading price indication where the price ticket shows a *lower* price than that at which he is prepared to sell.

(iii) The relevant provisions of the 1933 Act are now in ss 2 and 3 of the Poisons Act 1972.

(iv) See also *Esso Petroleum Ltd* v *Customs and Excise Commissioners* [1976] 1 All ER 117 where the House of Lords decided that price indications at a petrol filling station were invitations to treat.

(v) The concept of invitation to treat also applies to goods displayed with a price ticket in a shop window (*Fisher* v *Bell* [1960] 3 All ER 731).

49 *Partridge* v *Crittenden* [1968] 2 All ER 421

Mr Partridge inserted an advertisement in a publication called *Cage and Aviary Birds* containing the words 'Bramblefinch cocks, bramblefinch hens, 25s each'. The advertisements appeared under the general heading 'Classified Advertisements' and in no place was there any direct use of the words 'offer for sale'. A Mr Thompson answered the advertisement enclosing a cheque for 25s, and asking that a 'bramblefinch hen' be sent to him. Mr Partridge sent one in a box, the bird wearing a closed ring.

Mr Thompson opened the box in the presence of an RSPCA inspector, Mr Crittenden, and removed the ring without injury to the bird. Mr Crittenden brought a prosecution against Mr Partridge before the Chester magistrates alleging that Mr Partridge had offered for sale a brambling contrary to s 6(1) of the Protection of Birds Act 1954 (see now s 6(1) of the Wildlife and Countryside Act 1981), the bird being other than a close-ringed specimen bred in captivity and being of a species which was resident in or visited the British Isles in a wild state.

The justices were satisfied that the bird had not been bred in captivity but had been caught and ringed. A close-ring meant a ring that was completely closed and incapable of being forced or broken except with the intention of damaging it; such a ring was forced over the claws of a bird when it was between three and 10 days old, and at that time it was not possible to determine what the eventual girth of the leg would be so that the close-ring soon became difficult to remove. The ease with which the ring was removed in this case indicated that it had been put on at a much later stage and this, together with the fact that the bird had no perching sense, led the justices to convict Mr Partridge.

He appealed to the Divisional Court of the Queen's Bench Division where the conviction was quashed. The court accepted that the bird was a wild bird, but since Mr Partridge had been charged with 'offering for sale' the conviction could not stand. The advertisement constituted in law an invitation to treat, not an offer for sale, and the offence was not, therefore, established. There was of course a completed sale for which Mr Partridge could have been successfully prosecuted but the prosecution in this case had relied on the offence of 'offering for sale' and failed to establish such an offer.

Comment (i) The case shows how concepts of the civil law are sometimes at the root of criminal cases (and see *British Car Auctions* v *Wright* (1972)).

(ii) In *Spencer* v *Harding* (1870) LR 5 CP 561 the defendants were selling off a business and issued a circular inviting submission of tenders to buy the goods listed. It was held that the circular was merely an invitation to submit offers and not an offer. The defendants need not accept any tender, even the highest.

Offer and invitation to treat – alleged contracts for the sale of land

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

The claimants sent the following telegram to the defendant: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' The defendant telegraphed in reply: 'Lowest price for Bumper Hall Pen £900.' The claimants then telegraphed: 'We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title deeds in order that we may get early possession.' The defendant made no reply. The Supreme Court of Jamaica granted the claimants a decree of specific performance of the contract. On appeal the Judicial Committee of the Privy Council *held* that there was no contract. The second telegram was not an offer, but was in the nature of an invitation to treat at a minimum price of £900. The third telegram could not, therefore, be an acceptance resulting in a contract.

Comment (i) The point was also raised in *Clifton* v *Palumbo* [1944] 2 All ER 497 where the owner of a very large estate wrote to the other party to the case as follows: 'I am prepared to offer you or your nominee my Lytham estate for £600,000.' The letter was regarded as an invitation to treat and not an offer. The Court of Appeal said of the letter: 'It is quite possible for persons on a half sheet of notepaper, in the most informal and unorthodox language, to contract to sell the most extensive and most complicated estate that can be imagined. This is quite possible, but, having regard to the habits of the people in this country, it is very unlikely.'

(ii) The matter of invitation to treat and offer in the context of the alleged sale of land produced the most interesting case of *Gibson* v *Manchester City Council* [1979] 1 All ER 972. The City Treasurer wrote to Mr Gibson saying that the Council 'may be prepared' to sell the freehold of his council house to him at £2,725 less 20 per cent, i.e. £2,180. The letter said that Mr G should make a formal application, which he did. Following local government elections three months later the policy of selling council houses was reversed. The Council did not proceed with the sale to Mr Gibson. He claimed that a binding contract existed. The House of Lords said that it did not. The Treasurer's letter was only an invitation to treat. Mr G's application was the offer, but the Council had not accepted it. In the Court of Appeal Lord Denning said that there was an 'agreement in fact' which was enforceable. It was not always necessary, he said, to stick to the strict rules of offer and acceptance in order to produce a binding agreement. The House of Lords would not accept this and Lord Denning's view has not, as yet, found a place in the law.

(iii) The above cases are unlikely to occur on their own facts, at least in modern law. Under s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 a contract for the sale of land has to be in writing and must contain all the terms expressly agreed by the parties and each of those terms must be set out in the written agreement, although the Act does allow terms of the agreement to be incorporated in the document where it refers to some other document or documents containing the terms. So, because people now have to go through that procedure to get a valid contract for the sale of land, they are surely not going to be able to say that they did not intend to offer (or accept) and plead invitation to treat. Nevertheless, the cases do provide examples of invitations to treat in other areas, as where A says to B, 'The lowest price for my BMW is £20,000' and B tries to 'accept' or where A says to B, 'I may be prepared to sell you my BMW for £20,000' and B tries to 'accept'. Examination questions may well be set involving these principles in regard to sales other than land.

Acceptance of no effect until communicated to the offeror: agreement may be inferred from conduct

51 ***Brogden* v *Metropolitan Railway*** (1877) 2 App Cas 666

The claimant had been a supplier of coal to the railway company for a number of years, though there was no formal agreement between them. Eventually the claimant suggested that there ought to be one, and the agents of the parties met and a draft agreement was drawn up by the railway company's agent and sent to the claimant. The claimant inserted several new clauses into the draft, and in particular filled in the name of an arbitrator to settle the parties' differences under the agreement should any arise. He then wrote the word 'Approved' on the draft and returned it to the railway company's agent. There was no formal execution, the draft remaining in the agent's desk. However, coal was supplied according to the prices mentioned in the draft, though these were not the market prices, and prices were reviewed from time to time in accordance with the draft. The parties then had a disagreement and the claimant refused to supply coal to the railway company on the ground that, since the railway company had not accepted the offer contained in the amended draft, there was no binding contract.

Held –

(*a*) The draft was not an *express* binding contract because the claimant had inserted new terms which the railway company had not accepted; but

(*b*) the parties had indicated by their conduct that they had waived the execution of the formal document and agreed to act on the basis of the draft. There was, therefore, an *implied or inferred* binding contract arising out of conduct, and its terms were the terms of the draft.

The effect of lock-out agreements

52 ***Pitt* v *PHH Asset Management Ltd***, *The Times*, 30 July 1993

In September 1991 Tim Pitt made an offer to buy a cottage in a Suffolk village. The vendor was PHH Asset Management. The offer was initially accepted subject to contract but rejected when another prospective purchaser made a higher offer.

Mr Pitt made a second offer which was initially accepted by PHH's estate agent but the acceptance was withdrawn when the other contender again made a higher offer. After further communications between Mr Pitt and the estate agent it was agreed that PHH would stay with Mr Pitt's offer subject to contract and would not consider any further offers on the basis that contracts would be exchanged within two weeks of the receipt of draft contracts.

However, after sending the contract to Mr Pitt PHH sold at a higher price to the other contender before the end of the two-week period. Mr Pitt sued PHH for breach of contract.

The matter eventually reached the Court of Appeal which decided that there was no contract for the sale of land nor any option for the sale of land but there was a lock-out agreement which was enforceable in law. The effect of the agreement was that PHH could not negotiate with other prospective purchasers for a short stipulated period. PHH was liable to pay damages to Mr Pitt.

Comment It will be appreciated that at the end of the lock-out period the vendor can sell elsewhere if he wishes. The agreement only stops him from dealing with anyone else during that period. It is also worth noting that the lock-out agreement which was made orally was not unenforceable under s 2 of the Law of Property (Miscellaneous Provisions) Act 1989. It was not a sale or other disposition of land. As Bingham, LJ said, 'The vendor does not agree to sell to that purchaser – such an agreement would be covered by s 2 of the 1989 Act – but he does give a negative undertaking that he will not for the given period deal with anyone else.' So writing was not required.

Counter-offer: if an offeree makes a counter-offer he cannot then effectively accept the original offer: what constitutes a counter-offer: the offeror can accept a counter-offer

53 ***Hyde* v *Wrench*** (1840) 3 Beav 334

The defendant offered to sell his farm for £1,000. The claimant's agent made an offer of £950 and the defendant asked for a few days for consideration, after which the defendant wrote saying he could not accept it, whereupon the claimant wrote purporting to accept the offer of £1,000. The defendant did not consider himself bound, and the claimant sued for specific performance.

Held – the claimant could not enforce this 'acceptance' because his counter-offer of £950 was an implied rejection of the original offer to sell at £1,000.

54 ***Stevenson* v *McLean*** (1880) 5 QBD 346

On Saturday the defendant offered to sell to the claimants a quantity of iron at 40s nett cash per ton open till Monday (close of business). On Monday the claimants telegraphed asking whether the defendant

would accept 40s for delivery over two months, or if not what was the longest limit the defendant would give. The claimants did not necessarily want to take delivery of the goods at once and pay for them. They would have liked to have been able to ask for delivery and pay from time to time over two months as they themselves found buyers for quantities of the iron. The defendant received the telegram at 10.01 am but did not reply, so the claimants, by telegram sent at 1.34 pm, accepted the defendant's original offer. The defendant had already sold the iron to a third party, and informed the claimants of this by a telegram despatched at 1.25 pm arriving at 1.46 pm. The claimants had therefore accepted the offer before the defendant's revocation had been communicated to them. If, however, the claimants' first telegram constituted a counter-offer, then it would amount to a rejection of the defendant's original offer.

Held – the claimants' first telegram was not a counter-offer, but a mere inquiry for different terms which did not amount to a rejection of the defendant's original offer, so that the offer was still open when the claimants accepted it. The defendant's offer was not revoked merely by the sale of the iron to another person.

Comment The case shows that a distinction must be drawn between a rejection by counter-offer and a request for information. A common example of this distinction occurs in business when an offer to sell at a stated price is not regarded as rejected, where, as here, the seller is asked whether he is prepared to give credit or even whether he is prepared to reduce the price.

55 *Butler Machine Tool Co Ltd* v *Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965

In this case it appeared that on 23 May 1969 Butler quoted a price for a machine tool of £75,535, delivery to be within 10 months of order. The quotation gave terms and conditions which were stated expressly to prevail over any terms and conditions contained in the buyer's order.

One of the terms was a price variation clause which operated if costs increased before delivery. Ex-Cell-O ordered the machine on 27 May 1969, its order stating that the contract was to be on the basis of Ex-Cell-O's terms and conditions as set out in the order. These terms and conditions did not include a price variation clause but did contain additional items to the Butler quotation, including the fact that Ex-Cell-O wanted installation of the machine for £3,100 and the date of delivery of 10 months was changed to 10–11 months.

Ex-Cell-O's order form contained a tear-off slip which said: 'Acknowledgment: please sign and return to Ex-Cell-O. We accept your order on the terms and conditions stated therein – and undertake to deliver by . . . date . . . signed.' This slip was completed and signed on behalf of Butler and returned with a covering letter to Ex-Cell-O on 5 June 1969.

The machine was ready by September 1970, but Ex-Cell-O could not take delivery until November 1970 because it had to rearrange its production schedule. By the time Ex-Cell-O took delivery, costs had increased and Butler claimed £2,892 as due under the price variation clause. Ex-Cell-O refused to regard the variation clause as a term of the contract.

The Court of Appeal, following a traditional analysis, decided that Butler's quotation of 23 May 1969 was an offer and that Ex-Cell-O's order of 27 May 1969 was a counter-offer introducing new terms and that Butler's communication of 5 June 1969 returning the slip was an acceptance of the counter-offer: so the contract was on Ex-Cell-O's terms and not Butler's, in spite of the statement in Butler's original quotation.

Thus, there was no price variation clause in the contract, and Ex-Cell-O did not need to pay the £2,892.

Comment (i) Most commonly the parties will exchange terms relating to delivery dates, rights of cancellation, the liability of the supplier for defects, fluctuations in price (as here), and arbitration clauses to settle differences.

(ii) Title retention clauses (where goods are delivered to a buyer with a clause stating that he does not own the goods until he has paid for them) may also be exchanged in this way. For example, in *Sauter Automation* v *Goodman (HC) (Mechanical Services)* [1987] CLY, para 451, Sauter tendered to supply the control panel of a boiler. The tender contained a title retention clause. Goodman accepted on the basis of their standard contract which did not contain retention arrangements. Sauter did not formally accept what was in effect a counter-offer by Goodman but they did deliver the panel which was deemed acceptance. Goodman went into liquidation but the court held that Sauter could not recover the panel or the proceeds of its sale. The contract was on Goodman's terms. Goodman's terms did not contain a retention arrangement. Sauter were left to prove in the liquidation of Goodman with little, if any, prospect of getting paid.

(iii) It is not uncommon in business to find price variation and fluctuation clauses in longer-term contracts, as where the contract involves the manufacture or delivery of goods over, say, a period in excess of one year. These allow for changes in wages and/or the cost of materials. The alternative would be to try to get a variation to the original contract but this may be more difficult since a business may not be willing to pay more and the change cannot be made unilaterally by the supplier. This way the variation arrangements are in the original contract

following what is acceptance of a qualified offer, i.e. 'I will supply these goods for £X but they might cost more before the contract ends'. An offer, unlike an acceptance, may be conditional.

Effect of accepting a tender for the supply of goods of an indefinite amount: the standing offer

56 *Great Northern Railway* v *Witham* (1873) LR 9 CP 16

The company advertised for tenders for the supply for one year of such stores as they might think fit to order. The defendant submitted a tender in these words: 'I undertake to supply the company for 12 months with such quantities of [certain specified goods] as the company may order from time to time.' The company accepted the tender, and gave orders under it which the defendant carried out. Eventually the defendant refused to carry out an order made by the company under the tender, and this action was brought.

Held – the defendant was in breach of contract. A tender of this type was a standing offer which was converted into a series of contracts as the company made an order. The defendant might revoke his offer for the remainder of the period covered by the tender, but must supply the goods already ordered by the company.

Comment (i) Tendering by referential bid is invalid. In *Harvela Investments Ltd* v *Royal Trust Co of Canada Ltd* [1985] 2 All ER 966 the claimants submitted a tender for the purchase of shares in the following form: '2,100,000 dollars or 100,000 dollars in excess of any other offer'. The House of Lords held that such a bid was invalid. The decision is obviously a sensible one since, if all tenderers had bid in this way, there would not have been an ascertainable offer to accept.

(ii) If a person submits a tender which conforms in all respects with the rules laid down for submission of tenders, i.e. as to date, time, form and so on, this may give rise to an obligation on those asking for the tenders at least to consider all those that are properly submitted. It was held in *Blackpool and Fylde Aero Club Ltd* v *Blackpool BC* [1990] 3 All ER 25 that failure to do so could lead to a successful action for damages for what is, in effect, a breach of a contract to consider all tenders, at least if properly submitted.

Vague or incomplete agreements: treatment by the courts

57 *Hillas & Co Ltd* v *Arcos Ltd* [1932] All ER 494

The claimants had entered into a contract with the defendants under which the defendants were to supply the claimants with '22,000 standards of soft wood (Russian) of fair specification over the season 1930'. The contract also contained an option allowing the claimants to take up 100,000 standards as above during the season 1931. The parties managed to perform the contract throughout the 1930 season without any argument or serious difficulty, in spite of the vague words used in connection with the specification of the wood. However, when the claimants exercised their option for 100,000 standards during the season 1931, the defendants refused to supply the wood, saying that the specification was too vague to bind the parties, and the agreement was therefore inchoate as requiring a further agreement as to the precise specification.

Held – by the House of Lords – the option to supply 100,000 standards during the 1931 season was valid. There was a certain vagueness about the specification, but there was also a course of dealing between the parties which operated as a guide to the court regarding the difficulties which this vagueness might produce. Since the parties had not experienced serious difficulty in carrying out the 1930 agreement, there was no reason to suppose that the option could not have been carried out without difficulty had the defendants been prepared to go on with it. Judgment was given for the claimants.

Comment (i) In these cases the defendant is trying to avoid damages for failing to perform the contract by saying: 'I would like to perform the contract but I don't know what to do.' If there are, e.g., previous dealings then he does know what to do and the defence fails.

(ii) The case of *Baird Textile Holdings Ltd* v *Marks and Spencer plc* [2001] All ER (D) 352, provides a good illustration of the law relating to vague and inchoate contracts, the requirement of certainty of terms in the context of intention to create legal relations and promissory estoppel. It also provides a timely reminder to those in business of the need to ensure that contracts are made in writing even though this may not be a legal requirement.

Baird had been a major supplier of garments to M & S for some 30 years. There had never been a written contract between them. M & S terminated the agreement at short notice costing Baird some £50 million. Baird claimed that it was entitled to reasonable notice which it suggested should be three years at least. M & S declined and Baird sued for breach of contract. But what were the terms of the contract? Baird contended from the way the contract had been performed M & S were obliged to place orders 'in quantities and at prices which in all the circumstances were reasonable'. Baird also claimed that if an enforceable contract did not exist at common law equitable principles should be applied, i.e. promissory estoppel where the court will prevent a person from going back on his or her word. The Court of Appeal ruled that there was no enforceable contract at common law. There were no objective criteria to enable the court to

assess what was reasonable in terms of quantity, quality or price. Furthermore, the lack of certainty showed that the parties did not intend to create legal relations. This was not said the court an appropriate case in which to apply promissory estoppel. The rule was essentially a defence and could not be used to create an enforceable right in the circumstances of this case. Of course, in *Hillas* the court did imply a contract where only the quality of the timber was vague. Here the quantity, quality and price were not ascertained by the agreement and to have filled in all these matters would have brought the court into a position where it was making the contract for the parties – a power the courts do not possess.

58 *Foley* v *Classique Coaches Ltd* [1934] 2 KB 1

F owned certain land, part of which he used for the business of supplying petrol. He also owned the adjoining land. The company wished to purchase the adjoining land for use as the headquarters of their charabanc business. F agreed to sell the land to the company on condition that the company would buy all their petrol from him. An agreement was made under which the company agreed to buy its petrol from F 'at a price to be agreed by the parties in writing and from time to time'. It was further agreed that any dispute arising under the agreement should be submitted 'to arbitration in the usual way'. The agreement was acted upon at an agreed price for three years. At this time the company felt it could get petrol at a better price, and the company's solicitor wrote to F repudiating the petrol contract.

Held – although the parties had not agreed upon a price beyond three years, there was a contract to supply petrol at a reasonable price and of reasonable quality, and although the agreement did not stipulate the future price, but left this to the further agreement of the parties, a method was provided by which the price could be ascertained without such agreement, i.e. by arbitration.

Comment (i) The court awarded the claimant damages, a declaration that the agreement was binding, and an injunction restraining the company from buying petrol elsewhere, thus giving the company an enormous incentive to agree a price or go to arbitration as the contract provided. Generally speaking, of course, if the contract is silent as to price, the court is prepared to use s 8(2) of the Sale of Goods Act 1979 and imply and ascertain 'a reasonable price'. It would not have been appropriate in *Foley* to use this provision of sale of goods legislation (which in those days was in the 1893 Act) because the contract in *Foley* was not in fact silent as to price.

(ii) A similar problem arose in *F & S Sykes (Wessex)* v *Fine-Fare* [1967] 1 Lloyd's Rep 53. In that case producers of broiler chickens agreed with certain retailers to supply between 30,000 and 80,000 chickens a week during the first year of the agreement and afterwards 'such other figures as might be agreed'. The agreement was to last for not less than five years, and it was agreed that any differences between the parties should be referred to arbitration. Eventually the retailers contended that the agreement was void for uncertainty.

Held – by the Court of Appeal – that it was not, because in default of the further agreement envisaged, the number of chickens should be such reasonable number as might be decided by the arbitrator.

(iii) In *Rafsanjan Pistachio Producers Co-operative* v *Kauffmanns Ltd*, *The Independent*, 12 January 1998 the High Court decided that a contract which specified that the price was to be 'agreed before each delivery' was an agreement to agree and unenforceable. There was no provision for arbitration.

(iv) A price fluctuation or variation clause in the original contract could be used in this situation. The parties could agree in the original contract that the price from time to time of the goods as the contract proceeds shall be increased (or exceptionally decreased) on the basis of relevant indices of labour and materials costs. This is less expensive than reference to arbitration.

59 *Scammell (G) and Nephew Ltd* v *Ouston* [1941] AC 251

Ouston wished to acquire a new motor van for use in his furniture business. Discussions took place with the company's sales manager as a result of which the company sent a quotation for the supply of a suitable van. Eventually Ouston sent an official order making the following stipulation, 'This order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over a period of two years.' This was in accordance with the discussions between the sales manager and Ouston, which had taken place on the understanding that hire purchase would be available. The company seemed to be content with the arrangement and completed the van. Arrangements were made with a finance company to give hire-purchase facilities, but the actual terms were not agreed at that stage. The appellants also agreed to take Ouston's present van in part exchange, but later stated that they were not satisfied with its condition and asked him to sell it locally. He refused and after much correspondence he issued a writ against the appellants for damages for non-delivery of the van. The appellants' defence was that there was no contract until the hire-purchase terms had been ascertained.

Held – the defence succeeded; it was not possible to construe a contract from the vague language used by the parties.

Comment (i) If there is evidence of a trade custom, business procedure or previous dealings between the parties, which assists the court in construing the vague parts of an agreement, then the agreement may be enforced. Here there was no such evidence. It should also be noted that the hire-purchase term was essential to the contract which could not be enforced without it.

(ii) It is worth noting the quite common use in business contracts of the expressions 'best endeavours' and 'reasonable endeavours'. It would be too easy to fall into the *Scammell* trap and assume that these expressions made the contract in which they were used inchoate or uncertain but this is not the case. The courts have in a number of cases held that the use of these expressions does not have that effect. These are useful rulings because it is not possible in many business situations to necessarily achieve performance. For example, suppose an agent makes a contract to find a publisher to publish an author's book. The agent cannot say that he will find such a publisher, but he can, and often will, use the 'best endeavours' or 'reasonable endeavours' formula. If the agent has, on the facts, used best or reasonable endeavours and not obtained a publisher, he will be entitled to his contractual fee. If the agent, on the facts, has not done so, any claim by him will fail. Clearly, best endeavours also requires more effort than reasonable endeavours (see *Lambert* v *HTV Cymru (Wales) Ltd*, *The Times*, 17 March 1998 where an all reasonable endeavours contract in connection with book publishing was held to be enforceable).

60 *Nicolene Ltd* v *Simmonds* [1953] 1 All ER 882

The claimants alleged that there was a contract for the sale to them of 3,000 tons of steel reinforcing bars and that the defendant seller had broken his contract. When the claimants sought damages, the seller set up the defence that, owing to one of the sentences in the letters which constituted the contract, there was no contract at all. The material words were: 'We are in agreement that the usual conditions of acceptance apply.' In fact, there were no usual conditions of acceptance so that the words were meaningless, but the seller nevertheless suggested that the contract was unenforceable since it was not complete.

Held – by the Court of Appeal – the contract was enforceable and that the meaningless clause could be ignored:

> In my opinion a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms. . . . In the present case there was nothing yet to be agreed. There was nothing left to further negotiation. All that happened was that the parties agreed that 'the usual conditions of acceptance apply'. That clause was so vague and uncertain as to be incapable of any precise meaning. It is clearly severable from the rest of the contract. It can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be so rejected. The contract should be held good and the clause ignored. The parties themselves treated the contract as subsisting. They regarded it as creating binding obligations between them; and it would be most unfortunate if the law should say otherwise. You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free. (*Per* Denning, LJ)

Comment (i) In this case there was no evidence of any usual conditions either in the trade or between the parties as a result of previous dealings. Therefore, the expression 'the usual conditions of acceptance apply' had to be regarded as meaningless.

It should also be noted that it was possible to enforce the contract without the meaningless term. (Compare *Scammell* above.)

(ii) In view of the general policy to reduce litigation in court, clauses in contracts providing for alternative dispute resolution may more readily be found to be binding even where the form of ADR to be used is left vague (see *Cable & Wireless plc* v *IBM (United Kingdom) Ltd* [2002] 2 All ER (Comm) 1041). In that case where the ADR clause did not specify the type of ADR to be followed Mr Justice Coleman ruled that for the court not to enforce contractual references to ADR would 'fly in the face' of public policy. There were, he said, clearly recognised and well-developed processes of ADR. As such, a reference to ADR in a contract was certain enough to enforce. His judgment seems to suggest, though not specifically stated, that mediation in accordance with the Centre for Effective Dispute Resolution's Model Mediation procedure would be regarded as the method to adopt. In practical terms, of course, an ADR clause should state whether ADR is optional or not and the form of ADR should be spelled out.

Communication of acceptance

61 *Felthouse* v *Bindley* (1862) 11 CB (NS) 869

The claimant had been engaged in negotiations with his nephew John regarding the purchase of John's horse, and there had been some misunderstanding as to the price. Eventually the claimant wrote to his nephew as follows: 'If I hear no more about him I consider the horse is mine at £30.15s.' The nephew did not reply but, wishing to sell the horse to his uncle, he

told the defendant, an auctioneer who was selling farm stock for him, not to sell the horse as it had already been sold. The auctioneer inadvertently put the horse up with the rest of the stock and sold it. The claimant now sued the auctioneer in conversion, the basis of the claim being that he had made a contract with his nephew and the property in the animal was vested in him (the uncle) at the time of the sale.

Held – that the claimant's action failed. Although the nephew intended to sell the horse to his uncle, he had not communicated that intention. There was, therefore, no contract between the parties, and the property in the horse was not vested in the claimant at the time of the auction sale.

Comment (i) The rule that silence cannot amount to acceptance does not necessarily mean that words of acceptance have to be spoken or written to the offeror. In a unilateral contract situation such as *Carlill's* case (see Chapter 9), an acceptance may be inferred from the way in which the offeree behaves and communication of acceptance may be dispensed with. However, in this case the contract was bilateral so that the conduct of John Felthouse in removing the horse from the sale was not relevant, as it might have been in a unilateral situation. In a bilateral situation the rule against acceptance by silence means only that the offeror is unable to impose on the offeree a stipulation that the offeree will be bound if he merely ignores the offer.

Nevertheless, while the general principle laid down in this case, i.e. that an offeree who does not wish to accept an offer should not be put to the trouble of actively refusing it, is quite acceptable the decision is difficult to support on its own facts. John wanted to accept the offer and intended to accept it and his uncle had waived his right to receive an acceptance in his letter – so why no contract?

It should be noted, however, that although the approach in *Felthouse* appears unfair, it does run fairly consistently through English law in regard to positive obligations involving the payment of money for goods and services. Thus, if A asks B to clean his (A's) car but B by mistake cleans A's neighbour's car, the neighbour cannot be required to pay B even though the neighbour is not prejudiced because, as it happens, he did want his car cleaned.

(ii) It should also be noted that the communication of acceptance must be authorised. In *Powell* v *Lee* (1908) 99 LT 284 P offered his services to the managers of a school as headmaster. The secretary to the managers told P that he had been appointed which was true. The secretary had no authority actual or otherwise to do this. The managers later decided to offer the post to another candidate. P's action for breach of contract failed.

(iii) In a not dissimilar case a deputy headteacher's verbal assurance that a member of staff's temporary promotion would be made permanent had no contractual effect because, among other things, the deputy head had no authority to make a contract that would bind the school governors (see *Pantis* v *Governing Body of Isambard Brunel School* [1997] 573 IRLB 15).

Where the mode of acceptance is prescribed: must the offeree comply?

62 ***Yates Building Co* v *R J Pulleyn & Sons (York)*** (1975) 119 SJ 370

An option to purchase a certain plot of land was expressed to be exercisable by notice in writing by or on behalf of the intending purchaser to the intending vendor 'such notice to be sent by registered or Recorded Delivery post'. It was *held* – by the Court of Appeal – that the form of posting prescribed was directory rather than mandatory, or alternatively permissive rather than obligatory, and the option was validly exercised by a letter from the purchaser's solicitors to the vendor's solicitors sent by ordinary post and received within the option period.

Comment The fact that the letter arrived within the option period shows that there was no prejudice to the offeror.

Use of telephone and telex as a means of communicating acceptance

63 ***Entores Ltd* v *Miles Far East Corporation*** [1955] 2 QB 327

The claimants, who conducted a business in London, made an offer to the defendants' agent in Amsterdam by means of a teleprinter service. The offer was accepted by a message received on the claimants' teleprinter in London. Later the defendants were in breach of contract and the claimants wished to sue them. The defendants had their place of business in New York and in order to commence an action the claimants had to serve notice of writ on the defendants in New York. The Rules of Supreme Court allow service out of the jurisdiction when the contract was made within the jurisdiction. On this point the defendants argued that the contract was made in Holland when it was typed into the teleprinter there, stressing the rule relating to posting.

Held – where communication is instantaneous, as where the parties are face to face or speaking on the telephone, acceptance must be received by the offeror. The same rule applied to communications of this kind. Therefore, the contract was made in London where the acceptance was received.

Comment (i) The suggestion was made that the doctrine of estoppel may operate in this sort of case so as to bind

the offeror, e.g. suppose X telephones his acceptance to Y, and Y does not hear X's voice at the moment of acceptance, as where there is a break in the line or Y simply puts the phone down on his desk for a while without telling X, then Y may be estopped from denying that he heard X's acceptance and may be bound in contract. It is thought that the conversation prior to the acceptance which is not heard must suggest the possibility of an impending acceptance. It should be noted that this estoppel theory amounts to an exception to the rule that silence cannot amount to acceptance.

(ii) The House of Lords approved the *Entores* decision in *Brinkibon* v *Stahag Stahl* [1982] 1 All ER 293. The claimant wanted leave to serve a writ out of the jurisdiction, as in *Entores*. The message accepting an offer had been sent by telex from London to Vienna. The House of Lords *held* that the writ could not be served because the contract was made in Vienna and not London.

(iii) These decisions presumably apply to acceptances by fax and e-mail.

Use of the post in offer and acceptance

64 *Household Fire Insurance Company* v *Grant* (1879) 4 ExD 216

The defendant handed a written application for shares in the company to the company's agent in Glamorgan. The application stated that the defendant had paid to the company's bankers the sum of £5, being a deposit of 1s per share on an application for 100 shares, and also agreed to pay 19s per share within 12 months of the allotment. The agent sent the application to the company in London. The company secretary made out a letter of allotment in favour of the defendant and posted it to him in Swansea. The letter never arrived. Nevertheless, the company entered the defendant's name on the share register and credited him with dividends amounting to five shillings. The company then went into liquidation and the liquidator sued for £94 15s, the balance due on the shares allotted. It was *held* by the Court of Appeal that the defendant was liable. Acceptance was complete when the letter of allotment was posted on the ground that, in this sort of case, the Post Office must be deemed the common agent of the parties, and that delivery to the agent constituted acceptance. Bramwell, LJ, in a dissenting judgment, regarded actual communication as essential. If the letter of acceptance does not arrive, an unknown liability is imposed on the offeror. If actual communication is required the status quo is preserved, i.e. the parties have not made a contract.

Comment (i) Not all lawyers would accept the point that the Post Office is the common agent of the parties. Those who do not accept this point would say that the Post Office cannot be an agent for communication since the Post Office and its servants do not know what is in the letter.

(ii) In *Re London and Northern Bank* [1900] 1 Ch 220 the court decided that the letter of acceptance must be properly stamped and addressed. If not, there is no communication until the letter arrives. The case also decides that the letter must be actually posted and not given to a person to post, even a postman. If this happens, the acceptance takes place when the person concerned actually posts the letter. This is a matter of evidence. As regards handing a letter of acceptance to a postman, this may operate as an acceptance in a country district where the custom of postmen taking letters in this way is better established.

(iii) Bramwell LJ's point is well taken since the post rule places the risk of accidents in the post on the offeror, as can be seen from *Grant*'s case. Furthermore, it was decided in *Dunlop* v *Higgins* (1848) 1 HL Cas 381 that there was a good contract on posting even where a correctly addressed, stamped and posted acceptance was not delivered in due course of post because of an accident in the post office.

(iv) The case has some unusual features. First the initial deposit on application for the shares was not, in fact, paid. Instead the defendant was credited with an equivalent sum due to him from the company. Second, the dividends declared by the company were not actually paid to the defendant but merely credited to his account with the company, but for the above circumstances, the defendant would have known long before the end of three years that he was being regarded as a shareholder.

65 *Holwell Securities Ltd* v *Hughes* [1974] 1 All ER 161

By an agreement of 19 October 1971 Dr Hughes, a medical practitioner of Wembley, had granted to the claimants an option to purchase his premises in Wembley for £45,000. The agreement provided that the option should be exercisable 'by notice in writing' to Dr Hughes at any time within six months of the date of the agreement. On 14 April 1972, the claimants' solicitors sent to Dr Hughes by ordinary post a written notice exercising the option. That notice was never delivered to Dr Hughes nor left at his address.

Held – by the Court of Appeal – on a construction of the agreement – notice in writing had to be given to Dr Hughes in the sense that he had either to have actually received it or to be deemed to have received it under s 196 of the Law of Property Act 1925 which provides for service of notices by registered post, or within the Recorded Delivery Service Act 1962, which applies a similar rule to Recorded Delivery. This was not the case, said Russell, LJ, where the basic principle of the need for communication to the offeror was displaced by the artificial concept of communication by

the act of posting: the language of the agreement 'notice . . . to' was inconsistent with the theory that acceptance could be constituted by posting and s 196 of the Law of Property Act 1925 also impliedly excluded such a mode of acceptance.

Comment (i) The case illustrates that the rule of acceptance by post does not apply in all situations to which it might logically be applied. As the court said in this case the rule would not be applied where it led to 'manifest inconvenience and absurdity'. In each case, therefore, it is a matter of fact for the court to decide whether the rule should be applied, the test being whether it produces, on balance, a convenient and reasonable result.

(ii) This agreement for an option over land was governed by the Law of Property Act 1925 and s 196 deals with the method of serving 'notices' under the Act. It implies that they must be received. So here both the agreement and statute law required actual delivery.

(iii) On a related point it was held in *Miss Sam (Sales) Ltd* v *River Island Clothing Co Ltd* [1994] NLJR 419 that a cheque sent through the post is not payment unless it arrives and there can be no extension of the postal rule to this situation unless by express agreement between the parties.

66 *Adams* v *Lindsell* (1818) 1 B & A 681

The defendants were wool dealers in business at St Ives, Huntingdon. By letter dated 2 September they offered to sell wool to the claimants who were wool manufacturers at Bromsgrove, Worcestershire. The defendants' letter asked for a reply 'in course of post' but was misdirected, being addressed to Bromsgrove, Leicestershire. The offer did not reach the claimants until 7 pm on 5 September. The same evening the claimants accepted the offer. This letter reached the defendants on 9 September. If the offer had not been misdirected, the defendants could have expected a reply on 7 September, and accordingly they sold the wool to a third party on 8 September. The claimants now sued for breach of contract.

Held – where there is a misdirection of the offer, as in this case, the offer is made when it actually reaches the offeree, and not when it would have reached him in the ordinary course of post. The defendants' mistake must be taken against them and for the purposes of this contract the claimants' letter was received 'in course of post'.

Comment The position may be different if the fact of delay is obvious to the offeree so that he is put on notice that the offer has lapsed, e.g. A writes to B offering to sell him certain goods and saying that the offer is open until 30 June. If A misdirects the offer so that it does not reach B until 2 July, it is doubtful whether B could accept it.

Revocation of offer: the effect of an option

67 *Routledge* v *Grant* (1828) 4 Bing 653

The defendant made an offer to take a lease of the claimant's premises: 'a definitive answer to be given within six weeks from 18 March 1825'. On 9 April the defendant withdrew his offer and on 29 April the claimant purported to accept it. The Court of Common Pleas *held* that there was no contract. Best, CJ *held* that the defendant could withdraw at any moment before acceptance, even though the time limit had expired. The claimant could only have held the defendant to his offer throughout the period, if he had bought the option, i.e. given consideration for it.

Comment (i) The consideration need not be adequate. For example, let us suppose that on Monday Fred offers to sell Joe his house for £30,000 and Joe says 'Give me until Friday to think it over and I will buy you a pint.' The purchase of the pint for Fred or the promise to buy him a pint is enough to give Joe an enforceable option on the house. Again, in *Mountford* v *Scott* [1974] 1 All ER 248 the Court of Appeal held that a West Indian who signed an agreement in consideration of £1 giving the claimant an option to purchase his house for £10,000 within six months, was bound by the option in spite of the fact that only £1 was given for it.

(ii) The option is really a separate contract to allow time to decide whether to accept the original offer or not. It was thought at one time that, where the option to buy property was not supported by consideration, the offer could be revoked by its sale to another, but in modern law it is necessary for the offeror to communicate the revocation to the offeree either himself, or by means of some reliable person. (See *Stevenson* v *McLean* (1880) where the defendant's offer was not revoked merely by the sale of the iron to another.)

(iii) Before leaving the topic of options, it should be noted that the Law Commission in Working Paper No 60 entitled *Firm Offers* and published in 1975 criticised the present position under which a promise to keep an offer open will not be binding on the offeror unless consideration for the promise is given by the offeree (though of course this is not necessary where the option is made in a deed), on the grounds that it is contrary to business practice and also contrary to the law of most foreign countries. The Law Commission makes a provisional recommendation that 'an offeror who has promised that he will not revoke his offer for a definite time should be bound by the terms of that promise provided that the promise has been made in the course of business'. No action has so far been taken on this recommendation.

Revocation of an offer must be communicated. It is not effective on posting

68 ***Byrne*** **v** ***Van Tienhoven*** (1880) 5 CPD 344

On 1 October the defendants in Cardiff posted a letter to the claimants in New York offering to sell them tin plate. On 8 October the defendants wrote revoking their offer. On 11 October the claimants received the defendants' offer and immediately telegraphed their acceptance. On 15 October the claimants confirmed their acceptance by letter. On 20 October the defendants' letter of revocation reached the claimants who had by this time entered into a contract to resell the tin plate.

Held – (*a*) revocation of an offer is not effective until it is communicated to the offeree, (*b*) the mere posting of a letter of revocation is no communication to the person to whom it is sent. The rule is not, therefore, the same as that for acceptance of an offer. Thus, the defendants were bound by a contract which came into being on 11 October.

Revocation of offer: may be by a third party if a reasonable person would rely on that party's knowledge of the facts

69 ***Dickinson*** **v** ***Dodds*** (1876) 2 Ch D 463

The defendant offered to sell certain houses by letter, stating, 'This offer to be left over until Friday 9 am'. On Thursday afternoon the claimant was informed by a Mr Berry that the defendant had been negotiating a sale of the property with one Allan. On Thursday evening the claimant left a letter of acceptance at the house where the defendant was staying. This letter was never delivered to the defendant. On Friday morning at 7 am Berry, acting as the claimant's agent, handed the defendant a duplicate letter of acceptance explaining it to him. However, on the Thursday the defendant had entered into a contract to sell the property to Allan.

Held – since there was no consideration for the promise to keep the offer open, the defendant was free to revoke his offer at any time. Further, Berry's communication of the dealings with Allan indicated that Dodds was no longer minded to sell the property to the claimant and was in effect a communication of Dodds' revocation. There was, therefore, no binding contract between the parties.

Comment (i) The question of whether the person who communicates the revocation is a reliable source and should be relied on is a matter of fact for the court, but it could, e.g., be a mutual friend of the offeror and offeree. There is in fact no general statement in this case as to what is reliability or even that it is necessarily required.

(ii) This decision as it stands could cause hardship because it may mean that the offeree will have to accept as revocation all kinds of rumour from people who may not necessarily appear to be reliable and well informed. It would be nice to think that in modern law the third party would have to be apparently reliable and likely to know the true state of affairs, as where he is the offeror's agent, but as we have seen there is no actual clear statement in this case that this is so.

Lapse of offer after a reasonable time

70 ***Ramsgate Victoria Hotel Co*** **v** ***Montefiore*** (1866) LR 1 Exch 109

The defendant offered by letter dated 8 June 1864 to take shares in the company sending part-payment of 1 shilling (5p) a share. No reply was made by the company, but on 23 November 1864, they allotted shares to the defendant. The defendant refused to take up the shares.

Held – his refusal was justified because his offer had lapsed by reason of the company's delay in notifying their acceptance. He also recovered his part-payment.

Comment The question of 'reasonable time' is a matter of fact to be decided by the court on the basis of the subject matter of the contract and the conditions of the market in which the offer is made. Offers to take shares in companies are normally accepted quickly because the price fluctuates in the market. The same would be true of an offer to sell perishable goods. An offer to sell a farm might well not lapse so soon. The form in which the offer is made is also relevant so that an offer by mobile phone could well lapse quickly.

Conditional offer: termination on failure of condition

71 ***Financings Ltd*** **v** ***Stimson*** [1962] 3 All ER 386

On 16 March 1961, the defendant saw a motor car on the premises of a dealer and signed a hire-purchase form provided by the claimant (a finance company), this form being supplied by the dealer. The form was to the effect that the agreement was to become binding only when the finance company signed the form. It also carried a statement to the effect that the hirer (the defendant) acknowledged that before he signed the agreement he had examined the goods and had satisfied himself that they were in good order and condition, and that the goods were at the risk of the hirer from the time of purchase by the owner. On 18 March the defendant paid the first instalment and took possession of the car. However, on 20 March, the defendant, being dissatisfied with the car, returned it to the dealer, though the finance company was not