The case used in the moot was the case of *Kay v Hindmoor*. The case used in the Moot is concerned with whether an advertisement for a fur coat in a shop window was on offer or an invitation to treat. At first instance, the advertisement was held to be an invitation to treat and not an offer. However, the decision in the case was appealed against, on various grounds, and it is these appeals which formed the basis of the case for the appellant, Mrs Kay.

The first point of appeal was that the advertisement was not in fact an invitation to treat, as was first found, but was in fact an offer, open to the whole world and as such capable of acceptance by anyone fulfilling the required terms of the offer. An offer is defined as:

'An offer is an expression by one person or group of persons, or by agents on his behalf, made to another, of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain.'[1]

This shows that in order for an advertisement to be deemed an offer there must be an element of certainty/intent within the advertisement.

There are a number of cases which illustrate this point. The leading case on this matter is *Carlill v The Carbolic Smokeball Company*[2]. In *Carlill* it was held that the advertisement for the Smokeball was an offer and not an invitation to treat. This was due to a number of important factors which related to the advertisement. First, the language used showed

[1] Halsbury's Laws Direct paragraph 632
[2] [1883] 1 QB 293

an intention to be bound by the terms of the agreement i.e. the Company **will** pay as opposed to **may** pay £100. Secondly, the Company had deposited £1000 in the Alliance Bank to show their sincerity. However, the Smokeball Company maintained that the advertisement was a 'mere puff' and not intended to be taken seriously. Finally, consideration for the promise had been provided by Mrs Carlill when she used the smoke ball as directed. The point that the advertisement was an offer and not an invitation to treat was further emphasised by Lord Justice Smith:

> 'How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendant had to sell? I cannot read the advertisement in such any such way. In my judgement, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which action would lie'[3]

This means that due to the wording and implications of the advertisement it was deemed to be an offer, capable of acceptance by performance of the required terms (as Mrs Carlill did when she used the Smoke ball three times a day for almost two months) and not as maintained by the Smoke ball Company, an invitation to treat.

A further case on this point (and uses *Carlill*) is the case of *Bowerman and others v The Association of British Travel Agencies Ltd*[4]. The plaintiffs in this case wanted to recover

[3] *Carhill v Carbolic Smokeball Company*
[4] [1996] CLC 451

their insurance premium which because of the ATBA notice displayed to tour operators; they felt they were entitled to. The relevant section states:

> '(5) Where holidays or other travel arrangements have not yet been commenced at the time of failure, ABTA arranges for you to be reimbursed the money you have paid in respect to your holiday arrangements.'

This case relied heavily on the principle annunciated in *Carlill* and it was held that the advertisement was an offer and that ABTA had a contractual obligation to reimburse the cost of the plaintiff(s) insurance premium.

A final case which shows that an advertisement can be an offer is the American case of *Lefkowitz v Great Minneapolis Surplus Stores Ltd*[5]. The facts of the case are very similar to the case presented in the moot. However, in this case the claimant appealed on the grounds that, despite having fulfilled the terms of the advertisement, the defendants said the offer was only open to women. In this instance, the claimant was successful and awarded damages of $138.50. The only drawback with using this case is that it is not intended to be an authority on this matter and is merely intended to be persuasive and unlikely to be applied in Britain.

On the other hand, though, it is generally accepted that an advertisement is an invitation to treat and not an offer. An invitation to treat is defined as:

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[5] 86 NW 2d 689 (1957)

'An invitation to treat is a mere declaration of willingness to enter into negotiations; it is not an offer, and cannot be accepted so as to form a binding contract. In practice, the formation of a contract is frequently preceded by preliminary negotiations. Some of the exchanges in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat.'[6]

Often an advertisement is said to be an invitation to treat to avoid complications in the selling of goods. For example, if an advertisement was an offer then the seller would be obliged to sell that item to anyone and would not be able to refuse service. Also, a shop cannot guarantee an unlimited supply of a particular item, only the manufacturer has the power to do that.

There are a number of cases which show that an advertisement can be an invitation to treat.

The first case which emphasises that an advertisement can be an invitation to treat is *Fisher v Bell*[7]. In this case it was held that the display of flick knives for sale was merely an invitation to treat and not an offer, and as such was not contrary to section 1 subsection 1 of the Restriction of Offensive Weapons Act 1959. The case of *Fisher* was used as precedent for later cases.

[6] Halsbury's Laws paragraph 633
[7] [1961] 1 QB 394

A later case on this subject is *Partridge v Crittenden*[8]. In this case, the claimant, Crittenden, a police man stated that the defendant, Partridge, was offering for sale wild Bramble finches contrary to section 6, subsection 1 and schedule 4 of the Protection of Birds Act 1954. Section 6, states:

"(1) If... any person sells, offers for sale... (a) any live wild bird... including in Sch. 4 to this Act of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity;... he shall be guilty of an offence..." Schedule 4 has the heading: "Wild birds which may not be sold alive unless close-ringed and bred in captivity" and amongst the names in the schedule is "brambling".

It was held, by the Appeal Court, that the advertisement for the birds was not an offer but an invitation to treat and as such the claimant was not guilty of the offence he was originally charged with.

A final case which shows that an advertisement can be an invitation to treat is *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*[9]. The defendants organized their shop on a self-service basis. They were charged with a breach of section 18; subsection 1 of the Pharmacy and Poisons Act 1933, which required that a sale of drugs should be under the supervision of a registered chemist. There was no chemist present near the shelves but there was one present at the cash deck so anyone who was not fit to purchase drugs would not be allow to do so. It was held that the sale

[8] [1968] 1 WLR 1204
[9] [1953] 1 QB 401

of goods took place at the cash desk and not when the customer took the goods off the shelf. The display of goods was merely an invitation to treat and not an offer; therefore there was not breach of the Act.

Finally, it is important in cases such as this, to come to a conclusion as to whether the advertisement was an invitation to treat (as was first found) or was an offer/unilateral promise capable of acceptance by performance of the required terms of the agreement. When the advertisement is more carefully examined it amounts to an offer, and as such, establishes a contractual obligation on Hindmoor Superstores to supply the coat to Mrs Kay. This is due to a number of things present in the advertisement. First, the wording of the advertisement is very specific – in that it gives a precise price and not an estimated one. Also, it names a particular item which will be sold for that price and so is not vague about what particular item is available for that price.

In addition, any 'ordinary' person, with no legal knowledge of what defines an offer and what defines an invitation to treat who read the advert in the window would be under the impression that if they were the first customer through the doors, as Agnes Kay was, then the coat was (rightfully) theirs.

1,500 words

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|---|---|---|---|---|
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| Casebook on Contract Law | Jill Poole | 6th Edition | 2003 | Oxford |

## Cases

*Carlill v Carbolic Smokeball Company* [1883] 1 QB 293
*Bowerman v British Association of British Travel Agencies Ltd* [1996] CLC 451
*Lefkowitz v Great Minneapolis Surplus Stores Ltd* 86 NW 2d 689 (1957)
*Fisher v Bell* [1961] 1 QB 394
*Partridge v Crittenden* [1968] 1 WLR 1204
*Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [1953] 1 QB 401

## Additional Resources

Lecture Notes
Module Handbook
Halsbury's Laws Direct
Lexis Nexis