Chapter 2

Formation of the contract

The need for agreement

2.1 Whichever definition of the law of contract we use, the word 'agreement' will be central to it; put simply, it is the law relating to and regulating agreements. A contract is a legally enforceable agreement giving rise to obligations for the parties to it. However, not all agreements are legally binding contracts and no legal system could enforce all agreements: it would be both impracticable and inconvenient. For example, in our law, social and domestic agreements are generally not legally enforceable, unless there is clear evidence of an intention to create legal relations between the parties (see *Balfour* v *Balfour* (1919)). The law also requires that something of value must be given by both parties to an agreement; it will not enforce gratuitous promises. This is the requirement of consideration which is fundamental to simple contracts (see **Chapter 4**). In *Re Hudson* (1885):

> Hudson had promised to pay £4,000 a year for five years to a religious charity to help it pay off chapel debts. He died before the two final instalments could be paid and his executors claimed that his estate was not liable for the remaining £8,000 as there was no binding contract in law. The judge ruled that no consideration had been given by the charity in exchange for Hudson's promise. The promise was gratuitous, and there was no contract in any legal sense of the word. Thus Hudson's estate was not liable for the remaining instalments.

If a promise such as Hudson's were made in writing by deed, it would be enforceable even in the absence of consideration, because then the formality of the contract would give it legal force. But most contracts are not made in this way and, generally, we are concerned with 'simple' contracts which require consideration. A contract, therefore, is an agreement with undertakings (promises or obligations) on both sides; and it is an agreement that is intended to have legal consequences.

2.2 The agreement is often said to require a meeting of minds between the contracting parties, which is sometimes described as a consensus ad idem. However, this supposed requirement is apt to mislead, as our law takes a predominantly objective approach to agreement. The law is not so much concerned with what is in the minds of the parties, but with what can be inferred from their conduct. In *Storer* v *Manchester City Council* [1974] 3 All ER 824 at 828, Lord Denning stated:

> 'In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract.'

2.3 The reason for this predominantly objective approach is that it is not possible to ascertain a person's private or subjective intention when bargaining for a contract. Unlike the criminal law, which deals with the liability of the defendant only, and assesses intent from a subjective perspective, the law of contract has to be fair to *both* parties to an apparent agreement. In the interests of fairness, certainty and commercial convenience, one party has to be able to rely on the words and conduct of the other, even if it turns out that they are not an accurate reflection of the other party's private or subjective intentions. For example, if a person expresses a willingness to enter into a contract on a particular set of terms, the law will look at how a reasonable person in the position of the recipient of the offer would have understood it. The law will not concern itself with the subjective intention of the maker of the offer, as to do so would be unfair to the other party[1].

2.4 In the majority of cases there will, of course, be both actual and objective agreement. But, if one party *knows* either that the other has no intention of contracting with him or is mistaken as to the proposed terms, despite an objective appearance of agreement, the law will not apply the objective test (see *Hartog* v *Colin & Shields* [1939] 3 All ER 566).

2.5 The objective principle helps to prevent a party to a contract resiling from the agreement simply because he did not make a good bargain. For example, in 1984 some small investors in British Telecom sold their shares over the telephone to dealers and then tried to sell the same shares several times over as the market rose very rapidly. The contract for the sale of the shares was concluded over the telephone and therefore the sellers were bound by their original agreements. Whatever the innermost or subjective intention of the sellers may have been, they gave the outward appearance of having reached agreement[2]. In the interests of certainty and fairness a person is bound by his apparent agreement. A further illustration of the objective approach is provided by the case of *Moran* v *University College Salford (No 2)* (1993), where M, an applicant for a place on a physiotherapy course, was sent an unconditional offer from the

1 It should be noted that there are differing views on precisely what is meant by an 'objective' approach to agreement. For further discussion, see Howarth, 100 LQR 265; De Moor, 106 LQR 632; and Friedman, 119 LQR 68.

2 See *The Times* (9 December 1984). For a good example of the objective approach, see *Centrovincial Estates* v *Merchant Investors Assurance Co. Ltd* [1983] Com LR 158.

defendants as a result of a clerical error. M accepted the offer in the prescribed manner, but was later informed by the defendants of the error. The Court of Appeal stated that the unconditional offer of a place, despite the defendants' error, was capable of being accepted by M, thus creating a binding agreement under which the university was committed to accept him for the course.

2.6 In *G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 (see para. **2.9**), Steyn LJ stated (at 27):

> 'our law generally ignores the subjective expectations and unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men.'

2.7 In *Cheddar Valley Engineering Ltd* v *Chaddlewood Homes Ltd* (1992), a disagreement arose over whether negotiations between the parties' solicitors, about an existing dispute, were conducted on a 'without prejudice' basis, or whether they were 'open', i.e. fully disclosable to the court. The negotiations commenced on a 'without prejudice' basis, and the parties gave conflicting accounts of whether a later communication by telephone altered this understanding. The defendant's contention, that the negotiations had become 'open', failed because a reasonable person (in the plaintiff's position) would not have understood this to be the case from the communications between the parties.

2.8 In *The Bay Ridge* [1999] 2 Lloyd's Rep 227, the parties entered into negotiations for the sale of an oil tanker, agreeing on certain main terms. As further terms and conditions were still to be agreed between the parties, the issue for the High Court was whether the initial negotiations resulted in a binding contract of sale. Cresswell J held that there was no concluded contract as the intentions of the parties, judged objectively, were that negotiations would continue as further terms were still to be agreed. He stated (at 241) that the judge's task is:

> '[T]o review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract . . . to discern and give effect to the objective intentions of the parties.'

Offer and acceptance—the traditional approach

2.9 In deciding whether the parties have reached agreement, the law looks for an offer by one party and an acceptance of the terms of that offer by the other. In the bargaining process leading up to an agreement, one party will finally propose terms (price, date of delivery, etc.) and express a willingness to be bound by them if the other party signifies his acceptance of them. This is the traditional analysis of offer and acceptance which has been applied by the courts to the formation of contracts. It must be firmly stated that this approach, whilst convenient for analytical purposes (indeed a great many contracts are in fact made by such a process), does

have its limitations. Judges differ in their attitudes to the need for a strict adherence to the offer and acceptance analysis (see *Gibson* v *Manchester City Council* (1979) discussed at para. **2.12**). For example, in a recent Court of Appeal decision, *G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, Steyn LJ's approach (at 29–30) to the formation of a construction contract showed more concern for the parties' intentions and for commercial reality than it did for any technical requirement of 'matching' offer and acceptance. Also, in certain everyday consumer transactions, such as buying goods in a supermarket, it is difficult to detect any genuine process of negotiation or bargaining between the parties.

2.10 Moreover, some agreements cannot be explained by the traditional approach: for example, see *Clarke* v *Earl of Dunraven* (1897). There are also exceptional cases where, contrary to legal theory, the courts adopt a public policy approach and appear to impose an agreement on the parties in the interest of fairness. This type of 'agreement' does not result from any bargaining process and clearly does not conform to the traditional offer and acceptance analysis. Examples of this judicial approach, and the limitations of the traditional analysis, are considered at the end of this chapter.

Offer

2.11 An offer is a proposal or promise by one party (the offeror) to enter into a contract, on a particular set of terms, with the intention of being bound as soon as the party to whom the promise is made (the offeree) signifies his acceptance. An offer may be made either to an individual person, or to a particular group of people, or it may be made to the general public (as in the case of a reward offered for the provision of information). An offer may be written, spoken or implied by conduct; it may be made with varying degrees of complexity. Although this sounds straightforward, in fact what amounts to an offer can give rise to differences of opinion. During the bargaining process, there may be a series of communications between the parties as they move towards a final agreement, and it may be difficult to state with confidence whether a particular statement was an offer, or whether it was part of continuing negotiations between the parties. A possible test which can be applied is to ask whether further bargaining was still expected or whether the statement shows a clear willingness to be bound if the other party assents. This test, although valid, is probably simpler to state than it is to apply, and the cases on this subject are not always easy to reconcile.

Offer or invitation to treat?

2.12 A good illustration of the difficulty in distinguishing between an offer and an invitation to the other party to make an offer (an 'invitation to treat') can be found in the important House of Lords' decision in *Gibson* v *Manchester City Council* (1979). The facts were:

> The Conservative-controlled Manchester City Council advertised details of a scheme for tenants to buy their council houses from the corporation and P expressed interest and asked to be told the

price of buying his house. The city treasurer wrote in reply: 'The corporation may be prepared to sell the house to you at . . . £2,180', but the letter was not to be 'regarded as a firm offer of a mortgage'. P had to fill in a form to make a formal application, which he did, leaving blank the purchase price and listing certain defects in the property. He was told by the Council that the price had been fixed in accordance with the condition of the property, and P wrote that he wished to go ahead on the basis of his application. The Council took the house off the list of tenant-occupied houses which had to be maintained by them, and put it on their house purchase list. As a result of a local election, Labour gained control of the Council and reversed the policy of selling council houses. They would sell only those houses where a legally binding contract had already been concluded.

The trial judge and the Court of Appeal decided that there was a contract and ordered specific performance (i.e. an order compelling the Manchester Council to sell the property to P). In the Court of Appeal, Lord Denning stated that the parties appeared to have reached agreement on all the material terms and this was evidenced by their correspondence and conduct. He thought that it did not matter that 'all the formalities had not been gone through'[3]. He was overtly critical of the traditional approach which tries to analyse all contracts into the form of offer and acceptance.

2.13 The House of Lords allowed the Council's appeal and made it clear that the Council's statement of the price of the house was not an offer to Mr Gibson. It was merely one stage in the negotiating process. The language of the treasurer's letter indicated this with the phrases: 'may be prepared to sell' and 'this letter is not to be regarded as a firm offer of a mortgage'. In reply to the argument that the parties' agreement could be shown by their conduct, it can be said that their conduct was equivocal. The house was taken off the list of properties maintained by the Council, but this could merely indicate that the house was to be sold in the near future and not that agreement had been reached. The most damaging fact for the plaintiff to overcome was the uncertainty over whether he would be granted a mortgage: would he have gone ahead if he had been unable to obtain one? Would any court have ordered him to do so? The successive communications between the parties show that they were feeling their way towards agreement, but that the negotiations had not yet ripened into a contract.

2.14 The case can be contrasted with *Storer* v *Manchester City Council* (1974), which also arose out of the change of policy in relation to council house sales. The main difference between the cases is that in *Storer* the plaintiff received a letter from the Council's representative which stated: 'I understand you wish to purchase your council house and enclose the Agreement for Sale. If you sign the agreement and return it to me I will send you the agreement signed on behalf of the Corporation in exchange'. He signed and returned the Council's standard form 'Agreement for Sale' before control of the Council changed.

3 See [1978] 2 All ER 583 at 586.

2.15 Despite the fact that the agreement had not been signed on behalf of the Council, the Court of Appeal decided that there was a binding contract and specific performance was ordered. The conclusion which can be drawn (albeit tentatively) is that, in *Storer* v *Manchester City Council* (1974), the letter from the Council was more capable of being interpreted as an offer to sell the property than it was in *Gibson* v *Manchester City Council* (1979). The Court of Appeal was keen to enforce the apparent agreement in *Storer* in spite of any technical objections that there had been no exchange of contracts between the parties. But it should be observed that the Council's letter in *Storer* also left certain important details to be decided later. The date for the termination of the tenancy and the start of the mortgage repayments was left blank; yet the property was to be at P's risk from this unspecified date.

2.16 As *Gibson* v *Manchester City Council* (1979) illustrates, the statement of a price by one party does not necessarily indicate that there is an offer to sell at that price, i.e. without further negotiations. It is important to look at all the surrounding circumstances. Stating a price might be simply a response to a request for information. In *Harvey* v *Facey* (1893), P sent a telegram to D: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'. D's telegram replied: 'Lowest price for Bumper Hall Pen, £900'. P's final telegram purported to accept this 'offer' and 'agreed' to buy the property for £900. The Privy Council held that there was no contract, as D was not making an offer merely by responding to P's request for information and stating a price. There was no clear intention to be bound simply by the other party's expression of assent. (For a similar result, see *Clifton* v *Palumbo* (1944).)

2.17 The distinction between an offer and an invitation to treat is, therefore, often difficult to draw. One has to consider the communications between the parties and try to ascertain the intention with which a statement was made; does the statement evince a willingness to be bound if the other party expresses agreement? It may be necessary to look at a series of statements or letters which pass between the parties, during the negotiating process, to assess the overall impression conveyed by these communications. In *Bigg* v *Boyd Gibbins Ltd* [1971] 2 All ER 183, during the course of negotiations for the sale of his property to D, P stated that 'for a quick sale [he] would accept £26,000'. D replied by letter that he accepted this offer. P wrote back, expressing his pleasure at D's decision and stating that he was putting the matter in the hands of his solicitor to proceed with the sale. The Court of Appeal held that the impression given by these communications was that the parties 'intended to and did achieve the formation of a . . . contract' (per Russell LJ at 185).

2.18 The use of the word 'offer' by one party is not decisive; the courts might still interpret a statement as an invitation to treat. In *Spencer* v *Harding* (1870) LR 5 CP 561, D sent out a circular: 'We are instructed to offer [certain business stock] to the wholesale trade for sale by tender . . .'. P's tender for the stock was the highest that D received, but D refused to accept it. P's contention was that the circular amounted to an offer and contained a promise to sell to the highest bidder. Generally, advertisements are not regarded as offers, but P tried to draw an analogy with advertisements of rewards for information (dealt with below) where there is a promise to pay the

first person who supplies the information. But the court rejected this line of reasoning; there was no promise to sell to the highest bidder. In finding for the defendant, Willes J stated (at 563):

> '[T]he question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of goods, and to receive offers for the purchase of them . . . Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.'

2.19 Where a party invites bids (e.g. for property or shares), it is necessary to look at all the circumstances in deciding whether he intends to bind himself to the highest bidder. The question is whether the invitation goes beyond a mere invitation to treat and amounts to an offer capable of being accepted by the successful bidder. In *Harvela Investments Ltd* v *Royal Trust Co. of Canada* (1984):

> D(1) owned a parcel of shares which would give effective control of a company to either P or D(2), who were rivals bidding for the shares. D(1) invited both parties to submit, by sealed bid, a 'single offer' for the whole parcel by a particular time and date. In making the invitation, they stated that: 'we bind ourselves to accept [the highest] offer.' P made a single bid, but D(2)'s bid was really two bids, being (a) for a fixed monetary amount (which was less than that bid by P); and (b) a referential bid which offered $101,000 in excess of any other offer that D(1) received. D(1) accepted D(2)'s referential bid and entered into a contract with them for the sale of the shares. P claimed that D(2)'s successful bid was not valid as it was not within the terms of the original invitation to bid (because it was not a 'single offer'). P succeeded in this action. (NB: Despite reversal in the Court of Appeal, the House of Lords restored the original decision in P's favour.)

In this case we can see a different intention on the part of the sellers, when inviting bids, from that in *Spencer* v *Harding* (1870). In *Harvela*, the sellers bound themselves to accept the highest offer. This statement was itself an offer rather than a mere invitation to treat. A binding contract for the sale of the parcel of shares was made with the highest (valid) bidder at the time of the closing of bids. No further bargaining was either intended or necessary due to the way in which the invitation was expressed. (See the House of Lords' analysis of the transaction into two contracts: [1986] AC 207. *Quaere:* Is such an explanation necessary?)

2.20 Where X invites tenders from a small selected group of potentially interested parties, and tenders are received in accordance with the stipulated conditions of tender, is X under a contractual obligation to consider all the tenders when making his decision? This question arose in the case of *Blackpool and Fylde Aero Club Ltd* v *Blackpool Borough Council* [1990] 3 All ER 25. The facts were as follows:

> The defendant council owned an airport, from which it permitted an air operator to run pleasure trips. This concession had been granted to the plaintiff club on previous occasions and, on

> the expiry of the last concession, the council invited the club and six other parties to tender for the rights to operate pleasure flights from the airport. A very clear procedure for submitting bids was laid down by the council, and it was stated that tenders received after noon, 17 March 1983, would not be considered. Only the plaintiff club and two others responded to this invitation. The plaintiff's tender was put in the Town Hall letter box one hour before the deadline, but due to an oversight the letter box was not cleared by council staff at noon that day as it was supposed to be. (The council accepted that this was due to administrative error.) The plaintiff's tender was recorded as late and was therefore not considered. The club contended that the council was contractually bound to consider any tender that was validly made and received by the deadline. It sought damages from the council.

It was clear from the wording of the council's invitation to tender that it was not promising to accept the highest tender it received. But was it bound at least to consider all tenders submitted within the specified period? The Court of Appeal held that the council was liable in damages to the club for breach of contract. It held that, in certain circumstances, an invitation to tender could give rise to a contractual undertaking by the invitor to consider tenders which conformed with the stipulated conditions of tender. Bingham LJ stated (at 30):

> '[W]here, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure . . . the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are.'

The council was not obliged to accept any tender. Alternatively, it could have awarded the concession to any tenderer, so long as the decision was taken in good faith. But the council was contractually bound to consider the plaintiff's tender before making its decision. The outcome of the case is perhaps surprising. In effect the court implied a contract between the parties, who were merely in the process of negotiation[4]. (The case was referred to recently in the Court of Appeal in the context of a discussion of the criteria necessary for establishing the existence of an implied contract: see *Diane Modahl* v *British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192 at [35], [83] and [100]–[105].)

Offer or invitation to treat: practical examples

2.21 Because of the difficulty in distinguishing between an offer and an invitation to treat, the law has attempted to clarify the position in certain common types of transaction. For the sake of convenience, and for technical reasons, it is important to understand the process of offer and

4 For further discussion, see McKendrick 'Invitations to Tender and the Creation of Contracts' [1991] *Lloyd's Maritime and Commercial Law Quarterly*, pp. 31–6.

acceptance in shops, and auction sales, and in connection with tenders, advertisements, and automatic vending machines.

Advertisements

2.22 As a general rule the advertisement of goods for sale is not to be regarded as an offer. In *Partridge* v *Crittenden* (1968) the appellant was charged, under legislation for the protection of wild birds, with unlawfully offering for sale a wild bird. He had placed an advertisement in a magazine: 'Bramblefinch cocks and hens, 25s each'. The Divisional Court held that the appellant was not liable for the statutory offence as he had not offered the birds for sale; the advertisement was an invitation to treat.

2.23 The issuing of a catalogue or circular with a price-list is not to be regarded as an offer to sell those goods. If a person sees a price-list and places an order, the seller is not normally bound to supply the goods[5]. (See *Grainger & Son* v *Gough* (1896).) A seller of goods has to be free to give information about his goods (i.e. advertise them) in the interests of a competitive market. It would inhibit this flow of information if he were to be contractually bound to supply to anyone who placed an order, as the seller might not have sufficient stock to meet the demand. Similarly, the advertisement of an auction of specific goods will not be construed as an offer to sell those goods. There is no promise to sell the goods and the auctioneer will not be liable for withdrawing them from the sale without notice. For example, in *Harris* v *Nickerson* (1873), P attended an auction in order to buy furniture which the auctioneer had advertised for sale. When the furniture was not put up for sale, P's subsequent claim for damages (for his loss of time) failed as the court held that the advertisement was not an offer of sale. Blackburn J stated that to hold otherwise 'would be excessively inconvenient'.

2.24 The reasoning behind the rule that advertisements are not to be treated as offers is that further bargaining between the parties is still possible or even necessary. This is thought to serve the interests of commercial convenience, albeit the seller's rather than the buyer's convenience. But there are situations where an advertisement is couched in terms which will be interpreted as an offer because no further bargaining between the parties is possible or intended. Advertisements of rewards (e.g. for information or the return of lost property) fall into this category. In the famous case of *Carlill* v *Carbolic Smoke Ball Co* (1893):

> The defendant company placed an advertisement in the newspaper offering a reward of £100 to anyone who bought one of its smoke balls, and used it in the prescribed manner, and yet caught influenza. To show its 'sincerity in the matter', the company deposited £1,000 with its bank. Relying upon this advertisement, the plaintiff bought a smoke ball and used it as

5 For a discussion of goods advertised on the Internet, see K. Rogers (2002) 23 Bus LR 70 and paras **2.33–2.36.**

directed—and still caught influenza! The plaintiff sued successfully for the £100 reward and the defendant company appealed against the decision.

A variety of arguments were put forward by the defendants to defeat the plaintiff's claim for the reward. It was argued that the advertisement was too vague and that the defendants did not intend to be bound by it. These arguments were rejected by the Court of Appeal which held that both the meaning and the effect of the advertisement were clear. It was immaterial that the plaintiff did not notify the company of her acceptance before using the smoke ball and catching influenza. Where an offer takes the form of payment or reward in exchange for a particular act or acts—in what is known as a unilateral offer—there is no need for notification of acceptance. The offer is accepted by performance of the act or condition. Hence the plaintiff was entitled to the reward. The advertisement of the reward was an offer, as no further bargaining or negotiation was intended by the offeror.

2.25 This decision was relied upon in the Court of Appeal case of *Bowerman* v *Association of British Travel Agents Ltd* (1996). This case involved the cancellation of a school skiing holiday booked with Adventure Express, an Association of British Travel Agents (ABTA) tour operator. Adventure Express became insolvent and, although the holiday was rearranged with another firm, the ABTA reimbursement did not include the plaintiffs' holiday insurance premium paid on behalf of each pupil going on the holiday. The plaintiffs' claim for a refund of this insurance payment was rejected at the trial and the plaintiffs appealed, relying on ABTA's notice, which was displayed in all its members' offices, detailing the protection given to customers in the event of financial failure of ABTA members. The plaintiffs' appeal was based on the argument that the ABTA notice amounted to a unilateral offer to all customers of failed ABTA tour operators, containing promises which were legally enforceable by customers. This argument had been rejected by the trial judge on the basis that the ABTA notice was merely to inform the public of the ABTA protection scheme, and was not an offer by ABTA to the customer, and also that it was too vague to be construed as an offer.

2.26 The plaintiffs' appeal was allowed by a majority (Hirst LJ dissenting). It was held that the ABTA notice was intended to be understood by members of the public as containing an offer which the customer accepted by contracting with an ABTA member. There was the necessary intention to create legal relations on ABTA's part, and the promises contained in the notice were not too vague to be legally enforceable. It was also held that customers provided consideration for ABTA's promise, as it was to ABTA's benefit that customers chose to contract with its members. Waite LJ ([1996] CLC 456 at 457) thought that the ABTA notice, despite its complexities, would be understood by a potential customer as importing an intention to create legal relations with customers of ABTA members. In particular, he relied on the words in the notice which stated: 'Where holidays or other travel arrangements have not yet commenced at the time of failure, ABTA arranges for you to be reimbursed the money you have paid in respect of your holiday arrangements'. Waite LJ thought that

these words would be understood by a reasonable person as a clear promise. Hobhouse LJ stated (at 463):

> 'In my judgment this document is intended to be read and would reasonably be read by a member of the public as containing an offer of a promise which the customer is entitled to accept by choosing to do business with an ABTA member . . . it satisfies the criteria for a unilateral contract and contains promises which are sufficiently clear to be capable of legal enforcement. The principles established in the *Carbolic Smoke Ball* case apply.'

Items displayed in shops

2.27 It might be supposed that goods displayed in shop windows, or on shop counters, with the prices clearly marked, are being offered for sale. In certain types of shops or markets a limited degree of bargaining (or 'haggling') may be possible. But in the vast majority of shops, stores and supermarkets, this is neither possible nor expected; goods are to be sold at the prices shown and no negotiation takes place between retailer and customer. Yet it is firmly established by the decided cases that the display of goods in a shop is not an offer to sell those goods. In *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401:

> It had to be decided at what point a contract is concluded in a 'self-service' shop where the goods are priced and displayed on shelves, selected by customers, and then taken to the cash-desk for payment. The case arose under s 18(1) of the Pharmacy and Poisons Act 1933 which stated that ' . . . it shall not be lawful—(a) for a person to sell any [listed] poison, unless . . . the sale is effected by, or under the supervision of a registered pharmacist'. It was brought to establish whether the defendants were breaking the law by positioning their registered pharmacist (who was supposed to supervise sales) adjacent to the cash-desk. If the display of goods on the shelves were regarded as an offer to sell and could be accepted by the customer when they were picked up and put into the basket provided, then the defendants were breaking the law, as the sale would not be supervised by the pharmacist as required by the statute. But if the display of items were merely an invitation to treat and it was the customer who made the offer at the cash-desk, then Boots were complying with the law.

It was decided that the contract was concluded at the cash-desk. The customer made the offer, and this could be accepted or rejected by the defendants. Therefore, sales were supervised by the registered pharmacist. The court argued (per Somervell LJ) that if the display of items on the shelf amounted to an offer, a customer who picked up items and put them into the basket provided would thereby accept the offer and be contractually bound to pay for the goods even if he later changed his mind and did not want the goods. Somervell LJ stated (at 406):

> 'I can see no reason for implying from this self-service arrangement any implication other than that . . . it is a convenient method of enabling customers to see what there is and choose, and

> possibly put back and substitute, articles which they wish to have, and then go up to the cashier and offer to buy what they have so far chosen'.

2.28 It could be argued with equal force that if the display of goods were regarded as an offer, the acceptance by the customer would take place only when the goods are presented at the cash-desk for payment and not when they are placed into the basket. However, this view does not represent the law as it stands, which is that the display of goods in a self-service shop, supermarket, or shop window does not amount to an offer to sell those goods. (See *Fisher* v *Bell* (1961), where it was held that the display of a 'flick-knife' in a shop window was not an offer to sell this item.) It is interesting that the cases which have arisen have involved the sale of prohibited or restricted items to the public and not from any dispute between buyer and seller as to when the contract was formed. It is also important to consider whether there is any statutory regulation of the way goods are described, priced, and displayed in shops[6]. Should shops be allowed to lure in customers with tempting 'offers' if either they have no intention of selling at the advertised price, or they intend to impose some restriction on the type of person to whom they will sell their goods? (For an American case which raises interesting and relevant issues, see *Lefkowitz* v *Great Minneapolis Surplus Stores* (1957).)

Auctions

2.29 Where an auctioneer asks for bids, he is not making an offer to sell the goods to the highest bidder. It was established in *Payne* v *Cave* (1789) that the auctioneer is merely inviting offers from bidders, which he can either accept or reject. This rule is now encapsulated in s 57(2) of the Sale of Goods Act 1979 which states:

> 'A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner; and until the announcement is made any bidder may retract his bid.'

2.30 We have seen that the advertisement of an auction sale is not an offer to sell particular goods. But is there a binding promise to sell the goods to the highest bidder where an auction sale, which is advertised as 'without reserve', actually takes place? The point was not resolved entirely by the case of *Warlow* v *Harrison* (1859), despite obiter dicta supporting the view that such an advertisement may include a separate and binding promise by the auctioneer to sell to the highest bona fide bidder. The recent decision of the Court of Appeal in *Barry* v *Davies (t/a Heathcote Ball & Co.)* (2001) has now confirmed that this is the correct approach. In this case, two machines were advertised for sale by auction without reserve. B, the claimant, was the sole

6 For example, the Consumer Protection Act 1987, s 20(1) states: ' . . . a person shall be guilty of an offence if, in the course of any business of his, he gives . . . to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons).'

bidder and his bid of £200 for each of them fell a long way short of the commercial value of the machines. D, the auctioneer, refused to sell the machines to B and withdrew them from the sale. The trial judge and the Court of Appeal held that, in doing this, D was in breach of contract. In an auction sale without reserve, it was not open to the auctioneer to reject the highest bid—in this case the only bid—simply because it was not high enough. This may appear a harsh decision in these circumstances, where the bid was far below the estimated value of the goods. However, if the seller wishes to avoid such a risk, he should take the precaution of stipulating a reserve price. (For further discussion, see F. Meisel 'What Price Auctions Without Reserve?' (2001) 64 Mod LR 468.)

Automatic machines

2.31 It seems that the display of goods in an automatic vending machine *is* an offer to sell those goods, rather than a mere invitation to treat. In this situation, no further bargaining between the parties is either possible or necessary. The customer accepts the offer by putting money into the machine and receives the goods or ticket. If the machine is empty it must be implied that the offer continues only whilst stocks last. (The same argument could be used to support the view that goods displayed in shops ought to be regarded as being offered for sale; but, in theory, bargaining is still possible.)

2.32 It might be argued that analysing a sale by vending machine into offer and acceptance is of merely academic, rather than practical, significance. But there may be disputes as to precisely when a contract was formed and which terms were incorporated. If one party seeks to rely on terms printed on a ticket (such as an exclusion clause), it becomes important to know whether these terms were incorporated into the contract or whether they were ineffective for being introduced too late. For example, is the acceptance already complete when a ticket is taken by a motorist entering a multi-storey car park, having put money into a machine? If so, does this mean that terms printed on such a ticket have no contractual effect, as the motorist is not given notice of them until after the contract is concluded? In *Thornton* v *Shoe Lane Parking Ltd* (1971), a similar issue was raised and Lord Denning explained the transaction as follows:

> 'The customer pays his money and gets a ticket. He cannot refuse it . . . he was committed at the very moment when he put his money into the machine. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot.'

Advertisements on websites

2.33 It is increasingly common for customers to buy goods by selecting items advertised on websites, with payment normally made by credit card. It is obviously convenient for many

people to buy goods via the Internet, as part of what is often called 'e-commerce'. However, the limitations of this type of transaction should also be remembered: to engage in e-commerce, customers need a credit card and the use of a computer, and many potential customers are put off Internet shopping owing to fear of crime. (See the survey conducted jointly by Get Safe Online and the Serious Organized Crime Agency, in 2006, which found that 18 per cent of respondents said they would not shop online because of fear of crime). There is also the question of when, precisely, a contract is concluded during these transactions. This may be particularly important where the supplier and customer are in different countries, as it could give rise to issues of jurisdiction. We have seen (see para. **2.22**) that the advertisement of goods generally does not constitute an offer, but is regarded as merely an invitation to treat. Does the same approach apply to advertisements on websites? One of the arguments for holding that sellers should be free to advertise their goods without being bound to supply to any customer who places an order is that it avoids sellers being liable if their stocks cannot meet the number of orders received. A similar argument can be applied to goods advertised on websites and it is unlikely that suppliers would intend to be contractually bound to any potential customer who places an order via the Internet. (The same argument would apply to email price lists, which are basically circulars in electronic form.)

2.34 The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) transpose into our national law key provisions of the EC Directive on Electronic Commerce (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000). Although the EC Directive aimed to increase consumer confidence in e-commerce by promoting certainty and the avoidance of disparate approaches in member states, it did not attempt to harmonize the precise moment at which a contract is concluded. Regulation 12 of the Electronic Commerce (EC Directive) Regulations 2002 ('the Regulations'), which states that the ' . . . "order" may be but need not be the contractual offer . . .', is rather equivocal. However, the regulations do require, unless parties who are not consumers have agreed otherwise, the service provider to explain to customers in plain terms, where a contract is made by electronic means, the technical steps to follow to complete a binding agreement (reg 9(1)). It should be noted that this requirement does not apply to contracts concluded exclusively by exchange of electronic mail (reg 9(4)). Article 11(1)(a) states that, unless parties who are not consumers have agreed otherwise, it must be ensured that, where customers place orders electronically, the service provider 'shall acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means'. (Once again, this requirement does not apply to contracts concluded exclusively by exchange of electronic mail: reg 11(3).)

2.35 The issue as to when a contract is concluded, where goods are ordered from a website, has arisen recently in cases involving pricing errors by companies. (See K. Rogers 'Snap! Internet "Offers" Under Scrutiny' (2002) 23 Business Law Review 70; and N. Miller 'The Price Isn't Right' (2003) 147 Sol Jo 339.) In one instance, Kodak advertised a camera, by mistake, for £100 instead of £329. The company, on realizing its error, refused to proceed with the many orders it had received from potential customers before the mistake was detected. More recently,

Amazon.co.uk advertised computer equipment for £7.32, rather than the correct price of £274.99! It is thought that a number of orders were placed by hopeful customers before the site was taken off-line and the error corrected, but Amazon cancelled these orders by email.

2.36 In these cases, it can be argued that such advertisements are an invitation to treat, and it is the potential customer who actually makes the offer. Their offers can be rejected by the supplier in cases where an error has occurred. A further complication arose in the Kodak case, owing to the fact that the company initially responded with an automated reply which confirmed customers' orders. Nevertheless, it seems unlikely that this amounted to an acceptance of the orders it received. For, as stated above, suppliers are obliged to acknowledge to customers receipt of their orders without undue delay and by electronic means. It is likely that the confirmation of the orders sent by Kodak would not be regarded as an acceptance of those orders. Of course, some suppliers, in cases of incorrectly priced goods, might prefer to maintain good public relations by honouring orders placed, but this is less likely where the numbers involved are large and the potential financial loss to the company is considerable.

Acceptance

2.37 According to traditional analysis, contracts are usually arrived at by one party proposing terms and the other party agreeing to them. The law looks for an offer by one party (the offeror) and an acceptance of the terms of that offer by the other (the offeree), as the best method of establishing agreement between them. Although this is an accurate way of representing the bargaining process in the majority of cases, there are transactions which do not fit easily into this traditional approach (see earlier discussion). Also, it should be remembered that the law takes a predominantly objective view of agreement. A further problem is that during the negotiating process the parties may add or withdraw terms, and it may be disputed whether the parties did in fact reach agreement.

2.38 What constitutes acceptance of an offer? It is the final expression of assent, by words or conduct, to the offer or proposal. It should be conveyed in the manner indicated by the offeror, where a particular means of communication is requested or implied. It is important that the acceptance is both final and unequivocal. Put simply, it must be an acceptance of the offeror's proposal without varying the terms or adding new terms. A purported acceptance which attempts to introduce new terms, or vary those contained in the offer, will be regarded as a counter offer and not as an acceptance of the original offer.

2.39 In *Jones* v *Daniel* (1894), D wrote and offered to buy P's property for £1,450 and received a reply from P's solicitor which purported to accept the offer and enclosed a contract for D's signature. However, the document contained important new terms that were not part of D's original offer, and D refused to sign it. It was held that there was no contract between the parties. The letter from P's solicitor (with its draft contract) was not an acceptance, but a counter offer

which D was free to accept or reject. Similarly, if a person offers to pay a fixed price for services and materials, this will not be accepted by a promise to provide those services and materials at a variable price. (See *North West Leicestershire District Council* v *East Midlands Housing Association* (1981).)

2.40 A counter offer amounts to a rejection of the original offer. In *Hyde* v *Wrench* (1840), D made a written offer to sell his farm to P for £1,000, to which P replied that he would give £950 for it. D refused to sell at the lower price and, a few days later, P wrote to D agreeing to pay £1,000 for the property. D had not withdrawn his original offer, but he now refused to sell to P. The court held that there was no contract. P's counter offer (of £950) was a rejection of D's original offer and brought it to an end. It could not be revived afterwards by P simply purporting to accept it. (See also *Norfolk County Council* v *Dencare Properties Ltd* (1995), in which the Court of Appeal referred approvingly to the well-established rule in *Hyde* v *Wrench*.) However, there are situations where the offeree does not put forward a new proposal but merely seeks clarification of the offer or further information about it from the offeror. In such a case the offer is not to be regarded as rejected and it is still open to the offeree to accept it. This is illustrated by the case of *Stevenson, Jacques & Co.* v *McLean* (1880) 5 QBD 346:

> D wrote to P offering to sell a quantity of iron at '40s per ton net cash', and stating that the offer would remain open until the following Monday. It was clear from communications between the parties that P, in turn, was looking for buyers and that the market was unsettled. Early on Monday morning, P sent D a telegram: 'Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give'. D did not answer P's question and sold the iron to a third party. On Monday afternoon, P (having had no reply) sent another telegram accepting D's offer to sell at 40s cash. P's final telegram was sent before D's withdrawal of the offer reached P. P sued for breach of contract, and D claimed that P's telegram of Monday morning amounted to a counter offer and therefore a rejection of D's offer.

Was the plaintiff's first telegram a fresh proposal, or did it merely seek to clarify an aspect of D's offer? The distinction can be a fine one, but the court ruled in P's favour. Lush J held that P did not make a counter offer: 'Here there is no counter proposal . . . there is nothing specific by way of offer or rejection, but a mere enquiry, which should have been answered and not treated as a rejection of the offer' (at 350). However, where one party offers to supply goods to another at a certain price and the offeree purports to accept, but adds a new stipulation requiring delivery within a fixed period of time, this will probably be regarded as a counter offer. (See *Northland Airliners Ltd* v *Dennis Ferranti Meters Ltd* (1970).)

Acceptance by conduct

2.41 In a unilateral contract the offeree signifies acceptance by conduct: i.e. by performance of the act or condition stipulated in the offer. In *Carlill* v *Carbolic Smoke Ball Co* (1893) the court rejected the argument that the plaintiff failed to notify the defendant company of her acceptance

of their offer before using the product. She accepted by buying the smoke ball and using it as instructed; by claiming the reward after catching influenza, she was entitled to succeed. In a bilateral contract, acceptance may be signified by words or documents, or by the conduct of the parties. (Whether an offer is unilateral or bilateral may be a matter for debate and it should not be supposed that the distinction is unproblematic. Also see *Dawson* v *Helicopter Exploration Co. Ltd* (1955).) In *Brogden* v *Metropolitan Rly Co.* (1877) 2 App Cas 666:

> B had supplied the Metropolitan Railway Co with coal for some years without a formal agreement. The parties decided to formalize their transactions and the Metropolitan Railway Co sent B a draft agreement. B completed certain details in the draft which had been left blank, including the name of an arbitrator, and B then signed it and wrote 'approved', and returned it to the Metropolitan Railway Co whose manager put it in his desk. Nothing further was done formally with the document, but for some time the parties acted in accordance with its arrangements by supplying and paying for the coal. Finally a disagreement arose and Brogden denied that there was a binding contract between the parties.

The addition of the arbitrator's name by B was a new term and therefore a counter offer. Did the Metropolitan Railway Co. accept this offer? It might be thought that putting the document into the manager's desk was an equivocal act, incapable of amounting to a valid acceptance. But no objection was made to the terms suggested by B; instead the Metropolitan Railway Co. placed an order for and accepted coal on the strength of the agreement. As Lord Cairns stated (at 680):

> '[A]pprobation was clearly given when the company commenced a course of dealing which is referable . . . only to the contract, and when that course of dealing was accepted and acted upon by [B] in the supply of coals'.

2.42 Thus, in *Brogden*, there was a clear acceptance by the company's conduct, of which B was aware. This principle was applied (and potentially extended) in *G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25. Here, work began on a construction 'contract', apparently before negotiations were complete. But the parties obviously intended to enter into an agreement and the work, when finished, was paid for. The Court of Appeal held that there was a binding contract which 'came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance' (per Steyn LJ at 30). In contrast, see the more recent case of *Tesco Stores Ltd* v *Costain Construction Ltd* (2003), in which the *Archital Luxfer* decision was considered, but the conduct of the parties was regarded as equivocal and therefore of little help in deciding whether, and on what terms, there was an agreement. The judge in this case, in the Technology and Construction Court, stressed that the ideas of offer and acceptance are of the 'highest importance' in determining whether the parties have reached agreement.

2.43 *Brogden* v *Metropolitan Rly Co.* (1877) was considered in *Jayaar Impex Ltd* v *Toaken Group Ltd* [1996] 2 Lloyd's Rep 437, where it was emphasized by Rix J (at 446) that the conduct

of the parties in *Brogden* was 'only referable to the contract document, since there was no other contract between the parties'. In *Jayaar*, there was a dispute as to whether the contract between the parties for a quantity of Nigerian gum arabic was on the basis of an oral agreement, or a later written agreement which contained a specific set of terms on which the sellers wished to rely. The Commercial Court was not prepared to infer that the parties had agreed to amend their oral contract so as to incorporate the sellers' written terms. The court held, distinguishing *Brogden*, that the buyers were entitled to performance of their oral contract.

'Battle of the forms'

2.44 We have noted that an acceptance, to be valid, should show unqualified assent to the terms of the offer: it should not introduce new proposals or stipulations. This is the position in theory, but in practice business people may try to exploit the process of offer and acceptance so as to contract on their own standard terms. (For example, see *Chichester Joinery Ltd* v *John Mowlem & Co. plc* (1987).) In business negotiations it is frequently difficult to decide at which precise moment the parties have reached agreement. Sometimes they cannot be said to be ad idem at all. The parties may wish to keep the situation uncertain in the hope that their own standard terms will prevail in the event of a dispute. For instance, X makes an offer to sell goods using his standard form with its own printed terms, and Y 'accepts' the offer by using his own standard order form and its conflicting terms. If a dispute arises at this point, before there has been any performance of the undertakings (such as delivery of the goods), it seems that the parties have not reached agreement and there is no contract. However, the parties in this situation normally intend to proceed with the 'contract' and they actually go beyond an exchange of promises. The dispute arises over whose terms prevail and not over the existence of a contract. (But see *Midland Veneers Ltd* v *Unilock HCP Ltd* (1998), where it was held that there was no contract, despite goods being delivered, as both parties had been attempting to impose their standard conditions and this indicated continuing negotiations rather than agreement.)

2.45 This illustrates how the 'rules' of contract law are not always applicable, in a strict sense, to commercial practice. It seems that there are 'non-contractual business dealings' which do not fit neatly into the traditional analysis of offer and acceptance[7]. In these situations where legal theory and commercial practice diverge, it is difficult to state precisely what the rules of law are[8]. It is possible to argue that the party who gets in his terms last, without the other party raising any objection, succeeds in contracting on his own standard terms. He can be said to have 'fired the last shot'. This approach is illustrated by *British Road Services Ltd* v *Arthur V Crutchley & Co. Ltd* (1968). Under a well-established course of business between the parties, the plaintiffs delivered goods to the defendants' warehouse and presented a delivery note which stated: 'All goods are carried on [the plaintiffs'] conditions of carriage . . . '. However, as on previous occasions, when

7 See J. Adams, 'Non-Contractual Business Dealings' (1983) 133 NLJ, pp. 789–91.

8 See Beale and Dugdale, 'Contracts between Businessmen' (1975) 2 Br Jo Law & Soc 45.

the plaintiffs' driver presented the delivery note to the defendants, it was 'rubber-stamped' by the defendants with the words: 'Received under [the defendants'] conditions'. In this way the delivery note was transformed into a note of receipt and handed back to the plaintiffs' driver. In the course of an action for negligence against the defendants, it was disputed whose conditions prevailed. Although the defendants were liable to the plaintiffs in negligence for not adequately protecting the goods against theft, the Court of Appeal held that the defendants' liability was limited in accordance with their conditions which were incorporated into the contract between the parties. It seems that the defendants', rather than the plaintiffs', conditions prevailed as they got in the final word or 'shot', without any further riposte from the plaintiffs. However, on the facts, it was regarded as important that there was a long-established course of dealing between the parties. If this had not been the case, it might have been questioned whether the plaintiffs' driver had the authority to receive an important contractual document from the defendants.

2.46 Although a useful starting point, the 'final shot' approach cannot solve all the problems that arise in the 'battle of the forms' cases. What if one party stipulates at the outset of the negotiations that he will contract only on his own printed terms? What if the exchange of printed terms by the two parties (or their agents) is virtually simultaneous? Should the court, if litigation arises, attempt to strike out any disputed terms? In truth, it is impossible to lay down a rule to cover the variety of situations and disputes that can occur in the commercial world. Different trades may have their own ways of conducting business dealings. The judge will need commercial sense as well as legal knowledge and he or she must look carefully at the particular facts of each case that arises.

2.47 For these reasons, the leading case of *Butler Machine Tool Co. Ltd* v *Ex-Cell-o Corpn (England) Ltd* (1979) should be regarded as an illustration of the difficulties inherent in 'battle of the forms' cases, rather than as a definitive statement of the legal position. The facts were:

> In response to D's enquiry, P made a quotation on 23 May, offering to sell a machine tool to D for £75,535. The offer was stated to be subject to certain conditions which were to 'prevail over any terms in the buyer's order'. These conditions included a price variation clause: i.e. that any increase in the cost of the goods, by the date of delivery (which was to be in 10 months' time), would be added to the purchase price. On 27 May, D replied, ordering the machine, but on their own terms and conditions which did not include a price variation clause. At the foot of D's order form there was an acknowledgement section to be torn off, stating that 'We accept your order on the terms and conditions stated thereon'. On 5 June, P completed and signed the acknowledgement, returning it to D, together with a letter stating that D's order was being entered in accordance with P's quotation of 23 May. When the machine was delivered, P claimed the price had increased by £2,892, and D refused to pay the increase in price. P's action was based on the contention that they were entitled to increase the price under the price variation clause contained in their offer. D argued that the contract was on the buyer's terms and these did not include such a clause.

The Court of Appeal decided that the contract did not include the price variation clause and P could not claim the extra £2,892. It was held that D's order of 27 May was a counter offer which brought to an end the offer made by P on 23 May, and that P accepted D's counter offer by completing and returning the acknowledgement of the order on 5 June. The contract was therefore on D's terms and the price variation clause did not apply.

2.48 Although the reasoning of the majority of the Court of Appeal was said to be in accordance with the doctrine of offer and acceptance, it could be argued that the parties had failed to reach agreement over a most important issue, namely the price of the goods. Had the dispute arisen before the goods were made and delivered, it might have been concluded that there was no legally enforceable agreement. However, both parties intended to proceed with the 'agreement' and actually did so. The dispute was as to whose standard forms and terms prevailed. In deciding in favour of the defendant company the Court of Appeal, probably correctly, concluded that there was doubt whether the parties had agreed to the price variation clause and that this condition should not be included in the 'agreement'. There is no simple solution to 'battle of the forms' cases. Lord Denning in *Butler Machine Tool Co. Ltd* v *Ex-Cell-o Corpn (England) Ltd* [1979] 1 All ER 965 at 969 adopted a different approach from the majority, whilst arriving at the same conclusion. He argued that the documents must be considered as a whole:

> 'If [the terms and conditions of both parties] can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication'.

(Also of interest, see *HC Sauter Automation* v *Goodman (Mechanical Services)* (1986).) Although the approach advocated by Lord Denning offers flexibility, some have criticized the idea of such a wide (and uncertain) exercise of discretion by judges.

Communication of acceptance

2.49 As a general principle, acceptance must be communicated to the offeror if it is to lead to a binding agreement. The offeree must do more than simply make an uncommunicated decision to accept an offer. In *Brogden* v *Metropolitan Rly Co.* (1877) (see para. **2.41**) it was not the decision of the respondent company's manager to accept the amended draft contract that concluded the agreement with the appellant, but rather the ordering of coal and the subsequent course of dealing between the parties. An acceptance may be by words (spoken or written) or by conduct, but mere silence is insufficient. The law takes an objective view of agreement and some external evidence, beyond a mental resolution, is required for there to be a valid acceptance. If a particular form of acceptance is requested by the offeror, then generally the offeree must comply with this request.

2.50 Although there is a need to communicate acceptance to the offeror, what amounts to a communicated acceptance depends on the type of case we are considering. Furthermore,

in unilateral contracts, the offeror does not request a counter promise from the offeree(s); he asks for the performance of some act or acts. As we saw in *Carlill* v *Carbolic Smoke Ball Co.* (1893), there was no need for the plaintiff to notify the defendant company of her acceptance of their offer before using the product. She accepted by buying the smoke ball, using it as instructed and catching influenza.

2.51 The law requires the offeree to provide some objective manifestation of acceptance. After all, contracts are supposed to be based on agreement, and it would lead to considerable uncertainty and unfairness if the offeror were bound merely by an uncommunicated resolution by the offeree to accept. If O offers to sell his car to A for £1,000, he would not be bound simply by A's silent decision to accept. But what if O, having previously negotiated with A, writes to him, stating: 'I will sell you my car for £1,000. If I do not hear from you within seven days, I shall assume that you accept'. Can A's ensuing silence be regarded as a valid acceptance of the offer?

2.52 Generally, it is correct that the offeree should not be put to the trouble of either having to reject an offer, or risk being contractually bound if he fails to take active steps to do so. If it were otherwise, a salesman could make a nuisance of himself by sending goods to members of the public and stating in a letter that, if he hears no more from them within a certain period, he will consider the goods sold. It should be noted that the problem of 'inertia selling' is, to some extent, dealt with by the Unsolicited Goods and Services Act 1971, as amended in 1975, where the parties are businesses. In relation to inertia selling to consumers, this is now regulated by the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334); see reg 24.

2.53 But what is the position if O waives the requirement of a communicated acceptance and A, thinking that silence will amount to a valid acceptance, does nothing further? In the instructive case of *Felthouse* v *Bindley* (1862) the facts were:

> P entered into negotiations with his nephew, J, for the purchase of J's horse. He wrote to J, shortly after, offering to buy the horse and stating: 'If I hear no more about him, I consider the horse is mine at £30 15s'. J did not reply to his uncle's letter, but he did instruct the auctioneer (D) not to sell the horse along with his, J's, farming stock. D forgot this instruction and six weeks after P's letter, the horse was sold by D to another person. P sued D for conversion (in tort) basing his action on the contention that there was a concluded contract between P and J for the sale of the horse and therefore the horse belonged to P at the time of the auction. But was there a binding agreement between P and his nephew?

The court decided that the action for conversion failed. Although the nephew may have decided to sell the horse to his uncle, there was no communication of this decision to the uncle. Accordingly, there was no binding agreement between P and J, and the horse never became the uncle's property. The decision is a useful illustration of the general rule that mere silence is not sufficient to constitute acceptance of an offer. Silence is equivocal, and if the law did not follow this approach, much uncertainty could arise in negotiations between parties.

2.54 But the actual decision in *Felthouse* v *Bindley* (1862) can be criticized. The parties had negotiated for the sale of the horse previously and the uncle waived the requirement of a communicated acceptance. There was no suggestion that he was taking advantage of his nephew's silence, or making a nuisance of himself by putting the onus on his nephew to either reject the offer or be bound. Indeed, it is apparent that J intended his silence to constitute acceptance, and his conduct (in instructing D) was consistent with this. However, it could be argued that J did not accept P's offer by conduct, as there was no communication of J's conduct to P, and on this ground it is distinguishable from *Brogden* v *Metropolitan Rly Co.* (1877). (*Quaere:* If D had heeded the instructions and the uncle had then changed his mind and refused to purchase the horse from J, would the court have held that there was no contract between the parties?[9])

The need for communication: the general rule

2.55 Subject to certain exceptions, 'communication' of acceptance requires that it is actually brought to the offeror's notice. (Where the offeree notifies the offeror's agent of his acceptance, this will be effective communication, so long as the agent has the authority to receive acceptance.) In situations which involve 'instant' communication, such as face-to-face negotiations, telephone conversations, and telex messages, the acceptance must be actually received by the offeror (see *Entores Ltd* v *Miles Far East Corpn*, below). The contract is made at the place where the acceptance is received. This rule has been applied also in the case of acceptance by facsimile (fax) machine: 'a fax is a form of instantaneous communication . . . [and] by analogy with telegrams and telex messages' an agreement is made on receipt of the message (*JSC Zestafoni G Nikoladze Ferroalloy Plant* v *Ronly Holdings Ltd* [2004] 2 Lloyd's Rep 335 at [75] per Colman J) (For a discussion of fax transmission in conveyancing contracts, see P. Kenny 'Exchanging Contracts By Fax' (1988) 85 Law Soc Gazette 11–12).

2.56 But what if it is the offeror's own fault that he fails to receive the acceptance and the offeree thinks that his message has reached the offeror? In *Entores Ltd* v *Miles Far East Corpn* [1955] 2 QB 327 at 333, Lord Denning explained:

> 'This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated; or if the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated; so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it.'

9 See Miller, '*Felthouse* v *Bindley* Revisited' (1972) 35 MLR 489; also see *Fairline Shipping Corpn* v *Adamson* [1975] QB 180. Also, for a discussion of exceptions to the general rule, see P. Owsia (1991) 40 ICLQ 784.

Where the offeror fails to receive the message of acceptance through no fault of his own, but the offeree reasonably (but wrongly) thinks that the message was received, there is no contract (per Lord Denning). Although the *Entores Ltd* v *Miles Far East Corpn* (1955) decision is still good law, it should be remembered that the use of instantaneous forms of communication has increased since the time of that decision. There are a variety of ways in which business communications can be made. This was discussed by Lord Wilberforce, in relation to the use of telex, in *Brinkibon Ltd* v *Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 at 42:

> 'The senders and the recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or fault at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. 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.'

2.57 Despite these reservations, the House of Lords in *Brinkibon Ltd* v *Stahag Stahl* (1983) supported the *Entores Ltd* v *Miles Far East Corpn* (1955) decision as a general rule in relation to acceptance by telex. Perhaps clearer guidance might have been given by their Lordships on how to approach cases where the equipment proves to be faulty, or where messages are not read by the recipient until some time after transmission. (Lord Wilberforce's speech was considered by Gatehouse J in *Mondial Shipping and Chartering BV* v *Astarte Shipping Ltd* (1995), a case involving telex communications and contractual notice, rather than acceptance of an offer.)

2.58 In *Apple Corps Ltd* v *Apple Computer Inc* [2004] EWHC 768 (Ch), the parties were in dispute as to where their 'trade mark' agreement, drafted in writing but completed by telephone, was concluded. This was because neither party wanted to accept the other's jurisdiction or governing law. (The claimant record company were based in England, whilst the defendant computer company were in the USA.) The trial judge, Mann J, made reference (at [41]) to Lord Wilberforce's speech in *Brinkibon Ltd* v *Stahag Stahl* (1983) (discussed above), which he took as recognizing 'the need to be appropriately flexible in reflecting the needs and practices of commerce'. So, whilst the judge accepted that *Brinkibon* lays down a general rule, he did not think that it prevented him from finding that a 'contract can be made in two places at once in the sense that it forces a court always to find a single jurisdiction in which the contract should be taken to have been made'. The judge thought (at [42]) that it was rather artificial to analyse the final agreement (made by telephone) in terms of offer and acceptance: 'the offer and acceptance may well depend on who speaks first and who speaks second, which is likely to be largely a matter of chance in closing an agreement of this sort'). He found it more realistic to conclude that the contract was made in both places simultaneously. He argued that, on the facts of this particular case, such a conclusion was also consistent with the expressed intentions of the

parties, in so far as neither wanted the other to have the advantage in relation to jurisdiction and governing law. In short, the judge concluded (at [43]) that it was consistent both with principle and the facts of the case, that the claimant had 'a good arguable case for saying that the contract was made both in England and California'. (He went on to hold, for reasons that need not concern us here, that England was the appropriate place for the litigation.) It will be interesting to see what the higher courts make of Mann J's analysis of contract formation. (For further comment on this decision, see E Malcolm 'Jurisdiction and Governing Law—the Battle for Apple' (2004) 15(6) Ent LR 191, and N. Valner 'Upsetting the Apple Cart' (2004) *Legal Week*, 21 October 2004).

Acceptance by post

2.59 As a general rule, then, an acceptance must be brought to the offeror's attention for it to be effective. However, communication through the post provides an important exception to this general rule. In *Adams* v *Lindsell* (1818) the facts were:

> D wrote to P offering to sell wool and requested a reply 'in the course of post'. D misdirected the letter and this caused it to be delayed for a couple of days. On receiving the letter, P replied immediately, by posting a letter of acceptance. After P's acceptance was posted, but before it arrived, D sold the wool to a third party, in the belief that P was not interested.

The court decided that a contract was concluded between D and P when the letter of acceptance was posted by P. This approach might appear to contradict the idea of contracts being based on a 'meeting of the minds'. In fact, it is a further illustration of the objective, rather than the subjective, nature of agreement in contract law. The 'postal rule', as it is known, requires some explanation. If a posted acceptance were not effective until actually delivered to (or even read by) the offeror, then this could be unfair to the offeree in the event of his letter being delayed or lost in the post. Conversely, the offeror is at a disadvantage if he is bound by a posted acceptance that has not yet reached him. The law had to choose which party to favour, in postal communications, and for a number of reasons it chose to favour the offeree.

2.60 It is worth observing that the rule laid down in *Adams* v *Lindsell* (1818) originated at a time when there was no general rule that acceptance need be communicated[10]. The decision in *Adams* v *Lindsell* is defensible, moreover, on the basis that D was careless in addressing his offer and that it was fair for P's action to succeed. Whether this is a sufficient basis for the postal rule that has existed since that decision (surviving a few attempts at its overthrow) is more contentious. Much time has been spent by academics debating the merits and demerits of the rule. But, in truth, it is to some extent an arbitrary solution to the problem of which of two parties should be favoured where they communicate through the post. The argument that it is easier to prove posting than receipt is far from convincing. So, too, is the explanation that it is the offeror

10 See Simpson, 91 LQR 247.

who chooses to use the post and therefore it is he who should be at a disadvantage; as it might have been the offeree who originally started the negotiations by letter.

2.61 Despite the lack of a convincing rationale, the postal rule is firmly established in the law of contract. The rule applies even in cases where the letter of acceptance is delayed or lost in the post (see *Household Fire and Carriage Accident Insurance Co.* v *Grant* (1879)), but the letter must have been correctly addressed and stamped. However, the rule does not apply if it was unreasonable to use the post as a means of communicating acceptance. The offeror can stipulate the mode of acceptance, expressly or by implication, and he can make it clear that a postal acceptance is not enough, by emphasizing the need for a speedy reply. Alternatively, the offeror may request a written reply, but may also stipulate that this reply must actually arrive before a contract is concluded. In *Holwell Securities Ltd* v *Hughes* [1974] 1 All ER 161:

> D offered to sell a house to P in the form of an option 'exercisable by notice in writing to the intending vendor [D] at any time within six months'. Within the six-month period, P's solicitors wrote to D, notifying him of P's acceptance of the offer. The letter was correctly stamped, addressed and posted, but it never arrived. (A copy was received by D's solicitor, but P admitted that this was not sufficient notice.) No other written acceptance was given or sent to D before the time limit expired. P claimed specific performance, arguing that a contract was concluded on posting the letter of acceptance to D.

The Court of Appeal decided that the offer, by stipulating actual 'notice to [D]', could not be accepted merely by P posting a letter of acceptance. The offer was so framed as to require that the acceptance be communicated to the offeror and therefore the postal rule did not apply in this instance. Thus the rule can be ousted by the express provision of the offeror. Similarly, the rule does not apply if it causes severe inconvenience or absurdity. (See *Holwell Securities* at 166–7.)

Electronic communications

2.62 The use of the Internet for buying goods is now commonplace and was discussed earlier in this chapter. Where suppliers advertise goods on web sites, this is to be regarded as an invitation to treat; the customer will, generally, make the offer. It will be recalled that, under the Electronic Commerce (EC Directive) Regulations 2002, unless parties who are not consumers have agreed otherwise, a service provider must explain to customers in clear terms, where a contract is made by electronic means, the 'different technical steps to follow to conclude the contract' (reg 9(1)(a)). As Internet sales involve virtually instantaneous communications, it would seem that the message of acceptance sent by the supplier must be received by the customer to be effective. In other words, the general rule of acceptance should apply. The Electronic Commerce (EC Directive) Regulations 2002 do not deal explicitly with the question of when the acceptance is effective in such transactions. However, reg 11(2) does state that the consumer's order and the 'acknowledgment of receipt will be deemed to be received when

the parties to whom they are addressed are able to access them'. The emphasis here is on these communications being effective when they are capable of being accessed by the recipient. This might suggest that the acceptance also will be communicated effectively when it is accessible to the offeror.

2.63 Recently, there has been much discussion about when a contract is concluded by email[11]. Email is a very swift method of communication, but it is not instantaneous in a strict sense. This might suggest that such transactions may be brought within the postal rule of acceptance (discussed at paras **2.59–2.61**). However, the rationale of the postal rule needs to be understood in its historical context, and there appears to be little enthusiasm for applying this rule to more modern modes of communication, especially when it is now a simple matter to ascertain whether the acceptance has been received. Therefore, it seems more likely that the courts will decide that, in contracts concluded via email, the acceptance will be effective only when it is received. What is meant by 'received' in this context, presents us with an additional problem. It could be received, for example, either when the message arrives in the offeror's electronic mail box, or it could be when the offeror accesses his or her messages. A further (but perhaps less likely) possibility is that it is received only when the offeror reads the message. Each solution has its proponents and its critics. (For a recent discussion, see D. Capps 'Electronic Mail and the Postal Rule' (2004) 15(7) ICCLR 207, who argues (at 212) that 'e-mailed acceptances should be deemed effective from the moment that they are available for collection').

Consumer Protection (Distance Selling) Regulations 2000

2.64 Where contracts for goods or services, between businesses and consumers, are made at a distance under an organized sales or service provision scheme, they are now regulated by the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334), implementing Directive 97/7/EC. The regulations are not restricted to Internet sales, but it was intended that they would promote greater consumer confidence in ecommerce. A 'distance communication' (reg 3(1)) refers to any means of contracting where there is no simultaneous physical presence of the supplier and the consumer, and an indicative list of such distance communications (e.g. 'teleshopping', electronic mail, telephone, mail order, or letter) is provided in Sch 1 of the Regulations. It should be noted that certain types of contract are specifically excluded under reg 5(1), such as contracts for the sale or other disposition of an interest in land, contracts relating to financial services, certain types of construction contract, and contracts concluded at an auction. There are also some types of contract (under reg 6) to which only part of the Regulations apply. But, where a contract is made at a distance, and is not excluded from the Regulations, reg 7 states that the supplier must provide to the consumer, in good time prior to

11 In relation to contracts made by email, for a full discussion see D. Rowland and E. Macdonald, *Information Technology Law*, 2000, Cavendish. Also, see: Niemann 'Cyber Contracts—A Comparative View on the Actual Time of Formation' (2000) 5 Communications Law 48; and Downing and Harrington, 'The Postal Rule in Electronic Commerce: A Reconsideration' (2000) 5 Communications Law 43.

the conclusion of the contract, and in a clear and comprehensible manner, the following information:

- the identity of the supplier (and also the supplier's address if the contract requires payment in advance);
- a description of the main characteristics of the goods or services;
- the price (including taxes) of the goods or services;
- any delivery costs;
- the arrangements for payment and delivery;
- the existence of the right to cancel the contract;
- the cost of using the distance communication (where it is charged other than at the basic rate);
- the period for which the offer remains valid.

2.65 Regulation 8 of the Consumer Protection (Distance Selling) Regulations 2000 deals with additional information which must be provided, either in writing or in another durable and accessible form, by the supplier to the consumer, after the contract is made. This information includes: the conditions and procedures for the consumer to exercise his or her right to cancel the contract; the supplier's business address to which the consumer may send any complaints; information about guarantees and any after-sales services; and the conditions for exercising the consumer's contractual right, where appropriate, to cancel a contract of unspecified duration.

2.66 According to general principles, the parties to a contract are bound when a legally enforceable agreement is concluded. However, the distance-selling regulations have given the consumer an important right, subject to certain exceptions, to cancel a contract during what is sometimes referred to as the 'cooling-off' period (see regs 10–13). This means that a consumer may give notice of cancellation to the supplier, either in writing or in another durable and accessible form, and the contract will be treated as if it had not been made. In relation to contracts for the supply of goods, where the supplier has complied with reg 8 (described above), the cancellation period comprises seven working days starting with the day after the day on which the consumer receives the goods. Where the supplier has not complied with reg 8, the cancellation period 'ends on the expiry of the period of three months and seven working days beginning with the day after the day on which the consumer receives the goods' (reg 11(4)). In the case of contracts for the supply of services, the cancellation period (where reg 8 has been complied with) ends after seven working days, beginning with the day after the day on which the contract is concluded. Where the supplier of the service has not complied with reg 8, the cancellation period ends after three months and seven days from the day after the day on which the contract is concluded. (For recent amendments to regulations

8, 12, and 13, see the Consumer Protection (Distance Selling) (Amendment) Regulations 2005, SI 2005/689, which came into force in April 2005.)

Prescribed method of acceptance

2.67 As we saw in *Holwell Securities Ltd* v *Hughes* (1974) (above), the offeror can stipulate that the acceptance must be made in a particular way. He may require it to be sent to a certain place, or to take a particular form, such as by letter or fax. In order to complete a binding agreement the offeree must normally comply with the prescribed method of acceptance. If the offeror stipulates a particular form of acceptance, and states that only the stipulated form will suffice, the offeree must comply with the offeror's requirement in order for there to be an effective acceptance. But the offeror may have requested a particular method of acceptance for a specific purpose, for example to obtain a speedy reply. If the offeree uses some other method which equally achieves the offeror's purpose, this will be a valid acceptance. (See *Tinn* v *Hoffman* (1873).)

2.68 In some instances, such as where the offeree supplies forms of tender to other business people to make offers to buy property, it is the offeree who stipulates the mode of acceptance. Can the offeree depart from the method of acceptance that he himself has prescribed? In *Manchester Diocesan Council of Education* v *Commercial and General Investments Ltd* [1970] 1 WLR 241:

> P invited offers to buy property and supplied forms of tender on which the offers were to be made. Clause 4 provided: 'The person whose tender is accepted shall be the purchaser and shall be informed of the acceptance of his tender by letter sent to him by post addressed to the address given in the tender'. A letter accepting D's tender was sent, not to the address given in the tender, but to D's surveyor. This did not affect D adversely, as it was P (the offeree) which had introduced this requirement in its standard form and now P waived it. D claimed that the acceptance failed to comply with the method of communication stipulated in the offer.

The court decided that P's acceptance was valid. P included the stipulation, about the method of communicating acceptance, in the form of tender for P's own purpose. P was entitled to waive the requirement if doing so did not adversely affect D. Buckley J stated (at 246):

> 'Where . . . the offeror has prescribed a particular method of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of the opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract . . . If an offeror intends that he shall be bound only if his offer is accepted in some particular manner, it must be for him to make this clear. Condition 4 in the present case had not, in my judgment, this effect.'

Is knowledge of the offer required?

2.69 Can an offer be accepted by a person who has no knowledge that the offer exists? This situation can occur where someone performs an act or service, e.g. by returning an item of lost property to the owner, and later learns that a reward was in fact offered for the performance of this act. In one sense, such a person has fulfilled the terms of the offer, and it could be argued that he is entitled to claim the reward. But, in this type of case, there is no agreement or meeting of the minds. (For an interesting example of this requirement, involving a rather different set of facts, see *IRC* v *Fry* (2001).) The 'acceptance' is accidental, as the act or service is not given in exchange for the offeror's promise. Yet, in *Gibbons* v *Proctor* (1891) 64 LT 594, the court appeared to decide that ignorance of an offer did not preclude a person from claiming a reward where he gave information and then later learned of the existence of the offer. (The case is open to criticism, but another report of it suggests that it was significant that P did know of the reward by the time the information was passed, via P's agents, to the appropriate person: see (1891) 55 JP 616.)

2.70 The Australian case of *R* v *Clarke* (1927) 40 CLR 227 is a more widely approved statement of the law. It concerned an offer of a reward for information leading to the arrest of certain murderers and a pardon to any accomplice giving the information. C gave the required information but admitted that he had forgotten about the reward at the time that he supplied it (i.e. when he was in custody, himself charged with the murders). C's claim for the £1,000 reward was rejected by the High Court of Australia, and the case was treated as if he had never known of the reward. Higgins J stated (at 241):

> 'Clarke had seen the offer indeed; but it was not present to his mind—he had forgotten it, and gave no consideration to it, in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or forgetting it after hearing . . . But for this candid confession of Clarke's it might fairly be presumed that Clarke, having once seen the offer, acted on the faith of it, in reliance on it; but he has himself rebutted that presumption.'

2.71 Despite the less than satisfactory case law on the point, it seems that knowledge of an offer is required for there to be a valid acceptance. However, the motive for performing an act, which fulfils the terms of an offer, is irrelevant. So where a person knows of an offer of a reward for information, but gives the requested information for another reason (such as remorse), he is still entitled to claim the reward. (See *Williams* v *Cowardine* (1833) and, for a discussion, see P. Mitchell and J. Phillips 'The Contractual Nexus: Is Reliance Essential?' (2002) 22 OJLS 115.)

2.72 A related issue is that of 'cross offers'. For example, A writes to B offering to sell him his computer for £100 and B, without knowing of the offer, writes to A and offers to buy that computer for £100. It could be argued that there is a meeting of the minds, but clearly any

'agreement' between the parties is merely by chance. It is thought that there is no contract in this situation unless one of the parties replies to the other and accepts the other's offer. It would lead to uncertainty if cross offers, with nothing further, amounted to a binding agreement. The problem is hardly one of great practical significance, as indicated by the paucity of case law on the subject. (The one case which discusses the problem, obiter, is *Tinn* v *Hoffman* (1873). The majority of the judges thought there was no contract.)

Acceptance in unilateral contracts

2.73 In a unilateral contract, the offeror promises payment or a reward in exchange for the offeree performing a particular act or acts. (See *Carlill* v *Carbolic Smoke Ball Co*. (1893), discussed at para. **2.24**.) This is in contrast to a bilateral contract which, normally, is formed by the exchange of promises between the parties, resulting in reciprocal undertakings. In a unilateral contract, however, one party binds himself (e.g. to pay a reward) and the offeree accepts by performing the requested act (such as finding lost property). It is not necessary for the offeree to communicate to the offeror his intention to accept and the offeree is under no obligation to perform the requested act. The contract is 'unilateral' because only one party (the offeror) is bound, and the contract is concluded by the offeree's act.

2.74 Although offers of rewards are frequently given as examples of unilateral contracts, it should not be supposed that this is the full extent of the practical application of this type of contract. For example, the issuing of cheque cards by banks to their customers is now commonplace. The reason for this is that retailers were wary of parting with goods in exchange for a cheque which might not be honoured. The cheque guarantee card ensures that, so long as the card is used correctly, the retailer will receive payment from the bank, regardless of whether the customer has sufficient funds in his account to meet the cheque. On what basis is the bank contractually bound to retailers who give customers value for their cheques? The transaction can be explained as a unilateral contract. The bank's issuing of the card is an offer to retailers who do not have to communicate their acceptance. A contract with the bank is concluded when a retailer parts with goods in exchange for a guaranteed cheque.

2.75 The essence of a unilateral contract, then, is that O does not bargain for a counter promise by A; instead he requires the performance by A of some act. As we shall see later, an offer may generally be revoked at any time before a valid acceptance is made. This is normally fair, as neither party is bound until this time. But can O, in a unilateral contract, withdraw the offer once A has commenced the performance of the stipulated act? To take the classic example known to generations of law students: O offers a reward of £100 to anyone who walks from, say, Aberystwyth to Cardigan. It is evident that O is bargaining for the completed act of walking the whole distance of 38 miles. (A mere promise by someone to do the walk does not conclude a contract.) Can O revoke his offer once A has started, but not yet completed, the walk to Cardigan? In theory, there is no effective acceptance where the act in question is only partly

performed, but it could lead to manifest injustice if O were able to revoke the offer once A is in the process of accepting. Hence, some departure from strict legal theory is necessary, as illustrated by *Errington* v *Errington and Woods* [1952] 1 KB 290. The facts were:

> A father wanted to provide his son and daughter-in-law with a home and he bought a house for £750, borrowing £500 on a mortgage from the building society. The conveyance remained in the father's name and he also paid the rates. He promised his son and daughter-in-law that if they continued to occupy the house and paid all the mortgage instalments, he would transfer the property to them. Until the father's death nine years later, the couple occupied the house and paid the mortgage. On the death of the father, all his property (including the house occupied by the couple) was left to his widow. The son left the daughter-in-law and moved out of the house. The widow brought an action for possession against the daughter-in-law.

The Court of Appeal decided that the widow was not entitled to possession. Per Denning LJ (at 295):

> 'The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done.'

2.76 It seems that although a unilateral offer may be accepted only by performance of the requested act, the offer cannot normally be withdrawn once the offeree has started to perform. But in *Luxor (Eastbourne) Ltd* v *Cooper* (1941), C was promised commission if he introduced a buyer for two cinemas and if this introduction resulted in the sale of these properties. Although C introduced a willing purchaser, the vendors changed their minds and decided against selling the properties. C claimed damages, arguing that the offer implied that the vendors would not refuse to sell to a buyer that he had introduced. The Court of Appeal refused to imply such a term and rejected C's claim. It is submitted that the *Errington* v *Errington and Woods* (1952) approach is to be preferred. It provides a fairer solution, but is there any theoretical basis for it? The usual explanation is that a unilateral offer contains two promises: the promise of the reward, and an implied (or collateral) promise that the offer will not be withdrawn once the offeree has embarked upon performance of the act. *Errington* can be explained in this way and the decision is supported, obiter, in *Daulia Ltd* v *Four Millbank Nominees Ltd* [1978] 2 All ER 557 (at 561, 566, and 570).

Termination of offers

2.77 There are a number of ways in which an offer may be terminated before an acceptance has taken place. These are explained in the following sections.

Revocation (or withdrawal)

2.78 Although an offer cannot be withdrawn once it has been accepted, it may be revoked at any time before acceptance has occurred (see *Payne* v *Cave* (1789)). The offeror may withdraw his offer even if it was expressly stated that it would remain open for a fixed period. (See *Scammell* v *Dicker* (2001).) This is because a promise to leave an offer open is not, generally, supported by any consideration given by the offeree. (This is explained more fully in **Chapter 4**.) In *Routledge* v *Grant* (1828) 130 ER 920 the defendant offered to take a lease of the plaintiff's premises, giving the plaintiff six weeks to make up his mind. Three weeks later, the defendant withdrew the offer and, afterwards, the plaintiff purported to accept within the six-week period. The court held that there was no contract, as the defendant was free to withdraw the offer at any time before acceptance by the offeree. Despite the defendant's promise, the offer did not have to remain open for six weeks:

> '[I]f six weeks are given on one side to accept an offer, the other side has six weeks to put an end to it. One party cannot be bound without the other' (per Best CJ at 923).

2.79 A promise to keep an offer open for a fixed period will, of course, be binding if the offeree gives something in return for the offeror's promise. In this case there will be a separate or 'collateral' contract between the parties; the offeror's promise will no longer be one-sided. In *Daulia Ltd* v *Four Millbank Nominees Ltd* (1978), although the plaintiff's action in fact failed due to technicalities of land law, it is clear that there was a collateral contract to the effect that the offer would remain open for a fixed period, as promised by the offeror. The offeree gave consideration for the promise (to enter into a written contract) by complying with the offeror's stipulated conditions. (For a more recent illustration, see *Pitt* v *PHH Asset Management Ltd* (1993).)

2.80 Although an offer may be withdrawn at any time before the offeree has accepted it, the withdrawal has to be communicated to the offeree. It is not sufficient for the offeror merely to change his mind without informing the offeree. It should be noted that even where the revocation is made by letter it must still be actually communicated to the offeree. This is in contrast to a letter of acceptance of an offer, which is effective on posting. These rules are conveniently illustrated by *Byrne & Co* v *Leon Van Tienhoven & Co.* (1880) 5 CPD 344:

> The defendants wrote from Cardiff on 1 October offering to sell a quantity of tinplates to the plaintiffs in New York. On 8 October, the defendants posted a letter withdrawing the offer. On 11 October, the offer reached the plaintiffs, who accepted at once by telegram (and the plaintiffs also confirmed this in writing on 15 October). The defendants' letter of withdrawal reached the plaintiffs on 20 October.

It was decided that the mere posting of a letter of revocation does not amount to an effective communication to the offeree. The plaintiffs' acceptance (on 11 October) completed a contract with the defendants and this was not affected by the defendants' letter of revocation which did not

arrive until later. The decision was intended to promote certainty, for if the defendants' arguments had succeeded, 'no person who had received an offer by post and accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it' (per Lindley J at 348). The case is also a vivid example of the objective view of agreement taken by the law of contract. At no time was there a meeting of the minds in fact, but it was held that there was a binding agreement.

2.81 Although the withdrawal of an offer must be communicated to the offeree, it appears that the offeree does not have to be notified of the withdrawal by the offeror in person. In *Dickinson* v *Dodds* (1876) 2 Ch D 463, P was given the option to buy certain land from D for £800, with D promising that the offer would remain open for two days (until 9 a.m. on 12 June). But D sold the land to someone else on 11 June, and P learned of this later the same day, by chance, via a third party. P then proceeded to notify D of his acceptance of the offer before 9 a.m. on 12 June. The Court of Appeal held that P's action for specific performance failed, as there was no contract between P and D. We have seen already that a promise to keep an offer open for a specific period is not, by itself, binding on the offeror. But was the withdrawal of the offer effectively communicated to the offeree? James LJ (at 472) had no doubts that it was:

> '[I]n this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer".'

2.82 The case is generally regarded as deciding that communication of the withdrawal of an offer can be made to the offeree by any 'reliable source'. What matters is that the offeree has knowledge of the revocation, and not that notification comes directly from the offeror. Yet it might be contended that, in the interests of certainty, the withdrawal of an offer ought to be communicated by the offeror (or some person authorized by him) if it is to be effective. Otherwise, as the law stands, the offeree is in the unfortunate position of having to decide whether his source of information is reliable or not. There is no convincing reason why the offeree should shoulder this burden.

Rejection

2.83 An offer is terminated if the offeree rejects the offer. It is not possible for him simply to change his mind and accept. It will be remembered that a counter offer amounts to a rejection of the original offer (see *Hyde* v *Wrench* (1840)). If D offers to sell goods to P for £1,000 and P replies that he will give D £950 for them, this is a rejection of D's offer which brings it to an end. P cannot revive D's offer later by simply purporting to accept it. It does not matter that D has not formally withdrawn the original offer. In contrast, where the offeree does not make a counter offer, but merely seeks further information from the offeror, an offer is not to be regarded as rejected. (See *Stevenson, Jacques, & Co.* v *McLean* (1880).)

Lapse of time

2.84 An offer may come to an end due to the lapse of time. If A, on Monday, offers to sell his car to B and says, 'I must have your answer by Friday at the latest', B cannot accept the offer on Saturday. In many cases, the offeror does not stipulate that the offer must be accepted within a specified period. However, it would be impracticable if an offer could be accepted after an unreasonable delay on the part of the offeree. So where the offeror does not specify a time limit for acceptance, the offer will lapse unless it is accepted within a reasonable time. What amounts to a reasonable time will depend on the circumstances of the case and must take account of the subject matter of the offer. For instance, in *Ramsgate Victoria Hotel Co.* v *Montefiore* (1866), it was held that an offer to buy shares which was made in June could not be accepted as late as the following November. The offer had not been accepted within a reasonable period, bearing in mind the fluctuating nature of the subject matter. (For another illustration of what amounts to a 'reasonable time', see *Loring* v *City of Boston* (1844). For a more recent example, see *Flaws* v *International Oil Pollution Compensation Fund* (2001).)

Where the offer is conditional

2.85 An offer may be expressed as subject to the occurrence of some condition. For example, A may offer to sell goods to B subject to his being able to obtain supplies himself. If A subsequently cannot obtain supplies, the offer will come to an end. The offer was conditional on a particular state of affairs which did not occur. The courts can also imply a condition into an offer where it has not been expressly stated by the offeror. If A offers to buy goods, or to take them on hire purchase, it will be implied that the offer is subject to the condition that the goods will remain in (substantially) the same state that they were in at the time of the offer. (See *Financings Ltd* v *Stimson* [1962] 3 All ER 386, especially the words of Donovan LJ at 390.)

Death

2.86 What is the position where the offeror dies after making an offer but before the offeree has accepted? If it is an offer of a 'personal' contract (involving a personal service such as employment or agency), it is sensible that the offer should come to an end with the death of the offeror. (In these circumstances a resulting contract would in any case be brought to an end by death even if the offer was not regarded as terminated.) Otherwise, it is possible for an offer to continue even after the death of the offeror, where the offeree accepts without knowing of the offeror's death (see *Bradbury* v *Morgan* (1862)). In this event the contract will be performed by the offeror's personal representatives. A good example is where the offer takes the form of a continuing guarantee of a bank overdraft. If, unknown to the bank, the guarantor dies, and the bank makes a further loan to the customer, then the personal representatives of the deceased

may well be obliged to perform the contract. Of course there may be some other reason for refusing to allow the bank to charge the offeror's estate; for instance, it may be inequitable to do so.

2.87 Where the offeree dies after an offer has been made, it seems both likely and sensible that the offer comes to an end. It must be acknowledged, however, that the decided cases are not particularly helpful or conclusive on this rather esoteric point. (In *Reynolds* v *Atherton* (1921), Warrington LJ stated that an offer 'made to a living person who ceases to be a living person before the offer is accepted . . . is no longer an offer at all'. But it must be emphasized that the case was actually decided on different grounds and the above statement was merely obiter.)

Offer and acceptance—a critical view of the traditional approach

2.88 The traditional approach of the law of contract is to analyse the formation of contracts in terms of an offer by one party and a 'matching' acceptance by the other. The House of Lords in *Gibson* v *Manchester City Council* (discussed at para. **2.12**) affirmed this method of analysis and it was stated that the types of contract which cannot be so analysed are 'exceptional'. In contrast, Lord Denning, in the Court of Appeal's decision in the same case, advocated a more flexible and less formal approach. He stated ([1978] 2 All ER 583 at 586):

> 'To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some textbooks it has been the custom to do so; but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material.'

2.89 Although this approach found no favour with the House of Lords, it is possible that Lord Denning's statement is a more accurate reflection of business practice than the traditional or 'formalist' view. (It received some support more recently in *G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 29–30 per Steyn LJ.) The established legal principles which apply to the formation of contracts, e.g. in relation to offer and acceptance and consideration, were developed largely in the nineteenth century and some critics maintain that these principles are of marginal relevance to the conduct of business today. It is true that the various 'rules' that we have considered relating to the formation of contracts give the appearance of a 'technical and schematic' law of contract. (See the comments of Lord Wilberforce in *New Zealand Shipping Co. Ltd* v *AM Satterthwaite & Co. Ltd* (1975).) But, the law, in practice, is capable of adopting a fairly flexible and pragmatic approach. In areas such as the 'battle of the forms', disputes may be settled by reference to business practice as well as legal doctrine. Judges conventionally use the language of legal doctrine, even whilst adopting a more flexible

approach, but this should not disguise the fact that there are limitations to the traditional or 'formal' approach.

2.90 Even if we maintain that the process of offer and acceptance represents the way in which most contracts are made, there are certain agreements that cannot be explained convincingly by the traditional approach. A notable example is provided by *Clarke* v *Earl of Dunraven* [1897] AC 59:

> The case involved two yachts entered by their respective owners for a club race—the Mudhook Yacht Club Regatta. On entering for the race, each owner signed a letter to the club secretary undertaking to be bound by the yacht club sailing rules whilst participating in the race. These rules included an obligation to 'pay all damages' caused by any contravention of the sailing rules which were to be observed during races. One of the yachts (*Satanita*), in breach of one of the sailing regulations, fouled another yacht (*Valkyrie*) and sank her. The owner of *Valkyrie* sued the owner of *Satanita* for damages. The defendant argued that his liability was limited by statute (Merchant Shipping Act 1862, s 54(1)) to the payment of £8 per ton on the registered tonnage of the sunken vessel. The plaintiff claimed that the defendant was bound to 'pay all damages' under a contract made between the competitors entering the race and undertaking to be bound by the rules of the club.

The Court of Appeal held that there was such a contract and that the defendant was liable for all damages. This was affirmed by the House of Lords. Lord Herschell stated (at 63):

> 'I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.'

2.91 There is no reason to criticize the actual outcome of this case: the various competitors entered into an agreement, on entering for the race, to be bound by certain rules. But was there a contract between the plaintiff and the defendant created by a process of offer and acceptance? There can be little doubt that the owners of the various yachts entered into a contract with the yacht club by their letter to the club secretary. Yet it is not easy to see how one owner can be said to have accepted the offer of any other owner to participate in the race (other than by a tortuous and artificial process).

2.92 Similarly, where A and B are negotiating for, say, the provision of certain services and they fail to reach agreement, a third party (C) may suggest a solution to their points of difference. If A and B both agree, at the same time, to C's proposal, it is impossible to argue that one of the contracting parties offered and the other accepted the offer. But they have reached a binding agreement nevertheless (assuming that all the other requirements of a contract are met).

Contracts imposed by the courts

2.93 We have seen (above) that not all agreements made by contracting parties can be analysed convincingly in terms of the conventional process of offer and acceptance. These instances can be viewed perhaps as comparatively rare departures from the norm. Moreover, the recognition of these exceptional cases does little violence to strict contractual theory as the contracts in question are still the result of agreement between the parties. However, there are cases which are harder to reconcile with traditional theory; i.e. contracts which do not result from any express agreement between the parties, but as a consequence of being imposed or implied by the courts. In theory this is not supposed to occur, as it is for the contracting parties to strike bargains and not for the courts to make contracts for them. This is another example of how legal theory and legal practice may diverge.

2.94 A contract might be implied by the courts on the grounds of public policy or expediency. This is a difficult matter to predict or analyse. Consider the unusual case of *Upton-on-Severn RDC* v *Powell* [1942] 1 All ER 220:

> Discovering that his farm was on fire, Powell rang the local police in the Upton police district and asked them to get 'the fire brigade'. The police rang the local (Upton) fire brigade and alerted them about the fire. Powell's farm was in the Pershore, not the Upton fire district, but the Upton fire brigade was called and it went to the fire at once. Powell was entitled to the services of the Pershore brigade without charge, but the Upton brigade was entitled to charge for its services, if it went outside its own district. At the time of the emergency, all the parties involved thought that the farm was in the Upton fire district. Later, on discovering that it was not, Upton Council claimed that a contract had been created by implication, under which it was entitled to be paid for its services.

The Court of Appeal decided that there was a contract and Powell's appeal was dismissed. He was bound by contract to pay for the Upton fire brigade's services. Lord Greene thought that public policy necessitated such a conclusion. He thought it would be quite 'wrong in principle' (at 221) if Powell could avoid paying because Upton thought it was rendering free services. But it is hard to understand why Powell should have to pay, when he was entitled to the free services of another brigade. Assuming that the Upton Council should have been allowed to recover for its services, the remedy should perhaps have been a quasi-contractual one.

2.95 It is difficult to agree with the conclusion reached by the Court of Appeal that there was a contract between the parties. There was clearly no process of offer and acceptance. It is fanciful to claim that Powell's telephone call was an offer. It is even more of a distortion to argue that the Upton fire brigade, by rendering a service which they thought was performed free of charge, was in fact accepting an offer of payment for that service. There was, in truth, no agreement between the parties in this unusual case. In the interest of fairness to the Council, the court decided that the defendant should have to pay. A contract was accordingly 'invented' to achieve this result. Cases such as this might be dismissed as rare departures from established principles and, to a

certain extent, there is some force in this assertion. But it is salutary to realize that not all cases can be fitted neatly into the established 'slots' of legal doctrine and governed by a set of invariable rules. The law is not such an exact discipline, involving, as it does, judgments concerning fairness and the exigencies of public policy.

2.96 It might be contended that the cases which fail to fit within the established rules and lines of authority are not simply anomalies or 'hard cases', but that rather they are illustrations of the flexibility of judge-made law; i.e. that contracts can be imposed retrospectively by the courts as a 'remedial' device to achieve a just solution to an essentially non-contractual dispute. This point is made cogently by Professor Atiyah[12]:

> '[I]t is important for students to understand that the law of contract has nearly always had room for cases of this character. Judges have rarely hesitated to use whatever instruments they can lay hands on in order to achieve a just result in a particular case; and the law of contract is one of those instruments.'

2.97 The same writer gives the example, inter alia, of informal property transactions which are not based on any express agreement between the parties concerned. In *Tanner* v *Tanner* [1975] 1 WLR 1346:

> P and D were not married; D gave birth to twins and P was the father. (D also took P's name.) P bought a house with the help of a mortgage for them both to live in, together with the children. D relinquished her rent-controlled flat in order to move in with P. After a period of time, P moved out and tried to evict D. At first instance, D lost the case and was evicted. (She was rehoused by the local authority.)

On appeal, it was decided that D had, under an implied contract, a right to stay in the house with her children whilst they were of school age. As she had already lost her right to remain in the house (having been evicted), the order of the Court of Appeal was to award compensation of £2,000. Lord Denning was unabashed by the lack of any agreement between the parties to this effect. There was no pretence that the court's decision could be reconciled with established contractual principles. He stated (at 1350):

> ' . . . It is to be implied that she had a . . . contractual licence—to have accommodation in the house for herself and the children so long as they were of school age . . . There was no express contract to that effect, but the circumstances are such that the court should imply a contract by the plaintiff—or, if need be, impose the equivalent of a contract by him.'

2.98 Few judges have declared their law-making potential quite so overtly and unreservedly as Lord Denning was prepared to do on this occasion. Indeed, some effort was subsequently

12 Atiyah, *Introduction to the Law of Contract*, 5th edn, 1995, p. 90.

made to decide these informal property disputes more strictly in accordance with recognizable contractual principles (see *Burns* v *Burns* (1984), for example). But this does not alter the fact that, in certain circumstances, contracts can be imposed retrospectively by the courts on the parties, so as to achieve a just solution. This process has little or nothing to do with the established 'rules' of contract law that we have considered in this chapter. Here, the parties are not entering into an agreement to undertake certain obligations in the future; there is no offer and acceptance, nor any bargaining process.