FALL 2022 | CONTRACTS | LAW 410A

INTRODUCTION TO CONTRACTS

What is a Contract?

A contract is a legally enforceable promise

- Enforceable contracts require an exchange of values
    - Bargain theory of contracts = need to be an exchange of values, promises going both ways

Theories of Contract

1. **Moralist** – the state is justified in enforcing promisor's pre-existing moral obligation
    - We owe each other moral obligations to keep our promises as a matter of interpersonal morality, state is justified in enforcing interpersonal obligations
    - Key Questions:
        - Is the state in the business of enforcing interpersonal morality?
        - Is the state justified in enforcing other obligations we owe to each other in daily life?
    - Issues:
        - Cannot make sense of the fact that unilateral promises are not enforceable by the state through law
2. **Rights-based** – the state is justified in intervening to protect promisee's promissory rights
    - Prominent view is the corrective justice-based view
        - Individuals have natural rights that they acquire as the result of a promise being made and the state should have the authority to protect these rights
    - Key Questions:
        - Where do these rights come from?
        - Is there such a thing as a natural right?
3. **Instrumental** – the state is justified in enforcing promises as an instrument to promote overall social goods
    - Normative economic analysis of the law
        - Economists would say that those contracts/promises that ought to be enforced are the ones that maximize efficiency or overall welfare
    - Some indigenous views of contract have a social aim as well
        - Contract is an instrument to participating in the economic/social life of community
    - Key Questions:
        - What kinds of promises would be socially beneficial to enforce through the law?
    - Issues:
        - Does not accord with some views of contract
            - A social good has been undermined, is not a matter of being wrong in individual capacity

Freedom of Contract

Individuals are free to choose whether they enter a contract, with whom to contract, and on what terms

- The state should enforce contracts that parties have chosen to freely enter
- The common law often diverges from this ideal
    - Statutory modifications of contract law diverge from this basic principle
- When should we not enforce contracts even when freely entered into?
    - Inequality of bargaining power
    - Regulation of contracts to promote public values and aims

Private v Public Law

Private law (between individuals) vs. public law (between individual and state)

- Public law = constitutional, tax law, criminal law, etc.
- Private law = contract, tort, etc.

Contract law involves the coercion of the state, must be justified as a public matter

- Indicates that contracts should be viewed as a public matter
- Often regulated to promote public aims
    - Ex. Employment law, financial crises

Elements of a Contract

1. **Agreement**: a mutual promise and undertaking from two competent parties
    - **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
        - Given by offeror
    - **Acceptance of offe**r: a final and unqualified expression of assent to the terms of an offer
        - Given by the offeree
    - **Terms**: the promises contained in the contract
        - Need a meeting of the minds, agreeing on essential obligations of the contract
2. **Two competent parties**
    - Competence = legal capacity
3. **Consideration**: a bargain or exchange between the parties, each party must give something of value in the eye of the law in exchange for receiving something of value from other party
    - Bilateral agreement has mutual consideration
4. **Intention to create legal relations:** the agreement must be deliberate, meaning that both parties want to enter a contractual relationship to create legal relations
    - Intention means that parties made the agreement in contemplation of it having legal consequence
5. **Certainty:** the agreement must be complete, clearly set out for both parties to understand
6. **Voluntariness:** agreement must be freely chosen and not involve coercion or other forms of unfairness
7. **Sometimes in writing:** generally oral agreements are also enforceable though it is clearer, and thus preferable, that negotiators get a contract in writing
    - Oral contracts are prima facie binding
    - Certain contracts are required to be in writing

Remedies

1. **Primary remedy is damages** (monetary compensation)
    - **Expectation damages** = plaintiff is entitled to be put in the position they would have been in had the contract been performed
        - Default measure of damages
    - **Reliance damages**
    - **Restitutionary damages**
2. **Specific performance**
    - An order requiring performance or actual delivery of the good that was contracted
    - More common when contract is distinctive or unique
3. **Injunction**
    - Can come up in contract, more relevant in tort
    - Comes up where an individual keeps breaching a contract, gets an injunction order to stop from breaching of contract

Case decided on a balance of probabilities

- Plaintiff must show that on a balance of probabilities, there is a contract between the parties, and it was breached
- The burden of proof falls on plaintiff: 50%+1 chance that this case is valid and enforceable

Contract and Discrimination

Human rights legislation intervening to pursue some social aim beyond simply recognizing freedom of the contract

- Statutory and regulatory instruments

- Developments in common law

OFFER AND ACCEPTANCE

Prerequisite to contractual liability:
- Parties must have reached an agreement
- Offer and acceptance fixes the moment of responsibility

OFFER AND INVITATION TO TREAT

Offer
- Expression of willingness to contract on specified terms
- Intention for it to become binding as soon as it is accepted by the person to whom it is addressed

Invitation to Treat
- Expression of willingness to do business
- An invitation to the other party to make an offer

Meeting of the Minds

Basic idea running through offer and acceptance is that the parties will be held to have reached an agreement when they have formed a mutual intention to enter a bargain with each other and agree as to the terms of the bargain
- Meetings of the minds requires:
    1. Offer to be extended
    2. An acceptance to that offer

Harvey v Facey (1893) / offer vs invitation to treat

Ratio:
- **Mere quotation of price is not an offer**
- **Case defines when there is an offer vs. invitation to treat**

Facts: Harvey (buyer, plaintiff) sent a telegram asking Facey (seller, defendant):
- 'Will you sell BHP? Telegraph lowest cash price.'
- The defendants responded by saying 'Lowest cash price for BHP is $900 pounds'

Issue:
1. Was there an explicit offer from Mr. Facey to Mr. Harvey for the sale of the said property for the consideration of $900 pounds and is it capable of acceptance?
2. Was there a valid contract or not?

Analysis: First conversation was only a request for information not an offer that can be accepted, no agreement has ever existed between the parties**.** The telegram sent by Mr. Facey was not credible, at no point in time did Mr. Facey make an offer that could be accepted.
Conclusion: No offer was made
Holding: No contract, plaintiff not entitled to property

Canadian Dyers Association v Burton / dyers test

Ratio:
1. **Merely quoting a price on its own is not an offer**
2. **Dyers test: objective test of the intention of the parties, looked to language and context:**
    a. **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**
    b. **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**

Facts: May 1918: Canadian Dyers (plaintiff, purchaser) wrote to Burton (defendant, seller) asked 'With reference to purchasing this property…kindly state your lowest price. We will then give the same our best consideration'
- June 6, 1918: 'Lowest price I would care to sell at would be $1650'

- October 16, 1919: Plaintiff wrote defendant again asking for price
- October 21, 1919: Defendant responded saying previous price remained the lowest offer: 'I am prepared to accept…if it were any other party, I would ask more'
- October 23, 1919: CDA Interpreted this as an offer and accepted by sending a cheque for $500 and asked for the deed
- October 27, 1919: Burton's solicitor sent a draft deed, suggesting a closing price
- November 5, 1919: Burton's solicitor wrote to the CDA stating there was no contract and returned the $500

Issue: Was the communication of October 21, 1919 an offer by Burton or was it simply an invitation to treat?
Legal Rule: Question is one of intention – whether a proposal is to be construed as an invitation to deal or as an offer which can be turned into a binding agreement by acceptance, depends on the language used and circumstances of the case
Analysis:

1. Language used: what did Burton say?
    - 'Prepared to accept'; 'any other party, I would accept more'
        - This is more than a mere quotation of price, constitutes an offer to sell
2. Circumstances: what did Burton do?
    - Sent a draft of deed and closing date, no denying there is a contract
        - Further than an invitation to treat and constitutes an offer

Conclusion: Offer was made
Holding: Contract binding

Pharmaceutical Society of Great Britain v Boots Cash Chemists / invitation to treat in a self-service pharmacy

Ratio: Items on display are an invitation to treat, customer makes offer at cash, cashier accepts
Facts: Boots Cash (defendant, respondent) was a pharmacy in the UK. Was self-service, customers could get things from the shelves.

- The 'Chemists Department' of Boots sold controlled substances but sales were regulated by the *Pharmacy and Poisons Act, 1933*
- That Act required the sale of controlled substances to be 'by or under supervision of a registered pharmacist'
    - When a customer went to pay, the pharmacist nearby supervised the transaction and was authorized to prevent it
    - Two customers purchased controlled substances following this procedure

Issue: Did the sale of the substances on the Poisons List by Boots transpire by or under supervision of a registered pharmacist as required by the *Pharmacy and Poisons Act, 1933*

- Depends on when contract was formed

Rule: If contract formation was at cashier, it was under pharmacist supervision**.** If the contract occurred earlier, it was not.
Analysis:
<u>Plaintiff's Argument:</u>

- Offer: the display of goods on the shelf
- Acceptance: When customer selects the item and placed it in their cart
- If this is true, contract is formed before checkout and pharmacist cannot prevent transaction

<u>Defendant's Argument:</u>

- Invitation to treat is display of goods for sale
- Offer: When customer presents items at cashier
- Acceptance: When customers offer is valid and cashier takes payment
- If this is true, transaction was under supervision of the pharmacist

In the plaintiff's argument, once they put it in basket, they are required to buy the item, cannot put it back or switch it out

- Defendant's argument is a convenient way of enabling customers to see products and choose and offer to buy at the cashier

- If items on display were an offer, they would be forced into a contract with virtually everyone (freedom of contract)

Conclusion: Contract was made at cash, under pharmacist's supervision
Holding: In favour of the defendant

Broad policy considerations:

- If shopkeeper could be forced into a contract with anyone under the plaintiff's agreement, then freedom of contract is pretty much eliminated
- If shopkeeper can decide who he accepts, is there potential for discrimination?
    - Human rights legislation now deals with matters like this

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Doctrine of Consideration

Promises will only be enforced if they form part of a bargain (an exchange) to be enforceable a promise must be 'purchased' or exchanged in return for something of value

- Broad understanding of consideration is if counterparty suffers a detriment at my request
    - Can either be conferral of a benefit or a suffering of labour, detriment, etc.
- You don't require a benefit or detriment to have consideration

UNILATERAL VS BILATERAL CONTRACTS

Unilateral Contract

- No obligation to accept whatsoever
- Acceptance only occurs once condition is performed
    - There is no further requirement for communication of acceptance
    - Only the promisor has made a promise, other party can accept by acting but is not bound to

Bilateral Contract

- Contract has been agreed upon by both parties, that moment of agreeing is when the contract has been formed
- There is now an obligation to perform the action
- An exchange of promises is being made

Carlil v Carbolic Smoke Ball Co. (1893) / formation of unilateral contracts

Ratio:

- **Advertisements of unilateral contracts and advertisements of rewards for returned property are invariable treated as offers**
- **An advertisement can constitute a unilateral contract, which can be accepted by fulfilling the conditions of the contract with no formal acceptance required**

Facts: Carbolic Smoke Ball (defendant) made and sold a carbolic smoke ball and marketed it as a device that prevented influenza and colds

- Published an advertisement saying that any person who contracts influenza or colds after having used the smoke ball is entitled to a $100 compensation
- Carlil (plaintiff) purchased a ball and used as directed
    - Caught influenza and brought action to get the $100 reward
    - Plaintiff argues that there was a contract, defendant argues there was not

Procedural History: Trial judge found that the plaintiff was entitled to the $100 reward
Issue: Was there a real contractual offer from Carbolic and a real contractual acceptance from Carlil such that a contract was made and Carbolic owes Carlil the $100?
Legal Rule: Does the language used, and context demonstrate an intention to make an offer?
Analysis:

Sub-Issue #1: Was there a real contractual offer from Carbolic?

<u>Defendant's Arguments:</u>

- Vagueness: Document was so vague such that no contract was intended at all
- Puffery: The ad was 'puff', an exaggerated claim with no intent to contract
- Extravagance: The promise was so extravagant that it could never be intended to be serious

Rule: Ad is to be read in its plain meaning as general public would understand it

Analysis:

- Vagueness: Ad meaning was that protection was to endure during the time that the carbolic smoke ball was being used. The intent of the defendant was to pay if these conditions were fulfilled.
- Puffery: The ad stated that Carbolic lodged $1000 in deposit for reward, suggests that this was no puff but an offer to be acted upon.
- Extravagance: Extravagant promises are not a reason in law why a company should not be bound by them

Conclusion: This advertisement is an offer, reasonable interpretation that Carbolic intended to contract

Sub-Issue #2: Was there a real contractual acceptance from Carlil?

Defendant's Arguments:

- 'Nudum pactum': there was no consideration flowing from the plaintiff. It was a gratuitous promise by the defendant, not a valid contract
- Worldwide Contract: if the ad is an offer, then Carbolic would be contracting with the world, which is not fair, contract not valid
- Meeting of the Minds: acceptances of the offer must be communicated; no notification occurred so there is no meeting of the minds

Rule:

- Consideration: 'Any act of the plaintiff from which the defendant derives a benefit or inconvenience sustained by the plaintiff, provided either are performed with the consent of the defendant'
- General rule is that acceptance must be notified to maker of contract, but if the maker of offer implies that acting on the proposal without notification is sufficient acceptance, no communication is required

Analysis:

- Consideration: Defendant received benefit from the sales of smoke balls, plaintiff received detriment through inconvenience
- Worldwide Contract: there is not a contract with the world, merely an offer. A contract only solidifies when somebody performs the specific condition.
- Meeting of the Minds: an offer to the world may be interpreted to say that acting on the offer is sufficient acceptance with no communication necessary

Conclusion: The actions of Carlil constitute a sufficient acceptance

Overall Conclusion: this was a valid, enforceable contract. Carbolic owes Carlil $100

Holding: Contract valid, defendant liable.

Goldthorpe v Logan / extravagant promises

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 (is enforceable even if you try your best to deliver)**
- **Look to words and actions to determine if contract is made**

Facts: Logan (defendant/respondent) published an ad stating that hairs will be removed safely and permanently, results guaranteed

- Goldthorpe (plaintiff/appellant) went to the place of business, had an exchange with the employee and was told her hair could be removed permanently, results guaranteed
- Received the treatment but hair continued to grow
- Brought a claim in tort and in contract

Issue(s):

1. Was there negligence on part of defendant that caused loss or damages to the plaintiff?
2. Was there a contract between plaintiff and defendant?
3. If there was a contract, did defendant breach the contract?

Rule: Does a reasonable interpretation of the language used, and the facts/circumstances demonstrate an intention to make an offer?

Analysis:

- Focus is on language of 'results guaranteed'
    - Legal effect of such a statement is to create an offer to every person who is willing to accept the terms and conditions of it
- 'Extravagant promise'
    - If you are credulous enough to guarantee a result, you cannot escape a claim based on that guarantee
- Was there acceptance by the plaintiff?
    - Plaintiff accepted the offer and acceptance was communities to the defendant by her conduct
    - Had both common intention and good consideration

Conclusion: there was an agreement made, breach on part of defendant
Holding: appeal allowed
Order:

- Plaintiff entitled to be put in position she would have been in had the contract been fully performed
- Restitution damages for the treatment cost
- Expectation damages for value of a hairless face

Goldthorpe v Logan: Unilateral Contract?

Court accepted that the offer was made to the public like Carbolic, which was a unilateral contract

- This context is slightly different with the face-to-face interaction
    - Offer is consultation of services between employee and plaintiff
    - The acceptance is promising to proceed and pay for the treatment
        - There was an exchange of promises
    - In this case, more plausible to treat it as a bilateral agreement
- Is 'results guaranteed' binding?
    - In a bilateral agreement, it would have been the employee guaranteeing the results to her face that is binding, not the ad itself
        - It is a term of the offer in a bilateral contract
    - If it were a unilateral contract, the ad would be binding

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Goldthorpe v Logan: Criticism of Damages

The court should not have awarded expectation and restitution damages this way

- There is a double recovery since she was awarded expectation ($100) and restitution ($13), she gets $13 twice
    - The court should have either awarded the $100 as expectation damages and nothing else, or refunded the fee under restitution ($13) and deducted the same amount from the expectation damages ($87)

TENDERS

A way to make a formal written offer to carry out work, supply goods, or buy land, shares, or another asset for a state fixed price

- Usually, a contractor offering to do work for a company, the company puts out a tender request and all companies submit their offer
    - Then, the company can choose the tender it wants to do the work
    - A contractor must submit a valid tender and cannot negotiate the terms of the tender documents (tenders are to replace negotiation with competition)

The way Courts traditionally saw the tendering process was:

- Statement inviting tenders for the supply of goods: invitation to treat
- Submission of a tender: offer
- Selection of best bid: acceptance

R v Ron Engineering & Construction (Eastern) Ltd. / tendering process

Ratio:

- **Tendering process involves 2 contracts: Contract A and B**
- **The submission of a bid accepts Contract A and is an irrevocable offer for Contract B**
- **Bids can only be recovered if they don't conform with terms/conditions of contract A**

Facts: Ron Engineering (contractor, plaintiff, and respondent) submitted a tender to the Government of Ontario (owner, defendant, and appellant) along with a deposit for $150,000 for a total price of the job of $2,748,000

- After the tender closed an employee of the contractor discovered that it's tender was $632,000 lower than the next lowest tender
    - They realized they accidentally omitted it $750,000 short and immediately emailed the owner to ask to withdraw the offer
        - The owner refused to withdraw
    - The contractor did not perform the task and the Owner retained the $150,000 in accordance with the tender process

Issue:

- Is there a contract between the parties?
- Is the contractor entitled to withdraw its offer and recover its deposit?

Rule: Court decides the traditional tender analysis cannot accurately describe this case, and replaces it with a new theory:

- Contract A arises between the Contractor and Owner upon submission of the tender, and Contract B arises when a bid is selected
- Contract A: a call for tenders (offer) & submission of tenders (acceptance)
    - Content/terms of Contract A are the rules of the bidding process
    - This contract typically provides for the irrevocability of the bids and forfeiture of deposit
    - A tenderer could not withdraw the tender for a period of 60 days after the date of opening of tenders
- Contract B: submission of tender (offer) and selection of bid (acceptance)
    - Content/terms of Contract B are the terms of the bid

Analysis: When the contractor gave their tender, they offered. But the offer could not be accepted due to the doctrine of mistake and thus no contract.

- Doctrine of mistake deals with circumstances where the contracting party can avoid liability because they entered the contract based on mistake, no 'meeting of the minds' and thus no agreement
- Offeree cannot accept an offer it knows to be a mistake as a fundamental term of the contract is now invalid

Under this scheme, the call for tenders constitutes an offer and submission by the contractor was an acceptance of Contract A AND an offer of terms for the construction project

- By accepting Contract A, the bid becomes irrevocable if filed in conformity with the terms and conditions
- The deposit would only be recoverable if terms and conditions were not met
- The terms and conditions were met, so the deposit is subject to forfeiture

Conclusion: contractor not entitled to recover deposit
Holding: appeal allowed; trial judge findings dismissed
Order: appellant does not need to return deposit

Old vs New Framework

The SCC implemented the new process to protect the integrity of the bidding system under the law of contracts where possible

- The old framework had no contract of any kind relating to the tendering process
- Tendering process is complicated, a contractor must submit a valid tender and cannot negotiate the terms of the tender documents (tenders are to replace negotiation with competition)

	Old Analysis	New Analysis
Call for Tenders	Invitation to treat	Offer of Contract B
Submission of Bids	Offer	Acceptance of Contract A + Irrevocable offer of Contract B
Acceptance of Bids	Acceptance	Acceptance Contract B

Criticisms of the new analysis:

1. Analyzing contract A as a unilateral contract

    - With a unilateral contract, once acceptance has occurred the offeror has no further obligations
    - A better interpretation of Contract A is a bilateral contract
2. Integrity of the Bidding System
    - The idea is to protect the tendering process: if people can back out by saying they made a mistake, this jeopardizes the tendering process on its face
    - Does this incentivize companies to accept offers knowing they are wrong?
        - The protection of the process far outweighs the risk
3. Reliance
    - We enforce contracts because we are worried about the unfairness of people relying on representations made and then going back on them
        - Do we owe someone something for relying on the statements we have made that we have backed out on?

MJB Enterprise Ltd. v Defence Construction Ltd. / privilege clause

Ratio:

- **A privilege clause is only compatible with accepting compliant bids**
    - **Privilege clause allows them not to accept the lowest bid, but it does not override the implied term**
- **With a privilege clause, you do not have to accept the lowest bid but you cannot accept a deficient one; in the absence of a privilege clause you are most likely to be bound to accept the lowest offer**
- **Contract A is bilateral**

Facts: Defence Construction (respondent, invited tenders, owner) invited tenders for contraction of a pump house and water distribution system

- Instruction included a 'privilege clause' that the lowest or any tender shall not necessarily be accepted
- Tender document specified that bidder must quote a single price per meter regardless of the type of material they would use, could not provide 'contingent' pricing
- Respondent awarded the contract to Sorochan who submitted the lowest tender
    - Sorochan's bid did not conform to the requirements of the tender process
    - MJB (appellant, contractor, tenderer) submitted the second lowest tender
        - They had the lowest valid bid

The appellant argues that Sorochan's bid should be disqualified because it was not compliant with terms of the tender process

Procedural History: At trial, they found that while Sorochan was not in compliance, the privilege clause operated in a way that allowed the owner to award the contract to them anyways

- Trial court accepted argument that privilege clause trumped this

Issues:

1. Did contract A arise and what are the obligations on the owner?
2. Does the privilege clause allow the owner to disregard the lowest bid in favour of any other tender, including a non-compliant one?

Analysis: Argument over what Contract A required of the parties:

- MJB argues that Contract A imposes an obligation on defendant to only accept valid bids
- Defence Construction: we don't have to only accept valid bids due to the privilege clause
- Court rejects the unilateral contract analysis and provides legal analysis regarding the terms of Contract A as a bilateral contract
- This is a bilateral agreement
    - Contract A comes into being upon submission of tender, can impose obligation on both parties (terms established in call for tenders)
    - Respondent made an offer by inviting tenders through formal tendering process
        - Appellant's submission of a tender constitutes acceptance
- Court notes that there is an ***implied term*** in the contract that the owner will only accept compliant bids, but not the lowest compliant bid
- Privilege clause expressly states they don't have to accept the lowest bid
- Owner has an obligation to only accept compliant bids

Implied Terms Analysis

When the court will say there is an implied term in a contract, there are 3 situations:

1. Based on custom or usage
    - Appealing to whatever norms of an industry might be
2. As the legal incidents of a particular class or kind of contract
    - Implied as a matter of law
3. Based on presumed intentions of the parties, where necessary to 'give business efficacy to a contract or as otherwise meeting the officious bystander test'
    - Often interpreted as two different tests:
        - **Business efficacy** = make commercial sense of what parties are doing
        - **Officious bystander test =** If you imagine a bystander asking 'did you mean to include this term' the response needs to be 'obviously'
            - Answer needs to be so obvious that not including the term would be contrary to the intentions of the parties
            - If it is obvious, there is no evidence to the contrary, and consistent with other terms of contract the court will imply them

To accept non-compliant bids would be contrary to intentions of the parties as expressed in this extensive document setting out how bids must be submitted

Privilege Clause

How do we interpret the implied term in light of the privilege clause?

- Privilege has a more nuanced view of cost than always going for lowest price quoted
- Does a privilege clause give absolute freedom to choose any bid?
    - This is irrelevant in this case, as a bid was selected
- Concluded that privilege clause does not override the implied term of the contract for a compliant bid

Conclusion: owner breached contract A

Holding: appeal allowed, lower court finding set aside

Order: On a balance of probabilities, the appellants bid would have been selected had the chosen bid been disqualified. Appellant awarded damages of $398,121.17

MJB was a marked move from Ron Engineering because it switches from treating Contract A as unilateral to treating it as bilateral

COMMUNICATION OF OFFER

If there hasn't been communication of an offer, we may say there hasn't been a meeting of the minds. For there to be acceptance there must be awareness of an offer.

Williams v Carwardine

Motive in accepting does not matter

- Court decided that it doesn't matter what the plaintiff's motive was, by consenting to the ad based on its terms she is entitled to the reward
- What is important is that you accepted the terms as advertised

R v Clarke

Presume in most cases that if you have seen the ad you acted in reliance on it, but that can be rebutted by the facts

- In this case there was actual evidence that showed the person looking to collect on the reward did not intend to accept the offer
- Plaintiff was relying on *Williams* as precedent to say motive does not matter
    - Courts said that while motive doesn't matter, we still need to have consented to the actual offer that has been made
    - Presumption can be rebutted on evidence

ACCEPTANCE

Acceptance is final and unqualified expression of assent to the terms of an offer

- Objective test: does a reasonable interpretation of the facts and circumstances demonstrate unqualified assent on part of offeree?
    - Unqualified: variance of terms is not acceptance; it is a counteroffer
    - Counteroffer kills the original offer

Comes down to a reasonable interpretation of the words used and facts/circumstances to determine whether the purported acceptor is making a counteroffer, accepting, or simply requesting more information from the offeror

- The legal status of communication is important, since counteroffers terminate the original offer

Livingstone v Evans / counteroffer and acceptance

Ratio:

- **A purported acceptance which varies terms of offer is a counteroffer which kills the original offer**
- **Offeror can revive rejected offer through ambiguous language, such that it can be accepted**

Facts: The defendant offered to sell land to the plaintiff for $1800

- The plaintiff responded by wire saying 'send lowest cash price, will give $1600 cash. Wire'
- Defendant respondent 'cannot reduce price'
- Plaintiff attempts to accept original offer of $1800 in response to this communication
- Defendant argues that there was no contract and refuses to sell the land
    - Plaintiff brings action for sale of land
    - Remedy of specific performance is sought

Issue:

- Was the plaintiff's response a request for information or a counteroffer?
- If it was a counteroffer was the defendant's response a revival of the original offer?

Analysis: The court interprets the language 'send lowest cash price. Will give $1600 cash.' as a counteroffer:

- The defendant's response was a revival of the original offer
    - Court interpreted 'cannot reduce price' as saying 'the original price I quoted you still stands'
    - He was standing by the original price and still open to acceptance

Conclusion: defendant's response constituted a revival of the original offer, plaintiff's acceptance was valid

Holding: order for specific performance

BATTLE OF THE FORMS

Occurs when parties enter agreements using their own standard form documents

- When each party uses their own standard form with their own terms, whose standard form terms govern the contract? Which form constitutes the offer that is ultimately accepted?

3 methods for approaching these questions:

Traditional/Last Shot Fired	First Blow	Shots Fired on Both Sides
Apply the 'mirror image' principle of acceptance: each successive form is a counteroffer - The party who puts forth the latest terms, if not objected to, prevails If the last form is followed by conduct by other which amounts to acceptance, there is a contract on terms of last form	Party that puts forth the first terms prevails, unless the other side brings material changes in their terms to the attention of the first party	The terms of both parties are to be construed together, if this is possible with a harmonious result If the differences are mutually contradictory, then they may have to be scrapped and replaced by a reasonable implication The agreement would be constituted by the terms that are common to both forms, together with implied terms

Mirror Image Rule:
When there has been an offer, the acceptance has to mirror that offer, or else there is not meeting of the minds (terms have to be the same)

- If a party accepts but puts their own conditions on the return standard form, it could constitute a counteroffer and no meeting of the minds as terms are not the same
    - In this. Case, it would be said that there is not contract

Butler Machine Tool Co v Ex-Cell-O Corp. / battle of the forms

Ratio: In a battle of the forms, the last shot generally wins
Facts: An inquiry was made by Ex-Cell-O Corp. (buyer, defendant), Butler (seller, plaintiff) responded by quoting the price at $75,000 with delivery n 10 months

- On back of offer there were terms including:
    - Trumping clause – seller's terms will trump or prevail over any other terms of buyers
    - Price variation clause – allows the seller to change price they will charge based on prevailing market price at time of delivery
- The buyer responded by placing a purchase order, buyers document:
    - Stipulated that order is subject to terms and conditions different from sellers
    - No price variation clause
    - Included a tear off order form inviting seller to accept order on terms and conditions stated thereon
- In response, the seller takes the form delivered and tears off the slip with a letter stating the buyer's order was being entered in accordance with sellers terms from original offer
    - Seller delivers the machine and claims an additional $3000 from price variation clause
- Buyer argues that no further money is owed due to price variation clause not being part of contract for purchase and sale

Issue:

- Whose standard form terms govern the contract?
- Which form constitutes the offer that was ultimately accepted, what terms are ultimately accepted?

Analysis: Denning criticizes the 'traditional approach, suggests looking at documents passing between parties as to whether they have reach agreement on all material points
Denning uses the last shot fired approach but with different reasoning:

- Buyers' inquiry: invitation to treat
- Seller's quote (with price variation clause): offer
- Buyers' response (w/o price variation clause): counteroffer, new terms kill original offer
- Sellers return tear off form (with original terms): acceptance of counteroffer?

There was a counteroffer that killed the original offer. By completing the forms, the seller accepted the last form which the buyer offered. The contract was on the buyers' terms rather than the seller's terms. The buyers had no price variation clause so it cannot prevail.
Conclusion: contract was on buyers' terms and not seller's terms
Holding: appeal allowed; trial order set aside
Order: buyers allowed their fixed price

Lord Denning's Approach

In his decision, Lord Denning cautions against the 'last shot' rule by bringing up the 'first blow' and 'shots fired on both sides' methods; the latter being a radical new way of thinking

- There isn't fault applied to one party, but it is a process, when there is ambiguity between the terms, to clarify what the terms are
- To come to a conclusion a fair amount of reasoning is made on their conduct

Denning's methods didn't necessarily become adopted in Canada and the USA, they developed a statute to address it. Common law is more flexible and unpredictable than statutes, but it attempts to create a fair method that is consistent with parties intentions.

- When answering 'battle of the forms' questions, answer how each method would resolve the issue
- Analyze each method and give the problems seeing it that way
    - If we get the same result two ways, that is the likely outcome

Possible approach to exam question:

> According to the traditional method, the conclusion would likely be (x)
> - This may result in no meeting of the minds so Denning suggested two alternatives:
> - First blow: likely conclusion (y) but might also have no meeting of the minds
> - Shots fired on both sides: likely conclusion (z) but hard to determine

Denning's view wasn't adopted in Canada but there is a similar approach in *Tywood.*

Arbitration Clauses

Arbitration clauses can be included in contracts as terms. Arbitration means that when there is a conflict between parties, the first course of action must be through arbitration rather than through the Courts.

Tywood Industries Ltd. v St. Anne-Nackawic Pulp & Paper Co Ltd. / arbitration clause

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)?**
- **A move from classical contracting model to reasonable contracting**

Facts: Sept 19: St. Anne (buyer, defendant) invited a tender with 13 terms and conditions (none dealt with arbitration)
Sept 26: Tywood (plaintiff, seller) gave a quote with 12 terms and conditions (none dealt with arbitration) with term 12 being a 'trumping clause'
Nov 7: Plaintiff submitted a revised proposal with the same terms and conditions
Jan 6 & Jul 3: Defendant sent two purchase orders each with 19 terms and conditions
- Arbitration clause that any controversy would be settled by arbitration in accordance with the arbitration act
- Instructions on the form for plaintiff to sign and return form
  - Plaintiff never signed nor returned but the goods were delivered

Issue: Under which conditions was the contract formed? Does the arbitration clause apply?
Rule: Stay of action permitted under s7 of the Arbitrations Act. If arbitration clause applies, the court action should not be pursued.
Analysis: Under both last shot and first shot, the defendant's application would hold. Conduct in this case should be dealt with by the 'shots fired on both sides' approach
- Plaintiff never mentioned arbitration
- It could be said that the plaintiff tried to impose non-arbitration, but he certainly did not acknowledge the supremacy of the defendant's contract
- Defendant did impose arbitration conditions and didn't complain when the form wasn't returned
- To impose arbitration clause, there would need to be evidence that both parties are aware of this clause and there is reasonable interpretation to the notion which is absent
  - Arbitration wasn't the focus of the contract so less weight is given to it
  - There was a meeting of the minds on the price and goods, not arbitration
- Conduct of parties seemed to indicate that neither considered the terms on the reverse side of the sheets
- Plaintiff's contract most appropriate based on contextual analysis

Conclusion: contract under plaintiff's conditions, arbitration not warranted
Hold: defendant's application for stay dismissed
Order: trial to proceed

Century 21 Canada Ltd Partnership v Rogers Communications Inc. / online agreements

Ratio: Terms of Use alone, absent any kind of 'click-through' licence or other active step, can still constitute an enforceable contract between the parties
Facts: Plaintiff (Century 21) provides public access to its website which includes property listings of brokers and agents

- Zoocasa's (wholly owned entity of the defendant rogers communication) website operates as a search engine that indexed property listings from other real estate sites with other information which enables consumers to search using several criteria
- Zoocasa indexed and linked to P's website, accessed P's website once a day to make bulk requests, took data from the website and put it into fields in its own website

Aug 2008: Zoocasa makes a presentation to P seeking cooperation with plans, P denies

Sep 2, 2008: P's lawyers advise Zoocasa that they did not consent to Zoocasa downloading or copying any material from their website

Oct 5, 2008: P placed terms of use on their website stating

- Terms of use granted users access to website subject to terms and conditions
- Located on bottom of homepage, not drawn to attention of users in an active way, did not require acknowledgement of terms of use before granting access to website
- Stated that users are bound to the terms

Oct 6, 2008: P's lawyers demand Zoocasa remove all of their materials, advise of alleged breach of terms

Oct 17, 2008: P's lawyers advise they do not want to negotiate, may pursue litigation

Nov 6, 2008: P's lawyers write Zoocasa advising that their continued access of the site was putting them at risk of losing access to the Multiple Listing Service database

- Zoocasa acknowledged that they could stop indexing the website within a week but did not do so until 2010. P bring an action seeking injunction and damages.

Issue:

1. Whether there was a contract between P and D reflecting the terms, conditions, and warranties in the terms of use?
2. Whether D accepted P's terms of use?

Legal Rules: New descriptions have emerged due to the evolving electronic formations of contracts

1. **Shrink Wrap Agreement** – retail software packages are covered in 'shrink wrap' and some vendors have written licenses on the packaging that become effective as soon as the customer tears the wrapping from the package
    - 'End user license'
        - *ProCD Inc. v Zeidenberg*
            - Court held that terms of license were binding
            - Outside of box indicates purchase is subject to license
            - License in enclosed manual appears on the computer when program is used
            - User had the opportunity to read the license and accept before using the software
        - *North American Systemsshops Ltd. v. King*
            - Shrink wrap license was not enforceable because there was inadequate notice of terms
    - In most cases notice is adequate and can be enforceable
2. **Click Wrap Agreement** – user indicates agreement by clicking 'I agree'
    - *Rudder v Microsoft*
        - Upheld a click-wrap agreement; contract was formed when plaintiff clicked 'I agree'
        - Acceptance applied to all the terms in the agreement, including any they didn't read
        - Nothing unusual or out of the ordinary about the form of contract to justify not applying the ordinary signing rule
    - *Lan Systems Inc. v Netscout Service Level Corp.*
        - Terms of service appear after software purchased; contract was formed when plaintiff clicked 'I agree'
3. **Browse Wrap Agreement** – doesn't require the purchaser to indicate their agreement by clicking 'I agree'
    - All that is required is use of product after being made aware of the product's terms of use
        - *Register.com*
            - Court found that an express statement of agreement is not always required in online contracts or paper contracts
            - When a benefit is offered subject to stated conditions and they take the benefit with knowledge of the terms of offer, this constitutes an acceptance and becomes binding
        - *Kanitz v Rogers*

        - It is not unreasonable for consumers of electronic services/products to have their legal relationship with the provider 'defined and communicated to them in an electronic format'
        - Continued use indicated consent and conduct can imply consent
    - *Specht v Netscape*
        - Some browse wrap agreements are not enforced
        - There are two requirements that must be met before a contract is found:
            - Notice of terms of use is clearly given
            - There is clear assent to those terms by the user
    - *Ticketmaster*
        - A contract can be formed by proceeding into the interior web pages after knowledge (or presumptive knowledge) of conditions accepted when doing so

Analysis: The law of contract requires that offer and terms be brought to attention and are available for review in some manner accepted by the user, we look to prominence given to the terms and notice that user has seen what they are agreeing to upon acceptance.

- Consideration is given to whether user is a consumer or commercial entity and whether they are a one-time user or frequent user
- A properly enforceable browse wrap agreement gives the user opportunity to read it before deeming the consumer's use of the website as acceptance of the terms of use
    - Here the defendant acknowledged it was aware of the Terms of Use and what conduct was deemed as acceptance

Conclusion: act of browsing past initial page or searching the site is conduct indicating agreement with terms of use
Holding: claims of copyright infringement were rejected, action allowed in part for breach of contract

ProCD v Matthew Zeidenberg and Silken Mountain Web Services, Inc. / shrink wrap agreements

Ratio: Shrink-wrap licenses constitute a reasonable offer and confirming such a license constitutes an acceptance. Buying binds a contract, using accepts the terms.
Facts: ProCD sells a version of its database via a CD-ROM disc with a telephone directory database and software to download the database. Every package states that restrictions are in a license within the box (shrinkwrap license)

- ProCD wished to sell the program to the public, but also commercially for a higher price
    - If bought by a consumer there are restrictions enclosed in the manual
- Zeidenberg bought consumer package but ignored the license and made it available online, made a new company designed to sell the database online for a lower price
- Plaintiff filed suit for injunction against further dissemination against the rights in the license

Procedural History: Trial court ruled for defendant as terms don't appear on the package, purchaser doesn't agree to terms
Zeidenberg Argument: The product on shelves is an offer, buying is acceptance. A contract can only have terms to which the parties have agreed, and one cannot agree to hidden terms, inside terms do not constitute the contract because terms are not agreed upon
ProCD Argument: Illogical to put all terms outside, notice outside and terms inside and a chance to return product for their money if terms are not acceptable is a fitting solution. Acceptance occurs when purchaser uses software after reading the license.
Issue #1: Did Zeidenberg accept the terms even though they were not known at the time of the contract?

- **Rule**: A buyer accepts a good when, after inspection he fails to make an effective rejection. To use the product is to accept the terms. Buying binds the contract, using accepts the terms.
- **Analysis:** A vendor may invite acceptance by conduct and propose limitations on the conduct that constitutes acceptance. ProCD proposed a contract that Zeidenberg would accept by using the software after having an opportunity; ProCD gave an opportunity to reject terms. Zeidenberg had to accept because he used the product and effectively accepted the terms of the license
- **Conclusion:** contract accepted

Issue #2: Is Zeidenberg obliged to obey the terms of a shrink-wrap license?

- **Rule:** A contract for sale of goods is any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- **Analysis:** It would be impractical and costly to have all terms on outside. It is common for exchange of money prior to communication of detailed terms. Notice on outside, terms on inside, and right to refund if unacceptable is the best solution.
- **Conclusion:** obligation to obey shrinkwrap license, even if inside package

Holding: Appeal allowed, district trial judge decision set aside
Order: Injunction granted

In *ProCD* judges looked to economic efficiency, practical arguments, fairness, and legal arguments.
- The court effectively shows that consumers cannot manipulate what terms apply

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Boilerplate

Boilerplate terms: updating a phone/app often comes with terms and conditions users have to accept, but most people do not read them. The terms are fixed and non-negotiable, like shrinkwrap, so this goes against the fair contract values of meeting of the minds. Practically, it would be impossible to make individual terms with all people who want a phone.

Law should enforce agreements freely entered into
- Do boilerplate, shrink wrap, click wrap, or browse wrap contracts promote or undermine the ideal?
- In some cases, you accept the terms because you have no other choice and need to use the product on a daily basis
    - Does this undermine the rule of law?
- Standard contracts do provide several benefits

Eliason v Henshaw / terms of offer

Ratio: plaintiff has the right to dictate terms of the contract in their offer; unless complied with they are not bound to them. The mode of acceptance does not matter as long as the timeframe/location is equivalent to the method desired by the offeror.
- **Offeree must follow terms of the offer for an acceptance to be valid and binding**

Facts: Eliason (plaintiff, buyer) sent to Henshaw (defendant, seller) that they would like to purchase flour from them. Asked that if they accepted they would send money in advance (Feb 10, 1813)
- 'Please write by return of wagon whether you accept our offer'
- Letter received February 14

Feb 15,1813: Seller wrote a letter purporting to accept the offer but sent acceptance to Georgetown by mail in Feb 19 instead of return wagon to Harper's Ferry (where the plaintiff was)
Feb 25, 1813: Plaintiff said that because they did not hear from them or receive flour by wagon, they bought all the flour they needed and wouldn't accept the defendant's offer
Defendant delivered the flour anyways and brought action against Eliason for non-performance of an agreement
Issue: Was there acceptance that arose to a binding contract?
Rule: The offer of a bargain imposes no obligation on the other party until they have accepted it, in accordance with the terms from the offeror. Any deviation from these terms invalidates the offer.
Analysis: The buyer's intention was they could calculate the time a wagoner goes between the Mill and Harper's Ferry, by which time they could receive their answer and the flour. So, it could have been sent by any manner (a boat) provided it was in the same time frame.
- The answer from the plaintiff constituted accepted, but it did not arrive in the right timeframe or the right place, because these were essential terms there was no binding obligation on the defendant
    - Not important whether it arrived by wagon or boat, merely that it was sent to Harper's Ferry in the same time frame as a wagon

Conclusion: Contract not accepted, not binding
Holding: No contract
Order: Plaintiff no obligation purchase flour

Key Takeaways – Eliason

- Acceptance must be completed according to terms of the offer
- Any departures from those terms invalidates those terms unless agreed to by the offeror
- Does this require doing exactly what offer says?
    - It depends on what is seen as essential to the offer
    - Look to intention of the parties to determine what is 'essential'
    - In Eliason, the location/timeframe were essential terms, but method of delivery was not
        - This allows flexibility with respect to using the return wagon; if the method is comparable the contract is not invalidated
- General idea is that any deviation from exact terms come at the offeree's risk

REVOCATION

Principle of Revocation: until an offer has been accepted, it is open to the offeror to withdraw or revoke the offer, thereby precluding subsequent acceptance of the offer by the offeree

- This has obvious problems: detrimental reliance and the flagpole problem
    - Flagpole problem: 'I will pay you $500 if you climb to the top of the flagpole' in theory can be withdrawn at any point during the attempt to climb the pole. The offeror can revoke the offer when the offeree is a foot from completing the task.
        - Offeree not protected in the interim period prior to full performance of the act which constitutes acceptance
    - Courts respond by trying to treat offers as bilateral rather than unilateral when the language is fairly construed

Dawson v Helicopter Exploration Co / termination in bilateral contract

Ratio: Where a complementary action is contemplated for both parties, the offeror in a bilateral contract cannot unilaterally terminate the contract by preventing the other parties obligation to perform

Facts: Dawson (appellant) discovered a mineral deposit in 1931 in BC and filed a claim; it lapsed

1951: Dawson, stationed in Utah, communicated with Springer of Helicopter Exploration (respondent) concerning the exploitation of this deposit

- Respondent messaged Jan 1951 asking to make arrangements to discuss staking claims and pay for time and expenses and carry 10% interest in the claim
- Appellant responded that the proposition was fair, he wanted to meet
- Dawson then positioned overseas but sent to respondent that their plans were still good

March 5, 1951: Respondent replied that he would like to see the property with Dawson, he plans to explored in August. If he likes the property he would be happy to stake the claims.

April 12, 1951: Appellant responded, asked to tell him when they find a pilot and then he will request release to be at the property

June 7, 1951: Respondent wrote that they secured a pilot, but a prospector said operating there would be practically impossible, said they would not be able to go and see the property due to difficult conditions, appellant did not respond

August 1, 1951: Respondent led an exploration party to the area which was not known to the appellant until 1952

1953: Respondent made arrangements to enter upon developing claims by a new company, Dawson took legal advice on the action

Procedural History: Supreme Court of BC rule in favour of Helicopter Exploration

Issue #1: Was there a valid offer and acceptance to form the contract?

Rule: Mutual promises prompt bilateral treatment since both parties would be protected from a period prior to performance on either side (making of mutual promises)

Analysis: The respondent's Mar 5 letter was an offer. The offer implied he would participate, cementing his duty to do so. Also implied the company would not prevent complementary performance by Dawson.

- Dawson's April 12 answer was acceptance, it was a promissory acceptance forcing him to obtain leave
- Bilateral agreement because both parties made promises:
    - Respondent was to locate a pilot and not prevent appellant from fulfilling promises
    - Appellant was to get leave and accompany them

- Respondent could stake claims and the appellant would get 10%
    - If no pilot was found, the contract would end
    - These terms were agreed on as conditions
- In a purely formalistic way, there is a contract. Looking at the parties intentions, the bilateral nature of the contract is confirmed

Conclusion: valid bilateral contract was made

Issue #2: Was the contract terminated successfully?

Rule: Bilateral contract requires complementary action from offeror and offeree. Cannot be terminated by one party by not fulfilling their complementary action (cannot unilaterally end a bilateral contract). Silence is not abandonment for a bilateral contract.

Analysis: Respondent cited difficulties as reason to end contract, but a month later explored anyway without Dawson

- Makes it clear respondent decided it would go without appellant and then wrote letter of repudiation
- Argument that the June 7 letter was repudiation of contract by respondent, confirmed the appellant's silence is false
    - This silence, coupled with steps he took to address the issue upon his return prove he did not intend to abandon the contract
    - The contract remained valid and if the respondent found a pilot, was bound to take the appellant with him
        - Not only did the respondent not do this but he took other people
- The company violated it engagement by exploring without Dawson and preventing Dawson from fulfilling his promises

Conclusion: contract breached

Holding (Rand): Appeal allowed

Order: Appellant entitled to costs throughout

Concurring Opinion (Esty): the respondents letter of march 5th was an offer and April 12th was an acceptance, acceptance need not be express but can be found in conduct of acceptor. There is a bilateral agreement but also a contingent agreement. If they found a pilot, then Dawson would have to get leave and join.

- Condition precedent: event has to happen before obligations are triggered
- Conditions subsequent: event triggers end of contractual obligations

If pilot was obtained (precedent) there is an obligation on respondent to take Dawson (subsequent). If no pilot obtained, that is the condition subsequent and contract ends.

Key Takeaways – Dawson

1. Courts will endeavour to regard a contract as bilateral rather than unilateral to protect the offeree pending complete performance
    a. There may not be an explicit promise the context may prompt bilateral treatment
    b. Courts will not rewrite contracts but will try to interpret them as bilateral instead of unilateral when possible
2. Courts look for implied subsidiary obligations
    a. If you can view it as bilateral make it a bilateral agreement; such contracts cannot be terminated unilaterally
    b. If you can't view as bilateral, they can find these obligations in various contexts:
        i. In unilateral contracts to make them more difficult to revoke
        ii. Contingent agreements to ensure parties try to fulfill their promises

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Contingent Agreements

Contingent agreements = enforceability of promises depend on some condition being satisfied

- Either conditions precedent or subsequent
    - Precedent = condition must be satisfied before promise becomes enforceable
    - Subsequent = prescribed state of affairs brings an already existing enforceable promise to an end

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Bilateral Contracts

- X promises to sell Y her car; Y promises to buy X's car for $10

    - This is a bilateral agreement
    - Both parties immediately bound upon acceptance: both have obligations under contract
- X promises to sell Y her car if Y gets a first place in the road race
    - This is unilateral
    - Both parties NOT immediately bound; X is only obligated if Y finished first and Y has no obligation at all, can try to win or not try
    - Courts may find that X has an implied subsidiary obligation to not revoke the offer for a certain period, to protect Y's reliance
- X promises to sell Y car on January 1, if X's best friend moves in by then. Y agrees to purchase X's car subject to being able to borrow sufficient funds from the bank.
    - This is a contingent agreement
    - In general, both parties are not immediately bound; X has no obligation to transfer her car to Y until conditions are satisfied
        - Courts may find that X has an obligation to keep the offer open until January 1 and Y has an obligation to take steps to secure financing
        - Implied subsidiary obligations where you both take steps to fulfill your 'promise'

COMMUNICATION OF ACCEPTANCE

General rule: Acceptance has no legal effect until it is communicated to the offeror. This is to protect both the offeror (to know when there is a contract) and the offeree (to not have to reject every offer he/she receives).

There are exceptions:

- Unilateral contracts: When the offer is open to many people and communication would be unfeasible, completion of the offer may be enough for acceptance without communication
    - Courts amenable to offeror waiving requirement of communication
- Bilateral contracts: Waiver of communication requirement, is communication required?
    - It is not always the case that offeror can waive requirement of acceptance in bilateral agreement

Felthouse v Bindley / silence and acceptance

Ratio:

- **Acceptance cannot be assumed if there is no notification of acceptance, or implied acceptance through action present. Silence does not amount to acceptance.**
- **You cannot impose obligations on an unwilling party.**

Facts: Felthouse (plaintiff, purchaser) bought his nephew John's horse. Plaintiff misunderstood the transaction of 30 euros whereas John thought it was for 30 guineas (a guinea was slightly more than 1 euro)

- January 2: Uncle communication: if he heard nothing more, he assumed the horse was his and would get before March 25, nephew did not reply
- February 25: nephew held an auction, with Bindley (defendant) being the auctioneer
    - Nephew told defendant to reserve the horse, but forgot to do so and sold the horse
- February 27: nephew sent message to uncle that the horse was sold in error
    - Defendant also wrote to plaintiff that he committed the error
    - Plaintiff brought action against defendant for the wrongful conversion of the horse
    - Defendant argues that the nephew didn't validly accept the horse, so the plaintiff didn't actually have a right in the horse

Procedural History: Trial court ruled in favour of the plaintiff, granting him 33 euros, defendant appealed
Issue: Was this contract valid for the property of the horse to the plaintiff? When can silence constitute acceptance for the purpose of contract formation?
Rule: Acceptance of a contract needs to be properly communicated
Analysis: the initial bargain was incomplete, Plaintiff had no right to assume the sale was good at 30 euros. His Jan 2 letter was an offer. John could have bound the contract by responding or the uncle could have rescinded the offer; he did not communicate at all so offer stood open.

- By telling the defendant that the horse was reserved, it is clear his intention was to sell the horse to his uncle but this was never communicated to the uncle
- As such, the contract was not bound to vest the property in the plaintiff, and he could not object to the sale
    - Feb 27 letter from defendant means nothing

Conclusion: Contract not valid
Holding: Appeal allowed
Order: Horse fair to be sold

Criticisms - Felthouse

This case follows from the general rule – a contract cannot be bound unless acceptance is communicated, it makes sense the uncle could not impose conditions such as if he doesn't hear the horse is his. The nephew treated the horse as sold by telling the defendant not to sell the horse, however, as no agreement was confirmed there was no liability.

Looking for a meeting of the minds

- Seems as though parties did have a meeting of the minds
    - Offer made by uncle and nephew thought in his mind that he had accepted it (nephew told auctioneer not to sell the horse)
- Going forward from this case, silence is NOT enough to constitute acceptance in a bilateral agreement, conduct can be enough in certain cases

Unsolicited offers for purchase and sale of goods then impose and obligation on the offeree

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Saint John Tugboat Co v Irving Refinery Ltd. / circumstances around silence and acceptance

Ratio: If offeree's silence reasonably indicates acceptance to the offeror, we can find acceptance. The circumstances must be considered.
Facts: Irving refinery (respondent, offeree) ran an oil refinery and supplied crude oil to shipping companies, Kent Lines in this case (owned by irving)

- Irving needs tugboats to guide incoming tankers to harbour
- They needed a tugboat supplier and sought Saint John Tugboat (appellant, offeror)

March 24, 1961: Appellant writes to kent lines, saying that they only have two tugs left in the harbour and if they need more, a special arrangement is made

- If they don't respond, Tugboat assumed they are making other arrangements
- Appellant then responded saying they could find two tugs but they need to discuss rates as they were incapable of paying current rates

March 27, 1961: Letter sent to Kent Lines offering two tugs for $450/day and if used would credit the tariff rate 10% less handling

- No responses but respondent made verbal agreement to rent one of the boats for one month starting June 13, 1961. Agreement was twice extended.

Respondent company changed presidents in Aug 1961 and no contract extension was approved

- Respondent continued using the tugs that the appellant supplied and they invoiced Iriving. Irving never paid invoices but continued using the tugs until Feb 1962
    - Respondent charged 450/day for having the tug standby as per Mar 27 agreement
- Respondent never made any changes to the agreement but all appellant invoices went unpaid and respondent denies liability for all charges after Aug 1961

Issue: Did the actions of the respondent between Aug 1961 and Feb 1962 constitute a continuing acceptance of the offers to create a binding pay for standby services at the rate given by the appellant?
Rule: Objective test – the law attributes to a person the intention that her conduct bears when reasonably construed, not what is actually in her mind. If A allows B to work, under circumstances where no reasonable person would suppose B intended to work for free, then A is liable to pay.
Analysis: The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

- Is the agreement implied from the respondent's acquiescence in the tug's services being supplied for its benefit during the period?

- The respondent had to have known the boat was standing by for it's use in the above dates and the appellant expected it's pay for it. The respondent did nothing to reject the service or complain about the charge.
- Not unreasonable from the respondent's conduct that they were accepting the services as per the March letters via acquiescence.

Conclusion: respondent was accepting the offers and is bound by contract
Holding: appeal allowed
Order: appellant entitled to costs between August and February

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General Rule - St. John Tugboat

This case was a departure from the general rules around acceptance. The court finds silence can be reasonably found to constitute an acceptance but is the exception and not the rule. For silence to constitute an acceptance in a bilateral contract, 3 conditions on the offerees conduct have to be satisfied:

1. Offeree receives a benefit of service
2. Offeree has reasonable opportunity to reject, and
3. Offeree knows, or should have known, the provider expected to be paid

MAILED ACCEPTANCES

Need to determine when formation of contract occurs to determine the correct jurisdiction

- Where has acceptance been communication?
    - Raises issues around different modes of communication of acceptance
    - A gap in time between intention to accept and when acceptance has been communication

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Postal Acceptance Rule

Acceptance is communicated when acceptance has been put in the mailbox

Household Fire & Carriage Accident Insurance Co v Grant / postal acceptance rule

Ratio: contract is binding the instant that the acceptance is put in the mail, so long as the parties have contemplated the mail as a viable means of communication in their dealings
Facts: Kendrick (employee at plaintiff's company) was handed an application from Grant (defendant) for shares in the plaintiff's company; the defendant paid 5 euros to the bankers as a deposit for 1s per share and requested 100 shares.

- Kendrick forwarded the application to the plaintiffs, and they made out the allotment on October 20, 1874 and sent a letter to the defendant
- The letter never arrived and they did not pay the 5 euros but was credited by the plaintiff

The company went into liquidation and the liquidator asked for the sum; defendant would not pay since he was not a shareholder
Procedural History: Jury found that the letter from the defendant was posted, and the letter of allotment was never received by the defendant. Trial judge sided with the plaintiff and defendant appealed.
Issue: When do acceptances becoming binding when they are sent by post?
Rule: Acceptance without communication is not binding. This case involved post, so post must be considered an agent of both parties.
Analysis: As both parties use the postal service, the post office is an agent of both parties. This allows mistakes to fall equally on both shoulders. If an offeror trusts the post to deliver his communication of offer, it is to be treated as trustworthy. If the letter arrives at the post office, the contract is finalized and binding. If he doesn't hear anything, he should inquire.

- Only finalizing a contract when it has reached the offeror would open the contract to fraud; the acceptor would not be safe until he was certain the acceptance reached the offeror. Balancing the inconveniences/conveniences, it is better to consider the contract accepted once reached at the post office.

Conclusion: contract accepted and binding once reached the post officer, not the offeror
Holding: appeal dismissed
Order: defendant to pay his costs
Dissenting Opinion: Reasoning is arbitrary, it was to reduce inconvenience on the acceptor. It also puts inconvenience on the offeror:

- Non-receipt would seem as if the acceptor was absent altogether
- Sending in mail should not relieve him of loss
- What if the letter said 'your offer is conditional on your answer reaching me?'

Postal Acceptance Rule Overview

Acceptance takes effect when the letter of acceptance is posted, not when the offeror receives it

- Posted: putting mail in mailbox or handing letter to a postal agent
- Court admits this solution has its inconveniences, but it is the best option; any other way would make for more inconveniences
- There are exceptions to this rule if explicitly stated in the offer

Is not a rule about whether acceptance by post is appropriate or contemplated

- For this we look to the terms of the offer
- Offeror is matter of the offer (see ***Eliason***)

When it does not apply:

- It can be excluded by terms of the offer (ex. Acceptance must reach offeror)
- When it would produce manifest inconvenience and absurdity

In an exam address these 2 steps:

1. Can acceptance be communicated by post? (how, analyze if post is valid method)
2. If so, does the postal acceptance rule apply? (when, analyze if posting is enough)

Option Contracts

Contracts made for consideration to keep an offer open for a set amount of time. An option is an agreement which gives the optionee the power to accept an offer for a limited time. An option to purchase or sell is not a contract to purchase or sell, as the optionee has the right to accept or reject the offer, in accordance with its terms and is not bound.

- Consideration goes both ways; it is valuable for the contract to remain open for a known amount of time. Optionee has the choice but no obligation to accept or reject
- Optionee = offeree/grantee; optionor = offeror

Holwell Securities Ltd. v Hughes / postal rule exception

Ratio: Postal rule does not apply in situations where a notification of acceptance is required as per the offer
Facts: Hughes (defendant, optioner) granted Holwell (plaintiff, optionee) a property, giving 6 months to accept and stating that it must be accepted 'by notice in writing to the intended vendor'

- Holwell sent a copy of the letter to Hughes to exercise the option but it did not arrive
- Hughes did not sell to Holwell and Holwell brought an action
    - Hughes said the option was not properly exercised because it shall be exercisable by 'notice in writing'

Procedural History: Trial judge sided with Hughes; Holwell appealed
Issue: Was hughes option exercised according to the terms of the option, cementing the contract?
Rule: A binding contract requires acceptance to be communication to the offeror on their terms. If the acceptor responded by post, the agreement is finalized when it reaches the post.
Analysis: In the initial option offer, the defendant stated they want notice in writing. The plaintiff was not able to do this as the mail got lost, not giving the defendant with knowledge they would buy the property. The terms were specified by the offeror; explicitly asked for communication in writing. This overrides the postal acceptance rule, requiring acceptance to be delivered to the plaintiff.

- Court gets to this answer through 2 paths of reasoning:
    1. **<u>Short path reasoning</u>**
        a. Focus strictly on the language used, strict interpretation
            - 'The said option shall be exercisable by notice in writing'

- Notice means making something known; the offer requires actually making the acceptance known. The letter went astray so notice was not provided, this is not compliant with terms of the option contract
- Overrides the postal acceptances rule since the option agreement stipulated what had to be done to exercise the option

2. **<u>Roundabout path reasoning</u>**
    a. Holwell argued the option was exercised when the letter was posted because the option was contemplated via post; if acceptance via post is within contemplation of the parties, then the Postal Rule applies and acceptance will be complete when the letter is posted
    b. The Postal Acceptance Rule is narrower than that: it does not apply in all cases where the parties anticipated the use of the post. It does not apply when:
        i. Express terms of offer specify that acceptance must reach the offeror
        ii. If it's application would produce 'manifest inconvenience and absurdity'
            1. This is a broader rule and rarely used (be careful of invoking this)

Conclusion: Since the terms specify the mode of acceptance, this contract is not binding
Holding: Appeal dismissed
Order: Plaintiff not entitled to property

INSTANTANEOUS METHODS OF COMMUNICATION

Eastern Power Ltd. v Azienda Communale Energia & Ambiente / acceptance by fax

Ratio: acceptance by fax should follow the general rule of contract formation and not the postal acceptance rule
Facts: Eastern Power is an Ontario corporation based in Toronto and Azienda is an Italian corporation based in Rome.

- The companies had a preliminary meeting to potentially form a joint venture to generate power from non-conventional sources in Rome
- They drafted a cooperation agreement, ACEA signed and faxed the agreement, further negotiations followed but no Joint Agreement was reached
- EP commenced an action against ACEA with respect to breach of cooperation agreement

Procedural History: ACEA commenced a motion to stay action on grounds that contract was formed in Italy and that Italy is a more convenient location for litigation of this matter (non conveniens)

- Motions is granted, EP appeals this motion

Issue: Where is a contract formed when acceptance of an offer is communication by facsimile transmission?

- Is the contract formed in the place where acceptance is received or should postal acceptance exception to the general rule which says a contract is formed when placed in the mail apply to facsimile transmission?

Analysis: The court disagrees that the postal acceptance rule should apply to facsimile transmission. Cases have stated that it should not apply when communication is instantaneous in nature, because the point of the rule is commercial expediency.

- We don't apply the postal acceptance rule when the same worries of commercial expediency do not apply in an instantaneous mode of communication

Conclusion: Acceptance was received in Italy, so the contract was formed in Italy
Holding: Appeal dismissed

Brinkibon Ltd. v Stahag Stahl Und Stahlwarenhandelsgesellschaft mbH / acceptance by telex

Ratio: for instantaneous communication, a contract is made at the place the acceptance was received but must be analyzed for each cases context
Facts: The appellants/buyers (Brinkibon) attempt to sue the sellers/respondents (Stahag)

- Brinkibon is in London, UK and Stahag is in Vienna, Austria
- Stahag sent a counteroffer via telex to London. Then, appellants accepted an offer to purchase steel via telex from London to Vienna
    - Appellants brought an action for breach of contract to supply steel
    - Stahag claims they were not under British jurisdiction

Issue: In what jurisdiction was the contract formed, the UK or Austria? What legal rule applies to determine when acceptance is communicated in the context of telex?
Rule: Contracts are made when and where (in the jurisdiction) the acceptance was received. If the acceptance was sent by mail (postal rule), it would be bound the moment it touched British Post Office hands. If telephoned (instantaneous communication) it would be bound the moment it was heard by Austrian ears.
Analysis: Stahag's message to Brinkibon was a counteroffer. Did Brinkibon accept via conduct (opening a line of credit) or their telex acceptance?

- Brinkibon's actions were only between them and their agents, such that it cannot constitute acceptance. In the case of telex, it is considered instantaneous and thus the contract was made once it landed in Vienna, falling under jurisdiction of Austrian courts.

Conclusion: Contract formed in Vienna, matter to be dealt in Austrian courts
Hold: Appeal dismissed
Order: Action to follow Austrian Courts
Concurring Opinion (Fraser): Once the message was received by the offeror's telex, it is not unreasonable to treat it as delivered because it is the acceptor's responsibility to arrange a prompt handling of messages

- The acceptor can tell if telex was received by the other's machine or not, whereas an offeror will not know if an unsuccessful attempt has been sent
- The acceptor, being in the better position, should have the responsibility of ensuring the acceptance is received

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Advent of Modern Technology – Brinkibon and Eastern Power

These cases are a response to the advent of modern technology. With communication that is instantaneous (not mail) acceptance occurs when the offeror opens the message. As per Fraser, acceptance with telex should not be when the message pops up but when it is opened.

- This implies a subrule; if the offeror receives the message but does not check his messages, this rule may not apply. Timing of the communication may be more important than the location.
- There is no universal rule for these communications, should be treated on a case-by-case basis.

We can consider instantaneous communication rule that acceptance occurs when communicated to the offeror, not necessarily when it is received at offeror's device

- Risks should be given to the party who have a means of knowing if there is an error in the acceptance (offeror in post, offeree in telex or fax)

This ambiguity has prompted some statutory responses:

- *Ontario Electronic Commerce Act, 2000*
    - Defines a document as sent when it enters the information system outside the senders control. Defines a document as received when it enters the addressee's information system and is capable of being retrieved by the addressee.

Where legislation exists, they are the first thing to check. Establish when communication was sent, received and accepted. These statutes do not answer whether there was a valid legal acceptance even if it was deemed to be received by the statute. To answer this, we need ***Brinkibon*** and ***Eastern Power.***

General layout of acceptance communication problems:

Issue: When is acceptance communicated and contract formed?

1. Is communication by post appropriate or contemplated? (Holwell)
    - Postal Rule: acceptance is communicated when letter is posted (Household Fire)
    - Exceptions (Holwell)
        - Express terms of offer specify acceptance must reach the offeror
        - Application of postal rule would manifest inconvenience and absurdity
2. Communication by post not appropriate
    - Instantaneous forms of communication (once received by offeror) require a case-by-case analysis (intentions of parties and business practice to consider)
    - Ask if communication is more like opening a letter or answering a phone call
        - If instantaneous, traditional rule applied. If communication of acceptance is impeded through technical issues or the like, the offeror has not received it
        - When it comes to instantaneous communication, it is when the contract impinged on the mind of A

- Sometimes acceptance is not communicated through offeror's own fault; court may deem it communicated within a reasonable time

Issues of jurisdiction are often complicated. Courts retain power to say who deals with the matter even if parties agree on content.

Electronic contracts

Signing electronically or clicking 'I agree' can count as acceptance

- Following traditional instantaneous acceptance, it is not clicking 'I agree' that binds the contract, it is when the acceptance reaches HQ (this is practically instantaneous but can be disrupted)

Forum Selection Clause

A term of an offer to determine which jurisdiction covers the contract

- This is enforceable under general terms of contract unless there is a strong cause not to do so

Douez v Facebook Inc / forum selection clause

Ratio: to determine whether forum selection clause is enforceable, use the *Pompey* test

Facts: Deborah Douez a resident of BC starts a class action claim against Facebook (corporation headquartered in California) for breach of *Privacy Act.*

- Facebook seeks stay of action on basis of forum selection clause contained in terms of use.
- Every Facebook user including Douez has to click to accept terms of use in order to join and use Facebook social network

Issue: Whether the forum selection clause is enforceable?

Rule of law: Approach for determining the enforceability of forum selection clause:

1. Does legislation override the forum selection clause?
2. If not, then court applies the two-step Pompey test:
    a. The party seeking to enforce the forum selection clause 'must establish that the clause is valid, clear, and enforceable and that it applies to the cause of action before the court'
    b. If it is, then the plaintiff must show strong cause for why the court should not enforce the forum selection clause and stay the action; in exercising its discretion 'a court must consider all circumstances

Circumstances include convenience of parties, fairness between the parties and the interests of justice, public policy may also be a relevant factor

Analysis: there is disagreement regarding the application of steps 1 and 2 among the court

1. Majority: says the contract and provisions of terms of use are perfectly valid
    - There was valid acceptance through clicking online agreement
    - Specific clauses override general statements when we interpret terms of a contract
    - There is strong cause for court to exercise discretion to NOT enforce the forum selection clause
        - Freedom of contract is not unfettered
        - Looks to public policy, categorized reasons under:
            - Protection of weaker parties (imbalance in bargaining powers)
            - Considerations dealing with consumer contracts of adhesion (this is a contract of adhesion)
        - There is interest for courts to have power to adjudicate disputes over quasi-constitutional rights, privacy act is so important that Canadian courts have interest in litigation occurring in Canada
2. Concurring: clause is unenforceable because it is unconscionable
    - Doctrine of unconscionability applies to render clause unenforceable
    - **There is a two-step test used:**
        - Inequality of bargaining power
        - Undue advantage
    - Unenforceable on clause 1, doesn't even get to public policy analysis
3. Dissenting: under step 1, the clause is enforceable as a matter of contract law

- No argument was provided to make a claim of unconscionability
- A contract can be properly and validly formed under law through clicking terms of use
- There is no strong cause under step 2 for court to exercise discretion to not enforce this forum selection clause
- It creates certainty and predictability, there is uncertainty for international companies when they cannot determine where litigation may take place and under which laws

Conclusion: appeal allowed with costs, public policy concerns weigh heavily in favour of strong cause

TERMINATION OF OFFER: REVOCATION

An offer may be terminated through revocation or lapse. In revocation the following rules apply:

- Must be communicated to offeree
- Can be communicated indirectly
- Might be interpreted as implied subsidiary obligation in a unilateral contract

Dickinson v Dodds / revocation

Ratio: Offeror is free to withdraw their offer at any point until the offeree has accepted it, so long as the offeree has not provided any sort of consideration.

- **An offeree must have knowledge of a revocation, but explicit communication is not required. Do not have to learn of revocation directly from offeror.**

Facts: On June 10, Dodds (defendant, offeror) gave Dickinson (plaintiff, offeree) the offer saying he agrees to sell plaintiff his property for 800 euros (signed and witnessed) and said that the offer was open until June 12 at 9 o'clock.
On June 11, Dickinson hears that Dodds offered and agreed to sell to Mr. Allan

- Dickinson then delivers written acceptance to Dodds' mother-in-law, but she forgot to give Dodds the acceptance
- Dickinson signed a property contract with Allan and received deposit

On June 12, plaintiff finds Dodds at railway station and hands acceptance. Dodds rejects saying they are too late and he has already sold the property.

Issue #1: Was Dodds required to hold his offer open for the duration promised?

Rule: An offer is free to be revoked by the offeror before the offeree has rejected or accepted it without communication. He was not bound by law to hold the offer until Friday at 9 am.

Analysis: There was no consideration for the offer to remain open, so not legally required to do so. The offer, while open until Friday, is not binding until signed.

Conclusion: Allan's contract valid

Issue #2: Was Dodd's offer revoked prior to acceptance?

Rule: A contract requires meeting of minds on all terms

Analysis: There can be no meeting of the minds if the offeree knows that the offeror has sold the property to another. Dickinson knows that Dodds has not remained in the same mind to sell it to him; Dickinson cannot bind Dodds by accepting

- Was their communication revocation? Court says that the plaintiff's learning of the Allan agreement indirectly can still count as revocation of the offer.
- When Dickinson learned through his agent of the sale of the land, that was indirect communication of withdrawal of offer
  - Reliability of the third party is an important assessment/something to consider

Conclusion: No binding agreement between Dodds and Dickinson

Hold: Case dismissed

Order: Dickinson ineligible for damages

Dickinson knew that Dodds sold the property to Allan. However, it does not matter how Dickinson found out (indirect works as well). If the revocation was not communication, then it would change the outcome. Dodds would likely have had two contracts and damages would have to be awarded to Dickinson as he signed after Allan.

Byrne v Van Tienhoven / communication of revocation

Ratio: Revocation must be communicated to the offeree so that the offeree has knowledge of the revocation and can act upon the footing of offer and acceptance safely without communication of revocation.

- **Postal acceptance does not apply to revocation, mere posting of a revocation is not sufficient communication**

Facts: On October 1, Van Tienhoven (Defendant) mailed an offer to sell to Byrne (plaintiffs) in New York for 1000 boxes of tin at a fixed price

- On October 8, defendant mailed a revocation of the offer which was received on Oct 20 but plaintiff's had sold the plates to a third party as they assumed they had purchased the plates
- On October 11, offer was received by Byrne, immediately accepted by telegram and confirmed by letter October 15
- On October 20, Byrne received the revocation but plaintiff's had sold the plates to a third party as they assumed they had purchased the plates
    - Brought an action for breach of contract for failure to deliver tin plates

Issue #1: Does an offer that is withdrawn have effect until it is communicated to the offeree?

Rule: Offers are allowed to be revoked before they are accepted. An uncommunicated revocation is no revocation at all in law.

Analysis: The withdrawal was not communicated in time to the plaintiff and cannot be considered revoked until received. Byrne did not receive the revocation until Oct 20; this is when the offer withdrawal occurred.

Conclusion: Defendant's withdrawal not valid until Oct 20

Issue #2: Is posting a letter of withdrawal communication to the person to whom the letter is sent?

Rule: Postal Rule states that contracts are made once acceptance is posted, even if it does not reach the final destination

Analysis: The postal rule implies that he considers the postal office an agent of him to receive acceptance. This principle cannot be applied for a withdrawal and no legal principle holds that the withdrawal can be treated as communicated until it is received by the other party (not posted). Plaintiff had no reason to believe the offer would be revoked when they sent their acceptance. Any other conclusion would be unjust.

- If revocation was final when posted, no offeree who received and accepted through post would know of his position until he had waited to see a withdrawal letter posted through his acceptance letter

Conclusion: withdrawal not operative and contract was made on Oct 11

Order: Plaintiff entitled to their costs

Key Takeaway – Byrne v Van Tienhoven

Important takeaway is that, although an offer can be revoked by an offeror at any time before acceptance, it must be communicated, and postal rule does not apply for a revocation.

- Parties contemplate acceptance via post office as agent; they do not contemplate post office during revocation (offeree hasn't deemed post office to act as their agent)
- Revocation must be received in a timely manner, here it was received after acceptance and does not hold
- These rules protect offerees from detrimental reliance on an offer they don't know has been revoked

Errington v Errington and Woods / revocation of unilateral contract

Ratio: Offeror can only revoke a unilateral contract if the offeree didn't live up to their side of the contract.

Facts: Father bought a house for his son and daughter-in-law, paid 250 in cash and borrowed 500 from a building security, repayable with interests of 15s a week. He took the house in his name and was solely responsible for the payments.

- He told daughter in law that the 250 was a gift, but they were to pay the 15s a week
- He said the house will be their property when the mortgage is paid
- They made payments regularly but could not pay it all
- Father dies and his estate is trying to get out of the agreement

Issue: Can the father's estate renege on the agreement?

Rule: Court is not to imply a term unless it is necessary

Analysis: The promise was a unilateral contract – the house was theirs in return for paying the installments and the agreement could not be revoked once they performed. It was irrevocable but will cease to bind if they left it incomplete and underperformed which they did not do. They can remain in the house so long as they continue to pay and are entitled to pay once the mortgage was paid off.

- They were not purchasers but, in a position, analogous to purchasers

Conclusion: Binding agreement that so long as they pay, the house will be theirs
Order: No order for possession made

Flagpole Problem

As we saw in Dawson, unilateral contracts run the risk of the 'flagpole problem'

- The act/performance spans a long period of time and revocation is possible even after there has been detrimental reliance
- How do we avoid the flagpole problem?
    a. Interpret as a bilateral contract (Dawson)
    b. Find an implied collateral arrangement relating to the firmness of the offer (Errington)
        - If courts read into an implied promise based on the intention of the parties that avoids potential detrimental reliance by the offeree on the offer

In this case, the court found there was a collateral understanding where the father promised that if they made payments, they would be able to stay in the house

- The son and wife relied on the offer, to their detriment by making payments. This means there is the legal contract with an implied agreement. This circumvents the flagpole problem and protects the son and daughter-in-law.

TERMINATION OF OFFER: LAPSE

Offers can terminate via lapse without needing a communicated revocation. Unfortunately, this is an ambiguous rule which leads to a lot of uncertainty and court actions. Offers which expressly specify an expiry at a certain time cannot be accepted after that time. When do they expire if not expressly mentioned?

Barrick v Clark / lapse

Ratio: offer lapses are based on a reasonable time frame; 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 other reasonable indications.

- **Statements made outside of a contract have no bearing in deciding whether there was an agreement.**

Facts: Barrick's estate (appellant, seller) had been negotiating for the sale of ¾ of the late Mr. Barrick's land to Clark (respondent, prospective purchaser)
Oct 30, 1947: Clark offered to purchase the land for $14,500 with possession between Jan and March of 1948 and asked Barrick to reply by telegram
Nov 15, 1946: Barrick did not reply by telegram, but sent a letter saying they would sell for $15,000 and if ok, the deal would occur with initial payment of $2,000 for Jan 1
Nov 20, 1946: Mrs. Clark opened the letter and responded that Mr. Clark was away and would try to respond soon, asked to keep the deal open until he returned. Barrick did not reply.
Nov 28, 1946: Hohmann (appellant, ultimate purchaser) inquires about lane and Barrick makes him an offer of $15,000
Dec 3, 1946: Hohmann accepts and Barrick and Hohmann enter a contract
Dec 10, 1946: Clark returned and wrote that $14,750 would be a fair compromise and added a cheque of $2,000 and will pay the rest before Jan 1 and asked to reply with acceptance
Dec 11, 1946: Clark hears of Hohmann's purchase and telegrams Barrick
Dec 12, 1946: Barrick responds saying he did not hear from Clark so sold to Hohmann. Clark brings action seeking specific performance of the alleged contract with Barrick.
Procedural History: Action dismissed by trial judge, but Sask Court of Appeal found Barrick did not withdraw the offer and was still in force when received by plaintiff and accepted
Issue: Did Barrick's offer lapse prior to Clark's acceptance, negating the contract?

Rule: Unclear offer lapses determined by what a reasonable time will be based on nature and character and normal course of business in negotiations

- Method of communication: letters/telegram
- Nature of subject matter
- Conduct of parties

Analysis: Assuming Clark's Dec 10 acceptance of Barrick's counteroffer (Nov 15), the question is, was it in a reasonable time? Barrick's counteroffer did not specify a time to accept other than ideally ASAP. Clark had a reasonable timeframe to accept and post.

- Nature of subject matter: Farms are not subject to frequent price fluctuations, so the time frame could be longer than something like stocks
    - However, there was demand for farms at this time
- Conduct of parties: 'the deal could be closed immediately' and 'answer requested as soon as possible' indicate an intent for it to be short timeframe
    - Contemplated closing date Jan 1 wouldn't leave much time for acceptance

The letter asking to keep offer open is not relevant. Barrick's desire to deal with Hohmann is also no relevant. Clark's acceptance was too long after the offer when considering the context, contract lapsed.

Conclusion: offer lapsed, no contract

Holding: appeal dismissed

Order: no performance

Notes – Barrick v Clark

Offer lapses without an explicit date in the offer are said to lapse after a 'reasonable time'. This case does a good job of showing that the 'reasonable time' is determined by facts and circumstances.

- Barrick could have argued that the offer was revoked and indirectly communicated through town gossip, although court would have to decide if town gossip is reliable enough
- The offer was not required to be kept open, so Ms. Clark asking to keep open was irrelevant
- NB: Barrick could not have shortened the timeframe if he preferred Hohmann; he could accept Hohmann's offer *if and only if* the offer has lapsed (in a reasonable timeframe). He did not have to keep the offer open, but if he does, the offer must lapse before dealing with someone else. This differs from an option contract where it states the offer will be kept open until a specified date.

CERTAINTY OF TERMS

General Principles

The terms of the contract must be sufficiently certain if it is to be legally binding

- Where parties either fail to reach agreement on all the essential terms of the agreement or express themselves in such fashion that their intentions cannot be divined by the court, the agreement will fail for lack of certainty of terms
    - The idea is that parties must have a meeting of minds, we must be able to determine their obligations with certainty
    - There has to be objective determination of parties intentions regarding obligations
    - Often parties just cannot know the future so they want to leave some ambiguity in the contract
- Courts are pulled in 2 directions by following guiding principles:
    - Courts should not impose an agreement on the parties that they do not intend to partake in
    - If something can be made certain it should be interpreted that it is
        - Courts strive to balance fulfilling parties' reasonable expectations by giving their agreement a reading that makes it binding, while not going so far and defeating their expectations by imposing something that goes beyond what they agreed
    - There is a general hesitation for Courts to strike down a contract based on certainty of terms

Types of Uncertainty

1. Vagueness – there is uncertainty or ambiguity in ascribing meaning to the terms used by the parties to the agreement
    - Appears that agreement is complete on its face but language is difficult to render certain because there is difficulty in ascribing meaning to the words used
    - We don't want contracts to be so vague as to be uncertain but courts don't expect commercial contracts to have strict precision
        - If parties already acted under an agreement, conduct plays a role such that vagueness argument may be unavailable (weighs against vagueness argument)
2. Incompleteness – the worry is that a term or terms are left unspecified such that we can say the agreement is incomplete
    - Purpose of analysis of court is to determine whether terms were so important and essential that we can say there is not agreement at all
        - Parties may have good reason to leave terms open (may reflect commercial enterprise)
        - When has it gone too far where we can no longer say it is a flexible way of determining an essential term vs it just misses an essential term

Law requires certainty and completeness for binding obligations, but practical reality is that some terms need to be left flexible for commercial practice

INCOMPLETE TERMS

May & Butcher Ltd v R / agreement to agree

Ratio: A term yet to be determined means that there is no contract if it is an essential term; is simply an agreement to agree and is not enforceable

- **The court cannot read terms into an incomplete contract**
- **An agreement to agree is no contract, it is simply agreeing to come to some other agreement later down the line**

Facts: May & Butcher (plaintiff/appellant) arranged an agreement with Disposals Board (defendant/respondent) for purchase of surplus 'tentage' which was owned by the government after WWI. Agreement evidenced by letter on June 1921.

- Key terms: Because they agreed to deposit, the Commission confirm the sale of old tentage which may become available up to and including Dec 31, 1921 upon terms:
    1. Commission agrees to sell, and M&B agree to purchase the total stock
    2. Prices and dates are to be agreed from time to time between purchases as they become available
    3. All disputes shall be done by Arbitration Act 1889

The disposals controller renewed the agreement in Jan 1922 until Mar 1923 on same terms. A dispute arose later that month with respect to price.

Issue: Were the terms of the agreement sufficiently certain to constitute a legal binding contract? More specifically, are the terms too incomplete to amount to a legally valid contract?

Rule: If a contract has a critical part that is left undetermined, there is not contract at all

Plaintiff Argument:

- If no price was agreed, it should have been a reasonable one under the Sale of Goods Act
- If no price was agreed, arbitration clause covered the price issue

Analysis: There was never a contract between the two.

- Reasonable price: If no price is agreed, a reasonable price must be assumed, according to Sale of Goods Act which allows a third party to fix the price. If the third party does not provide a price (as in this case), the agreement is voided. Having a third party fix the price is no different than having two parties fix it. They failed to set a price so no contract.

- Arbitration clause: This clause is for settling disputes after the agreement is made. It cannot be used to set the terms of the original bargain. Arbitration is moot until the price has been fixed as without this the agreement is not there. They are not entitled to arbitration as this agreement doesn't exist.

Conclusion: No complete agreement, no contract between the parties
Holding: Appeal dismissed

Notes – May & Butcher

Sale of Goods Act uses two-step analysis:

1. Act says a reasonable price can be paid when the parties are silent on the price, but the parties are not silent, they agree to negotiate in the future (Agreement to agree)
2. If there is no agreement on price, a third party can arbitrate. However, they agreed to agree in the future, so there isn't necessarily 'no agreement'

The agreement to agree is not a contract. *Sale of Goods Act* arguments fail. Additionally, the arbitration clause only kicks in after a contract is made and terms have been reached.

Hillas & Co v. Arcos Ltd / contract to negotiate

Ratio: A contract to negotiate is enforceable. The courts can apply what is just and reasonable to determine the terms of an agreement through context and intentionality of the contract.

- **Must interpret a clause as a part of the whole agreement**

Facts: Hillas & Co (English timber firm, plaintiff) alleges breach of contract by Arcos (Russian government representative, defendant) to supply plaintiff with 100,000 standards of timber.

- Contract for 22,000 standards of timber from defendant of 'fair specification'
- Clause 9: Buyers shall also have to option of entering a contract with the sellers for the purchase of 100,000 standards for delivery during 1931 and shall obtain them at a reduction of 5% at any time in 1931

After this contract ended, Hillas made a contract with Central Softwood for sale of its entire timber production.

- Hillas tried to get the 100,000 standards under clause 9 but Arcos said the agreement had been cancelled and refused
- Hillas brought action for breach of contract but Arcos argues there is no contract and clause 9 is too uncertain

Procedural History: Trial judge ruled in favour of the Hillas; Court of Appeal favoured with Arcos
Issue: Was the Clause 9 provision too uncertain to be enforceable?
Rule: Certainty with respect to price, quality of timber and timing of shipping dates and location of ports of delivery is necessary. Contracts that include future actions to which one party is unable to commit may be incomplete or uncertain.
Analysis: Drafting here is 'unartistic' but that is not enough to invalidate. Both parties intended to make a contract and thought they had done.

  - *Verba its sunt intelligenda ut res magis valeat quam pereat:* words should be understood such that their aim can be carried out and not frustrated
  - *Id certum est quod certum redid potest*: that is certain which can be made certain

- Clause 9 is not to be constructed alone, but in light of the whole agreement
  - Clause 9 is not an agreement to agree, it meant the appellants had the option of accepting an offer in terms of Clause 9 so that when it was exercised, a contract at once came into existence. This is not a situation where they agree to negotiate in hopes of completing an agreement.
  - Price: this is a fixed clause in the defendant's price list. Their aim was to secure a 5% advantage over other buyers.
  - Quality of timber: 100,000 standards can be understood from the other clauses (refers to Russian softwood of fair specification). The law can tell us what a reasonable speculation of this would be if parties cannot; a tribunal would work.
  - Timing of delivery: saying 'over the season 1930' because the shipments were to be over various dates, leaves these dates ambiguous. Deliveries are to be at reasonable times under the *Sale of Goods Act.*
- Complete and binding agreement, not dependant on any future agreement for validity.

Conclusion: Contract clear and binding for 1931 season
Holding: Appeal allowed; trial decision restored

Notes - *Hillas*

The courts emphasize that price and quality has an extra-contractual way of being determined. Arcos would make a tender for specification and go back and forth with Hillas to get a price. If they cannot agree, they can go to Court where Court will come up with a reasonable specification of what the parties intended. There is a mechanism by which they will determine either price of quality; the law will give reasonable certainty. This means the incompleteness is not an insurmountable problem.

- It was clear the parties intended to contract, all that is to debate is the further agreement.

Case is hard to reconcile with *May & Butcher* which seems to have conflicting decisions

- May & Butchers had an agreement to agree. The judges found this as not an agreement at all, only a mere decision to agree sometime in the future.
    - May & Butcher not a standard commercial agreement, it was conferral of a private monopoly on government owned materials
    - Court emphasizes the commercial setting in Hillas
- But in this case, there is a n agreement to the matters of price/quality, etc. and a way of determining them. **This makes it an agreement to negotiate, with machinery to answer issues if they cannot agree on the negotiable terms.**

Foley v Classique Coaches Ltd / past performance

Ratio: Past performance will indicate that a contract is binding (reliance interest)
Facts: Classique Coaches (defendant) operators of a fleet of motor coaches agreed to purchase land from Foley (plaintiff) who operated a service station on adjacent properties. The sale was made subject to the defendants entering into a supplemental agreement to purchase all the petrol from Foley.

- Price of gas was to be 'agreed by parties in writing from time to time'
- The supplemental agreement contained an arbitration clause (clause 8)

For three years, the defendants obtained petrol with the plaintiff until they could get a better deal

- They tried to repudiate the supplemental agreement and the plaintiffs sought a declaration that the agreement was binding and an injunction on the defendants deal

Procedural History: Trial judge sided with plaintiffs and defendants appealed
Issue: Does the agreement fail for uncertainty with respect to price of gas?
Rule: If a contract has a critical part that is left undetermined, there is not contract at all
Analysis: Obviously both parties treated the contract as legitimate as they obeyed it for three years. The only thing subject to change was the price of the petrol sold to the defendant. If the defendants want to repudiate this, they are to return the land.

- They agreed to an arbitration clause to remove uncertainty with respect to price
- They intended that a reasonable price be paid

Conclusion: Contract binding and enforceable
Holding: Appeal dismissed
Order: Injunction and declaration granted

Notes - *Foley*

The arbitration clause removes uncertainty for price when one cannot be negotiated. So, the arbitration clause does not go to the terms of the agreement, it goes to price negotiation (failure to negotiate). In the May & Butcher case, the arbitration clause was for the agreement itself which did not exist (failure of agreement). Slight difference makes certainty of terms a hard area to understand.

Trilogy of Cases

None of these cases has a general principle to know, they are all to be decided on context

- May & Butcher was never overruled (agreement to agree is not a contract is still used) but there is room for judges and lawyers to interpret what is critical in each particular case
- If there are details to be worked out later, courts are open to interpreting them
- Whether a particular term is critical and left undetermined will depend on context:

- Some contracts are intended to be open ended for commercial contexts, others may have a particular method for determining price
- Can look at past dealings between the parties (Hillas)
- Look at part performance (Hillas and Foley)
- Considerations of bad faith or detrimental reliance (Foley)
- Hillas and Foley were in commercial settings, May & Butcher was a 'conferral for a private monopoly' which may have less reason to find agreement
    - Plaintiffs were not harmed in May & Butcher for not completing contract, but Hillas and Foley plaintiffs certainly were
- Some contracts may not include a specific price, but may specify a way to get there (machinery) which prevents the agreement from failing for incompleteness
- This machinery is often adopted as it is an objective test
    - In Hillas, the price could be determined by Arcos' price list
    - If the mechanism is unworkable, that may make the whole agreement fail

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Price Machinery

Parties might specify an objective standard such as reasonable price or market price for determining price which may prevent agreement from failing for incompleteness

- An agreement establishing a workable mechanism will no fail for incompleteness
- The more difficult question is whether it might fail if established mechanism proves to be unworkable

Sudbrook Trading v Eggleton

- Lease gave tenant option to purchase the property 'at such price as may be agreed upon by two valuers, one to be nominated by each party'
- Mechanism failed because one party refused to appoint a valuer
- Court held that parties agreed to established a fair and reasonable price to be determined at later date and that the mechanism itself wasn't essential
- The objective intention was to establish a fair and reasonable price, the objective wasn't to have a mechanism
- Court can then step in and provide fair and reasonable price

Hillas and Foley showed that their agreement to negotiate is an obligation, but should the negotiation fail, there is an objective test to imply price on a reasonable basis. *May & Butcher* had an agreement to agree, which does not give guidance or obligation.

AGREEMENT TO NEGOTIATE

Is an agreement to enter a process to negotiate (an agreement to engage in a certain process, not a substantive agreement underlying, just an agreement to engage in negotiations)

- Are understood as having some substantive result; parties might expect that even if they aren't bound to sell or buy at established price, they are committed to seriously engaging in negotiation with aim of reaching an agreement
    - **Substantive Agreement**: An agreement to perform a transaction on unspecified terms or terms to be agreement
    - **Process Agreement:** An agreement to negotiate in order to arrive at and establish the terms on which a transaction will be performed
        - Not an agreement to agree
- There is a general reluctance of Courts to find agreement to negotiate:
    1. Impossible to know the content required in a duty to negotiate
        a. Parties have counter interests; it isn't sensible to put obligations on them
    2. Unclear what damages would be
        a. Do we assume there will be success?
        b. On the balance of probabilities, on what terms would the contract be?

There is a general principle of good faith, which informs how to handle a duty to negotiate in good faith

Courts have three options in cases of agreements to negotiate:

1. Where rent is simply 'to be agreed' (usually not enforceable)
2. Where rent is to be established by a formula (market value) but no machinery for applying is provided (who provides market value?) courts will often supply the machinery (courts determine what market value is)
3. Where formula is set out but defective (market value price but no market activity) and machinery is provided, it may be used to cure the defect

Empress Towers Ltd v Bank of Nova Scotia / agreements to negotiate

Ratio: When agreements to negotiate provide a framework to settle terms like price when negotiations fail, the Courts can use this framework to (a) validate the contract as not uncertain and (b) find the price to be used going forward

Facts: Bank of Nova Scotia (defendant) leased its premises from Empress Towers (plaintiff); the agreement had a lease renewal clause:

- "The rental for any renewal period, which shall be the market rental prevailing at the commencement of that renewal term as mutually agreed between the Landlord and the Tenant. If the Landlord and Tenant do not agree upon the renewal renatal within 2 months following the exercise of the renewal option, then this agreement may be terminated at the option of either party"

The lease was made in 1972, expired in 1984, renewed and ran out on Aug 31, 1989
May 25, 1989: The bank exercised its option to renew the lease for another 5 years and proposed an increase in rent; Empress did not reply
July 26, 1989: The bank wrote to Empress saying the proposed rate was appropriate as per appraisers; Empress said the offer was still being reviewed
August 31, 1989 (lease expiry date): Empress finally replied saying they could remain on a month to month basis at the defendant's proposed rent and if $15,000 was given up front
Empress towers brought a petition against Bank of Nova Scotia seeking to obtain a writ of possession under s 21 of the *Commercial Tenancy Act*
Issue: Was the renewal clause void for uncertainty or an agreement to agree?
Rule: Negotiation of a contract is to be done in good faith and an attempt to negotiate. Only after that can alternative price suggestion methods be applied. If it is an agreement to negotiate (with default mechanisms), there are contractual obligations. If it is just an agreement to enter a lease at a rate to be agreed, there is no contractual lease obligation.
Analysis: If the parties intended to renew at a rate the landlord wanted they would have just done that. Here the agreement says the prevailing market rate as mutually agreed between landlord and tenant. This means the landlord is not compelled to renew at which it has not accepted as market rate. This is an objective measure of prevailing market rates. Two implied terms:

1. Landlord has obligation to negotiate in good faith with aim of reaching agreement
2. An agreement on a market rate will not be unreasonably withheld
    a. These two terms prevent the clause from being uncertain; not struck down
    b. Requirements to negotiate in good faith and not withhold agreement unreasonably 'carry the same degree of diligence as best efforts'

This should be interpreted that an agreement should try to be made, but if not, other measures can enforce the market rate. The landlord did not negotiate in good faith, waited until the last day to provide their offer. This unreasonable conduct can effectively be seen as terminating the lease without actually doing it.
Conclusion: Renewal clause clear, plaintiff not abiding
Holding: Motion dismissed
Order: No writ of possession granted

If the implied terms (good faith and market rate will not be unreasonably withheld) prevents the landlord from getting a veto. If not it would be option #1 and not enforceable. The terms help qualify this agreement as not uncertain and enforceable.

Mannpar Enterprises Ltd v Canada / good faith

Ratio: There is a duty to negotiate in good faith if there is a contract between the parties, it is consistent with their intentions, and there is an objective benchmark to assess whether parties are in breach

Facts: Mannper (plaintiff/appellant) held a permit acting through the Department of Indian and Northern Affairs (defendant/respondent) to remove and sell sand and gravel on a reserve

- This reserve was on Skway land; they are not part of the suit but involved in negotiation between Mannpar and Crown
- Clause 7: right to renew the permit for 5 years subject to satisfactory performance and negotiation of rate and rental
    - Included recital that Skway authorized Crown entrance of permit and would be completed in 5 years
- Both parties knew it would extend over 10 year term
- Crown had a fiduciary relationship to act in best interest of Skway
- Mannpar attempted to negotiate but Crown and Skway did not before expiry
    - Argues the Crown repudiated the contract by refusing to negotiate the renewal
    - Relied on *Empress Towers* to argue the Crown has duty of good faith to negotiate

Procedural History: Mannpar loses at trial, appeals to the BC Court of Appeal

- Trial judge found no obligation to negotiate in good faith

Issue #1: Is clause 7 of the agreement uncertain?

Rule: Terms that are too uncertain simply cannot be enforced

Analysis: Renewal clause is too broad such that it is just an agreement to agree. Arbitration clause lacking was meant to be an agreement to agree. Renewal of continuing lease is different from anticipation that an arrangement may continue for a certain period; the anticipation is not sufficient. Each agreement is to be construed on its own words. Negotiation in this case means the Crown has a broad role to re-enter not based on its fiduciary duty

Conclusion: Clause 7 too uncertain

Issue #2: Is there an implied term for the Crown to negotiate in good faith?

Rule: Terms can only be implied if its likely that both parties would include the term

Analysis: No language for an objective benchmark (market value) so there is not duty for good faith. In *Empress* there was a benchmark of market value for an objective assessment. In this case, there is no such benchmark, so negotiation clause is unworkable. Agreement to agree lacks the certainty needed to be enforced. Each party has a right to pursue their own interests.

- Government has a fiduciary duty to act in best interest of Skway; it isn't just a transactional agreement. Crown only wanted to authorize renewal only if acceptable to Skway people, and it was not acceptable to them. The law must recognize this relationship.
- 'Negotiation' the clause reflects the Crowns desire to have latitude in the extension and if terms are acceptable, given the relationship to the Skway

Conclusion: No duty to negotiate

Holding: Appeal dismissed

Order: No permit renewal

There are key ways this case was different from Empress:

1. Nature of relationship between Crown and First Nations
2. Renewal of continuing lease is different from an 'anticipation' that an arrangement may continue for a certain period

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Good Faith as General Principle

Bhasin v Hrynew

- Court held that there is a general duty of good faith that underpins contracts as a whole (good faith principle)
- Since Bhasin, an obligation to negotiate in good faith is now certain enough such that we can say it provides a benchmark with which to evaluate conduct of parties
    - Good faith standard is capable of definition

- Is sufficiently certain to imply conduct to parties

VAGUENESS

Vagueness: whether we can ascribe meaning to an otherwise complete agreement that is uncertain due to ambiguity in words used by the parties

R v CAE Industries Ltd / vagueness

Ratio: Courts will make every effort to apply definite meaning to vague terms in a contract so as not to render if unenforceable; this is especially true if it is obvious that parties intended to enter a binding relationship, or if there was partial performance

- **The onus of proving agreement is too vague to be enforced is on the party alleging it. This onus is very high.**

Facts: Government of Canada (appellant/seller) and CAE Industries (respondent/purchaser) negotiated the possibility of CAE taking over and running an aircraft maintenance base in Winnipeg that Air Canada no longer used. The Minister of Transport wrote to CAE in March 1969 to incentivize CAE to purchase the base, clarifying the deal with several assurances:

- Agrees that 700,000 manhours/year is a realistic target for operation of the facility
- GoC can guarantee 40-50,000 manhours but will employ 'best efforts' to secure the additional work to meet the 700,000 manhours
- In fulfilling the above, work will not be taken from the CAE base in Edmonton

The Air Canada lease will be given to Northwest under these terms for 10 years

- Signed by the Ministers of Transport, Trade and Commerce and Defence Production

Respondent purchased the base but by 1971 the workload at the base declines and respondent sues for breach of contract. Appellant contends that letter was not meant to be a legal contract.

Issue #1: Was a contract intended by the Minister of Transport to CAE?

Rule: The onus of proof to prove there is no contract is on the person who asserts that no legal effect is intended, it is a heavy one

Analysis: The letter does not disclose a political arrangement rather than a contract. GoC approached CAE and was eager to preserve the base. Both treated it as binding.

Conclusion: There was an intention from both parties to create a legal binding contract

Issue #2: Was the contract in the letter from the Ministry vague and uncertain or incomplete?

Rule: If the language of the contract is vague and uncertain it renders the contract unenforceable. But, in commercial contracts, Courts take every effort to find meaning in words used by every party in deciding enforceability under the maxim of *ut res magis valeat quam pereat* (a deed shall never be void where the words may be applied to any extent to make it good)

Analysis:

1. Incompleteness: the negotiations do not leave anything unsettled that was necessary to be settled between them. The letter was a contract capable of standing on its own. Even with individual contracts needed for continuation of work, it does not mean this contract is incomplete.
2. Vagueness: There is a certain looseness of language but that does not preclude the language from being sufficiently clear to have created equal obligations. This contract has been partly performed, making the 'vagueness' argument particularly weak. Courts can look beyond the 4 corners to determine the parties' intentions.
    - 'Assurances': the GoC intended to make this a binding commitment
    - 'Guarantee': should be viewed in the same way as a binding provision
        - Had to provide 40,000, not 700,000. But had to try their best to obtain 700K.
    - 'Set aside': a guarantee with no strings attached
    - 'Best efforts': GoC argues this is lacking in precision as to render it incapable of creating legal rights and obligations. It is meant as 'leaving no stone unturned', creating a broad obligation to secure for respondent the manhours.
    - It doesn't require government to neglect public interest and is sufficiently certain.

Conclusion: The contract was sufficiently clear to be followed by the GoC.

Holding: Appeal dismissed

Notes – R v CAE

Contract clearly requiring subsequent contracts in the future, but Court notes this does not make the initial one incomplete. The biggest factor for courts is that the contract was partly performed (did supply some manhours for 2 years). If the Government truly thought the contract was incomplete, they would have not done any of the contract.

- Court points out that 'best efforts' is common in agreements to convey levels of stringency as to what they are agreeing to and is not too vague. From a reasonable perspective, what did the parties intend by this? They intended to entice CAE into buying the base by sweeting the deal with their help. Government has to use best efforts to get manhours.

Courts will struggle against vagueness, providing contract is complete. They often make every effort to find a meaning in words actually used by parties. Here, everything between parties has been settled (no missing terms, not incomplete) so words 'best efforts' can be given meaning.

Anticipation of Formalization

Arises when agreement is reached that contemplates a further formal document

- Key issue: distinguish between situations where parties intend to be bound at once, and where they do not anticipate being bound until document is executed
- Letters of intent, memoranda of understanding, etc.
    - Can we say that one of these earlier documents constitutes an actual enforceable contract?
- Issue often raised on basis that we just have an agreement to agree

Bawitko Investments Ltd v Kernels Popcorn Ltd / anticipation of formalization

Ratio: An oral agreement in contemplation of a formal written agreement when lacking essential terms is not enforceable due to lack of certainty; it is a contract to form a contract

- **Two conditions that both need to be satisfied for a contract:**
    - **Sufficient certainty**
    - **Parties are anticipating formalization**

Facts: Kernels (defendant, appellant) looking to expand several new location in Ontario in the 80s. Passander (real estate broker with Bawitko who is respondent, plaintiff) approached to acquire franchise rights for a Hamilton branch.

- April 3: Kernels sent Bawitko an info packet with a draft franchise agreement intended for a long-time business relation
- April 18: Passander met and orally contracted with Kernels to grant a franchise agreement, culminating with a $5000 renewal fee, extensions from 5-10 years, resale fee payable only if sold in first year, and personal guarantees from draft agreement would be eliminated
    - Parties ended meeting by shaking hands and saying 'you've got a deal'
    - Respondent said parties agreed to embody obligations in writing

Procedural History: Trial judge found that an oral contract was formed during the meeting

- There was an oral contract formed and parties contemplated that the terms of agreement would be memorialized in a subsequent written document

Issue:

- What was the effect of the oral contract?
- Was it a complete and binding contract or was enforceability subject to subsequent agreement to be contained in contemplated written franchise agreement?

Rule: When all formal provisions to be incorporated in the document are agreed upon, the contract becomes binding; a written document to the same effect does not alter the binding validity of the contract.

Analysis:

1. Certainty Issue: Were the terms settled yet or not?
    - Franchise agreements are complex and intend a long-term relationship
    - That agreement could not have simply been settled orally due to complex nature of a franchise contract

    - Some terms were agreed but other essential terms remained open, nature of agreement mandates express agreement on terms
    - There was no meeting of the minds at the purported oral agreement on April 18th
    - Since the certainty issue failed, there must have been an anticipation of formalization
2. Anticipation of Formalization Issue: If terms were certain, the parties may have considered their legal obligations deferred until creation of the written contract.
    - A contract can be incomplete because understanding or intention of parties, even if no uncertainty as to terms, is that their legal obligations are to be deferred until a formal contract has been approved and executed
    - Terms may be so uncertain or incomplete that parties intended formal written agreement in the future
        - Even with no uncertainty, there may still have been an intention
    - Court decides that the original or preliminary agreement cannot constitute an enforceable contract

Conclusion: For there to be a legally binding contract, there must have been a formal written agreement due to the nature of the contractual relationship at issue, parties did not intend for oral agreement to take immediate effect
Holding: Appeal allowed, trial findings set aside
Order: No costs to plaintiff

Notes - *Bawitko*

This case did not fail for lack of certainty

- Certainty points us to intention of parties, they intended to formalize agreement at some point in the future
- These issues can come apart
- Judge sets out possibility that even with certainty of terms, parties may still have intended that they were not entering an agreement until subsequent formalization of written document

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Subject to Contract

'Subject to contract' is used to communicate from an objective perspective that there is no agreement until subsequent execution of formal document

- We always look to particular facts of a case, it is possible that even if such language is used, it might be held parties intended to be bound before the formal written contract
    - Is a question of construction