

## OFFER & ACCEPTANCE

### Lack of Need for Formality

Contracts do not generally need to be in writing, or to use any particular form of words. A verbal offer and acceptance is sufficient.

Exceptions to this exist in relation to contracts concerning land, and consumer credit agreements.

### Offer

An offer is an indication by one person that he or she is prepared to contract with one or more others, on certain terms, which are fixed, or capable of being fixed, at the time the offer is made.

### Distinction from 'Invitation to Treat'

An offer can be distinguished from 'invitation to treat': preliminary negotiations, or expressions of interest will be regarded as invitations to treat, rather than offer.

Note, *Gibson V Manchester City Council - 1979*.

### Displays of Goods

Displays of goods in shop, or shop windows, will generally be regarded as invitations to treat, not offers.

Note, *Pharmaceutical Society of Great Britain V Boots - 1953*

Note, *Fisher V Bell - 1961*

### Advertisements

Advertisements may be either invitations to treat (*Note, Partridge V Crittenden - 1968*); or offers (*Note, Carlill V Carbolic Smoke Ball Co. - 1983; Lefkowitz V Great Minneapolis Surplus Stores - 1957 American Case*), depending on the precise terms of the advert.

Advertisements which are offers, will normally involve 'unilateral', or 'if' contracts, under which the offeree incurs no obligation, prior to performing an act requested by the offeror.

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### Invitation to Tender for Work

An invitation to tender for work will normally constitute an invitation to treat, with the responses being offers (*Note, Spencer V Harding - 1870*). There may, however, be a unilateral contract obliging the person inviting the tenders to comply with any procedures set out in the invitation (*Note, Blackpool and Fylde Aero Club Ltd V Blackpool Borough Council - 1990*).

### Auctions

The bids are offers, which are accepted by the fall of the hammer. An auction advertised as being 'without reserve' however, implies an obligation to sell to the highest bidder (*Note, Warlow V Harrison - 1859; Harvela Investments V Royal Trust of Canada - 1987*).

### Acceptance

An unconditional assent to a definite offer.

### Distinction from Counter-Offer

A response to offer which introduces new terms or conditions is a 'counter-offer' not an acceptance.

A counter-offer prevents later acceptance of the original offer (*Note, Hyde V Wrentch - 1840*).

A request for information which is not a counter offer does not have this effect (*Note, Stevenson, Jaques & Co. V McLean - 1880*).

### Battle of the Forms

Exchange of incompatible terms between businesses may make it difficult to identify an agreement. Courts have generally used traditional 'offer and acceptance' analysis (*Note, Bulter Machine Tool Co. Ltd V Ex-Cell-O Corporation - 1979*). Also Note recent broader approach in *Trentham V Archital Luxfer - 1993*.

### Methods of Acceptance

Acceptance may be achieved by various means:

#### I **Acceptance by conduct:**

This is possible, as in *Brogden v Metropolitan Rly -1877*, provided the offeror is aware of the acceptance.

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### I **Acceptance by Silence:**

This is not generally possible (*Note, Felthouse V Bindley - 1863*).

### I **Acceptance by Post:**

Acceptance will take place on posting (*Note, Adams V Lindsell - 1818*) unless:

- i. use of post is unreasonable (*Note, Henthron V Fraser - 1892*); or
- ii. the offeror has required actual communication (*Note, Holwell Securities V Hughes - 1974*).

### I **Acceptance by Private Courier:**

There is no authority on this. It is not clear whether the *Adams V Lindsell* rule would apply.

### I **Acceptance by Electronic Communication:**

'Instantaneous' communications, such as telx, take effect at the point of receipt (*Note, Entores V Miles Far East Corporation - 1995*). The time at which they take effect is not settled (*Note, The Brimnes - 1975, and Brinkibon Ltd V Stahag Stahal - 1983*).

### I **Acceptance in Unilateral Contracts:**

If acceptance equals completion of performance, can the offer be withdrawn before the performance is complete (*as suggested in Great Northern Rly V Witham - 1873*), (*Note, Errington V Errington - 1952*) and *Daulia V Four Millbank Nominees - 1978*). which suggest that, at least where the offeror is aware of the attempt to perform, withdrawal of the offer will not be allowed.

### I **Acceptance in Ignorance of the Offer:**

The general view (*despite Gibbons V Proctor - 1891*) is that the person accepting must be aware of the offer, though this need not be the sole motive for acting (*Williams v Cawardine - 1833*). *Tinn V Hoffman - 1873* suggests that cross-offers do not make a contract.

### I **Acceptance & the Termination of an Offer:**

The general rule is that an offer can be revoked at any time before acceptance (*Payne V Cave - 1789*), even if there has been a promise to keep it open (*Routledge V Grant - 1828*).

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Withdrawal of the offer must be communicated (*Byrne V Van Tienhoven - 1880*), though this may be done via a third party (*Diskinson V Dodds - 1876*).

An offer may also lapse after the expiry of a specified, or reasonable, time (*Ramsgate Victoria Hotel V Montefiore - 1866*).

## Revocation of Acceptance

Revocation of Acceptance is not normally possible. The only exception may exist in relation to postal acceptances while they are still in transmission. There is no English authority on this - compare *Dunmore V Alexander - 1830* (Scottish Case, revocation possible), with *Wenckheim V Arndt - 1873* (New Zealand) and *A to Z Bazaars (Pty) Ltd V Minister of Agriculture - 1974* (South Africa) (both of which suggest revocation is not permissible).

## Certainty in Offer & Acceptance

If an agreement is uncertain on some important issue, or leaves it open to be decided, the courts will hold that there is no contract (*Scammell V Ouston - 1941*). This does not prevent contracts to pay a 'reasonable price' for goods or services.

## Meaningless Phrases

A meaningless phrase which can be excised without affecting the agreement will not prevent a contract (*Nicolene V Simmonds - 1953*).

## Incomplete Agreements

An 'agreement to agree' will not be enforced (*Courtney and Fairbairn Ltd V Tolaini Brothers - 1975*), unless the contract itself contains a method for determining the matter left open (*Sudbrook Trading Estate V Eggleton - 1982*).