Chapter 2: Agreement

Outline

Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

1 Understand the concept of contract
2 Understand the rules for establishing whether a valid offer and acceptance have taken place

2.1 Introduction

There can be no contract unless the parties are in **agreement** and this is therefore the usual starting point in establishing whether there is a valid and enforceable contract.

Compare the following cases, both of which involve similar facts, but which resulted in very different outcomes, due to the presence or absence of agreement.

"Fifty-five – snakes alive!"

"It is regrettable that I lost my best friend as a result of this quarrel", said Mrs Robertson. The quarrel that Mrs Robertson was referring to turned on a verbal agreement between her and her bingo partner, Mrs Anderson. The two ladies were neighbours, and had agreed on the way to the bingo hall that they would share their winnings, should they be lucky.

On scooping the main prize of £108,000, Mrs Anderson denied that there had been any agreement with Mrs Robertson, but the court's view of the evidence in this 2003 case was that an agreement did exist and Mrs Anderson was forced to share her prize money.

"Bingo! £100,000 win is all mine"

In 2005, Tania Burnett won £100,000 at her local bingo hall, but two of her work colleagues claimed that the three of them had earlier agreed to share any winnings. Ms Burnett denied that this had happened, and the Court of Appeal agreed, identifying that there had been only a "casual conversation" which was insufficient for a legally binding agreement.

And what was Ms Burnett's reaction to the news that she had succeeded in defending the claim of her colleagues? "They can get stuffed!"

Metro online

It is vital to remember that agreement alone is **not** proof of the existence of a valid contract, however – consideration and an intention to create legal relations will also have to be found; an agreement is **not** the same as a binding contract. These concepts will be discussed in more detail in **Chapter 3**.

This chapter will consider:

- the differing approaches taken by the courts in order to establish the fact of an **agreement**;
- the requirements for a valid **offer** to exist, and the ways in which an offer can be terminated; and
- the legal meaning of **acceptance**, together with the rules governing communication of that acceptance.

2.2 The fact of agreement

The historic approach to establishing agreement was for the courts to look for *consensus ad idem* – or a meeting of minds – between the parties. However, this **subjective** approach (i.e. an approach that focused upon what the parties themselves actually thought at the time of entering into the contract) was very difficult to implement, since the courts are neither mind readers nor time travellers!

Today, the courts apply an **objective** test of agreement – they do not attempt to investigate what was actually in the minds of the parties, but will judge things by outward appearances: the facts.

In ***Butler Machine Tool Co v Ex-Cell-O Corporation (England) Ltd [1979]*** and ***Gibson v Manchester City Council [1979]***, Lord Denning suggested that a relaxed approach to this objective test should be followed, with the focus simply on establishing whether there was **any** evidence of an agreement between the parties.

This approach has been rejected, though, and the courts generally focus upon trying to find an **offer** from one party that is then **accepted** by the other. Although this approach does not cover all possible situations of agreement, it is a rule that generally works well in practice. Offer and acceptance can therefore be seen as the **factual indicators** of an agreement; this means that they are things that the court can look for to find that there was an agreement.

The way in which the objective, offer-and-acceptance approach is applied can be seen in ***Gibson v Manchester City Council*** (the facts of this case are set out at **2.3.3.5**). Even though Mr Gibson subjectively thought the council was offering to sell a house to him, the House of Lords decided that, from an objective standpoint, the words "may be prepared to sell" did not amount to an offer. Without an offer, one of the vital elements of an agreement was missing, and there could therefore be no legally binding contract.

Case law has confirmed that the objective approach is still relevant. For example, in ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010]***, Lord Clarke set out what he described as the "general principles" in this area of law:

"Whether there is a binding contract between the parties … depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations."

The continued importance of this statement and, therefore, the objective approach, has been confirmed by a number of cases, including ***JAS Financial Products LLP v ICAP plc [2016]***, where a lack of objective evidence that a binding legal agreement had been entered into prevented the court from concluding that there was a legally binding contract between the parties. A further example of how the words of the parties will guide a court in assessing the objective intention of the parties came in ***Goodwood Investments Holdings Ltd v Thyssenkrupp Industrial Solutions AG [2018]***. Here, words in a purported "offer" provided that any contract was subject to the approval of the Board of Directors of the boatbuilding company making it. This, the court said, meant that they were not making an offer, because it was not capable of acceptance by those receiving it. The key point is to consider "the parties' exchanges as a whole".

These "general principles" from ***RTS Flexible Systems [2010]*** have been used, applied and confirmed in ***MacInnes v Gross [2017]***, ***Blue v Ashley [2017]*** and ***Wright v Rowland [2017]***. In all three cases, no agreement was found to exist due to a lack of clear objective evidence of an intention to create a legal relationship. The judges in the latter two cases also made it clear that the parties' conduct both before and after entering into any "agreement" will be a relevant consideration for the courts.

Examples of agreements from the *Emma's Day* scenario at **1.1** include:

- Emma will have made an **offer** to buy the hamster, which Mrs Green then **accepted** by agreeing to sell the animal to her;

- when Emma successfully applied for her job as a receptionist, the solicitors' firm would have made her an **offer**, which Emma then chose to **accept**; and

- in presenting the wine at the checkout in the supermarket, Emma was making an **offer** to buy the item, which the sales assistant then **accepted** when she took Emma's money.

2.3 Offer

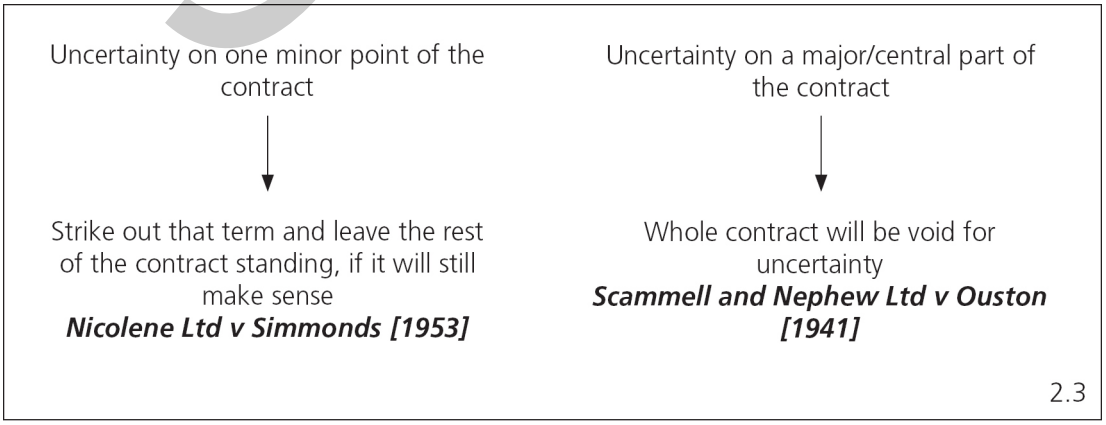
The party making the offer is called the **offeror** and the person to whom the offer is made is called the **offeree**.

An **offer** is an expression of willingness to contract on certain terms on which the offeror is prepared to be legally bound following acceptance. This means that the terms of an offer must be sufficiently **certain**; if they are not, then the offeree could not be absolutely sure about what he was agreeing to.

For example, if I say to you, "I will sell you a book", the term "a book" is uncertain. Which book are you agreeing to buy from me? Further, in the first bingo scenario at **2.1**, if Mrs Anderson had said to Mrs Robertson, "I'll share any winnings with you tonight, unless I win big", this could also be viewed as an uncertain offer, as there is no clarity on how much a "big" win might be.

If one of the terms of the agreement is meaningless, the court may simply ignore it, as the Court of Appeal did in ***Nicolene Ltd v Simmonds [1953]***. It decided that a statement by the defendant that "the usual conditions of acceptance apply" was meaningless because there were no "usual conditions of acceptance". The rest of the contract made sense and so it could be enforced.

On the other hand, if the uncertain term is a central part of the contract, the whole contract may fail if the court is unable to "resolve" the uncertainty. This happened in ***Scammell and Nephew Ltd v Ouston [1941]***, in which the House of Lords found that an agreement that a van should be acquired "on hire purchase terms" was void because "hire purchase terms" was too vague a term to have any meaning and the contract made no real sense without this detail.



The differing approaches of the courts to situations of uncertainty can be seen in the following cases.

Published in 2019 by:
CILEx Law School Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-1078-9