1 Introduction

1.1 Introduction

> 'If the "law of contract" were not already entrenched in the traditions of legal education, would anyone organise a course around it, let alone produce books expounding it?' (Wightman, 1989)

The fact that a lawyer can ask such a question would, no doubt, confound laymen. Yet it is true that the scope, the basis, the function and even the very existence of the law of contract are the subject of debate and controversy among academic lawyers.

But such questioning seems absurd. After all, we enter into contracts as a regular part of life and generally we experience no difficulty in so doing. A simple case is the purchase of a morning newspaper or the purchase of a bus ticket when travelling to work. What doubt can there possibly be about the existence of such contracts or their basis? But, behind the apparent simplicity of these transactions, there lurks a fierce controversy. In an introductory work of this nature we cannot give full consideration to these great issues of debate. The function of this chapter is simply to identify some of these issues so that the reader can bear them in mind when reading the ensuing chapters and to enable the reader to explore them further in the readings to which I shall make reference.

1.2 The Scope of the Law of Contract

A good starting point is the scope of the law of contract. Contracts come in different shapes and sizes. Some involve large sums of money, others trivial sums. Some are of long duration, while others are of short duration. The content of contracts varies enormously and may include contracts of sale, hire purchase, employment and marriage. Nevertheless, we shall not be concerned with all such contracts in this book. Contracts of employment, marriage contracts, hire purchase contracts, consumer credit contracts, contracts for the sale of goods, contracts for the sale of land, mortgages and leasehold agreements all lie largely outside the scope of this book. Such contracts have all been the subject of distinct regulation and are dealt with in books on employment law, family law, consumer law,

commercial law, land law and landlord and tenant law respectively. At this stage you might be forgiven if you asked the question: if this book is not about these contracts, what is it about and what is its value?

The answer to the first part of such a question is that this book is concerned with what are called the 'general principles' of the law of contract and these general principles are usually derived from the common law (or judge-made law). Treatises on the general principles of the law of contract are of respectable antiquity in England and can be traced back to Pollock (1875) and Anson (1879). This tradition has been maintained today in works such as Treitel (1999), Anson (1998) and Cheshire, Fifoot and Furmston (1996). One might have expected that these treatises would gradually disappear in the light of the publication of books on the contract of employment, the contract of hire purchase, etc which subject the rules relating to such contracts to close examination. Yet, textbooks on the 'general principles' of the law of contract have survived and might even be said to have flourished.

The existence of such general principles has, however, been challenged by Professor Atiyah (1986b) who maintains that these 'general' principles 'remain general only by default, only because they are being superseded by detailed *ad hoc* rules lacking any principle, or by new principles of narrow scope and application'. Atiyah argues that 'there is no such thing as a typical contract at all'. He maintains (1986a) that it is 'incorrect today to think of contract law as having one central core with clusters of differences around the edges'. He identifies the classical model of contract as being a discrete, two-party, commercial, executory exchange but notes that contracts can be found which depart from each feature of this classical model. Thus, some contracts are not discrete but continuing (landlord and tenant relationships), some are not two-party but multiparty (the contract of membership in a club), some are not commercial but domestic (marriage), some are not executory (unperformed) but executed (fully performed) and finally some do not depend upon exchange, as in the case of an enforceable unilateral gratuitous promise. Atiyah concludes by asserting that we must 'extricate ourselves from the tendency to see contract as a monolithic phenomenon'.

Atiyah uses this argument in support of a wider proposition that contract law is 'increasingly merging with tort law into a general law of obligations'. But one does not need to agree with Atiyah's wider proposition to accept the point that the resemblance between different types of contracts may be very remote indeed. A contract of employment is, in many respects, radically different from a contract to purchase a chocolate bar. The considerations applicable to a contract between commercial parties of equal bargaining power may be very different from those applicable

to a contract between a consumer and a multinational supplier (see Chapter 17).

This fragmentation of the legal regulation of contracts has reached a critical stage in the development of English contract law. The crucial question which remains to be answered is: do we have a law of contract or a law of contracts? My own view is that we are moving slowly in the direction of a law of contracts as the 'general principles' decline in importance.

Given this fragmentation, what is the value of another book on the general principles of contract law? The principal value is that much of the regulatory legislation concerning contracts has been built upon the foundation of the common law principles. So it remains important to have an understanding of the general principles before progressing to study the detailed rules which have been applied to particular contracts. The general principles of formation, content, misrepresentation, mistake, illegality, capacity, duress and discharge apply to all contracts, subject to statutory qualification. These principles therefore remain 'general', but only 'by default'.

1.3 The Basis of the Law of Contract

The basis of the law of contract is also a matter of considerable controversy. Atiyah has written (1986c) that 'modern contract law probably works well enough in the great mass of circumstances but its theory is in a mess'. There are many competing theories which seek to explain the basis of the law of contract.

The classical theory is the will theory. Closely associated with *laissez-faire* philosophy, this theory attributes contractual obligations to the will of the parties. The law of contract is perceived as a set of power-conferring rules which enable individuals to enter into agreements of their own choice on their own terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the courts or Parliament and their agreements should be respected, upheld and enforced by the courts. But today the will theory has been largely discredited. It is not possible to attribute many of the doctrines of contract law to the will of the parties. Doctrines such as consideration, illegality, frustration and duress cannot be ascribed to the will of the parties, nor can statutes such as the Unfair Contract Terms Act 1977.

The will theory has, however, been revived and subjected to elegant refinement by Professor Fried (1981). Fried maintains that the law of contract is based upon the 'promise-principle', by which 'persons may impose

on themselves obligations where none existed before'. The source of the contractual obligation is the promise itself. But, at the same time, Fried concedes that doctrines such as mistake and frustration (Chapter 14) cannot be explained on the basis of his promise-principle. Other non-promissory principles must be invoked, such as the 'consideration of fairness' or 'the encouragement of due care'.

But Fried's theory remains closely linked to *laissez-faire* ideology. He maintains that contract law respects individual autonomy and that the will theory is 'a fair implication of liberal individualism'. He rejects the proposition that the law of contract is an appropriate vehicle for engaging in the redistribution of wealth. But his theory is open to attack on two principal grounds.

The first is that it is difficult to explain many modern contractual doctrines in terms of liberal individualism or *laissez-faire* philosophy. The growth of standard form contracts and the aggregation of capital within fewer hands has enabled powerful contracting parties to impose contractual terms upon consumers and other weaker parties. The response of the courts and Parliament has been to place greater limits upon the exercise of contractual power. Legislation has been introduced to regulate employment contracts and consumer credit contracts in an effort to provide a measure of protection for employees and consumers. Such legislation cannot be explained in terms of *laissez-faire* ideology, nor can the expansion of the doctrines of duress and undue influence, or the extensive regulation of exclusion clauses which has been introduced by Parliament (see Chapter 11). Conceptions of fairness seem to underpin many of the rules of contract law (see Chapter 17). Such departures from the principles of liberal individualism have led some commentators to argue that altruism should be recognised as the basis of contract law (Kennedy, 1976), while others have argued that the law of contract should have as an aim the redistribution of wealth (Kronman, 1980). We shall return to this issue in Chapter 17.

A second attack on the promise-principle has been launched on the ground that, in many cases, the courts do not uphold the promise-principle because they do not actually order the promisor to carry out his promise. The promisee must generally content himself with an action for damages. But, as we shall see (in Chapter 20), the expectations engendered by a promise are not fully protected in a damages action. One of the principal reasons for this is the existence of the doctrine of mitigation (see 20.10). Suppose I enter into a contract to sell you 10 apples for £2. I then refuse to perform my side of the bargain. I am in breach of contract. But you must mitigate your loss. So you buy 10 apples for £2 at a nearby

market. If you sue me for damages, what is your loss? You have not suffered any and you cannot enforce my promise. So how can it be said that my promise is binding if you cannot enforce it? Your expectation of profit may be protected but, where that profit can be obtained elsewhere at no loss to you, then you have no effective contractual claim against me. Your expectations have been fulfilled, albeit from another source.

Although you cannot enforce my promise, it is very important to note that in our example you suffered no loss and I gained no benefit. Let us vary the example slightly. Suppose that you had paid me in advance. The additional ingredients here are that you have acted to your detriment in reliance upon my promise and I have gained a benefit. Greater justification now appears for judicial intervention on your behalf. Can it therefore be argued that the source of my obligation to you is not my promise, but your detrimental reliance upon my promise or your conferment of a benefit upon me in reliance upon my promise? Atiyah has written (1986b) that 'wherever benefits are obtained, wherever acts of reasonable reliance take place, obligations may arise, both morally and in law'. This argument is one of enormous significance. It is used by Atiyah (1979) in an effort to establish a law of obligations based upon the 'three basic pillars of the law of obligations, the idea of recompense for benefit, of protection of reasonable reliance, and of the voluntary creation and extinction of rights and liabilities'. The adoption of such an approach would lead to the creation of a law of obligations and, in consequence, contract law would cease to have a distinct identity based upon the promise-principle or the will theory (see further 1.4). This is why this school of thought has been called 'the death of contract' school (see Gilmore, 1974). We shall return to these arguments at various points in this book, especially in Chapters 20 and 21.

My own view is that Fried correctly identifies a strong current of individualism which runs through the law of contract. A promise does engender an expectation in the promisee and, unless a good reason to the contrary appears, the courts will call upon a defaulting promisor to fulfil the expectation so created. But the critics of Fried are also correct in their argument that the commitment to individual autonomy is tempered in its application by considerations of fairness, consumerism and altruism. These conflicting ideologies run through the entire law of contract (for a fuller examination of these ideologies under the titles of 'Market-Individualism' and 'Consumer-Welfarism' see Adams and Brownsword, 1987). The law of contract is not based upon one ideology; both ideologies are present in the case-law and the legislation. Indeed, the tension between the two is a feature of the law of contract. Sometimes 'market-

individualism' prevails over 'consumer-welfarism', at other times 'consumer-welfarism' triumphs over 'market-individualism'. At various points in this book we shall have occasion to note these conflicting ideologies and the tensions which they produce within the law.

1.4 Contract, Tort and Restitution

A further difficulty lies in locating the law of contract within the spectrum of the law of civil obligations. Burrows (1983) has helpfully pointed out that the law of obligations largely rests upon three cardinal principles. The first principle is that expectations engendered by a binding promise should be fulfilled. Upon this principle is founded the law of contract. The second principle is that compensation must be granted for the wrongful infliction of harm. This principle is reflected in the law of tort. A tort is a civil wrong, such as negligence or defamation. Let us take an example to illustrate the operation of the law of tort. You drive your car negligently and knock me down. You have committed the tort of negligence. Harm has wrongfully been inflicted upon me and you must compensate me. The aim of the award of compensation is not to fulfil my expectations (contrast Stapleton, 1997, who maintains that the aim of an award of damages in tort is to protect the claimant's 'normal expectancies', namely to re-position the claimant to the destination he would normally have reached by trial had it not been for the tort). The aim is to restore me to the position which I was in before the accident occurred; to restore the 'status quo' or to protect my 'reliance interest'.

The third principle is that unjust enrichments must be reversed. This principle is implemented by the law of restitution. There are three stages to a restitutionary claim. First, the defendant must be enriched by the receipt of a benefit; secondly, that enrichment must be at the expense of the claimant and, finally, it must be unjust for the defendant to retain the benefit without recompensing the claimant. The latter stage does not depend upon the unfettered discretion of the judge; there are principles to guide a court in deciding whether, in a particular case, it is unjust that the defendant retain the benefit without recompensing the claimant (see Goff and Jones, 1998 and Birks, 1985). The classic restitutionary claim arises where I pay you money under a mistake of fact. I have no contractual claim against you because there is no contract between us. Nor have you committed a tort. But I do have a restitutionary claim against you. You are enriched by the receipt of the money, that enrichment is at my expense, and the ground on which I assert that it is unjust that you retain the money is that the money was paid under a mistake of fact.

Contract, tort and restitution therefore divide up most of the law based upon these three principles and they provide a satisfactory division for the exposition of the law of obligations. This analysis separates contract from tort and restitution on the ground that contractual obligations are voluntarily assumed, whereas obligations created by the law of tort and the law of restitution are *imposed* upon the parties by the operation of rules of law. Occasionally, however, these three principles overlap, especially in the context of remedies (Chapter 20). Overlaps will also be discussed in the context of misrepresentation (Chapter 12) and third party rights (Chapter 7).

Finally, it must be noted that these divisions are not accepted by writers such as Professor Atiyah. His recognition of reliance-based and benefit-based liabilities cuts right across the three divisions. The writings of Atiyah deserve careful consideration, but they do not, as yet, represent the current state of English law. Although we shall make frequent reference to the writings of Atiyah, we shall not adopt his analysis of the law of obligations. Instead, it will be argued that the foundation of the law of contract lies in the mutual promises of the parties and, being founded upon such voluntary agreement, the law of contract can, in the vast majority of cases, be separated from the law of tort and the law of restitution.

1.5 Contract and Empirical Work

Relatively little empirical work has been done on the relationship between the rules that make up the law of contract and the practices of the community which these rules seek to serve. The work that has been done (see, for example, Beale and Dugdale, 1975 and Lewis, 1982) suggests that the law of contract may be relied upon in at least two ways. The first is at the planning stage. The rules which we shall discuss in this book may be very important when drawing up the contract and in planning for the future. For example, care must be taken when drafting an exclusion clause to ensure, as far as possible, that it is not invalidated by the courts (see Chapter 11). Secondly, the law of contract may be used by the parties when their relationship has broken down. Here the rules of contract law generally have a less significant role to play than at the planning stage. The rules of contract law are often but one factor to be taken into account in the resolution of contractual disputes. Parties may value their good relationship and refuse to soil it by resort to the law. Litigation is also time-consuming and extremely expensive and so the parties will frequently resort to cheaper and more informal methods of dispute

resolution. In the remainder of this book, we shall discuss the rules that make up the law of contract but it must not be forgotten that in the 'real world' the rules may be no more than chips to be used in the bargaining process on the breakdown of a contractual relationship.

1.6 A European Contract Law?

The subject-matter of this book is the English law of contract and so the focus is upon the rules that make up the English law of contract. But it should not be forgotten that we live in a world which is becoming more interdependent and where markets are no longer local or even national but are, increasingly, international. The creation of world markets may, in turn, encourage the development of an international contract and commercial law. There are two dimensions here.

The first relates to our membership of the European Union; the second is the wider move towards the creation of a truly international contract law. The first issue relates to the impact which membership of the European Union is likely to have on our contract law. As yet, membership has had little direct impact, but this is unlikely to remain the case. An example of its potential impact is provided by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083) which gave effect to an EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC). The Regulations give to the courts greater powers to strike down unfair terms in consumer contracts which have not been individually negotiated. The purpose which lay behind the Directive, as stated in Article 1, was 'to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in consumer contracts'. The Directive and the Regulations will be discussed in more detail in Chapter 17 but the issue which concerns us at this point is the potential which EC law has to intrude into domestic contract law. Some clue as to the likely reach of EC law can be found in Article 95 of the Treaty of Rome, which gives the Council of the European Community the power to adopt measures which have as their object 'the establishment and functioning of the internal market'. This Article formed the legal basis for the Unfair Terms Directive, as can be seen from its preamble where it is stated:

> 'whereas in order to facilitate the establishment of a single market and to safeguard the citizen in his role as consumer when buying goods and services by contracts which are governed by the laws of other Member States than his own, it is essential to remove unfair terms from those contracts.'

It can be argued that differences between the substantive laws of Member States do act as a restriction on intra-community trade because contracting parties are generally unsure of the legal rules which prevail in the different Member States and are therefore more hesitant about contracting with persons in other Member States. For example, an English supplier selling goods to an Italian customer will generally want to ensure that the contract is governed by English law because he is ignorant of the legal position in Italy. Conversely, the Italian customer will wish to ensure that the contract is governed by Italian law for the reason that he does not know the law in England. This gives rise to what lawyers call a 'conflict of laws'. If the law was to be the same in each Member State, these problems would not arise and a further barrier to intra-community trade would be removed. Thus far the Commission has not sought to use Article 95 of the Treaty of Rome in such an expansive manner but they may yet become more interested in the creation of a European Civil Code. As Dean has noted (1993), the Unfair Terms Directive 'could create a precedent for intervention in other areas of the law of contract'.

There is, however, a second development at the European level which is worthy of note, namely the establishment in 1980 of the Commission on European Contract Law (a non-governmental body of lawyers drawn from the Member States), which was set up with the purpose of drafting a statement of general Principles of Contract Law for all the EC countries. Professor Lando, the chairman of the Commission, has stated (1992) that there is 'no doubt that Europe needs a unification of the general principles of contract law and that a Uniform European Code of Obligations will enhance trade and other relationships in the Community'. The Commission has published the first and second part of its work dealing with 'general provisions, formation of contracts, authority of agents, validity, interpretation, contents and effects, performance, non-performance and remedies in general and particular remedies for non-performance'. In their introduction to the Principles, Professors Lando and Beale (1999) state

> 'the Principles have both immediate and longer-term objectives. They are available for immediate use by parties making contracts, by courts and arbitrators in deciding contract disputes and by legislators in drafting contract rules whether at the European or the national level. Their longer-term objective is to help bring about the harmonisation of general contract law within the European Union.'

There are powerful voices which support the creation of a European Contract Law. For example, in 1989 and again in 1994 the European

Parliament passed a resolution on the preparation of a European Code of Private Law, the preamble to which stated: 'unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law'.

The creation and development of the Single Market within the European Community is likely to fuel demands for a single European Contract Law. Yet the difficulties which lie ahead should not be underestimated because it involves the bringing together of civilian and common law traditions. An example of the difficulties involved in bringing such traditions together is provided by the experience of the English and the Scottish Law Commissions. In the mid-1960s both Commissions commenced work on the codification of the law of contract but the project was suspended in 1973 after the withdrawal of the Scottish Law Commission. One ground which was cited by the Scottish Law Commission to justify its withdrawal was that it was becoming 'increasingly concerned at the areas of disagreement that still existed on fundamental issues'. The points of divergence were, indeed, substantial (England has a doctrine of consideration, whereas Scotland does not). These differences are multiplied when it comes to reaching agreement at a European level. Not only are there differences of substance but also there are differences of methodology: the civilians are more comfortable with statements of general principle, whereas common lawyers prefer to reason from the particular to the general and shy away from broad statements of principle.

While these difficulties are undoubtedly great, it is important to note that the aim of the Commission on European Contract Law is not to impose mandatory uniform rules on all Member States: rather it is to encourage harmonisation through the production of non-binding principles of law. This is very much a long-term goal. But as Europe grows closer together through stronger trade and political links, so the climate may be created in which an agreed and effective statement of general principles of contract law will become possible.

1.7 An International Contract Law?

A broader vision of the future is concerned with the internationalisation of contract law. There are, essentially, two different ways of proceeding. The first is the production of non-binding statements of principle or model contracts: the second is the attempt to impose mandatory uniform rules on the international community.

A notable example in the former category is provided by the Interna-

tional Institute for the Unification of Private Law (Unidroit) which has published a statement of Principles for International Commercial Contracts. These principles are contained in approximately 120 articles, each article being accompanied by a brief commentary setting out the reasons for its adoption and its likely practical application. These Articles are not intended to be imposed upon the commercial community in the form of mandatory rules. They are non-binding principles which, it is hoped, will be adopted by contracting parties across the world, by arbitrators, and by national legislatures seeking to update their law relating to international commercial contracts. The Unidroit principles should be seen alongside international standard form contracts, such as INCOTERMS (a set of standard trade terms sponsored by the International Chamber of Commerce) and the FIDIC (Fédération Internationale des Ingénieurs-Conseils) Conditions of Contract for Works of Civil Engineers, which have achieved widespread acceptance in international sales and international construction contracts respectively. There can be little to object to in such developments because they seek to bring about harmonisation through persuasion rather than imposition. Their alleged weakness is, however, the fact that they are not mandatory. They can therefore be ignored or amended by contracting parties and so are a rather uncertain method of seeking to achieve uniformity.

In an effort to ensure a greater degree of uniformity, it has been argued that there is greater scope for mandatory rules of law. But the attempt to impose uniform terms on the commercial community has given rise to considerable controversy. The most notable example of an international convention in this category is provided by the United Nations Convention on Contracts for the International Sale of Goods, commonly known as the Vienna Convention. Unlike earlier conventions, the Vienna Convention does not enable states to ratify the Convention on terms that it is only to be applicable if the parties choose to incorporate it into their contract. It provides that, once it has been ratified by a state, the Convention is applicable to all contracts which fall within its scope (broadly speaking, it covers contracts for the international sale of goods) unless the contracting parties choose to contract out of the Convention or of parts thereof. The Convention has been in force since 1988 and, although the United Kingdom has not yet ratified it (although the signs are that it may do so in the not too distant future) it has been ratified by a number of major trading nations, such as USA, France, Germany and China. Supporters of such Conventions argue that they promote the development of international trade by ensuring common standards in different nations. Contracting parties can then have greater confidence when dealing with a party from a different nation and such uniformity should result in lower

costs because there will be no need to spend time arguing about which law should govern the transaction, nor will there be any necessity to spend time and money seeking to discover the relevant rules which prevail in another jurisdiction.

But such Conventions have also been the subject of considerable criticism. It is argued that they do not achieve uniformity because national courts are likely to adopt divergent approaches to their interpretation (some courts adopting a literal approach, others a purposive approach). In this way, the aim of achieving uniformity will be undermined. The Vienna Convention took many years to negotiate and, even now, 20 years after agreement was reached, it has not been adopted by all the major trading nations of the world. Furthermore, it is not at all clear how the Convention will be amended. The commercial world is constantly on the move and the law must adapt to the changing needs of the market if it is to facilitate trade. An international code which is difficult to amend is unlikely to meet the demands of traders. It is also argued that such Conventions tend to lack clarity because they are drafted in the form of multicultural compromises in an effort to secure agreement and so lack the certainty which the commercial community requires. Lord Hobhouse, writing extra-judicially, summed up these arguments when he wrote (1990) that 'international commerce is best served not by imposing deficient legal schemes upon it but by encouraging the development of the best schemes in a climate of free competition and choice . . . . What should no longer be tolerated is the unthinking acceptance of a goal of uniformity and its doctrinaire imposition on the commercial community'.

While these arguments have a great deal of force, they are not universally shared (for a reply, see Steyn, 1994) and it should be noted that they do not deny the value of internationally agreed standards. But it is suggested that they do show that we should proceed by way of persuasion rather than imposition. Attempts to draft international standard form contracts and non-binding statements of the general principles of contract law should be encouraged as they are most likely to produce uniform standards which will meet the needs of contracting parties and, in so doing, lower the cost of concluding international contracts.

1.8 The Role of National Contract Law in a Global Economy

What is the likely role of national contract law in a global economy? This is not an easy question to answer. Much is likely to depend on the various projects currently in existence which aim to produce either a European

or an international law of contract. If they are successful, the rǫle for national contract law is likely to diminish considerably. On the other hand, if they are unsuccessful the national laws of contract will continue to regulate the vast majority of contracts that are made. But it should not be thought that trade across national boundaries is a new thing. It is not. While the volume of such trade has increased significantly in recent years, international trade is not a new phenomenon. Indeed, many of the cases to be discussed in this book were litigated between parties who had no connection with England other than the fact that their contract was governed by English law (usually by virtue of a 'choice of law clause' in their contract). The explanation for the choice of English law as the governing law is undoubtedly to be found in England's great trading history, which has been of great profit to the City of London and English law, if not to other parts of the United Kingdom. The commodities markets have had their centres in England for many years and many contracts for the sale of commodities are governed by English law. London has also been an important arbitration centre and a number of our great contract cases started life as arbitration cases which were then appealed to the courts via the stated case procedure, before the latter procedure fell into disrepute and was abolished in the Arbitration Act 1979. The fact that English contract law has had this 'global' influence in the past may make English lawyers reluctant to accede to attempts to create a European or an international law of contract: they may have too much to lose if English law diminishes in importance. Of course, much depends on the reasons why contracting parties choose English law as the governing law or choose to arbitrate in London. If the reason is to be found in the way in which English lawyers handle disputes or in procedural factors, then there is little for English lawyers to fear from the creation of a European or an international law of contract. But if parties choose English law because of the quality of the substantive law, then the City may well lose out if English contract law is to be abandoned at some future time in favour of some uniform law. The threat to national contract law in the short-to-medium term is relatively low but in the longer term it is much harder to quantify and the arguments for and against the adoption of a uniform law may be governed as much by economics and practical politics as the quality of the uniform law which is ultimately produced.

1.9 Contract Law and Human Rights

One of the most significant events in our recent legal history is the enactment of the Human Rights Act 1998 which comes into effect in October

2000 and which incorporates the European Convention on Human Rights into English law by creating 'Convention rights' which are enforceable in domestic law (Human Rights Act 1998, s.1). The impact which the rights contained in the Convention will have on private law is currently uncertain. It has already begun to have an effect on the law of tort (see, for example, *Osman* v. *United Kingdom* [1999] 1 FLR 193 but its likely impact on the law of contract remains unclear.

In this introductory chapter there are two issues which are worthy of brief note. The first is that the Act makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right' (Human Rights Act 1998, s.6(1)). It therefore clearly applies as between a public authority and a natural or a legal person. But does the Act also have 'horizontal effect', that is to say does it apply between two private citizens or between an individual and a business? The answer to this question is currently unclear and there is an extensive debate taking place on the subject (see, for example, Phillipson, 1999 and Buxton, 2000). The fact that section 6 includes 'a court or tribunal' within the definition of public authority makes it difficult to conclude with any confidence that the Act will not have at least some horizontal effect. Also, because it is unlawful for the courts, as a public authority, to act in a way which is incompatible with a Convention right may persuade the courts to give effect to the Act even in litigation involving two private individuals. On the other hand it can be argued that, while the court must not act in a way which is incompatible with a Convention right, given that the Convention does not apply against a private individual, a court cannot act incompatibly with a Convention right if it refuses to apply the Convention in a claim against a private individual. While there remains considerable uncertainty about the applicability of the Act to litigation between private individuals, there can be no doubt that, at the very least, the Act will apply to contracts entered into by public authorities.

The second question relates to the scope of the 'Convention rights' and the extent to which they may be violated by contracts or by the rules of contract law. Some examples are obvious. A contract of slavery would be a violation of Article 4 of the Convention but English law already refuses to recognise the validity of such a contract. The difficult cases are going to be those rules of contract law which are currently valid but in fact can amount to a violation of a Convention right. At the moment it is only possible to speculate as to which Convention rights may suddenly surface in contract litigation. The most obvious are perhaps Article 6 (which states that 'in the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'), Article 14 (which

states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status') and Article 1 of the First Protocol (which states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'). So attempts to expropriate contract rights or to deny to claimants the right to have their disputes resolved by a court of law may involve a violation of a Convention right.

Here it will suffice to give one example of the potential impact of Convention rights on the law of contract. The law currently refuses to enforce a contract which is illegal or which is contrary to public policy and it also generally refuses to allow a party who has conferred a benefit on another party to an illegal contract to recover the value of the benefit so conferred. The reason for this is generally that the courts wish to deter parties from entering into illegal contracts (see further 15.17 and 15.18). The law in this area is widely considered to be unsatisfactory and the Law Commission have begun work on reforming it. But does the Human Rights Act add an extra dimension to the problem? Can a party who has entered into a contract which is illegal or which is contrary to public policy argue that his Convention rights have been violated if a court refuses to enforce the contract or refuses to allow him to recover the value of the benefit which he has conferred on the other party to the contract? Take the example of a contract under which one party promises in return for a fee to procure the marriage of another. There is authority in England which concludes that such a contract is unenforceable (*Hermann* v. *Charlesworth* [1905] 2 KB 123) but, if a court held that it was bound by authority not to enforce such a contract or to allow the recovery of any benefit conferred under it, could the claimant, assuming for now that the Act has horizontal effect, allege that there has been a breach of Article 6 of the Convention? The answer is not entirely clear. The potential significance of Article 6 also surfaces in the Law Commission's Consultation Paper (1999) on reform of the law relating to the effect of illegality on contracts and trusts (on which see 15.18). The Law Commission provisionally recommend that the courts should be given a discretion to decide whether or not to enforce an illegal contract or to reverse an unjust enrichment which has occurred under an illegal contract. Is this proposal compatible with the European Convention on Human Rights? In the past it would not have been necessary to ask this question: if Parliament passed a law which was generally thought to be desirable it was the task of the

courts simply to give effect to it. But today, proposed legislation must be tested for compatibility with Convention rights. The Law Commission identified three provisions of the Convention which could potentially apply to their proposals, namely Article 6, Article 7 ('no punishment without law') and Article 1 of the First Protocol. However they declared that they were 'confident' that their proposals are compatible with the Convention. In the case of Article 1 of the First Protocol, the Law Commission stated that, to the extent that the Article was applicable, the public interest provision would apply and, in the case of Articles 6 and 7, they maintain that no part of their proposals would deny a claimant access to the courts or to a fair and public hearing. However the fact that the Law Commission conclude their consideration of the point by stating that 'we would be very grateful if consultees with the relevant expertise could let us know whether they agree with our view that our provisional recommendations do not infringe the European Convention on Human Rights and Fundamental Freedoms, and, if they do not agree, to explain their reasoning' demonstrates the uncertainty which currently surrounds the impact which Convention rights may have on private law. Convention rights may turn out to be a time-bomb ticking away under the law of contract and private law generally.

Part I

The Formation and Scope of a Contract

2 Agreement: Clearing the Ground

To say that contract is based upon the agreement of the parties may be a trite statement but it is also a statement which begs a number of questions. Two of these questions will be dealt with in this chapter. The first is: who decides whether or not the parties have indeed reached agreement? Is it the parties or is it the courts? The second question is: how is it decided whether or not the parties have actually reached agreement?

2.1 Who Decides that an Agreement has been Reached?

When discussing the standard which is adopted in deciding whether or not a contract has been concluded, a useful starting point, which is quoted in most of the reference works on the law of contract, is the judgment of Blackburn J in *Smith* v. *Hughes* (1871) LR 6 QB 597. He said:

> '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.'

This establishes the important point that the test for the existence and the scope of an agreement is objective rather than subjective. A subjective test attempts to ascertain the actual intention of the contracting parties, whereas an objective test examines what the parties said and did and not what they actually intended to say or do (see further 2.3). The commercial justification for the adoption of an objective test is that great uncertainty would be caused if a person who appeared to have agreed to certain terms could escape liability by claiming that he had no 'real' intention to agree to them.

Some confusion has, however, been caused by the judgment of Lord Diplock in *The Hannah Blumenthal* [1983] 1 AC 834. Lord Diplock stated that:

> 'to create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the

> promise of the other, what is necessary is that the intention of each *as it has been communicated to and understood by the other* (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide.'

In *The Leonidas D* [1985] 1 WLR 925 Robert Goff LJ interpreted Lord Diplock as saying that the 'actual intentions of both parties should in fact coincide', which he took to be a reference to a subjective test. It is, however, highly unlikely that Lord Diplock intended to overturn established principles of contract law in such a way (see Atiyah, 1986f) and, in so far as he intended to state that the test was a subjective one, it is likely that, as was the case with Robert Goff LJ in *The Leonidas D*, his dicta will not be followed.

A good example of the application of the objective test is provided by *Centrovincial Estates plc* v. *Merchant Investors Assurance Company Ltd* [1983] Com LR 158. The claimants let premises to defendants at a yearly rent of £68,320, subject to review from 25 December 1982. The parties were obliged by their contract to endeavour to reach agreement before 25 December 1982 on the then current market rental value of the property and to certify the amount of the current market rental value. In June 1982 the claimants wrote to the defendants inviting them to agree that the current market rental value should be £65,000. The defendants accepted. When the claimants received the defendants' written acceptance they immediately contacted the defendants to inform them that they had meant to propose £126,000 and not £65,000. The defendants refused to agree to this new figure and insisted that a contract had been concluded at a rental value of £65,000. So the claimants sought a declaration that no legally binding agreement had been entered into between the parties. The Court of Appeal refused to grant such a declaration, holding that the parties had entered into a contract at a rental value of £65,000. Slade LJ said that:

> 'it is contrary to the well-established principles of contract law to suggest that the offeror under a bilateral contract can withdraw an unambiguous offer, after it has been accepted in the manner contemplated by the offer, merely because he has made a mistake which the offeree neither knew nor could reasonably have known when he accepted it.'

An alternative argument which was relied upon by the claimants in *Centrovincial* was that the objective test of intention was founded upon the principle of estoppel. Estoppel is based upon the proposition that a rep-

resentor will be prevented from going back on his representation when the representation was intended to be acted upon and is acted upon to his detriment by the representee (see further 5.25–5.27). The claimants argued that the defendants had not relied upon the claimants' offer to their detriment because the proposed rent of £65,000 was lower than the original rent of £68,320. This argument was rejected by the court on the ground that 'the mutual promises alone will suffice to conclude the contract'.

Professor Atiyah (1986f) has attacked the decision in *Centrovincial* on the ground that he can see no reason why an offeree should be entitled 'to create legal rights for himself by the bare act of acceptance when he has in no way relied upon the offer before being informed it was made as a result of a mistake and did not in reality reflect the intention of the offeror'. He has further argued that the decision of the House of Lords in *The Hannah Blumenthal* (above) lends support to his argument that *Centrovincial* was wrongly decided.

The *Hannah Blumenthal* concerned an agreement between two parties to settle a dispute by reference to arbitration. There was then a delay of some six years, during which time nothing happened in relation to the arbitration. When the buyers attempted to fix a date for the arbitration, the sellers sought an order that the buyers were not entitled to proceed with the arbitration because of the delay which had occurred. One of the grounds relied upon by the sellers was that the parties had, by their silence and inactivity, agreed to abandon the reference to arbitration; the offer being made by the buyers and the acceptance by the sellers (see further 3.11). Lord Brandon held that there were two ways in which the parties could agree to abandon a contract to arbitrate. The first was where they actually agreed to do so. The second was where one party created a situation in which he was estopped from asserting that he had abandoned the contract. In the latter context it was held that the sellers must have 'significantly altered [their] position in reliance' upon their belief that the contract had been abandoned. Lord Diplock also placed emphasis upon the need for detrimental reliance, saying that this was 'an example of a general principle of English law that injurious reliance on what another person did may be a source of legal rights against him'. However it must be remembered that *Hannah Blumenthal* is a rather unusual case in that it was alleged that the parties had entered into a contract to abandon an arbitration by mere inactivity on both sides. In the absence of express communication between the buyers and the sellers, the only way of showing that the sellers had accepted the buyers' offer to abandon the arbitration was to show that they had acted in reliance on the fact that the contract had been abandoned. The function of reliance was therefore

to provide *evidence* of the fact that the sellers had accepted the buyers' offer to abandon the agreement to arbitrate; it is not the case that the House of Lords was laying down a rule that such reliance was a prerequisite to the formation of any contract. Thus interpreted, *Hannah Blumenthal* does not cast doubt upon the correctness of *Centrovincial* because in *Centrovincial* the defendants' acceptance was evidenced by the fact that they wrote and accepted the claimants' offer. In such a case, the acceptance concludes the contract without the need for any further act in reliance upon the offer.

2.2 A Residual Role for a Subjective Approach?

It should not, however, be assumed that the subjective intentions of the parties are irrelevant to the law of contract. In many cases the subjective intentions of the parties will coincide with the interpretation put upon their intentions by the objective test and to that extent their subjective intentions are protected. Further, as was made clear by Slade LJ in *Centrovincial*, there are two situations in which the objective test is either displaced or modified by a test which appears to place greater emphasis upon the subjective intentions of the parties.

The first arises where the offeree knows that the offeror is suffering from a mistake as to the terms of the offer; in such a case the courts, on one view, have regard to the subjective understanding of the offeree but in fact, on closer examination, it is more likely that the courts adopt the approach of a reasonable person in the position of the offeree. An example is provided by the facts of *Hartog* v. *Colin and Shields* [1939] 3 All ER 566. The defendants entered into a contract to sell 3000 Argentinian hare skins to the claimants. However by mistake they offered them for sale at 10d per pound instead of 10d per piece. When they discovered their mistake, the defendants refused to deliver the skins. The claimants brought an action in respect of the defendants' non-delivery of the skins. It was held that they were not entitled to succeed because the negotiations had proceeded upon the basis that the skins were to be sold at a price per piece and that, as there were three pieces to the pound, the claimants could not reasonably have thought that the defendants' offer matched their true intention. The claimants were thereby prevented from snatching a bargain which they knew was not intended by the defendants. However it is not necessary to have resort to a purely subjective test in order to explain the outcome of the case. It can be accommodated within an objective test on the basis that the reasonable person in the position

of the claimants would have known that the offer made by the defendants did not reflect their true intention. Had the test been a subjective one it would have been necessary for the defendants to show that the claimants actually knew that the defendants were mistaken; instead it sufficed that the reasonable person in the claimants' position would have known of the defendants' mistake.

The second situation in which it has been argued that the subjective intentions of the parties are relevant is where the offeree is at fault in failing to note that the offeror has made a mistake. Such was the case in *Scriven Bros* v. *Hindley* [1913] 3 KB 564. An auctioneer acting for the claimants put up for sale lots of hemp and tow. The auction catalogue was misleading because it implied that the lots were the same when, in fact, the second lot only contained tow. Tow was considerably cheaper than hemp. The defendants bid for the lot, thinking that it was hemp when in fact it was tow. The auctioneer did not realise that the defendants had misunderstood what was being auctioned; he merely thought that they had overvalued the tow. When the defendants discovered their mistake, they refused to pay the price and so the claimants sued them for the price. It was held that no contract for the sale of the tow had been concluded when the tow was knocked down to the defendants, because the auctioneer intended to sell tow and the defendants intended to purchase hemp and the defendants' mistake had been induced by the carelessness of the claimants in preparing the auction catalogue. The importance of the misleading nature of the auction catalogue can be seen in the fact that, had it not been misleading, a contract would have been concluded on the claimants' terms because, in the usual case, an auctioneer is entitled to assume that a bidder knows what he is bidding for. Thus in the ordinary case a contract would have been concluded for the sale of tow. But, once again, it is not necessary to have regard to the subjective understandings of the parties in order to explain the outcome of the case. The case simply stands for the proposition that the carelessness of the claimants prevented them from enforcing their understanding of the contract. The result can be explained in terms of 'defendant objectivity' (see 2.3) on the basis that the court was concerned to scrutinise the understanding of the reasonable person in the position of the defendants. Given that the reasonable person in the position of the defendants would have been misled by the auction catalogue, the claimants were not entitled to enforce their version of the contract against the defendants.

A further situation in which it has been argued (see Spencer, 1974) that the subjective intentions of the parties are relevant arises where the parties are subjectively agreed but that subjective agreement is at

variance with the result achieved by applying the objective test. Spencer gives the admittedly rather far-fetched example of two immigrants who have little command of the English language and who enter into a contract under which one is to sell to the other a 'bull'. Both parties intend to use the word 'bull' but they both think that the word 'bull' means cow. The application of the objective test, Spencer argues, leads to the conclusion that a contract has been concluded for the sale of a bull. But, as Spencer points out, this is absurd as the seller does not have a bull to sell and the buyer does not want one. He argues that while

> 'it may be acceptable for the law occasionally to force upon *one* of the parties an agreement he did not want . . . surely there is something wrong with a theory which forces upon *both* of the parties an agreement which neither of them wants.'

Thus Spencer concludes that the subjective intentions of the parties must prevail. But if both parties in fact wished to contract to sell a cow and a cow was delivered and accepted then the law of contract would not force upon the parties an agreement which neither of them wanted because, in such a case, the objective approach would lead to the conclusion that a contract had been made for the sale of a cow. The actions of the parties, in delivering and accepting delivery of the cow, would displace the inference which had been raised by the words which they had used. So, in this example, there is no question of the law forcing upon the parties an agreement which neither of them wants and no need to invoke any reference to the subjective understandings of the parties.

It is, however, important to understand that the subjective understandings of the parties will not generally prevail over their intention, objectively ascertained. As Lord Normand stated in *Mathieson Gee (Ayrshire) Ltd* v. *Quigley* 1952 SC (HL) 38:

> 'when the parties to a litigation put forward what they say is a concluded contract and ask the Court to construe it, it is competent for the Court to find that there was in fact no contract and nothing to be construed.'

Conversely, it has been stated that 'if the parties' correspondence and conduct shows [objectively that they intend to make a contract] it will not, or may not, matter that neither privately intended to make a contract' (*The Amazonia* [1990] 1 Lloyd's Rep 238, 243). The existence or non-existence of a contract is ultimately a question for the court which will generally be decided by the application of an objective test.

2.3 The Objective Test

So the general rule is that the intention of the parties is to be assessed objectively. Thus far it has been assumed that there is only one objective test which can be applied by the courts but it has been argued (Howarth, 1984) that there are, in fact, three different interpretations of the objective test which can be applied by the courts. The first is the standard of detached objectivity. This approach takes as its standpoint the perspective of the detached observer or the 'fly on the wall'. In other words, it asks what interpretation would a person watching the behaviour of the contracting parties place upon their words and actions. The second possible interpretation suggested by Howarth is to interpret the words as they were reasonably understood by the promisee (called 'promisee objectivity' by Howarth). This is the standard which finds the greatest support in the case law (see *Smith* v. *Hughes* (above)). The third and final interpretation is the standard of the reasonable person in the shoes of the person making the offer (called 'promisor objectivity' by Howarth). The approach which is preferred by Howarth is 'detached objectivity' but there is little judicial support for such a test (Vorster, 1987).

However the distinction which Howarth draws between 'promisor' and 'promisee' objectivity has been criticised on the ground that it is misleading because, in a bilateral contract, each party is both a promisor and a promisee (Vorster, 1987, especially pp. 276–8). Thus, for example, in *Scriven Bros* v. *Hindley* (above) the defendant purchaser was a promisor in relation to his promise to pay for the lot and a promisee concerning the auctioneer's promise to sell him the tow. On the other hand, the auctioneer was a promisor in relation to the promise to sell the lot and a promisee concerning the defendant's promise to purchase the lot. It is true that the nomenclature which Howarth employs is rather misleading but it should not blind us to his essential point, which is that there are two parties to a contract and that a court could elect to apply the perspective of one or other contracting party. One could meet the criticism by restyling the classification as 'claimant' and 'defendant' objectivity to underline the point that one is simply looking at the contract from the position of one or other contracting party.

Although it is true that, in our terminology, 'defendant' objectivity has the greatest support in the case law this may be a product of the way in which the cases have come before the courts rather than distinct judicial preference. The case of *Scriven Bros* v. *Hindley* (above) provides a good example of this point. In that case the court considered whether the claimants were entitled to recover the price of the lot which they alleged that the defendants had contracted to buy. The emphasis of the court was

upon the defendants' understanding of the offer made by the auctioneer. This was because the defence to the claim was based on the defendants' understanding of the offer and therefore the court was forced to examine that understanding. It is crucial to note that the defendants simply denied liability; they did not take the further step of asking the court to enforce their version of the 'contract'. This had the consequence that the court did not consider whether the defendants would have been able to sue the claimants for breach of a contract to sell hemp. Had the defendants counterclaimed for breach of their version of the 'contract', the roles would have been reversed and the court would have been compelled to consider the claimants' understanding of the bid made by the defendants. The infrequency of such counterclaims by defendants means that 'defendant' objectivity is most commonly considered by the courts, but it does not follow that the courts are averse to applying 'claimant' objectivity; it is simply the case that they are not often asked by defendants to apply such a standard.

2.4 Has Agreement been Reached?

An instructive example of the approach which the courts adopt in deciding whether or not the parties have reached agreement is provided by the case of *Butler* v. *Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401. The sellers, Butler, offered to sell a machine tool to the buyers, the offer being made on Butler's standard terms of business, which included, *inter alia*, a pri variation clause. The buyers sent an order for the machine tool which, in turn, was on their own standard terms of business, which made no provision for a price variation clause and stated that the price of the machine tool was to be fixed. The buyers' order form contained a tear-off acknowledgement slip, which stated that 'we [the sellers] accept your order on the terms and conditions stated thereon'. The sellers signed and returned this slip to the buyers, together with a letter stating that they were carrying out the order on the terms of their original offer. After constructing the machine tool, but before delivering it, the sellers sought to invoke the price variation clause contained in their original offer and claimed the additional sum of £2892. The buyers refused to pay this increase in price, claiming that they were not contractually bound to do so. The sellers accordingly sued the buyers for £2892 in damages. The Court of Appeal held that they were not entitled to recover the sum claimed because a contract had been concluded on the buyers' terms which did not include the price variation clause. Although the Court of Appeal was unanimous in holding that a contract had

been concluded on the buyers' terms, the court was divided in its reasoning.

The reasoning of the majority, Lawton and Bridge LJJ, proceeded by applying the traditional 'mirror image' rule of contractual formation. According to this rule, the court must be able to find in the documents which passed between the parties a clear and unequivocal offer which is matched or 'mirrored' by an equally clear and unequivocal acceptance. A purported acceptance which does not accept all the terms of the original offer is not in fact a true acceptance at all but is a counter-offer which 'kills off' the original offer and amounts to a new offer which can in turn be accepted by the other party. Applying this, they held that the buyers' order could not be construed as an acceptance of the sellers' offer because it did not mirror exactly the terms of the sellers' offer and therefore amounted to a counter-offer. They held that this counter-offer was accepted by the sellers when they signed the tear-off acknowledgement on the buyers' order form. The letter accompanying the acknowledgement slip was held not to be an attempt to reintroduce the terms of the sellers' original offer and so was not a counter-offer, but was simply a means of identifying the order for the machine tool.

This traditional approach has a number of advantages. The first is that it provides some degree of certainty because legal advisers at least know the principles which the courts will apply in deciding whether or not a contract has been concluded. There is no separation between the formation of the contract and the ascertainment of the terms of the contract because the offer and acceptance must mirror each other exactly before a contract is concluded. Thus it gives the parties a clear standard against which to measure their conduct and sends out a message that a failure to reach agreement on all points may lead a court to hold that a contract has not been concluded. The second advantage of this approach is that it provides a standard which can be applied to every type of contract.

However the traditional approach has also been subjected to considerable criticism. One such criticism is that it is excessively rigid. It produces an 'all or nothing' result, in the sense that it is either the terms of the buyer or the terms of the seller which govern the relationship of the parties; the court cannot pick and choose between the respective sets of terms and conditions or seek to find an acceptable compromise. This is unfortunate in cases involving the 'battle of the forms' (as cases such as *Butler* are commonly called) where both parties may reasonably believe that their terms are the ones which govern their relationship and where a compromise may produce the fairest result on the facts of the case. The traditional approach has also been criticised in its application to battle of the forms cases on the ground that it encourages businessmen to continue

to exchange their standard terms of business in the hope of getting the 'last shot' in and it places the party in receipt of the last communication in a very difficult position. If he refuses to accept the goods, it is likely that it will be held that no contract has come into existence, but if he accepts the goods it is possible that he will be held to have accepted them on the sellers' terms. This suggests that the onus will generally be upon the buyer and that a seller which insists that its terms prevail and refuses to sign the buyer's tear-off acknowledgement slip will be in a strong position. As Leggatt LJ observed in *Hitchins (Hatfield) Ltd* v. *H Butterworth Ltd*, Unreported, Court of Appeal, 25 February 1995, 'if express terms are to govern a contract of sale, a buyer would expect to buy goods upon the seller's terms, unless supplanted by the buyer's own'.

The strains on the traditional approach have led some judges to reject it in favour of a new approach. In *Butler* Lord Denning, who has in the minority (in terms of reasoning, but not result), rejected the traditional mirror image approach to contractual formation, holding it to be 'out-of-date' (see too his judgment in the case of *Gibson* v. *Manchester City Council* [1978] 1 WLR 520, 523 when he said that 'to my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance'). He stated that the

> 'better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them.'

He also held that, even where the terms used by the parties were mutually contradictory, it was possible for a court to 'scrap' the terms and replace them by a 'reasonable implication'. Applying this reasoning, he held that the signing of the tear-off acknowledgement by the sellers was the 'decisive document', which made it clear that the contract was concluded on the buyers' terms.

This approach clearly conflicts with the mirror image approach to contractual formation because it adopts a two-stage approach. At the first stage, it must be decided whether a contract has been concluded and, at the second stage, it must be decided what are the terms of the contract. At the latter stage the court has considerable discretion in filling the gaps. The approach adopted by Lord Denning seeks to construct a more flexible framework for the law of contract which can accommodate inconsistent terms and an apparent lack of consensus within the law of contract.

This approach has in turn been criticised on the ground that it produces uncertainty because it gives too little guidance to the courts, or to legal advisers, in determining whether or not an agreement has been reached. Certainty is a particularly important commodity in the law of contract because businessmen will often want to know the standard which the law applies so that they can plan their affairs accordingly.

Despite the attempt by Lord Denning to introduce this new general approach to the issue of agreement, English law remains wedded to the traditional approach. This was confirmed by Lord Diplock in *Gibson* v. *Manchester City Council* [1979] 1 WLR 294, 297 when he said that, although there may be certain 'exceptional' cases which do not 'fit easily into the normal analysis of a contract as being constituted by offer and acceptance', these cases were very much the exception and they have not displaced the traditional rule. It would be a mistake, however, to think that the traditional rule is always rigidly applied by the judiciary. In *The Eurymedon* [1975] AC 154, 167 Lord Wilberforce stated that 'English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration'. We shall see, when discussing issues such as the application of the rules of offer and acceptance to transactions in the supermarket (see 3.2), that the courts do have some discretion in identifying the offer and the acceptance and so have some flexibility in applying the rules in a particular factual context.

In the next chapter we shall give consideration to the schematic approach to agreement by examining in greater detail the constituent elements of offer and acceptance. Then, in Chapter 4, we shall give further consideration to the application of the objective test.

Summary

1 The test for the existence of an agreement is objective rather than subjective. The principal justification for the adoption of this test is the need to promote certainty.
2 Where the offeree knows that the offeror is suffering from a mistake as to the terms of his offer and where the offeree is at fault in failing to note that the offeror has made a mistake, the offeree will not be entitled to enforce the contract according to his version of its terms.
3 There are three potential forms of the objective test: detached objectivity, claimant (or promisor) objectivity and defendant (or promisee) objectivity. The latter form has the greatest support in the case law but this may be a product of the way in which the cases have come before the courts rather than distinct judicial preference.
4 The courts apply the 'mirror image' rule in deciding whether or not a contract has been concluded. The acceptance must mirror the offer exactly. The general approach to contract formation advocated by Lord Denning has been rejected.

Exercises

1 Do you think that *Centrovincial Estates plc* v. *Merchant Investors Assurance Company* was correctly decided?
2 Andrew, an old man aged 80, agreed to sell his house to David for £6800. Andrew in fact meant to sell it for £68,000. David is now seeking to enforce the agreement. Advise Andrew.
3 Compare and contrast the reasoning of the majority and the minority in *Butler* v *Ex-Cell O Corporation*. Which approach do you prefer and why?

3 Offer and Acceptance

We noted in Chapter 2 that the courts adopt the 'mirror image' rule of contractual formation; that is to say they must find a clear and unequivocal offer which is matched by an equally clear and unequivocal acceptance. In this chapter we shall give more detailed consideration to the constituent elements of an offer and an acceptance. However, three points should be noted at the outset of our discussion.

The first point is that most of the cases which we shall discuss in this chapter are cases which came to court because one party was alleging that the other had broken the contract between them. This can be seen in *Butler* v. *Ex-Cell-O Corporation* [1979] 1 WLR 401 (see 2.4), where the discussion of the rules of offer and acceptance was crucial because the court had to find the existence of a contract and ascertain its terms before it could decide whether or not the buyers were in breach of contract. Thus the context of most of these cases is an allegation of *breach* of contract.

The second point which should be borne in mind relates to the way in which the courts use the requirements of offer and acceptance in deciding cases. Professor Atiyah has argued (1995) that the courts could either 'reason forwards' or they could 'reason backwards'. By 'reasoning forwards' Professor Atiyah means that the courts reason from the legal concepts of offer and acceptance towards the solution to the dispute. This is the traditional approach which has been adopted by the courts; they 'find' the existence of an offer and an acceptance and only then do they reason towards their conclusion. On the other hand the courts could 'reason backwards'; that is to say they could reason from the appropriate solution back to the legal concepts of offer and acceptance. On such a model the court can decide which solution it wishes to adopt and then fit the negotiations within the offer and acceptance framework to *justify* the decision which they have already reached. The distinction which Professor Atiyah is seeking to draw is a difficult one to grasp in the abstract but it is one to which we shall return when discussing some of the cases.

The third point is that, on a number of occasions, we shall note that great difficulty is experienced in accommodating many every-day transactions within the offer and acceptance framework. This point will lead us to conclude by discussing the utility of the offer and acceptance model.

With these preliminary points in mind let us examine the detailed rules of law relating to offer and acceptance.

3.1 Offer and Invitation to Treat

An offer is a statement by one party of a willingness to enter into a contract on stated terms, provided that these terms are, in turn, accepted by the party or parties to whom the offer is addressed. There is generally no requirement that the offer be made in any particular form; it may be made orally, in writing or by conduct.

Care must be taken, however, in distinguishing between an offer and an invitation to treat. An invitation to treat is simply an expression of willingness to enter into negotiations which, it is hoped, will lead to the conclusion of a contract at a later date. The distinction between the two is said to be primarily one of intention; that is, did the maker of the statement intend to be bound by an acceptance of his terms without further negotiation or did he only intend his statement to be part of the continuing negotiation process? Although the dichotomy is easy to state at the level of theory, it is not so easy to apply at the level of practice, as can be seen from the case of *Gibson* v. *Manchester City Council* [1978] 1 WLR 520 (CA) and [1979] 1 WLR 294 (HL).

In 1970 the defendant council prepared a brochure explaining how a council tenant could purchase his council house and sent a copy to those tenants who had previously expressed an interest in purchasing their council house. Mr Gibson completed the form contained in the brochure and sent it to the council, together with a request that he be told the purchase price of the house. The treasurer of the council wrote to inform him that the 'council may be prepared to sell the house' to him at a stated price and that if he wished to make a 'formal application' to purchase the house he should complete a further form. Mr Gibson completed the form, but he left the purchase price blank because he wished to know whether the council would repair the path to his house or whether he could deduct the cost from the purchase price. The council replied that the price had been fixed according to the condition of the property and so allowance had been made in the price for the condition of the path. Mr Gibson accepted this and asked the council to continue with his application. The council took the house off the list of houses for which they were responsible for maintenance and Mr Gibson carried out maintenance to the house. At this point the Labour Party gained control of the council after the local elections and promptly discontinued the policy of selling off council houses, unless a legally binding contract had already been con-

cluded. The council refused to sell the house to Mr Gibson because they claimed that no contract had been concluded for the sale of the house.

The trial judge and the Court of Appeal held that a contract had been concluded between the parties. Lord Denning, in a broad and sweeping judgment, held that a contract had been concluded because there was agreement between the parties on all material points, even though the precise formalities had not been gone through. The House of Lords took a different view and held that no contract had been concluded. It was held that the letter written by the treasurer, which stated that the council *may* be prepared to sell, was not an offer as it did not finally commit the council to selling the house. It was simply an expression of their willingness to enter into negotiations for the sale of the house and was not an offer which was capable of being accepted. This was further evidenced by the fact that Mr Gibson was invited to make a 'formal application' to purchase the house and not to signify his agreement to the stated terms.

The difficulty in a case such as *Gibson* arises from the fact that it is not easy to ascertain when the preliminary negotiations end and a definite offer is made. The court must examine carefully the correspondence which has passed between the parties and seek to identify from the language used and from the actions of the parties whether, in its opinion, either party intended to make an offer which was capable of acceptance. *Gibson* shows that judges can and do differ in the results which they reach in this interpretative exercise and that each decision must ultimately rest on its own facts (contrast the decision of the Court of Appeal in *Storer* v. *Manchester City Council* [1974] 1 WLR 1403, where the court held that a contract had been concluded where the negotiations had advanced beyond the stage reached in *Gibson* but had not resulted in an exchange of contracts).

In a case such as *Gibson* the court is clearly engaged in trying to ascertain the intention of the parties from the documents which have passed between them (although it should be noted that, even in *Gibson*, the case was seen as a test case for 350 other similarly placed prospective purchasers and these purchasers would be presumed to have the same intention as Mr Gibson). There is, however, another group of cases, which concern certain stereotyped transactions, such as advertisements and shop-window displays, where the courts are less concerned with the intention of the parties and are more concerned to establish clear rules of law to govern the particular transaction. Professor Treitel has stated (1999) that

> 'it may be possible to displace these rules by evidence of contrary intention, but in the absence of such evidence [these rules of law] will

determine the distinction between offer and invitation to treat, and they will do so without reference to the intention (actual or even objectively ascertained) of the maker of the statement.'

These situations are discussed in sections 3.2–3.6.

3.2 Display of Goods for Sale

As a matter of principle, there are at least three different approaches which could be adopted to the display of goods for sale in a shop or supermarket. The first is to hold that the display of goods is an offer which is accepted when the goods are picked up by the prospective purchaser and put into his shopping basket. However, such a conclusion would have the undesirable consequence that a purchaser would be bound as soon as he picked up the goods and he could not change his mind and return them to the shelves without being in breach of contract. The second approach is to hold that the display of goods is an offer which is accepted when the purchaser takes the goods to the cash desk. This solution avoids the weakness of the first approach but it has been argued that it too is undesirable. Three criticisms have been levelled against this solution. The first is that it has been argued that a shop is a place for bargaining and not for compulsory sales and that to hold that the display of goods is an offer will take away the shopkeeper's freedom to bargain (Winfield, 1939). This argument can be countered by pointing out that, apart from second-hand shops, bargaining is not a reality in the shops of today. Goods are displayed on a 'take it or leave it' basis. If the customer is not prepared to comply with the stated terms he can go elsewhere. Secondly it has been argued that this conclusion is undesirable because it takes away the freedom of the shopkeeper to decide whether or not to deal with a particular customer. It would compel the shopkeeper to trade with his worst enemy. However, it is submitted that, in an era when shopping in vast superstores has become commonplace, such an argument can no longer be regarded as conclusive. Thirdly it has been argued that to treat a display of goods as an offer might result in the vendor being bound to a series of contracts which he would be unable to fulfil (see *Partridge* v. *Crittenden* [1968] 1 WLR 1204, discussed at 3.3). This objection can be countered by holding that the shopkeeper's offer is subject to the limitation that it is only capable of acceptance 'while stocks last'.

The third possible conclusion is that the display of goods constitutes an invitation to treat and that the offer is made by the customer when he presents the goods at the cash desk, where the offer may be accepted by

the shopkeeper. This conclusion preserves the freedom of the shopkeeper to decide whether or not to deal with a particular customer but it can fail to protect the interests of the customer. For example, a customer who takes the goods to the cash desk may be told that the goods are in fact on sale at a higher price than the display price and there would be no way that the customer could compel the shopkeeper to sell the goods at the display price. It is true that the seller may be subject to criminal sanctions under s.20(1) of the Consumer Protection Act 1987 where he gives a misleading indication as to the price at which the goods or services are available for sale, but that does not assist the purchaser with his civil action. He is still left without a civil remedy.

In this simple everyday situation the rules of offer and acceptance simply do not demand that a particular conclusion be reached. Nor can the intention of the parties provide a useful guideline because, in truth, the parties often have no discernible intention one way or the other. The general rule which the courts have, in fact, adopted is that the display of goods in a shop window is an invitation to treat rather than an offer (*Fisher* v. *Bell* [1961] 1 QB 394). The application of this rule can be seen in the case of *Pharmaceutical Society of GB* v. *Boots Cash Chemists* [1953] 1 QB 401 (see Montrose, 1954). The defendants organised their shop on a self-service basis. They were charged with a breach of the Pharmacy and Poisons Act 1933, which required that a sale of drugs take place under the supervision of a registered pharmacist. There was no pharmacist present close to the shelves, but a pharmacist supervised the transaction at the cash desk and was authorised to prevent a customer from purchasing any drug if he thought fit. It was held that the sale took place at the cash desk and not when the goods were taken from the shelves; the display of the goods was simply an invitation to treat and therefore there had been no breach of the Act.

However a rigid application of the rule established in *Boots* could lead to injustice in certain cases. An instructive example of a factual situation in which the application of the *Boots* rule may lead to injustice is provided by the American case of *Lefkowitz* v. *Great Minneapolis Surplus Stores* 86 NW 2d 689 (1957). On two occasions the defendants placed an advertisement in a newspaper. The first advertisement stated 'Saturday 9 am sharp; 3 Brand new fur coats, worth to $100; First come first served, $1 each', and the second stated 'Saturday 9 am . . . 1 Black Lapin Stole . . . worth $139.50 . . . $1.00; First Come, First Served'. On each of the Saturdays following publication of the advertisement the claimant was the first person in the store at 9 am, but on both occasions the defendants refused to sell the goods to him. On the first occasion the reason given was a 'house rule' that the offer was intended for women only and on the

second occasion he was informed that he knew the 'house rules'. The claimant brought a claim for damages for breach of contract. His claim in relation to the first advertisement was dismissed on the ground that the value of the fur coats was too speculative and uncertain to found a claim. But his claim for damages succeeded in relation to the second advertisement and he was awarded damages of $138.50. The Supreme Court of Minnesota held that the advertisement was an offer and not an invitation to treat and that the defendants were not entitled to confine their offer to women only because no such restriction was explicit in the offer itself. But would an English court conclude that these advertisements constituted an offer? Some authority can be adduced for treating a display of goods as an offer; in *Chapleton* v. *Barry UDC* [1940] 1 KB 532, it was held that the display of deck chairs for hire on a beach was an offer which was accepted by a customer taking a chair from the stack (see too *Carlill* v. *Carbolic Smoke Ball Co* [1893] 1 QB 256, discussed at 3.3). But if a court were to rely on the authority of *Chapleton* would it not be because the court thought that it was unfair to leave the claimant without a remedy? Would this not be an example of what Professor Atiyah calls 'reasoning backwards'; that the court feels that the claimant ought to have a remedy and it justifies that conclusion by treating the advertisement as an offer rather than an invitation to treat?

3.3 Advertisements

The general rule is that a newspaper advertisement is an invitation to treat rather than an offer. In *Partridge* v. *Crittenden* [1968] 1 WLR 1204, the appellant advertised Bramblefinch cocks and hens for sale at a stated price. He was charged with the offence of 'offering for sale' wild live birds contrary to the Protection of Birds Act 1954. It was held that the advertisement was an invitation to treat and not an offer and so the appellant was acquitted. Lord Parker CJ stated that there was 'business sense' in treating such advertisements as invitations to treat because if they were treated as offers the advertiser might find himself contractually obliged to sell more goods than he in fact owned. However, as we have seen, this argument is not conclusive because it could be implied that the offer is only capable of acceptance 'while stocks last'.

Nevertheless there are certain cases where an advertisement may be interpreted as an offer rather than an invitation to treat. The classic example is the case of *Carlill* v. *Carbolic Smoke Ball Co* (above). The defendants, who were the manufacturers of the carbolic smoke ball, issued an advertisement in which they offered to pay £100 to any person who

caught influenza after having used one of their smoke balls in the specified manner, and they deposited £1000 in the bank to show their good faith. The claimant caught influenza after using the smoke ball in the specified manner. She sued for the £100. It was held that the advertisement was not an invitation to treat but was an offer to the whole world and that a contract was made with those persons who performed the condition 'on the faith of the advertisement'. The claimant was therefore entitled to recover £100 (for a more modern application of the rule see *Bowerman* v. *Association of British Travel Agents Ltd* [1996] CLC 451).

3.4 Auction Sales

The general rule is that an auctioneer, by inviting bids to be made, makes an invitation to treat. The offer is made by the bidder which, in turn, is accepted when the auctioneer strikes the table with his hammer (*British Car Auctions Ltd* v. *Wright* [1972] 1 WLR 1519). The advertisement of an auction sale is generally only an invitation to treat (*Harris* v. *Nickerson* (1873) LR 8 QB 286), but it is unclear what is the effect of the addition of the words 'without reserve', that is that the auction is to take place without a reserve price. In *Warlow* v. *Harrison* (1859) 1 E & E 309, Martin B stated *obiter* that in such a case the auctioneer makes an offer that the sale will be without reserve and that that offer is accepted by the highest bidder at the auction. It should be noted that the offer is made by the *auctioneer* and not the owner of the goods, so that there is no concluded contract of sale (unless, perhaps, the auctioneer is the agent of the vendor). Such an analysis is not without its problems (see the debate between Slade, 1952, 1953, and Gower, 1952). The contract is presumably made with the highest bidder, but how can it be shown who is the highest bidder if the auctioneer does not bring down his hammer?

An alternative analysis put forward by Professor Gower (1952) is to the effect that the advertisement of the auction as being without reserve constitutes an offer to the whole world by the auctioneer that the sale will be without reserve and that offer is accepted by anyone who, in reliance upon the advertisement, attends and bids at the auction. The consequence of this analysis is that a contract is made with all those who attend the auction and bid in reliance upon the advertisement and that a withdrawal of the goods after bidding has begun constitutes a breach of contract with every such person at the auction. However Professor Gower argues that the only person who suffers damage as a result of the breach is the person who is the highest bidder and that breach is therefore the only one worth suing on.

But this analysis also has its problems. The problem of identifying the highest bidder remains because, until the hammer is brought down, there is always the possibility of a last minute bid being made. It also has the consequence that liability can be avoided by refusing to hold the auction at all because acceptance only takes place by attending *and bidding* at the auction. Despite these difficulties, it must be conceded that the intimation that an auction is to be held without reserve raises an expectation in those attending the auction that the goods will be sold to the highest bidder and that *Warlow* provides protection for these expectations and prevents an auctioneer ignoring a condition of the sale which he himself has set. *Warlow* may be another example of the courts reasoning backwards in that they decide that in such a case the bidder ought to have a remedy and they then accommodate that conclusion within the offer and acceptance framework, even though the fit is somewhat uneasy.

3.5 Tenders

Where a person invites tenders for a particular project the general rule is that the invitation to tender is simply an invitation to treat. The offer is made by the person who submits the tender and the acceptance is made when the person inviting the tenders accepts one of them. However in an appropriate case a court may hold that the invitation to tender was, in fact, an offer. Two cases are relevant here.

The first is *Harvela Investments Ltd* v. *Royal Trust Co of Canada* [1986] AC 207. The first defendants decided to sell their shares by sealed competitive tender. They invited the two parties most likely to be interested in the shares each to submit a single sealed offer for their shares and stated that they would accept the highest 'offer' received by them which complied with the terms of their invitation. The claimants tendered a fixed bid of $2,175,000. The second defendant tendered a 'referential' bid of '$2,100,000 or . . . $101,000 in excess of any other offer . . . whichever is the higher'. The first defendants accepted the second defendant's bid, treating it as a bid of $2,276,000. But the House of Lords held that the first defendants were bound to accept the claimants' bid. It was held that the invitation to tender was an offer of a unilateral contract to sell the shares to the highest bidder, despite the fact that the invitation asked the claimants and the second defendant to submit an 'offer'. The bid submitted by the second defendant was held to be invalid because the object of the vendors' invitation was to ascertain the highest amount which each party was prepared to pay and this purpose would be frustrated by a referential bid.

The second case is *Blackpool and Fylde Aero Club Ltd* v. *Blackpool Borough Council* [1990] 1 WLR 1195 and it provides us with a very good example of the flexibility which the courts have in applying the rules relating to offer and acceptance. In 1983 the defendant local authority invited tenders for a concession to operate pleasure flights from Blackpool airport. The form of tender stated that 'the council do not bind themselves to accept all or any part of the tender. No tender which is received after the last date and time specified shall be admitted for consideration'. Tenders had to be received by the Town Clerk 'not later than 12 o'clock noon on Thursday 17th March 1983'. The claimants posted their bid in the Town Hall letter box at about 11 am on 17 March. A notice on the letter box stated that it was emptied each day at 12 o'clock noon. Unfortunately, on this particular day, the letter box was not emptied at 12 o'clock and so the claimants' bid remained in the letter box until the morning of 18 March. The claimants' bid was not considered by the Council because they considered it to be a late submission and the concession was awarded to another party. The claimants brought an action for damages for, *inter alia*, breach of contract. The obvious difficulty which they faced was that they did not appear to be in a contractual relationship with the defendants because an invitation to tender is only an invitation to treat. The claimants had therefore simply submitted an offer which the defendants had not accepted. But the Court of Appeal took a different approach. They held that the defendants were contractually obliged to consider the claimants' tender and, for breach of that obligation, they were liable in damages. The court appeared to adopt a two-contract analysis. A contract was concluded with the party whose tender was accepted but the invitation to tender also constituted a unilateral offer to 'consider' any conforming tender which was submitted and that offer was accepted by any party who submitted such a tender. It is suggested that there are two problems with this approach.

The first lies in ascertaining the circumstances in which a court will see fit to imply an offer to consider all tenders submitted. The council did not expressly accept an obligation to consider conforming tenders yet the court saw fit to imply such a duty. Indeed, the court had to imply both a contract and its terms because the parties were not otherwise in a contractual relationship. The Court of Appeal relied upon a number of factors, none of which appear to be conclusive. The first was that the invitation to tender was directed to a small number of interested parties; the second was that the duty to consider was alleged to be consistent with the intention of the parties; finally, the court stated that the tender procedure was 'clear, orderly and familiar' and, the greater the precision, the easier it is for a court to spell out an offer which is capable of acceptance. But

were there other factors of importance? Was there any significance in the fact that the defendants were a local authority (and so owed a fiduciary duty to rate-payers to act with reasonable prudence in their financial affairs) or in the fact that the claimants were the existing holders of the concession and so may be said to have had a legitimate expectation of being considered? The answer to these questions remains unclear. In each case the court must decide whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender. There is no automatic rule that an invitation to tender triggers a contractual obligation to consider bids submitted, although the courts may be relatively willing to imply such an obligation where there is a formal tendering process involving complex documentation and terms which must be complied with by the tenderers (see *MJB Enterprises Ltd* v. *Defence Construction (1951) Ltd* (1999) 170 DLR (4th) 577). A party issuing an invitation to tender who does not want to be subject to an obligation to consider bids made would be well advised to say so expressly in the invitation to tender.

The second difficulty lies in determining the scope of this 'duty to consider'. Bingham LJ stated that the duty would have been breached had the defendants 'opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded' or if they 'had considered and accepted a tender admittedly received well after the deadline'. Could the defendants have rejected all the tenders? It would appear so. Stocker LJ stated that the obligation to consider 'would not preclude or inhibit the council from deciding not to accept any tender or to award the concession, provided the decison was bona fide and honest, to any tenderer'. So the obligation to consider tenders submitted does not preclude a local authority from removing a contractor from the tendering process when it discovers that there is a conflict of interest between a senior council employee and one of the tenderers (see *Fairclough Building Ltd* v. *Borough Council of Port Talbot* (1993) 62 Build. LR 82).

Finally, this two-contract analysis may have implications for those who submit tenders, as can be seen from the Canadian case of *The Queen in Right of Ontario* v. *Ron Engineering & Construction Eastern Ltd* (1981) 119 DLR (3d) 267. The defendants invited tenders on the basis that tenders had to be accompanied by a deposit which was to be forfeited if the tender was withdrawn or if the tenderer otherwise refused to proceed. The claimants discovered, shortly after the tenders were opened, that they had made a mistake in the submission of their tender and they refused to proceed with the execution of the contract documents. They sued to recover their deposit of $150,000. It was held that they were not entitled

to recover because the invitation to tender followed by the submission of a tender created a contract, the terms of which were that the claimants were not entitled to recover their deposit if they refused to proceed with the contract. There is, as yet, no English case on this point but it is suggested that, in the light of the *Blackpool* case, an English court might reach the same conclusion.

3.6 Time-tables and Vending Machines

It is remarkable how difficult it is to distinguish between an offer and an invitation to treat in many everyday transactions. A simple example is boarding a bus. One could say that the bus time-table and the running of the bus are an offer by the bus company which is accepted by boarding the bus (although it should be noted that most time-tables contain express disclaimers of any obligation to provide the services contained in the timetable). Such was the view of Lord Greene in *Wilkie* v. *London Transport Board* [1947] 1 All ER 258, when he stated that the offer was made by the bus company and that it was accepted when a passenger 'puts himself either on the platform or inside the bus'. Alternatively, it could be said that the acceptance takes place when the passenger asks for a ticket and pays the fare. A further possibility is to say that the bus time-table is an invitation to treat, the offer is made by the passenger in boarding the bus and the acceptance takes place when the bus conductor accepts the money and issues a ticket. Finally it could be said that the bus conductor makes the offer when he issues the ticket and this offer is accepted by paying the fare and retaining the ticket.

In many ways the issue may seem to be an academic one, devoid of any practical consequence. But this is not the case. It has serious consequences if there is an exclusion clause contained on the back of the ticket (see further Chapter 11). If the first analysis is adopted then the exclusion clause is not part of the contract because the contract is concluded before the ticket is handed over. On the other hand if the final alternative is adopted then the exclusion clause is part of the contract because it is contained in the offer made by the conductor. A court might adopt the first of these alternatives in our exclusion clause example in order to protect the passenger but, would it also apply it where the same passenger boards the bus by mistake and wishes to get off the bus before it moves from the stop without paying for his fare? As Professor Treitel has stated (1999), the cases 'yield no single rule' and all that can be said is that 'the exact time of contracting depends in each case on the wording of the relevant document and on the circumstances in which it was issued'.

Other everyday examples could be provided which defy simple classification. What is the status of a menu outside a restaurant? What about a vending machine selling tea and coffee? The former is probably an invitation to treat but, in *Thornton* v. *Shoe Lane Parking Ltd* [1971] 2 QB 163, Lord Denning stated that an automatic machine which issued tickets outside a car park made a standing offer which was accepted by a motorist driving so far into the car park that the machine issued him with a ticket.

3.7 Acceptance

An acceptance is an unqualified expression of assent to the terms proposed by the offeror. There is no rule that acceptance must be made by words; it can be made by conduct, as was the case in *Carlill* v. *Carbolic Smoke Ball Co* (see above 3.3).

A purported acceptance which does not accept all the terms and conditions proposed by the offeror but which in fact introduces new terms is not an acceptance but a counter-offer, which is then treated as a new offer which is capable of acceptance or rejection. The effect of a counter-offer is to 'kill off' the original offer so that it cannot subsequently be accepted by the offeree. This rule can be seen in operation in the case of *Hyde* v. *Wrench* (1840) 3 Beav 334. The defendant offered to sell some land to the claimant for £1000 and the claimant replied by offering to purchase the land for £950. The defendant refused to sell for £950. So the claimant then wrote to the defendant agreeing to pay the £1000 but the defendant still refused to sell. It was held that there was no contract between the parties. The claimant's offer of £950 was a counter-offer which killed off the defendant's original offer so as to render it incapable of subsequent acceptance. It is this rule that acceptance must be unqualified which has given rise to difficulties in the battle of the forms cases, such as *Butler* v. *Ex-Cell-O Corp* (see above 2.4).

3.8 Communication of the Acceptance

The general rule is that an acceptance must be communicated to the offeror. The acceptance is generally only validly communicated when it is actually brought to the attention of the offeror. The operation of this rule was illustrated by Denning LJ in *Entores* v. *Miles Far East Corp* [1955] 2 QB 327. He said that if an oral acceptance is drowned out by an overfly-

ing aircraft, such that the offeror cannot hear the acceptance, then there is no contract unless the acceptor repeats his acceptance once the aircraft has passed over. Similarly, where two people make a contract by telephone and the line goes 'dead' so that the acceptance is incomplete, then the acceptor must telephone the offeror to make sure that he has heard the acceptance. Where, however, the acceptance is made clearly and audibly, but the offeror does not hear what is said, a contract is nevertheless concluded unless the offeror makes clear to the acceptor that he has not heard what was said. In the case of instantaneous communication, such as telephone and telex, the acceptance takes place at the moment the acceptance is received by the offeror and at the place at which the offeror happens to be (see *Brinkibon Ltd* v. *Stahag Stahl* [1983] 2 AC 34).

3.9 Acceptance in Ignorance of the Offer

An offer is effective when it is communicated to the offeree. This requirement generally does not give rise to problems, but difficulty does arise in the following type of case. X offers £100 for the safe return of his missing dog. Y returns the dog but is unaware of X's offer. Is Y entitled to the money? A good argument can be made out to the effect that Y should be entitled to the money. X has got what he wanted and there seems no reason in justice why he should not be required to pay what he has publicly promised to pay. At the same time Y has performed a socially useful act in returning the dog and he should be rewarded for so doing. On the other hand, in the case of a bilateral contract which imposes mutual obligations upon the parties, the effect of such a rule would be to subject the 'accepting' party to obligations of which he was unaware. For example, if X offered to sell the dog for £50 to the first person who returned it to him, Y, who returns the dog, unaware of the offer, should not thereby be held to have accepted an offer to purchase the dog for £50. In the light of these considerations it has been argued that the best approach to adopt is to hold that knowledge of the offer is not necessary in the reward type of case but that knowledge should be required in the case of bilateral contracts (Hudson, 1968).

However the rule which has been adopted in England is that a person who, in ignorance of the offer, performs the act or acts requested by the offeror is not entitled to sue as on a contract. The case of *Gibbons* v. *Proctor* (1891) 64 LT 594, which was thought to stand for the contrary proposition, appears on closer examination of the facts to be a case where

the person claiming the reward knew of the offer at the time when the information was given to the police (Treitel, 1999). It is here that we see the importance of the schematic approach to agreement because it is not sufficient that the parties were, at some moment in time, in agreement; there must be a definite offer which is mirrored by a definite acceptance. For the same reason cross-offers which are identical do not create a contract unless or until they are accepted (*Tinn* v. *Hoffman & Co* (1873) 29 LT 271). These cases reinforce the point made in Chapter 2 that contract law adopts an objective rather than a subjective approach to agreement and therefore the fact that the parties are subjectively agreed is not conclusive evidence that a contract exists (contrast the view of Spencer discussed at 2.2).

Once it is shown that the offer has been communicated to the other party, a person who knows of the offer may do the act required for acceptance with some motive other than that of accepting the offer (*Williams* v. *Carwardine* (1833) 4 B & Ad 621). But the offer must have been present to his mind when he did the act which constituted the acceptance. Thus in *R* v. *Clarke* (1927) 40 CLR 227, where the party claiming the reward had forgotten about the offer of a reward at the time he gave the information, it was held that he was not entitled to the reward.

3.10 Prescribed Method of Acceptance

Where the offeror prescribes a specific method of acceptance, the general rule is that the offeror is not bound unless the terms of his offer are complied with. However the offeror who wishes to state that he will be bound *only* if the offer is accepted in a particular way must use clear words to achieve this purpose. Where the offeror has not used sufficiently clear words a court will hold the offeror bound by an acceptance which is made in a form which is no less advantageous to him than the form which he prescribed. This can be seen in the case of *Manchester Diocesan Council for Education* v. *Commercial and General Investments Ltd* [1969] 3 All ER 1593. The claimant decided to sell some property by tender and inserted a clause in the form of tender stating that the person whose bid was accepted would be informed by means of a letter sent to the address given in the tender. The defendant completed the form of tender and sent it to the claimant. The claimant decided to accept the defendant's tender and sent a letter of acceptance to the defendant's surveyor but not to the address on the tender. It was held that communication to the address in the tender was not the sole permitted means of communication of

acceptance and that therefore a valid contract had been concluded. The defendant was not disadvantaged in any way by notification being given to its surveyor and, in any case, the stipulation had been inserted by the claimant, not the defendant, and so it was open to the claimant to waive strict compliance with the term provided that the defendant was not adversely affected thereby.

3.11 Acceptance by Silence

The general rule is that acceptance of an offer will not be implied from mere silence on the part of the offeree and that an offeror cannot impose a contractual obligation upon the offeree by stating that, unless the latter expressly rejects the offer, he will be held to have accepted it. The rationale behind this rule is that it is thought to be unfair to put an offeree to time and expense to avoid the imposition of unwanted contractual arrangements. The principal English authority on this point is *Felthouse* v. *Bindley* (1862) 11 CB (NS) 869. The claimant and his nephew entered into negotiations for the sale of the nephew's horse. The claimant stated that if he heard nothing further from his nephew then he considered that the horse was his at a price of £30 15s. The nephew did not respond to this offer but he decided to accept it and told the defendant auctioneer not to sell the horse because it had already been sold. Nevertheless, the auctioneer mistakenly sold the horse and so the claimant sued the auctioneer in conversion (a tort claim in which it is alleged that the defendant has dealt with goods in a manner inconsistent with the rights of the true owner). The auctioneer argued that the claimant had no title to sue because he was not the owner of the horse as his offer to buy the horse had not been accepted by his nephew. This argument was upheld by the court on the ground that the nephew's silence did not amount to an acceptance of the offer. The application of the general rule to the facts of *Felthouse* has been the subject of criticism on the ground that the uncle had waived the need for communication of the acceptance and the nephew had manifested his acceptance by informing the auctioneer that the horse had been sold (see Miller, 1972).

But the rule itself has not emerged unscathed from the line of cases represented by *The Hannah Blumenthal* (see 2.1), where the House of Lords held that a contract to abandon a reference to arbitration could be concluded by the silence of both parties. As Bingham J noted in *Cie Française d'Importation et de Distribution SA* v. *Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep 592, 599, this line of authority does

> 'some violence . . . to familiar rules of contract such as the requirement that acceptance of an offer should be communicated to the offeror unless the requirement of communication is expressly or impliedly waived.'

But no case actually sought to overrule or to question explicity the correctness of *Felthouse* v. *Bindley* and the reasoning in the arbitration cases was distorted by the fact that neither arbitrators nor courts had, at common law, the power to dismiss an arbitration for want of prosecution and so the courts were asked to employ any common law doctrine which appeared even remotely suitable to enable them to reach a commercially just solution, namely that the agreement to arbitrate had been abandoned. Now that Parliament has intervened in the form of s.41(3) of the Arbitration Act 1996 and given to arbitrators the power to dismiss a claim for want of prosecution, the courts no longer need to engage in such subterfuge, nor to distort the rules relating to offer and acceptance (see *The Amazonia* [1990] 1 Lloyd's Rep 238, 243).

Instead it is submitted that these arbitration cases remind us that the rule that silence does not amount to an acceptance is not an absolute one: 'our law does in exceptional cases recognize acceptance of an offer by silence' (per Lord Steyn in *Vitol SA* v. *Norelf Ltd* [1996] AC 800, 810, citing the case of *Rust* v. *Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334). For example, a course of dealing between the parties may give rise to the inference that silence amounts to acceptance. It is also unclear whether the general rule will apply where the offeree assumes that his silence has been effective to conclude a contract and then acts in reliance upon that belief. It is suggested that, in such a case, the general rule should give way and a court should hold that a contract has been concluded between the parties (see Miller, 1972, although it is very difficult to reconcile this proposition with *Felthouse* v. *Bindley* (above)). As we have noted, the purpose behind the general rule is to protect the offeree and therefore it should not apply where its application would cause hardship to the offeree. However where the offeree only mentally assents to the offer but does not act in reliance upon it, it is suggested that the general rule should apply, because otherwise the offeree would be able to speculate against the offeror, by stating that he had accepted the offer when the contract was a good one for him and by stating that he had not accepted it when the contract turned out to be a bad one. Therefore it is submitted that some positive action is required on the part of the offeree to provide evidence that he has in fact accepted the offer.

3.12 Exceptions to the Rule Requiring Communication of Acceptance

The rule that acceptance must be communicated to the offeror is not an absolute one. Fox example, the terms of the offer may demonstrate that the offeror does not insist that the acceptance be communicated to him (*Carlill* v. *Carbolic Smoke Ball Co*, see above 3.3). The offeror may be prevented by his conduct from arguing that the acceptance was communicated to him (*Entores* v. *Miles Far East Corporation*, see above 3.8). But the major and most controversial exception relates to acceptances sent through the post.

As a matter of theory any one of a number of possible solutions could be used to ascertain when an acceptance sent by post takes effect. It could be when the letter is posted, when it reaches the address of the offeror, when it is read by the offeror or when, in the ordinary course of the post, it would reach the offeror. The general rule which English law has adopted can be traced back to *Adams* v. *Lindsell* (1818) 1 B & Ald 681, which is now understood to stand for the proposition that acceptance takes place when the letter of acceptance is posted by the offeree.

However the justifications put forward in support of this rule are, to say the least, rather tenuous (see Gardner, 1992). The first justification is that the Post Office is the agent of the offeror and so receipt of the letter by the agent is equivalent to receipt by the offeror. This justification is open to the criticism that it cannot be said in any meaningful sense that the Post Office is the agent of the offeror because the Post Office has no power to contract on behalf of the offeror. The second justification is that the offeror has chosen to start negotiations through the post and so the risk of delay or loss in the post should be imposed upon him. However it is not necessarily the case that the offeror must have started the negotiations through the post. It could be the case that the offeree initiated negotiations through the post by asking the offeror for the terms on which he was prepared to do business. Nevertheless, it must be conceded that this justification has some element of validity because, in *Henthorn* v. *Fraser* [1892] 2 Ch 27, it was held that the postal rule only applies where it is reasonable to use the post. However it is reasonable to use the post where the parties live at a distance from each other; it is not necessary for the offeror to have commenced the negotiations by post. So it is not entirely true to say that the offeror has accepted the risk of delay in the post. A more promising justification is that the offeree should not be prejudiced once he has dispatched his acceptance and he should be able to rely on the efficacy of his acceptance. This argument is a strong one but

it could be met by providing that, once the acceptance has been posted, the offeror can no longer revoke his offer; it does not demand that the acceptance be treated as taking effect when it is dispatched. In fact, it may be that the explanation for the initial adoption of the rule lies in the public perception of the postal service in the middle of the nineteenth century (Gardner, 1992). The uniform penny post was introduced in 1837. At around the same time postage began to be pre-paid rather than paid for on receipt and the cutting of letter boxes in doors meant that a letter need no longer be handed to the addressee individually. These factors, Gardner argues, meant that the public perception of the time was that a letter, once posted, would reach its destination 'without further subvention from outside the system' and that this led to the 'notional equation of the posting of a letter with its delivery'. In the modern world this perception seems ridiculous: with the advent of truly instantaneous means of communication, the idea that posting is equivalent to delivery is not credible. This may help explain why it was that the judiciary in the late nineteenth century (in cases such as *Henthorn* v. *Fraser* (above) and *Byrne* v. *Van Tienhoven* (1880) 5 CPD 344, see 3.14) began to confine the postal rule within narrow limits. As quicker methods of communication, such as the telephone, were developed, so the equation of posting with delivery began to look increasingly anomalous. Indeed, on this basis it can be said that the postal rule is now 'something of a museum piece', continuing to exist in a world which bears no relationship to the world in which the rule was introduced and therefore serving a purpose which is entirely different from the one intended by those who initially adopted and developed the rule.

Not only are the justifications for the general rule weak, but the operation of the rule can give rise to manifest injustice. Take the following example. X makes an offer to Y and states that it will be open for acceptance until 5 pm on Friday. Applying the general rule Y may validly 'accept' that offer by posting his acceptance at 4.45 on Friday afternoon, even though it will not reach X until Monday or Tuesday of the following week. It is true that X could avoid such hardship by stating in his offer that the acceptance must *reach* him by 5 pm on Friday (see below) but the fact that the parties can contract out of the general rule is no justification for the general rule itself.

In addition to creating injustice, the general rule gives rise to practical difficulties. Two such difficulties will be dealt with here. The first arises where the letter of acceptance is lost in the post. A logical application of the general rule leads to the result that a contract has been concluded because the acceptance takes effect when it is posted and not when it reaches the offeror. This was held to be the case in England in *Household*

Fire Insurance v. *Grant* (1879) 4 Ex D 217. But in Scotland this view was rejected by Lord Shand in *Mason* v. *Benhar Coal Co* (1882) 9 R 883. He stated that, in his opinion, no contract came into existence when the acceptance was posted but never reached the offeror. It is suggested that the latter rule is the preferable one because it is the offeree who has sent the acceptance and so he is in the best position to know when his acceptance is likely to reach the offeror and to take steps to check that it does so reach the offeror. Nevertheless English law is presently committed to the view that a contract is concluded on the posting of the letter of acceptance even where it gets lost in the post, although Professor Treitel has argued (1999) that, where the reason for the loss of the letter is that it has been incorrectly addressed by the offeree, then the acceptance should not take place on posting because, while the offeror may take the risk of delay or loss in the post, he does not take the further risk of carelessness by the offeree.

The second practical difficulty arises where the offeree posts his acceptance and then sends a rejection by a quicker method so that the rejection reaches the offeror before the acceptance. Once again a logical application of the general rule leads to the result that the contract was concluded when the letter of acceptance was posted and so the subsequent communication is not a revocation of the offer but a breach of contract, which may be accepted or rejected by the offeror. But it can be argued that it would be absurd to hold that a contract has been concluded when both parties have relied on the fact that there was no contract (although in such a case it could be argued that both parties have entered into a second contract under which they agreed to abandon their rights and obligations under the first contract). On the other hand it can be argued that to hold that the contract was not concluded when the letter of acceptance was posted allows the offeree to speculate at the offeror's expense by sending a rejection by a faster means where the contract turns out to be a bad one for him. It is unclear which of these approaches will be adopted in English law (for contrasting views see the Scottish case *Countess of Dunmore* v. *Alexander* (1830) 9 S 190 and the South African case *A to Z Bazaars (Pty) Ltd* v. *Minister of Agriculture* 1974 (4) SA 392).

Given these practical difficulties to which the general rule gives rise it is no surprise to find that the postal rule is subject to some limitations. In the first place, as we have seen, it must have been reasonable for the offeree to use the post (see *Henthorn* v. *Fraser* (above)). Secondly, the offeror can avoid the operation of the rule by stating that the acceptance will only be effective when it actually reaches him. Thirdly, it is interesting to note that the rule has not been adopted in many other cases where the parties are not dealing face to face. Thus in *Entores* v. *Miles Far East Corp*

(above) it was held that the postal rule did not apply to telexes and that it was confined to non-instantaneous forms of communication. Therefore a distinction has been drawn between instantaneous and non-instantaneous forms of communication; only the latter being caught by the postal rule. This distinction is likely to pose difficulties in its application to new forms of technology but it is suggested that, in the case of communication via computers, communication is virtually instantaneous and therefore is unlikely to be governed by the postal rule. The widest exception to the general rule was recognised in *Holwell Securities Ltd* v. *Hughes* [1974] 1 WLR 155, where it was suggested that the postal rule ought not to apply 'where it would lead to manifest inconvenience and absurdity'.

The width of the latter exception illustrates the weakness of the arguments which have been put forward to support the general rule but, rather than recognise that it is the general rule which is the source of the problem, the English courts have chosen to widen the scope of the exceptions to the general rule. It is submitted that the better approach would be to abolish the general rule and replace it with the normal rule that acceptance takes place when the acceptance is received by the offeror, subject to the qualification that the offeror cannot revoke the offer once the acceptance has been posted (see, for example, Articles 16(1) and 18(2) of the United Nations Convention on Contracts for the International Sale of Goods, more commonly known as the Vienna Convention, and Articles 2:202(1) and 2:205(1) of the Principles of European Contract Law).

3.13 Acceptance in Unilateral Contracts

A unilateral contract is a contract whereby one party promises to pay to the other a sum of money or to do some other act if that other party will do or refrain from doing something without making a promise to that effect. Classic examples are the reward cases or *Carlill* v. *Carbolic Smoke Ball Co* (see 3.3). The effect of classifying a contract as unilateral rather than bilateral is that acceptance can be made by fully performing the requested act; there is no need to give advance notification of acceptance. The principal difficulty lies in determining when the offer can be withdrawn, which, in turn, depends upon when the offer has been 'accepted'. For example X offers Y £10,000 if Y will walk from London to Newcastle. Does Y accept the offer when he expresses an intention to accept the offer, when he reaches York, or only when he gets to Newcastle? The general rule which English law has adopted was described by Goff LJ in *Daulia Ltd* v. *Four Millbank Nominees Ltd* [1978] Ch 231, in the following terms:

> 'Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform.'

The willingness of the courts to imply an obligation not to 'prevent the condition becoming satisfied' can be seen by contrasting the following two cases. The first is *Errington* v. *Errington* [1952] 1 KB 290. A father bought a house for £750 and took out a mortgage for £500. His son and daughter-in-law moved into the house and the father stated that if they paid off the mortgage the house was theirs. The couple moved into the house and began to pay off the mortgage, without promising to continue with the payments. The father died and the father's personal representatives sought to revoke the arrangement. The Court of Appeal held that they could not do so because the 'father's promise was a unilateral contract', which could not be revoked once the couple had embarked upon performance provided that they did not leave performance 'incomplete and unperformed'.

On the other hand, a different result was reached in the case of *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108. The claimant agreed with the defendants that if he introduced a purchaser who would buy the defendants' two cinemas for at least £185,000 each, he would be paid a commission. The claimant succeeded in introducing to the defendants a purchaser who was ready and willing to complete the purchase, but the defendants refused to proceed with the sale. It was held that the claimant was not entitled to the commission because it was only payable on completion of the sale. The House of Lords refused to imply a term that the defendants would do nothing to prevent the claimant from earning his commission because it was contrary to the common understanding of the parties which was that the claimant took 'the risk in the hope of a substantial remuneration for a comparatively small exertion'.

3.14 Termination of the Offer

There are five principal methods by which an offer may be terminated. The first is that the offer may be withdrawn. An offer can be withdrawn by the offeror at any time before it has been accepted. However to withdraw an offer the notice of withdrawal must actually be brought to the

attention of the offeree. There is no requirement that the offeror himself must be the one to bring the withdrawal to the attention of the offeree. Thus in *Dickinson* v. *Dodds* (1876) 2 Ch D 463, the defendant offered to sell a house to the claimant for £800, the offer to be left open until Friday. On Thursday the defendant sold the house to a third party and the claimant was informed of this by another third party. Nevertheless the claimant sent the defendant his letter of acceptance on the Friday. It was held that no contract had been concluded between the parties because the offer had been withdrawn before it was accepted (for critical evaluation of the case see Gilmore, 1974).

The rule that the withdrawal must be brought to the attention of the offeree has odd effects in relation to offers sent throught the post. This can be seen in the case of *Byrne* v. *Van Tienhoven* (1880) 5 CPD 344. The defendants sent the claimants an offer on 1 October. This offer was received by the claimants on 11 October and they sent off an immediate acceptance. However, in the meantime, the defendants had sent, on 8 October, a letter revoking their offer, which reached the claimants on 20 October. It was held that a contract was concluded between the parties on 11 October. To be effective the withdrawal must be drawn to the attention of the other party and, for this purpose, the postal rule does not apply, so that the revocation only takes effect when it actually reaches the other party. So the purported withdrawal could not take effect until 20 October but, by that time, a contract had already been concluded and the withdrawal was therefore too late. This case is a good example of the objective approach which the courts adopt to the issue of agreement because at no time were the parties actually subjectively agreed; by the time the claimants accepted the offer on 11 October, the defendants had already dispatched their 'withdrawal' of the offer.

Although it is clear that the revocation must be brought to the attention of the offeree it is not entirely clear when the revocation is treated as being brought to his attention. It could be when the letter reaches his business or it could be when he actually reads it. There is no clear English authority on this point, although in *The Brimnes* [1975] QB 929, the Court of Appeal held that, in the case of a notice of withdrawal of a vessel sent be telex during ordinary business hours, the withdrawal was effective when it was received on the telex machine. There was no requirement that it actually be read by any particular person within the organisation.

Secondly, an offer can be terminated by a rejection by the offeree. We have already seen how a rejection or a counter-offer has the effect of 'killing off' the original offer (*Hyde* v. *Wrench* (see 3.7)). Thirdly, an offer may be terminated by lapse of time. An offer which is expressly stated to last only for a specific period of time cannot be accepted after that date.

An offer which specifies no time limit is deemed to last for a reasonable period of time.

Fourthly, an offer which is stated to come to an end if a certain event occurs cannot be accepted after that event has actually taken place. Finally, an offer may be terminated by the death of the offeror, although the law is not entirely clear on this point. On one view it could be said that death always terminates an offer because the parties cannot enter into an agreement once one of the parties is dead. However it seems to be the case that an offeree cannot accept an offer once he knows that the offeror has died but that his acceptance may be valid if it is made in ignorance of the fact that the offeror has died, provided that the contract is not one for the performance of personal services. There is no authority on the position where it is the offeree who dies. The generally accepted view is that on the offeree's death the offer comes to an end by operation of law.

3.15 The Limits of Offer and Acceptance

We have noted at various points in this chapter how difficult it is to fit many everyday transactions within the offer and acceptance framework. Simple examples which give rise to difficulty are boarding a bus, buying goods in a supermarket and making a contract through the post. The battle of the forms poses difficulties for the businessman. These difficulties have led some commentators to doubt the utility of the offer and acceptance model. It is true that there are difficulties with the offer and acceptance model but these problems are often experienced because of the tension between the court's wish to give effect to the intention of the parties, their desire to achieve a just result on the facts of the case and the need to establish a clear rule which can be applied to all such cases in the future.

Some commentators argue that there is too much uncertainty within the present law. Certainty is an extremely important commodity in the law of contract. A greater degree of certainty could be provided by adopting legislative formulae to prescribe solutions for difficult and uncertain areas, such as the battle of the forms. An example of this approach is Article 19 of the Vienna Convention which provides that:

'(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance

but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.'

This type of approach seeks to achieve a solution which is practical, without being excessively rigid, and which is easy to apply. Yet Article 19 in turn has been criticised for being uncertain (see Vergne, 1985). For example, is any alteration proposed by the offeree an 'addition, limitation or other modification' or does some form of *de minimis* rule apply? Secondly, although the definition of materiality in paragraph (3) is helpful, it is clearly not exhaustive, but it is unclear how much further it goes. It is important to note that none of the many legislative solutions proposed for battle for the forms cases has escaped criticism (see McKendrick, 1988). The variety of battle of the forms cases is such that no single formula can provide an acceptable solution to all possible cases (another attempt to resolve the problem is to be found in Articles 2:208 and 2:209 of the Principles of European Contract Law). Absolute certainty of this type is unattainable because the intentions of parties vary too widely. It is submitted that English law is unlikely to be improved by the adoption of such formulae, which will still give rise to some uncertainty but at a price of an unacceptable level of rigidity.

Other commentators argue that the present rules can give rise to injustice in certain cases. This could be ameliorated by the adoption of Lord Denning's general approach in *Butler* v. *Ex-Cell-O Corporation* but, as we have noted (see 2.4), the general approach has its own problems because it gives rise to so much uncertainty.

It is submitted that the present law strikes a reasonable balance between the need for certainty and the desire to achieve a just result which is consistent with the intention of the parties. The offer and acceptance model has a core of well-established rules which are understood by lawyers and which are capable of being understood by the business community. At the same time the model is applied with some degree of flexibility by the courts so that a conclusion can be reached which is consistent with the intention of the parties. The present state of the law

cannot be said to be entirely satisfactory but it is better than a system which imposes an unacceptable level of rigidity or a system which creates an unacceptable level of uncertainty.

Summary

1 An offer is a statement by one party of a willingness to enter into a contract on stated terms, provided that these terms are, in turn, accepted by the party to whom the offer is addressed.
2 An offer must be distinguished from an invitation to treat. A display of goods in a shop and advertisements are, subject to cases such as *Carlill* v. *Carbolic Smoke Ball Co*, regarded as invitations to treat. An auctioneer, by inviting bids to be made, makes an invitation to treat (except, perhaps, where the auction is to take place without a reserve price) and an invitation to parties to submit a tender is generally an invitation to treat.
3 An acceptance is an unqualified expression of assent to the terms proposed by the offeror. An acceptance must generally be communicated to the offeror.
4 A purported acceptance which does not mirror the terms of the offer is not an acceptance but a counter-offer which kills off the original offer.
5 An offer cannot be accepted by someone who is ignorant of the existence of the offer or by someone who does not have the offer in his mind when he does the act which he alleges constitutes the acceptance.
6 Where the offeror prescribes a specific method of acceptance, the general rule is that the offeror is not bound unless the terms of his offer are complied with.
7 The general rule is that acceptance of an offer will not be implied from mere silence on the part of the offeree.
8 A letter of acceptance takes effect whenever it is posted, provided that it was reasonable for the offeree to have used the post. This rule applies even where the letter gets lost in the post and never reaches the offeror. It is unclear what is the legal position where the offeree posts his acceptance and then sends a rejection by a quicker method so that the rejection reaches the offeror before the acceptance.
9 In the case of a unilateral contract the offeror is only bound by full performance of the requested act but, in certain cases, the court will imply an obligation on the part of the offeror not to prevent completion of performance, which obligation arises as soon as the offeree starts to perform.
10 An offer may be terminated by revocation, rejection by the offeree, lapse, of time, the occurrence of a stipulated event and, possibly the death of one or other of the parties. In the case of revocation the general rule is that the revocation must actually be brought to the attention of the offeree.

Exercises

1 Distinguish between an offer and an invitation to treat. Give examples to illustrate the distinction.
2 Do you think that *Lefkowitz* v. *Great Minneapolis Surplus Stores* would be followed in this country? Give reasons for your answer.
3 In offer and acceptance cases do the courts 'reason forwards' or 'reason backwards'?

4 What is the 'postal rule'? Do you think it is a good rule?
5 Do you think Article 19 of the Vienna Convention is an improvement upon the principles established in *Butler* v. *Ex-Cell-O Corp*? How would Article 19 apply to the facts of *Butler*?
6 Billy wishes to know whether or not he can refuse to carry out the following arrangements without finding himself in breach of contract. Advise him.
   (a) Billy offered to sell his car to Jimmy for £5000 and stated that he would assume that Jimmy had accepted his offer unless he informed Billy to the contrary. Jimmy has not been in contact with Billy but he has contacted his bank manager and agreed a loan to purchase the car.
   (b) Billy offered to sell a consignment of bricks to Jimmy subject to his terms and conditions which stated that Jimmy would be responsible for collecting the bricks. Jimmy accepted the offer, subject to his terms and conditions which stated that Billy would be responsible for delivery of the bricks. Billy still possesses the bricks.
   (c) Billy offered to sell his golf clubs to Jimmy. Jimmy immediately replied by letter accepting Billy's offer but, due to his carelessness in wrongly addressing the letter, the acceptance never reached Billy.

4 Certainty and Agreement Mistakes

In Chapter 2 we noted that the test for the existence of an agreement is objective rather than subjective. In this chapter we shall consider the application of the objective test in two areas, namely certainty and mistake.

4.1 Certainty

In order to create a binding contract, the parties must express their agreement in a form which is sufficiently certain for the courts to enforce. The traditional reason for this is that it is for the parties, and not the courts, to make the contract. The function of the court is limited to the interpretation of the contract which the parties have made and it does not extend to making contacts on their behalf (Fridman, 1962). This sentiment was classically expressed by Viscount Maugham in *Scammell and Nephew Ltd* v. *Ouston* [1941] AC 251 when he said that

> 'in order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done . . . consensus ad idem would be a matter of mere conjecture.'

The traditional stance has to be tempered, however, in its application to commercial contracts where businessmen wish to avoid rigid agreements which give them no room to manoeuvre in a fluctuating economy. For example, it is not uncommon for building and civil engineering contracts to contain terms which permit the contractor to vary the work which he is required to do, or which make provision for a variation of the time for performance or for the price to be recalculated in the light of events occurring during the agreement. A good example of such flexibility is provided by clause 51 of the current version of the Institute of Civil Engineers Conditions of Contract which provides:

> '(1) The Engineer:
>
> (a) shall order any variation to any part of the Works that may in his opinion be necessary for the completion of the Works and

> (b) may order any variation that for any other reason shall in his opinion be desirable for the completion and/or improved functioning of the Works.
>
> Such variations may include additions omissions substitutions alterations changes in quality form character kind position dimension level or line and changes in any specified sequence method or timing of construction required by the Contract and may be ordered during the Defects Correction Period.'

Such a clause is an essential ingredient of any long-term construction contract because it obliges the contractor to carry out such additional work and it also entitles the contractor to be paid for that work under the terms of the contract. The desire to provide the parties with a degree of flexibility is not the only factor which impels the courts towards the conclusion that agreements are enforceable. The courts are also generally reluctant to find that no contract has been concluded where the parties have acted on the assumption that a contract has been entered into (*Percy Trentham Ltd* v. *Archital Luxfer* [1993] 1 Lloyd's Rep 25, 27), although that reluctance has its limits (*Mathieson Gee (Ayrshire) Ltd* v. *Quigley* 1952 SC (HL) 38, see 2.2 (above)).

Thus this area of law is characterised by a tension between the traditional refusal of the courts to make a contract for the parties and the desire of the courts to put into effect what they believe to be the intention of the parties. The dominant judicial philosophy may be said to be one which leans in favour of upholding an agreement and treating it as a valid contract. Thus in *Hillas* v. *Arcos* (1932) 147 LT 503, Lord Wright said:

> 'Business men often record the most important agreements in crude and summary fashion . . . It is . . . the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

However there are limits to the benevolence of the courts. Lord Wright himself recognised that such a liberal approach did not mean that 'the court is to make a contract for the parties'. In comparing these two statements of Lord Wright we can see that he is making a contrast between 'construing' (or interpreting) a contract and 'making' a contract; the former being legitimate, the latter being illegitimate. Some academic commentators have accepted the existence of such a distinction (Fridman, 1962) but others have subjected it to heavy criticism (Samek, 1970 and Ellinghaus, 1971). In application the distinction is by no means obvious. This is so for two reasons. The first is that the test for the existence of an

agreement is objective and, as we have seen in cases such as *Gibson* v. *Manchester City Council* [1979] 1 WLR 294 (see 3.1), the courts can and do differ in the application of this test. Secondly, as is clear from the judgment of Viscount Maugham in *Scammell* v. *Ouston* (quoted above), the courts do not insist upon absolute certainty: 'a reasonable degree of certainty' will suffice. There is no hard and fast line between what is certain and what is uncertain. What is sufficiently certain to one judge may be uncertain to another. Thus the distinction between 'construing' a contract and 'making' a contract is one of degree and not one of kind.

One consequence of this is that the approach which the courts have adopted has not been wholly consistent, with some judges being more willing than others to find the existence of a contract. This inconsistency was present in the cases at the time of the formulation of the rules in *Hillas* v. *Arcos* (above) and it has continued to the present day. This can be demonstrated by reference to the following two pairs of contrasting decisions.

The first pair consists of *May and Butcher* v. *R* [1934] 2 KB 17 and *Hillas* v. *Arcos*. In *May and Butcher* the parties entered into a written agreement under which the British government was to sell tentage to the claimant and the agreement provided that the price and date of payment 'shall be agreed upon from time to time'. It was held that, the parties not having reached agreement on these matters, no contract had been concluded because, according to Lord Buckmaster, 'an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all'. On the other hand a different approach was adopted in the case of *Hillas* v. *Arcos* (above). In 1930 the parties entered into a contract under which the claimants bought from the defendants 22,000 standards of 'softwood goods of fair specification'. The 1930 contract also contained a provision which stated that the claimants had an option 'of entering into a contract with sellers for the purchase of 100,000 standards for delivery in 1931'. When the claimants sought to exercise this option the defendants argued that the clause was too uncertain to be enforced. This argument was rejected by the House of Lords, who held that the words could be given a reasonable meaning and that therefore the option was binding. Lord Tomlin said that, before the conclusion that no contract has been completed is reached 'it is necessary to exclude as impossible all reasonable meanings which would give certainty to the words'. But it should be noted that in *Hillas* there was a prior contract between the parties which assisted the court in giving a meaning to the option clause.

The second pair of decisions demonstrates that the inconsistency is still present in the cases today. The two cases are *Queensland Electricity*

Generating Board v. *New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205 and *Walford* v. *Miles* [1992] 2 AC 128. In the former case the parties entered into a contract in 1978 under which New Hope Collieries agreed to supply the Board with coal for a period of 15 years. It is very difficult to draft a supply contract which is to last for such a long period of time. Some idea of the difficulties involved can be obtained by imagining a contract draftsman in 2000 seeking to assess the impact of possible events up to the year 2015 on the obligations contained in the contract. How can a contract draftsman possibly see into the future with any degree of accuracy? These difficulties are particularly acute when it comes to finding an acceptable formula for the price of the product over the lifetime of the contract. The contract in *Queensland Electricity* made provision, for the first five year period of the contract, for a scale of base prices and the contract also contained elaborate 'escalation' or 'price variation' clauses for adjusting the base prices to reflect changes in New Hope's costs. Although provision was made for the general terms of the contract to continue beyond the initial five-year period, clause 2.5 of the agreement stated that '[t]he base price and provisions for variations in prices for changes in costs for purchases after 31 December 1982 shall be agreed by the parties thereto in accordance with clause 8' (which set out the broad criteria to be applied in setting the new pricing structure). The agreement also contained a comprehensive arbitration clause. One of the issues which arose before the Privy Council was whether or not the contract was enforceable after the first five years. It was argued that the contract was too uncertain because no price had been agreed for the supply of coal. The Privy Council rejected this argument in robust terms. Sir Robin Cooke stated:

> 'in cases where the parties have agreed on an arbitration or valuation clause in wide enough terms, the Courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction . . . their Lordships have no doubt that here, by the agreement, the parties undertook implied primary obligations to make reasonable endeavours to agree on the terms of supply beyond the initial five-year period and, failing agreement and upon proper notice, to do everything reasonably necessary to procure the appointment of an arbitrator. Further, it is implicit in a commercial agreement of this kind that the terms of the new price structure are to be fair and reasonable as between the parties . . .'

This liberal approach should, however, be contrasted with the more restrictive approach adopted by the House of Lords in *Walford* v. *Miles* (above). The defendants were the owners of a company and they entered into negotiations with the claimants for the sale of the company to the claimants. On 17 March 1987 the parties entered into an agreement under which the claimants promised to provide a comfort letter from their bank which confirmed that they had the financial resources to pay the price which was being asked for the company. In return the defendants agreed to deal exclusively with the claimants and to terminate any negotiations then current between the defendants and any other prospective purchasers of the company. The claimants complied with their side of the agreement but the defendants subsequently decided not to deal with the claimants and they agreed to sell the company to a third party on 30 March 1987. The claimants sought to recover damages in respect of the breach of the agreement of 17 March, while the defendants argued that the agreement was unenforceable on the ground that it was too uncertain.

The agreement of 17 March was both a 'lock-out' agreement (in that it sought to prevent the defendants from continuing negotiations with third parties) and a 'lock-in' agreement (in that it purported to oblige the defendants to negotiate exclusively with the claimants). Both aspects were held by the House of Lords to be unenforceable. The lock-out agreement could not be enforced because it was not limited to a specified period of time and the argument that a term should be implied that it was to last a reasonable period of time was decisively rejected. That argument had found favour with Bingham LJ in the Court of Appeal who stated that a reasonable time 'would end once the parties acting in good faith had found themselves unable to come to mutually acceptable terms'. But the House of Lords dismissed the argument on the ground that it 'would indirectly impose upon [the defendants] a duty to bargain in good faith'. The lock-in aspect of the agreement was also held to be unenforceable on the ground that an agreement to negotiate is not an enforceable contract because it is too uncertain to have any binding force (in this respect following the decision of the Court of Appeal in *Courtney and Fairbairn Ltd* v. *Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297). The claimants sought to meet this argument by asserting that, in order to give 'business efficacy' to the agreement of 17 March, it was necessary to imply a term that the defendants were obliged to continue the negotiations in good faith, with the result that they were only entitled to terminate the negotiations if they had a 'proper reason', subjectively assessed, for doing so. Lord Ackner rejected this argument. He doubted whether a court could properly be

expected to decide whether a contracting party subjectively had a good reason for terminating negotiations. He further stated that a 'concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations' and that 'each party is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations'. Thus, he held, either party was entitled to withdraw from the negotiations at any time and for any reason and the claimants' claim was therefore held to be without foundation.

It is suggested that the decision in *Walford* is a regrettable one for three reasons. The first is that the refusal to countenance the existence of an undertaking to negotiate in good faith sits rather uneasily with the willingness of the Privy Council in *Queensland Electricity* to imply an obligation to use reasonable endeavours to agree on the terms of supply of coal after five years. The difference between an obligation to use 'reasonable endeavours' to reach agreement and an obligation to negotiate in 'good faith' is not at all clear and it is particularly unfortunate that the decision in *Queensland Electricity* was not cited to the court in *Walford*. The second is that the decision makes it difficult to draft an enforceable 'lock-out' or 'lock-in' agreement, despite the commercial purposes which are served by such agreements in enabling contracting parties to buy time to put together a bid with no competition from a third party or to purchase a period of time in which to negotiate exclusively with a party in an effort to persuade him to conclude a contract. It is possible to draft an enforceable lock-out agreement provided that the duration of the agreement is confined to a limited period of time, such as 14 days (see *Pitt* v. *PHH Asset Management Ltd* [1994] 1 WLR 327). But it is extremely difficult, if not impossible, to draft an enforceable lock-in agreement because of the refusal of the House of Lords to recognise an obligation to negotiate in good faith for the period in which the parties are prohibited from conducting negotiations with third parties. Finally, the rejection of a role for an obligation to negotiate in good faith may render a number of clauses in long-term contracts unenforceable in English courts (see further 14.9).

So it can be seen from these cases that the approach adopted by the courts does seem to differ. The court in *Hillas* and *Queensland Electricity Generating Board* was more willing than the court in *May and Butcher* and *Walford* v. *Miles* to uphold the agreement entered into by the parties. It is the more liberal approach in *Hillas* and *Queensland* which has been followed with the greatest regularity in the cases (see, for example, *Foley* v. *Classique Coaches* [1934] 2 KB 1). Judges generally do not want to 'incur the reproach of being the destroyer of bargains' (per Lord Tomlin in

Hillas v. *Arcos*) and therefore they tend to gravitate towards upholding and enforcing agreements. Nevertheless, it must be borne in mind that the distinction between 'construing' a contract and 'making' a contract is one of degree and that judges will continue to differ in their approach, with some preferring to adopt a more restrictive approach, as in *May and Butcher* v. *R* and *Walford* v. *Miles*.

4.2 Vagueness

The uncertainty may arise from one of a number of different sources. In the first place, the terms of the agreement may be too vague for the courts to enforce. Such was the case in *Scammell and Nephew Ltd* v. *Ouston* (above), where the parties entered into an agreement to buy goods on 'hire purchase'. It was held that this agreement was too vague to be enforced because there were many different types of hire purchase agreements in use, these agreements varied widely in their content and it was not clear what type of hire purchase agreement was envisaged.

However, as we have noted, the courts are reluctant to find that an agreement is so vague that it cannot be enforced. There are a number of devices available to a court which does not wish to find that an agreement is too vague to be enforced. The court may be able to ascertain the meaning of the phrase by reference to the custom of the trade in which the parties are contracting (*Shamrock SS Co* v. *Storey and Co* (1899) 81 LT 413), or it may be able to enforce the agreement by severing a clause which is meaningless (*Nicolene Ltd* v. *Simmonds* [1953] 1 QB 543) or, finally, the court may be able to interpret the vague phrase in the light of what is reasonable (*Hillas* v. *Arcos* (above)).

4.3 Incompleteness

Alternatively, the agreement may be incomplete because the parties have failed to reach agreement upon a particular issue. It is at this point that cases such as *May and Butcher* and *Hillas* become relevant. Once again, however, a number of devices are available to a court which wishes to avoid the conclusion that the agreement is incomplete and therefore cannot be enforced. The first is to invoke section 8(2) of the Sale of Goods Act 1979 which provides that where the price of goods in a contract of sale is not 'determined' by the contract (on which see section 8(1) of the Act) 'the buyer must pay a reasonable price' (see also section 15(1) of the Supply of Goods and Services Act 1982). This section only comes into

play where the contract is silent as to the price; where, as in *May and Butcher*, provision is made for calculating the price but the provision is not implemented then the section is inapplicable. Secondly, where, as in *Hillas* v. *Arcos*, the parties have agreed criteria by which an incomplete matter can be resolved it is much easier for the court to uphold the agreement.

Thirdly, the contract itself may provide for machinery to resolve the dispute between the parties. It is possible for that machinery to be provided by one of the contracting parties. Thus in *May and Butcher* v. *R* Viscount Dunedin stated that 'with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer' and this rule has been applied to consumer credit contracts where the lender is given the power unilaterally and in its absolute discretion to vary the rate of interest subject to notice to the debtor (see *Lombard Tricity Finance Ltd* v. *Paton* [1989] 1 All ER 918, but where such a provision is contained in a contract concluded between a seller or a supplier and a consumer and the contract has not been individually negotiated, it may also fall within the scope of the Unfair Terms in Consumer Contracts Regulations 1999, Schedule 2, para 1(j)). Difficulties do, however, emerge where the machinery has, for some reason, failed to come into effect. It was once thought that such a failure was fatal to the existence of an enforceable contract because the court would not substitute its own, different machinery for that agreed by the parties. This view was, however, rejected by the House of Lords in *Sudbrook Estates Ltd* v. *Eggleton* [1983] 1 AC 444. A lease gave to tenants (the lessees) an option to purchase the premises at a price to be agreed upon by two valuers, one to be nominated by the lessors and the other by the lessees and, in default of agreement, by an umpire to be appointed by the valuers. When the lessees sought to exercise the option, the lessors refused to appoint a valuer and claimed that the option clause was void for uncertainty. It was held by the House of Lords that the crucial question in each case was whether the machinery agreed upon by the parties was an essential factor in determining the price to be paid or whether it was simply a means of ensuring that a fair price was paid. It was only where the machinery was essential and had not been implemented that the agreement would be held to be incomplete and not binding. An example of machinery which may be held to be essential is the appointment of a particular valuer because of his special skill or his special knowledge. On the facts, it was held, Lord Russell dissenting, that the reference to the valuers was an indication that the price was to be a reasonable and fair one and that the machinery for appointing the valuers was subsidiary to the main purpose of ascertaining a fair and reasonable price. Therefore, given that the machinery was not essential, the House of

Lords was able to substitute its own machinery for ascertaining the price to be paid and an inquiry was ordered into what was the fair value of the premises.

4.4 A General Rule?

The general impression which is left by a study of the English case law on uncertainty is that the courts have adopted a rather piecemeal approach, which has resulted in a degree of inconsistency in the case law. The courts have not laid down a general rule which could provide a unifying basis for the law in this area. Such a general rule has been adopted in America in section 2–204 of the Uniform Commercial Code which states that

> 'even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.'

This rule could provide a basis for a coherent development of the law, but it would also bring its own problems of interpretation. For example, how would the courts decide whether the parties had an intention to contract and what meaning would be given to the phrase a 'reasonably certain basis for giving an appropriate remedy'? It is a matter for consideration whether or not English law should adopt such a general rule.

4.5 A Restitutionary Approach?

It should not be assumed that the law of contract, and the law of contract alone, can resolve all the problems raised by agreements which appear to lack certainty. A role may be found for the law of restitution, as can be seen from the case of *British Steel Corp* v. *Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504. The parties entered into negotiations for the manufacture by the claimants of steel nodes for the defendants. The defendants sent the claimants a letter of intent which stated their intention to place an order for the steel nodes and proposed that the contract be on the defendants' standard terms. The claimants refused to contract on these terms. Detailed negotiations then took place over the specifications of the steel nodes, but no agreement was reached on matters such as progress payments and liability for loss arising from late delivery

and no formal contract was ever concluded. After the final node had been delivered the defendants refused to pay for them. The claimants brought an action against the defendants, who counterclaimed for damages for late delivery or delivery of the nodes out of sequence. Robert Goff J discussed three possible analyses of the claimants' claim.

The first was to hold that an executory contract had come into existence after the letter of intent had been sent. But he rejected this solution on the ground that, since the parties were still negotiating and had not reached agreement, it was impossible to say what were the material terms of the contract. The second solution was to hold that there was a unilateral contract or a standing offer made by the defendants which, if acted upon before it was lawfully withdrawn, would result in a contract. But, because of the disagreement between the parties, Robert Goff J held that it could not be assumed from the fact that the claimants had commenced the work that a contract had thereby been created on the terms of the defendants' standing offer. The third solution, and the one which Robert Goff J adopted, was to allow the claimants to recover in a restitutionary action for the reasonable value of the work which they had done. He held that, because the defendants had requested the claimants to deliver the nodes, they had received a benefit at the expense of the claimants and that it was unjust that they retain that benefit without recompensing the claimants for the reasonable value of the nodes. The conclusion which was reached in the case was not altogether satisfactory because, no contract having been concluded, the defendants' counterclaim for damages for breach of contract fell away (although on the facts no injustice was caused because the counterclaim was held to be without foundation in any event). On a different set of facts, if the defendants had argued that the claimants' *restitutionary* claim should have been reduced on the ground that the defects in the final product had reduced the value of the benefit which they had received as a result of the work done by the claimants, their argument might have been successful (see *Crown House Engineering Ltd* v. *Amec Projects Ltd* (1990) 47 Build LR 32 and, more generally, Ball, 1983 and McKendrick, 1988). So, instead of liberalising the rules relating to certainty (or possibly in addition to such liberalisation), an alternative approach would be to hold that no contract was concluded and look to the law of restitution for a solution. However it should not be thought that a restitutionary claim will lie in all cases where work is done in anticipation of a contract materialising. In many cases the work will be done at the risk of the party who is doing the preparatory work, especially where the parties have conducted their negotiations on an express 'subject to contract' basis (see *Regalian Properties plc* v. *London Dockland Development Corporation* [1995] 1 WLR 212).

4.6 Mistake Negativing Consent

This is an extremely difficult area of law. It is important to distinguish at the outset between two different types of mistake. The first is called common mistake and arises where both parties enter into the contract sharing the same mistake which nullifies their contract (see further 14.2–14.7). In this type of case the parties do initially reach agreement but that agreement may subsequently be set aside on the ground of the parties' shared mistake. The second type of mistake, and the type with which we shall be concerned here, may be called an 'offer and acceptance' mistake because it negatives consent and prevents a contract coming into existence on the ground that one party is labouring under a mistake or the parties are at cross-purposes. Professor Goodhart has written (1941) that 'there is no branch of the law of contract which is more uncertain and difficult than that which is concerned with the effect of mistake on the formation of a contract'.

Despite this uncertainty, it is at least clear that the mere fact that one party to the contract is mistaken in his 'innermost mind' is not sufficient, of itself, automatically to render a contract void. This is because, as we have seen, the courts have adopted an objective rather than a subjective test of agreement (see 2.1). The objective test of agreement considerably reduces the scope of the doctrine of mistake and this restriction is traditionally justified on the ground that it promotes certainty in commercial transactions. Despite these restrictions, mistakes can operate to negative consent in the following cases.

The first case arises where the terms of the offer and acceptance suffer from such latent ambiguity that it is impossible reasonably to impute any agreement between the parties. The classic, if confusing, case in this category is *Raffles* v. *Wichelhaus* (1864) 2 H & C 906. The defendants agreed to buy from the claimants a cargo of cotton to arrive 'ex Peerless from Bombay'. There were, unknown to the parties, two ships called 'Peerless' and both sailed from Bombay. The defendants meant the Peerless which sailed in October, whereas the claimants meant the Peerless which sailed in December. When the cotton eventually arrived, the defendants refused to accept delivery because they argued that the claimants were obliged to deliver the cotton on the Peerless which sailed in October, not the Peerless which sailed in December. The claimants therefore sued for the price of the cotton. Judgment was given for the defendants but, as no reasoned judgment was given in the case, it is not clear whether judgment was given for the defendants because there was no contract or because there was a contract to deliver the cotton on the October Peerless, which the claimants had breached. Despite the obscurity of the case, *Raffles* has

generally been understood by contract lawyers to stand for the proposition that latent ambiguity in the terms of an offer and acceptance can operate to negative consent in an appropriate case.

The second case is where one contracting party is under a mistake as to the terms of the contract, and that mistake is known to the other contracting party. In such a case the party who is aware of the mistake will be unable to enforce his version of the contract against the mistaken party (see *Hartog* v. *Colin and Shields* [1939] 3 All ER 566, discussed at 2.2). In *Smith* v. *Hughes* (1871) LR 6 QB 597 a buyer purchased from a seller a quantity of oats in the belief that they were old oats when, in fact, they were new oats and therefore unsuitable for the buyer's proposed use. When he discovered his mistake the buyer refused to accept the oats and the seller sued for the price. The jury found in favour of the buyer but the Court of Queen's Bench ordered a new trial because of a misdirection given to the jury by the trial judge. The Court of Queen's Bench held that a distinction must be drawn between two different types of case. The first is where the buyer correctly understands that the seller's offer is an offer to sell oats but the buyer mistakenly believes these oats to be old oats, and this mistake is known to the seller. In such a case the seller is not under an obligation to inform the buyer that he has made a mistake. The responsibility lies with the buyer to ensure that the oats are as he believed them to be; he cannot escape from what is a bad bargain for him by arguing that it is the responsibility of the seller to inform him of his error (see further Brownsword, 1987). In the second class of case the seller knows that the buyer is mistaken, but this time the buyer is mistaken as to the *terms* of the seller's *offer*. The buyer mistakenly believes that the seller's offer is an offer to sell old oats and the seller knows that the buyer has thus misunderstood his offer. In such a case there is an offer and acceptance mistake and the seller is under an obligation to inform the buyer of the true nature of his offer.

The third case is where there is a mistake as to the identity of the other contracting party. The identity of the person with whom one is contracting or proposing to contract is often immaterial. However, a mistake is sufficiently material to negative consent if one party is mistaken as to the *identity* of the other contracting party. Where the mistake is simply one as to the *attributes* of the other contracting party the mistake is not sufficiently fundamental to render the contract void. The distinction between identity and attributes can best be understood by contrasting the following two cases.

In *Cundy* v. *Lindsay* (1878) 3 App Cas 459, a dishonest person called Blenkarn, who gave his address as 37, Wood Street, Cheapside, ordered handkerchiefs from the claimants. Blenkarn signed his name to make it

look like Blenkiron & Co, a respectable firm who carried on business at 123 Wood Street and who were known by reputation to the claimants. The claimants duly sent the handkerchiefs to 'Blenkiron & Co, 37 Wood St' where Blenkarn received them. He did not pay for the goods, but rather sold them to the defendants. When they discovered their mistake, the claimants sought to recover the goods from the defendants. The question whether the contract between the claimants and Blenkarn was void for mistake was crucial to the defendants' rights. A contract which is void is set aside for all purposes and generally produces no legal effects whatsoever. So, if the contract was void for mistake, Blenkarn could not have obtained title to the goods and was therefore incapable of giving title to the defendants. But a contract which is voidable remains a valid contract until it is set aside by the innocent party. Therefore, if the contract was merely voidable on the ground of fraud then, provided Blenkarn sold the goods to the defendants before the contract between the claimants and Blenkarn was set aside by the claimants, the defendants would have obtained good title. However it was held that the contract was void because the claimants did not intend to deal with Blenkarn but with Blenkiron and Co, a firm which they knew; thus they had made a mistake as to identity.

On the other hand a different result was reached in the case of *King's Norton Metal Co* v. *Edridge Merrett & Co Ltd* (1897) 14 TLR 98. The claimants sent goods on credit to Hallam and Co, which purported to be a large firm in Sheffield, but was in fact an impecunious rogue called Wallis. Wallis failed to pay for the goods and sold them to the defendants. The claimants, when they discovered their mistake, sought to recover the goods from the defendants. But it was held that the claimants had not made a mistake as to the identity of Wallis. They intended to contract with the writer of the letters; they had simply made a mistake as to one of his attributes, namely his creditworthiness, and so the defendants got good title to the goods. The distinction between the two cases is that the mistake in *Cundy* was a mistake as to identity because the claimants intended to deal with an identifiable third party (Blenkiron & Co, a company which they knew), whereas in *Kings Norton* the claimants had not heard of Hallam and Co and simply intended to contract with the writer of the letters.

This distinction between a mistake as to identity and a mistake as to attributes has led to acute difficulties where the contracting parties meet face to face. The difficulties begin with the case of *Phillips* v. *Brooks* [1919] 2 KB 243. A man called North entered the claimant's shop and asked to see some pearls and rings. He selected a ring and produced a cheque book to pay for it, saying that he was Sir George Bullough (a wealthy man

known to the claimant) and gave Sir George's address. The claimant checked the address in a directory and let North take the ring away for a cheque, which was later dishonoured. North pledged the ring to the defendant, from whom the claimant sought to recover it or its value. It was held that he could not do so because the contract between the claimant and North was not void, no mistake as to identity having been made. The claimant intended to contract, and did contract, with the person in his shop. The defendants therefore had good title to the ring.

However, a different approach was adopted in the case of *Lake* v. *Simmonds* [1927] AC 487. The claimant, a jeweller, was insured against loss of his stock by theft, with the exception of jewellery entrusted to a customer. A woman called Ellison, who pretended to be the wife of a wealthy customer, Mr Van der Borgh, took two pearl necklaces 'on approval' for her supposed husband and never returned them. The claimant sought to recover for his loss under the insurance policy. The House of Lords held that the claimant was entitled to recover as he had not entrusted the jewellery to Ellison because he did not in fact consent to her obtaining possession of the jewellery. There was a fundamental mistake both about the identity of the rogue, in that the claimant would never have entrusted the jewellery simply to the postman or to a messenger, and about the identity of the person to whom the jewellery was to be delivered, because Mr Van der Borgh was a well-known and wealthy customer (see *Citibank NA* v. *Brown Shipley & Co Ltd* [1991] 2 All ER 690, 700). Such a conclusion appears to be inconsistent with *Phillips* but Lord Haldane sought to reconcile the instant case with *Phillips* on the ground that in *Phillips* the sale was concluded before any mention was made of Sir George Bullough, so the mistake did not induce the contract. However it is not clear that this finding is consistent with the facts as found by the trial judge in *Phillips*.

The issue was reconsidered by the Court of Appeal in *Ingram* v. *Little* [1961] 1 QB 31. The claimants, who were two sisters, were visited by a rogue who called himself Hutchinson and who wished to buy their car. He produced a cheque to pay for it, but one of the claimants said that they would not accept a cheque. The rogue then said that he was a certain P.G.M. Hutchinson of Stanstead House, Caterham. Neither of the claimants had heard of this person, but one of them went to the Post Office, checked in the telephone directory and confirmed that there was such a person. Believing the rogue to be P.G.M. Hutchinson they allowed him to take the car on handing over the cheque, which later proved to be worthless. The rogue then sold the car to the defendants. When the claimants discovered their mistake they sought recovery of the car from

the defendants. The Court of Appeal held that the contract between the claimants and the rogue was void because of a mistake as to identity. They held that there was a prima facie presumption that a party contracts with the person in front of him, but held that the presumption was displaced on the facts of the case. The decisive factor appears to be that the claimants refused to accept the rogue's offer to enter into a contract on terms that he paid by cheque until they had checked his identity in the telephone directory, which showed that his identity was crucial to the creation of a contract. It should be noted, however, that it was not the fact that they consulted a directory which was decisive because the shopkeeper in *Phillips* v. *Brooks* also consulted a directory. The vital factor appears to be the *purpose* behind consulting the directory. If, as in *Ingram*, it is relevant to the decision to enter into the contract, the identity is crucial but if, as in *Phillips*, it is relevant only to the methods of payment then the mistake is as to attributes, namely creditworthiness.

The final case on this point is the decision of the Court of Appeal in *Lewis* v. *Avery* [1972] 1 QB 198. A rogue, calling himself the actor Richard Greene, offered to buy the claimant's car. He signed a cheque, but the claimant did not want him to take the car away until the cheque had been cleared. In order to persuade the claimant to allow him to take the car away immediately, the rogue produced an admission pass to Pinewood Studios, bearing the name Richard A. Greene, his address, his photograph and an official stamp. The claimant then let the rogue take the car in return for a cheque, which proved to be worthless. The rogue then sold the car to the defendant, from whom the claimant sought recovery when he discovered his mistake. In giving judgment for the defendant the Court of Appeal held that there was nothing to displace the prima facie presumption that the claimant intended to deal with the party in front of him and they confined *Ingram* to its 'special facts'. The 'special facts' would appear to be that in *Ingram* no contract was concluded until the claimants had ascertained the rogue's identity, thus the mistake was as to identity. On the other hand, in *Lewis* a contract had been concluded and the identity of the rogue was only crucial to the method of payment; thus the mistake was one as to his attributes, namely his creditworthiness.

It can be seen from this brief discussion of the leading cases that the distinction between a mistake as to identity and a mistake as to attributes is a very fine one. The fineness of the distinction was recognised by Devlin LJ in an important dissenting judgment in *Ingram*. He suggested that the more appropriate solution was to divide the loss between the parties in such proportion as is just in all the circumstances. Such a solution would

avoid the apparent harshness of cases such as *Ingram* and *Lewis* where the claimant either gets everything or he gets nothing and there are few distinguishing facts between the cases. However it is unlikely that such a reform will be introduced in the foreseeable future either by the courts or by Parliament. This is because the common law has traditionally set its face against such loss-splitting devices, preferring to use an all-or-nothing solution, and Parliament is unlikely to intervene because such a proposal was rejected as long ago as 1966 by the Law Reform Committee on the ground that a power of apportionment would give rise to too much uncertainty and would create excessive complexity in an effort to do justice between all the parties to the dispute.

There is a temptation to conclude that each case 'rests on its own facts' (per Waller J in *Citibank NA* v. *Brown Shipley & Co Ltd* [1991] 2 All ER 690, 700) and to leave it at that. But the law cannot be left in such an unprincipled state. It is suggested that the courts in future are, in fact, likely to follow *Lewis* in preference to *Ingram*. This is so for three reasons. The first is the effect of the presumption that a contracting party intends to contract with the person in front of him and that presumption will only be displaced upon 'special facts'. The second is that the courts have sought to protect third party rights and such a policy would be frustrated by holding that the contract was void on the ground of mistake. The third and final reason is the strength of the objective approach which, as we have seen in this chapter, is applied by the courts in determining whether or not a contract has been concluded.

Summary

1 An agreement must be expressed with sufficient certainty before it will be enforced by the courts.
2 The principal causes of uncertainty are vagueness and incompleteness.
3 There are, however, a number of devices available to a court which wishes to avoid the conclusion that an agreement is too uncertain to be enforced.
4 It should not be forgotten that a remedy may be found in the law of restitution where it is held that the agreement is too uncertain to constitute a contract.
5 A mistake may negative consent and prevent a contract coming into existence where one party is labouring under a mistake or the parties are at cross-purposes.
6 Mistake does, however, operate within very narrow confines. Mistake has been held to negative consent where the terms of the offer and acceptance suffer from such latent ambiguity that it is impossible reasonably to impute any agreement between the parties, where one party was under a mistake as to the terms of the contract and that mistake was known to the other party and where there was a mistake as to the identity (not attributes) of the other contracting party.
7 Where the parties are dealing face to face there is a prima facie presumption that a party contracts with the person in front of him but, as in *Ingram* v. *Little*, that presumption can be displaced by 'special facts'.

Exercises

1 Compare and contrast the decisions of the House of Lords in *May and Butcher* v. *R* and *Hillas* v. *Arcos*.
2 List the devices which are available to a court which wishes to avoid the conclusion that an agreement is too uncertain to be enforced.
3 Would any advantage be obtained by introducing into English law a provision equivalent to section 2–204 of the American Uniform Commercial Code?
4 Distinguish between common mistake and unilateral mistake. Give some examples of the distinction.
5 What is the difference between a contract which has been held to be void and one which has been held to be voidable?
6 Compare and contrast the decisions of the Court of Appeal in *Ingram* v. *Little* and *Lewis* v. *Avery*.