

4. ACCEPTANCE

4.1 Definition and capacity

[2-62] An acceptance of an offer is 'an indication, express or implied, by the offeree made whilst the offer remains open and in the manner requested by that offer of the offeree's willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer.'⁹¹

[2-63] The general rule is that only the offeree has capacity to accept an offer.⁹² However, where the offer is irrevocable because it is the subject of an option agreement,⁹³ an assignee of the option agreement⁹⁴ may accept the offer.

4.2 Determining the existence of acceptance

[2-64] As with the case of an offer, it is not always easy to determine whether an acceptance has been effected. The court examines the communications between the parties to determine, on an objective basis, whether a final and unqualified assent to the terms of the offer has been expressed. A communication often fails to take effect as an acceptance because it is qualified or because it attempts to introduce new terms.

Illustration

Jackson. J applied for shares in a company. The directors allotted shares to him. In their notification of allotment, the company stated: 'The amount to be paid to the bank on or before the 1st of October next, or the shares will be forfeited.' J did not answer the letter and did not pay. Subsequently when the company was wound up J denied that he was a holder of the shares. **Held:** for J, the letter of notification of allotment was not an effective acceptance of J's offer to take shares because it introduced a new term.⁹⁵

[2-65] Not every addition to the expression of an offer will render an acceptance ineffective. If, for instance, the addition is merely a clarification of an implied term or intention, a statement of the offeree's understanding of the offer, a request for indulgence (without making indulgence a condition) or an offer of indulgence, the acceptance is effective notwithstanding any departure from the expression of an offer.

91 *Halsbury's (HK)* para [115.051] (footnotes omitted).

92 *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, [1953] 2 WLR 596 (CA, Eng) (offer made to a company prior to its incorporation could not be accepted by its promoter).

93 See [2-142] et seq, below.

94 See Ch 14 on assignment.

95 *Jackson v Turquand* (1869–1870) LR 4 HL 305 at 312 (HL).

Illustrations

(1) *Global Tankers*. Plaintiff had a claim against Defendant arising out of a prior contract. After preliminary negotiations, the parties reached an oral settlement agreement that was subject to confirmation by telex. Defendant telexed Plaintiff: '[T]his is to confirm our offer of £120,800 in full and complete settlement of the claim outstanding for this vessel' Plaintiff replied, '[W]e accept your offer of £120,800 on the understanding that payment to us will be promptly effected.' **Held:** Plaintiff's telex was an effective acceptance because Plaintiff's reply was merely setting out Plaintiff's understanding of Defendant's telex and 'was not introducing any new term'.⁹⁶

(2) *Harris' Case*. H applied for shares in a company. The directors of the company allotted shares to him and notified him by letter posted on 15th March 1866 and received by H on 17th March. This letter had the following paragraph: 'As the interest warrants attached to the shares bear interest from 21 March 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at ten per cent per annum.' On 16th March, H posted a letter of withdrawal. **Held:** the company's acceptance was unqualified and effective. James LJ said, '[T]he statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent, but it is that he ought to pay exactly on the 21st of March, 1866, and that by way of indulgence the directors have told the bankers, that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorised to receive payment, but not otherwise.'⁹⁷

[2-66] A request for title deeds and a reference to preparation of conveyancing documents does not impose new terms. They are, rather, only consistent with an acceptance of the offer to sell.

Illustration

Yau Fook Hong. In an application submitted to the Government, Developer offered to surrender certain Letters B in settlement of debts owed by other members of its group of companies to the Government (a 'Letter B' was a written promise by the Government known as a land exchange entitlement made upon the compulsory acquisition of land and entitling the owner of the land acquired to the future grant of building land, when available, at a price calculated by reference to values prevailing at the date of the compulsory acquisition and otherwise upon the terms set forth in the Letter B). Developer further undertook 'to surrender [its] entitlements and, if so required, to deliver

96 *Global Tankers Inc v Amercoat Europa NV* [1975] 1 Lloyd's Rep 666 at 672 (QBD).

97 *Re Imperial Land Co of Marseilles, Harris' Case* (1872) LR 7 Ch App 587 at 593 (CACh).

up to the Government the original letters in respect of the lots specified in such land exchange entitlements and to execute a memorandum of release in such form as may be required by the Government releasing the Government from all costs, claims and demands whatsoever arising out of or in connection with the surrender of the said lots'. The Registrar General replied on behalf of the Government: 'I have been requested by [another department] to prepare the relevant memorandum of release for your execution. However, prior to execution of the same, your title to the abovementioned land exchange entitlements has to be verified. In this respect I shall be grateful if you would at your earliest convenience forward all relevant title deeds ... for the purpose of title checking ... Upon receipt of confirmation as to your title from District Lands Officer, North, I will arrange for execution of the memorandum of release by you.' **Held**, the Government effectively accepted Developer's offer: '[T]he request for the title deeds and the reference to preparation of the memorandum of release are only consistent with the acceptance by the Government of the offer made by the [Developer] in the application form. In conformity with time-honoured conveyancing practice and in conformity with the terms of the application form the preparation and execution of a memorandum of release followed upon the creation of a binding agreement and the checking of title followed and did not precede the constitution of a contract.'⁹⁸

[2-67] The test is whether or not a reasonable person in the position of the offeror would regard it as introducing a new term into the bargain, and not as a clean acceptance of the offer.⁹⁹

4.3 Counter-offer

[2-68] If the communication purporting to be an acceptance contains new terms, or if an offeree not purporting to accept, returns to the offeror with a proposal of different terms, the communication from the offeree constitutes a counter-offer which terminates the original offer and would then be open for acceptance by the original offeror (who then becomes the offeree).¹⁰⁰

Illustration

Capacious Investments. Plaintiff owned various lands in the New Territories which were resumed by Defendant government. Prior to resumption, Defendant offered compensation of more than \$21 million 'in full and final settlement of all and any claims' which Plaintiff might have against Defendant in respect of the resumptions. Plaintiff replied purporting to accept the offer,

98 *Yau Fook Hong Co Ltd v Attorney General* [1988] 1 HKLR 573 at 576, [1988] HKCU 338 (PC).

99 *Global Tankers Inc v Amercoat Europa NV* [1975] 1 Lloyd's Rep 666 at 672 (QBD), at 671.

100 Eg [2-227] below.

but adding that it reserved its right to claim interest. Defendant subsequently refused to pay the \$21 million. **Held:** for Defendant. Plaintiff's acceptance of Defendant's offer had been transformed into a counter-offer by the inclusion of a new term concerning interest. Defendant never having accepted the counter-offer, there was no agreement to pay the money.¹⁰¹

[2-69] A counter-offer is for all intents and purposes an offer (and a rejection of the original offer) and subject to the same rules that apply to offers.

4.4 Further negotiations subsequent to acceptance

[2-70] Businessmen often negotiate without regard to either legal niceties or to the classification of various statements made or acts done in the course of negotiations. In many cases, negotiations may continue although legally the parties have already reached an agreement as the result of an offer being accepted. If these subsequent negotiations also result in an agreement, the original agreement can be considered varied by the new agreement (provided, of course, all the requirements of *consensus ad idem*, consideration, and *animus contrahendi* are satisfied in respect of the subsequent agreement). If the subsequent negotiations break down, however, the original agreement remains valid and unaffected.

Illustration

Perry. Plaintiff and son were owners of a public house. On 23 February 1915, Defendant by its secretary wrote to Plaintiff as follows: 'At a meeting of directors held today I was instructed to write and offer you seven thousand pounds for freehold premises, goodwill and possession.' Plaintiff replied by letter on 3 March: 'I am obliged for your offer of seven thousand pounds for above of 23rd of February last. Please note I now accept same, viz. £7000.' Plaintiff did not indicate that the agreement was subject to the conclusion of any formal contract. Plaintiff's solicitor then sent a draft contract to Defendant's solicitor, but the parties failed to agree on the contents of this document. Plaintiff sued Defendant for specific performance of the contract constituted by the two letters. Defendant contended that the two letters were only negotiations. **Held:** for Plaintiff. The two letters constituted a concluded agreement, unaffected by the failure to reach an agreement on the documentation.¹⁰²

4.5 How acceptance is effected

[2-71] Acceptance of an offer is generally effected by communication of assent to the offeror. When permitted by the terms of the offer, acceptance may be effected by conduct which comes to the offeror's notice or by performance. Exceptionally,

101 *Capacious Investments Ltd v Secretary for Justice* [2001] 1 HKC 219 (CFI).

102 *Perry v Suffields Ltd* [1916] 2 Ch 187 at 192 (CA, Eng). See also *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, [1962] 2 WLR 525 (CA, Eng).