PROBLEMS OF INDEFINITENESS IN THE FORMATION OF CONTRACTS FOR THE SALE OF GOODS

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There are important consequences which result from the distinction between an offer, which gives the offeree the ability to create a contract by acceptance, and a preliminary proposal which is merely the first stage in a process of negotiation which may or may not lead to the formation of a contract. The purpose of this article is to use the initial stages of the negotiating process in order to illustrate the ways in which indefiniteness of expression creates uncertainties as to a party's intention. Where A's initial communication is directed to B[1] and not to the general public, the court may be faced with a difficult problem where A does not make his intention clear. In the absence of any assistance from statements by A that he intends, or does not intend, to make an offer, the court is faced with the task of determining A's intention by a process of '... interpretation in the light of all the surrounding circumstances'.[2]

There is obviously a much greater difficulty here for the court than when it has to deal with such 'standard situations' as advertisements, price lists and displays of goods. It is clear that, in these situations, the court will apply a rule of law without reference to A's intention.[3] Although this article is not concerned with communications which are directed to the general public it may be observed that, whilst emphasis is placed upon the standard situations in the text-books, the cases falling within those categories really provide no guidance to the solution of problems which occur where the communication is directed to an individual. Indeed, it is suggested that the reverse ought to be the position. Rather than placing all situations in the category of an invitation to treat where A's communication is directed to the general public, the courts ought to determine A's intention as a question of fact in each case.

It is proposed to consider the problems in the following way —

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1 In the following discussion, 'A' will be used to designate the proposer or offeror and 'B' will be used to designate the person to whom the proposition or offer is made.

2 I *Corbin on Contracts*, (1963) at p. 67.

3 *Fisher* v. *Bell* [1961] 1 Q.B. 394, at p. 399, *per* Lord Parker C.J.; *Partridge* v. *Crittenden* [1968] 1 W.L.R. 1204, at p. 1209, *per* Ashworth J.; *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.* [1952] 2 Q.B. 795. Affd., on appeal, [1953] 1 Q.B. 401.

I. Expressions of Intention by A.

II. 'Interpretation' by the Court. Problems relating to —
A. Incompleteness.
B. Indefiniteness.

III. A Consideration of the Circumstances Surrounding A's Communication.

I. *Expressions of Intention by A.*

A can make it clear in his initial communication to B that he intends making an offer or, alternatively, that he does not intend this and there appears to be no reason why effect should not be given to these expressions of intention. Where A expresses his intention merely to open negotiations, by the use of such phrases as 'without obligation' or 'subject to agreement',[4] it is likely that the court would more easily accept this as an expression of A's intention to begin negotiations than they would if A had used the word 'offer' for example and it was argued by B that this showed an expressed intention to make an offer. The reason for this would be that the court would take the view that it is very unlikely, although as we shall see not impossible, that A would intend to make an offer with his initial communication. In other words, unless there are other factors present, the court would not interpret the word 'offer' in its technical sense and hold that A had made an offer.[5]

However, the court ought to be satisfied that A intended to make an offer where his communication, in addition to the use of the word 'offer', also contains a complete and precise statement of terms. Where A communicates with B in these terms it is difficult to see why he did so unless he intended to make an offer. In *Philp & Co.* v. *Knoblauch*,[6] for example, the plaintiff wrote to the defendant in the following terms, 'I am offering today Plate linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41s. 3d., usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply.' Apart from a precise statement of terms, the plaintiff's reference to the

4 It is well established that when A uses such expressions as 'subject to agreement' that he is not intending to make an offer; see *Masters* v. *Cameron* (1954) 91 C.L.R. 353. See also *John Howard & Co. Ltd.* v. *J. P. Knight Ltd.* [1969] 1 Lloyd's Rep. 364 for another example of the operation of the principle.

5 See, for example, *Clifton* v. *Palumbo* [1944] 2 All E.R. 497 (the size and complexity of the proposed deal was an important factor). *Spencer* v. *Harding* (1870) L.R. 5 C.P. 561 and *Partridge* v. *Crittenden* [1968] 1 W.L.R. 1204. The last two cases related to 'standard situations' and it is suggested that the use of the word 'offer' would not be sufficient by itself to show A's intention to make an offer. Where A uses the weaker expression, such as 'we quote', it is even more unlikely that this would be held to be an offer. Where, however, such words as 'offer' and 'quote' are contained in a communication by A which is in reply to one from B the position may be different.

6 [1907] S.C. 994. See also *Duveen Bros.* v. *Countess of Pembroke* (1897) 13 T.L.R. 509 and 554, on appeal.

defendants as 'buyers' and the request for a reply[7] would be regarded as important indications of an intention to make an offer. Where the word 'offer' is used but there is not a complete or definite statement of terms as in *Philp & Co.* v. *Knoblauch*,[8] whether the court would give that word its technical meaning would depend upon the same factors which are now going to be considered under the heading of 'Interpretation by the Court'.

II. *'Interpretation' by the Court.*

Where A does not express his intention, the court is faced with the task of 'interpreting' what A has said in the light of the circumstances surrounding his communication to B. The two arguments which are likely to be advanced, as showing that A did not intend to make an offer, are in the first place that his communication was incomplete or secondly that it was expressed in an indefinite fashion. In relation to the second, the argument may be expressed in different ways; either the degree of indefiniteness shows that A is merely negotiating, or, the vagueness is such that even though A may have intended to make an offer, and B may have accepted it as such, the court cannot give effect to the parties' intention because it cannot determine with sufficient certainty what that intention is.

It is submitted that it is important to distinguish the problem of incompleteness from that of indefiniteness. Where A's communication is incomplete but the court is satisfied that he intended to make an offer the task of the court will involve the process of interpretation in the broad sense of filling the gaps in A's communication and thereby giving effect to the intention to contract. Where there is vagueness in A's communication the court's task of interpretation involves giving a sufficiently definite meaning to the words used.

It may be observed that both in the case of incompleteness, where the court fills the gaps, and that of vagueness, where it holds that it is of such a character that A did not intend to make an offer, the court is giving effect to A's intention, as interpreted by the court, whereas the intention of the parties to contract is defeated where the court holds that it cannot discover what the parties' intention is.

A. Incompleteness.

It is reasonable to say that the more terms of importance A's communication fails to mention the more likely is it that he did not intend

7 Unless it is held that the words are not intended to be words of contract: see *Willis* v. *Baggs and Salt* (1925) 41 T.L.R. 453 ('orders to be acknowledged by return.'). A request for an acceptance within a specified time may also indicate an intention to make an offer — see Schlesinger, *Formation of Contracts*, (1968) Vol I, at p. 332 and the consideration of the use of the phrase 'for immediate acceptance' in American law.

8 [1907] S.C. 994.

to make an offer but merely to begin the process of negotiation.[9] Conversely of course where A's communication states a price and refers to a specific quantity of goods without any qualification it is difficult to see any reason why A should frame his communication in this way unless he intended to offer the goods for sale and *Philp & Co.* v. *Knoblauch*[10] is a good example of this.

Where there are gaps in A's communication, an alternative argument that may be advanced is that although an offer may have been intended and accepted the gaps are such that the parties' obligations cannot be determined with sufficient completeness. In relation to this argument, it is submitted that the court will usually[11] be able to fill gaps where it is satisfied that the parties intended to contract. There is, therefore, little force in this argument.

Returning to the argument that the incompleteness of A's communication shows that he only intended to begin negotiations, it is submitted that no rigid formula can be applied to every case whereby it can be said because of the presence of particular gaps, or their absence, that A must have intended merely to begin negotiations or that he intended to make an offer. Much will depend upon the particular facts and the circumstances surrounding each case. To take an extreme example, A's communication to B may express a willingness 'to supply you with some cases of fruit'. On the face of it, this is a preliminary inquiry because of the almost total lack of important terms. However, if there is evidence before the court that A has sold his apples to B in this way for the last thirty years and that both parties are perfectly familiar with the quantities supplied and the price which B pays and have never had any problems relating to deliveries or methods of payment there is clearly a perfectly good contract here. It is important therefore to remember that evidence of a trade custom or previous course of dealing is really part of the contract between A and B and may clearly show that A intended to make an offer even though what passes between A and B is incomplete.

In the absence of evidence of this nature, it is submitted that, with the normal commercial contract, A would not be held to have intended to make an offer unless he has provided at least for the price term and also specified a particular quantity of goods. It has already been said that where A phrases his communication in this fashion it is difficult to understand why he would do so unless he intended to make an offer. Whether any additional terms would be necessary to show A's intention

9 See the Comment to s. 2-204 (3) of the *Uniform Commercial Code* (U.L.A.) at p. 108, 'The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement. . . .'

10 [1907] S.C. 994.

11 It will only be in exceptional circumstances that the court will be unable to fill a gap. This would happen where the usual gap-filling technique would be impossible to apply (an attempt, for example, to use the standard of a 'reasonable quantity' of goods.).

to make an offer, apart from the price and quantity terms, would depend upon the circumstances. For example, it may be unnecessary to make a detailed reference to delivery provisions where A is selling to B who lives in the same town as A. However, B may carry on business on the other side of the world and unless A's communication contained detailed provisions relating to delivery and methods of payment in addition to the price and quantity terms the court would not hold that A intended to make an offer. Another consideration which may be relevant is the nature of the goods being sold; a matter which does not relate to the completeness of the terms but the required completeness of description of the goods.[12] There is an obvious difference between selling sacks of potatoes and selling a car (or other sophisticated machinery) and in the latter case, in order to establish that A had made an offer it would not be enough merely to show that he had simply stated that he had a car for sale. There would obviously have to be a reasonably detailed description of the vehicle. As a general guide, it may be suggested that the greater the complexity of the goods the more detailed a description will the court require before it is satisfied that A intended to make an offer.

B. Indefiniteness of Expression.

It is submitted that a distinction can be drawn between the vague phrase to which the court cannot attribute any meaning and the case where the parties have phrased terms of importance in such a way that they are capable of a variety of meanings. In the former case the court will hold, unless the meaningless phrase can be severed, that in spite of any intention to contract no agreement has been formed because that intention cannot be ascertained. With cases falling within the second category the court will hold that there is no concluded contract; usually[13] on the ground that the parties are still negotiating and have yet to agree upon a particular meaning. In the first case, the court is compelled to defeat any intention of the parties to contract but in the second case the court is giving effect to the parties' intention, as interpreted by the court.

I. *Meaningless Expressions*

With cases falling within this category,[14] the parties[15] have used a phrase to which the court cannot give meaning and, in the absence of

12 See *Gilchrist Vending* v. *Sedly Hotel* (1967) 66 D.L.R. 24 as an example of uncertainty as to the subject-matter of the contract; the granting of a licence to instal and operate 'a shuffle-board' for a period of five years.

13 But see the judgment of Lord Wright in *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston* [1941] A.C. 251, at pp. 261-273, and *British Electrical and Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd.* [1953] 1 All E.R. 94.

14 See, for example, *Davies* v. *Davies* (1887) 36 Ch. D. 359 (to retire 'so far as the law allows'), *Taylor* v. *Portington* (1885) 7 De G.M. & C. 328 (to take a house 'if put into thorough repair'). See also I *Williston on Contracts*, at p. 132 for the numerous American examples relating to the price term.

15 The phrase is usually contained in A's communication but may be found in B's purported acceptance as in such cases as *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543 and *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Company Ltd.* [1944] K.B. 12.

evidence of a trade usage or a previous course of dealing which defines such phrases as, for example, 'our usual conditions', the only hope[16] of preserving the contract is if the court can ignore the meaningless part 'without impairing the sense or reasonableness of the contract as a whole...'[17] *Nicolene Ltd.* v. *Simmonds*[18] is an interesting example of the operation of this principle. In that case there was an acceptance which included the phrase 'I assume that we are in agreement that the usual conditions of acceptance apply'. There were no 'usual conditions'[19] and as there was nothing left for future agreement the court upheld the contract and ignored the meaningless words.

There appear to be two limitations upon the principles of rejection of a meaningless phrase. In the first place, it is necessary that there should be no provision in the contract for further agreement in relation to the clause which the court is asked to strike out. Thus if the contract contained a clause that 'the usual terms of sale are to be agreed upon and will apply' or refers to 'the usual conditions of sale in a form satisfactory to us'[20] it is submitted that the court could not reject these clauses as meaningless, even though there was evidence that they never existed, because the parties have expressly provided that they are to be the subject of further negotiation.

A second limitation is stated by Denning L.J. in *Nicolene Ltd.* v. *Simmonds*,[21] referring to the meaningless phrase where 'It can be rejected without impairing the sense or reasonableness of the contract as a whole...' This appears to be a vague way of stating that this technique of upholding the contract, where the parties clearly intended to contract, can only be used where the parties' obligations are still clear and complete after the meaningless clause has been struck out as was the case

16 There may, however, be a subsequent definition by means of the conduct of the parties; see under the heading of 'A Consideration of the Circumstances surrounding A's Communication', below at pp. 268-271 for a consideration of this possibility.

17 *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543, at p. 552 *per* Denning L.J.

18 [1953] 1 Q.B. 543. See also *Lovelock* v. *Exportles* [1968] 1 Lloyd's Rep. 163 (where a meaningless arbitration clause was severed and the dispute settled by the court), *Bosaid* v. *Andy* [1963] V.R. 465 and *Barker* v. *Shakespeare* (1956) 2 D.L.R. 768 ('in the usual form'). *Cf. Hobbs Padgett & Co.* v. *J. C. Kirkland Ltd.* [1969] 2 Lloyd's Rep. 547 (a 'suitable arbitration clause') where *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543 was considered. In *Guthing* v. *Lynn* (1831) 2 B. & Ad. 232 there was a promise to buy another horse if the one purchased proved lucky. Instead of striking the whole contract down, as the court did, a more reasonable approach would have been to sever that part as a meaningless addition to an agreement to sell a horse at a specified price.

19 Where, however, the parties are familiar with the intended terms, a reference to 'usual terms' is a short-hand method of including them in the contract. The agreement will be upheld if there is evidence of a definite meaning to be attached to such phrases: see *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston* [1941] A.C. 251, at p. 273, *per* Lord Wright, referring to a 'usual' hire-purchase agreement. See also *Shamrock S.S. Co.* v. *Story & Co.* (1899) 81 L.T. 413 (the 'usual colliery guarantee'). *Cf. Summergreene* v. *Parker* (1950) 80 C.L.R. 304 (the 'usual terms of sale') where there was no evidence of these.

20 As in *Summergreene* v. *Parker* (1950) 80 C.L.R. 304.

21 [1953] 1 Q.B. 543, at p. 552.

in *Nicolene Ltd.* v. *Simmonds*[22] itself. Denning L.J. expressed the view in that case[23] that the striking out of the meaningless clause may have been an appropriate technique to have used in *British Electrical & Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd., etc.*[24] where the court described[25] the phrase used in the contract ('subject to *force majeure* conditions') as 'so vague and uncertain as to be incapable of any precise meaning', because the clause could have been severed and ignored without affecting the validity of the contract. However, it is clear that this technique could not have been used in a case like *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston*[26] because, apart from the fact that the phrase 'hire-purchase terms' is not a meaningless clause but one which is capable of a variety of meanings and the parties had still to agree upon a particular one, for the court to have attempted to strike out that clause would certainly not have left the parties' obligations clear and complete.[27]

It is submitted however that in appropriate cases, where the clause which is to be struck out does not require further negotiation, the gap which is left after the meaningless phrase has been removed ought to be able to be filled by the use of the normal gap-filling techniques which the court would use where it is faced with a gap in the contract initially. The contract, for example, may refer to the 'usual conditions' as to the time for delivery and there may be no such 'usual conditions'. It is submitted, however, that if the court is satisfied that the parties intended to deal they could strike out this phrase and deal with the matter as if there was a gap in the original contract by relating the time for delivery to the time for payment or, in the absence of a provision relating to payment, by the use of the standard of a reasonable time for delivery. This example could be multiplied but the same principle would apply to all cases where the court would fill a gap in the contract in the first place.

II. *Phrases Having a Variety of Meanings.*

Where the parties have used expressions[28] such as 'subject to *force majeure* conditions', 'subject to war clause' or 'subject to strike and lock-out clauses', unless there is evidence of a usage between the parties or a trade custom with which they are both familiar and which gives a particular meaning to these phrases, the court will be compelled to hold

22 *Ibid.*

23 *Ibid.*, at p. 552.

24 [1953] 1 All E.R. 94.

25 *Ibid.*, at p. 95.

26 [1941] A.C. 251.

27 The same is true of *Love & Stewart Co. Ltd.* v. *S. Instone and Co. Ltd.* (1917) 33 T.L.R. 475, and *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Co. Ltd.* [1944] K.B. 12, although perhaps to a lesser extent of incompleteness in the sense that in these two cases the 'usual' principal obligations were complete.

28 It has already been noticed in note 15, *supra*, that although the indefiniteness is usually found in A's communication, it may also occur in B's reply as in *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543 or *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* [1944] K.B. 12.

that no contract was concluded. It is clear, however, that these expressions are not meaningless and the difficulty facing the court is that they are capable of a variety of meanings and, in the absence of evidence of a course of dealing or custom known to the parties, there is no basis upon which the court can prefer one meaning to another and say that this is what the parties must have intended. It has already been said that the court will usually approach difficulties of this type by deciding that there is no concluded contract because the parties are still negotiating and have yet to agree upon a particular meaning for the expression they used. In this way the court uses the parties' intention, as interpreted by it, and does not defeat it which may be so with cases coming within the category of the 'meaningless phrase'.

It is interesting to observe, however, that there are examples where the phrase has a variety of meanings and it has been held that the parties are still negotiating but an alternative ground was, as Lord Wright said in *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston*,[29] that the 'language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention'.

The judgment of Lord Wright in *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston*[30] is a good illustration of the use of the two grounds of decision.[31] On the one hand, from the language used it was impossible to ascertain any contractual intention and, on the other hand, '... the parties never in intention nor even in appearance reached an agreement... their agreement was inchoate and never got beyond negotiations. They did, indeed, accept the position that there should be some form of hire-purchase agreement, but they never went to complete their agreement by settling between them what terms of hire-purchase were to be. The furthest point they reached was an understanding or agreement to agree upon hire-purchase terms.'

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29 [1941] A.C. 251.

30 *Ibid.*, at pp. 261-273.

31 No other member of the House used both of these grounds. Lord Russell of Killowen took the view that the respondents failed either because the term was 'uncertain' (as meaning, it is submitted, that it was capable of a variety of meanings), or, there was an essential term left for further negotiation. Viscount Simons' view, in similar terms, was that the phrase was so vaguely expressed that '...it requires further agreement to be reached between the parties before there could be a complete consensus ad idem'. Viscount Maugham stated that as no one could agree 'upon the true construction of the agreement', it was impossible to hold that a contract had been formed. It was only Lord Wright, therefore, who based his decision on the ground that the parties' contractual intention could not be ascertained because the language used was 'so obscure and so incapable of any definite or precise meaning'. It is of interest to notice that the Court of Appeal, in *Ouston* v. *Scammell* [1940] 1 All E.R. 59, had no difficulty in upholding the contract although there was complete diversity as to the form of the hire-purchase arrangements suggested by the three members of the Court of Appeal. See I *Corbin on Contracts*, (1966) 405, n. 12 approving of the Court of Appeal decision.

In *British Electrical & Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd., etc.*[32] the court applied both principles as Lord Wright had done. In this case the issue before the court was whether the use of the phrase 'subject to *force majeure* conditions', which the court interpreted as meaning 'clauses' or 'stipulation' and not 'circumstances' or 'contingencies', would prevent the court from holding that an enforceable contract had been concluded. The court held that it did and applied both principles. In the first place the court said[33] '... the whole sentence is so vague and uncertain as to be incapable of any precise meaning...' Secondly,[34] that as there was evidence that there were a variety of *force majeure* conditions in the trade, the case came within the line of authority of which *Love & Stewart Ltd.* v. *S. Instone & Co. Ltd.*[35] is an example and within the principles stated in *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston*[36] and *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Co. Ltd.*[37] 'Those cases seem to me to establish that, notwithstanding that the parties may have thought and acted on the basis that a contract existed between them, no *consensus ad idem* will be held to exist where there still remains to be negotiated and agreed the exact form of the clauses or conditions referred to by the parties.'[38]

Before looking at *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Company Ltd.*[39] it is of interest to notice again the comment which Denning L.J. made upon *British Electrical & Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd., etc.*[40] in *Nicolene Ltd.* v. *Simmonds*:[41] 'If the true construction of the documents in that case was that an essential term had yet to be agreed, it would fall within the cases to which I have referred,[42] but if the true view was that the exempting clause was agreed but was "so vague and uncertain as to be incapable of any precise meaning" (which is how McNair J. described it) I should have thought that it could be ignored without impairing the validity of the contract. It was clearly severable from the rest of the contract whereas the term in *G. Scammell & Nephew Ltd.* v. *Ouston* was

32 [1953] 1 All E.R. 94.
33 *Ibid.*, at p. 95.
34 *Ibid.*, at p. 96.
35 (1917) 33 T.L.R. 475.
36 [1941] A.C. 251.
37 [1944] K.B. 12.
38 [1953] 1 All E.R. 94, at p. 96.
39 [1944] K.B. 12.
40 [1953] 1 All E.R. 94.
41 [1953] 1 Q.B. 543, at p. 552.
42 These were *Love & Stewart Co. Ltd.* v. *S. Instone & Co. Ltd.* (1917) 33 T.L.R. 475, *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston* [1941] A.C. 251 and *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Company Ltd.* [1944] K.B. 12.

not.' Apart from the point relating to the severability of the meaningless clause, which has already been considered, the importance of this passage is that it draws the distinction between the phrase which has a variety of meanings and the one to which the court cannot ascribe any meaning at all.

In *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.*[43] the court applied *Love & Stewart Co. Ltd.* v. *S. Instone and Co. Ltd.*[44] where the House of Lords held that no contract had been concluded where there was an agreement upon the terms of importance including one that there should be a strike and lock-out clause ('all offers are subject to strike and lock-out clauses') but they had not agreed upon a particular clause when negotiations broke down. Like *Love's* case,[45] *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.*[46] is an example of where the contract contains an expression which is capable of a variety of meanings and from this point of view the case is also similar to *G. Scammell and Nephew* v. *H. C. and J. C. Ouston.*[47] There are, however, two points of additional interest in *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Company Ltd.*[48]

In the first place, the phrase 'subject to war clause' was contained in a purported acceptance of an offer.[49] It was held that no contract had been formed because, as the content of the clause contained in the counter-offer could take many forms, it required further agreement between the parties. It may be noticed that where there is, as in the *Bishop & Baxter* case,[50] an attempted acceptance of an offer and that acceptance is conditional and the offeror has not agreed to the provision then there is no contract for lack of agreement and not because of 'indefiniteness'.[51]

The second point of interest in this case is that the parties had performed obligations under their arrangement and before the dispute arose

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43 [1944] K.B. 12.

44 (1917) 33 T.L.R. 475.

45 *Ibid.*

46 [1944] K.B. 12.

47 [1941] A.C. 251.

48 [1944] K.B. 12.

49 *Cf.* the clause in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston* [1941] A.C. 251 where an acceptance contained the phrase, 'this order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years'. The better view, as expressed by Viscount Maugham (at p. 255), is that this was not a conditional acceptance but merely a recording of what had already been agreed upon.

50 [1944] K.B. 12.

51 See I *Corbin on Contracts,* (1966) 406 n. 13 disapproving of the *Bishop & Baxter* case and arguing that 'the conditional acceptance had been assented to and the seller had disregarded the absence of a definite 'war clause'.

(which had no connection with the war clause[52]) they obviously intended to deal and clearly thought they were bound to do so. It is quite clear that performance of obligations is very important evidence[53] of an intention to contract and it may also assist in filling gaps in the contract[54] and help in the interpretation of words used in relation to the type of performance to be rendered.[55] Apart from this, a separate contract may be implied from conduct as happened in *Bishop & Baxter's* case[56] where the buyer was required to pay for the goods which had been delivered even though no other contract was formed.[57]

However, it seems clear that performance cannot cure or help the form of indefiniteness which is found in cases like *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Company Ltd.*[58] where the clause refers to unusual circumstances which do not normally arise in the normal course of performance. It would only be if a particular problem relating to the clause had arisen (which it did not do in any of the cases considered), and parties selected a particular clause, that performance would help. It is more likely to occur in cases with factual situations similar to *G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston*[59] where the parties have selected a particular form of hire-purchase.

III. *A Consideration of the Circumstances Surrounding A's Communication.*

The words of A's communication to B do not exist in complete isolation and it is submitted that where any of the following circumstances surround A's communication they ought to be used by the court as a source of interpretation —

I. The Conduct of the Parties Prior to A's Communication to B.
   A. A previous course of dealing between the parties.
   B. Is A's communication in response to a communication from B?

II. The Conduct of the Parties Subsequent to A's Communication to B.
   A. The conduct of B alone.
   B. The interpretation and performance by the parties.

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52 *Cf. G. Scammell and Nephew Ltd.* v. *H. C. and J. C. Ouston* [1941] A.C. 251, *British Electrical & Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd.* etc. [1953] 1 All E.R. 94, *Love and Stewart Co. Ltd.* v. *S. Instone & Co. Ltd.* (1917) 33 T.L.R. 475. The disputes in these three cases were quite unrelated to the particular clauses.

53 Discussed later, at pp. 268-271, under heading of 'The Circumstances Surrounding A's Communication'.

54 Where, for example, no time for delivery is fixed and the seller delivers the goods or no quantity is specified and there is delivery by the seller.

55 See I *Corbin on Contracts,* (1966) at p. 407.

56 [1944] K.B. 12.

57 B's remedies would be limited to the restitution of the property or damages for the breach of a contract which was created by conduct.

58 [1944] K.B. 12.

59 [1941] A.C. 251.

I. The Conduct of the Parties prior to A's Communication to B.

A. *A previous course of dealing between the parties.*

The point has already been made when looking at the incompleteness of A's communication[60] that evidence of a previous course of dealing between the parties is really part of their contract. Evidence of this nature may not only help in filling gaps in A's communication and show his intention to make an offer but may also enable the court to determine the meaning of the expressions which A uses. In this respect it will be seen that evidence of this nature may be necessary not only where the meaning of the words is not clear but also where the meaning is apparently clear but it is argued that a special meaning attaches to A's words.

(a) Incompleteness.

An example has already been given[61] of extensive incompleteness in A's communication to B where he expressed a willingness to sell some fruit without stating any more terms and it was suggested that the evidence of a previous course of dealing, which can establish all the important terms such as type and quantity, price,[62] delivery and payment provisions, is really part of the contract between A and B and can be used to show that A intended to make an offer.

A trade custom is not created by previous conduct between A and B but by the conduct of other people who carry on a similar business to the parties but it is suggested that for the present purpose there is no need to draw a distinction between the two[63] and that evidence of a trade custom, with which both parties are familiar, can be used to supplement A's communication in exactly the same way as can evidence of a previous course of dealing. Each is an important 'surrounding circumstance' showing A's intention.

(b) Indefiniteness.

Where evidence of a trade usage or course of dealing is available to establish the meaning of the words used in A's communication it may serve two different purposes. In the first place, it may be used to give meaning to expressions which are seemingly clear and, secondly, to give a definite meaning to expressions which, on the face of it, are too indefinite. These expressions may, as we have seen,[64] either be meaningless to the court or, alternatively, be capable of a variety of meanings.

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60 At pp. 260-262.

61 At p. 260.

62 Provided for expressly by the Sale of Goods Acts. See, for example, the *Sale of Goods Act*, (Eng.) 1893 56 & 57 Vict. c. 71, s. 8 (1).

63 A trade custom and a course of dealing are based upon the same principle of being effective through agreement between the parties, unlike a custom which is part of the ordinary law and does not depend for its force upon intention.

64 At pp. 262-268.

1. Evidence which gives a special meaning to A's words.

It may be shown that a particular word or phrase which A has used bears a particular meaning in the trade with which both parties are familiar or that these expressions have been used in previous dealings and have acquired a particular meaning. In other words, even though the expressions used by A have an ordinary meaning, and there may be no ambiguity about this, the words were intended by A to bear this special meaning when he communicated with B. This 'trade dictionary' principle, which is one of general application to the words used by the parties, has relevance to the present problem of determining whether A has made an offer. For example, A may have used the word 'offer', 'proposal' or 'quote' and he will be held to have made an offer if there is evidence of a custom in the trade of which his business is a part that this is the way in which offers are made even though there may not be a complete statement of terms. Again, evidence of a previous course of dealing may show that A offered goods in the past to B by the use of such expressions as 'we have on our hands' or 'we are interested in disposing of'. This again would be held to be an offer even though, in the absence of this evidence, A's communication would be held to be a preliminary inquiry.

2. Evidence which gives a definite meaning to A's words.

Here the object of the evidence would be to give a sufficiently definite meaning to an expression which on the face of it is too indefinite. The expression may either be indefinite in the sense of 'meaningless to the court', or indefinite in the sense of having a variety of meanings. In the absence of evidence of a trade usage or course of dealing, unless the court can strike out the meaningless clause in the way which has already been considered[65] the court will be compelled to hold that no contract was concluded because it cannot ascertain the parties' intention. However, the parties themselves may understand the phrase used, such as 'usual conditions', as referring to trade terms with which they are familiar or as the terms used in their previous contracts and a sufficiently definite meaning can be given to A's words in this way.

Where the expression used by A is capable of a variety of meanings, it has already been suggested[66] that the difficulty facing the courts here is that there is no basis upon which the court can prefer one meaning to another. It was also suggested that the difficulty would not have occurred if there had been evidence before the court in *Love and Stewart Co. Ltd.* v. *S. Instone and Co. Ltd.*,[67] for example, that the parties had used a particular strike and lock-out clause in their previous dealings or that

65 At pp. 262-264.
66 At p. 264.
67 (1917) 33 T.L.R. 475.

a single meaning could be given to such expressions as *force majeure* conditions, or 'war clause' by the presence of evidence of a trade usage or previous course of dealing. There would be no need for further agreement between the parties and the contract could be upheld.

B. *Is A's communication in response to a communication from B?*

It has already been suggested that where A states the quantity of goods and also the price the only reasonable interpretation is that he is making an offer to B.[68] However, it is submitted that a stronger indication of A's intention to make an offer would be shown where his communication is not volunteered but is in reply to one from B in which B has asked if A has particular goods for sale and the price at which A is prepared to sell.[69] In *Harvey* v. *Facey*,[70] however, it was held that A had not made an offer when he replied: 'Lowest price for Bumper Hall Pen, £900' to B's telegraph which had asked: 'Will you sell us Bumper Hall Pen. Telegraph lowest cash price'. The Board took the view that A had only replied to the second matter relating to the price and had not made an offer to sell to B. It is submitted with respect, however, that this is not a reasonable interpretation to put upon A's reply and where A does respond in this fashion any reasonable person would say that he is making an offer.

II. The Conduct of the Parties Subsequent to A's Communication to B.

A. *The conduct of B alone.*

In the usual 'reward cases' or instances such as *Carlill's* case,[71] A has requested B to do something in return for his promise and B's subsequent conduct shows that he relied upon A's promise. However, in normal commercial dealings A may have made no such request or promise and yet B may have understood A's communication to be an offer and have relied upon it.[72] If A's communication satisfies the

68 See I *Williston on Contracts*, (1957) 64: 'Where the property to be sold is accurately defined and an amount stated as the price in a communication made, not by general advertisement, but to one person individually, no reasonable interpretation seems possible except that the writer offers to sell the property described for the price mentioned.'

69 The use of the word 'offer' in B's communication, when requiring a reply from A, would be an additional indication. *Cf. Boyers* v. *Duke* [1905] 2 Ir. Rep. 617: 'Please give us your lowest quotation for . . .' and the reply was held not to be an offer.

70 [1893] A.C. 552 (P.C.) Applied in *Theberge* v. *Girard* (1922) 68 D.L.R. 585, and *Kelly* v. *Caledonian Coal Co.* (1898) 19 L.R. (N.S.W.) 1. *Cf. Boyers* v. *Duke* (1905) 2 Ir. Rep. 617 where the plaintiffs wrote to the defendant canvas makers, 'Please give us your lowest quotation for 3,000 yards of canvas, 32.1/2 inches wide, to the enclosed sample, or near, and your shortest time for delivery.' The defendant replied: '. . . Lowest price, 32.1/2 inches wide, is 4.5/8d. per yard, 36 inches measure. Delivery of 3,000 yards, in 5/6 weeks'. The court held that this was not an offer but merely a quotation of terms upon which the plaintiffs might make an offer. It is submitted that this ought to have been held to be an offer. See I *Williston on Contracts*, (1957) p. 64, n. 7 for examples in American law.

71 *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

72 For example, the sending of money, arranging transport or the re-selling of the goods.

criteria relating to completeness and definiteness which have already been considered[73] then the court will agree with B that A has made an offer. If A's communication does not satisfy those criteria then it is submitted that the court will only agree with B where he can show that A knew, or had reason to know, that B understood him to be making an offer.[74] In other words, B's understanding by itself of the nature of A's communication is not a factor which the court will take into account. Although B's conduct may support his argument that he understood A to have made an offer, it is only if A knew, or had reason to know, the sense in which B understood his communication that B's understandings will become relevant. Where there is evidence of A's knowledge[75] it is submitted that this is sufficient and the court will not concern itself with whether B's understanding is reasonable.

It remains to consider the ways in which the court can assist B once it is established that A knew, or had reason to know, that B thought that he (A) had made an offer, where A's communication is either incomplete or indefinite. If there are gaps in A's communication, most of these can be filled by the court in the way which has already been noticed.[76] Where, in exceptional circumstances, the court cannot fill the gap,[77] then any contractual remedy for B would depend upon the parties' conduct creating another contract of which A is in breach.[78] Apart from this, B's remedy would be limited to a claim for the return of any money or property transferred to A. This would not be a satisfactory remedy where B has expended other money or involved himself in other contracts such as forward sales of the goods. Where A's communication is indefinite (either meaningless or having a variety of meanings), in the absence of evidence of a previous course of dealing or trade usage which will make the meaning sufficiently definite, the court in both cases will be compelled to hold that there is no contract unless the phrase can be severed as meaningless. Again B's only contractual remedy would be one which arose out of a separate contract created by the conduct of A and B[79] or, alternatively, limited to the return of any money or property transferred to A.

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73 At p. 259.

74 *Hutton* v. *Watling* [1948] 1 All E.R. 803 is a good illustration of the operation of this principle although the case was not concerned with sale of goods.

75 See 3 *Corbin on Contracts*, (1963) at p. 66: 'How is a court to find out whether either party knew or had reason to know the intent or understanding of the other? Knowledge of such a factor may be proved by any evidence that is ordinarily admitted to prove a state of mind. This would include the party's own admissions, his actions from which knowledge may reasonably be inferred, and the usages and meanings of third persons with which he probably was familiar.'

76 At pp. 261-262.

77 Quantity, for example, in the absence of evidence of the previous course of dealing or subsequent conduct.

78 See *British Bank for Foreign Trade* v. *Novinex* [1949] 1 K.B. 623 as an excellent illustration of the operation of this principle, although there were no gaps in the contract.

79 See again *British Bank for Foreign Trade* v. *Novinex* [1949] 1 K.B. 623.

B. *Interpretation and performance by the parties.*

1. Subsequent interpretation by A and B.

Another source for the interpretation of the words used by A is any evidence of a subsequently agreed definition of the terms used. Again, A's communication may contain gaps and the parties may subsequently define the terms and fill the gaps. It is reasonable to say that this evidence should be accepted because the parties are not re-making their contract but '... it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made'.[80] This subsequently agreed interpretation by A and B may not only help with A's communication but the fact that A has subsequently taken the trouble to act in this way will tend to indicate that he was not merely negotiating with his initial communication to B.

2. Subsequent performance by A or B (With the knowledge and approval of the other).

> The determination of the intention of the parties and the interpretation of their words may both be largely affected by their conduct in the course of a transaction. The fact that one of them, with the knowledge and approval of the other, has begun performance is nearly aways evidence that they regard the contract as consummated and intend to be bound thereby. It may also aid in the interpretation of their words with respect to the character of the performance to be rendered.[81]

It may be observed that the subsequent conduct of A and B may occur after A's communication without there having been any previous dealings between the parties. However, it could be part of a continuous relationship between A and B. Whether this is the case or not, it serves exactly the same purpose as evidence of a previous course of dealing by helping to make A's communication sufficiently complete or sufficiently definite.

Before noticing the ways in which performance can assist the court, two points may be made. In the first place, it is important to remember that the performance of a definite promise cannot make an indefinite promise enforceable[82] unless the two are related. For example, a delivery of goods will not assist where the term relating to the mode of payment has been omitted or is expressed in an ambiguous fashion. However, if the time for payment is not provided for or the term is expressed in too vague a fashion then delivery of the goods will fix the time for payment because usually they are concurrent obligations. Apart from related obligations of this nature, however, the performance of A's definite promise will not help but will only give rise to a claim for the return of any money or property transferred as a result of the performance.

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80 3 *Corbin on Contracts*, (1963) at p. 249.

81 I *Corbin on Contracts*, (1963) at p. 407.

82 Although it may give rise to a non-contractual remedy where services are rendered or property transferred.

Secondly, it has already been noticed[83] that performance did not help with cases such as *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Co. Ltd.*[84] and it was suggested[85] that this was because of the nature of the particular clause which provided for a contingency which was quite outside the parties' normal contractual obligations. The only way in which performance would have helped in that case would have been if the parties had been faced with a disruption of their contract by virtue of war and had selected a particular clause. The same is true of *Love & Stewart Co. Ltd.* v. *S. Instone and Co. Ltd.*[86] and *British Electrical & Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd. etc.*[87] and only if the parties had selected a relevant clause would performance have helped.[88]

How will performance help? Apart from performance being important evidence showing that both parties thought there was a contract, it is submitted that there are two ways in which it will assist the court in determining whether A's communication was an offer.[89] In the first place, where A's communication is incomplete, the conduct may fill the gaps. Where, for example, A expresses a willingness to sell some goods at a stated price but does not specify the quantity and then delivers a particular quantity in response to B's expression of willingness to buy at that price it is clear that A's performance has filled the gap and there is a complete and enforceable contract. In the absence of this conduct, the court could not have filled this gap unless there was evidence of a previous course of dealing between the parties. Secondly, A may express a willingness to sell a particular quantity of goods to B but no mention is made of the price term. B may then forward a sum of money which A does not question and in this case it is B's conduct that fills the gap in A's communication. Conduct of this nature, to which objection is not taken by the other party, could fill a gap of any nature in A's communication. The effect of this would be not only to show that A and B clearly intended to deal but also to make A and B's obligations sufficiently complete. Clearly evidence of this nature is a very important source for giving effect to the parties' intention.

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83 At p. 259.

84 [1944] K.B. 12.

85 At p. 259.

86 (1917) 33 T.L.R. 475.

87 [1953] 1 All E.R. 94.

88 Performance relating to the particular clause is more likely to have occurred in a case like *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston* [1941] A.C. 251 where the clause related to the method of financing the deal as this is a problem which occurs in all contracts.

89 See another purpose in *Brogden* v. *Metropolitan Ry. Co.* (1877) 2 App. Cas. 666 where the execution of a document was contemplated but this was never done. The conduct of the parties showed that a contract had been formed.

It is equally important for the purposes of determining what the parties understood by the indefinite expressions used by A.[90] The meanings which the parties, by their conduct, attach to A's words are obviously important sources of their interpretation. Evidence of this nature may enable the court to uphold a contract which it could otherwise not have done because it would have been unable to determine the parties' contractual intention.

Conclusions

The initial stages of the negotiating process have been used to illustrate problems of indefiniteness. The cases show that the courts deal with difficulties of this character by treating each case as raising a question of fact as to A's intention. We observed that this is an approach which has not been adopted where A's communication is directed to the general public. It was submitted, however, that to apply an inflexible rule is an unsatisfactory method of dealing with the problem and that a more attractive approach is to ascertain A's intention in the light of the circumstances of the particular case.

In relation to the cases dealing with communications to an individual, the only serious complaint is where it has been held that A did not intend to make an offer in spite of the fact that A's communication, being one in response to a communication from B, contained a statement of the important terms. It was suggested that this is an unreasonable interpretation. Apart from this, it is submitted that the principles established by the cases are generally satisfactory.

90 See the Comment to s. 2-208 of the *Uniform Commercial Code* (U.L.A.), 126: 'The parties themselves know best what they have meant by their words or agreement and their action under that agreement is the best indication of what that meaning was'.