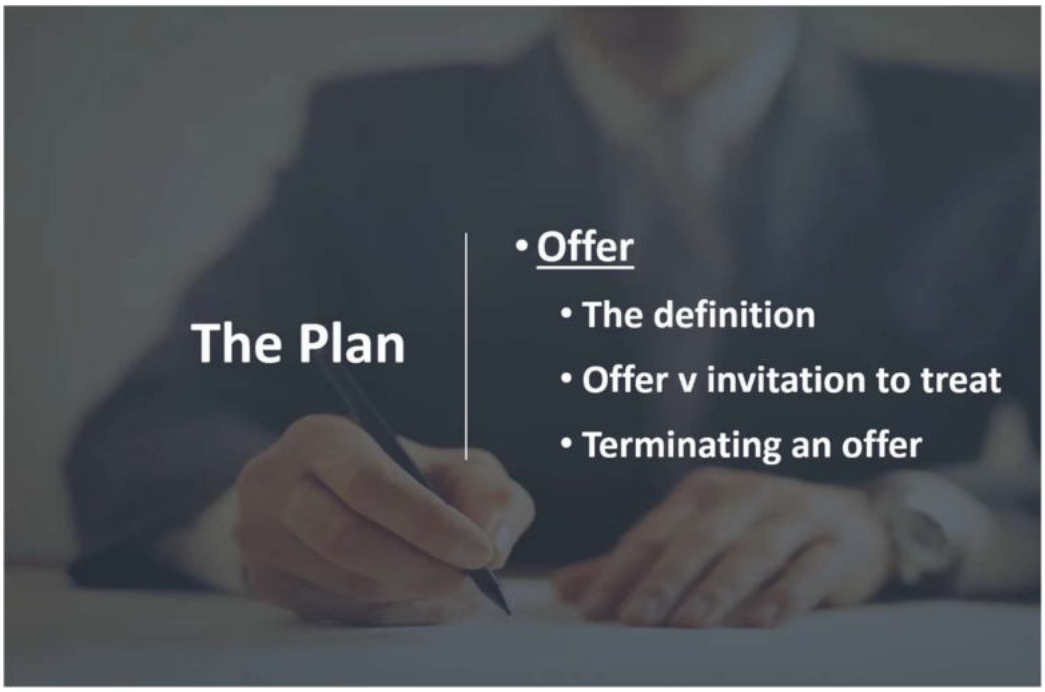
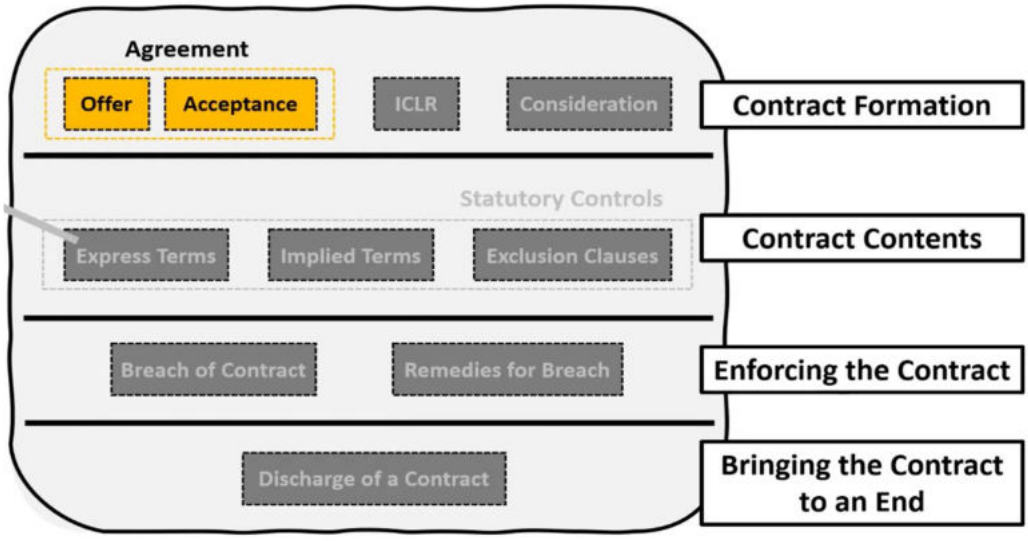
Week 2: Contract Law
Offer





Please find the video from the following link: https://youtu.be/wtENmNMzvgs

Week 2: Contract Law
Offer

Offer – Perspective

Offer – What is an offer?

- Forget what you know about this term
- An offer (in the eyes of contract law) is:

"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"

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Week 2: Contract Law
Offer

Offer – What is an offer?

- The contrasting *Gibson and Storer* cases are useful here
- Similar sets of facts, two different outcomes
  - ***Gibson v Manchester City Council (1979)*** – offer was NOT valid
  - ***Storer v Manchester City Council (1974)*** – offer was valid

Invitation to Treat (recognised examples)

[1/4] Advertisements, brochures and price lists

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Week 2: Contract Law
Offer

Invitation to Treat (recognised examples)

[1/4] Advertisements, brochures and price lists

- Let's look at ***Carlill v Carbolic Smoke Ball Co*** **(1893)**
  - Smoke Ball Co placed an 'advert' where it promised to pay £100 to any person who caught influenza after using its smoke ball for 2 weeks →
  - Smoke Ball Co stated in the advert that £1,000 had been placed in a bank account to honour any claims made →
  - Mrs Carlill used the smoke ball as prescribed, and caught influenza.

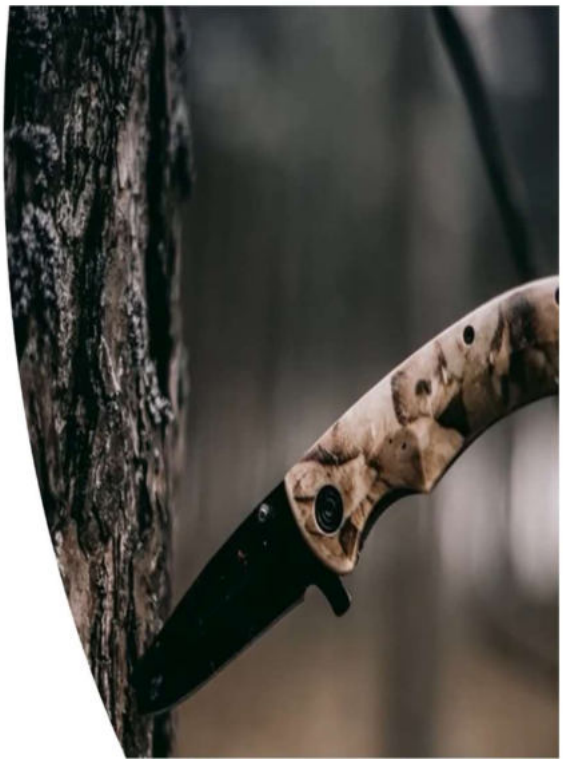
UNILATERAL OFFER

Performance of specified act

+

Intention to be bound

Invitation to Treat (recognised examples)



[2/4] Shop displays: shop windows and supermarket shelves

- GENERAL RULE – these are invitations to treat – ***Fisher v Bell*** **(1961)**
- See also ***Pharmaceutical Society of GB v Boots Cash Chemists*** **(1953)**
  - Invitation to treat = goods on display
  - Offer = goods being presented to cashier
  - Acceptance = cashiers act of 'acceding to the sale'

Please find the video from the following link: https://youtu.be/wtENmNMzvgs

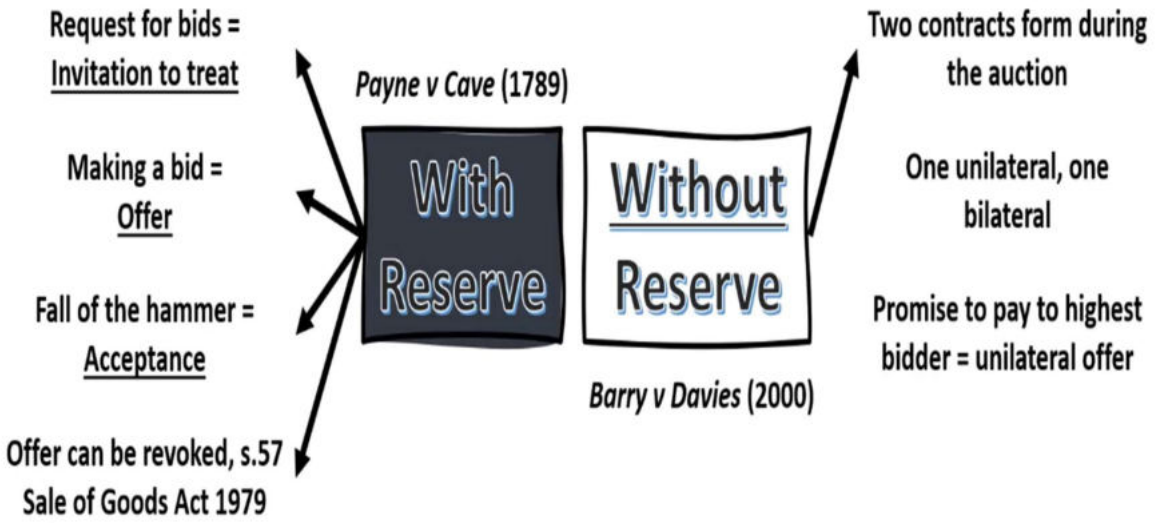
Week 2: Contract Law
Offer

Invitation to Treat (recognised examples)

[3/4] A request for tenders

- GENERAL RULE – these are invitations to treat – ***Spencer v Harding*** **(1870)**
  - Invitation to treat = the request for a tender
  - Offer = the tender submission
  - Acceptance = the tender being accepted
- EXCEPTIONS
  1) An express promise is made to accept the most competitive bid (***Harvela***
  2) An express promise is made to consider compliant bids (***Blackpool***)

[4/4] Auctions



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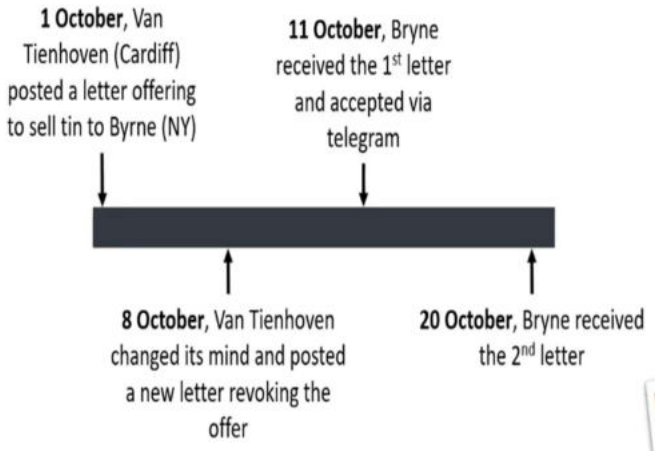
Week 2: Contract Law
Offer



- Offer was still open when it was accepted by Byrne.
- When was contract formed?

Termination of an Offer

[2/4] Lapse of time

- An indefinite offer will lapse after a reasonable period of time – ***Ramsgate Victoria Hotel v Montefiore (1866)***
- What is reasonable? This is a question of fact
  - Tinned peaches?
  - Fresh peaches?

Please find the video from the following link: https://youtu.be/wtENmNMzvgs

Week 2: Contract Law
Offer

Termination of an Offer

[3/4] Failure to comply with a condition precedent

- Sometimes referred to a *"subject to"* offers
- Condition precedent = an event that is required before something else will occur
- Offer is terminated if condition precedent is not satisfied – ***Financings v Stimson (1962)***

Termination of an Offer

[4/4] Death

- This area of contract law is far from clear
- Death of Offeror
  - If offeree is aware of death = probably lapses – ***Coulthart v Clementson*** **(1879)**
  - If offeree is NOT aware = probably does not lapse – ***Bradbury v Morgan*** **(1862)**
- Death of Offeree

Please find the video from the following link: https://youtu.be/wtENmNMzvgs

Chapter 2

AGREEMENT

2.1 INTRODUCTION

The courts have, traditionally, ascertained that parties have, in fact, reached agreement, by analysing the dealings between the parties, in terms of offer and acceptance. The question asked is whether there has been a *definite offer* by one party (the "offeror") and an *unqualified acceptance* by the other (the "offeree").

2.2 OFFER

An offer is an expression of willingness to contract, made with the intention that it shall become binding on the offeror, as soon as it is accepted by the offeree. The majority of offers are negotiated on a "promise for a promise" basis. Thus, an offer to sell a house involves a promise by the offeror to sell, in return for the offeree's promise to pay. This is called a bilateral offer. A unilateral offer, on the other hand, is made to the world at large, or at least to anyone who comes forward and performs the conditions. It is sufficient if the terms of the offer, which may be made in writing, by words or by conduct, are clear, and that the offer was made with the intention that it should be binding on anyone that accepts it.

2.3 INVITATION TO TREAT

A genuine offer is different from what is known as an "invitation to treat", i.e. where one party, demonstrating a willingness to negotiate, merely *invites* offers, which the other party is then free to accept or reject, or a "statement of intention". Essentially, it is an *invitation*, extended by one party to the other, to enter into negotiations, or to make an offer himself.

The words in which the transaction is couched are not themselves conclusive. An "offer" may, in fact, be an "invitation to treat" (or vice versa), depending on the intention of the person making it, as revealed by his words or actions and the surrounding circumstances. For example, an "offer" of shares made by a company to potential investors when it publishes a prospectus is, in fact, an invitation to treat to the public to make *offers*, with the directors then being entitled to decide to whom the shares will be allotted (the acceptance).

Two domestic examples illustrate the fine line that separates a valid offer from an invitation to treat. *Gibson v Manchester CC* [1979] 1 WLR 294 involved a council house tenant who wished to buy his house under a "right to buy" policy. The council wrote to the tenant informing him that it might be willing to sell the property and the tenant replied, confirming that he wished to buy. The council's leadership changed hands, however, and the right to buy option was withdrawn. The tenant claimed against the council for breach of contract, but the House of Lords held that the council never made an offer to sell; there could be no valid acceptance, since the parties were, effectively, in negotiations. In *Storer v Manchester CC* [1974] 3 All ER 824, however, the council sent a council house tenant an application form to buy his council house. It promised that, when the form was completed by the tenant, it would sign and complete the sale. He followed the council's instructions and returned the completed application form. The council, subsequently, refused to sign and complete the sale, as promised. It was held that a contract had been formed, since the council's letter constituted a firm intention to continue with the sale once the tenant had returned the application form. The council was, therefore, bound to complete the sale.

The decisions in *Gibson v Manchester CC* and *Storer v Manchester CC* illustrate the distinction between an offer and an invitation to treat, with the *Storer* case highlighting the legal effect of negotiations proceeding beyond an invitation to treat, to a formal offer being made.

The distinction between offers and invitations to treat, i.e. the exact point at which an invitation to treat is converted into an offer, is often hard to draw, as it depends upon the intention of the person making the statement. Surrounding circumstances and the normal pattern of dealing (e.g. what is usual in a particular trade or industry) may give valuable clues as to the parties' intentions. However, in some cases, the distinction has been settled – at least presumptively – by authority or by statute, as will now be seen.

2.4 PRINCIPLES APPLIED BY THE COURTS IN ASCERTAINING WHETHER THERE HAS BEEN AN OFFER CAPABLE OF ACCEPTANCE

2.4.1 WINDOW AND SELF-SERVICE DISPLAYS OF GOODS IN SHOPS

The display of goods in shops, on shelves, or in the window, with a price tag attached, can constitute either an offer or an invitation to treat. If it is an offer, the customer can accept it simply by indicating his desire to buy the item and the shopkeeper must then sell it to him at the stated price. By contrast, the customer seeking to buy the item will make the offer, which the shopkeeper can then accept or refuse as he wishes – if it is an invitation to treat.

In the case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 All ER 456, the question the Court of Appeal had to consider was whether the display of certain drugs on open shelves in a self-service store, which required the supervision of a registered pharmacist at the point of sale, constituted an offer to sell or an invitation to treat. The Pharmaceutical Society argued that such a display constituted an offer to sell, which the customer accepted by placing the selected items into the shopping basket provided. However, the Court held that the items on display were invitations to treat. The customer made an offer to buy, rather than the chemist making an offer to sell, by the customer tendering the items for payment at the sales counter. Accordingly, there was effective supervision of the drugs at the point of sale.

In *Fisher v Bell* [1961] 1 QB 394, a display of flick knives in a shop window was similarly held to be an invitation to customers to make an offer to buy, rather than an offer for sale (the Restriction of Offensive Weapons Act 1961 was passed shortly after this case, to close this loophole in the law).

2.4.2 ADVERTISEMENTS

The principles applied by the courts in ascertaining whether there has been an offer capable of acceptance closely follow window and self-service displays of goods in shops. In *Partridge v Crittenden* [1968] 1 WLR 1204 (a case similar in its facts to *Fisher v Bell*, but concerning the sale of bramble finches, rather than flick knives), Lord Parker CJ stated that:

> "...when one is dealing with advertisements and circulars, unless they...come from manufacturers, there is business sense in their being construed as invitations to treat, and not offers for sale..."

Newspaper advertisements of bilateral transactions are (unless they come from manufacturers) generally considered to be attempts to induce offers from recipients, rather than offers themselves. Thus, an advertisement in a newspaper of land for sale will usually lead to further bargaining. Moreover, the seller may wish to assure himself that the prospective purchaser will

be able to pay for the goods, before entering into a binding agreement.

Posting an advertisement on a website (e-commerce), similarly, amounts to an invitation to treat. The customer selects the products and services, thus, making an offer to purchase them. The seller may accept the offer or reject it (e.g. if a computer firm which mistakenly advertises on its website that it is selling PCs for £20, instead of £200, could refuse to sell the goods at the advertised price).

By contrast, a unilateral offer of a reward for lost property or for information leading to the capture or conviction of a criminal will, generally, be treated as an offer and the first person to return, e.g., the lost pet, will be able to claim the money. Provided the advertisement is not mere sales promotion or "puff", not intended to create legal relations, then, even if the offeree has not supplied any consideration and has not communicated his acceptance of the offer, the advertisement will be deemed sufficiently clear to constitute an offer (*Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 CA).

2.4.3 TICKET CASES

An area which has caused difficulty, and is still far from clear, involves contracts where a ticket is given by one party to another. Does such a ticket constitute a contractual document? In which case, will the parties to the contract be bound by any printed conditions on the ticket, or referred to on the ticket?

In *Chapelton v Barry Urban District Council* [1940] 1 KB 532, deck chairs were offered for hire by a local council, under a sign setting out the price per hour. The claimant hired a deck chair and in return he received a ticket from a council attendant, which he pocketed after quickly glancing at it. He was subsequently injured when the deck chair collapsed under him, after he sat down on it. Negligence was not denied by the council, but it claimed it was protected by an exclusion clause on the back of the ticket which asserted that: "The council will not be liable for any accident or damage arising from hire of chair". The Court of Appeal held that the ticket amounted to no more than a receipt. Any terms printed on the back of the ticket claiming to exclude liability were of a non-contractual nature, since a customer would not expect to find such terms contained there.

By contrast, in the case of cinema, raffle and cloakroom tickets, a ticket will clearly be a contractual document, with the request for a ticket constituting an offer and the issue of that ticket an acceptance.

In *Thornton v Shoe Lane Parking Ltd.* [1971] 1 All ER 686, the Court of Appeal deemed that provisions exempting a company from liability on a ticket issued by a machine at an automatic barrier at the entrance to one of its car parks were communicated too late to be effective. The contract was completed only when the claimant drove up to the sensor that activated the automatic barrier. This was prior to the ticket being issued.

This topic will be revisited later on in the context of exclusion clauses.

2.4.4 AUCTION SALES

An auctioneer's call for bids is regarded as an invitation to treat, a mere request for offers – offers which the auctioneer can accept (with the fall of the hammer) or reject as he chooses (*Payne v Cave* (1789) 3 TR 148 and s. 57 Sale of Goods Act 1979). Likewise, the bidder is entitled to withdraw his offer, at any time, before the auctioneer has signified acceptance with the fall of the hammer.

In an auction which is advertised as being held "without reserve" (a "reserve price" is the price which bidders must reach for the auctioneer to be obliged to accept the highest bid), the auctioneer is obliged to accept the highest bid. In *Barry v Heathcote Ball & Co* [2001] 1 All ER 944; [2000] 1 WLR 1962, an auctioneer refused to accept a bid of £200 for two machines worth £14,000 on the open market, even though the auction was without reserve. The Court of Appeal, relying on the decision in *Warlow v Harrison* (1859) 1 E & E 309; 29 LJ QB 14, decided that, if the auctioneer had specified that the auction was "without reserve", a legal commitment arose which bound the auctioneer. This decision is similar, in many respects, to the decision that a local authority had committed itself to accept all responses to tender submitted before the deadline in the "tenders" case of *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 3 All ER 25 (see paragraph 2.4.5 below).

2.4.5 TENDERS

Where goods are advertised for sale by tender, the statement is not an offer to sell to the person making the highest tender, but an invitation to treat, i.e. a request by the owner of the goods for offers to purchase them. For example, where a building contract is put out for tender, this is a request for offers by contractors, which can then be accepted or rejected. This said, an invitation to tender can give rise to a binding obligation on the part of the inviter to consider tenders submitted, in accordance with the tender conditions. So, where the claimant delivered a tender and placed it in the letterbox of the defendant council, in accordance with the latter's instructions, one hour before the time limit for submitting the tender, the council had a duty to consider the claimant's tender and, by failing to do so, the club was entitled to damages for breach of an implied unilateral contract (*Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 3 All ER 25).

2.4.6 SUBJECT TO CONTRACT

The words "subject to contract" are used by parties who are negotiating as to the terms of a contract involving the sale of land, to indicate that documents passing from one to the other are not intended to be offers capable of acceptance, so as to form a binding contract. No contract will, thus, come into existence, until a formal contract has been drawn up and approved by the parties. This allows either party to withdraw from the agreement at any time, and for any reason, even if he has incurred considerable expense in negotiations, without facing an action for breach of contract. Whilst other legal systems impose a duty to negotiate, in good faith, in order to overcome this loophole, English law does not recognise such a duty. Where, however, there is clear evidence of a contrary intention, a court may be prepared to find that a contract has been concluded, despite the use of this formula. It should be noted that courts will generally not imply a duty of good faith into the performance of a contract as well.

2.5 CROSS-OFFERS OR COUNTER-OFFERS

There will, generally, be no contract if two persons make identical cross-offers, neither knowing of the other's offer, when he made his own (e.g. if X writes to Y offering to sell Y his car for £1,000 and Y, simultaneously, writes to X offering to buy his car for £1,000). One or both parties must seek to confirm that they are in agreement; without such extra communication and consequent guarantee of certainty, no contract (acceptance) can be implied.

2.6 TERMINATION OF OFFER

An offer is capable of acceptance until it is brought to an end in one of the following ways:

2.6.1 REVOCATION BY OFFEROR

The offer may be revoked by the offeror, at any time, until it is accepted. This applies even when the offeror has stated that the offer will remain open for a certain period, unless the offeree can establish the existence of a separate and distinct contract to keep the offer open (i.e. that he had bought the option to purchase by a separate agreement). An offer to settle, under Part 36 of the Civil Procedure Rules, is an offer to enter into a contract with the offeree and, as such, it may be withdrawn at any time prior to acceptance.

2.6.1.1 Communication of Revocation

The revocation of the offer must be communicated (actual communication, not deemed communication, as in the case of the postal rule in acceptance[2]) to the offeree. However, the revocation need not be communicated directly to the offeree; it is sufficient that it can be shown that he was *aware* of the revocation prior to his acceptance (as in *Dickinson v Dodds* (1876) 2 Ch D 463, where the offeror's decision to sell his house to someone else was communicated to the offeree by a mutual – and reliable – third party).

2.6.1.2 Unilateral Offers

Where the offer is *unilateral*, the question arises whether the offer can be withdrawn, at any time, before complete acceptance (e.g. if a person has completed all but the last few metres of swimming the English Channel, which would entitle him to the reward made by the offeror), or whether withdrawal can only take place *before* the offeree has commenced performance of the act that constitutes acceptance (swimming of the Channel, in the above example).

In *Errington v Errington & Woods* [1952] 1 KB 290, a father bought a house for his son and daughter-in-law to live in. He paid one-third of the purchase price in cash and borrowed the remainder from a building society, on mortgage. He told the children that, if they paid the mortgage instalments, he would convey the house to them when the payments were complete. They duly paid the instalments. The father purported to revoke his offer to convey the house before the whole mortgage had been repaid. The House of Lords held that there must be a term implied into the offer, that it would be irrevocable once performance had commenced.

It follows, then, that once the offeree has commenced performance of the act that constitutes acceptance, the offer can no longer be revoked. However, until that act has been completely performed, the offer will not have been accepted so as to form a binding contract (i.e. the swimmer cannot claim the reward, unless he completes the crossing, in the above example).

2.6.2 REJECTION/COUNTER-OFFER BY OFFEREE

An offer is terminated and cannot be subsequently accepted, if the offeree has either rejected it outright, or has made a counter-offer, e.g. by attempting to vary the terms of the offer (so-called "conditional acceptance").

No counter-offer will be implied, however, where the offeree makes a *request for further information* (e.g. as to the availability of credit terms), which does not affect the original offer. If the offeree is merely seeking further information, before deciding whether to accept an offer, or enquiring as to whether the offeror will modify his terms, he is not necessarily making a counter-offer. Therefore, where A offers to sell iron at £2 per tonne and B then enquires whether A would agree to a contract by which delivery would be spread over two months, if A

[2] Discussed in paragraph 2.7.2 below.

does not reply and B then accepts the offer as originally made within the time limit fixed by A in his offer, there will be a valid contract of sale with A, B's enquiry amounting to a mere request for further information and not, therefore, terminating/rejecting A's offer (*Stevenson v McLean* (1880) 5 QBD 346).

Nor will the court find a counter-offer where the "new" term would be implied, in any case, into the offer. So, if in response to an offer to sell goods, the prospective purchaser stated in his reply that the goods must be suitable for the purpose for which he was purchasing them, such a term would be implied into the contract for sale by s. 14 Sale of Goods Act 1979.

A counter-offer must be similarly contrasted with an acceptance, coupled with a request for information, which brings a contract into existence.

2.6.3 LAPSE OF TIME

Where an offer is stated to be open, for a specific length of time, it will automatically terminate, once that time limit expires. In the absence of any express time limit, an offer is normally open for a reasonable time. What constitutes "reasonable" will depend largely on what is usual and to be expected, in respect of the subject matter of the proposed contract. Thus, in *Ramsgate Victoria Hotel Co v Montefiore* (1866) LR 1 EX 109, the defendant was held entitled to refuse to buy the claimants' shares, five months after making his original offer, as his offer had not been accepted within a reasonable time and had, therefore, lapsed.

2.6.4 DEATH

While the death of the offeree terminates the contract in all cases, some writers consider that the offeror's death only terminates the offer, where the offeree knows of the death, or where the potential contract has some kind of a personal element (such as an employment contract, writing a book or singing at a concert).

2.6.5 FAILURE OF A TERMINATING CONDITION

An offer may be made subject to an express or implied condition precedent. Examples include that the offer must be accepted within a stated time; that the goods forming the subject of the sale are in substantially the same condition as at the date of the offer; or that an applicant for life insurance is in the same state of health as he was when he made his application. If any of those conditions are not satisfied, the offer will not be capable of acceptance.

2.7 ACCEPTANCE

An acceptance is a final and unqualified assent to the terms of an offer, whether by express words or by action. Without it, there can be no contract. Frequently, progress towards agreement involves long and arduous bargaining by the parties; in these circumstances, the courts will need to look carefully at all of the dealings between the parties, in order to decide whether there has, in fact, been an agreement, and upon which terms.

In addition to being a firm and unqualified acceptance of all the terms of the offer, the fact of acceptance must normally be communicated to the offeror before there is a concluded contract.

2.7.1 ACCEPTANCE BY CONDUCT

In the case of a bilateral offer, acceptance normally takes the form of spoken or written words; in the case of *unilateral* offers (i.e. the offer of a promise in return for the performance of some