

ACCEPTANCE AND COUNTER - OFFER

The normal method of accepting an offer is by communicating the acceptance to the other party.

Remember that sometimes it may be difficult to decide precisely which is the offer and which the acceptance but providing the parties are agreed on the terms and act on them the Courts will find a contract.

AGREEMENT BY CONDUCT

Even if the parties have not communicated agreement in words they may have by their conduct.

Brogden v Metropolitan Railway Co. [1877] 2 App Cas 666 (HL)

Brogden supplied the defendants with coal for a number of years, without a contract. The parties wanted to formalise the arrangement. The company's agent sent Brogden a draft agreement, having inserted the name of an arbitrator in a space left blank for that purpose. The company's agent signed and marked it as approved then left the contract in his desk without completing it. Both parties acted on the strength of the contract until a dispute arose, Brogden denied any binding contract existed.

When was the contract made?

signing it,
returning it,
the agent receiving it,
ordering the coal,
delivering the coal?

Held - *The House of Lords*, There was an intention to accept the contract and the contract came into existence, either when the company ordered its first load of coal from Brogden, or when Brogden supplied it.

Even if some of the terms are missing agreement may be inferred from conduct.

Hillas & Co. Ltd. v Arcos Ltd. [1932] 147 LT 503, [1932] All ER Rep 494

Hillas agreed to buy wood from Arcos (1930) with a written agreement to buy next year. Didn't specify; type, port of delivery or size of shipment.

Held - House of Lords, Because of a previous agreement, the option showed sufficient intention and could create a binding obligation.

However this is not always possible

Scammell v Ouston [1941] AC 251, [1941] 1 All ER 14

Ouston wanted to buy a new vehicle, order was given on the understanding that balance could be paid by HP over two years. Scammell accepted, HP terms were never determined.

Held - House of Lords, No precise meaning could be attributed to the clause, as HP terms varied widely. The level of vagueness rendered the contract unenforceable, especially as there were no previous dealings between the parties to rescue the contract.

The contrast is instructive. In the first case there was a pattern of dealing in a commercial environment so that the judges could strive to give effect to what appeared to be an agreement. In the second there was no pattern and the number of possibilities was endless.

"Businessmen do not share the lawyer's desire for certainty and precision and may deliberately avoid using precise terms, either as a result of familiarity, trust and knowledge of trade custom and practice, or in order to avoid disagreement."

Bradgate & Savage, Commercial Law

Nicolene Ltd. v Simmonds [1953] 1 All ER 822, [1953] 1 QB 543

Plaintiffs wrote to Defendant, offering to buy steel bars. Defendant replied in writing that he would be happy to supply them, and thanked the plaintiffs "for entrusting the contract to me".

He added "usual conditions of acceptance apply" Plaintiff acknowledged the letter and said they would await the goods, but made no reference to the clause. Defendant failed to deliver, Plaintiff sued for breach of Contract.

Held - Court of Appeal, There were no usual conditions of acceptance. The words were therefore meaningless and must be ignored

The result may be summarised that, if an outsider, who is knowledgeable in the trade, would consider an agreement exists it will be held to exist.

COUNTER - OFFER

A counter - offer immediately terminates an offer so that it can no longer be accepted.

Hyde v Wrench [1840] 49 ER 132

| | |
|---------|--|
| 6 June | Wrench offer to sell his estate for £1 000 |
| 8 June | Hyde offered to buy for £950 |
| 27 June | W refused £950 |
| 29 June | H said he would buy for £1 000 |

Wrench rejected it and Hyde sued for breach of contract

Held - Original offer rejected A counter offer negates the original offer, therefore no contract existed.

However not every query will amount to a counter-offer as it may be possible to request information without the request changing terms.

Stevenson v McLean (1880) 5 QBD 346

The defendant offered to sell iron at 40 shillings a Ton, open till Monday. Early on Monday the plaintiffs sent a telegram "*please wire whether you would accept 40 for delivery over two months, or if not longest limit you would give?*"

No reply was received so a further telegram sent by plaintiff to defendant accepting the original offer.

The defendant maintained the 1st telegram was a counter offer, which destroyed the original contract.

Held - It was a request for information, not a counter offer.

CONDITIONAL AGREEMENT

In normal circumstances if there are any conditions put on an agreement there is no contract. So an agreement

"subject to contract"

is not a contract.

However, it is fairly common for major commercial contracts to be entered into with a proviso that a full contract document will be entered into at a later date.

Branca v Cobarro [1947] KB 854, 2 All ER 101CA

A vendor agreed to sell the lease and goodwill of his mushroom farm, the parties signed a document which contained the terms of the agreement, the document stated "this is a provisional agreement until a fully legalised agreement is drawn up by a solicitor embodying all the herewith conditions", Purchaser sued for return of his deposit.

Held - There was an immediate and binding contract despite the use of the word "provisional".

All major construction contracts are entered into on this basis as the existence of a deed, a formal document signed and sealed by the parties, doubles the period of liability from 6 years to 12 years.

To avoid any doubt this is achieved by inserting in the original tender documents a requirement that the contract will be formalised. This is not an agreement to agree, which is not a contract, but a series of documents which together contain all the terms of a contract specifying a future formal document embodying the series of documents.

Trollope & Colls Ltd. v Atomic Power Constructions Ltd. [1963] 1 WLR 333, [1962] 3 All ER 1035

Power Station construction: parties negotiating for some time and agreed nearly everything, in order to get things moving, decided contract would start on the site and continued negotiating. They never reached agreement on outstanding points.

Question for the courts: what is the contract?

Held - Contract consisted of everything they had agreed on, what they had not agreed on, was blank and did not exist.

This can cause problems if relied on, particularly if ultimate agreement is not reached.

British Steel Corporation v Cleveland Bridge and Engineering Co. Ltd. [1984] 1 All ER 504

Cleveland Bridge had a contract for a steelwork to build a bank in Saudi Arabia. It required 144 steel nodes, they asked BSC for a quote for supply, BSC said

they could supply & required a contract, a clause in the proffered contract held that BSC were "liable for losses incurred to C/bridge by late delivery. BSC rejected contract with this term, while this negotiation went on, BSC designed and manufactured 143 nodes, dispatched them to Saudi & they were used in the bank's construction. The last one node sat on dock for dispatch when BSC went on a 3 month strike. Building of the bank was delayed, the strike ended, the last node sent & BSC sent a bill to C/bridge. C/bridge sent bill for late delivery & costs to BSC that which more than BSC's Bill.

Held - No contract, CBE forced to pay on a Quantum Merit basis (*for what it's worth*). No research costs to BSC.

The result is that, whilst the formal tender with subsequent sealed contract is good practice, it is bad practice to start work with major items left undecided.

PERIOD TENDERS

One area in which both commercial and public organizations can hit problems is the supplies tender.

Brogden v Metropolitan Railway Co. [1877] (above)

As there was no contract until an order was placed for a specific amount, the supplier can withdraw the offer at any time.

The answer, often, is the collateral contract. Namely a contract, the consideration for which is entry in to the main contract.

A Collateral contract

A *collateral contract* is one where the parties to one contract enter into or promise to enter into another contract. Thus, the two contracts are connected and it may be enforced even though it forms no part of the original contract.

According to Lord Denning MR in the case of *Evans & Sons Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078 a collateral contract is

'When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, we hold that it is binding'.

Thus, no term of the collateral contract is found in the original one, but nevertheless it is enforceable for the original one.

A collateral contract usually takes the form of a unilateral contract. A unilateral contract is where only one party to it makes a promise. This promise is usually in

the form of doing something in return for something else. The offer and acceptance of the agreement is the original intention of the first contract that is in place. The consideration of the collateral contract is the promise to enter into the original agreement. Whereas in a three way agreement it can be used as a means to evade the notion of privity.

A collateral contract was evidenced in the case of

Shanklin Pier v Detel Products [1951] 2 KB 854.

In this case the plaintiffs who were owners of a pier and were promised by the paint manufacturers, who were the defendants, that their paint had a life span of seven years. This was said it was an attempt to induce the plaintiff into buying the defendant's paint.

Due to this representation the plaintiff instructed contractors to purchase the paint and use it to decorate the pier. This was duly done, however the paint only lasted three months. The plaintiff's did not appear to have a remedy as they had not provided the defendants with any consideration for the promise. The only contract in force was between the defendant and the decorators for the purchasing of the paint, this did not include the plaintiffs. However, it was held that the plaintiffs could recover damages on the basis of a collateral contract.

It was held that the consideration for the promise as to the life of the paint was sufficiently inductive to render it effective in the chain of purchase. The contract in existence in this case was to purchase paint in order to re-decorate the pier.

Thus, a collateral contract is a creation of the courts to allow certain pre-contractual comments to be relied upon in the event of a dispute.