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OFFER. A communication is treated as an offer if it indicates the terms on which the offeror is prepared to make a contract and gives a clear indication that the offeror intends to be bound by those terms if they are accepted by the offeree.

Partridge v Crittenden (1968)

An advertisement in a magazine stated 'Bramblefinch cocks and hens, 25s each'. As the Bramblefinch was a protected species, the person who placed the advertisement was charged with unlawfully offering for sale a wild bird contrary to the Protection of Birds Act 1954, but his conviction was quashed on the grounds that the advertisement was not an offer but an invitation to treat.

***Spencer v Harding* (1870) LR 5 CP 561**

The defendant had sent out a circular stating *'We are instructed to offer [certain business stock] to the wholesale trade for sale by tender ...'*. The claimant had submitted a tender for the stock and his tender was the highest, however, the defendant refused to sell him the goods.

The claimant argued that the circular was an offer which contained a promise to sell the goods to the party who submitted the highest tender, but the court rejected this argument.

Willes J. in that case identified the crucial question to be 'whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of goods, and to receive offers for the purchase of them.'

Carlill v Carbolic Smoke Ball Co (1893)

In Carlill v Carbolic Smoke Ball Co the defendants were the manufacturers of 'smokeballs' which they claimed could prevent flu. They published advertisements stating that if anyone used their smokeball for a specified time and still caught flu, they would pay that person £100, and that to prove they were serious about the claim, they had deposited £1,000 with their bankers. Mrs Carlill bought and used a smokeball, but nevertheless ended up with flu. She therefore claimed the £100, which the company refused to pay. They argued that their advertisement

could not give rise to a contract, since it was impossible to make a contract with the whole world, and therefore they were not legally bound to pay the money. This argument was rejected by the court, which held that the advertisement did constitute an offer to the world at large, which became a contract when it was accepted by Mrs Carlill using the smokeball and getting flu. She was therefore entitled to the £100.

Lindley LJ, one of the three judges who heard this case, had this to say about the defendants claim that they had never intended to be bound to pay £100 to anybody who contracted influenza after using their smoke ball:

"... Was it a mere puff? My answer to that question is No, and I base my answer upon this passage [in the advert]: '1000/. is deposited with the Alliance Bank, shewing our sincerity in this matter.' Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter - that is, the sincerity of his promise to pay this 100/. in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise, there is the promise, as plain as words can make it."

The Court of Appeal, therefore, rejected the defendant's arguments and found in favour of Mrs Carlill. The Court of Appeal took the view that the fact the defendants had paid £1,000 into a bank account, seemingly to cover any payments that they might have to make, indicated that the Carbolic Smoke Ball Company did intend to be bound by the terms of the advert after all.

Gibson v Manchester City Council (1979)

A council tenant was interested in buying their house. He completed an application form and received a letter from the council stating that it ‘ may be prepared to sell the house to you’ for £2,180. Mr Gibson initially queried the purchase price pointing out that the path to the house was in bad condition. The Council refused to change the price, saying that the price had been fixed taking into account the condition of the property. Mr Gibson then wrote on 18 March 1071 asking the council to ‘carry on with the purchase as per my application’. Following a change in political control of the council in May 1971, it decided to stop selling Council houses to tenants, and Mr Gibson was informed that the Council would not proceed with the sale of the house. Mr Gibson brought legal proceedings claiming that the letter he had received stating the purchase price was an offer which he had accepted on 18 March 1971. The House of Lords, however

ruled that the Council had not made an offer, the letter giving the purchase price was merely a step in the negotiations for the contract and amounted only to an invitation to treat. Its purpose was simply to invite the making of a 'formal application', amounting to an offer, from the tenant.

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd (1953)

Boots were charged with an offence concerning the sale of certain medicines which could only be sold by or under the supervision of a qualified pharmacist. Two customers in a self-service shop selected the medicines, which were price marked, from the open shelves, and placed them in the shops wire baskets. The shelves were not supervised by a pharmacist, but a pharmacist had been instructed to supervise the transaction at the cash desk. The issue was therefore whether the sale had taken place at the shelves or at the cash desk.

The Court of Appeal decided the shelf display was like an advertisement, and therefore only an invitation to treat. The offer was made by the customer when the medicines were placed in the basket, and was only accepted when the goods were presented at the cash desk. Since a pharmacist was supervising at that point no offence had been committed.

REASONABLE LENGTH OF TIME

In **Ramsgate Victoria Hotel v Montefiore (1866),** the defendant applied for shares in the plaintiff company, paying a deposit into their bank. After hearing nothing from them for five months, he was then informed that the shares had been allotted to him, and asked to pay the balance due on them. He refused to do so, and the court upheld his argument that five months was not a reasonable length of time for acceptance of an offer to buy shares, which are a commodity with a rapidly fluctuating price. Therefore the offer had lapsed before the company tried to accept it, and there was no contract between them.

FAILURE OF A PRECONDITION

Total Gas Marketing Ltd v Arco British Ltd (1998). The parties entered into an agreement for the sale of North Sea gas. The contract stipulated that it was conditional on the seller entering into an allocation agreement. The seller failed to enter this agreement until a week after the date due for the first delivery. The seller argued that their failure to enter into the agreement prior to the first delivery date merely suspended the contract coming into effect until the allocation agreement was made. This view was rejected by the House of Lords. They accepted the purchaser's contentions that the requirement that the seller enter into an allocation agreement

was a condition precedent to the contract of sale coming into effect and that the seller's failure to do so prior to the first delivery date meant that they were not bound by the agreement.

COUNTER OFFER

Hyde v Wrench (1840). The defendant offered to sell his farm for £1,000, and the plaintiff responded by offering to buy it at £950 – this is called making a counter offer. The farm owner refused to sell at that price, and when the plaintiff later tried to accept the offer to buy at £1,000, it was held that this offer was no longer available; it had been terminated by the counter offer. In this situation the offeror can make a new offer on exactly the same terms, but is not obliged to do so.

Brogden v Metropolitan Rail Co (1877), Brogden had supplied the railway company with coal for several years without any formal agreement. The parties then decided to make things official, so the company's agent sent Brogden a draft agreement, which left a blank space for Brogden to insert the name of an arbitrator. After doing so and signing the document, Brogden returned it, marked 'approved'.

The company's agent put the draft away in a desk drawer, where it stayed for the next two years, without any steps being taken regarding it. Brogden continued to supply coal under the terms of the contract, and the railway company to pay for it. Eventually a dispute arose between them, and Brogden denied that any binding contract existed.

The courts held that by inserting the arbitrator's name, Brogden added a new term to the contract, and therefore in returning it to the railway company he was offering (in fact counter offering) to supply coal under the contract. But when was that offer accepted? The House of Lords decided that an acceptance by conduct was completed either when the company first ordered coal after receiving the draft agreement from Brogden, or at the latest when he supplied the first lot of coal.

Felthouse v Bindley (1862), an uncle and his nephew had talked about the possible sale of the nephew's horse to the uncle, but there had been some confusion about the price. The uncle subsequently wrote to the nephew, offering to pay £30 and 15 shillings and saying 'If I hear no more about him, I consider the horse to be mine at that price.' The nephew was on the point of selling off some of his property at auction. He did not reply to the uncle's letter, but did tell the auctioneer to keep the horse out of the sale. The auctioneer forgot to do this, and the hose was sold. It was held that the nephew's conduct in trying to keep the horse out of the sale did not

necessarily imply that he intended to accept his uncle's offer – even though the nephew actually wrote afterwards to apologize for the mistake – and so it was not clear that silence in response to the offer was intended to constitute acceptance. This can be criticized in that it is hard to see how there could have been clearer evidence that the nephew did actually intend to sell, but on the other hand, there are many situations in which it would be undesirable and confusing for silence to amount to acceptance.

NEGOTIATION AND 'BATTLE OF THE FORMS'

British Road Services v Crutchley (Arthur V) Ltd (1968) the plaintiff delivered some whiskey to the defendants for storage. The BRS driver handed the defendants a delivery note, which listed his company's 'conditions of carriage.' Crutchley's employee stamped the note 'Received under [our] conditions' and handed it back to the driver. The court held that stamping the delivery note in this way amounted to a counter offer, which BRS accepted by handing over the goods. The contract therefore incorporated Crutchley's conditions, rather than those of BRS.

Butler Machine Tool Ltd v Ex-Cell-O Corp (1979) the defendants wanted to buy a machine from the plaintiffs, to be delivered ten months after the order. The plaintiffs supplied a quotation (which was taken as an offer), and on this document were printed their standard terms, including a clause allowing them to increase the cost of goods if the price had risen by the date of delivery (known as price-variation clause). The document also stated that their terms would prevail over any terms and conditions on the buyers order. The buyers responded by placing an order, which was stated to be on their own terms and conditions, and these were listed on the order form. These terms did not contain a price variation clause. The order included a tear-off acknowledgement slip, which contained the words: 'we accept your order on the terms and conditions thereon' (referring to the order form). The sellers duly returned the acknowledgement slip to the buyers, with a letter stating that the order was being accepted in accordance with the earlier quotation. The acknowledgement slip and accompanying letter were the last forms issued before delivery.

When the ten months were up, the machine was delivered and the sellers claimed an extra £2,892, under the provisions of the price-variation clause. The buyers refused to pay the extra amount, so the sellers sued them for it. The Court of Appeal held that the buyer' reply to the quotation was not an unconditional acceptance, and therefore constituted a counter offer. The sellers had accepted that counter offer by returning the acknowledgement slip, which referred

back to the buyer' conditions. The sellers pointed out that they had stated in their accompanying letter that the order was booked in accordance with the earlier quotation, but this was interpreted by the Court of Appeal as referring back to the type and price of the machine tool, rather than to the terms listed on the back of the seller' document. It merely confirmed that the machine in question was the one originally quoted for, and did not modify the conditions of the contract. The contract was therefore made under the buyers' conditions.

COMMERCIAL AGREEMENTS

In Esso Petroleum Ltd v Commissioners of Customs and Excise (1976), Esso ran a sales promotion in which 'coins' showing members of the England football squad for the 1970 World Cup were to be given away free, one with every four gallons of petrol. The scheme was advertised on television and by posters at filing stations. The case arose when for tax purposes it became necessary to decide whether or not there was a contract for sale – did the motorist who bought for gallons of petrol have a contractual right to one of the coins? The House of Lords held, by a majority, that the coins were not being sold, and so were not liable for tax, but that there was intent to create legal relations. Lord Simon pointed out that 'the whole transaction took place in a setting of business relations', that it was undesirable to allow companies to make promises in advertisements that they were not bound to keep, and that Esso knew that despite the coins' negligible monetary value, they would be attractive to motorists and Esso would therefore derive considerable commercial benefit from the scheme.

'MERE PUFFS'

Weeks v Tybald (1604) the defendant announced that he would give £100 to any suitable man who would marry his daughter, but it was held that his words were not intended to be taken seriously, and his promise was not legally binding.

CERTAINTY

In Scammell v Ousten (1941), the parties agreed that Ousten could buy a van from Scammell, providing his old lorry in part-exchange and paying the balance 'on hire-purchase terms' over two years. Before the precise nature of those terms could be negotiated, Scammell decide not to go ahead with the deal, and claimed that there was no contract between the parties. The House of Lords agreed, pointed out that although the courts aimed to uphold an agreement if there really was one, the terms used were too vague to signify any true agreement. The phrase 'hire-purchase terms' could be used to describe many different arrangements: weekly, monthly or

yearly basis; whether there would be an initial deposit; and what the interest rate would be. Consequently the parties could not be said to have made a sufficiently certain agreement to constitute a contract.

CONSIDERATION

Currie v Misa (1875)

It was stated that consideration existed when there was 'some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'.

Dunlop v Selfridge (1915)

The House of Lords explained consideration in terms of purchase and sale – the plaintiff must show that he or she has bought the defendants promise, by doing, giving, or promising something in return for it.

Roscorla v Thomas (1842)

The defendant sold the plaintiff [claimant] a horse. After the sale was completed, the defendant told the plaintiff that the animal was 'sound and free from any vice'. This turned out to be rather far from the truth, and the plaintiff sued. The court held that the defendant's promise was unenforceable, because it was made after the sale. If the promise about the horse's condition had been made before, the plaintiff would have provided consideration for it by buying the horse. As it was made after the sale, the consideration was past, for it had not been given in return for the promise.

Re McArdle (1951)

A widow had been left the family home in her husbands will. The will allowed her to live in it for the rest of her life, and on her death it was to be inherited by their five children equally. During the mother's lifetime, one of her sons and his wife lived with her in the house and the daughter-in-law paid for some home improvements. When these were finished, the other four children signed a document which promised to pay her £488 for the work, 'in consideration of [her] carrying out certain alterations and improvements to the property'.

After the mother died, the daughter-in-law tried to claim the money, but her husband's brothers and sisters refused to pay. The Court of Appeal held that although the wording of the document suggested that the payment related to work to be done in the future, the facts of the case made it

clear that the promise was given in return for something already done; it was therefore past consideration, and the promise was not binding.

Lampleigh v Brathwait (1615)

Thomas Brathwait had been convicted of killing a man, and he asked Anthony Lampleigh to obtain a pardon for him from the King. After considerable trouble and expense, Lampleigh managed to do so. In the excitement of getting his pardon, Brathwait promised to pay Lampleigh £100, but later refused to hand over the money, so Lampleigh sued.

It might appear that Lampleigh's consideration was past, since he had secured the pardon before the promise to pay was made. In fact, the court upheld Lampleigh's claim. It reasoned that Lampleigh had obtained the pardon at Brathwait's own request, and this request carried with it the unspoken understanding that the service would be paid for. Lampleigh obtained the pardon after, and in return for, this implied promise to pay, and so obtaining the pardon was good consideration for the promise to pay. The later promise, specifying that £100 would be paid, was said to be merely confirmation of the original, unspoken one.

Re Casey's Patents (1892)

The defendants owned some patents rights, and the plaintiff worked for them. They wrote to him, saying that in consideration of his services as manager in relation to the patents, they were going to give him a one-third interest in them. They later claimed that their promise was made in relation to services which the plaintiff had already given, it was past consideration and therefore the promise was not binding. The court held, however, that the plaintiff's services were clearly always meant to be paid for, and the promise was merely putting this expectation into the form of a specified amount.

Thomas v Thomas (1842)

The plaintiff was a widow whose husband had stated that if he died before his wife, she should be allowed to live in his house for the rest of her life, after which it was to pass to his sons. When the man died, the defendant, who was his executor, agreed that the widow could continue to occupy the house in return for a promise that she would pay £1 a year and keep the house in good repair. Despite this, some time later, the defendants tried to evict the widow, so she sued them for breach of contract. The defendants claimed that their promise was not binding due to lack of consideration. However, the court held that the widow's promise to pay £1 and keep up the repairs was sufficient consideration to make the owners' promise binding.

Chappell & Co Ltd v Nestle Co Ltd (1960)

Nestlé ran a special offer involving a record of a song called 'Rockin' Shoes' – customers could get a copy of the record by sending in 1s 6d (about seven and a half pence), and three wrappers from Nestlé's bars of chocolate. The copyright holders for the record brought an action against Nestlé, which among other things claimed that royalties should be paid on the price of the record. To calculate the royalties due, it was necessary to establish what price Nestlé were charging for the record, and the copyright holder alleged that this price (which was the consideration for the promise to send the record) included the three wrappers. Nestlé, on the other hand, contended that the consideration was only the 1s 6d, and that they threw away the wrappers they received. The House of Lords held that the wrappers did form part of the consideration – the fact that they were of no real worth to Nestlé was irrelevant.

The interesting implication of this case is that if the fact that the wrappers were useless to Nestlé was irrelevant, presumably wrappers alone could have amounted to consideration – if, for example, Nestlé had just asked for three wrappers, and not requested money in addition.

White v Bluett (1853)

A father promised not to make his son repay money he had borrowed, if the son promised not to keep boring him with complaints. The court held that the son's promise was not sufficient consideration to make his father's promise binding, because it had no economic value.

Tweddle v Atkinson (1861)

Guy and Tweddle agreed that they would each give a sum of money to Tweddles son William, who was about to marry Guy's daughter. When Guy died without paying, William sued his executors for the money. His action failed on the grounds that no consideration had moved from him – he himself had given nothing in return for Guy's promise.

MISREPRESENTATION

Fletcher v Krell (1873)

A woman applied for a post as a governess, without revealing the fact that she had been previously married. At the time, this may well have been a factor that would have affected the employer's decision to employ her. Despite this, the court held that her silence did not amount to a misrepresentation.

Bisset v Wilkinson (1927)

Bisset was selling land in New Zealand to Wilkinson, who planned to use it for sheep farming. The land had not previously been used as a sheep farm, but during the negotiations, Bisset expressed the view that if the land were worked properly, it could support 2,000 sheep. This was not actually the case.

What looked like a statement of fact was in fact regarded as no more than a matter of opinion as the land had never been used for sheep farming before and neither could expect the other to know, as a matter of fact, how many sheep it could support.

Edgington v Fitzmaurice (1885)

A prospectus inviting loans from the public stated that the money would be used to improve the buildings and extend the business. The Court of Appeal held that this statement was a fraudulent misrepresentation of the fact, since the person issuing the prospectus did not intend to use the money as suggested, and had therefore misrepresented the state of his mind. Bowen LJ stated that 'The state of a man's mind is as much a fact as he state of his digestion'.

Redgrave v Hurd (1881)

A solicitor wanted to sell his law practice. He told the buyer that it was worth £300 a year and invited him to check this by inspecting the papers in his office. Had the buyer done this, he could have learned that the practice was actually worth no more than £200 a year. However, the Court of Appeal held that the buyer had relied on the seller's word, and was entitled to do so, even if he had the means to discover that it was untrue.

Attwood v Small (1838)

The owners of a mine made rather exaggerated statements as to its earning capacity to the prospective buyers. The purchasers had these statements checked by their own surveyors, who wrongly reported they were correct. The House of Lords held that the plaintiffs had been induced to enter the contract by their surveyors report and not the vendor's statements; if they had believed those statements they would have not had them checked.