
Contract LAW
FOURTH EDITION
WILLAN
PUBLISHING
Mary Charman

Contract Law

Contract Law

Fourth edition

Mary Charman

WILLAN
PUBLISHING

Published by

Willan Publishing
Culmcott House
Mill Street, Uffculme
Cullompton, Devon
EX15 3AT, UK
Tel: +44(0)1884 840337
Fax: +44(0)1884 840251
e-mail: info@willan.publishing.co.uk
Website: www.willan.publishing.co.uk

Published simultaneously in the USA and Canada by

Willan Publishing
c/o ISBS, 920 NE 58th Ave, Suite 300,
Portland, Oregon 97213-3786, USA
Tel: +001(0)503 287 3093
Fax: +001(0)503 280 8832
e-mail: info@isbs.com
Website: www.isbs.com

First edition published 2001
Second edition published 2002
Third edition published 2005
Fourth edition published 2007

ISBN 978-1-84392-358-9 paperback

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Project managed by Deer Park Productions, Tavistock, Devon
Typeset by Pantek Arts, Maidstone, Kent
Printed and Bound by TJ International, Padstow, Cornwall

Contents

Table of Statutes

Table of Cases

Preface to the fourth edition

The study of any area of law can appear somewhat daunting to a new student and presenting material in an accessible way, while retaining academic integrity, has become a significant feature of each edition of this book. This new edition is no exception and the book aims to be a complete text for students of Contract Law at A-level as well as those on other courses in further and higher education. The frequent revision programme means that the book is up to date with regard to examination specifications and this edition incorporates the new OCR four-module requirements, including both new source materials for the Special Study paper and examples of the new-style dilemma questions.

As before, the book includes opportunities to make connections between areas of law and to consider the moral, ethical and social issues found within the law. The reminders within the text prompt you to think about issues, to consider whether outcomes are fair to individuals and to consider the way in which justice is achieved within the broad context of the society in which we live. Many of these issues are raised in 'boxed' questions, indicating points at which you could stop and consider answers for yourself before moving on to the next section. At the end of each chapter is an updated set of questions, including some from recent A2 examination papers, for you to practise, with suggested outline answers at the end of the book. A whole section towards the end examines the general context of the law of contract, and the specific ways in which a synoptic overview is assessed by the major examination boards have been updated. The aim is twofold: to help you to achieve success in examinations and to present a context in which contract law may be set in order to acquire skills for life and to extend the value of study.

Many students have found the key skills section useful in assembling their portfolios, finding that generally those students who achieve a qualification at an advanced level do have such key skills in order to undertake their studies. At A-level there are specific requirements for this qualification, so to aid you in achieving this as smoothly as possible, a section is included to suggest some ways in which these skills can be demonstrated through your 'normal' study of contract law, and in fact to show how the assessments can complement and enhance each other.

It is obviously important that a law textbook keeps up to date, since the law itself is a living and changing entity, reflecting the society in which we

live. This book is based on the state of the law at the time of publication, including recent cases and statutes. Try to read quality newspapers and legal journals, visit courts and legal practices, and make full use of the internet. The opinion of others is valued as a resource in both forming an individual view and in assessing the current state of the law. I have suggested further resources which you may like to investigate to help broaden your knowledge and to become aware of new law as it develops.

I hope that this book helps you not only to acquire the knowledge that you need to pass examinations, but that it will encourage you to be enthusiastic in your study of Contract Law for its own sake, so that you really want to find out more because you are genuinely interested. Most of all, I wish you well in your studies and examinations, and hope that you are indeed successful.

Acknowledgements

I would again like to acknowledge gratitude to the A-level examination board OCR for allowing the reproduction of examination questions. I would also like to thank Brian Willan and the production team for their continuing expertise, support and extreme patience, and my family for again putting up with the domestic difficulties that writing seems to produce.

1 Principles of the law of contract

Have *you* made a contract today, or this week? If you have not studied the law of contract at all, then your answer may well be 'no', since the law of contract may conjure up images of long, complicated forms for the sale of houses, loan agreements, exchange of businesses, etc. However, contracts exist in much more humble settings, beginning with everyday actions such as buying a packet of crisps or making a bus journey, and so the law concerning it has simple foundations. Yet this basic law of everyday contracts with which we will be concerned during much of this book, covers all kinds of situations from simple shopping to large commercial deals, and the cases which lay down the rules are equally wide in the matters which they cover.

Note: The particular area of contracts concerning the sale of land operates within this general framework of the law of contract, but is also covered by further law specific to land, which is outside the scope of this book. ('Land' covers not just the ground, but things growing in it, flowing through it, and attached to it, such as houses and other buildings.)

> Can you think of some situations during the last few days when you might have made a contract?

Contracts are made by ordinary people in everyday situations, often many times during a day. Examples include buying a magazine, parking a car, doing the family shopping, entering competitions. Most of these events take place quite smoothly without any awareness of a contract having been made. It is usually not until disputes occur that the question of a possible contract arises.

Why do we need a law of contract?

The majority of people generally honour most of their promises as a matter of principle. However, situations do arise where conflicting interests lead to dispute, and then an established system of some sort is needed to resolve the problems and to attempt to prevent injustice.

It is easy enough to imagine a situation where an intention to trade dishonestly leads to a contract dispute, but problems may also arise when two or more people have honest, but differing, views of a situation. For example, those involved may have used similar language while understanding completely different things in an agreement. Equally, an arrangement may have begun amicably, a subsequent difference of opinion colouring a person's view of the situation.

In theory, at least, it would be ideal if problems with contracts could be sorted out by referring to the intentions of those involved. However, most contracts are not written, and it is obvious that no court can look into a person's mind, so English law looks for an objective test of agreement. It attempts to look at the conduct and communications between the parties involved, as if through the eyes of an ordinary reasonable person, to see if the outward signs of a contract exist. A good illustration of this is found in the following case.

Smith v Hughes (1871) Here a buyer wanted some old, mature, oats for his horse, and, after inspecting a sample, thought he had obtained these at a reasonable price. In fact the seller thought that new oats were required, and sold him less mature oats at a fairly high price (old oats were worth more than new oats). When the error was discovered the question arose as to what had really been intended.

Since the court could not investigate what had taken place in the parties' minds, they based their decision on the evidence of what was intended, that is that the two parties had been quite happy with the sale of what they had seen in the sample in front of them.

Blackburn, J said of this objective approach,

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound, as if he had intended to agree to the other party's terms.

Are all promises enforced by law?

No. If a friend promises to bring a CD along for you to listen to, and forgets, this would not be a breach of contract. Even though the friend's promise is made honestly and seriously and intended to be binding, it was probably not the intention that it would form a legal agreement enforceable

in court. Happily, the law takes this view too, as the promise itself may not contain the essential elements which are considered to be part of a contract. An obvious example is two members of a family, or a group of friends, making social arrangements – but more about this later.

Generally, the type of promise which the law will enforce is where something is to be gained on each side, such as goods for money, goods for goods, or exchange of services, although other less obvious bargains may be enforceable. So, in contract law, a court will look for a *promise given for a promise*, as opposed to a gratuitous (or one-sided) promise.

The form of a contract

Apart from a few exceptions (such as the sale of land) a contract may take any form. It may be oral or in writing, and may be made as a casual statement or accompanied by anything from a handshake to an elaborate ceremony. Often the form of agreement is suggested by the value of the contract in money terms, although this is not always the case, and it is certainly not a legal principle. However, buying a newspaper would not normally take place in the same manner as an agreement to deal in gold bullion!

The basis of contract law

The main aim of the law of contract is to ensure that these agreements are made in a fair way, and to enforce them, whether it is on behalf of the owner of a large company or a consumer buying a bar of chocolate. The rules of contract law are built on fairness and reasonableness, as cases have been decided in court, and on top of these Parliament has formed statutes where issues are of general concern.

As issues have come before the courts in the form of broken, misunderstood or non-existent contracts, the law has developed the rules which we apply to contracts today. The situation is gradually changing as more legislation is passed, often in an attempt to protect the consumer, who may otherwise be at a disadvantage in negotiating arrangements. Some examples are the Sale of Goods Act 1979 (as amended) and the Unfair Terms in Consumer Contracts Regulations 1994.

However, the principle that contract is a ‘case law’ subject remains true. The law of contract does not, in general, give rights and impose duties (as do some other aspects of law). It works by limiting the obligations that people may impose on themselves and others, within a general freedom to contract. The case of *Felthouse v Bindley* (1862) shows that obligations cannot be imposed on another party. In this case an uncle proposed to buy his nephew’s horse. The uncle wrote to the nephew saying that if he did not

hear otherwise, he would assume that the horse was his. It was held that this could not amount to a contract without some communication from the nephew, as a contract cannot be imposed on a person in this way (even if they are happy with it).

Some aspects of *Felthouse v Bindley* appear a little harsh. Do you think that the outcome is justified? What if someone wrote to you offering to buy your hi-fi, and stated that unless you let them know otherwise they would assume that there was a contract between you? Should you be under an obligation to reply?

So, exactly what is needed to form a valid contract? The rest of this book will address that issue, and will also look at ways in which courts deal with problems that may arise once a contract is formed.

Part 1

The formation of a contract

Is there agreement?

To form a binding contract, the essential requirement is that the parties are like-minded over the basis of their contract. We say that there should be *consensus ad idem*, which is a meeting of minds, and to a pure theorist that is all which should be required. The problem lies in finding evidence of this agreement. It is a little like convincing a teacher or an examiner of your knowledge of the law (or anything else). Evidence is required of your knowledge in an agreed way.

Through case law a pattern has evolved of finding evidence of agreement, and it is by requiring the parties to have communicated in some way, one of them making an offer and the other making an acceptance. In most cases this is not too difficult, although it will be seen in Chapter 2 that there are a few difficult and non-standard cases.

The benefit obtained or 'bargained'

If offer and acceptance were the only requirements, we could in theory have some very one-sided agreements. If I offer to give you a present of £20 next week, and you agree to this, we have an offer from me and an acceptance from you. If I then do not give anything at all next week, I will have broken my promise. Is this something that the law should enforce? The law is quite strict on not generally enforcing one-sided promises, feeling that it becomes very much a problem of morals when people break such promises.

The law will, however, enforce an agreement if something has been bargained by both parties, and both sides have contributed to the agreement in a recognisable way, for example by paying in exchange for goods. This does not have to be the actual handing over of goods, so a promise to pay could be given in exchange for the promise to hand over goods. This exchange is known as consideration, and is another requirement in forming a contract.

The intention to be bound by the agreement

A third requirement is that the parties do really intend to be bound by whatever they agree. In a shopping context this is likely to go without saying, as a seller is unlikely to intend to give away goods without really expecting payment! However, if I offer to pay for my friend's drink if he buys my sandwich, I do not seriously expect to sue him if he only buys his own sandwich. To distinguish between serious contracts and social agreements the law requires an element of legal intention in forming a contract.

Capacity

A further factor to consider in the legality of a contract is whether the parties are of the standing required by the law to make a binding agreement. If a child in a playground agrees to sell one of his toys, this would not normally be binding. The law requires a legal capacity to contract, and generally adults over the age of 18 are said to have this. A further formation requirement examined in this part of the book, then, is the capacity to contract.

If all four of these requirements are present, then there will normally be a binding contract.

2 Offer and acceptance

A contract is an agreement between two parties imposing rights and obligations which may be enforced by law. The courts need some kind of evidence of this agreement, so they look, through the eyes of a reasonable person, for external evidence of it. To help identify evidence of agreement, it is conventionally analysed into two aspects: offer and acceptance.

Figure 2.1

Offer

An offer can be defined as follows:

> *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.*

Offers can be one of two types:

- Specific – made to one person or group of people. Then only that particular person or group of people can accept.
- General – made to 'the whole world' (or people generally), particularly seen in the cases of rewards and other public advertisements.

The following is probably one of the best known cases in contract law, and it involves a general offer, made to the 'whole world'.

Carlill v Carbolic Smoke Ball Company (1893)
In the *Illustrated London News* in November 1891 appeared what was to become a notorious advertisement. It read,

£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic, influenza, colds or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball .... One Carbolic Smoke Ball will last a family several months making it the cheapest remedy in the world at the price – 10 shillings post free.

Recent winters had been hard, influenza epidemics sweeping the country and resulting in many deaths. Mrs Carlill, like many others, must have been impressed by the advertisement and acquired a smoke ball from her chemist. Unlike many others, however, when the smoke ball failed to prevent her from getting influenza (despite its use as directed from November to January), Mrs Carlill claimed her £100. When the company refused to pay she sued them. It was held that Mrs Carlill could successfully recover the £100. An offer to the whole world was possible, becoming a contract with any person(s) who accepted the offer before its termination. Mrs Carlill had accepted by her actions, and had turned the offer to the world into a contract with her personally. The Carbolic Smoke Ball Company were therefore bound to give her the money promised in the advertisement.

Imagine life in 1893. The fear of influenza was immense, and a remedy would appear attractive. The price of 10 shillings would be high (this could have be a person's wages for a week at that time). Do you think, therefore, that a customer like Mrs Carlill would have considered the advertisement to be taken seriously, as a genuine offer?

The Carbolic Smoke Ball Company, in defending its claim, put forward various defences, and in rejecting them one by one the court laid down important legal principles:

1 The Company claimed that promise was a mere advertising puff, not intended to create legal relations (see Chapter 4 on this issue). However, the Court of Appeal dismissed this argument because:

(a) The company had made a specific statement of fact, capable of forming part of a binding contract: If you use our product and catch 'flu, we will give you £100.

(b) The advert had also stated that '£1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter'. The court felt that people generally would interpret this as an offer to be acted on.

2 The company argued that a 'contract with the whole world' was not legally possible.

Bowen LJ said that this was not a contract with the whole world, but an offer made to all the world, which was to ripen into a contract with anybody who performed the necessary conditions.

3 The company claimed that as Mrs Carlill had not notified them of her intention to accept the offer there was no contract.

The Court of Appeal held that the company had waived the need to communicate acceptance because the advert indicated that the action of using the smoke ball was what was required of the offeree, rather than an oral or written response. In this the court recognised the existence of unilateral contracts.

4 The company argued that there was no consideration to make the promise binding.

The Court of Appeal said that Mrs Carlill's use three times daily was consideration, also the benefit received in promoting sales.

Apart from the various points of law dealt with by this case, it had other interesting implications, in that it probably had a strong influence on commercial thinking in advertising practice. Whereas it had been acceptable until this time to make unsubstantiated claims over products, Victorian advertising in similar style was greatly curtailed, and later years saw the arrival of consumer protection legislation. As for the Carbolic Smoke Ball Company, they went into liquidation in 1895.

A recent case found acceptance of a general offer to take place in a similar way, involving action in response to a written poster.

Bowerman v ABTA (1996)
Notices on the wall in a travel agency were held to amount to an offer that anyone booking a holiday with this agency would be covered by membership of the Association of British Travel Agents. Acceptance was the act of booking a holiday with this agency by a client.

So, while most offers require verbal or written acceptance (forming what are known as bilateral contracts), with general offers the performance of some act may be valid acceptance (forming a unilateral contract).

An offer may be:

- express – either verbal or written, or
- implied – from conduct or circumstances. Sometimes nothing is said at all, but an offer is obvious from the actions. This is probably the situation when making a journey on a bus. The case of *Wilkie v London Passenger Transport Board* (1947) involved a discussion as to how and where a contract was formed in a bus journey. Clearly there was a contract, but exactly where offer and acceptance took place was debatable. It was

largely implied by the actions of the parties, rather than anything said specifically on each bus journey.

Think about your actions when you travel on a bus. What part of your conduct, or the conduct of the bus company, could amount to an offer?

Offers and 'non-offers'

Faced with the task of establishing whether or not a contract exists between two parties, the court normally looks first at the statements and negotiations between the parties to see if a binding offer has been made. Sometimes what appears to be an offer is, in law, an invitation to others to make an offer, or an invitation to treat. Although many given situations may at first sight appear to be debatable, enough cases have passed before the courts over the years for certain 'rules' to be laid down.

So, initial negotiations could amount to:

- an offer – which is capable of acceptance, or
- an invitation to treat, which is an invitation to others to make or negotiate an offer – and therefore not open to acceptance.

Generally, displays in shop windows are not offers, but merely invitations to treat. This was established in the case of *Timothy v Simpson*, but confirmed in the following more recent case.

Fisher v Bell (1961)
A seller was accused of 'offering for sale' a flick-knife, contrary to the Restriction of Offensive Weapons Act 1959. The knife was on display in his window, and the court held that this was an invitation to treat, not an offer.

A similar situation arose shortly afterwards in *Mella v Monahan* (1961) regarding obscene publications in a shop window, with the court again holding the window display to be an invitation to treat, not an offer.

So if the customer makes the offer in this situation, it is up to the seller to accept or reject the offer. This follows through the idea that there is freedom to contract, and means that the seller has a right to refuse to sell an item to a particular customer. This could occur, for example, if a customer mistakenly thought that a display item was for sale, or if a person asking a landlord for alcohol was already very drunk, or if a seller just did not like a customer. This was expressed by Winfield in 1939 as follows:

> A shop is a place for bargaining and not compulsory sales.... If the display of such goods were an offer, the shopkeeper might be forced

to contract with his worst enemy, his greatest trade rival, a reeling drunkard or a ragged and verminous tramp.

Do you think that this law is widely known? Does it make any difference in practical terms? It is likely, in practice, that most sellers will want to maintain good customer relations, and most retailers will not refuse to sell to people because of personal dislike.

It should be noted that:

- A shopkeeper might incur criminal liability under the Trade Descriptions Act 1968.
- The law is not the same in some other countries.

The idea of an invitation to treat was applied to supermarkets, which of course is very relevant to modern shopping habits, in the following case.

Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd (1953)
Boots were accused of selling goods without the supervision of a pharmacist under the Pharmacy and Poisons Act 1933. Boots had opened a shop in supermarket style, the customer taking products from displays and paying for them at a cash point. It was established that there was a registered pharmacist at the cashier point. The court held that the display of goods amounted to an invitation to treat, the customer making an offer by taking them to a cashier, and the cashier accepting by some action which indicated willingness to sell. There was therefore no offence, since the 'sale', that is the offer and acceptance, took place at the cash point where a pharmacist was situated.

What about goods and services described in advertisements? Would such an advertisement amount to an offer?

In many situations the court has held that the advertisement of goods or services is an invitation to treat, the customer making the offer. These situations include the distribution of circulars, the posting of timetables, auctions, tenders and where goods are mentioned in the small advertisements section of newspapers. This last situation arose in the following case.

Partridge v Crittenden (1968)
The appellant had inserted in the classified section of a periodical a notice advertising 'bramblefinch cocks and hens, 25s each'. He was charged with

unlawfully offering for sale a wild live bird contrary to the provisions of the Protection of Birds Act 1954, and was convicted. The divisional court quashed the conviction, saying that as the advertisement was an invitation to treat, there had been no 'offer for sale'. Lord Parker said in his judgment, 'I think that when one is dealing with advertisements and circulars, unless indeed they come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale.' He went on to explain that if the advertisement was an offer, then the seller may well find that he had contracts with a large number of people when he only had a limited supply of birds for sale. The problem of exhausted stocks is a practical reason for the law being this way round.

So, for displays of goods in shop windows, classified advertisements, catalogues, circulars and timetables, the following general 'shopping' principles apply.

'Shopping' principles

- *The display or advertisement is an invitation to treat.*
- *The customer offers to buy the goods at a particular price.*
- *This offer can then be accepted by the seller in some action, for example by a verbal statement or by entering the price in a cash register.*
- *This offer and acceptance may then be a binding contract.*

However, this does not mean that all advertisements are automatically invitations to treat. We have seen already in *Carlill v Carbolic Smoke Ball Company* that some advertisements are general offers, especially where the main terms are included in the advertisement and all that remains is for the customer to take action. This could arise in a sale, for example, where a shop window display contains an advertisement which says, 'Any CD player at £5 for the first 10 customers inside the shop on 1st January'. If a customer is one of the first ten customers in the queue, and wished to buy a CD player for £5, they would presumably be regarded by the court as accepting the offer made by the shop in its advertisement. A similar kind of situation arose in the case which follows, regarding a sale of fur coats.

Lefkowitz v Great Minneapolis Surplus Stores (1957)
Here the advertisement stated, 'Saturday 9am sharp; 3 brand new fur coats worth $100. First come, first served, $1 each.' The seller refused to sell to one of the first three customer because he was a man, and they intended to sell to women. It was held that the man had accepted the terms of the offer in the advertisement and was entitled to the coat for $1.

A further problem arises where the two parties are not in a traditional 'shopping' situation, but are negotiating individually. How do the courts decide when their statements have become firm enough for one of them to have made an offer? The issue arose in the following case.

Gibson v Manchester City Council (1979)
Gibson wanted to buy his council house under a scheme run by the Manchester Council. The council wrote that 'the Corporation may be prepared to sell the house to you' at a certain price. Gibson completed the necessary form and returned it, but this was followed by an election and change of council policy on house sales. The council refused to sell, and when the case went to court it was held that the council's proposal was an invitation to treat, followed by an offer from Gibson on the form which was rejected by the council, therefore not forming a binding contract of sale.

This is one logical view of the negotiations, but another equally logical view may produce an opposite result, and this may well be more in line with the expectations of both Gibson and the council as it was at the point of negotiations – the original parties to the contract. The court was not prepared to view the negotiations as a whole, and was very precise in identifying an invitation to treat, leading to an offer followed by an acceptance. It is not always easy to be as precise as this in real life situations, and the approach taken was quite different in the case of *Trentham Ltd v Archital Luxfer* (1993) – see p. 22.

The issue of whether a party has made an offer or invitation to treat enters a new arena with the increase in trading on the internet. See further discussion of this at the end of the chapter, p. 40.

Termination of an offer

Various events may bring an offer to an end, but only an unconditional acceptance will result in a contract. The diagram on page 14 summarises the various ways in which an offer may terminate.

Acceptance

This will normally mean that the offer is no longer available to anyone else, as the stock may be exhausted, such as where a person has a bicycle for sale.

Refusal

An offeree may refuse an offer, in which case the offer ends, so it cannot be accepted later by the offeree.

Counter-offer

Sometimes a reply from an offeree comes in the form of a new proposal, or counter-offer. It may simply be that the offeree is not happy with one or more of the terms and makes changes accordingly. Since this is not an agreement to all the terms of the offer, it is not an acceptance (p. 20), and is known as a counter-offer. It is really a new offer, which is then open to acceptance or termination in some other way. The effect of a counter-offer is to destroy the original offer. An example would be if Jack offers to sell a bicycle to Jill for £70, and Jill says 'I'll give you £68 for it'; here, there would be no contract, even though Jack and Jill may be quite close to agreement. Further, if Jack did not want to accept £68, Jill could not subsequently insist on being allowed to buy the bicycle for the original price of £0, because her counter-offer cancelled Jack's original offer. In the following case this kind of bargaining situation arose over buying a farm.

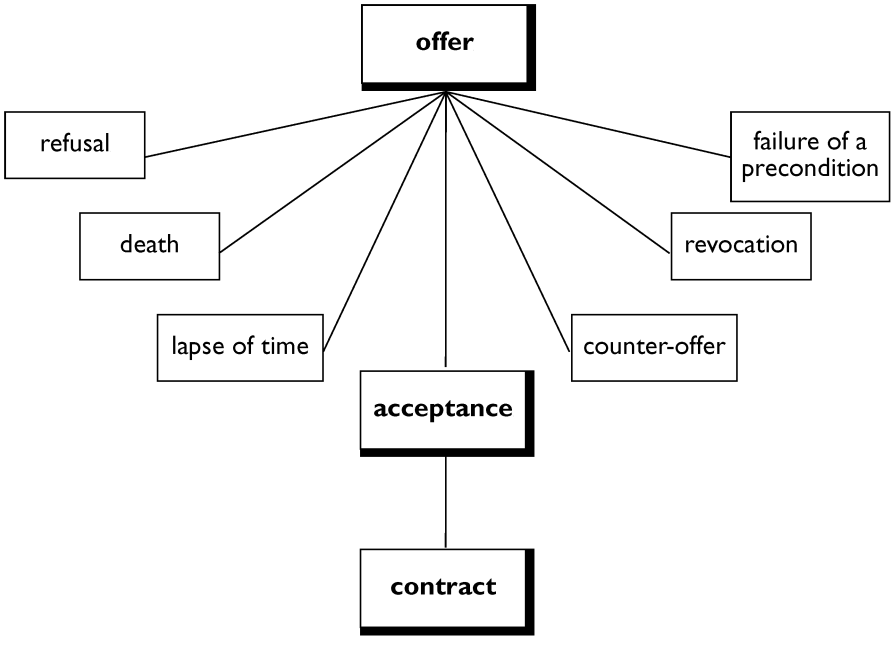

Figure 2.2

Hyde v Wrench (1840)
An offer was made to sell at £1000. The buyer refused this, but offered to pay £950. When this was not accepted by the seller, the buyer then tried to insist on buying at £1000, but the seller had decided not to sell him. It was held that he was not obliged to do so, since in making a counter-offer of £950 the buyer had at the same time refused the original offer, thereby terminating it.

In this case there were no external signs of agreement at any stage, in contrast to *Brogden v Metropolitan Rail Co* (1877), where both parties thought that a valid contract existed and indeed behaved as if that was so, until the time of the dispute. These are good examples of the necessity of looking at the situation and the actions of the parties objectively.

The following, more recent, case shows an interesting variation of a typical counter-offer situation.

Pickfords v Celestica (2003)
An offer was made to carry out work using lorries, the price quoted being £890 per lorry used. Then a second offer was made as a total price of £98,760 for the whole work, regardless of the number of lorries. The second offer was seen by the court as cancelling the first one, in a similar way to a counter-offer, and eventually the carrying out of the work was held to amount to acceptance.

Battle of forms

An extension of the counter-offer situation arises in modern business negotiations where both parties deal with standard form stationery. Both have their own terms set out, often on the back of printed quotations, invoices, delivery notes, etc. If one party's terms differ substantially from the other's, on whose terms are the parties dealing? The view taken by the courts is that the last party to send a piece of paper containing such terms, before the actual performance takes place (often delivering goods), lays down the terms. This has turned into the saying that 'he who fires the last shot wins'. This situation arose in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* (1979) where the buyer and seller of a piece of machinery clearly had their own, quite different, standard terms. Lord Denning suggested in this case that basing everything on the chance of being the party to fire the 'last shot' in this way was not satisfactory, and that the courts should look at the whole picture painted by the parties' actions in deciding whether there is really a contract, and exactly what terms have been agreed. His views were largely based on an approach suggested in *Gibson v Manchester City Council* (1979) (see p.13 above). However, this was not the eventual decision of the court in Gibson, and his views are not therefore really representative of the law on this, sensible though they may appear, and the 'last shot' rule still remains.

Request for further information

The distinction between a counter-offer and a request for further information is sometimes difficult to make. It is important because of the effect on the original offer.

- A counter-offer (as seen above) terminates the original offer.
- A request for further information leaves the original offer open until withdrawn by the offeror.

An enquiry of this kind arose in the following case.

Stevenson v McLean (1880)
Following an offer to sell iron, the buyer sent a telegram asking whether credit terms would be available. As this did not change any existing terms, but merely asked for more information on the agreed price, it did not constitute an offer which could be accepted and was held not to be a counter-offer but an enquiry.

This must be a borderline case, but it does not fit in with the proposition that a counter-offer must be:

- definite enough to accept just like an original offer
- a change of terms – not just adding new information to the original ones.

Lapse of time

An offer may lapse due to the passing of time. This can occur when:

(a) It is stated in the offer that it is open for a specific time, for example,'You have until Friday to let me know your decision'. If acceptance, refusal or revocation do not take place before Friday, then the offer will lapse on that day.

(b) No specific time limit is stated in the offer. In this case the offer is open for a 'reasonable time'. It is left to the courts to decide exactly what is a reasonable time, and their decision will depend on the individual circumstances and the nature of the goods. The following case is an example of an unreasonable time delay.

Ramsgate Hotel v Montefiore (1866)
An offer to buy shares was made in June and an attempt was made to accept in November. It was held that after five months the offer had lapsed. This is a fairly predictable decision, given the time span. It would be more difficult if the acceptance had not been such a long time after the offer.

So how long after the offer would the courts find that it had lapsed? They would probably take into account such factors as the nature of the goods

(strawberries would not be treated in the same way as books or a house), the market demand for the goods, and whether prices for the item normally fluctuated greatly, as they do when selling shares, for instance.

Death

The death of an offeror will obviously, in some circumstances, mean that a contract becomes impossible to complete, as in the case of a personal service or artistic performance (such as an offer to paint a portrait or sing or dance). Where the offer is not of a personal nature, such as an offer to sell someone a piece of furniture, then there seems no reason why it should not remain open for acceptance and be honoured by the estate of the deceased offeror. The case of *Bradbury v Morgan* (1862) suggests that in general the death of an offeror may not cause an offer to lapse, particularly if the offeree accepts in ignorance of the death. The law regarding the death of an offeree is not clearly decided, but there seems no reason why the offer should not be accepted by the estate, as in the case of the death of the offeror, given the right circumstances.

Revocation

An offer can be revoked, or withdrawn, by the offeror at any time before it is accepted. This must be communicated to the offeree before acceptance takes place. The offeror has taken the responsibility of starting the negotiations, and cannot simply change his mind. This is illustrated in the following cases.

Byrne v Van Tienhoven (1880)
The defendant, trading in Cardiff, wrote to the plaintiff, in New York, offering to sell goods. On the day when the offer was received, the plaintiff telegraphed acceptance, but, three days before, the defendant had sent a letter withdrawing the offer. However, this did not arrive until after the acceptance had been confirmed by post. It was held that there was a binding contract on acceptance, and the revocation was of no effect as it was not communicated until after acceptance had taken place. So an offer can be revoked, but the revocation must be communicated to the offeree before acceptance.

Confetti Records v Warner Music UK (2003)
The recording company, Warner, produced an album from music sent to them by Confetti. It was then held too late for Confetti to revoke their offer.