Contracts

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CONTRACTS

CHAPTER 1: INTRODUCTION

- Contract: an agreement giving rise to obligations which are enforced or recognized by law

The Components of a Contract

- An agreement: an agreement is composed of an offer to enter into a contract and an acceptance of the offer
    - **An offer**: an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed
    - **An acceptance**: a final and unqualified expression of assent to the terms of an offer
        - The promises contained in the agreement are known as **terms**. The informing idea behind a contract is that there has been a **meeting of the minds** – that the parties have agreed on what their essential obligations are to each other
- Must be complete: this means the agreement must be complete, which means it is certain
    - Example: know who the parties are, what the matter is about, what the potential purchase price is, etc. This comes down to reasonableness
- Deliberate: the agreement must be deliberate, meaning that both parties want to enter into a contractual relationship. This matter is formally known as an *intention to create legal relations.*
    - Intention to create legal relations means that the parties made the agreement in contemplation of it having legal consequences
- Voluntary: the agreement must be freely chosen and not involve coercion or other forms of serious unfairness
- Between two or more competent persons: those who enter into a contract are known as *parties* to the contract. There must be at least two parties to any contract, who *must have legal capacity*
    - As a general rule, only parties to a contract can sue and be sued on it
- Supported by mutual consideration: a contract involves a bargain or exchange between the parties. This means that each party must give something of value in the eye of the law in exchange for receiving something of value from the other party
    - This bilateral element means there is mutual consideration
- Not necessarily in writing: as a general rule, even oral contracts are enforceable, though it is preferable for negotiators to get the contract in writing
    - In most Canadian jurisdictions there are certain kinds of contacts (like those involving an interest in land) that must be evidenced in writing to be enforceable

Notes:

- **Balance of probabilities:** the plaintiff has to show on a B of P that there is a contract between the parties in order to sue
    - This burden of proof falls on the plaintiff
    - B of P is 50% certainty plus a bit

Classical Theory of Contract

- The idea that there is a stable body of doctrine containing general principles relevant to all contracts. Concepts include:
    - That the law could be reduced to a statement of rules
    - That the law was concerned with the objective manifestation of agreement and not the parties' private thoughts
    - That freedom existed for people to contract as they choose
    - That contractual liability was strict once a bargain that the law recognized as a contract was struck
- In reality, the free market overlaps and exists in tension with public regulation, markets are not left to operate untouched by democratic processes, and problems of racism and sexism in contracts, or the refusal to form contracts, exists
    - **The doctrine of unconscionability** offers some protection from unfair bargains by insisting upon individual responsibility to avoid taking advantage of inequality
    - **The doctrine of good faith** was shown in the decision in *Bhasin v Hrynew* and recognized a duty of good faith and honest performance

Freedom of Contract:

- This is focused on the voluntary choices of individuals. The role of the law of contracts was conceived principally as a facilitation of voluntary choices by giving them legal effect
- However, the law has always placed some express limits on the pursuit of self-interest
    - Example: the law protecting those who are presumed to transact at a disadvantage, like youth or those with a mental disability
- Another limitation on this is a **fiduciary**, a person who occupies a position of trust and confidence
    - Because fiduciaries have expressly or impliedly undertaken to do so, they are required to relinquish their self interest and act solely on behalf of another
    - A fiduciary duty places the strictest limitations on the pursuit of self-interest
    - Example: the relationship between a trustee and a beneficiary

INTRO TO DAMAGES

- Contractual measure of damages:
    - The plaintiff is entitled to be put in the position they would have been in had the contract been performed
- Duty to mitigate:
    - The law imposes a duty on the plaintiff to mitigate loss

    - A plaintiff can only recover for unavoidable losses – a plaintiff will not be able to recover to the extent that they have failed to act reasonably to limit or reduce their loss caused by the defendant's breach
- Types of damages:
    - **Expectation:** this measure aims to put the innocent party in the position they would have been in had the contract been fulfilled
    - **Reliance:** this measure aims to put the innocent party in the position they would have been in had they not entered the contract
        - To permit recovery of losses incurred due to reliance on the contract
    - **Restitution:** this measure aims to give back what the innocent party transferred to the contract breaker
        - To have a claim here you need to show three things: an enrichment, a corresponding deprivation, and the absence of a juristic/legal reason justifying the enrichment

Chapter 2: Offer and Acceptance

INTRO

- The rules of offer and acceptance are tools of analysis to assist in defining the "moment of responsibility", rather than *a priori* statement that can be blindly applied in a variety of circumstances
- Current common law rules on offer and acceptance are not the only options, many other reasonable alternatives
- **Invitation to treat:** an expression of willingness to do business. The party does not make the offer but invites the other party to do so
- **Offer:** an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed
- **Offeror**: the person making the offer
- **Offeree**: the person to whom the offer is addressed

Canadian Dyers Association Ltd v Burton (1920)

- Facts: In May of 1918, Canadian Dyers Association (CDA) wrote to Burton and asked for a quote of the lowest price for the property on 25 Hanna Avenue. Burton replied on June 6th stating a price of $1 650 was the lowest he would sell at. On October 16th the following year the CDA wrote Burton again asking for the price. October 21st Burton responded saying previous price remained the lowest offer. CDA interpreted this as an offer and accepted by sending a cheque for $500 on October 23rd. On the 27th Burton's solicitor sent a draft deed, suggesting a closing date of the 1st. On the 5th of November Burton's solicitor wrote to the CDA stating there was no contract and returned the $500
- Issue: Did the words and actions of the defendant constitute an offer?
- Reasons:
    - Merely quoting the price does not manifest an intention to sell
    - Middleton held that the letter which was more than a mere quotation of price, but rather a statement of the price at which Burton was willing to sell
    - This constitutes an offer as it indicates a readiness to sell

- Burton's conduct after Oct. 23rd suggested a contract had been made – he didn't send out a letter denying the sale but rather wrote up a draft deed, did a title search and suggested a closing date
    - Need to be cautious when considering conduct following an offer, because the person's conduct can't 'travel back in time' and affect the contract
    - Policy rationale to look at subsequent conduct: could lead to the issue of buyers remorse where a dishonest person could alter their subsequent conduct in order to escape the offer
    - For this reason subsequent conduct is generally irrelevant, but some exceptions made
- Holding: Held for the plaintiff. Burton's words and actions constituted an offer
- Ratio: Created the **Dyers test for assessing contractual intention**
    - An apparent intention to be bound may suffice to create a contract. The alleged offeror may be bound if his words or conduct are such to induce a reasonable person to believe that he intended to be bound, even though in fact he has no such intention
    - Subsequent conduct is generally irrelevant because of policy rationale – could lead to issues of buyer's remorse where a dishonest person could alter their conduct to escape the offer
    - **Difference between *Dyers* test for an offer versus invitation to treat:** comes down to intention, and whether a proposal is to be construed as an invitation to deal or as an offer. This depends on the language used and the circumstances of the particular case

Harvey v Facey [1893]

- Facts: Would-be purchasers (the plaintiffs) sent a telegram asking the would-be vendors (the defendant) these two questions: "will you sell us BHB (the name of the property)? Telegraph your lowest cash price". The defendants responded by saying, "Lowest cash price for BHP is 900 pounds".
- Issue: Was there an offer?
- Reasons:
    - Facey had not directly answered the first question as to whether they would sell and the lowest price stated was merely responding to a request for information not an offer
    - There was thus no evidence of an **intention** that the telegram sent by Facey was to be an offer.
- Holding: The Privy Council held that there was no contract concluded between the parties
    - BUT Justice Russell criticized this case, said that the JCPC construed the telegrams in such a narrow grammatical sense that was so contrary to their obvious meaning and the obvious intention of the parties as to shock one's intelligence and one's sense of fairness
- Ratio:
    - **A quotation of price does not evidence an indication to sell**
    - This case defines when there is an offer versus an intention to treat

RULES GOVERNING OFFER AND ACCEPTANCE

A. Retail sales: The Display of Goods (*Boots*)
B. Advertisements of rewards/advertisements of unilateral contracts (*Carlill*)
C. Advertisements of bilateral contracts (*Goldthorpe*)
D. Tenders (old law pre *Ron Engineering,* new law in *Ron Engineering*)

Pharmaceutical Society of Great Britain v Boots Cash Chemists

- Facts: Defendants operated a self-service pharmacy that sold drugs that had substances in them that were in the Poisons List. When the pharmacy was open the pharmacist and other workers were in the building, and the pharmacist was stationed near the poisons section. A sign was clearly displayed showing his registration, and in every case where a drug was sold the pharmacist supervised the transaction
- Issue: Did the sale of the substances on the Poisons List by Boots transpire by or under the supervision of a registered pharmacist as required by the *Pharmacy and Poisons Act,* 1933?
    - This depends entirely on where the contract was formed
- Reasons:
    - Plaintiffs alleged the purchase was complete once a customer puts an article into their bag, and therefore the contract was complete at this time, disallowing the pharmacist from preventing the drug from being sold to customers as occasionally required under the Act
    - Court ruled that the contract is not completed until the customer has indicated to the shopkeeper what they need and the shopkeeper accepts the offer
    - If this was not the case, then customers could be bound to the contract of the object once it is in their basket, and then could be unable to substitute it for another object
    - If a display of goods in a window were an offer, the shopkeeper could be forced to contract with virtually anyone
- Holding: In favour of the defendant
- Ratio: **establishes the general rule that a display of price-marked goods in a store window/on a store shelf is not an offer to sell at that price, but an invitation to treat**

Unilateral and Bilateral Contracts

1) Unilateral contract: where a party makes an express engagement or undertakes a performance, without receiving in return any express engagement or promise of performance from the other.
    a. The essence of this contract is that neither party is bound until the promisee accepts the offer by performing the proposed act
    b. Consists of a promise for an act, the acceptance consisting of the performance of the act requested rather than the promise to perform it
2) Bilateral contract: a contract in which the contracting parties are bound to fulfill obligations reciprocally towards each other
    a. The contract is formed by exchange of promises in which the promise of one party is consideration supporting the promise of the other, as contrasted with a unilateral contract which is formed by the exchange of performance for an act

- In a unilateral contract only one party (the promisor) is bound to perform because only one party has made a promise. In a bilateral contract both parties are bound to perform as both have made promises

Carlill v Carbolic Smoke Ball Co

- Facts: the defendants were the proprietors of a medical preparation called "The Carbolic Smoke Ball", and placed an advertisement in a newspaper stating that they would give a $100 reward to anyone who contracted a cold after having used the smoke ball three times a day for a period of two weeks. The plaintiff bought the smoke ball and used it as directed for three weeks, and then caught a cold. She held that she was entitled to the $100
- Issue: Is there a contract between the parties such that Mrs. Carlill is entitled to be paid 100 pounds?
    - Was the ad merely "puff"?
- Reasons:
    - The ad was not a unilateral offer to all the world, rather an offer restricted to those who acted upon the terms contained in the ad
    - Satisfying the conditions for using the smoke ball constituted acceptance of the offer
    - Use of the smoke ball and payment were both forms of consideration (detriment and inconvenience sustained at the request of the offeror), and people buying the smoke balls by relying on the ad was a clear benefit to the company
    - Company's claim that the money was already in the bank showed the serious intention to be legally bound
    - The company waived its rights to be notified of acceptance as they really just want to hear from you once you've gotten sick after using (completing the necessary condition)
- Holding: In favour of the plaintiff
- Ratio: **Advertisements of rewards for returned property are "invariably" treated as offers. So are advertisements of unilateral contracts generally**
    - **An advertisement can constitute a unilateral contract, which can be accepted by fulfilling the conditions of the contract; no formal acceptance required**

Note: Harrier Fighter Jet ad as an example of a unilateral contract, but of "puff"

Goldthorpe v Logan

- Facts: Plaintiff had hairs on her face and wanted them removed. Saw an advertisement by the defendant Logan, went to the business and consulted the defendant Fitzpatrick. She was told that her face could be definitely "cleared" and the hair removed permanently, and that the result was guaranteed. She underwent treatments but the hairs continued to grow as before. She claimed that the treatments by or on behalf of the defendants were unskilfully or negligently administered or should not have been administered at all, and that as a result she suffered damages. Husband also claims damages from the defendant based on suffering loss and expense.
- Issue: Is there a contract between Goldthorpe and Logan? Has it been breached?
- Reasons:

    - Through the advertisement, the defendants clearly communicated what the results would be and were careless in their promise – suggested no exceptions for their guarantees
        - The ad should be read in plain meaning.
    - The defendant pandered to the weakness of a distressed client; the strong cannot be allowed to prey on the weakness of the gullible or misguided (allusion to inequality of bargaining powers)
    - It was determined that an offer was made to the public, the plaintiff accepted the offer (communicated by conduct), and consideration was given in the form of detriment or inconvenience sustained by the plaintiff by undergoing the procedure
    - This was an ad for a bilateral contract, not a unilateral contract
- Holding: Judge ruled in favour of the plaintiff. Ordered to pay the sum of the treatments, as well as $100 in expectation damages. Action against Fitzpatrick and action on behalf of her husband both dismissed without costs.
- Ratio: **Advertisements of bilateral contracts are typically not held to be offers since further bargaining is contemplated**
    - **If you make an unqualified promise, you are bound by it (they are enforceable even if you try your best to deliver)**

Note on assessing damages:

- The court should not have awarded expectation damages and restitution damages in the way that it did in *Goldthorpe*
- What we have here is **double recovery** since she was awarded $100 in expectation damages and $13 in restitution
- This means Goldthorpe is recovering the $13 twice – the court should have either awarded $100 as the expectation damages and nothing else, or refunded the fee under restitution ($13) and deducted that same amount from the expectation damages ($87)
- This is because to get the value of a hairless face ($100), Goldthorpe would have had to spend $13

R v Ron Engineering & Construction (Eastern) Ltd

- Facts: Ron Engineering submitted a tender for $2,748,000 in response to the owner's call. Ron also gave a deposit in the amount of $150,000. Upon the owner opening the tenders, an employee of RE discovered that its tender was $632,000 lower that the next lowest tender because they had accidently omitted $750,000 from the total sum. RE immediately informed the gov't of the error and initially asked to withdraw its tender. Gov't refused. Now and on the assumption that the bid was an offer, RE is saying that its tender is incapable of being accepted
- Issue: Is there a contract? Can RE get its money back?
- Reasons:
    - Under the old law:
        - Invitation to tender was the invitation to treat
        - Submission of the bids was the offer
        - Choosing the best bid was the acceptance
    - Under the **new law created** here

        - Offer of Contract A is the invitation to tender. The content of Contract A contains the rules governing the bidding process. This contract typically provides for the irrevocability of the bids and forfeiture of deposit
        - Submission of the tender is the acceptance of Contract A and an irrevocable offer to enter into Contract B. Contract B contains the terms of the main agreement
    - The contractor accepted contract A when he submitted his bid in accordance with the terms, and it states that he has an obligation to enter into Contract B (construction contract). Accepting Contract A binds the contractor to enter into Contract B. The deposit was to ensure that the performance of the contractor of its obligations under Contract A, which it failed to live up to
- Holding: Appeal allowed, owner to keep the deposit
- Ratio: Bids at once become irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made, if such terms so provide
    - In many cases the submission of an offer in response to a call for tenders constitutes a contract separate from the eventual contract for the construction

Note: Mistake in Relation to the Law of Tender

- This is an extremely narrow defence – used in *Ron Engineering* to argue that there was no Contract A because of the mistake in tender
- Idea is that we don't want people to back out of a deal after it has been made by easily saying that they have made a mistake so it isn't a valid deal
- BUT if you know someone has clearly made a mistake, you can't snap up the offer you know isn't really there
- SCC says that we assess the situation when the tender has been submitted. The tender has to show itself as deficient at that very moment
- The error has to be so clear that a person knows immediately by looking at it that it is wrong for it to fall under the category of mistake

MJB Enterprises Ltd v Defence Construction (1951)

- Facts: MJB submitted a tender in the context of a privilege clause that stated: "the lowest or any tender shall not necessarily be accepted." Defence awarded the tender to the lowest bid by Sorochan but Sorochan's bid was a non-conforming bid. MJB's bid was the lowest conforming bid.
- Issue: Can defence rely on its privilege clause as defence to MJB's action?
- Reasons:
    - The formation of Contract A, including if it is formed at all, depends on the intention of the parties. There are specific parameters that show intention (always needs to be a case by case analysis)
    - It is an **implied term** in tenders that only complying bids will be accepted and that Sorochan's bid didn't comply with the terms, so it can't be accepted
    - In accepting the disqualified bid the owner is in a breach of Contract A (outlined in (*Ron Engineering*)
    - Although the privilege clause does not overrule this obligation to only accept compliant bids, it does allow the owner to not simply accept the lowest bidder because of this the owner was under no obligation to contract with the plaintiff

- Holding: Appeal allowed. The contract with Sorochan is not binding, but the respondent does not have to contract with MJB
  - On a balance of probabilities the record supports the appellant's contention that as a matter of fact it would have been awarded the Contract B if Sorochan was disqualified, so the appellant is awarded damages
- Ratio:
  - A privilege clause is only compatible with accepting compliant bids
  - With a privilege clause you do not have to accept the lowest bid, but you cannot accept a deficient bid
  - This case is important because it confirms and clarifies Contract A and Contract B **(Contract A is bilateral, not unilateral)**

ACCEPTANCE OF CONTRACTS: INTRODUCTION

- Acceptance is a final and unqualified expression of assent to the terms of the offer
- Important principles regarding acceptance:
  1) **If purported acceptance varied in any respect with the terms of the offer, this is a counter offer**
  2) **A counter offer kills the original offer per *Hyde v Wrench***
  3) **An offeror can revive the rejected offer, including by implication, such that it can be accepted (*Livingstone v Evans*)**
  4) **A simple reject for information is not a rejection (*Livingstone v Evans*)**

Livingstone v Evans

- Facts: The defendant Evans offered to sell land to the plaintiff for $1800. The plaintiff, Livingstone, responded: "Send lowest cash price. Will give $1600." The defendant responded: "Cannot reduce price." Then the plaintiff purported to accept
- Issue: Is this acceptance effective? Is this a request for information or a rejection?
- Reasons:
  - Under *Hyde v Wrench* a counter offer constitutes a rejection – this is very firmly established
  - Because of this long standing precedent, Livingstone's first telegram is a counter-offer and an inquiry would have put an end to Evan's liability under
  - However, Evans' second telegram constitutes a renewal of the original offer and Livingstone's acceptance makes it a binding contract
- Holding: The judge held that there was a binding contract for the sale of land and the plaintiff is entitled to specific performance
- Ratio:
  - **The making of a counter offer is a rejection of the original offer**
  - **An offer can be renewed after a counter offer through ambiguous language**

BATTLE OF THE FORMS

- Agreements are commonly entered into because between parties via standard form contracts. Each party may have a document that purports to set out the terms of the contract
- Battle of the forms determines whose terms triumph

(Per Denning LJ in ***Butler Machine Tool Co Ltd***)

TRADITIONAL APPROACH	FIRST BLOW	SHOTS FIRED ON BOTH SIDES
• Apply the 'mirror image' principle of acceptance: each successive form is a counter offer and it is possible that no consensus is ever reached if only forms have been exchanged • Apply the **last shot rule:** if the last form utilized is followed by conduct by the other side which amounts to acceptance, there is a contract the terms of which are contained on the last form • The party who 'fires' the last document prevails	• Party prevails who offers terms first unless the other side draws material changes in their terms to the attention of that first party	• The terms and conditions of both parties are to be construed together • If the differences are irreconcilable so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication • The agreement would be constituted by the terms that are common to their respective forms, together with implied reasonable terms

- Virtue of the mirror image/last shot rule: certainty
    - Under mirror image, a contract only comes into existence when the forms exactly match; alternatively and based on the last shot rule, the terms are those contained in the last document preceding performance by the other side
- Problems with the traditional approach:
    - Where only forms are exchanged the conclusion will be that no contract has been formed, even though the parties may regard themselves as having been bound at the time
    - When there has been delivery, the last shot rule can produce arbitrary results
    - Overall, the virtue of certainty is attained by ignoring reality and mechanically rendering formalistic decisions

Butler Machine Tool Co v Ex-Cell-O Corp (1979)

- Facts: On May 23, 1969, in response to an inquiry by the buyers, the sellers quoted a price for a machine tool for 73 pounds. On the back of their offer was a number of terms and conditions, which stipulated that they were to "prevail over any terms and conditions in the buyer's order". One of the conditions purported to allow the seller to charge the buyers the price for the machine prevailing at the time of delivery. The buyers replied by placing an order for the purchase of the machine. Their document stipulated that the order was subject to terms and conditions that differed from those put forward by the sellers and didn't make any provision for the increase in price. The sellers completed and returned the form with these conditions, stating that the order was being entered in accordance with the seller's quotation from May 23rd. When the sellers came to deliver the machine they claimed to be entitled to additional money under the price formula of their offer. The buyers said that their own order prevailed and there was a fixed contract
    - Basically Butler (seller and plaintiff) says it's owed more money via a price escalation clause. Ex-Cell O Corp (purchaser and defendant) says that no further money is owed because the price escalation clause is not part of their contract of purchase and sale
- Issue: Whose terms triumph?
- Reasons:
    - Denning says that facts are critical – we can't look at the law in abstraction, need to look at the law in combination with the particular facts
    - **The last shot method is used** here. May 23rd is seen as an offer, May 27nd is a rejection of the offer and a counter offer by the buyer. June 5th could be acceptance of the May 23rd counter offer, but they included a cover letter saying they are entering the buyer's order in accordance with the seller's quotation of May 23rd
    - June 5th is the decisive document as the cover letter doesn't change anything, it agrees to go through with the arrangement based on the purchaser's terms
- Holding: The court allowed the buyer's appeal. It found that the buyer's order was not an acceptance of the initial offer from the seller but a counter-offer, which the sellers had accepted by returning the signature section of the buyer's letter. On this basis, the court found that the contract was completed without the price variation clause and therefore the seller could not increase the cost of the tool.
- Ratio: Battle of the forms tests by Denning

Tywood Industries Ltd v St Anne-Nackawic Pulp and Paper Co Ltd

- Facts: The plaintiff (Tywood, the seller) brought an action for the price of goods sold, and the defendant (St. Anne, purchaser) argued that the agreement of sale contained a clause for submission to arbitration. The defendant's invitation to tender did not contain an arbitration clause, and a revised proposal was submitted to the plaintiff. When two purchase orders from the defendant were submitted, an arbitration clause was present
- Issue: Under whose terms was the contract formed?
- Reasons:
    - Judge found that neither party considered any terms other than those found on the face of the document (specifications and price) to be important

    - Under the classical model, St. Anne's contract would hold. Similarly under either a first shot or a last shot model, St. Anne would prevail. Grange, however, takes an interventionist tack. He wants to prevent inefficiency by working out what he thinks is a reasonable agreement between the parties.
    - Tywood imposed non-arbitrable conditions when they quoted initial price and never acknowledged St. Anne's terms. The defendant tried to smuggle in arbitration terms and did not complain when the purchase orders were not returned.
    - The conduct of the parties indicates both parties were interested only in the specifications and the price and that consummation of the business deal was paramount for the parties
- Holding: Application for stay dismissed, Tywood's terms prevail
- Ratio:
    - **If there is a discrepancy, look to the essence of the contract**
    - **One cannot sneak terms into contracts without proper notification**
    - **Look to actual conduct of business (do people really read the terms?)**
    - **Represents a move away from classical contracting model to reasonable contracting**

ProCD v Matthew Zeidenberg and Silken Mountain Web Services Inc

- Facts: Defendant bought a CD-ROM database with a license restriction, limiting the consumer-purchaser to non-commercial use. The existence of a license restriction was declared by shrinkwrap packaging but the terms were inside the packaging and not on the outside. Defendant ignored the license and resold the information on the CD database.
- Issue: Is Zeidenberg bound by the terms of the license when the terms were not known at the time of contract?
- Reasons:
    - The UCC (uniform commercial code) permits parties to structure their relations so that the buyer has a chance to make final decision after a detailed review. The customer inspected the package, tried out the software, learned of the license and did not reject the goods, which the customer could if the license was unsatisfactory
    - A buyer accepts, under 2-206 when after an opportunity to inspect the goods, he fails to make an effective rejection. Thus, the buyer had accepted and was bound to abide by the license as he had the opportunity to reject the license
- Holding: Held for ProCD. The buyer must comply with the license terms
- Ratio: If a buyer is presented with additional terms and offered the opportunity to reject and return the goods and subsequently does not reject the goods, then the buyer will have accepted those terms

ACCEPTANCE IN UNILATERAL AND BILATERAL CONTRACTS

- Acceptance is a "final and unqualified expression of assent to the terms of an offer"
- **Unilateral context**: acceptance is achieved by fully performing the act or forbearance. There is generally no need for the offeree to give advance notice of the acceptance to offeror

    - Whereas in a bilateral contract acceptance must be communicated
- Courts will endeavor to regard the contract as bilateral in order to protect the offeree pending complete performance (*Dawson v Helicopter Exploration Co*)

Dawson v Helicopter Exploration Co (1995)

- Facts: In 1931 Dawson had discovered and staked a mineral deposit in a remote area. In 1951 Dawson communicated several times with the respondent concerning the exploitation of his property. The respondent expressed interest in making arrangements the next summer to finance the staking of the claims, to which Dawson expressed interest. The respondent wanted Dawson to take him to the property and get a pilot to do so, and Dawson again agreed and offered to obtain a temporary release from his army position to do so. Month later the respondent replied and said that the unfavorable conditions meant Dawson shouldn't both making the trip and to make other arrangements. Later an exploration party of the respondent investigating the area and located showings reported by Dawson in 1931, and he made arrangements to enter into the development of the claims. Dawson did not find out until 1953
- Issue: Was there a breach of contract? This hinges on if the contract was unilateral or bilateral
- Reasons:
    - Springer said he wasn't in breach of contract because there was no contract as the March 5th document was an offer of a unilateral contract that could only be accepted by Dawson doing the thing requested
    - Courts say this isn't an offer of a unilateral contract because it doesn't simply contemplate an act done by Dawson and isn't a reward situation – both sides had to undertake things and Springer was supposed to participate in his own proposal (express obligations)
    - It was necessarily implied that Springer would participate. The offer was unconditional but contemplated a performance subject to a condition. Whether the primary obligation comes to fruition depends on contingencies
    - Springer was also in anticipatory breach
    - Demonstrates the existence of primarily and subsidiary obligations
- Holding: Held for the appellant
- Ratio: Relies on business efficacy to support the proposition **that whenever possible, courts interpret an offer as contemplating a bilateral rather than unilateral agreement**. This is done because **in a bilateral contract both parties are protected from a period prior to the beginning of performance on either side**

Note: This case is also an example of a **conditional contract**

- This is where the primary obligations (e.g. for Springer to give 10% interest and for Dawson to bring him to the site) are subject to conditions, and those conditions have to be fulfilled before the primary obligations are triggered
- There will be implied subsidiary contracts in this case – e.g. good faith efforts
- No standard for what constitutes effort for a good faith contract, need to apply the facts to determine what is reasonable (case by case basis)
- Condition subsequent: A rule in a contract that allows interest to be defeated if a specific event occurs or doesn't occur

RULES OF COMMUNICATION
(*Felthouse v Bindley)*

1) Communication of acceptance:
    a. Acceptance has no effect (is not complete) until it is communicated to the offeror
2) Purpose of the communication rule:
    a. To protect offeror – to the offeror know that they are in a contract
    b. To protect offeree – so the offeree does not have to take the trouble of rejecting every offer they receive
3) Exceptions to the general rule:
    a. Silence is acceptable as a means of acceptance in a unilateral contract because performance of the condition is sufficient acceptance without notification
        i. E.g. *Carlill v Carbolic Smoke Ball*
    b. If the offeror waived the communication requirement in a bilateral contract, assuming no prejudice to the offeree, the waiver is effective
        i. E.g. *Felthouse v Bindley* – questions about whether this case is correctly decided (Treitel doesn't think it is)
    c. If there is conduct by the offeree that evidences acceptance, this may constitute acceptance – seen where the conduct in question plainly signals agreement to the terms of the offeror
        i. E.g. Battle of the forms case law
    d. The offeree's silence can reasonably indicate acceptance to the offeror. Acquiescence by the offeree in receipt of the services permits the inference of an acceptance
        i. E.g. *Saint John Tug*

Felthouse v Bindley (1892)

- Facts: Plaintiff had discussed buying a horse from his nephew, but due to a misunderstanding the uncle thought he had bought the horse for 30 pounds, and the nephew thought the price was 30 guineas (one guinea worth a bit more then one pound). The uncle wrote the nephew on January 2nd offering to split the difference and stating that if he didn't hear anything back he would consider the horse his at 30 pounds. The nephew did not reply. On February 25th an auction sale was held and Bindley, the auctioneer, was instructed to reserve the horse in question from the sale but forgot to do this, so it was sold for 33 pounds. The uncle brought an action against the auctioneer for the conversion of the horse. At trial, the defendant objected that the property in the horse was not vested in the plaintiff at the time of sale by the defendant
- Issue: Did the nephew accept his uncle's offer, or was the horse still his at the time of the auction?
- Reasons:
    - Willes J says that there was nothing that had been done at the time of the action to imply that the property had changed hands to the uncle, and the nephew had not given acceptance
    - Because of no acceptance or implied acceptance, through actions, the property remained that of the nephew at the time of the auction and the uncle has no case against the auctioneer for conversion

    - If the nephew wanted to enter into the contract he should have given clear indication of his acceptance, which he failed to do
- Holding: Appeal allowed. Held in favour of the respondent
- Ratio: **One cannot impose an obligation on another to reject one's offer**

Saint John Tug Boat Co v Irving Refinery Ltd

- Facts: Saint John Tug Boat had a deal with Irving to supply them the use of their tugboats for assisting incoming oil tankers to their shipyard. However, with no firm arrangements having been made, Saint John told Irving that they could use their two tug boats if they paid $450/day to have them "on call" until a certain date. This date passed, and Saint John continued to keep the tugs on call and Irving continued to use them for a few months. When billed for these months after the original end of the contract, Irving refused to pay. Saint John sued for payment
- Issue: Did the defendant's course of conduct during the months in question constitute acceptance of the offers to give rise to a binding contract for the "stand by" services of the tug?
- Reasons:
    - After the original deadline passed, Saint John were essentially serving Irving a new offer every time they sent them an invoice and kept the tugs on call, and that Irving continued to imply acceptance by their continuation of using the service
    - Irving must have known that the tug was still standing by, and that Saint John expected to be paid for their services
- Holding: Held for the appellant
- Ratio:
    - **Silence can constitute acceptance when combined with conduct**
    - **If a party allows another party to work for them under such circumstances that no reasonable person would suppose the work was being done for nothing, then the first party will be liable to pay for it**
    - **The doing of the work is the offer, the permission to do it or the acquiescence of its being done is the acceptance**

Eliason v Henshaw (1819)

- Facts: On February 10th, 1813, a letter from Eliason to Henshaw was sent, offering to purchase flour from them at Georgetown at a price of 9 dollars and 50 cents a barrel sent to Harper's Ferry. They asked for an answer by the return of the wagon. The letter was delivered on February 14th, but the wagoner said he would not be returning to Harper's Ferry, so they despatched an answer by mail that left on the 19th to Georgetown. In this letter Henshaw accepts the offer at the earliest opportunity. On the 25th of February Eliason writes another letter stating that since they did not hear earlier and had expected a letter the next day, they no longer require the flour. Henshaw sued for non-performance
- Issue: Was a valid contract formed (offer accepted at the right place and time)?
- Reasons:
    1. The contract was no accepted within the proper time (not sent back by the wagon)
    2. The contract was not accepted in the right place (acceptance should have been sent back to Harper's Ferry, not to Georgetown)

3. The contract was not accepted in the right manner (should have been sent by wagon, but they sent by mail)

- Holding: judge holds that it was perfectly reasonable for Eliason to dictate the terms of the contract as such, finds that no contract was created so there is no breach of contract
- Ratio: **Offeree must follow the terms of the offeror (time/place/manner of acceptance) for an acceptance to be valid and binding**

Note: Common law rule versus consumer protection legislation

- *Weatherby* (1832): Jam was sent under circumstances showing that the offeror accepted to be paid. If you eat the jam you have to pay for it (took the benefit of the service), so under this rule the offeror can recover the price of the jam. This is the common law rule
    - Under consumer protection legislation - says that you aren't liable to pay for goods and services in these circumstances. Goes to the idea that you're delivered something that you'll have a deal unless you let them know to the contrary
        - Essentially reverses the common law rule

MAILED ACCEPTANCES

Household Fire and Carriage Accident Insurance Co. v Grant (1879)

- Facts: Grant had negotiated to purchase shares in Household Fire. His application was accepted, and his name was added to the list of registered shareholders. However, the letter informing the appellant of this never reached him and thus Grant never paid for the shares. His earnings from dividends were credited to his account. Eventually Household Fire went into liquidation and the liquidator applied for money from the appellant. He refused to pay on the grounds that he was not a shareholder – he had never received the notification in the mail and was not aware
- Issue: When do acceptances become binding when they are sent by mail?
- Reasons:
    - A contract becomes binding when the offer is sent through the post, the post office is seen as the agent
    - BUT an offeror can always make a contract where actual communication to themselves is necessary for the contract to be formed
    - If the rule weren't this way, it would open the doors to fraud and delay commercial transactions. The acceptor would never be safe in acting on the acceptance until he had received notice that the letter of acceptance had reached its full destination
- Holding: Held for the appellant
- Ratio: **The postal rule – contract becomes binding when the letter of acceptance is posted (this does NOT apply to rejections)**

Note: Deviations to the postal rule

- Criticism of the postal rule – seen as arbitrary, favours the offeree
- **The postal rule only applies if it is reasonable to use the post**
- **It can be excluded by the terms of the offer (*Howell Securities v Hughes*)**
- **The rule does not apply if it would produce an inconvenience and absurdity (*Howell Securities v Hughes*)**

Note: Deviations to acceptances

- If the offeror has specified the manner of acceptance, they can waive it themselves (can't waive the rights of others, but can waive your own rights)
- If the offer was accepted by means seen as an improvement to the method of acceptance, this still doesn't matter. Offeror can choose to waive this, but safest thing is to accept exactly as told

Howell Securities Ltd v Hughes

- Facts: Hughes granted Holwell a six-month option to purchase a property, and stated that the option had to be exercised "by notice in writing". Before the six months were up, Holwell's lawyer wrote to Hughes' lawyer stating that his client was exercising his option. The letter also included a cheque for the deposit, which was not accepted. Holwell's lawyer sent a copy of the letter to Hughes by mail, but it was never delivered. Hughes refused to sell the property and Holwell sued for breach
- Issue: Does the postal rule always apply?
- Reasons:
    - The postal rule does not always apply when the express terms of the offer specify that the acceptance must reach the offeror
    - It also generally doesn't operate if its application would produce manifest inconvenience and absurdity
    - The fact that the words "notice in writing" were included meant that Hughes required actual notice in writing
    - Still need the general elements of a contract (communication)
- Holding: Held for the respondent
- Ratio: **The postal rule does not apply when the terms of a contract point to the necessity of actual communication, even if the post is the desired medium of communication**
    - This case demonstrates a way to get around the postal rule
    - Remember that the onus falls on the offeror to make sure the postal rule doesn't apply, otherwise it applies by default

INSTANTANEOUS METHODS OF COMMUNICATION

Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH

- Facts: Brinkibon was a London company that bought steel from Stahag, a seller based in Austria. Brinkibon sent their acceptance to a Stahag offer by Telex to Vienna. Brinkibon later wanted to issue a writ against Stahag and applied to serve an out of jurisdiction party. They would only be able to do so if the contract had been formed in England.
- Issue: In what jurisdiction was the contract formed?
- Reasons:
    - This case follows the similar case of Entores Ltd. v Miles Far East Corp. which found that in cases of instantaneous communication, the contract is only complete when the acceptance is received by the offeror, and the contract is made at the place where the acceptance is received
    - In this case the acceptance was delivered to the offeror in Vienna, thus Austria has jurisdiction over the issue

    - No universal rule of acceptance can cover all cases of instantaneous communication – they must be resolved with references to the intentions of the parties, and the specific circumstances of the case
- Holding: Appeal dismissed
- Ratio: **Instantaneous communication rule – formation generally occurs in the place where acceptance is received (not necessarily a universal rule)**

Rudder v Microsoft Corp

- Facts: Plaintiffs brought a class action for breach of contract, fiduciary duty, misappropriation and punitive damages, alleging that Microsoft has charged members of MSN and taken payment from their credit cards in breach of contract and that Microsoft has failed to provide reasonable or accurate information regarding accounts. The Member Agreement contains the provision that it is governed under the laws of Washington, and that this is the venue for any dispute arising from MSN - the defendant Microsoft relies on this clause to support its assertion that the intended class proceeding should be permanently stayed
- Issue: Is the forum selection clause part of the contract and therefore enforceable?
- Reasons:
    - Forum selection clauses should be treated the same way as arbitration agreements (deference to arbitration agreements - greater commercial certainty)
    - Plaintiff's submission that the form in which the Member Agreement is provided obscures the forum selection clause, but the Court holds that there is no fine print as would be defined in a written document
- Holding: Held for the respondent.
- Ratio:
    - **Click-wrap agreements are valid. To not give them effect would lead to commercial uncertainty and undermine the integrity of any agreement entered into through this medium**
    - The onus is on the plaintiff to show strong cause to override a term of exclusive jurisdiction. In absence of a strong cause, an exclusive jurisdiction term will be enforced for the benefit of commercial certainty

Note: Instantaneous Methods of Communication

- The postal rule does not apply to acceptances made by some instantaneous modes of communication (e.g. telephone or telex). These acceptances are governed by the general rule that they must have been communicated to the offeror
- The reason why the postal rule doesn't apply is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that is up to him to make a proper communication, but a person who accepts by letter which goes astray might not know of the loss until its too late to make another communication
- For something like email, the effects of unsuccessful attempts to communicate should depend on whether the sender of the message knows (or has the means of knowing) at once of any failure in communication

TERMINATION OF AN OFFER

1) An offer is terminated by withdrawal/revocation
2) An offer can be revoked at any time before it is accepted (*Byrne*)
3) As a general rule, revocation has to be communicated to the offeree

TERMINATION BY REVOCATION

Dickson v Dodds [1876]

- Facts: Dodds makes a written offer to sell property, says he will keep it open until Friday. Dickinson hears from his friend that Dodds has been offering to sell the property to others, so Dickinson delivers his acceptance to Dodd's relative that day, who forgets to give it to Dodds. On Friday the plaintiff's agent found Dodds and gave him a duplicate of the acceptance, but Dodds had already sold the property
- Issue: Is Dodds in breach of contract?
- Reasons:
    - All we have is a firm offer, no consideration to hold the offer open (for an open promise to be enforceable we need an option contract)
    - Cannot accept an offer you know isn't open anymore. The Court says that you don't have to hear directly from the offeror, it is enough that withdrawal of the offer has been brought up
    - ALTHOUGH, Treitel is critical because it creates uncertainty. If you hear from the offeror that the offer is revoked, then that makes sense. But what the court is implying here is essentially just some talk that a person could hear is sufficient. **Treitel says that the rule is that you have to hear from a reliable third party source**
- Ratio:
    - **Revocation from a reliable third party source is effective. But revocation has to be communicated**
    - **An offer to sell property may be withdrawn before acceptance without any formal notice to whom the offer is made**

Byrne v Van Tienhoven [1880]

- Facts: On October 1st the defendants mailed an offer to sell 1000 boxes of tin plates to the plaintiffs at a fixed price. The offer was received on October 11th and the plaintiffs immediately accepted by telegram on the 11th and by letter on the 15th. On October 8th the defendant mailed a revocation of the offer, which was received on October 20th. The plaintiffs had already resold the tin plates on the assumption that they had purchased them. They brought an action for breach of contract and for failure to deliver
- Issues:
    - Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer is sent
    - Whether posting a letter of withdrawal is a communication to whom the letter is sent
- Reasons:
    - The withdrawal by the defendants on October 8th of their offer on the 1st is inoperative and a complete binding contract was entered into on the 11th, when the plaintiffs accepted the offer of the 1st

    - If the defendant's opinion was correct, then no person who had ever received an offer by post and had accepted it would know their position until they waited for some time to make sure that a letter withdrawing the offer hadn't been sent (commercial inconvenience)
- Holding: Held for the plaintiff
- Ratio: **An offer is only revoked by communication with the offeree, and the postal rule does not apply in revocation; while simply posting a letter counts as a valid acceptance, it does not count as valid revocation**

Errington v Errington and Woods [1952]

- Facts: The father bought a house for his son and daughter in law under his name and paid part of it in cash, but for the rest took out a loan that had to be repaid with interest. He told the daughter in law that if she continued to pay the mortgage payments, once it was fully paid off the house would belong to her and the son. Although she had continued to repay the loans to him, he died before it was paid off
- Issue: Can the offer be terminated even though performance has already begun?
- Reasons:
    - The father's promise was a unilateral contract (he made a collateral undertaking)
    - The promise could not be revoked once the couple entered on performance of the act, although it would cease to bind him if they left it incomplete and unperformed
    - The father expressly promised that the property would belong to them when the mortgage was paid, and impliedly promised that as long as they paid the installments they would be allowed to remain in possession (they acted on this promise so no one can disregard them from it)
- Holding: Appeal dismissed, no order for possession made
- Ratio: **Once performance has begun, the offer cannot be terminated. The amount of performance completed is irrelevant as long as it has been started**

TERMINATION BY LAPSE

Barrick v Clark [1951]

- Facts: Facts: Barrick owned farmland that Clark wanted to buy. They entered into negotiations, which resulted in Clark making an offer of $14,500. Barrick wrote back stating that the price was $15,000 and if the price was satisfactory the deal could be closed immediately. At this time Clark was away on a hunting trip. His wife received the letter and responded asking Barrick to hold the offer open until her husband returned in around ten days. Barrick did not reply. Thirteen days later, Barrick sold the property to someone else for $15,000. Clark did not return until twenty days after his wife received the offer. Clark sought specific performance of the alleged contract between him and Barrick
- Issue: What is the reasonable time an offer must be left open for before it lapses?
- Reasons:
    - The reasonable time that this specific offer must be left open for is longer than for goods that fluctuate in price (stocks) or for perishable goods. The fields could not be used until spring anyways

    - Although his actions and insistence on replying to Barrick's letters by wire, Clark indicated that he did not have a spring date in mind but wanted to get the sale done, or go to pursue other options. Barrick also did not respond to Clark's letter, so he was not bound to any particular period of offer
    - Leaving the offer open for 13 days was reasonable, as Clark had indicated that he wanted to accept and close the sale as soon as possible. What the wife said was irrelevant, as it is up to the offeror
    - Kellock, in a concurring judgment, discussed how much of the Court of Appeal's reasoning was based off claims that Barrick made concerning his intent to sell as soon as possible outside his communication with Clark. The offer by Barrick was clear that it should be dealt with swiftly, so the time frame was valid. He also stated that since the purchase-price was agreed to be paid on January 1st, only giving 2 weeks intervening between the receipt of acceptance and this date was entirely unreasonable
- Holding: Appeal allowed
- Ratio:
    - **The reasonable time to accept an offer can be determined from the conduct and language of the two parties, the nature of the goods and subject matter, the means to communicate the offer, and other reasonable indications**
    - **Lapse of an offer can occur after a reasonable amount of time has passed, under the right conditions, without notice to the offeror**

Chapter Three: Certainty of Terms

- **General statement of law: An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete**
- Although parties may have reached agreement in the sense that they requirements of an offer and acceptance have been complied with, there might not be a contract yet because the terms of the agreement are uncertain or because the agreement is qualified by reference to the need for a future agreement between them
- Two competing propositions:
    1. Courts will not make an agreement for the parties
    2. That is certain which is capable of being rendered certain
- Main question: if the parties have *consensus ad idem* – try to figure out if the parties are truly in agreement (share a unambiguous understanding of their respective rights and obligations)

VAGUENESS

- **General statement of law: Where the courts cannot determine on what terms the parties have purportedly contracted due to vagueness, the agreement is unenforceable.** That said, courts do not expect commercial documents to be drafted with precision and will (particularly if the parties have acted on an agreement) **do their best to avoid striking it down on the grounds that it is too vague**

- *R v CAE Industries Ltd:* If parties have expressed themselves in language sufficiently clear so as to have created rights and obligations, the court will enforce the contract especially where it has been partly performed
- *Hillas & Co v Arcos Ltd:* Vague words or phrases can be interpreted in light of what is reasonable

R v Cae Industries Ltd (1986)

- Facts: CAE Industries wished to take over and run an aircraft maintenance base no longer required by Air Canada and the Gov't of Canada. An agreement was made which contained many vague statements, but essentially states that although the base usually generated 700 thousand man hours per annum, the Government could not commit to guaranteeing more than 40-50 thousand – although they could use their "best efforts" to increase this number. The contract was formed, but the hours fell below 40 thousand and CAE sued for breach. They were successful at trial Crown appealed.
- Issue: Was a contract intended? If so, was it breached?
- Reasons:
    - Stone, writing for the majority, determined that the parties definitely intended to enter into a contract – particularly because they acted as if they did until the respondent brought this action (part performance as per Foley)
    - The onus is on the Crown to prove that the parties did not intend to enter into a contract and they failed to prove this. Stone then scrutinized all of the "uncertain" clauses cited by the Crown and determined that none of them are so vague as to render no meaning to the contract
    - He stated that in business relationships the courts must make every effort to interpret vague terms and determine their intended meaning at the time the contract was formed. He determined that the Crown guaranteed a certain amount of work, and this was not provided; therefore, the Crown breached the contract.
- Holding: Appeal dismissed
- Ratio**: In business relationships, the courts will make every effort to apply definite meaning to vague terms in a contract so as not to render it unenforceable; this is especially true if it is obvious that the parties intended to enter into a binding relationship, or if there was part performance**

Note: letters of comfort are often used in commercial loan transactions - these letters state that the parent company is aware of the loan provided and gives assurances of the continuing financial involvement. Often raise questions of whether the writer intends to create a contract, but in a SCC case it was concluded that the lack of precise language indicated that there was no contractual effect

INCOMPLETE TERMS

- Parties to an agreement may be reluctant to commit themselves to a rigid long-term agreement (particularly when prices affecting performance are likely to fluctuate). They attempt to introduce an element of flexibility into the agreement
- **The line between discovering an agreement of the parties and imposing an agreement on the basis of what the Court considers ought to have intended can be fine – court**

must be satisfied that the parties have actually concluded a contract, not just expressed willingness to contract in the future

- May have regard to what has been said and done, the context in which it was said and done, the relative important of the unsettled matter, and whether the parties have provided machinery for settling it

1. **Criteria or machinery specified in the agreement**
    a. **Criteria specified in the agreement:**
        i. An agreement may fail to specify matters such as price or quality, but lay down criteria for determining those matters
        ii. Example: in *Hillas* an option to buy timber was binding even though it didn't specify the price, since it provided for the price to be calculated by reference to the official price list
    b. **Machinery specified in the agreement:**
        i. The agreement may provide machinery for resolving matters originally left open
        ii. *Sudbrook Trading v Eggleton:* Lease gave tenant the option to purchase the property "at such a price as may be agreed upon by two valuers, one nominated by each party". The mechanism failed because the lessor refused to appoint a valuer
        iii. Issue: whether the price mechanism is an essential term (to distinguish from *May*) If it isn't an a reasonableness standard is consistent with the parties' intent, the court can set the price
        iv. The valuer's clause amounts to an agreement to sell at a reasonable price to be determined by the valuers. The stipulation that each party should nominate one of the valuers was merely subsidiary and inessential
        v. The agreement of a fair an reasonable price is more important than the machinery to get there

2. **Terms "to be agreed"**
    a. *May v Butcher:* agreements to agree are not enforceable
    b. *Foley v Classique Coach:* One of the mechanisms here had broken down but *May* was distinguished
        i. In default of an agreement, a reasonable price must be paid
        ii. The court appears to be saying that the presence of an arbitration clause on these facts means that it is to be implied in this contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality
3. **Agreements to negotiate**
    a. *Empress Towers*
    b. *Mannpar Enterprises:* where renewal clause is too broadly worded, it fails because there is no objective measure. All we have is an agreement to agree which is void
    c. *Mannpar* interprets *Empress* to say that there is a duty to negotiate in good faith if:
        i. There is a contract between the parties
        ii. A duty to negotiate in good faith is consistent with the parties' intent

iii. There is an objective benchmark against which the court can assess whether the party in question is in breach or not

May & Butcher Ltd v R (1934)

- Facts: Arrangement with a supplier and the Disposals Board for the purchase of surplus "tentage". The terms of the arrangement did not specify the prices to be paid, the dates on which payment is to be made, the quantities to be sold, or when delivery would take place
- Issue: Was a contract formed despite the lack of incomplete terms?
- Reasons:
    - It was impossible to agree to the prices, so we can't hold the Crown liable for a contract at a reasonable price or for the arbitration clause in the contract that was intended to garner a reasonable price
    - There was never a concluded contract by the parties - if a critical part of the matter is left undetermined there is no contract at all
    - There is nothing in the arbitration clause that enables a contract to be made
    - Parties not entitled to an offer for further parcels because the agreement is not binding, and the payment of the deposit was not for the appellants to have the right to this
- Holding: Appeal dismissed
- Ratio: **An agreement to agree is not a contract. A court cannot read terms into an implied contract**
    - An agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all

Hillas & Co v Arcos Ltd (1932)

- Facts: Hillas, an English timber firm, brought an action against Acros, the business representatives for the Russian government, for breach of contract to supply 100 000 standards of Russian timber during 1931. Under an agreement in 1930 on which the action was based, Hillas had agreed to buy 22 000 standards of timber and the price to be paid was determined in accordance with the seller's new "revised schedule", including a stipulation for reduction of the price in the event that the sellers prices were reduced during 1930. Clause 9 held that the buyers shall obtain the goods on conditions and at prices which give them a reduction of 5% against competing buyers. After this agreement was concluded, Acros entered into a contract with Central Softwood Buying Corporation Limited for the sale of its entire timber production for the 1931 season. Acros claimed the agreement had been cancelled with Hillas purported to exercise the option granted by clause 9
- Issue: Was the option provision a binding agreement for the purchase of timber?
- Reasons:
    - It is the duty of the courts to construe a contract fairly and broadly, but this doesn't mean the court should make a contract for the parties or go outside words used
    - The parties here don't fix precise dates for the shipments, but the court holds that this is okay because if differences emerge during consultation, the standard of what is reasonable can be applied by the law as a last resort

    - This is not a contract to enter into a contract - in law this doesn't exist, there is either an enforceable contract or no contract. Clause 9 simply means that the appellants had the option of accepting an offer in those terms
    - The only thing that had to be negotiated was the price, but this was because prices change yearly. In his judgment, Wright says that "words are to be interpreted so that subject matter is preserved not destroyed", a legal realist position focusing on the intention of the parties.
- Holding: Appeal allowed. A binding contract exists
- Ratio:
    - **A contract to negotiate is enforceable**
    - **The courts should intervene to determine the terms of an agreement through context and intentionality of the parties**
    - **This departs from the previous decision in *May* where the court held that missing terms result in a contract not being created**

Foley v Classique Coaches Ltd (1934)

- Facts: The defendants operated a fleet of motor vehicles. They agreed to purchase a piece of land from the plaintiffs, who operated a service station on adjacent premises. The sale was made subject to the defendants entering a supplemental agreement to buy all of the petrol required for their business from the plaintiff at a price to be agreed by the parties in writing and from time to time. This agreement included an arbitration clause. Later, the plaintiffs thought they could purchase their supplies for a cheaper price elsewhere so they attempted to dispute the agreement. The plaintiffs sought a declaration that the agreement was binding
- Issue: Was this agreement binding despite lacking an agreed upon price?
- Reasons:
    - Significant difference in the two cases prior. In *May* it was determined that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all, but in *Hillas* it was held that there was a contract despite missing terms
    - In this case the parties believed that there was a contract because they acted on it for three years. They also had an arbitration clause that related to the supply of petrol
    - There is an implied term in the contract that petrol should be supplied at a reasonable price
- Holding: Appeal fails. There was an effective and enforceable contract despite no definite price agreed upon
- Ratio: **Past performance will indicate that a contract is binding (reliance interest)**

AGREEMENTS TO NEGOTIATE

- Conceptual and policy reasons for concluding that parties to an agreement who have only agreed to agree aren't in a contract:
    - If there is no basis to determine the price for goods to be paid in the future, the judicial determination of a price at which the intended buyer is obliged to

purchase may well impose on that party a risk that they did not and would not have voluntarily assumed

- However, a binding promise to negotiate is often of real practical value because its fulfilment offers a greater likelihood that parties complete a transaction
- A distinction may be drawn between an agreement to perform a transaction on unspecified terms or on terms to be agreed, and an agreement to *negotiate* in an endeavour to arrive ay terms pursuant to which transaction will be performed
    - In the first case the subject of the agreement is the transaction itself
    - In the second, the subject of the agreement is the process by which it is hoped a transaction will be concluded
- Primary objections against the view that an express or implicit agreement to negotiate may in itself constitute a contract:
    - It is impossible to determine the content of a duty to negotiate
    - There is no basis upon which to determine damages for breach of such a duty

Empress Towers Ltd v Bank of Nova Scotia (1991)

- Facts: ET and BNS had a twelve-year lease agreement which was about to expire. The agreement stated that the price of rent for a renewed contract would be the prevailing market rate, conditional on the "mutual agreement" of landlord and tenant, and that in the absence of agreement, the contract could be terminated by either party. An employee of ET had been robbed in a branch of BNS of $30,000 and ET's insurance had paid only $15,000. This robbery was no fault of BNS. During negotiations, ET demanded $15,000 cash and the right to cancel BNS lease with 90 days notice (which is unreasonable). BNS refused. ET brought a petition for writ of possession against BNS for its office space. This was all at the end of the lease, with little response from ET to BNS's reasonable rent offers
- Issues:
    - Was the renewal clause valid or void for uncertainty?
    - Did it contain an implicit obligation to bargain in good faith?
- Reasons:
    - Lambert, writing for the majority, held there were two courses of action:
        - Follow May v Butcher - if there are things to be agreed upon then then there is no contract; or
        - Follow Hillas - the courts should strive to find meaning if there is an agreement between parties
    - He held that there were 3 approaches for determining rent:
        - Rent to be agreed (cannot be enforced)
        - Rent to be established by a formula, but no machinery to do so (courts will generally supply machinery)
        - A formula is given but it is defective (courts will cure the defect)
    - He interprets the section of the clause requiring the parties to agree on the rent to mean:
        - Empress could not be compelled to enter into a market rental value;
        - There was an implied term that the landlord negotiated in good faith; and
        - An agreement on the market rate would not be unreasonably withheld

- Implying these terms was acceptable for reasonability and for reasons of business efficacy. In the evidence adduce, Empress had no negotiated in good faith by adding the $15 000 "penalty"

- Holding: The clause was valid. It did contain an implicit obligation to bargain in good faith
- Ratio: **The courts will try, whenever possible, to give the proper legal effect to any clause that the parties understood and intended was to have legal effect."**
  - This case is special because it does not imply a third party to determine market rate upon disagreement of the parties, explicitly calls on good faith of parties. Not the same as saying that if they are undecided, to the courts to decide. Here, if the court were to intervene, would go against the will of the parties expressed in the K, which excluded intervention of the courts. Troublesome because usually when a contract does not have set price, it is not enforceable

Mannpar Enterprises Ltd v Canada (1999)

- Facts: Mannpar entered an agreement with the Crown to extract sand and gravel from an aboriginal reserve. The contract was to last five years with an option to renew for another five years subject to satisfactory performance amongst other things. Evidence indicates that both parties expected the project to last ten years. The Crown failed to renew the contract, and Mannpar took the position that they were repudiating their obligation to renew. Mannpar launched an action seeking damages
- Issue: Did the Crown have an obligation to negotiate in good faith?
- Reasons:
  - The language in the renewal clause allowed the Crown considerable flexibility. There was nothing in the clause to suggest an enforceable agreement, rather, it conveyed only an option to renegotiate if the Crown wanted to. Given their duty to the aboriginal band, it would have been reckless not to preserve such flexibility
  - The court distinguished this case from *Empress Towers v Bank of Nova Soctia* because**, here, there was no market value that could be assigned**. Without such an objective benchmark, the contract is unworkable. Furthermore, there was no arbitration clause in the contract, suggesting that the Crown intentionally left it out because they did not want to be bound for ten years
  - **The implication of a term can only be made if it is the case that both parties would be likely to agree that such a term should be implied** (e.g. to satisfy the officious bystander test, in order to give business efficacy to a contract). A court will not imply a term just because the court may think that such a term would be reasonable or likely to be more satisfactory
- Holding: Court ruled against Mannpar. No duty to negotiate in good faith

- Ratio:
  - **A right of renewal does not always imply a duty to negotiate in good faith**
  - This case is the authority for the general principle that there is no contract duty to negotiate in good faith - the concept of a duty to negotiate is unworkable in the absence of an objective benchmark or standard against which to measure the duty