# Offer:

* **Offer:** an expression of willingness to be contractually bound, on certain terms, without further negotiation
* Use an **objective test** – would a *reasonable* person in the shoes of the person addressed understand the communication to evince a *serious commitment to be bound*

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| **Case** | **Facts** | **Rule** |
| *Harvey v Facey* | Declaration of lowest cash price, H agrees to buy, but F refuses to sell | NO CONTRACT – nominating a lowest cash price is not an offer |
| *Gibson v Manchester CC* | ‘may’ sell house ‘if’ you complete formal application of attached form | NO CONTRACT – use of conditional language suggests no intention to be bound |
| *Boulder v Tangaere* | Suggestion to keep in touch re. lot; 3 months later, T selects lot; B refuses sale | NO CONTRACT – too tentative, exploratory, non-committal for intention |

## Two Contract Analysis:

* **Invitation to treat:** attempt to induce an offer (e.g. auction/tender, newspaper ad, price list/catalogue, priced goods on display)
* Leads to two possible contracts:
  + **Process contract:** *unilateral* offer to abide by a particular process, accepted by the performance of submitting an offer to the main contract
  + **Main contract:** *bilateral* offer of a price for services/goods/land, expressly accepted

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| **Case** | **Facts** | **Rule** |
| *Leftkowitz v GMSS* | GMSS advertises sale, L abides by conditions but is refused the fur coat (not a woman) | CONTRACT – unilateral offer, containing a promise on positive terms upon performance of conditions |
| *Carlill v Carbolic Smoke Ball* | Smoke ball case | CONTRACT – unilateral ‘offer to the world’; showed intention to be bound on performance, overriding need for communicating acceptance; sincere intent |
| *Markholm v Wellington* | Sale of land by ballot promised; failed to hold such ballot | CONTRACT per two contract analysis:   1. Process contract to hold ballot & select 2. Main contract to sell land |
| *Harvela Investments* | Fixed price (FPB) and referential bids (RB) | NO CONTRACT for RB - intention was to consider FPB only, and RB inconsistent with promised process contract |
| *Blackpool* | ‘pleasure flight’ licence to be tendered; tender submitted but D’s staff failed to clear in time; P’s tender rejected | CONTRACT – to consider all tenders that conformed to conditions (limited to specific case facts) |
| *Hughes v Airservices* |  | CONTRACT – two contract analysis affirmed, esp. because public body |

## Terminating Offers:

### Revocation:

* **Revocation:** express negation of the power of acceptance that was created by the offer
* An offer may be withdrawn or revoked at any time before it is accepted, provided the offeree is informed that the offeror no longer wishes to proceed with the proposed transaction

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| **Case** | **Facts** | **Rule** |
| *Dickinson v Dodds* | Offer to sell house open till a date, but when P attempts to accept, D already sold it to third party, and D knew | NO CONTRACT - revocation occurs any time before acceptance; notification need not come from offeror personally |
| *Byrne v Van Tienhoven* | Letter/telegram miscommunication | CONTRACT – revocation inoperative because it was received after acceptance (occurs when actually communicated) |
| *Shuey v US* | US govt. posted offer of reward for apprehending criminal; revocation similarly offered, after which P acted in response to offer | NO CONTRACT – offer revoked before acceptance; communication in unilateral offer must be of same channel and notoriety; ignorance of revocation irrelevant |
| *Great Northern Railway v Witham* | W offered to supply all GNR stores; GNR orders some | CONTRACT – new contract formed for each order, W can revoke **standing offer** for future but not past orders |

### Termination by Effluxion of Time:

* When there is a fixed/stated duration, offer lapses upon expiry of the stated period
* When there is indefinite duration, general rule is offers to be accepted within ‘reasonable time’ (question of fact), after which offer is lapsed or impliedly rejected

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| **Case** | **Facts** | **Rule** |
| *Manchester Diocesan v CGI* | Extended period of communication – P decided to sell by tender – D sent tender offer, P accepts (but needed D.Ed. approval), D.Ed. approves, D denies contract, P sends formal acceptance, D declines | CONTRACT – method of acceptance prescribed in tender not mandatory; acceptance via equally effective method; if method is mandatory, need explicit statement of this |
| *Barrick v Clark* | B offered to sell land to C for 15K, C went on hunting trip and wife wrote to B to request offer be kept open till C returned; C returned and accepted purchase, but B had sold to third party | Reasonable time =   * Nature and character of transaction * Circumstances of offer * Normal and usual course of business * Conduct of parties during negotiations * ‘reasonable contemplation/expectation’ of offeror |

### Rejection and Counter-Offers:

* Rejection can be express or implied; counter-offer is a form of implied rejection
* Objective test: would reasonable person apprehend the unequivocal intention to reject offer through presenting ‘materially different terms’ (those that affect price)
* Mere request for information is not a counter-offer, or rejection

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| **Case** | **Facts** | **Rule** |
| *Hyde v Wrench* | D offered to sell farm to P; P posed different price, which D refused; P them accepted original offer; D refused | NO CONTRACT – P posing different price is a rejection of the original offer, so P cannot revive what he destroyed |
| *Gibson v Manchester CC* | Left price blank when returning house purchase application but in cover letter requested additional terms | CONTRACT – cover letter contained no cover-offer, ‘merely exploratory of the possibility of a reduction in price’ |
| *Powierza v Daley* | - |  |
| *Financings v Stimson* | - |  |

# Acceptance:

* **Acceptance:** a clear declaration of assent to the transaction proposed by the offeror in their offer – three elements:
  + Knowledge: did the offeree know of the offer and act *on the faith* of it?
  + Mirror image rule: did the offeree accept the offer *unconditionally and in total*?
  + Communication: was acceptance *actually and unequivocally* communicated?

## Knowledge:

* Acceptance cannot be coincidental or accidental
* Need **intention to accept**, as this presupposes knowledge of offer
  + Exception: unilateral contracts; acceptance assumed on performance (*Carlill*)

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| **Case** | **Facts** | **Rule** |
| *Williams v Carwardine* | P who initially withheld info on trial; ad for info released; P abused by husband; gave evidence to incriminate him to ‘ease conscience’; D refused to give $$$ | Knowledge assumed on basis of performance of ad conditions (providing info), even if *motive* was not to get $$$  (similar to *Carlill*) |
| *R v Clarke* | P gives info re. murder in exchange for plea deal, but then sues for reward published in ad | P’s *intention* was to get out of jail, not acting on basis of $$$ - offer must motivate the action (intention different to motive) |

## Mirror Image Rule:

* Need full and unconditional acceptance; any attempt to renegotiate will amount to a counter-offer and is non-binding
* *Butler Machine Tool v Ex-Cell-O*
  + Standard forms sent to each other, but containing differing clauses and prices
  + ‘battle of the forms’ – the person who makes the last manifestation of the terms, to which the other party agrees, is the official agreement

## Communication:

* Need actual and unequivocal communication, because the nature of an agreement – voluntary assumption of responsibility – requires actual communication
* **Silence is not acceptance**, as it’s evidentially equivocal, consistent with offer rejection (*Felthouse v Bindley* – horse case)
* Exceptions:
  + Implied acceptance, by conduct, where assent is inferred (lack of *pure* silence)
    - *Empirnall Holdings* (‘boss never signs contracts’): an objective consideration of circumstances infers E’s agreement – reasonable bystander test
  + Dispensing with the need for notification of acceptance
    - Offeror free to prescribe the manner of acceptance, but must be explicit (*Manchester Diocesan*)
    - E.g. unilateral offers (*Carlill*); clear indication of dispensing requirement
    - *Latec Finance v Knight*:
      * D signed standard form hire-purchase agreement for TV (offer), P signed as acceptance internally but no evidence of communication to D
      * D not bound by ‘agreement’: did not use TV enough to constitute contract by course of conduct, and form did not have ‘very clear’ language displacing need for actual communication of acceptance
  + **Postal acceptance rule:** when parties decide that post/telegram is the manner of communication, acceptance is complete as soon as it’s posted (*Henthorn v Fraser*)
    - Rule of convenience only; can be expressly displaced (*Wardle v ARF*)
* *Entores*: telephone acceptance equivalent to face-to-face acceptance; general rule applies
* No universal rule with emails, texts etc.: rely on intentions of parties, sound business practice, risk allocation (ability to control risk) 🡪 *Brinkibon*

# Certainty and Completeness:

* Paradox: want to uphold a contract decided between two parties, but don’t want to uphold any contract that is ambiguous
* **Intention to be immediately bound**, beyond the stage of negotiation, is vital
* Requires **sufficient certainty** **regarding legal essentials** – parties, subject matter, principal undertakings, price (*Hall v Busst*)

## So, what is uncertainty?

* Uncertainty in two ways:
  + **Unclear:** vague, ambiguous or meaningless language used for essential term
  + **Incompleteness:** lacks determination of an essential term
* Meaning of an agreement determined **objectively**, part performance makes enforcing agreements more likely
* Courts can assume meaning, but will not spell out to an unacceptable degree what the parties have themselves failed to agree upon (*Biotechnology v Pace*, per Kirby P)

## How do you establish certainty?

* For unclear agreements:
  + Use of objective test, including implication and deduction from express terms
  + Appeals to **external** or ‘reasonableness’ **standards**, proved and authorised by parties
  + Any subsequent action (to prove intention to be bound)
* For incomplete agreements:
  + Intention to be immediately bound
  + Stated **machinery/formula** that is bound to work if parties fail to agree
    - Machinery = arbitrator, independent valuation
    - Formula = mathematical ways of determining price
  + Implied terms
* Can sever an invalid term from the contract if the parties’ intentions seem to indicate this is possible, and term is NOT essential 🡪 allows rest of contract to remain enforceable, leaving invalid term ignored (see *Fitzgerald v Masters*; *Whitlock v Brew*)

### Key Cases:

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| **Case** | **Facts** | **Rule** |
| *Biotechnology v Pace* | ‘I confirm…the option to participate in the company’s…equity sharing scheme’ – P knew this didn’t exist; when fired, P sued under this term | UNCERTAIN – no enforceable right; promise illusory, devoid of meaning and uncertain of content (no actual promise of implementing scheme); lacking external standard |
| *Fitzgerald v Masters* | ‘usual conditions of…REI NSW’; mistake of word ‘inconsistent’  When P sued for specific performance of farm sale, D claimed uncertainty | UNCERTAIN, but SEVERABLE – absurd to conclude lack of contract given expressions of agreement; must have intended to accept reading as ‘consistent’, but clause unessential |
| *Meehan v Jones* | Agreement re. sale of land on which oil refinery was built – ‘satisfactory’ quantity of oil and finance | CERTAIN – clause read as leaving it to purchaser alone to decide satisfactoriness (purpose of clause to benefit purchaser) |
| *Whitlock v Brew* | Agreement re. sale of land – ‘upon such reasonable terms as commonly govern a lease’ + arbitration clause; B paid deposit but declined to complete purchase, wanted deposit back | INCOMPLETE – no means for calculating lease period; no ascertainable reasonable terms; arbitration clause too narrow; inseverable as too essential a term – would alter nature of agreement |
| *Scammell & Nephew v Ouston* | Van’s hire-purchase agreement never settled – ‘hire-purchase terms’; failed to agree; S refused to supply van | UNCERTAIN – language too obscure to attribute any contractual intention; partied never moved beyond negotiating (incomplete); cannot have bare agreement to agree |
| *Fletcher v ENCZ* | Negotiating for natural gas supply; signed agreement but some provisions expressly marked ‘to be agreed’ | INCOMPLETE – no intention to be bound; two-step process = (1) intention to be immediately bound; (2) agreement/means of achieving agreement on every essential term or term that parties regarded as essential |
| *Hall v Busst* | Island purchase: fixed price plus ‘value of all additions and improvements’, less the deficiencies and depreciation; B sold land to someone else, H sued | UNCERTAIN – price not clearly fixed, but court cannot imply reasonable price (in sale of land) + need ‘ascertainable objective fact’ for valuation (‘reasonable price’ insufficient) |
| *Sudbrook v Eggleton* | P granted options to purchase land at price ‘no less than 12,000’, to be fixed by valuers appointed by parties; D refused to appoint | UNCERTAIN but resolved? – lack of identified valuers made machinery ‘non-essential’; if it breaks down, then the court can substitute own machinery to ascertain the price (for business efficacy) |
| *Nelson v Cooks* | P agrees to sell grapes to D, with price-setting clause incl. purchasing committee that wasn’t established + 2nd wide arbitration clause; though never got to this stage previously, one year failed to agree; arbitration clause not utilised | INCOMPLETE – no machinery exists for determining price, and courts could not supply alternative machinery because it’s essential aspect of the agreement; intention was to allow people with specific knowledge to decide, court weren’t these people (applied *Sudbrook*) |
| *Booker v Wilson Parking* | WP leased premises to B, lease can be renewed at an agreed price or by arbitrator appointed by QLS; WP asked to do this but B refused, ejected WP | CERTAIN – both parties would do all that is ‘reasonably necessary’ to secure nomination by QLS, so WP entitled to *limited* specific performance (Brennan J prepared for *full* specific performance) |

### Agreement to Negotiate:

* **Traditionally**, courts have not accepted as valid a ‘contract’:
  + to make a contract
  + to ‘negotiate’ a later agreement

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| **Case** | **Facts** | **Rule** |
| *Walford v Miles* | Negotiating to buy M’s business & premises, but terms of process ‘subject to contract’; created a ‘lock-out’ agreement; M decided to sell to third party; W claimed that ‘lock-in agreement’ should be implied for business efficacy | INCOMPLETE – lock-in agreement devoid of legal content, so cannot be policed; Lord Ackner: ‘concept of duty to carry on negotiations in good faith is inherently repugnant to adversarial position of parties… is inconsistent with position of negotiating party... no obligation to negotiate’ |
| *United Group Rail v Rail Corp* | UGR contracted to construct rail for RC; dispute to be resolved by senior rep who would ‘meet and undertake genuine and good faith negotiations’ to solve | BREACH – Express agreements to negotiate in good faith are enforceable, to promote ‘efficient dispute resolution’; bad faith = threatening future breach; pretending to negotiate, refusal |
| *Strzelecki v Cable Sands* | S wanted to buy land from CS but it was contaminated by radioactive tailings; agreement clause said ‘if parties acting in good faith fail to conclude contract within 30 days, this agreement ceases’; S claimed breach of C on this | NO BREACH – **Good faith:** ‘within the framework of fidelity to the bargain’; examination of self-interest is subjective |

# Intention to Create Legal Relations:

* Parties must intend that their relation be attended by *legal consequences*
* Intention determined *objectively* as an inference of fact, considering:
  + Subject matter of agreement
  + Status of parties to it and their relationship
  + Other surrounding circumstances
* Two rebuttable presumptions:
  + No intention to create legal relations with family members
  + Strong intention to create legal relations in commercial agreements
* BUT modern courts have cautioned against reliance on this: ‘At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof…’; only distracts from the basic principle (*Ermogenous v Greek Orthodox Community*)

## Social, Family and Domestic Agreements:

* Number of factors that courts have considered relevant to determining contractual intention:
  + **Amicability** e.g. *Balfour v Balfour*, *Jones v Padavatton*, cf *Popiw v Popiw*
  + **Formality** e.g. *Popiw v Popiw*
  + **Uncertainty** e.g. *Jones v Padavatton*, *Australian Woollen Mills v Cth*, *Ashton v Pratt*
  + **Reliance** e.g. *Jones v Padavatton*, *Riches v Hogben*

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| **Case** | **Facts** | **Rule** |
| *Balfour v Balfour* | H agreed orally with W to pay her an allowance |  |