

Practice questions for Chapter 6 – The formation of the contract

Essay question

Discuss the validity of the following three statements:

1. A unilateral offer can be revoked at any time before acceptance.
2. A unilateral offer is only accepted once performance of the stipulated task is completed.
3. There is no need to communicate acceptance or revocation of a unilateral offer.

Introduction

- First you should define what constitutes a unilateral contract. A unilateral contract is a contract where one party (the promisor) binds himself to perform a stated promise upon performance of a stated condition by the promisee, but under which the promisee gives no commitment to perform the condition but rather is left free whether to perform or not.
- In other words, the promisor is bound, but the promisee is not. Rewards are a good example of unilateral offers as the promisor is bound to pay the reward if the condition is met, but people seeing the promisor's offer of a reward are not bound to perform the stipulated act.

A unilateral offer can be revoked at any time before acceptance

- The case of *Payne v Cave*¹ first established that an offer can be revoked at any time before acceptance, since no legal obligation exists until acceptance occurs. However, in the case of unilateral offers this orthodox approach presents particular difficulties as acceptance usually takes place when the condition is completed. Academics have argued that applying the traditional approach to unilateral offers can lead to abuse and injustice.
- Consider the following example. A makes an offer stating that he will pay £1,000 to anyone who cycles from Land's End to John O'Groats. B sets off from Land's End but, when he is a mile from John O'Groats, A revokes the offer. According to the traditional view, A would be able to do this as acceptance has yet to take place.
- Many academics (e.g. Richards) believe that such an approach is undoubtedly intolerable and unjust for obvious reasons. However, other academics disagree. For example, Wormser² analysed a similar situation in depth and his analysis can also be applied to our example to demonstrate how the traditional view is logical.
- From a moral standpoint, permitting A to revoke his offer seems very harsh upon B. However, from a legal standpoint, Wormser believes that such a revocation (although his example is not quite so extreme) is perfectly valid. Until B had reached John O'Groats, he had not accepted A's offer. Therefore A should not be bound in any way to B.
- It can still be argued that this is harsh on B, but let us instead ask 'Was B bound to cycle from Land's End to John O'Groats?' The answer to this is obviously no. B never made any promise to A that he would cycle to John O'Groats. B could at any time give up with no legal consequences. If B is not bound to carry out the full trip – if he is will-free – why should A not also be will-free?

¹ (1789) 3 Term Rep 148.

² See M Wormser, 'The True Conception of Unilateral Contracts' (1916-17) 26 Yale LJ 136.

- According to Wormser therefore, until the act is fully performed, A and B should have the opportunity to reconsider and withdraw. Not until the completion of the act is there a valid contract. Critics who argue that it is unfair to revoke unilateral offers when a party has started the act in question ignore the need for mutuality of withdrawal, and in highlighting the plight of B, they completely ignore the fact that B has the same right of withdrawal as A.
- However, it is important to note that in the above example, A was not unjustly enriched by B's act. If there is unjust enrichment then there is no doubt that the traditional rule can cause considerable injustice.
- Consider the following example. Suppose A says to B 'if you build a garage on my land, I will give you £1,000.' B commences to build the garage, but just as B is adding the roof, A withdraws the offer. This time A has been unjustly enriched by the improvement to his land. B has expended time and effort and to deny his compensation for his efforts would be unjust.
- Accordingly, it can be argued that in some circumstances to stick rigidly to the orthodox rule in relation to unilateral offers can result in hardship. Given this, Sir Frederick Pollock argued that a distinction should be drawn between acceptance of the offer and performance of the stipulated act. He argued that acceptance occurs not on completion of the act, but when the offeree unequivocally commences performance. This means that the offeror thereafter loses the right to revoke the offer. The offeror was then only bound to pay when the act was completely performed.³
- Support for Pollock's view comes from Denning LJ (as he then was) in the case of *Errington v Errington*.⁴ Here, a father bought a house for his son and daughter-in-law to live in, promising that although the house and mortgage were in his name, he would transfer the house to their name once the mortgage was paid off.
- The father died and the son left the daughter-in-law – she, however, continued to live in the house and pay off the mortgage instalments. The issue was whether the daughter-in-law could be forced to surrender possession of the house. Denning LJ stated:

The father's promise was a unilateral contract – a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act but it would cease to bind him if they left it incomplete and unperformed ... They have acted on the promise and neither the father nor his widow, his successor in title, can eject them in disregard of it.

- The cases of *Luxor (Eastbourne) Ltd v Cooper*⁵ and *Daulia Ltd v Four Millbank Nominees*⁶ upheld the principle established in *Errington*. However, what is unclear is the theoretical basis behind these decisions. Denning tended to rely on the doctrine of promissory estoppel. However, this analysis will not work because in order for estoppel to apply there needs to be a pre-existing legal relationship, and in many unilateral offers this will not be present. Further, currently the doctrine of promissory estoppel cannot be used as a cause of action.
- The result of the above cases is that, in the case of a unilateral offer, acceptance occurs when the promisee unequivocally begins to perform the stipulated act. Once this takes place, the offeror cannot revoke his offer. Therefore, the statement is true, but the time of acceptance differs depending on whether the contract is bilateral or unilateral.

³ Sir F Pollock, *Principles of Contract* (13th edn, Stevens 1950) 19.

⁴ [1952] 1 KB 290 (CA).

⁵ [1941] AC 108 (HL).

⁶ [1978] 2 All ER 557 (CA).

A unilateral offer is only accepted once performance of the stipulated task is complete

- As we saw in the discussion above, in the case of unilateral offers, acceptance takes place once the offeree has unequivocally commenced performance, so the above statement is incorrect.
- However, the offeror is only bound to complete his promise once the offeree has fully and precisely performed the stipulated task.

There is no need to communicate acceptance of a unilateral offer

- This was discussed in the case of *Carlill v Carbolic Smoke Ball Co.*⁷ Here, the defendant advertised its preparation by offering to pay £100 to any purchaser who used it and caught influenza within a given period, and by declaring that it had deposited £1,000 with their bankers 'to show their sincerity.' The claimant bought the preparation, used it and caught influenza.
- The defendant argued that there was no contract as the advertisement was a 'mere puff' and was not to be taken seriously. The Court of Appeal disagreed and held that there was a valid contract – the deposit of the £1,000 in the bank was evidence that the promise was meant to be taken seriously.
- The relevant point to note here is that the claimant did not have to inform the Carbolic Smoke Ball Co that she was going to accept its offer and use the smokeball.
- Therefore it is a general principle that in the case of unilateral offers, the offeror has impliedly waived the right to communication of acceptance. In relation to communication of acceptance, the above statement is therefore correct.
- However, the statement is not correct as regards revocation of a unilateral offer. The normal rule is that in order for revocation of an offer to be effective, it must be communicated to the offeree.⁸ However, as unilateral offers are often made to the entire world, this general rule causes difficulties with these types of offers.
- There is no UK authority, but many academics advocate the decision of *Shuey v United States*.⁹ Here, a proclamation dated 20th April 1865 had been published offering a reward of \$25,000 for the apprehension of a criminal. On 24th November 1865, a notice revoking the offer was published. In 1866, the claimant discovered the criminal and informed the authorities. He did not know that the offer had been revoked.
- Strong J held that the criminal was not apprehended according to the terms of the offer, but during his judgment, he stated:

Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn.

- Accordingly, in order to revoke a unilateral offer, it is likely that the revocation must be made in the same manner as the offer was made.

Problem question

On the 15th February, Basil, a local antique dealer, received a letter from Sybil which stated:

⁷ [1893] 1 QB 256 (CA).

⁸ *Byrne v Van Tienhoven* (1880) 5 CPD 344.

⁹ 23 L ed 697 (1875), 92 US 73 (US Supreme Court).

'I have decided to retire to Eastbourne and need to sell much of my cherished furniture that you admired on your recent visit. I know that you particularly liked the Queen Anne table and I want to offer it to you for £9,600, which I'm sure you will agree, is a very reasonable price. Let me know as soon as possible if you wish to go ahead with the purchase as there will no doubt be others interested in acquiring this beautiful table.'

Basil immediately sent the following fax message to Sybil:

'I certainly wish to accept your offer but would find it difficult to find the £9,600 in one payment. Would you be prepared to accept payment in four monthly instalments of £2,400?'

Having heard nothing further for five days, on the 20th February, Basil posted a letter to Sybil purporting to accept the offer to sell the table at the initial price of £9,600. After posting the letter, Basil purchased a copy of the local newspaper and was interested in an advertisement placed by Manuel detailing an antique table for sale at £7,000. After inspecting the table, Basil decided it was worth far more than £7,000 and that this would be a better purchase than the table offered by Sybil. Basil immediately telephoned Sybil's mobile telephone and left a message on her voice mail service telling Sybil to ignore the letter that would arrive the next day because he had changed his mind about purchasing Sybil's table. When Sybil arrived home on the morning of 21 February, she listened to her voice mail messages and then opened her post, including the letter from Basil. Sybil is insisting that Basil made a binding contract to purchase the table.

Does a binding contract exist between Sybil and Basil?

Introduction

- Point out that this question involves a discussion of the law relating to offer and acceptance. The task here to determine is whether or not a binding contract exists between Sybil and Basil. Point out that, generally, once a person has validly accepted an offer, then a binding contract will come into existence.

Sybil's letter received the 15th

- The first step is to determine the legal status of the letter sent by Sybil, namely does it amount to an offer or is it merely an invitation to treat. It is extremely important that you are able to correctly determine this. If you incorrectly conclude the status of the letter, every conclusion that follows will also likely be incorrect.
- You may wish to provide a definition of what amounts to an offer. There are numerous definitions, but Treitel's is regarded by many as the most authoritative. He defines an offer as 'an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.'
- There is little doubt that Sybil's letter constitutes an offer to sell the table. She does use the word 'offer' but this is not necessarily conclusive. However, it is clear that she is demonstrating a willingness to contract on the terms mentioned in the letter.

Basil's fax sent on the 15th

- Given that Sybil has made Basil an offer, the question is whether or not the fax sent by Basil amounts to valid acceptance. Again, Treitel provides us with the most authoritative definition when he defined 'acceptance' as 'a final and unqualified expression of assent to the terms of the offer.'
- Basil's fax initially indicates that he is accepting the offer when he states 'I certainly wish to accept your offer ...' However, he goes on to say '... but would find it difficult to find the £9,600 in one payment. Would you be prepared to accept payment in four monthly instalments of £2,400?' The request to pay in instalments complicates matters.
- A number of possibilities exist. First, you could argue that Basil's fax amounts to acceptance of Sybil's offer. However, it is highly unlikely Basil's fax amounts to acceptance as the purported acceptance is not unqualified or final.
- Second, you could argue that, by introducing the possibility of paying in instalments, Basil has altered the terms of the original offer and has therefore made a counter-offer. If you come to this conclusion, then Sybil's original offer made on the 15th will be destroyed and Basil will become the offeror.
- Third, and this is the more likely option, you could argue that Basil's fax does not constitute acceptance, nor does it amount to a counter-offer, but that it is merely a request for information. Obvious parallels can be drawn with the case of *Stevenson, Jacques & Co v McLean*.¹⁰

Basil's letter sent on the 20th

- Five days later, having heard nothing from Sybil, Basil sends a letter in which he purports to accept the offer Sybil made on the 15th. The issue to determine here is whether Sybil's original offer is still capable of acceptance.
- If you are of the opinion that the fax that Basil sent on the 15th amounted to a counter-offer, then Sybil's original offer will not longer exist¹¹ and so Basil's letter will not amount to valid acceptance and no contract will exist. Basil will have become the offeror and Sybil is free to accept or reject the offer he made.
- However, if you concluded that Basil's fax merely amounted to a request for information, then Sybil's original offer is still capable of acceptance. As Basil has accepted the offer based on its original terms, the acceptance will be valid, but the question is when does acceptance take place. As Basil sent his acceptance by post, the postal rule will apply which states that acceptance takes place as soon as the letter is posted. Accordingly, Basil accepted Sybil's offer on the 20th when he posted the letter of acceptance.
- Do not be afraid about giving alternate answers based on alternate conclusions. Often, you will not be able to state a definitive legal position, and so you may have to provide alternate answers.

Basil's telephone call

- Basil decides that he no longer wishes to purchase the table from Sybil, and telephones Sybil informing her that his letter of acceptance should be ignored and he does not wish to purchase the table.

Sybil arrives home on the 21st

¹⁰ (1880) LR 5 QBD 346 (QB).

¹¹ *Hyde v Wrench* (1840) 3 Beav 334.

- On the 21st, Sybil arrives home. She listens to the message that Basil left on her voicemail and then reads the letter in which he accepts her offer.
- If you are of the opinion that the fax Basil sent on the 15th amounted to a counter-offer, then Sybil's original offer will not exist and Basil will have made a new offer, which Sybil is capable of accepting. However, the telephone call that Basil made to Sybil on the 21st could be viewed as a revocation of that counter-offer.
- Revocation of an offer is only valid if it is (i) made before acceptance,¹² and (ii) is communicated to the offeree before acceptance occurs.¹³ As Sybil listened to her voicemail first, it could validly be argued that Basil communicated the revocation before she accepted the offer. Accordingly, no contract will exist between Sybil and Basil and Basil will not be in breach of contract
- However, if you are of the opinion that Basil's fax sent on the 15th is merely a request for information, then Sybil's offer will still exist, and Basil accepted this offer by posting the letter on the 20th. As acceptance has already occurred, Basil is bound as English law does not appear to allow an offeree to revoke acceptance. Accordingly, Basil's telephone call will make no difference and a binding contract will exist between Sybil and Basil and if Basil does not pay the contract price, he will be in breach of contract.

Essay question

'The decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* has significantly eroded the rule in *Stilk v Myrick*. Further, the reasoning employed by the Court has devalued the requirement of consideration.'

Discuss this statement. Do you agree with the decision of the Court in *Williams*? Provide reasons for your answer.

Introduction

- Point out that this question involves a discussion of an aspect of the law relating to consideration. You may want to briefly define what consideration is and that it is one of the five requirements of a valid contract.

The principle in *Stilk v Myrick*

- Before looking at the facts of *Williams*, it would help to look at a principle that *Williams* affected, namely the idea that a claimant provides insufficient consideration if he merely performs an act that he was meant to perform under the previous contract.
- In *Stilk v Myrick*,¹⁴ the claimant entered into a contract to act as a crewman aboard a ship that was to sail from London to the Baltic and back. During the voyage, two crew-members jumped ship and subsequently the captain promised to divide the wages of these two men amongst the rest of the crew (including the claimant), as the ship was now short-handed. On returning to London, the captain refused to pay the extra wages, alleging the claimant had done no more than he was contractually obliged to do, and that therefore the claimant had not given sufficient consideration.
- The court agreed with the captain and held that the crewmen were not entitled to the extra wages as they had not provided consideration for the extra money.

¹² *Payne v Cave* (1789) 3 Term Rep 148.

¹³ *Byrne v Van Tienhoven* (1880) 5 CPD 344

¹⁴ (1809) 2 Camp 317.

Williams v Roffey Bros

- The principle in *Stilk* has been affected by the decision in *Williams v Roffey Bros*.¹⁵ Here, the defendant building contractor entered into a contract to refurbish a block of 27 flats. It subcontracted the carpentry work to the claimant for which the claimant would receive £20,000. A term of the arrangement provided that the claimant would receive interim payments for completed work. The claimant received £16,000 for completing work on the roof, 9 flats and preliminary work on the remaining flats. The £16,000 represented 80% of the total, although there was far more than 20% of the work to be completed.
- The claimant was in financial difficulties because the initial price of £20,000 was too low (he had also failed to supervise his workforce adequately.) The defendant, who was subject to a penalty clause should the work not be completed on time, became aware of the claimant's financial difficulties. To ensure that the work was completed on time, the defendant agreed to pay the claimant an extra £10,300 (based on a sum of £575 per flat.) The claimant completed a number of flats, but did not receive the extra payment. The claimant stopped work and began legal proceedings.
- The defendant denied liability and denied that it was liable to pay the extra £10,300 since the promise to pay this extra money was not supported by sufficient consideration by the claimant. It also argued that the additional sum was only payable once the work was completed. As the claimant had not done this, he was not entitled to the extra money.
- Both at first instance and in the Court of Appeal, it was held that the claimant was entitled to the contract price, less a deduction for defects. The main issue in the case surrounded the issue of sufficiency of consideration and whether it was sufficient to support the £10,300.
- At first instance, the judge found that the parties had agreed too low a price and that this was clearly contrary to their interests – it would never get the job done unless the defendant agreed to pay more money. As it was in the interests of both parties, it did not fail for lack of consideration. It appears that this decision is wrong given that the orthodox position (as stated in *Stilk*) is that performance of an existing contractual duty is not sufficient consideration. Richards argues that, whilst it was certainly true that the claimant's price was too low, the court should not rewrite a contract simply because the claimant had made a bad bargain.
- On appeal, the defendant indicated that it hoped to gain three benefits from the payment of the additional sums, namely (i) getting the job finished, (ii) avoiding the penalty clause, and (iii) avoiding the trouble of engaging new carpenters. The defendant admitted that it gained a factual benefit. However, it also argued that these were not benefits recognized in law due to the principle in *Stilk*.
- The Court of Appeal did not accept this defence. It stated that in the absence of economic duress or fraud, where one party of a contract agrees to convey an advantage over and above his contractual duty in order to ensure that a contract is completed on time, or that as a result obtains some other benefit or avoids a disbenefit, the obtaining of the benefit can amount to consideration.

Analysis of Williams

- This case has been criticized on a number of grounds. Firstly, it seems to completely overturn the principle set out in *Stilk* that performance of the original contract is insufficient consideration. However, Glidewell LJ stated that 'If it be objected that the propositions above contravene the principle in *Stilk v Myrick*, I answer that in my view they do not: they refine and limit the application of that principle, but they leave the principle unscathed, e.g. where B secures no benefit by his promise.' It has been contended that Glidewell LJ went beyond mere refinement or limitation.¹⁶

¹⁵ [1990] 1 All ER 512 (CA).

¹⁶ See e.g. R Hooley, 'Consideration and the Existing Duty' (1991) JBL 19, 26.

Glidewell LJ recognized as benefits, that which the defendant would have gained or avoided if the original contract had been performed according to its terms.

- In *Stilk v Myrick* the captain gained similar benefits. As a result of the captain's promise the ship reached its destination and he was relieved of the time, trouble and expense of making alternative arrangements to get the ship there. These were benefits directly akin to those listed by Glidewell LJ but were ignored by Lord Ellenborough in *Stilk*. To recognize such benefits in *Williams v Roffey* severely emasculates the principle in *Stilk v Myrick*. Some commentators have even argued that following *Roffey*, the principle in *Stilk* remains in name only.¹⁷
- It has been argued that is not logical to extol consideration as a vital, fundamental element of contract law and then go on to treat it with contempt, which is what happened in *Roffey*. As has been forcibly pointed out elsewhere,¹⁸ a promise to do no more than perform what one has already agreed to do under a contract has never, at least under classical contract law, been adequate consideration to enable the enforcement of a promise by the other party to pay more. In *Roffey*, the Court tells us that this is now adequate consideration, because it confers a 'practical benefit' on the party agreeing to pay. This is not to say, necessarily, that freely given promises which do provide benefit should never be enforceable, but consideration is not the best doctrinal resource to enable such enforcement, which, if it is considered desirable, must be considered to be an exception to the doctrine of consideration.
- On the above analysis Glidewell, Russell and Purchas LJ's judgments in *Williams v Roffey* could be regarded as incompatible with *Stilk v Myrick*. In fact if the only fresh benefit received by the defendant was 'a bird in the hand,' or at least the comfort of their own perception of a greater chance of completion, then it is difficult to think of many occasions when a promisor does not receive a factual benefit by the promisee's performance of, or promise to perform, an existing contractual duty. At the very least, by mere confirmation that the duty will be performed, the promisor may feel more certain that the promisee would do the thing bargained for and he is relieved of the burden of seeking alternative performance. If the courts recognize such a benefit, then the doctrine of consideration loses much of its effect in policing the bargain.
- However, this could be beneficial. In *Williams v Roffey*, the claimant's financial difficulty and anticipated failure to complete the project was a change in circumstances from those that existed at the time of the original contract. Taking this into account the additional or fresh benefit received by the defendant in *Williams v Roffey* was, that in the light of such an anticipated failure, the defendant had flats completed in return for its promise to pay additional sums to the claimant.
- Although the reasoning adopted by Glidewell, Russell and Purchas LJ in *Williams v Roffey* lies open to criticism, there are reasons to commend the decision itself. It provides a more flexible approach than to be found in the principle set out in *Stilk v Myrick*. The Court of Appeal showed greater awareness of the practical benefit that may arise out of a renegotiation than the courts had hitherto been willing to accept. Adams & Brownsword argue that the decision indicates that the courts may be guided less by technical questions of consideration than by questions of fairness, reasonableness and commercial practicality.¹⁹
- In *Roffey* it was the defendant company who approached the claimant with the promise of extra cash. There was clearly no duress involved, at least, no duress in the legal sense. If the defendant freely chose to promise more money to ensure that the job was finished and the claimant carpenter carried on working in reliance on this promise, it seems only fair that the defendant should be held to that promise. The claimant is not asking the court to protect him from his original bad bargain, only to

¹⁷ See for example, NJ Hird and A Blair, 'Minding Your Own Business – *Williams v Roffey* Re-Visited: Consideration Reconsidered' (1996) JBL 254, 255.

¹⁸ M Chen-Wishart, 'Consideration, Practical Benefit and the Emperor's New Clothes,' *Good Faith and Fault in Contract Law* (OUP 1995) 123-150.

¹⁹ J Adams & R Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 MLR 536, 537.

protect him from the subsequent position he finds himself in because of his reliance on the defendant's promise. However, the doctrine of consideration should not be used for this purpose. However, there is a doctrine that protects those who rely on the promises of others, namely the doctrine of promissory estoppel. Unfortunately, promissory estoppel could not be used by the claimant in this case as it cannot be used to found a cause of action (promissory estoppel can be used as a shield, but not a sword).

- Russell LJ in particular regretted the fact that the Court was unable to give due consideration to the effect of the doctrine of estoppel. If promissory estoppel could have been used in *Williams*, it would have produced the same result, but in a much more acceptable way than was achieved by using the doctrine of consideration.

Subsequent cases

- Subsequent cases have looked at the rule in *Williams*, notably the case of *Re Selectmove Ltd.*²⁰ Here, the taxpayer company owed the Inland Revenue substantial amounts of income tax and National Insurance contributions. At a meeting in July 1991 between the company's managing director and the collector of taxes, the managing director suggested that the company should repay the tax and NIC as they became due and the arrears at a rate of £1,000 per month from 1st February 1992.
- The collector was unsure about the proposal and said he would seek the approval of his superiors and get back to the company if it was unacceptable. The company heard nothing further until 9th October 1991 when the Revenue demanded payment of the arrears in full. Eventually, the Revenue served a statutory demand and presented a winding up petition.
- The Court of Appeal considered whether the July arrangement gave rise to a binding agreement. There were many issues here, but the relevant one was whether the arrangement would fail for lack of consideration.
- Counsel for the company argued that following *Williams* a promise to perform an existing obligation can be good consideration provided there are practical benefits to the promisee. The Court of Appeal rejected this argument. It stated that the principle in *Williams* applied to promises to pay more, but not to promises to pay less. Note especially the judgment of Peter Gibson LJ. It has therefore been stated by several academics (e.g. Poole) that the courts have sought to place a limit on the *ratio* of *Williams*.

Conclusion

- Conclude based on the arguments made. There is little doubt that *Williams* has had a notable effect upon the doctrine of consideration and has significantly weakened the rule established in *Stilk v Myrick*. However, it could legitimately be argued that the principle established in *Williams* does little more than to give effect to commercial reality. However, while the result may be accepted by many, there is little doubt that the reasoning employed by the Court is highly suspect and many believe that it has substantially eroded the doctrine of consideration in those cases where it applies. That subsequent courts have placed limits on the *ratio* of *Williams* could be regarded as evidence of this.

²⁰ [1995] 2 All ER 531 (CA).