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## Forming Contracts without Offer and Acceptance, Lord Denning and the Harmonisation of English Contract Law

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### Summary

English contract law has traditionally used the requirement of a matching offer and acceptance as the means of identifying agreement. A more flexible approach was proposed by Lord Denning in several cases in the 1970s, but firmly rejected by the House of Lords in *Gibson v Manchester City Council* [1979] 1 WLR 294. More recently there have been some suggestions of a revival of Lord Denning's approach, culminating in the decision of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14, [2010] 1 WLR 753. This article analyses this development, discussing the implications for both practice and theory of a more flexible approach to formation of contracts. It also draws comparisons with the approach taken in other European jurisdictions and the United States. It concludes that provided the development is kept within identifiable limits, it provides a welcome harmonisation of English law with that of other jurisdictions.

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## Introduction

It is axiomatic in classical English contract law that the process of finding “agreement” is carried out by identifying an offer and matching acceptance. There has been little challenge to this fundamental element of the classical theory of contract, but an alternative approach has now received the tacit support of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14, [2010] 1 WLR 753, in which the judgment delivered on behalf of the court analyses the formation of a contract, and the terms in which it was made, without any reference to “offer and acceptance”. At the same time, the Court of Appeal has continued to demonstrate the strength of the orthodox analysis (in, eg, *Pickfords v Celestica* [2003] EWCA Civ 1741, *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89). If there is to be more than one method of identifying contractual agreement, this has the potential to cause problems for contract theory and more particularly for those involved in advising on contractual disputes. Where the dispute focuses on the question of whether an agreement was reached, and if so on what terms, certainty in the methods adopted by the courts make the life of the legal adviser that much easier. Where there is more than one potential analysis that may be adopted, the adviser is left trying to predict the method that a court is likely to use.

The approach taken here is to analyse the relevant case law leading up to the *Müller* decision, and then consider the implications of that decision for both legal practitioners, and contract theory.

## Lord Denning and the rejection of “offer and acceptance”

The starting point for any consideration of alternatives to the “offer and acceptance” model inevitably starts with Lord Denning, and his well-known statement in the Court of Appeal in *Gibson v Manchester City Council* [1978] 1 WLR 520, where, in discussing whether Mr Gibson’s correspondence with the Council had led to a binding contract, he commented unfavourably on the attempts to decide which letter was an offer and which an acceptance. In his view (at p 523):

[I]t is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the text books it has been the custom to do so: but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material.

This was a view that he had expressed previously in two cases in 1977. First, in *Port Sudan Cotton Co v Chettiar* [1977] Lloyd’s Rep 5, where (although the case was actually decided by all three members of the Court of Appeal on the traditional basis, including the application of the postal rule to the posted “acceptance”) Lord Denning commented that (at p 10):

I do not much like the analysis in the text-books for inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to

examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards.

In both this case and in *Gibson* he cited *Brogden v Metropolitan Railway* [1877] 2 AC 666 in support of this proposition. Similarly, later in the same year, in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp* [1979] 1 WLR 401 (the case was actually heard in 1977, though not reported until 1979), he commented that in many “battle of the forms” cases (at p 404):

[O]ur traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date... The better way is to look at all the documents passing between the parties — and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points...

On that occasion he also came close to a traditional offer and acceptance analysis in support of his conclusion, and the other members of the Court of Appeal agreed, adopting the traditional approach.

Neither *Port Sudan Cotton Co v Chettiar* nor *Butler Machine Tool v Ex-Cell-O* was appealed, but *Gibson v Manchester City Council* was, and when the case reached the House of Lords, Lord Denning’s unorthodoxy was firmly rejected by Lord Diplock in the following terms ([1979] 1 WLR 294, at p 297):

My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these.

On the facts of the case, there was no need to depart from the traditional analysis. Note that even in relation to “exceptional cases” Lord Diplock is not explicitly saying that the offer and acceptance analysis should not be used – merely that it may be more difficult to fit the agreement within this framework.

It may be that he had in mind, though the case is not mentioned in the judgments, the comment of Lord Wilberforce in *New Zealand Shipping Co v Satterthwaite, The Eurymedon* [1975] AC 154. Lord Wilberforce noted that many everyday transactions are not easily accommodated within an analysis based on offer, acceptance and consideration – for example (at p 167):

sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

Lord Wilberforce's point is that despite the fact that these situations are not easily analysed in terms of the traditional concepts, that difficulty is not in itself a reason why the offer and acceptance analysis should not be applied. If that is the case, then in a situation which can more easily be "fitted into the slots", such as negotiation by exchange of correspondence (as in both *Butler Machine Tool v Ex-Cell-O* and *Gibson v Manchester City Council*), there could be no good reason to depart from the traditional approach.

### The authority of *Brogden v Metropolitan Railway* [1877] 2 AC 666

Before moving on to some cases which seem to suggest a revival of the Denning approach, it is worth considering whether the case that he regularly cited as authority, *Brogden v Metropolitan Railway*, does actually provide support for his position. The case is one that appears in the contract texts as authority for the proposition that acceptance can take place by conduct – in this case by placing orders for coal in response to an "offer" contained in a draft contract that had not previously been "accepted". Interpreted in that way, it does not represent a departure from the traditional analysis into offer and acceptance. Is it possible to read into it a more flexible approach to the identification of an agreement?

The first judgment, with which Lord Hatherley and Lord Gordon agreed, was delivered by Lord Cairns, the Lord Chancellor. It is true that he starts by stating a principle in broad terms to the effect that (at p 672):

[T]here may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form.

This does look very similar to the Denning approach. The rest of his judgment, however, focuses much more on the question of whether the terms set out in the draft contract had been accepted. This draft indicated an agreement (at p 680):

subject only to approbation, on the part of the company, of the additional term which [Mr Brogden] had introduced with regard to an arbitrator, that approbation was clearly given when the company commenced a course of dealing which is referable in my mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs. *Brogden & Co.* in the supply of coals.

Although the first section of this passage focuses on "agreement" or "approbation" in a general way, the final words indicate that Lord Cairns is looking for an action which indicates "acceptance" of what has been proposed. The other judgments adopt a similar approach. Even Lord Blackburn, who expresses some hesitancy about the outcome (because he was uncertain whether the conduct of the railway company was sufficiently unequivocal to indicate acceptance), states the relevant test as being (at p 693):

If the parties have by their conduct said, that they act upon the draft which has been approved of by Mr. Brogden, and which if not quite approved of by the railway company, has been exceedingly near it, if they indicate by their conduct that they accept it, the contract is binding.

Here we have the explicit recognition of the possibility of acceptance by conduct which is the principle for which the case is mostly commonly cited as authority. These passages do not indicate any significant departure from an orthodox offer and acceptance approach to agreement. The overall impression of the judgments, however, is that the court took the view that the way in which the parties behaved in relation to the supply and delivery of coal, and their communications in relation to this, indicated that they assumed they were dealing on the basis of the terms in the draft contract, and so the court should treat this as evidence that they had actually formed a contractual agreement on those terms. To that extent, the overall impression of the parties' actions, rather than specific conduct, is what is most significant. This is perhaps closer to what Lord Denning had in mind, but also has resonance with the fact that in the recent case law discussed below, the fact that a transaction has been performed, rather than being executory, is regarded as a reason to allow a more flexible approach to the identification of agreements.

The conclusion on *Brogden* must be that, while it does contain some passages which support a broad approach to deciding when parties have reached an agreement, it is also entirely consistent with orthodox analysis.

We now turn to consider whether more recent case law can be said to be indicating a more fundamental departure from orthodoxy.

## A Change of Direction?

As we have seen, the House of Lords' decision in *Gibson*, and in particular the comments of Lord Diplock, seemed to put an end to any analysis of the formation of contracts not centred on identifying an offer and acceptance. There has, however, been a recent revival of the Denning approach (or at least something very like it), in particular in the form of the Supreme Court decision, *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14, [2010] 1 WLR 753. On the other hand, as has been noted above, there are also recent decisions from the Court of Appeal (as well as High Court decisions such as *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 and *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 2531) which adopt the traditional analysis. Where does this leave the current English law of contract, in relation to identifying when the parties have reached sufficient agreement?

The starting point for a consideration of the recent developments, which may involve a revival of Lord Denning's approach, is to be found in the judgment of Steyn LJ in *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25. The plaintiffs (Trentham) were the main contractors on a building contract. They entered into negotiations with the defendants (Archital), for sub-contracts to supply and install doors, windows, etc. The work was done, and paid for, but when the plaintiffs tried to recover a contribution from the defendants towards a penalty which the plaintiffs had had to pay under the main contract, the defendants denied that a binding contract had ever been formed. There had been exchanges of letters, and various telephone conversations, but there was no matching offer and acceptance. In particular, there was a dispute as to whose standard terms should govern the contract. The trial judge held that there was a contract, in that the defendants, in carrying out the work, had accepted Trentham's offer – in other words, acceptance by conduct (as in *Brogden v Metropolitan Railway*). The defendants appealed. The only full judgment was delivered by Steyn LJ, with whom the other two members of the court agreed. Steyn LJ

agreed that there was a contract here. In reaching this conclusion, he started by stating four basic points which he considered relevant to the case:

- (a) The approach to the issue of contract formation is “objective”, and so does not take account of the “subjective expectations and unexpressed mental reservations of the parties” (at p 27). In this case, the relevant yardstick was “the reasonable expectations of sensible businessmen”.
- (b) In the vast majority of cases, the coincidence of offer and acceptance represents the mechanism of contract formation, but “it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance” (citing in support *Brogden v Metropolitan Railw; New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* and *Gibson v Manchester City Council*, none of which provides clear authority for the proposition).
- (c) The fact that a contract is executed, rather than executory, is of considerable importance – it will almost certainly preclude, for example, an argument that there was no intention to create legal relations, or that the contract is void for vagueness or uncertainty.
- (d) If a contract only comes into existence during and as a result of performance of the transaction, it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance (citing *Trollope v Colls v Atomic Power Construction Ltd* [1963] 1 WLR 333).

Applying these points to the case before him, Steyn LJ concluded that the judge had sufficient evidence before him to conclude that there was a binding contract. The parties had clearly intended to enter into a legal relationship. The contemporary exchanges, and the carrying out of what was agreed in those exchanges, supported the view that there was a course of dealing which on Trentham’s side created a right to performance of the work by Archital, and on Archital’s side created a right to be paid on an agreed basis. Thus, although the trial judge had found that there was offer and acceptance, Steyn LJ was of the view that, in any event (at 29-30):

...in this fully executed transaction, a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance.

This decision had the potential to broaden the approach to contract formation beyond the straitjacket of offer and acceptance, but attracted very little attention at the time. There appears to have been no extended commentary on it in the main legal journals, and it was rarely referred to in other decisions. It was, however, relied on heavily by the trial judge in *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Co Kg (UK Productions)* [2008] EWHC 1087 (TCC). Before considering this case, however, one other High Court decision should be mentioned as indicating an approach to formation which avoids the offer and acceptance analysis. This is the decision in *Apple Corp Ltd v Apple Computer, Inc* [2004] EWHC 768 (Ch). The case concerned an agreement reached in the course of transatlantic telephone call, and the question was whether it was governed by the law of England or California. As part of that inquiry it was relevant to determine where the agreement was made. The parties argued that it was possible to analyse the conversation in terms of offer and acceptance, with the principle from *Brinkibon Ltd v Stahag Stahl* [1983] 2 AC 34 indicating that the acceptance would take place where it was received (or in this case, heard). They disagreed, however, as to who made the offer and who the acceptance. An alternative was put forward by counsel for Apple Corps that a contract could be

made in two places at the same time. The judge, having reviewed the relevant case law, concluded that there was no reason in principle why this should not be the outcome, and that it probably accorded more accurately with the reality of the parties communications (at para 42):

Where completion takes place at a distance over the telephone, it might well be possible to construct an offer and acceptance analysis (indeed, each party has sought to do so in this case) but it might equally be thought that that analysis is extremely forced and introduces a highly random element. The offer and acceptance may well depend on who speaks first and who speaks second, which is likely to be largely a matter of chance in closing an agreement of this sort. It is very arguably a much more satisfactory analysis to say that the contract was made in both places at the same time.

This clearly has similarities to the approach of Steyn LJ in *Trentham*, but like that case (at least until the *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Co Kg (UK Productions)*), the decision in *Apple Corps v Apple Inc*, has not been developed in subsequent cases. It again shows, however, a willingness of the courts to depart from the traditional analysis in order to cope with the reality of modern transactions.

It is now appropriate to return to the use of the *Trentham* decision by the High Court in *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Co Kg (UK Productions)*.

The alleged contract was for the design, manufacture, assembly, works testing, delivery, installation and commissioning at the defendant's ("Müller's") factory of equipment intended to improve the defendant's processes for the packaging of their yoghurts. There were extensive negotiations between the parties towards a contract for this work, and eventually a letter of intent was issued, on which basis the claimants started work. It was understood that the letter of intent was only to last for four weeks, and that there would be a formal contract in due course. The letter of intent expired, but though there were continuing negotiations no formal contract was ever agreed. The letter of intent had included a draft contract referring to a set of standard terms and conditions produced by the Institutes of Mechanical and Electrical Engineers and known as "MF/1". Clause 48 of MF/1 provided:

48.1. This contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other.

The work was completed, but disputes arose between the parties which led to the action by the claimants for money due, or damages. There was a direction for the trial of a preliminary issue relating to the nature of the contract, if any, between the parties. The trial judge held that there was a contract for the work to be done at an agreed price, but that this contract did not incorporate any of the MF/1 terms. In coming to this conclusion the judge relied heavily on Lord Steyn's approach in *Trentham*. The Court of Appeal, by contrast, held that, on the basis of the proper interpretation of clause 48 of the MF/1 there was no contract at all between the parties. There had been no "exchange of counterparts" and so there was no contract ([2009] EWCA Civ 26, paras 56 and 57).

In the Supreme Court Lord Clarke set out the test to be applied as follows ([2010] UKSC 14, [2010] 1 WLR 753, para 45):

Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.

Applying this approach, he then found that the parties had agreed to a contract, substantially on the MF/1 terms, as negotiated on a particular date, but that the requirement in clause 48 for a signed agreement had effectively been superseded or waived.

To the extent that the above paragraph from Lord Clarke's judgment sets out an objective approach to deciding whether there was an agreement, based on both the words and actions of the parties, this is in line with orthodoxy. Lord Diplock, however, would, we assume, have expected him to go on and identify the particular words or actions which constituted an offer from one party, and an acceptance by the other. This is what Lord Clarke fails to do. Instead he looks in detail at the evidence of the negotiations between the parties and then concludes (para 81):

Essential agreement was in our judgment reached by 5 July. None of the issues remaining after that date... was regarded by the parties as an essential matter which required agreement before a contract could be binding.

In coming to this conclusion he does not identify any specific behaviour of the parties which leads to it.

The terms settled by the 5 July were then varied in relation to issues relating to the delivery schedule at a meeting on 25 August (see para 26)(it was common ground between the parties that this variation was agreed at this meeting). Lord Clarke's conclusion is (para 85):

In short, by 25 August there was in our judgment unequivocal conduct on the part of both parties which leads to the conclusion that it was agreed that the project would be carried out by RTS for the agreed price on the terms agreed by 5 July as varied on 25 August.

Once again Lord Clarke does not identify any specific words or actions which constitute the "unequivocal conduct" to which he refers. The approach seems to be that of looking at the overall conduct between the parties and then deciding, on an objective basis, that there is an agreement. The "objective basis" in this case would seem to be that of what a reasonable third party looking at the negotiations would conclude was the outcome – that is, had the parties reached an agreement or not, and if so, what were the terms of that agreement? In this case, the Supreme Court appears to be saying that the reasonable third party would conclude that there was an agreement on the basis of the terms arrived at by the 5 July, as varied in relation to delivery on 25 August.

This approach seems very similar to that of Lord Denning in *Gibson v Manchester City*



*Council*, and *Butler Machine Tool v Ex Cell O*. At least one commentator (Richards 2011, p 36) has taken the line that it is not, categorising Lord Denning's approach in *Butler Machine Tool v Ex Cell O*, as subjective – attempting to find an actual consensus between the parties – whereas the approach in *RTS Flexible Systems v Molkerei Müller* is clearly objective. There seems no reason why Lord Denning's statements in *Butler* and *Gibson* should be read in that way. In particular, his references to taking account of the behaviour of the parties seem to indicate an objective approach. Assessing what the behaviour of a person means (as opposed to their words), can only be on the basis of that behaviour would mean to a reasonable person observing it. That is why the decision of the Supreme Court in *RTS Flexible Systems v Molkerei Müller* can be seen as an at least partial vindication of the Denning approach, which was dismissed by Lord Diplock in *Gibson*. The vindication may be only partial, in that it is not clear in exactly which situations the *Müller* approach is appropriate. This issue is discussed further, below.

### The Survival of Orthodoxy

Alongside this decision of the Supreme Court, there have been several recent Court of Appeal decisions which have adopted the “offer and acceptance” orthodoxy, including *Pickfords v Celestica* [2003] EWCA Civ 1741, *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89. A good example is the case of *Tekdata Interconnections Ltd v Amphenol Ltd*, decided couple of months prior to *RTS Flexible Systems v Molkerei Müller*. This was a classic “battle of the forms” case. The contract concerned was part of the supply chain in relation to components used in making Rolls Royce aero engines. Tekdata were the purchasers and Amphenol the suppliers. Some of the components supplied by Amphenol were said by Tekdata to have been delivered late, and to be not of a satisfactory quality. Amphenol wished to rely on terms in its standard conditions which limited or excluded liability. The parties had been in a long term business relationship, but the procedure for the contracts about which the dispute arose was that a Purchase Order was sent by Tekdata. This stated that the contract was to be on its terms and conditions. Amphenol then sent an acknowledgment which stated that its terms and conditions were to apply. No further communications were received prior to delivery and acceptance of the goods. Using the traditional analysis this would lead to the conclusion that a contract was made on the basis of a counter-offer from Amphenol, accepted by Tekdata taking delivery of the goods. The trial judge refused to apply this, relying in part on Lord Denning's analysis in *Butler Machine Tool*, and also on his view of the overall commercial relationship between the parties. He took this as indicating that the intention throughout their dealings was that Tekdata's terms would apply to the supply contracts. He saw the idea of the contract including exclusions of the type contained in Amphenol's terms as “defying common sense”. The Court of Appeal disagreed, and held that the traditional analysis should be applied. For example, Longmore LJ stated (para 21):

So, although I am not saying that the context of a long term relationship and the conduct of the parties can never be so strong as to displace the result which a traditional offer and acceptance analysis would dictate, I do not consider the circumstances are sufficiently strong to do so in this present case.

His view is that “offer and acceptance” is likely to be the most appropriate analysis in “battle of the forms” cases.

Similarly, Dyson LJ commented, that although it may not be possible to say that all battle of the forms cases should be treated in the same way (para 22):

But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the ‘traditional offer and acceptance analysis’, i.e. that there is a contract on B's conditions....

Such an approach has, in Lord Justice Dyson’s view the benefit of providing certainty “which is both desirable and necessary in order to promote effective commercial relationships”.

It seems then, that we have two conflicting approaches to formation issues:

1. The traditional approach, based on identifying words or conduct which can be labelled as “offer” (or “counter-offer”) and “acceptance” (the “*Gibson*” analysis);
2. The more flexible approach which depends on taking a broad view of the negotiations between the parties to determine whether, in the view of the reasonable third party, they appear to have reached agreement (the “*Müller*” analysis).

## Practical Problems

One of the dangers of this dual approach to finding agreement implicit in the *Müller* analysis increases the possibility of the courts deciding what they think the parties *should* have agreed, particularly if it appears that such an agreement makes commercial sense. A comparison might be drawn here with the current approach to interpretation of contractual terms, based on a willingness to move beyond the literal meaning of the words used, to take into account their “factual matrix” (see also Mitchell 2009). In *Chartbrook v Persimmon* ([2009] UKHL 38; [2009] 1 AC 1101) this approach led the House of Lords to interpret a clause in a way which clearly contradicted its grammatical meaning, because doing so led to the clause having the commercial effect which the House of Lords thought that the parties must have intended. In the formation context this might lead a court to find that the parties intended to reach a legally binding agreement (a “contract”) even though they did not express this in a way which allows the court to identify a clear offer and acceptance. In both cases this involves the court stepping beyond its traditional role of acting purely as an umpire giving effect to what appears to be the parties’ agreement (or lack of agreement), even if this involves a “bad bargain”, or may not accurately represent what one of the parties reasonably thought they were agreeing to at the time. In other words, the court adopts an interventionist role of the kind which has recently been eschewed in relation business to business contracts in the area of exclusion clauses (as in, eg *Watford Electronics v Sanderson* [2001] EWCA Civ 317, and *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570).

The second practical question is the very real one of how it is to be decided which approach is to be adopted in any particular situation. This is clearly not only an issue for judges determining disputes, but also for lawyers advising parties in the process of negotiating a contract, or who are in conflict over an alleged contract, but wish to avoid legal proceedings (see Furmston and Tolhurst 2010, para 4.138 and Rawlings 1979, 718-719). Uncertainty as to the applicable legal principles is generally

regarded as undesirable in the context of commercial transactions— the parties want to know where they stand in the event of a dispute arising (see the comments of Lord Justice Dyson in *Tekdata Interconnections Ltd v Amphenol Ltd* referred to above), and whether or not they are in a contractual relationship, and if so on what terms, will be central to that assessment. Are there any factors which might point in one direction rather than the other as indicators of which analysis should be applied?

Both *Trentham v Archital Luxfer* and *Müller* involved completed contracts. *Gibson v Manchester City Council*, by contrast, concerned a wholly executory contract. So it might be argued that the *Gibson* analysis is to be applied to executory contracts, and the *Müller* analysis to those where the work, or most of it, has been done. The first part of this premise might be correct, but the second cannot be said to be in line with existing case law, since both *Butler Machine Tool v Ex Cell O* and *Tekdata v Amphenol* involved transactions where the required work had been done, and the dispute was simply as to which set of terms was to apply. Conversely it cannot be said that the *Gibson* analysis should be used where the dispute is more about the particular terms, rather than whether there was an agreement, since the main issue in *Müller* was as to the terms under which the work had been carried out.

The most that might be said is that the *Müller* approach is only applicable to executed transactions, but that this is only a necessary and not a sufficient condition for its adoption. What the rational basis might be for such a distinction between executory and executed transactions is far from clear. In practical terms, there may well be the feeling that where a transaction has been completed it is better to try to find an agreement if at all possible, rather than to get sucked into the murky waters of claims based on restitution and quantum merit. This was the route taken by Robert Goff J in *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, but provides a rather “rough and ready” solution based simply on preventing obvious unjust enrichment, without necessarily fairly balancing the rights as between the parties in a way which would have resulted from the intended contract. (Thus in *British Steel v Cleveland Bridge* the defendants, while having to pay for what had been supplied, were unable to claim any remedy for late delivery, which would have been available to them had it been found that there was a contract.)

For the legal adviser faced with a situation where the client has completed a transaction, but there is a dispute as to whether there was a contract, or if there was what its terms were, the choice as to which approach might be favoured by the courts should the case come to trial is likely to be largely a matter of guesswork. If there is a clear trail of correspondence by letter, fax or email, then the chances are that the traditional analysis will be favoured. This is likely to include the straightforward “battle of the forms” case, where negotiation has simply taken the form of exchanges of mutually inconsistent standard terms. But in any more complex case, and particularly if the negotiations preceding the transaction have taken place at face to face meetings, or by telephone (as in *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch)), there is a far higher chance of the flexible analysis being adopted. But neither outcome can be predicted with any great assurance. This uncertainty is likely to encourage early settlement of such disputes (to avoid the “gamble” of guessing which approach a court would take), which may be desirable in terms of the reduction of litigation costs, but will mean that the chances of case arising which will give the higher courts a further opportunity of clarifying are fairly slim. It is likely that practitioners will have to live with this situation for the foreseeable future. As

will be seen below, however, this is a situation which contract lawyers have to deal with in other jurisdictions, so the problems are clearly not insuperable.

## Principle/theory

What are the implications of this, if any, for contract theory? For those who would analyse contract in terms of “reliance” the whole debate will be of marginal relevance. The question of whether or not there was an agreement, and how it should be identified, is much less significant than the question of whether one party has acted in reliance on what it reasonably thinks is being promised by the other. Nor does it seem of particular significance to supporters of the “relational” approach to contractual analysis (ie those who adopt or adapt the analysis of Professor Ian Macneil). They are more concerned with the inability of the classical law of contract to cope with the complex reality of transactional relationships, and in particular the fact that those relationships may need to change and develop over the life of a contract. The Supreme Court’s analysis in *Müller* does not move away from an approach which treats the contractual agreement as a discrete event, determining the outcome of all that follows.

For those, however, who remain wedded to the more traditional analysis, which puts the agreement at the centre of contractual doctrine, the question of how that agreement is identified is of crucial importance. In Stephen Smith’s *Contract Theory*, OUP 2004, for example, the chapter discussing the formation of contracts is simply entitled “Establishing the Agreement: the Law of Offer and Acceptance”, and Smith states (at 167) that the rules of offer and acceptance:

provide the baselines for what is, and is not, a contract. They form the core of contract law, and as such they are crucial in understanding contract law’s theoretical foundations.

Later in the same chapter (at 193) he supports what has been criticized as an unduly rigid approach to identifying contracts as being desirable in a system which assumes the parties are acting competitively rather than co-operatively, thus implicitly adhering to the traditional analysis. Similarly, Treitel (2007, 50-52) recognises only very limited exceptions to offer and acceptance as the determining factors of agreement, citing simply “multipartite agreements” (as in *Clarke v Dunraven* [1897] AC 59), “reference to a third party” (ie where a third party is asked to provide a solution to a negotiating deadlock) and “sale of land” (because of the complications surrounding agreements “subject to contract”). There is no recognition of any general alternative to the traditional analysis, which might be applied widely to executed transactions. The same limited exceptions appear in *Chitty on Contracts*, alongside a similar rejection of Denning’s approach in *Gibson v Manchester City Council* on the basis that “it provides too little guidance for the courts (or for the parties or for their legal advisers) in determining whether agreement has been reached” (Beale 2008, paras 2.110-11); a slightly more receptive approach is to be found in Michael Furmston, *The Law of Contract*, (Furmston, 2007, para 2.140).

The decision in *Müller* should mean at the least that these passages in the texts will require revising to recognise an additional exception to the list of situations where offer and acceptance does not provide the answer to whether there is an agreement. If the *Müller* decision is followed and developed in subsequent cases, then a more fundamental review of what constitutes contractual agreement may be required.

One aspect of orthodoxy that clearly remains under the *Müller* analysis is that the approach to identifying agreement remains objective. It is not concerned with whether the parties were actually in agreement, but whether their words and behaviour, regarded objectively, indicate that there was an agreement. The approach is that of “detached objectivity”, in that the behaviour of the parties is viewed through the eyes of a reasonable third party (see, for example, McLintock 1998-91; Howarth 1984). Would it appear to such a third party that the parties had reached an agreement which they intended to be legally binding? Following the orthodox approach, the court is concerned with “the phenomena of agreement” (see Furmston 2007, 39) rather than whether the parties themselves actually agreed. The change is that the relevant phenomena have broadened beyond matching offer and acceptance, to encompass any evidence that would indicate to a reasonable observer that an agreement has been reached.

## Other Jurisdictions

What can be learnt about the merits or otherwise of a more flexible approach to identifying agreement from other jurisdictions? As Beale, et al, have noted, it seems to be established that in the major European jurisdictions the existence of agreement is “normally” demonstrated by the identification of an “offer and acceptance” (Beale et al 2010, 241; see also Jansen and Zimmermann 2011, 636-637). As they also note, however, “in some cases a contract may be concluded where it is difficult to identify a clear offer and acceptance between the parties”. They refer to this as the “knock-out” rule, where it is accepted that there is a contract, but conflicting terms or conditions are omitted from the agreement, with gaps to be filled by “suppletive rules of law, usage, trade practices, etc” (at p 311). They note that this approach has been adopted in Germany, and also appears in Article 2.122 of the UNIDROIT PICC:

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates.....that it does not intend to be bound by such a contract.

A similar approach can be found in the USA, where the 2<sup>nd</sup> Restatement of the Law of Contracts states at para 22 which states that “mutual assent” to an exchange is “ordinarily” in the form of offer and acceptance, but goes on to recognise that:

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

Paragraph 2.204 of the current version of the Uniform Commercial Code (accessed at <http://www.law.cornell.edu/ucc/>, 18 January 2012), dealing with sale of goods contracts, states

- (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of an electronic agent and an individual.
- (2) An agreement sufficient to constitute a contract for sale may be found even if the moment of its making is undetermined.

- (3) Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Once again, offer and acceptance is the norm, but other ways in which agreement may be identified are recognised. This is much less restrictive than the traditional English approach, but much more in line with that adopted in *Müller*.

Finally, returning to Europe, we have the *Draft Common Frame of Reference: Book II Contracts and other juridical acts* (von Bar, C, Clive, E and Shulte-Nölke, H (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DFCR)*, (Sellier 2009)) which is largely based on the *Principles of European Contract Law* (Lando, O, and Beale, H (eds), *The Principles of European Contract Law*, Parts I and II, (Kluwer Law International 2000)). In discussing the formation of contracts, this starts by stating simply that a “contract is concluded, without further requirement, if the parties (a) intend to enter into a binding legal relationship or bring about some other legal effect; and (b) reach a sufficient agreement” (Para II. – 4:101). It then, in paragraphs 4:201 to 4:210, goes into some detail in relation to the rules regarding “offer and acceptance”, but concludes with para 4:211 which states:

*Contracts not concluded through offer and acceptance*

The rules in this Section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.

Once again, these rules recognise the importance of offer and acceptance as a route to identifying the existence of a contract, but also make it clear that in the end all that is required is “sufficient agreement”, and if that can be established by means other than offer and acceptance then the courts should be prepared to find that a contract has been made.

## Conclusions

Although it is clear that offer and acceptance will remain as an integral part of the process of identifying agreements in English contract, there is also evidence of a more flexible approach, which has been endorsed by the Supreme Court in the *Müller* decision. This flexibility has its dangers, particularly in relation to the uncertainty that may surround the question of when it is appropriate to use the *Müller* approach as opposed to the *Gibson* approach. For that reason, a clearer statement by one of the appeal courts as to when it might be appropriate to use one approach rather than the other would be helpful. As indicated above, on the basis of current case law, it seems that the *Müller* approach is most likely to be applicable to transactions which have been completed, and to those which are the result of a period of face to face negotiation, rather than simply an exchange of correspondence, or a “battle of the forms”. These limitations mean that while the *RTS* decision can be characterised as a partial vindication of Lord Denning’s views *Gibson v Manchester City Council*, it does not provide full support for his advocacy of the use of a flexible approach in all situations involving the identification of a contractual agreement.

In terms of broader issues, the *Müller* approach does not raise any fundamental problems for contractual theory, though it should lead to the rewriting of certain standard accounts of the ways in which contracts are formed in English law. It also has

what may be regarded as a positive outcome in bringing English law of contract into closer alignment with that of our European neighbours, and the United States. Although this forms no part of the *Müller* decision itself, it may in that context be seen as helpful as part of the process of “harmonising” English contract law as the process of developing a European contract law takes shape.

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