

The Formation and Enforceability of Contracts Under English Law: A Critical Analysis of the Essential Elements

Module: LAW1001 Contract Law

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1. INTRODUCTION

A contract is defined by Treitel as "an agreement giving rise to obligations which are enforced or recognised by law."¹ The apparent simplicity of this definition belies the considerable doctrinal complexity that governs contract formation under English law. For a contract to be legally binding, the courts require the satisfaction of several distinct elements: a valid offer, unequivocal acceptance, consideration, intention to create legal relations (ITCLR), legal capacity, and sufficient certainty of terms.² The absence of any one of these elements may render a putative agreement unenforceable, a consequence with significant commercial and personal implications. This essay critically analyses each of these formation requirements in turn, evaluating the case law that has shaped their development and examining the tensions and policy considerations that explain apparent anomalies in judicial reasoning. The analysis demonstrates that while the elements of formation are conceptually distinct, they are deeply interrelated in practice, and that English contract law reflects an ongoing judicial balancing of commercial utility against principled doctrinal consistency.

01 Offer A definite promise to be bound on specified terms. Distinguished from invitation to treat by objective intent.	02 Acceptance Unequivocal assent to the terms of the offer. Communicated to offeror; postal rule applies where post is authorised.	03 Consideration Something of value moving from the promisee. Must be sufficient but need not be adequate.	04 ITCLR Presumed in commercial agreements; rebutted in domestic/social contexts. Objective test applied.	05 Capacity Minors bound only by contracts for necessities. Statutory protection under Minors' Contracts Act 1987.
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2. OFFER AND INVITATION TO TREAT

An offer must be a definite expression of willingness to be bound on specified terms upon acceptance, distinguished from a preliminary step in negotiations known as an invitation to treat (ITT). The distinction is of

fundamental importance: acceptance of a genuine offer creates a binding contract, whereas purported acceptance of an ITT merely constitutes a counter-offer which the original party remains free to reject.

English law has established through a line of consistent authority that the display of goods in a shop window or on a shelf does not constitute an offer but only an ITT. In *Fisher v Bell*,³ a shopkeeper who displayed a flick knife in his window with a price tag was charged with offering such a weapon for sale contrary to the Restriction of Offensive Weapons Act 1959. The Divisional Court acquitted the defendant on the ground that the display was an ITT, not an offer for sale, and accordingly the statutory offence was not made out. This reasoning was affirmed in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*,⁴ where the Court of Appeal confirmed that self-service display shelves constitute an ITT; the customer makes an offer by presenting goods at the till, which the retailer may then accept or reject. The policy rationale is sound: requiring a retailer to sell every item displayed to every customer who expressed willingness to buy would produce commercially intolerable results, particularly where stock levels are limited.

Similarly, advertisements and price lists are generally construed as ITTs rather than offers. In *Partridge v Crittenden*,⁵ an advertisement in a periodical offering bramblefinches for sale was held to be an ITT, with the court observing that it would be absurd to hold that an advertiser was bound to sell to every respondent irrespective of available stock. Price lists circulated by merchants also fall within this category, as confirmed in *Grainger & Son v Gough*.⁶

A significant and instructive exception arises in cases of unilateral offers — promises made to the world at large or to a class of persons, conditional upon the performance of a specified act. The landmark decision of *Carlill v Carbolic Smoke Ball Co*⁷ establishes the governing principles. The defendants advertised that they would pay £100 to any person who contracted influenza after using their smoke ball in the prescribed manner, and deposited £1,000 with a bank to demonstrate

sincerity. The Court of Appeal held that this was a binding unilateral offer to the world, accepted by Mrs Carlill's performance. The court rejected the argument that an offer cannot be made to the world; Bowen LJ observed that it is a continuing offer which anyone can accept by complying with the condition.⁸ The requirement of communication of acceptance is waived by implication in unilateral contracts, since the offer itself dispenses with notification.⁹

1. **Edwin Peel**, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 1.

2. **Ewan McKendrick**, *Contract Law: Text, Cases and Materials* (9th edn, OUP 2020) ch 2.

3. *Fisher v Bell* [1961] 1 QB 394 (DC).

4. *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 (CA).

5. *Partridge v Crittenden* [1968] 1 WLR 1204 (DC).

6. *Grainger & Son v Gough* [1896] AC 325 (HL).

7. *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA).

8. *ibid* 268 (Bowen LJ).

9. *ibid* 262 (Lindley LJ).

3. ACCEPTANCE

Acceptance must be an unequivocal assent to the precise terms of the offer. Any purported acceptance that introduces new terms or modifies existing ones operates as a counter-offer, which destroys the original offer and cannot thereafter be accepted. This principle was established in *Hyde v Wrench*,¹⁰ where the defendant offered to sell a farm for £1,000. The claimant counter-offered £950, which was rejected. The claimant then purported to accept the original £1,000 offer, but no contract was held to exist; the counter-offer had extinguished the original offer. It should be noted that a mere request for information does not constitute a counter-offer and does not destroy the original offer, although drawing the line between a genuine inquiry and an implicit rejection has generated difficult cases.

The general rule is that acceptance takes effect when and where it is communicated to the offeror. For instantaneous communications such as telephone, telex, fax, and email, the contract is concluded when the acceptance is received at the offeror's place of business. In *Entores Ltd v Miles Far East Corp*,¹¹ Denning LJ held that a contract made by telex is completed when the acceptance is received by the offeror. The House of Lords affirmed this reasoning in *Brinkibon Ltd v Stahag Stahl*,¹² though Lord Wilberforce cautioned that no universal rule governs communications sent outside business hours or through automated systems, and that the answer in such cases must depend on the intentions of the parties, the terms of any offer, and the circumstances generally.

3.1 The Postal Rule

An important exception to the general communication requirement is the postal rule, established in *Adams v Lindsell*.¹³ Where the parties have contemplated post as the means of acceptance, acceptance takes effect at the moment the letter is posted, not when it is received. The

consequence is that a contract may be formed, and the offeror's power to revoke extinguished, even before the offeror has any knowledge of the acceptance — and indeed even if the acceptance letter is subsequently lost in the post. The rule was affirmed in *Henthorn v Fraser*,¹⁴ where the Court of Appeal held that the postal rule applies wherever it is within the reasonable contemplation of the parties that the post might be used as a means of communication.

The rationale for the postal rule has been debated. One view is that the Post Office acts as the offeror's agent, so that delivery to the Post Office constitutes delivery to the offeror. A more persuasive commercial justification is that the rule protects the offeree who has done everything required of them — and should not be prejudiced by postal delays outside their control — whilst placing the risk of postal failure on the offeror, who chose to make an offer by post and can protect themselves by expressly requiring actual receipt of acceptance. However, the rule produces anomalies: it cannot be reconciled with instantaneous communication cases, and its application to email and electronic contracting remains unsettled.

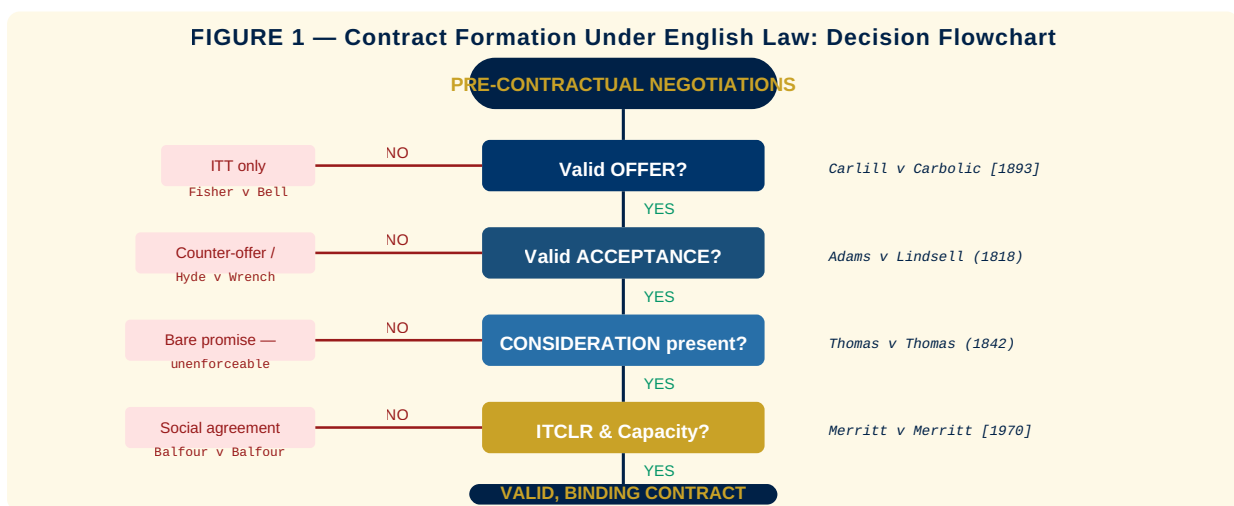


Figure 1: Simplified contract formation decision flowchart under English law. Each element must be satisfied for a valid, binding contract to arise. Key cases are noted at each decision node. Source: Author's original design, based on McKendrick (2020) and Peel (2015).

1. *Hyde v Wrench* (1840) 3 Beav 334.
2. *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327 (CA) 332 (Denning LJ).
3. *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH* [1983] 2 AC 34 (HL) 42 (Lord Wilberforce).
4. *Adams v Lindsell* (1818) 1 B & Ald 681.
5. *Henthorn v Fraser* [1892] 2 Ch 27 (CA) 33 (Lord Herschell).

4. CONSIDERATION

Consideration is the element of English contract law that most clearly distinguishes binding agreements from gratuitous promises. The classic definition is that of Lush J in *Currie v Misa*: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."¹⁵ The House of Lords in *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd* defined it as "an act or forbearance of one party, or the promise thereof, which is the price for which the promise of the other is bought."¹⁶ The effect of the doctrine is that a promise unsupported by consideration — a bare promise — is unenforceable at common law, though it may be enforceable in equity under the doctrine of promissory estoppel.

Table 1: Key Rules of Consideration — Governing Principles and Leading Cases (OSCOLA)

Rule	Principle	Leading Case
Adequacy	Consideration need not be adequate — courts will not assess the commercial value of the bargain	<i>Thomas v Thomas</i> (1842) 2 QB 851 ¹⁷
Sufficiency	Consideration must be sufficient — it must be something of legal value, however trivial (e.g. chocolate wrappers)	<i>Chappell & Co Ltd v Nestlé Co Ltd</i> [1960] AC 87 (HL) ¹⁸
Past Consideration	Acts completed before the promise was made cannot constitute consideration for that promise	<i>Re McArdle</i> [1951] Ch 669 (CA) ¹⁹
Implied Request Exception	Past act at promisor's implied request, with understanding of payment, may be good consideration	<i>Lampleigh v Braithwait</i> (1615) Hob 105 ²⁰
Part Payment	Payment of lesser sum cannot satisfy a debt for a greater sum (rule in <i>Pinnel's Case</i>)	<i>Foakes v Beer</i> (1884) 9 App Cas 605 (HL) ²¹
Practical Benefit	Practical benefit to promisor from performance of existing duty may constitute consideration	<i>Williams v Roffey Bros</i> [1991] 1 QB 1 (CA) ²²

4.1 Adequacy and Sufficiency

The courts do not enquire whether consideration is adequate — that is, whether the exchange is commercially fair or reasonable. This reflects the laissez-faire principle that competent parties are free to strike

whatever bargain they choose, and the courts will not re-write it for them. In *Thomas v Thomas*,¹⁷ a widow's promise to pay £1 per year and maintain the property was held sufficient consideration for the grant of a house; the motive of carrying out her husband's wishes was irrelevant, but the nominal £1 payment was valid consideration. The court's distinction between motive and consideration is important: a widow's desire to honour her husband's wishes, or a party's wish to be generous, is not consideration, whereas an act or forbearance of legal value — however trivial — suffices. This point was vividly illustrated in *Chappell & Co Ltd v Nestlé Co Ltd*,¹⁸ where chocolate bar wrappers, which Nestlé threw away after receipt, were held to form part of the consideration for the supply of gramophone records, because the defendants required them and derived commercial benefit (promotional value) from their collection.

4.2 Past Consideration

Consideration must not be past — an act entirely completed before the promisor's promise is made cannot, in general, constitute consideration for that promise, since the promisor has conferred a gratuitous benefit and then simply attached a promise to an already-completed transaction. In *Re McArdle*,¹⁹ work done on a house before a written promise of payment was signed was held to be past consideration, rendering the promise unenforceable. The exception established in *Lampleigh v Braithwait*²⁰ — confirmed in *Pao On v Lau Yiu Long*²³ — allows that where an act was performed at the promisor's express or implied request, and it was understood between the parties that payment would be made, a subsequent promise to pay a specified sum is enforceable, as the earlier request and the later promise form part of a single transaction.

4.3 Part Payment and *Williams v Roffey*

The rule in *Pinnel's Case*, affirmed by the House of Lords in *Foakes v Beer*,²¹ holds that payment of a lesser sum in satisfaction of a debt for a greater sum cannot discharge the greater debt: the creditor receives no additional legal benefit, and the debtor provides no additional consideration. The rigidity of this rule was significantly moderated in

Williams v Roffey Bros & Nicholls (Contractors) Ltd.²² The Court of Appeal held that where a party promises to make additional payment to secure performance of an existing contractual duty, and that party thereby obtains a practical benefit — such as avoiding a penalty clause or the expense of engaging a substitute contractor — that practical benefit constitutes good consideration, provided the promise was not induced by economic duress. The decision attracted academic controversy: it was difficult to reconcile with *Foakes v Beer*, a House of Lords authority, and raised questions about whether 'practical benefit' dissolves the requirement of consideration in any negotiated settlement. The Supreme Court addressed the relationship between *Williams v Roffey* and consideration for contractual variations in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,²⁴ though did not fully resolve the tension.

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1. *Currie v Misa* (1875) LR 10 Ex 153, 162 (Lush J).
 2. *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd* [1915] AC 847 (HL) 855 (Lord Dunedin).
 3. *Thomas v Thomas* (1842) 2 QB 851, 859 (Patteson J).
 4. *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87 (HL).
 5. *Re McArdle* [1951] Ch 669 (CA).
 6. *Lampleigh v Braithwait* (1615) Hob 105.
 7. *Foakes v Beer* (1884) 9 App Cas 605 (HL).
 8. *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 15 (Glidewell LJ).
 9. *Pao On v Lau Yiu Long* [1980] AC 614 (PC).
 10. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24.

5. INTENTION TO CREATE LEGAL RELATIONS

Even where offer, acceptance, and consideration are all present, a contract will not be binding unless the parties intended their agreement to be legally enforceable. The courts apply an objective test, asking whether a reasonable person would have understood the parties to intend legal relations — not what each party subjectively believed. English law operates two rebuttable presumptions depending on the context of the agreement.

5.1 Domestic and Social Agreements

In domestic and social contexts, the presumption is that the parties did *not* intend to create legal relations. The leading authority is *Balfour v Balfour*,²⁵ where a husband promised his wife an allowance of £30 per month while she remained in England for health reasons. When the marriage broke down, the wife sought to enforce the promise. The Court of Appeal held it unenforceable: agreements between spouses living amicably are not generally intended to give rise to legally binding obligations; if every such arrangement were enforceable, the courts would be overwhelmed with domestic disputes. However, the presumption is rebuttable, as demonstrated by *Merritt v Merritt*.²⁶ In that case, a husband and wife who had already separated signed a written agreement transferring the matrimonial home to the wife on condition that she paid the remaining mortgage. The Court of Appeal enforced the agreement: the objective circumstances — a separated couple, negotiating at arm's length, reducing their agreement to writing — rebutted the domestic presumption and demonstrated genuine intention to be legally bound.

5.2 Commercial Agreements

In a commercial context, the presumption is reversed: the parties are presumed to intend their agreement to be legally binding. However, this presumption too is rebuttable by clear evidence to the contrary. In *Rose*

& *Frank Co v Crompton Bros*,²⁷ a commercial agency agreement contained an "honourable pledge clause" expressly stating that it was not a legal agreement and would not be subject to legal jurisdiction. The House of Lords upheld this clause and held that the arrangement was a binding gentleman's agreement only, demonstrating that commercial parties may exclude legal enforceability by unambiguous language. The threshold for doing so is high, however: vague disclaimers or aspirational language in commercial documents will generally not suffice.

6. CAPACITY AND CERTAINTY OF TERMS

Legal capacity is the requirement that contracting parties must have the legal power to make binding agreements. The primary category of concern at law is contracts made by minors — persons under the age of eighteen at common law. The general rule, established in *Nash v Inman*,²⁸ is that contracts with minors are voidable at the minor's option, with the exception of contracts for necessities — goods or services that are suitable to the minor's condition in life and to their actual requirements at the time of sale. In *Nash v Inman*, a Cambridge undergraduate with an ample supply of clothing could not be required to pay for waistcoats ordered from a Savile Row tailor, since the clothing was not a necessary given his circumstances. The Minors' Contracts Act 1987 modified the common law position to allow courts to require a minor who has repudiated a contract to return any property still in their possession, and to enforce guarantees of a minor's obligations.

Certainty of terms is the final formation requirement: the courts will not enforce a contract whose essential terms are too vague or incomplete to be given legal effect. A court will, however, use its best efforts to construe and give effect to an agreement where possible, and will imply terms from trade custom, a course of dealing, or statute where the parties have left gaps. The principle is that courts seek to uphold commercial agreements rather than defeat them on technical grounds of uncertainty, subject to the limits of legitimate implication.

7. CONCLUSION

The formation of a binding contract under English law requires the simultaneous satisfaction of five elements — offer, acceptance, consideration, ITCLR, and capacity — each of which has generated its own complex body of case law. Several observations emerge from this analysis. First, the objective approach adopted by the courts throughout — in determining whether an offer has been made, whether acceptance has been communicated, whether the parties intended legal relations — reflects a preference for certainty and transactional security over the subjective intentions of the parties. Second, the doctrine of consideration, whilst principled in its basic formulation, has been strained by commercial reality, most notably in *Williams v Roffey Bros*, where judicial recognition of practical benefit as consideration acknowledged that the traditional formulation poorly served the needs of business relationships that evolve and require renegotiation. Third, the ITCLR requirement demonstrates that English law calibrates its intervention by context: it presumes enforceability in commerce and non-enforceability in domestic life, but applies an objective test in both settings that permits the presumption to be displaced by the facts. Taken together, the doctrine of formation reflects a common law system that is simultaneously principled and pragmatic — anchored in doctrinal categories while adapting through incremental case-by-case development to meet the demands of a changing commercial environment.

1. *Balfour v Balfour* [1919] 2 KB 571 (CA).

2. *Merritt v Merritt* [1970] 1 WLR 1211 (CA).

3. *Rose & Frank Co v Crompton Bros* [1925] AC 445 (HL).

4. *Nash v Inman* [1908] 2 KB 1 (CA).

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