CONTRACTING OUTSIDE THE PARADIGM

ALTERNATIVES TO OFFER AND ACCEPTANCE

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"if all you have is a hammer, everything looks like a nail"

Abraham H. Maslow

Introduction

Contract formation is at the heart of contract law. However, it is an often overlooked area of study.[1] The phrase 'offer and acceptance' has become so ingrained in the contract law vernacular that there is a frequent perception all contracts are created equal; and the traditional approach provides the most reliable method for understanding the formation process. This dissertation will challenge this perception by critiquing the assumptions of the traditional approach and exploring alternate ways of explaining how contracts are brought into existence.

This dissertation proceeds on the assumption the orthodox promissory theories provide the most convincing explanation of the analytical nature of contract law. Analytical theories seek to describe the "essential characteristics of contractual obligation[s]".[2] They describe the scope of what is, and what is not, contract law and "what sort of events give rise to contractual obligations".[3] Promissory theories are united by their view that contractual obligations are self-imposed and the result of voluntarily undertaken promises.[4] Accordingly, offer and acceptance and the classical approach to formation, will be evaluated against this understanding.

Promissory theories can be directly contrasted with reliance-based analytical accounts, which view contractual obligations as externally imposed to protect reasonable reliance upon the actions of others.[5] Some of the issues raised in this dissertation might be resolved better under a reliance based account of contracting. They are excluded from this paper as extraneous to the goal of evaluating the traditional approach within the promissory model.

Chapter I provides an overview of offer and acceptance before discussing its criticisms and the reasons offered for its retention. The origins of the traditional approach are also analysed within the context of the rise of classical contract law. It is argued the ideological influence of classical liberalism combined with offer and acceptance's abstract nature and the preference

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[1] Shawn J Bayern *Offer and Acceptance in Modern Contract Law: A Needless Concept* (2014) Cal. L Rev. Vol. 103 (Forthcoming), at 1, available at Social Science Research Network <www.ssrn.com> .
[2] Stephen A Smith *Contract Theory* (Oxford University Press, 1993) at 43.
[3] At 43.
[4] At 56.
[5] At 78; See generally LL Fuller and William R Perdue Jr "The Reliance Interest in Contract Damages: 2" (1937) 46 The Yale Law Journal 373.

for textual-objectivity work to create a constrained conception of contracting behaviour and how contracts are formed.

The first aim in Chapter II is to illustrate the claim that offer and acceptance provides an incomplete method for understanding contract formation, by examining its application to a range of transactions. The second aim is to explore an alternative. It is proposed that the analysis most accurate and consistent with the self-imposed nature of contract law will be reached simply by looking at the mechanism contemplated the parties themselves. To strengthen this claim the findings from Allan Beever's working paper *A Theory of Contract Formation*[6] are introduced. Beever provides a theory which better explains unilateral contracts and simultaneous exchanges[7] and many other previously troubling features of contract law, but it still subscribes to the conceptual constraints of offer and acceptance. Accordingly, it is adapted and modified to explain how contractual obligations can be generated in the different types of contracts which fall outside the paradigm. Then contracts formed through the 'course of dealing'[8] are discussed. It is concluded that neither this expanded understanding nor offer and acceptance can account for the underlying relational elements which determine this type of contract formation because both continue to subscribe to classical liberal views of contracting behaviour.

Chapter III introduces the findings of relational contract theory. Relational contract theory was developed by Ian MacNeil as a critique of the classical assumption of contracts as discrete and isolated exchanges. This theory believes all contracting takes places against a rich matrix of social relations. [9] After addressing the practical and neoformalist[10] concerns against adopting a relational approach it is concluded that to give effect to contract law's self-imposed nature any inquiry into contract formation should begin by examining the nature of the contractual relationship between the parties and the social matrix they are a part of.

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[6] Allan Beever *A Theory of Contract Formation* (2013) Social Science Research Network <www.ssrn.com>.
[7] See Chapter II Part B.
[8] See Chapter II Part E.
[9] See generally Ian Macneil *Relational Contract Theory: Selected Works of Ian Macneil* (1st ed, Sweet & Maxwell, London, 2001).
[10] Neoformalism emerged as a reaction to the legal realist movement in the United States, which saw the drive by the Uniform Commercial Code to adjust legal rules to better account for commercial practice. Jonathan Morgan *Contract Law Minimalism: a Formalist Restatement of Commercial Contract Law* (1st ed, Cambridge Univeristy Press, Cambridge, 2013) at 90.

Chapter IV concludes by providing a relational commentary on the recent Supreme Court decision concerning contract formation in *Savvy Vineyards 3552 Limited v Kakara Estate Limited.*[11]

[11] *Savvy Vineyards 3552 Limited v Kakara Estate Limited* [2014] NZSC 121.

Chapter I

A. Offer and Acceptance

A contract, in its most general sense, is a legally enforceable agreement. It contains a set of obligations which are recognised by the law as giving rise to a duty of performance or a right to damages in the event of breach.[12] It is often said that the starting point will be to inquire if there was a 'meeting of the minds' (*consensus ad idem*) between the parties.[13] However, the court is not concerned with their subjective intent rather the external phenomena of agreement, traditionally evidenced by the occurrence of two distinct acts known as the 'offer and acceptance'.[14] The 'offer' will take the form of a statement by one party , the 'offeror', communicated to the other expressing a willingness to be bound to a set of proposed terms. 'Acceptance' will occur when the other party, the 'offeree', communicates in response a reciprocal intention to enter into the proposed agreement. Although the term 'agreement' is often used synonymously with 'contract'[15] not all agreements evidenced by offer and acceptance are enforced.[16] To attract legal recognition the courts require additionally certainty of terms, an intention to create legal relations and the exchange of 'consideration'.

Parviz Owsia compared the laws of contract formation under English and French law and observed the offer and acceptance mechanism rests on three basic assumptions:

> First, two parties are involved in making an agreement; second, their respective expressions are separably capable of being reduced to corresponding definite propositions, each determinable at a given time; and, third, the propositions, so reduced, sequentially follow each other to produce the contract.[17]

When any of these three assumptions is not met, he argues the "doctrine has to be strained beyond its traditional limits to accommodate the situation concerned, or the doctrine has to be

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[12] Jack Beatson, Andrew Burrows and John Cartwright *Anson's Law of Contract* (29th ed, Oxford University Press, New York, 2010) at 2.
[13] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 34.
[14] Beatson, Burrows and Cartwright, above n 12, at 29.
[15] For example consider the commonly used phrases: 'sale and purchase agreement', 'there is a binding agreement' or 'the parties had an agreement to sell'.
[16] The scope of agreement as a concept of human relations is significantly wider than that of contract. Marriage engagements, dinner dates and bets amongst friends all involve agreements which the law refuses to recognise as legally binding.
[17] Parviz Owsia "Notion and Function of Offer and Acceptance under French and English Law" (1991) 66 Tul L Rev 871 at 893.

modified or even discarded."[18] More behaviour appears to fall outside rather than within these three limits and Atiyah observes that to "insist on the presence of offer and acceptance in every case is likely to land one in sheer fiction".[19]

A defining limitation of offer and acceptance is the 'mirror image' rule from *Hyde v Wrench.*[20] For an acceptance to be effective it must express a willingness to be bound on the same terms of the offer. A purported acceptance with a variation will replace the original offer with a counter-offer requiring further acceptance. Chen-Wishart explains that during any inquiry into formation there are three separate questions that need to be considered:

1. The *commitment* question: whether a contract was concluded at all between the parties?
2. The *content* question: what did the parties contract for?
3. The *timing* question: when were the parties locked into the agreement?[21]

However, the traditional analysis constrains these issues into a single question: was there a matching offer and acceptance?—assuming *commitment* and *timing* occur at the moment the last offer is accepted.

Complex commercial transactions frequently involve more than two contractual parties; normally formal documentation will be used to signify the beginning of their contractual relations, from which it is difficult to extract a symbolic eclipse of offer and acceptance. Many everyday transactions occur through simultaneous exchanges which courts struggle to force "uneasily into the marked slots of offer, acceptance and consideration". [22] Finally, as will be demonstrated in Chapter II, even where the communications of the parties can be definitively reduced to a corresponding offer and acceptance, the particular context in which they were made may sometimes indicate the parties contemplated some further act to bring into existence contractual obligations.

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[18] At 894.
[19] Patrick Atiyah *An Introduction to the Law of Contract* (Clarendon Press, Oxford, England, 1995) at 55.
[20] See generally *Hyde v Wrench* [1840] EWHC Ch J90.
[21] Mindy Chen-Wishart *Contract Law* (4th ed, Oxford University Press, Oxford, England, 2012) at 42.
[22] The New Zealand Shipping Company Ltd v A M Satterthwaite & Company Ltd [1974] AC 154 at 167 per Wilberforce LJ.

Despite its abstract nature there is a persisting unwillingness to depart from the traditional approach.[23] One explanation is the lack of academic attention devoted to contract formation.[24] Others cite a tendency to synonymise offer and acceptance with the presence of agreement. [25] A more compelling reason, however, may lie in the doctrine's apparent pragmatic effectiveness and lack of a suitable alternative: Courts often refuse to depart from offer and acceptance on the basis that an alternative would provide "too little guidance for the courts (or for their parties or for their legal advisers) in determining whether an agreement has been reached."[26] Dyson LJ in the English Court of Appeal, felt the traditional approach "has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."[27] Owsia observes that offer and acceptance will usually provide an adequate working method for determining the presence of agreement by helping "the development and compartmentalisation of sub-rules determining the positions of the contracting parties with respect to such matters as certainty, communication, revocation, correspondence…"[28] Others minimalise the inadequacy of the doctrine, arguing that cases that fall outside the paradigm are marginal and rare.[29]

Burrows Finn and Todd suggest that in practice the classical model acts as more of a judicial guide than a 'straightjacket':

> The phrase "offer and acceptance", though hallowed by nearly two centuries of judicial usage is no more than a premise from which the judges have developed a

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[23] This is demonstrated by the decision of Elias CJ and McGrath J for the minority of the New Zealand Supreme Court in *Savvy Vineyards 3552 Ltd v Kakara Estate Limited* at [1]-[44], above n 11 and the Court of Appeal *Kakara Estate Ltd v Savvy Vineyards 3552 Ltd* [2013] NZCA 101.

[24] See Bayern, above n 1, at 2. He observes that though many academic articles have addressed the desirability of consideration and specific problems produced by the rules of offer and acceptance, but "relatively few significant articles over the last several decades have evaluated the fundamental doctrine of contract formation – that is, the offer-and-acceptance paradigm itself".

[25] Richard Stone "Forming contracts without offer and acceptance, Lord Denning and the harmonisation of English contract law" (2012) Web Journal of Current Legal Issues, at 1, <www.webjcli.ncl.ac.uk/ >.

[26] H G Beale (ed) *Chitty on Contracts* (31st ed, Sweet & Maxwell, London) at [2–111].

[27] *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209 at [25].

[28] Owsia, above n 17, at 890.

[29] *Gibson v Manchester City Council* [1979] WLR 294 per Diplock LJ: "there may be certain types of contract, though I think they are *exceptional*, which do not easily fit into the normal analysis of a contract as being constituted by an offer and acceptance"; *Ormwave v Smith* [2007] NSWCA 210 at [72] citing *Magill v Magill* (2006) 226 CLR 551 observed that offer and acceptance works in many circumstances and "the fact that it does not work well and can only be applied with some artificiality in other sets of circumstances, has not been seen as a reason for its wholesale abandonment".

> number of rules to aid in the ascertainment of the existence or otherwise of a concluded agreement which may have contractual force.[30]

It may be easy, therefore, to create a straw-man out of the classical doctrine without appreciating in practice it just acts as general "guidance for the courts (or for the parties or their legal advisers) in determining whether an agreement has been reached" rather than a "talisman" to ascertaining agreement.[31]

Nonetheless, in Chapter II and III it will be demonstrated that in many types of transacting (both inside and outside the paradigm) the traditional approach produces a confused view of the formation process as contemplated by parties, obscures judicial reasoning and increases uncertainty.

B. The History of Offer and Acceptance

Modern contract law's adherence to a generalised formulae for explaining contract formation can be traced through the wider history and ideology of classical contract law. Though there is a common perception that offer and acceptance is "deeply rooted" [32] in the common law and an intelligent product of centuries of judicial insight, examining its historical origins we can see that it is a comparatively late and not entirely necessary development. [33]

Prior to the nineteenth century contracts were understood solely in unilateral terms.[34] Actions were brought for a breach of a promise under the action of assumpit.[35] Promises in two sided agreements were regarded as enforceable not by virtue of a contract but by forming reciprocal consideration for each other.[36] Pothier's *Traite des obligations*, published in English in 1806, introduced the notion that contracts consisted of self-imposed obligations formed through the mutual consent of the parties.[37] He theorised that contracts were created at the

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[30] Burrows, Finn and Todd, above n 13, at 39.
[31] MP Furmston *Cheshire, Fifoot and Furmston's* (14th ed, Butterworths LexisNexis, Bristol, 2001) at 40.
[32] Horst K Lucke "Striking a Bargain" 19 AdelLawRw 293 at 294.
[33] JW Carter, Elizabeth Peden and GJ Tolhurst *Contract Law in Australia* (5th ed, LexisNexis Butterworths, Australia, 2007) at 37: "So accustomed have lawyers become to analysis of problems of formation in terms of offer and acceptance that it is often overlooked that this method of analysis is of comparatively recent origin and appears to have developed in the 19th century as a result of the need to provide a framework for the increasing number of cases where parties dealt with each at a distance by communicating by letter or telegram…"
[34] AWB Simpson "Innovation in Nineteenth Century Contract Law" 91 Law Q Rev 247 at 259.
[35] At 257.
[36] At 259.
[37] At 259.

moment there was a meeting of the minds of the minds (*consensus ad idem*).[38] This was consistent with then common means of concluding a bargains through simultaneous manifestations of consent—such as shaking hands, trading coins, or sharing a drink.[39] However, these ancient means of settling an agreement could not be adapted to the modern advent of contracting by correspondence.

To overcome this difficulty Pothier resorted to legal fiction.[40] He suggested the first letter sent in an exchange be viewed as a continuing expression of intent (i.e. "continuing offer") until such time that was received and accepted by the recipient, at which point the will of the parties merged.[41] This was explicitly adopted in *Adams v Lindsell*[42] where the court held "the defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs: and then the contract is completed by the acceptance of it by the latter". Although most commonly cited as authority for the postal-rule, by adopting Pothier's reasoning the court in *Adams v Lindsell* became the first English court to truly analyse a transaction in terms of offer and acceptance and signalled the shift to a two-sided conception of contract in English law. [43] Within just four decades this "new doctrine of offer and acceptance" soon became a "universal truth about life" overtaking the older forms of concluding agreement. Influential English text book writer Anson is attributed with elevating offer and acceptance to doctrinal status by proclaiming that "every expression of a common intention arrived at by two parties is ultimately reducible to question and answer"[44].

At the end of the eighteenth century there was no cohesive law of contract but a loose collection of individual rules and categories of action. During the nineteenth century these were eclipsed by the rise of classical liberalism. By shifting its binding force from the individual promise to an external concept "contract was rendered abstract".[45] A template for contractual analysis was created based on the "life cycle of an ideal contract" that could be

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[38] At 255.
[39] Lucke, above n 32, at 294.
[40] Simpson, above n 34, at 261.
[41] At 251.
[42] *Adams & Ors v Lindsell & Ors* (1818) 106 ER 250 (KB).
[43] Simpson, above n 34, at 260-261. Simpson argues there is a common misconception that *Payne v Cave* (1789) 3 TR 148 was the first English offer and acceptance case, but there the terms 'offer' and 'assent' were merely used as "unspecialised descriptive terms".
[44] Owsia, above n 17, at 877; Furmston, above n 31, at 13.
[45] John Wightman *Contract A Critical Commentary* (1st ed, Pluto Press, Chicago) at 57.

"superimposed" upon diverse areas of law previously regarded as non-contractual. [46] This abstraction facilitated classical contract law's adoration for the freedom and security of contract which was "at the very heart of classical economics".[47] Classical contract law, like classical liberalism, was based on a negative conception of individual autonomy. In order to maximise free choice they both believed contracting parties should be left largely to their own devices and to structure their affairs with minimal state interference. [48]

However, to complete the Hobbesian ideal of self-interested agents competing in an ideal free market the classical liberal model had to disregard the actual range of social and individual behaviour.[49] Similarly to account for the diverse range of relationships and bargains encountered in the commercial world, offer and acceptance formed a one-size-fits-all approach to explain the formation of agreements. In almost any common undertaking regardless of how varied or unique, the court was able to point to a question and answer exchange as signalling contract formation. The disappearance of the status of common carrier, the law of master and servant, and the common callings of innkeeper and farrier provide illustrative examples: Wightman explains that prior to the rise of classical contract, disputes in each of these commercial relationships were decided by reference to specific customary rules and a judge's concept of fairness on the facts of the case, however, by the mid-nineteenth century they became subsumed within the general body contract.[50]

C. The Objective Approach to Contract Formation

To fully understand offer and acceptance it is necessary to appreciate its relationship with the objective approach to contract formation. Despite the emphasis on *consensus ad idem*, courts are not concerned with what a person subjectively intends at the moment of formation. They are concerned the objective manifestation of that intention. This objective approach to formation is famously formulated in *Smith v Hughes:*

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party,

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[46] At 60.
[47] At 50.
[48] Grant Gilmore *The Death of Contract* (1st ed, Ohio State University Press, Columbus, Ohio, 1974) at 2.
[49] See Ian R Macneil "Values in Contract: Internal and External" (1983) 78 Nw U L Rev 340 at 348 who observes that "[man] is both an entirely selfish and an entirely social creature, in that man puts the interests of his fellows ahead of his own interests at the same time that he puts his own interests first."
[50] Wightman, above n 45, at 58 citing generally JN Adams "The Carrier in Legal History" in *Law, Litigants and the Legal Profession* (Royal Historical Society, London, 1983).

> and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[51]

Although *Smith v Hughes* is silent, for the most part, on the type of knowledge that the reasonable man is to be equipped with, varying degrees of objectivity apply depending upon the point of reference of the reasonable man taken by the court. [52] Resting at one end of the spectrum is formal or textual objectivity. Favoured by classical contract law, textual objectivity takes the position of a detached third-party observer and prioritises the importance of different types of evidence "according to a fairly strict hierarchy of probative value".[53] Signed documentation is valued as the most definitive expression of contractual intention, [54] followed by written and then verbal communications, non-verbal conduct and finally silence, as the least persuasive manifestation of intent.[55] At the other end of the spectrum can be found contextual-observer objectivity. Championed in recent years by Lord Hoffmann in the areas of implied terms[56] and contractual interpretation,[57] under a contextual-objective approach the reasonable person is placed within the matrix of fact and equipped with all the background knowledge that would have been available to the parties. A literal legal interpretation of the written documentation and communications of the parties is rejected in favour of "the common sense principles by which any serious utterances would be interpreted in real life".[58]

The traditional preference for textual-objectivity can equally be attributed to the influence of classical liberalism. Classical liberalism, like classical contract law, is premised on a limited

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[51] *Smith v Hughes* (1871) 6 LR QB 597. This raises a fundamental problem for promissory theories: if contract law is only concerned with enforcing the outward appearance of intention, then surely contractual obligations are better understood under reliance based accounts of contract law as externally imposed by law. As will be seen in chapter II the objective approach can be reconciled with promissory theories if contract law is properly understood as only seeking to enforce promises that are the *result* of the actions of two or more individuals.

[52] See generally Mindy Chen-Wishart "The Oxymoron of Smith v Hughes" in *Exploring Contract Law* (Hart Publishing Ltd, Oregon, 2009) 341. Chen-Wishart argues that the correct interpretation of *Smith v Hughes* is as an endorsement for contextual-objectivity.

[53] At 351.

[54] See the rule from *L'Estrange v F Graucob Ltd* [1934] 2 WLR394 (KB) that a signature placed on a contract is to be taken as assent to all the terms contained.

[55] Chen-Wishart, above n 52, at 352.

[56] *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)* [2009] 2 WLR 1127 (PC).

[57] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 98 (UK HL).

[58] At 57.

conception of social behaviour.[59] The hierarchy of value assigned to different manifestations of intention subscribes to the classical liberal ideal that all humans are intelligent, calculating and individualistic.[60] They are assumed to know and structure their affairs around the law, put things in writing and read before signing. Contextual-objectivity on the other hand strikes a better cord with modern liberalism which generally appreciates a wider range of human behaviour.[61] Joseph Raz appreciates that humans are social (not just individualist) creatures. He explains most promises will take place against a framework of ongoing relationships and "the normative consequences of a promise are only in part the effectuation of the expressed intention of the promisor".[62] In his view the textual-objectivity of the classical law undermines individual choice by failing to recognise the full extent to which communications and formal documentation will have different meanings in different contexts. Chapters III and IV demonstrate that this is further aggravated when combined with the aforementioned conceptual constraints of offer and acceptance.[63]

D. Reform in New Zealand

Since *Boulder Consolidated v Tangaere*[64]courts in New Zealand courts have shown a disposition toward a more 'global' analysis of formation. The facts in *Boulder* concerned what Owsia would describe as a series of ambiguous communications from which it was difficult to extract a discernible offer and acceptance, but which leads to an overall impression of agreement.[65]

Expressing his dissatisfaction with a "mechanical analysis" of the facts in terms of offer and acceptance Cooke J proposed an alternative inquiry whether "viewed as a whole and objectively, the correspondence shows a concluded agreement", with particular emphasis on "the point of view of the reasonable man in the shoes of the recipient of each letter."[66]

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[59] See Patrick Atiyah *The Rise and Fall of the Freedom of Contract* (1st ed, Clarendon Press, Oxford, 1979) at 294.
[60] See generally Macneil, above n 9.
[61] See generally Joseph Raz *Is There a Reason to Keep Promises?* (ID 2162656 2012).
[62] Joseph Raz "Promises in Morality and Law" (1982) 95 Harv L Rev 916 at 932.
[63]In Chapter IV it is discussed how textual-objectivity constrained the minority's perception of the commercial relationship in *Savvy Vineyards.Savvy Vineyards 3552 Ltd v Kakara Estate Limited*, above n 11.
[64] *Boulder Consolidated Ltd v Tangaere* 1 NZLR 560 (CA).
[65] Owsia, above n 17, at 909.
[66] *Boulder Consolidated Ltd v Tangaere*, above n 64, at 563. citing with approval *Gibson v Manchester City Council* Diplock LJ above n 29 at 297.

Cooke J's alternative analysis has been christened the 'global approach'[67] and applied in dozens of cases in New Zealand[68] and Australia.[69] Most commonly it is used an additional enquiry in difficult cases, rather than as an outright replacement. Many judges have observed is fails to produce different results and questioned whether it is a worthwhile endeavour.[70]

In any case, it may be asserted that despite the failings of offer and acceptance, the global approach provides a poor replacement. By allowing judges to depart from the traditional rules and decide questions of formation as they see fit, the global approach could act as disguise for unrestrained judicial creativity; leading to an impoverishment of judicial reasoning. Instead of deciding cases by applying legal rules judges will resort to vague conceptions of common sense and fail to articulate clearly the basis for their decision. Not only does this undermine legal certainty, but by imposing an external conception of what is 'just' or 'reasonable' it is inconsistent with the view of this dissertation that contractual obligations are self-imposed.

Chapters II and III demonstrate, however, that the legal certainty provided by offer and acceptance is significantly overstated.[71] But to the extent the global approach is applied arbitrarily and produces inadequate articulation of judicial reasoning then it cannot be an adequate replacement; something else must be looked for.

E. Conclusion

The divergence between the traditional approach to contract formation and actual contracting behaviour is closely linked to the influence of classical liberalism. An abstract model of classical contract formation was able to incorporate a diverse range of social interactions and commercial transactions in a manner which was consistent with and facilitated the classic

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[67] Burrows, Finn and Todd, above n 13, at 41.

[68] *GHP Piling v Leighton Contractors Pty Ltd* HC CIV–2010–404–003231, 2012; *Meates v Attorney-General* [1983] NZLR 308 (CA); *Paper Reclaim Ltd v Aotearoa International Ltd* (2006) 3 NZLR 188; *Powierza v Daley* (1985) 1 NZLR 558 (CA); *TV3 Network services v The News Corporation Ltd* (1996) 7 TCLR 60.

[69] *Vroon BV v Foster's Brewing Group Ltd* [1994] VR 53 at [82] cited with approval *Meates v Attorney-General*; *Ormwave Pty Limited & Anor v Smith* at [73] - [75], above n 30.

[70] Burrows, Finn and Todd, above n 13, at 41. They observe "none of the cases [examined] would appear likely to have been decided different by reliance solely on an offer and acceptance analysis"; Also see *Wickham Developments v Vuletic* CP401/94, 21 December 1995 where it was observed at 17 " a brief excursion to the sidelines suggests little likelihood that such an approach would bring a different result." It is important to note , however, that this can only be true of cases where the issue to be resolved is an all-or-nothing inquiry (either the parties agreed to a contract or they did not) into the *commitment* to a contract where textual objectivity was retained. In Chapter II using the global approach with contextual-objectivity to separate issues of *timing* or *content* may lead to a greater difference in result.

[71] Atiyah, above n 19, at 58.

liberal world view. However, this abstraction—combined with the tendency to favour textual-objectivity— created a constrained view of contracting behaviour and the different ways contracts can be formed. It is well recognised that few modern transactions fit the traditional paradigm, but the contractual certainty it provides is seen to absolve its failings. Perceptions of judicial opaqueness and uncertainty mean the global approach in New Zealand is yet to prove itself as an adequate replacement. The ultimate goal of any alternative must be seen to provide greater legal certainty than the traditional approach and be consistent with the self-imposed nature of contractual obligations.

Chapter II: Expanding the Formation Process

The first aim of this chapter is to illustrate the claim that offer and acceptance is an inadequate tool for evidencing agreement. There are many routes to agreement. Often in cases where traditional paradigm does not apply, offer and acceptance confuses the formation process. Rather than serving as a useful judicial guide, it produces legal uncertainty and disguises judicial reasoning. The second aim is to explore alternative ways of looking at formation. To promote the self-imposed nature of contractual obligations the recurring theme is that offer and acceptance should be strictly confined to its conceptual limits. For transactions that fall outside the paradigm, this chapter proposes that our conceptions of the formation process—and determinations as to *content, commitment,* and *timing*[72]—should be decided by reference to the mechanism contemplated by the parties themselves on the facts of the case.

Two types of contracting in particular, unilateral contracts and simultaneous transactions, conflict not just with offer and acceptance but the underlying premise of this dissertation: that promissory explanations provide an adequate account of the nature of contracting. To remedy this Allan Beever's working paper *A Theory of Contract Formation*[73] is adapted to expand our conceptions and the nature of contractual obligations under promissory theories and the underlying normative process by which they are created. To fully appreciate the contemplated formation process regard to commercial custom—and thus contextual-objectivity—will be inevitable. In the final section it is admitted that one type of contract—contracts formed through the 'course of dealing'—cannot be resolved with the approach proposed. Ultimately, leading on to the solution proposed in the final chapter, it is concluded that our inability to deal with these types of contracts is caused by an incomplete picture of the various norms which define contracting behaviour.

A. Self-determined Mechanisms for Forming Agreement

1. Signed contracts

[72] See Chapter I Part A for explanation of these three issues.
[73] Above n 6.

Contracting through signed documentation, although common, is also one of the processes of formation most inconsistent with the offer and acceptance method. [74] Because offer and acceptance was originally invented as a means of dealing with postal contracting, it is limited by a binary conception of communication and variation.[75] In the paradigm case contractual terms are proposed entirely by the offeror, which are either accepted (upon which point the offeree becomes committed to the contract) or rejected. If the offeree purports to vary the terms proposed, a counter offer will arise and the original offer will cease to exist. To negotiate the terms of a complex transaction requires a ping pong exchange of offers and counter-offers until a tipping point is reached where one party concedes, accepting a counter-offer, and a contract is formed. In reality complex transactions will be broken up into a negotiation and a signing phase.[76] In the negotiation phase, the parties will debate the terms of the agreement subject to the understanding that no commitment will arise until the later execution of written documentation in the signing phase. Offer and acceptance subsumes agreement to contractual terms and the timing of contract formation into the single act of acceptance. However, once the signing phase is reached substantive *agreement* to the contractual terms is already reached, all that remains is the placing of signatures on the dotted lines of the contract to signify final *commitment* and the *timing* of formation.

From a pragmatic perspective, generally there will be no need for a court to trouble itself as to how formation occurred; the mere fact of a written contract itself will be taken as clear evidence of the presence of agreement. However, where more than two parties are involved and the *place* and *timing* of contract formation needs to be decided (e.g. for contracts executed by distance) the situation becomes murkier. [77] When a contract is concluded by

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[74] Lucke, above n 32, at 307.; Bayern, above n 1, at 10.; Owsia, above n 17, at 911.
[75] See Chapter I Part B.
[76] Owsia, above n 17, at 897-898.
[77] In conflict of laws, to determine to which jurisdiction a contract has its "closet and most real" connection (where the parties have not specified a preference), the court may take into account where the contract was formed. *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch) at [42]; Also see generally Philip R Wood *Conflict of Laws and International Finance* (Sweet & Maxwell, 2007). In the tax context when determining the source of income from a transaction the court may inquire where it occurred. *Commissioner of Inland Revenue v N V Philips' Gloeilampenfabrieken* [1955] NZLR 868 (CA) at 894. Syndicated loans will frequently involve multiple parties contracting across more than one jurisdiction to execute a syndicated loan agreement sometimes over thirty lenders known as co-arrangers will set a date for a 'signing ceremony'(See generally Benjamin C Esty "Structuring Loan Syndicates: A Case Study of the Hong Kong Disneyland Project Loan" (2001) 14 Journal of Applied Corporate Finance 80 at 81. Representatives of each institution might fly to the host country to ensure that the contract is executed there. However, it seems likely that in practice the loan agreement might be signed by each institution in their respective country and circulated among the other parties via email.

distance it will come into effect, not when executed, but *when* and *where* the offeror receives notification of acceptance.[78] For example, in a five party contract where each and every party is joint and severally liable it becomes conceptually difficult to pick out which parties are the offerors and which are the offerees. The natural response may be to call each party to the agreement an offeree: conceivably at the moment of signing they might regard themselves as 'accepting' the agreement. However, acceptance can only really occur when no further act is required to bring a contract into existence.[79] Each of the first four signatures is placed conditionally on further signatures being added to agreement and the contract cannot truly be regarded as *accepted* until signature number five.

As a circuit-breaker a court might point the second-to-last signee as the offeror—meaning that the contract will come into effect in their jurisdiction when notified of signee number five's acceptance. However, the normative basis for requiring the offeror to be notified of acceptance—so that they know they are bound by the contract—applies equally to the first three signees. Why should the second-to-last party to sign, simply by being the second-to-last, have this advantage? And how can the other parties to the agreement be considered bound by the agreement until they are notified?

This difficulty arises because the traditional model works on the assumption that there must be a causative link between the offer and the acceptance: that acceptance is conveyed *in response to the* offer received to form a contract. However, in the signing process the placing of signatures may be entirely random. Each signature plays no role in inviting the next and can only be regarded as an offer and acceptance "in a very stylised sense".[80] For Bayern contracts concluded at a distance result in a theoretical conundrum for deciding which signature was second-to-last. He explains using Einstein's theory of special relativity that "simultaneity in the absence of causation is relative; the sequence of events depends on an arbitrary selection among many possible reference points".[81]

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[78] *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 at 328. Here we are assuming that the parties are using instantaneous forms of communication e.g. email, fax or telephone. For contracts accepted by post, a contract will come into existence when it is posted by the offeree *Adams & Ors v Lindsell & Ors*, above n 42.

[79] *Airflo Holdings Limited v Eastbay Eldercare Limited* [2002] NZCA 38 per Tipping and Randerson JJ "It is elementary contract law that offer and acceptance must be in the same terms and the offeree's acceptance of the offer must be unequivocal and unconditional."

[80] Bayern, above n 1, at 10.

[81] This might seem like an unnecessary over complication: surely it would be possible to determine signing order with reference the timing of emails circulated among the group after each party signed. However, what

For Kenneth K Ching "even in a contract negotiated in many stages, proposals must be exchanged, and one proposal must come first and one must come last. Something resembling offer and acceptance has occurred"[82]. Adopting his view there is in effect not one, but many exchanges of offer and acceptance for each of the terms added to the draft contract.[83] The use of written documentation could then be reconciled by viewing it as a *form requirement* superimposed upon the traditional approach. This aligns with the practice that substantive agreement is reached in the negotiation phase, and the signing phase only serves to signify final commitment. Written documentation also appears consistent with Fuller's description of form requirements, e.g. deeds, fulfilling three main functions: the *evidentiary,* providing that the promise actually occurred; the *cautionary*, ensuring that sufficient care was taken by the promisor; and the *channelling* which facilities appreciation of the implications of the obligation.[84] When drafting a written contract offer and acceptance is still used to reach common intention, but due to the complexity of the transaction a written contract is seen as the best means of tracking, facilitating and evidencing that intention.

Lucke, however, rejects that mechanisms of contracting through simultaneous manifestations of consent,[85]such as contract signing, can be explained as fulfilling a form function. To extend the form explanation beyond deeds[86] to formation practices that are not required by law leads to the uneasy conclusion that consent is manifested twice: "first ineffectively by offer and acceptance, then effectively by ceremonial observance."[87] Under the traditional approach the act of acceptance signifies both agreement to terms and commitment to the resulting contractual obligations. If, however, the parties have chosen to use some other method of signifying the latter then offer and acceptance has effectively been displaced from determining formation in a meaningful way.

Bayern is attempting to say is that if causation between signatures is irrelevant for the purposes of the creation of the contract, then timing becomes redundant as a reference point for determining which act constituted an offer and which an acceptance; there simply was none.

[82] Kenneth K Ching *Beauty and Ugliness in Offer and Acceptance* (2014)Social Science Research Network <www.ssrn> at 9 citing Atiyah, above n 19, at 60.

[83] Owsia, above n 17, at 877 citing; Simpson, above n 35, at 247. On this view offer and acceptance is perhaps retained in the sense envisaged by Anson, as a question and answer medium for arriving at common intention

[84] Lon L Fuller "Consideration and Form" (1941) 41 Colum L Rev 799 at 800.

[85] Lucke, above n 32, at 294; Also see above the earlier observation that bargains were historically concluded through handshakes, trading rings or sharing a drink. .

[86] Section 9 of the Property Law Act 2007 requires that in order for a deed (a contract for land) to be effective it must be in writing, signed and witnessed.

[87] Lucke, above n 32, at 299.

Therefore when contracts are concluded through a mechanism other than offer and acceptance, instead of attempting to stretch the facts to fit formalistic reasoning, the parties should be simply regarded as determining their own mechanism of formation. To this end issues of *timing*, *commitment* and *content* that arise should not be decided by an abstract conception of how contracts *should* be formed, but simply the facts of the particular case. It is not a stretch to regard the act of signing as neither an offer nor an acceptance but the manifestation of final commitment to the terms of the contract. The contract comes into existence when the parties view it as such: when the last signature is placed on the dotted line and it is 'executed'.[88]

This is already largely consistent with the analysis used to formulate the subject-to-contract rule in *Eccles v Bryant*.[89] There the court needed to consider if a failure to exchange signed counterparts of a contract for the sale of land failed to bring the contract into existence. It was argued the exchange was mere machinery and of no particular importance to formation but the court disagreed, finding it was a "crucial and vital fact which brings the contract into existence".[90] Ultimately the "touchstone for determining whether or not an agreement is formed will be the parties' own intentions."[91]

The view of signed contracts as a party-determined mechanism of formation can be extended to a many other contexts. In each of the three following transaction types the most accurate analysis is arrived at by simply using the facts of the case to determine the contemplated process of formation, rather than forcing the facts to fit an offer and acceptance analysis.

2. Auctions

Auction enable competition between multiple bidders to drive up the price of a chattel or land to an amount that accurately reflects market demand.[92] The traditional approach applied to auctions would suggest the tendering of the auction is an invitation to treat by the auctioneer, each successive bid is an offer replacing the previous and the falling of the hammer is an

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[88] This position is supported by empirical research about commercial expectations. In a study at the University of Pennsylvania subjects tended to view the signing of a contract as signifying the moment of formation, rather than the notification thereof. Tess Wilkinson-Ryan and David A Hoffman *Intuitions About Contract Formation* 2014 U. of Penn, Inst. for Law & Econ Research Paper No. 14-5 Social Science Research Network <www.ssrn.com> at 20.
[89] Lucke, above n 32, at 298 citing *Eccles v Bryant* [1948] 1 Ch 93.
[90] At 99–100.
[91] At 104.
[92] At 93.

acceptance of the last bid, bringing the contract into existence.[93] This led to the uneasy conclusion that bidders were able to retract their bids before the time is up, which Lucke argues is not only at odds with the desired auction process (that bids are non-retractable) but results in hardship for the seller by depriving them of a profitable sale.[94] A more accurate analysis—of when a sale is made or whether bids are retractable—is arrived at by simply adopting the rules of the auction house. Some auctioneers may allow the retraction of bids; for others the bidding process may end at a time specified by the seller;[95] or, if auctioneer allows the seller or last-bidder to change their mind at the conclusion of the bidding, no contract may be brought into existence at all. In each case, it should be commercial preference, not an abstract legal concept, which dictates how sale occurs.

3. Securities exchanges

A securities exchange is a mechanism for facilitating sales between buyers and sellers of shares, debt-securities, commodities, derivatives or currency.[96] Many securities today are traded through Electronic Communication Networks (ECN).[97] ECNs allow for more direct market access and remove the need for brokers.[98] When an order is placed, however, the trader does not intend to contract with another specific trader. Instead buy and sell orders are matched and executed automatically by a computer system as they are received based on order type and supply and demand.[99] It is difficult to regard a placement of an order with the ECN as either an offer or an acceptance. Calling a trade order an 'offer' is inconsistent with the inability of traders to retract orders once they are placed. 'Acceptance' seems equally dubious. A contract for the sale of the securities is not brought into existence until the system finds a matching order. It is simply more accurate to say that the ECN acts as a third-party intermediary which determines the process of formation. The placement of a trade is a

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[93] *Payne v Cave* TR.
[94] Lucke, above n 32, at 304.
[95] For example on the New Zealand auction website Trademe users can specify the length of time and reserve price for their auctions <www.trademe.co.nz >.
[96] See generally John L Teall "Chapter 2 - Financial Markets, Trading Processes, and Instruments" in John L Teall *Financial Trading and Investing* (Academic Press, San Diego, 2013).
[97] Jason Fink, Kristin E Fink and James P Weston "Competition on the Nasdaq and the growth of electronic communication networks" (2006) 30 Journal of Banking & Finance 2537;.
[98] At 2538.
[99] There are several different order types. For example, a market order is a specific instruction to trade at the current market price. A limit order allows you to specify the specific amount of securities you want to trade and at what price. ASB Securities "What types of orders can I place when I'm share trading?"<www.asb.co.nz> (2014)

manifestation of willingness to participate in that process, and accordingly, a contract is formed on the terms of the orders the moment they are matched by the ECN.

4. Crowdfunding

Crowdfunding involves the funding of projects or ventures "by raising many small amounts of money from a large number of people, typically via the Internet."[100] There will be three separate parties involved: the project initiator, the project participants and the crowdfunding platform.[101] The project initiator will propose a business venture via a crowdfunding platform to the public to invest equity or pledge donations to finance the undertaking. Different platforms will have different models and processes by which investors/donors contract with the project initiator.[102]On the New Zealand crowdfunding platform Snowballeffect,[103] participants will contribute money that is held in escrow until the project reaches the funding threshold, at which the point they become shareholders in the company.

The proposed project could be regarded as a standing-offer which is accepted—and an individual contract brought into existence—each time a participant contributes money. However, this is inconsistent with the understanding project initiators are under no contractual obligation to participants prior to reaching the funding threshold. If the threshold is never reached the initiator would fail to obtain sufficient funds to undertake the project. Equally, most platforms allow initiators to pull out before the funding threshold is met if a change in circumstances change mean the project is no longer viable. Like the falling of a hammer at an auction or the matching of securities by an ECN, it is the crossing of the funding threshold—and thus the parties' own process—which brings the contract into existence.

B. Unilateral Contracts and Simultaneous Exchanges

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[100] "Crowdfunding" 2014 Oxford dictionary (American English) (US) <www.oxforddictionaries.com >.

[101] See generally Andrea Ordanini Marta Miceli and A Parasuraman "Crowd-funding: transformation customers into investors through innovative service platforms" (2011) 22 443.

[102] One of the most popular, Kickstarter <www.kickstarter.co.nz>, prohibits equity investment. Instead project initiators will offer 'rewards' (normally the product which they are proposing to develop) in exchange for 'pledges' (a promise to donate a certain amount of money). Once a threshold of pledges is met (normally the amount required to fund the project) the project will proceed and the credit cards or paypal accounts of the participants will be charged.

[103] <www.snowballeffect.co.nz>

Unilateral contracts generally involve an undertaking by one party to the public or a class of persons to provide a reward or payment in exchange for the act of another.[104] A common example is a reward offered by an owner of a lost dog to a member of the public that returns their dog. These types of contracts have not posed any particular practical difficulty for the traditional analysis. The undertaking is viewed as an 'offer' to the 'world at large' which is 'accepted by conduct' the moment the specified act is performed.[105]

But it is often argued that unilateral contracts are not agreements. The offeree does not promise or agree to do anything, they simply do it. This is not inherently damaging for promissory theories: if the central tenet contract law is to enforce promises, then a unilateral promise (supported by consideration) equally deserves recognition. Smith explains, however, that an inherent feature of promising is to treat a particular person as different from everyone else. [106] However, "once the class of 'promisees' becomes 'the world', this essential feature of promising makes little sense".[107] Accordingly, Smith argues unilateral contracts are more like oaths, and fall outside contract law and into the general category of juridical acts—such as signing a will or drawing up a deed.[108]

A similar conclusion is reached with simultaneous exchanges. A common objection against offer and acceptance is its inability to account for many "every transactions such as buying from a vending or ticket machine, making a purchase in a store, or taking a bus."[109] In these transactions dissecting offer and acceptance can become a confusing task.[110] Ching, argues this may be a "theoretical red-herring." In the sense that the speed of the transaction does not rebut the presence of an offer and acceptance for "one does not spontaneously produce $3 and at the exact moment the grocer spontaneously produces a gallon of milk".[111] However, the difficulty highlighted by Smith is not the inability to *call* certain acts in the exchange either offers or acceptances, but the lack of promises or agreement therein. Agreements are normally entered into to bring about a mutually beneficial future state of affairs. With so-called 'simultaneous transactions' it is argued that neither party agrees, promises or

[104] Smith, above n 2, at 183.
[105] *Carlill v Carbolic Smoke Ball Company*, [1892] EWCA Civ 1.
[106] Smith, above n 2, at 56.
[107] At 186.
[108] Smith, above n 2, at 187.
[109] At 62.
[110] For example of a court attempting to apply offer and acceptance to a passenger boarding a bus see *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258 (CA).
[111] Ching, above n 82, at 9.

undertakes to do any anything—"rather, they simply do something (e.g., hand over money , get on the bus, etc)."[112]

For Atiyah these transactions can be better accounted for if we chose to adopt a reliance based view of contract law e.g. a person undertakes efforts to find a lost dog in *reliance* of the reward for $500.[113] Smith, however, argues instead of abandoning the promissory model to account for unilateral contracts and simultaneous exchanges these transactions should be jettisoned from contract, to be picked up by other areas of private law.[114] He suggests the rise of unjust enrichment and the increasing scope of tort, to include claims such as negligent misstatement, ensures that consumers will still be afforded adequate protection. [115]

Even if Smith is correct this position would severely limit the scope of contract law to purely executory contracts. Virtually any transaction in which one party requires payment as an element of formation would be excluded as contractual. Because customers are notoriously non-committal it is contrary to good business sense for a retail outlet to bind themselves contractually to one customer before they have received some sort of payment, as this is the best means of confirming their bona fide. It seems odd that for simply adjusting the timing of formation to coincide with payment, for a practical commercial reason, the transaction should no longer be regarded as contractual in nature. In the next section we will see that this conclusion is caused by a constrained view of promissory theory and the formation process underlying offer and acceptance.

C. An Expanded Understanding of the Formation Process

It may be possible to justify the explanatory force of offer and acceptance in the above situations by developing the normative understanding of formation from Beever's working paper *A Theory of Contract Formation*.[116] Beever's theory also strengthens promissory theories as a convincing analytical account of the nature of contract law by dispelling the difficulties mentioned in the previous section. To do this he begins by exploring the nature of an offer. Offers are commonly conceived as containing promises that become binding upon acceptance. Beever explains that this is a misunderstanding for the promise itself can only

[112] Smith, above n 2, at 62.
[113] P S Atiyah "Fuller and the Theory of Contract" in Essays on Contract (Clarendon Press, Oxford, 1986) 73 at 79-82.
[114] Smith, above n 2, at 179.
[115] At 179.
[116] Beever, above n 116.

come into existence once the contract is formed. [117] The offer should only be thought of as a latent, rather than conditional, promise: "it creates a power in the offeree and not an obligation in the offeror" by setting up an external state of affairs "such that, when the offeree accepts, the offer is transferred by the acceptance into a promise".[118] This is consistent with an offeror's ability to retract an offer prior to acceptance, because "he [or she] removes that state of affairs without violating any commitment he made – he made none".[119]

A common objection leveraged against promissory accounts of contracting is that while promises are unilateral, contracts are inherently bilateral—they contain not one, but two sets of promises. If contracts deserve legal recognition due to the intrinsic value of a promise then arguably it is not just contracts that should be enforced, but promises in general. [120] Beever's account reconciles this difficulty by demonstrating that contract law is not concerned with enforcement of promises generally but specifically those that are the *product* of the combined *actions* of two or more individuals.[121] This explains a number of features of contract which previously troubled promissory theories, such as the objective approach to contract formation,[122] the law's refusal to recognise cross-offers as giving rise to agreements,[123] the current law on mistake[124] and the ability to discharge for breach.[125]

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[117] Beever, above n 6, at 9.
[118] At 29.
[119] At 30.
[120]Smith, above n 2, at 65. This leads to the common objection raised against consideration that if the intrinsic value of a promise is what is most important then there is little discernible basis for distinguishing between promises supported by consideration and unsupported by consideration. A Kull "Reconsidering Gratuitous Promises" (1992) 21 J Legal Stud 39.
[121] Beever, above n 6, at 30. "The contractual promise is the product of both parties."
[122] At 37. It is commonly argued that if contracting is all about promises then contracts should be determined according to subjective intent. However, once we realise that contract law is only concerned with promises that are the product of actions of both parties, then Beever explains "it is only appropriate that the content of that promise is determined by taking both sides of that equation into account".
[123] 'Cross-offers' refers to the situation where two parties simultaneously offer to each other the same proposal in ignorance of each other. For example, one party sends to another "will you buy my horse for $4000" while the other sends at the exact same time "I will buy your horse for $4000". Under a promissory approach one might argue that there is no reason for a contract not to arise –both intended to enter into a sale and purchase agreement for the horse for $4000. Beever's approach, however, explains the position taken in obiter in *Tinn v Hoffman* (1873) 29 LT 271 that it does not. Contractual promises are the *result* of the actions two parties. In cross offers because neither communication is sent *in response to* the other, this necessary causal connection is missing.
[124] For New Zealand see Contractual Mistakes Act 1977, s 6(1)(a) which allows contracts to be set aside on the basis of common mistake or a unilateral that the other party was aware of. Smith, above n 2, at 66 explains that a promise made based on a mistaken assumption about past fact is still a promise. But if the mistake is shared, then the contractual promise (which is the *result* of the actions of the parties) is about something that does not exist. For unilateral mistakes we can say that if one party was aware of the other's mistake then it can equally be

Beever's analysis of the formation process also shows that the position taken by Smith on unilateral contracts and simultaneous exchanges is premature. In contract formation the 'agreeing' or 'promising' to do something is not a *requirement* of acceptance, rather it is the *result*.[126] The offeree simply performs the necessary condition, as determined by the state of affairs created by the offer, which brings the contract into existence.

When a bus driver pulls up at a stop or a shop keeper opens their store for business in the morning a state of affairs has been created such that when the necessary condition is satisfied contractual obligations will come into existence. For the shopkeeper, bringing items to the counter and handing over cash satisfies the necessary condition to transfer the store-owner's latent promise into an obligation to transfer ownership of the item paid for.[127] Equally when a member of the public climbs on the bus and the bus pulls away, a contractual obligation to pay the driver and for the bus to continue to the next stop arises. As for the knowledge criticism of unilateral contracts, whether or not acceptance needs to be communicated to the offeror is determined by the nature of the offer itself.[128] Although the default rule is that acceptance must be communicated, this interpretation is consistent with the sub-rules that the offeree may determine the mode of acceptance,[129] and that communication may be waived.[130]

While Beever manages to retain simultaneous exchanges and unilateral contracts within the explanatory power of promissory theories, his explanation of the formation process is inadvertently limited by the conceptual constraints of offer and acceptance. The first of these is the assumption the aspects of *timing*, *commitment* are subsumed within the single act of acceptance. As we have seen in many contexts issues of timing and commitment will be separated depending on the needs of the particular transaction type.[131]

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said that their action of accepting *in response* to this knowledge brought a contract into existence for something that does not exist. For an explanation in relation to English case law see Beever, above n 6, at 43.

[125] Beever, above n 6, at 41. "…because the second party nevertheless promised to perform."

[126] This suggests that the term 'unilateral' contracts may be a misnomer. The creation of the promise Is still the product of two or more individuals, the knowledge requirement has just been dispensed with.

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

[128] Beever, above n 6, at 39.

[129] *Allbrite Industries v Gill Contractors* [2002] NZCA 317 at [12].

[130] The postal rule from *Adams & Ors v Lindsell & Ors*, above n 43is normally viewed as an implied waiver of communication.

[131] For example, as discussed above in Chapter II Part A. In auctions the *timing* of formation is delayed until the hammer falls in order to encourage the bidding process and drive the price up. With crowdfunding *timing* occurs at the moment the funding threshold is crossed because it would not make sense for the project initiator to be under any contractual obligations before such time as they have sufficient funds to undertake the project.

The next difficulty is the assumption that the state of affairs which allows for the creation of contractual obligations upon satisfaction of some necessary condition, originates wholly from a single communication made from one individual to the other in the form of an offer. The discussion above demonstrates that this is not always the case. When a signed contract is drafted the creation of the necessary state of affairs for bringing a contract into existence (and thus the contract formation process) is a joint-effort between the parties. With auctions, securities exchanges and crowdfunding platforms the necessary conditions for creating contractual obligations are facilitated externally by a pre-existing medium for exchange created by a third party.

The final failing of Beever's theory—and equally the classical approach to formation—is the assumption that all the conditions necessary to bring a contract into existence are entirely apparent from the communications between the parties. Often understanding the events necessary to bring a contract into existence requires an appreciation of some pre-existing mechanism (frequently created by a third-party) or some other additional requirement that is not immediately apparent from the communications between the parties. Sometimes this will be imposed by law, such as s9 of the Property Law Act 2007[132] which requires contacts involving the sale of land to be in writing, signed and witnessed in order to be effective. However, in other cases the state of affairs, and its necessary conditions, for generating contractual obligations may arise from pre-existing commercial or social customs against which the exchange between the parties takes place. In the next section, it will be demonstrated by reference to two cases that in some circumstances adopting contextual-objectivity alongside a withdrawal from offer and acceptance is crucial to fully grasp the contemplated process for creating contractual obligations.

D. Contextual Formation in the Privy Council and the High Court of Napier

The case of *John Woolhouse Motors v Foulds*[133] in the High Court of Napier demonstrates how the state of affairs necessary for generating a contractual obligations may be determined by a background custom which is only observable through contextual-objectivity.

Foulds involved a contract for the sale of a stolen car in Napier. The plaintiff Woolhouse had learnt of Foulds attempts to sell a Range-Rover on behalf of a third party. After inspecting

[132] Property Law Act 2007, s 7.
[133] *John Woolhouse Motors v Foulds* HC Napier AP53/93 14 July 1994.

and test driving the vehicle Woolhouse offered $13,000, to which Foulds responded with a counter-offer of $14,000. The next day Woolhouse telephoned Foulds and accepted. The two met the next day to exchange ownership papers and a cheque for $14,000, at which point Woolhouse emphasised he was purchasing the car directly from Foulds. It later transpired the vehicle was stolen—a fact neither Foulds nor Woolhouse were aware of—and the vehicle was returned by the police to the true owner. To decide whether Woolhouse entered into a contract with Foulds acting as agent or principal (the latter allowing Woolhouse to recover against Foulds) the court had to consider if Woolhouse's assertion that he was dealing solely with Foulds formed part of the contract.

Applying a traditional offer and acceptance analysis, it would be excluded because a concluded contract had already arisen when Woolhouse accepted Foulds's offer by telephone.[134] Nonetheless Justice McGechan applied *Boulder* to find that when viewed as a whole, the dealings indicated the contract had not been concluded until the ownership papers and money had been exchanged. Thus allowing Woolhouse's assertion to form part of the contract.[135] For his Honour there were a number of "realities" in the case which did not accord with a strict legal application of offer and acceptance:

> In reality if Mr Foulds had changed his mind , perhaps offered a better price, the plaintiff would not have sought to enforce; and likewise if the plaintiff had looked again, and said it had thought better of the matter, Mr Foulds would not have sought to enforce; in both cases on the basis of the conversation alone. Such realities do not always correspond with legalities, and some care is needed, but they are a sign. In reality, the common assumption in such dealings over cars is that the deal is not actually done until the car is delivered and money paid over.[136]

McGechan J may have unwittingly stretched the global approach to adopt a more contextually sensitive inquiry to contract formation. As discussed in the first chapter a common criticism is that it often fails to lead to a different result. Cooke J's inquiry departed from the use of the terms "offer and acceptance" to take into account the dealings of the parties as a whole. But by carefully stressing the objective nature of the inquiry—the focus being on the correspondence between the parties—textual objectivity was for the most part

[134] The exchange of an offer and acceptance for a car by telephone is perhaps as paradigm as it gets.
[135] But also note at McGechan J went on to find in the alternative that the conversation the next day would still have formed part of the contract on the basis of variation. .*John Woolhouse Motors v Foulds*, above n 133, at 5.
[136] At 4.

nonetheless retained (albeit in a modified form).[137] McGechan J's approach, on the other hand, by taking into account the "common assumption …. that the deal is not done until the car is delivered and money paid over" not only departed from a binary analysis in terms of offer and acceptance but took a step towards contextual-objectivity. Instead of interpreting the communications between the parties on the basis of their literal meaning, McGechan attached a significance that would be more consistent with certain commercial "realities"—as derived from the 'factual matrix'—about when a contract is formed. As a result the issues of *timing* of formation was separated from *content, commitment* to coincide with the formation process as contemplated by the parties themselves.

McGechan J's approach bears a striking resemblance to that adopted by the High Court in *Aotearoa International Ltd v Scancarriers*.[138] *Scancarriers* concerned the legal significance of a telex exchange between a New Zealand exporter and a Norwegian shipping company. Aotearoa met with Scancarriers' agents to arrange for the carriage of waste paper on Scanarriers' ships to India via the Suez Canal whereby 1000 tonnes of space would be available on each shipment. Later a telex was sent to Aotearoa "flwg our discussion on friday 29/1 we agree to a promotional rate of us$120…. and this rate will be held until 29/7/82. [sic]"[139] Aotearoa then negotiated a supply agreement with an Indian company, and notified Scancarriers it wished to make a first shipment in March 1982. This went ahead successfully, but in May Scancarriers refused to make a further shipment. Market rates had subsequently increased and other exporters were then offering a higher price for the available space. Aotearoa began proceedings for a breach of contract to failing to make available space at the agreed rate until the end of July.

The High Court, Court of Appeal and Privy Council all sought to find the approach that would "give effect to the legitimate commercial expectations" of the parties.[140] In the High Court Wallace J began by asking whether a "reasonable person experienced in shipping for export" would have regarded the defendants as undertaking to keep available 1000 tonnes of

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[137] *Boulder Consolidated Ltd v Tangaere*, above n 66, at 563. Cooke J was careful to stress under either approach the point of view is of the reasonable man in the "shoes of the recipient of each letter". This can possibly be read as contextual-objectivity, but it is important to note that he chose specifically not to adopt the analysis of Quilliam J in the lower court who seemed to equip the reasonable man with more contextual knowledge by incorporating the "the history of the dealings between the parties".
[138] *Aotearoa Ltd v Scancarriers A/S* (1985) 1 NZLR 513 (PC).
[139] At 513.
[140] David MacLauchlan "Offer and acceptance in the Privy Council" [1989] NZLJ 136 at 136.

space for shipping at the specified rate until the end of July.[141] Taking into account "the background of the way in which bookings are made in New Zealand by shipowners and shippers" he concluded that "a shipowner cannot reasonably be regarded as offering to contract in such an informal way".[142] The normal understanding in the industry was shipowners had the right to refuse shipments at the wharf. For the Court of Appeal, however, the finding that there was no freight-rate agreement "would fail to give effect to legitimate commercial expectations".[143] Furthermore, the court felt it was necessary to formulate an implied term that the "shipping company would not arbitrarily refuse the customer at that rate" in order to give "business efficacy" to the "telex in its context".[144] The Privy Council expressly disagreed with this analysis. At most the telex by the defendants was a quote for a freight rate that would be adopted if cargo from the plaintiff was accepted. Furthermore they found that to imply a term against arbitrary refusal would "create a contractual relationship which certainly the parties had not expressed for themselves". They concluded that the telex was no more than a quoted rate.[145] David MacLauchlan argues the facts of *Scancarriers* boiled down to the simple fact that:

> …shippers of goods (much like second-hand car buyers!) are notorious non-starters; they often express a firm interest, even obtain a price, but then fail to front up at the business end of the deal. [146]

It was therefore shipping custom, not offer and acceptance, which determined that *timing* of formation would not occur until goods were accepted at the wharf. Just as in *Foulds* commercial understanding dictated that in second-hand car dealings the "deal is not done" until ownership papers and money are exchanged.

Foulds and *Scancarriers* therefore demonstrate that even when a case appears to blatantly fall within the traditional paradigm, offer and acceptance may nonetheless play no role in dictating the conditions which the parties view as necessary to bring into existence contractual obligations. At most, as a question and answer medium, it may have determined the *content* of a common intention between the parties. However, in both cases in order to

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[141] *Aotearoa Ltd v Scancarriers A/S*, above n 138, at 528.
[142] At 529.
[143] At 548.
[144] At 548.
[145] At 556.
[146] MacLauchlan, above n 140, at 145.

fully appreciate the conditions necessary to satisfy the state of affairs to create contractual obligations—and thus the contemplated process for formation—resort to commercial background, by adopting contextual objectivity was inevitable.

E. Contracts Formed Through the Course of Dealing

Expanding Beever's theory beyond the constraints of offer and acceptance can explain a wider variety of formation process. However, simply opening the door to contextual elements does not provide judicial guidance on how they are to be navigated. Courts frequently struggle with cases where the parties behave as if they have a contract in force but failed to adequately evidence using offer and acceptance or formal documentation how their contractual relationship began. *Brogden v Metropolitan Railway*[147] is perhaps the earliest known example, where two parties had been involved in a supply and purchase arrangement for coal over a number of years, but failed to properly execute their execute their contract.[148] Nonetheless, Cairns LJ found an agreement was in force by observing that:

> …there 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…[149]

Although *Brogden* is commonly cited as authority for the 'acceptance by conduct' rule and there are several references in the case made to the traditional approach, Owsia observes that "the facts of the case were not specifically dissected into offer and acceptance."[150] Instead the judgment is better analysed as a court finding agreement through "the course of dealing" rather than by "identifying and labelling particular manifestations of the offer or the acceptance".[151]

Bayern calls these types of cases the contractual equivalent of 'res ipsa loquitur': the court is certain that there is a contract between the parties, but is unable to say exactly how it arose.

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[147] *Brogden v Metropolitan Railway* [1876] 2 App Cas 666 (HL).
[148] In the beginning the defendant sent a draft supply agreement to the plaintiff, which was signed and returned with an arbitrator's name inserted. Despite continuing to accept the plaintiff's coal, the contract was soon forgotten and remained unexecuted in the defendant's desk until a dispute arose years later.
[149] *Brogden v Metropolitan Railway*, above n 147, at 682 per Cairns LJ.
[150] Owsia, above n 18, at 900.
[151] At 901. However, compare with the judgment of Blackburn LJ, although the phrase 'acceptance by conduct' is not used, he does view the parties has having or as "shewn by their conduct" they intended to agree informally. *Brogden v Metropolitan Railway*, above n 147 per Blackburn LJ at 693;

[152] This poses significant difficulty for the analysis of the formation process offered thus far: How is a court to decide how an agreement arose, if the parties themselves failed to conform to their own contemplated process of formation? Under Beever's theory, we cannot say that contractual obligations are generated by one party satisfying a condition of the external state of affairs created by the other—in this case signing the contract—if some totally different act brought the contract into existence (buying and purchasing coal).

One response may be that the parties contemplated in the back of their minds the possibility that agreement could arise without executing the formal contract—by simply accepting the first shipment of coal. But if this is the case, it cannot be demonstrated simply by resorting to contextual-objectivity as occurred in *Scancarriers* or *Foulds*. Beever's theory tells us that contract law is not concerned with giving effect to contracts that arise simply from the *actions* and *beliefs* of the parties, but *actions* satisfying the contemplated conditions as created in *externally* generated states of affairs.

The answer is that neither offer and acceptance nor our expanded conception of formation can provide us with a complete understanding. Something more led to the creation of a contractual relationship between the parties which the discussion thus far has been unable to appreciate. Empirical research demonstrates that businessmen will frequently ignore precise planning and consent (and thus compliance with the law of formation) of their affairs in favour of the more imprecise social norms of flexibility, trust and co-operation.[153]The contractual obligations found to exist in *Brogden*[154] cannot be explained as arising at a definitive moment in time through a definitive contemplated process. Instead the parties simply drifted in an arrangement for the sale and purchase of coal over time as their relationship grew.[155]

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[152]'Res Ipsa loquitur', meaning 'the thing speaks for itself' is a principle used in tort law to prove negligence where there is a damaged caused but a plaintiff is unable to prove exactly how it occurred. Bayern, above n 1, at 17.

[153] Catherine Mitchell *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing Ltd, Oxford, 2013) at 111.

[154] Above n 147.

[155] Compare with Burrows, Finn and Todd, above n 13, at 55. They interpret Brogden as holding that a contract arose at the specific moment when coal was first delivered or received. However, of the four judges it was only Lord Hatherley that suggested this. *Brogden v Metropolitan Railway*, above n 147, at 685 per Hatherley LJ.

This understanding leads us to two possible conclusions: that these types of relationships should not be classified as contractual at all[156]; or, alternatively, the model offered thus far is incomplete. The next chapter argues that the answer is the latter—we have reached this crossroad because our approach has been limited by a one-dimensional picture of contracting behaviour. The very idea that contractual obligations arise from the actions of the parties satisfying a condition in an external state of affairs is still premised on the classical liberal belief that all contracting parties are calculating and individualistic. Simply expanding our notions of how promises are generated by the actions of the parties, and opening our eyes to contextual-objectivity is not enough. To give full effect to the self-imposed nature of contractual obligations we must also appreciate the full range of social norms which define contracting activity.

F. Conclusion

Painting diverse transactions with the same brush of offer and acceptance can serve to frustrate individual choice and obscure the different processes which some commercial parties use to create contractual obligations. Beever's theory provides considerable insight into the normative events of formation by explaining that contract law is concerned with enforcing those promises that are the *product* of actions of two or more individuals creating and satisfying external states of affairs. But, he equally remains committed to forcing transactions into the conceptual constraints of offer and acceptance. This allows incorporation of unilateral contracts and simultaneous exchanges, but to make the most of Beever's theory, and expand it to other types of contracting, we have to recognise that the state of affairs necessary to bring contractual promises into existence may be generated and satisfied by the actions of the parties in different ways; not necessarily, indeed perhaps not often, using definitive acts of offer and acceptance. In many of the types of transacting discussed this can be done simply using the facts of the case to guide the questions of *commitment*, *content* and *timing*. *Foulds* and *Scancarriers*, demonstrated that sometimes the contemplated process can only be observed using contextual objectivity to incorporate background commercial custom. However, the inability of this approach to account for contracts formed through the 'course of dealings' exposed a key limitation: it continues to subscribe to the classical conceptions of

[156] Instead the rights and liabilities of the parties could be defined by the law of restitution.

contracting behaviour. To offer a complete theory of formation we must also expand our understanding beyond the behavioural assumptions of the classical law.

Chapter III: A Relational Understanding of Formation

A. Introduction

This chapter applies relational theory to expand the conclusions reached in the last chapter. By adapting Beever's analysis of the formation process it was observed that states of affairs for the creation of contractual promises can be generated and satisfied by the parties' actions in various ways. However, this approach is still based upon the understanding that contractual relations are only created through precise planning and effectuation of consent (albeit in a modified form). Consequently it is unable to explain the underlying factors at work which led to the creation of contractual obligations in contracts formed through the 'course of dealing'. To fill this void the insights of relational theory are introduced. Insofar as relational contract theory is a sociological study of the norms that define actual contracting behaviour, it is hoped it can provide judicial guidance on the factors that might determine how issues of contract formation ought to be resolved in manner which is more consistent with contract's self-imposed nature.

This is an ambitious task. Incorporating vague social norms is fundamentally inconsistent with traditional understandings of both contract *law* and proper legal method. Even if properly deployed, relational analysis is 'contextual with a vengeance', and entails a highly individualised system of justice. For neoformalists this spells the death of legal certainty and contract law's goal of facilitating dispute resolution. However, this overlooks the extent the classical analysis of formation is already uncertain. Applying a relational approach to the cases of *Brogden*,[157] *Foulds*,[158] *Scancarriers*[159] and *Boots Cash Chemists*[160] it will be demonstrated that to deal with the inherent indeterminacy in legal language and its application to contracting behaviour judges are already sensitive to relational factors—but this is often obscured by the myth that judges simply apply the law. It will be argued that relational analysis encourages a more open engagement with the social norms which impact contract formation. To this end better judicial guidance can be provided; and contract law can be used by parties in a manner which is more consistent with its self-imposed nature.

B. The Writings of Ian Macneil

[157] *Brogden v Metropolitan Railway*, above n 147.
[158] *John Woolhouse Motors v Foulds*, above n 133.
[159] *Aotearoa Ltd v Scancarriers A/S*, above n 138.
[160] *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, above n 128.

For Ian MacNeil the main consequence of classical liberal influence was the loss of appreciation for the complex social relations that underpin all contractual exchanges.[161] Contracts are viewed as discrete and isolated exchanges. Rather than appreciating the full extent of human nature, contracting parties are seen as "atomistic, rational, self-interested individuals of roughly equal bargaining power who agree on contract terms" and adhere to the neat definition of the life cycle of contract as defined by the rules on planning, formation and performance. [162] The contractual obligations are created at a precise point in time, through offer and acceptance, and cease to exist once discharged through performance.[163] Dissatisfied with this classical ideal, Macneil dedicated his life's work to describing the dynamic and relational reality of contracting, pioneering what is now known as relational contract theory. Relational contract theorists believe that the key to understanding contract is to appreciate the rich social matrix of interpersonal relations in which all contracting takes place. They can be broadly united by four core assumptions about contracting:

1. Every transaction is embedded in complex relations.
2. Understanding any transaction involves understanding these relations
3. Effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.
4. Combined contextual analysis of relations and transactions is more efficient and produces a more compete and sure final analytical product than does commencing with non-contextual analysis of transactions. [164]

According to Macneil all contracting behaviour can be summarised by ten common contract norms: "(1) role integrity (2) reciprocity (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the restitution, reliance, and expectation interests (8) creation and restraint of power (9) propriety of means and (10) harmonisation with the social matrix."[165] Not all contracts present these ten norms, rather relational theorists believe there is a spectrum between discrete and relational contracts. In relational contracts the norms of role integrity, contract solidarity and harmonisation with the social matrix are

[161] Macneil, above n 10, at 32.
[162] Mitchell, above n 153, at 173.
[163] At 173.
[164] Macneil, above n 10, at 368.
[165] At 153.

intensified; whereas the discrete contract is defined by its intensification of the norms of implementation of planning and effectuation of consent, often best served by textual-objectivity.[166].

C. Applying Relational Theory to Contract Formation

Recognising a wider range of contractual norms may help guide judges in interpreting the factors that affect formation. The findings in the second chapter, for example, are only determinative of the formation process as contemplated by the parties themselves to the extent their relationship exhibits the discrete characteristics of planning and consent. Opening the inquiry up to contextual objectivity is a step in the right direction, as it acknowledges the factors affecting formation which arise from the harmonisation with the social matrix. However, it does not provide us any answer as to why these background norms *should* impact contract formation. It also fails to recognise, and provide judicial guidance on, the intensification of other norms, other than effectuation of consent and implementation of planning, which are only revealed through an analysis of the specific relationship between the parties.

To illustrate this we can use Bayern's example of the inability of the traditional approach to account for the purchase of a newspaper from a familiar street vendor:

> For example, if I pass by a newsstand at which I am a regular customer and familiar with the proprietor, and in a rush, I take a newspaper and nod toward the proprietor, pointing at my watch, the proprietor and I likely have a contract for the sale of goods on the usual terms by which we buy and sell daily newspapers.[167]

The normal understanding, based on a discrete analysis, would be that a contract is formed at the moment payment is accepted by the vendor.[168] However, the relationship of trust which Bayern has developed over time with this particular vendor has led to an intensification of the behavioural norms of contractual solidarity and flexibility. These shape the contract

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[166] At 154.
[167] Bayerrn, above n 1, at 15.
[168] See *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, above n 128. Applying *Boots Cash Chemists* the display of the newspapers is an 'invitation to treat' the act of picking out the newspaper and handing over money is the 'offer' which is in turn 'accepted' by the vendor when they take the money; the contract is subsequently performed when the newspaper is handed over. However, as will be explained further on, even this apparently discrete analysis would have to incorporate a social norm (the general understanding that we must pay for items in shops before they will be handed over) to determine when the contract with the street vendor is formed.

formation process, in a manner unique to their specific relationship, to allow Bayern to purchase newspapers on a more casual basis. A contract for sale is thus formed the moment Bayern grabs a newspaper from the stand—if any other member of the public simply grabbed a newspaper without paying, they would likely be pursued by the proprietor for theft.

These same insights can be applied to contracts formed through the 'course of dealing'. Often when parties first meet they might conduct themselves on a discrete basis, but overtime as familiarity increases they move along the spectrum and begin to exhibit more relational norms. For example, in *Brogden*[169] the draft contract was created at the beginning of their relationship when the norms of effectuation of consent and planning were at their peak. However, as they became more familiar with one another and their trust grew, norms of flexibility and solidarity became more prevalent and the formal contract was quickly forgotten, which allowed the contractual relations to be structured on a more informal basis.

The intricacies of these types of underlying relational shifts, however, can become obscured by judicial backpedalling to fit within classical doctrine. Burrows, Finn and Todd interpret the judgment in *Brogden* as meaning that a contract arose the moment the first shipment of coal was received.[170] However, if at that point a dispute arose it seems less likely that the court would have found their 'conduct' to have indicated agreement to the terms of the draft being in effect. It was the length of their dealings, and thus the strength of the relationship, which undoubtedly influenced the court's decision. They also likely appreciated the commercial reality that parties in long-term relationships have a tendency to ignore compliance with formal documentation or the legal understandings of formation.[171] However, instead of explicitly recognising these underlying elements, they simply concluded that it was the 'conduct' which indicated their assent for the draft contract to bind them.

This exemplifies what Atiyah describes as the common tendency for judges to provide the impression they are reasoning forwards from the application of the settled doctrine, when in reality they have merely reached the outcome which they believe just and then reasoned backwards to find the presence of an offer and an acceptance.[172] Chen-Wishart explains "this is reinforced by the long-standing fiction that judges merely apply settled rules without

[169] *Brogden v Metropolitan Railway*, above n 147.
[170] Burrows, Finn and Todd, above n 13, at 55.
[171] See generally Mitchell, above n 153 at 104–108.
[172] Atiyah, above n 19, at 58. *Boots Cash Chemists* is given below as a further example. *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, above n 127.

reference to the justice of the rules or the outcomes they yield". She concludes that on this basis "findings on questions of 'offer' and 'acceptance' are less the outcome of an empirical examination of the parties' conduct than an expression of the court's conclusion of the labels that justice requires". [173]

Adopting a relational approach to understanding formation therefore may not only ensure outcomes which are more consistent with the relationship established between the parties themselves, but enhance judicial transparency by encouraging a more open engagement with the factors which are perhaps already impacting judicial reasoning; but are currently disguised by classical doctrine.

D. Difficulties with Relational theory

MacNeil's work is frequently criticised for being purely analytical. It is useful for understanding contracting behaviour, but he never went as far as proposing an alternative system to rival the classical approach.[174] According to Eisenberg to do so "requires the formulation of a new body of legal rules based on approaches and assumptions that are justified by morality, policy and experience". He laments that is a "place to which relational contract theory has not gone and cannot go."[175] If classical contract law is most relevant to those contracts operating at the discrete end of the relational spectrum, the natural response is to judge parties' behaviour on the norms most appropriate to that kind: planning and consent. This would mean that contracts sitting elsewhere on the relational spectrum would be determined by the other relational norms as appropriate. Eisenberg's rejoinder is "that rules whose applicability depended on where a contract is located in a spectrum-that is, on how many relational indicia the contract has and of what kind-would be rules in name only".[176]

Moreover, there is no consistent means for determining the extent a given contract is relational. Duration of the relationship may not always be a defining factor. [177] A year-long fixed term lease in which a tenant is responsible for maintenance, may be less relational than

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[173] Chen-Wishart, above n 21, at 79.
[174] As a branch of law and sociology, Smith rejects that relational contract scholarship can even be called contract law theory: "an explanation of contracting practices is not contracting theory because the facts it seeks to explain are not contract law facts." Smith, above n 2, at 8.
[175] Melvin A Eisenberg "Why there is no law of relational contracts" (1999) 94 Nw U L Rev 805 at 813.
[176] At 814.
[177] Charles J Goetz and Robert E Scott "Principles of Relational Contracts" (1981) 67 Virginia Law Review 1089 at 891; See also Eisenberg, above n 135, at 814.

a "one day contract between a photographer and a portrait sitter".[178] Goetz and Scott propose that contracts are relational to "the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations".[179] However, Eisenberg argues this definition would incorporate virtually every type of contract.[180] It also overlooks one of the fundamental findings of Macneil's theory: That all transactions are inherently relational.[181] The discrete contract is merely an ideal because "exchange in any meaningful sense is impossible outside a society, even the purest discrete model necessarily does postulate a social matrix."[182]

For neoformalists[183] the findings of relational theory serve to strengthen rather than undermine the discrete approach of classical contract law. They do no deny that all contracts are underpinned by complex social relations, but they dispute whether including these norms into contract *law* will promote the goal of facilitating dispute resolution.[184] They argue commercial contract law should consist of straightforward and simple rules to provide a counter-weight of certainty and predictability against the infinitely complex and diverse nature of human relations.[185]

Other writers question the ability of judges to arrive at an accurate picture of the different unexpressed norms governing a particular relationship, simply by opening the door to a more contextual enquiry, [186] especially where the parties themselves may have different or no understanding at all about the unexpressed norms that governed their relationship. Greater admissibility of evidence on pre- and post-contractual conduct compounds the costs and time involved in litigation.[187] Even once such evidence is properly digested "a judge's idea of commercial sense may be thought by some to be about as reliable as a businessman's idea of legal principle".[188] After all, the judicial test of the Clapham omnibus man[189] is simply the

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[178] Eisenberg, above n 175, at 814.
[179] Goetz and Scott, above n 177, at 1091.
[180] Eisenberg, above n 175, at 815.
[181] Macneil, above n 9, at 2.
[182] Ian R Macneil *The New Social Contract* (Yale University Press, New Haven, 1980) at 11. This point is illustrated in further detail below.
[183] See above n 90
[184] Morgan, above n 10, at 69.
[185] Mitchell, above n 153, at 188; Morgan, above n 11, at 89.
[186] John Gava and Janey Greene "Do We Need a Hybrid Law of Contract? Why Hugh Collins Is Wrong and Why It Matters" (2004) 63 CLJ 605 at 617.
[187] Lord David Neuberger "The impact of pre- and post-contractual conduct on contractual interpretation" (2014) <www.supremecourt.uk> at [12].
[188] At 20.

fictional embodiment of the "good sense of the judge trying the case."[190] Lord Neuberger argues the inquisitorial style of civil law procedure is significantly more suited to such an undertaking, whereas common law judges are better suited to playing the role of detached arbiter. [191] Gap-filling by judicial reference to commercial norms in the common law equates to judicial activism, rather than an "essential part of the judicial task".[192] Contract law should only provide the bare minimum needed for facilitating exchange. When parties fail to meet that minimum, by adequately specifying their intended rights and obligations in written documentation, they cannot expect a Lord Denning to rescue them by giving legal force to arbitrary social norms.

Even if a relational approach can be properly employed, the end result may be an unhappy picture: a highly individualised system of contract law that arrives at a 'just' result on a case-by-case basis, is arguably worth less to commercial parties if it fails to provide a tolerable degree of legal certainty.[193] It is difficult for individuals to plan and order their affairs against a system of rules that is in a constant state of flux from attempting to adapt to the never-ending tide of social and commercial norms. Equally if contract law is straightforward and certain it may be better understood and employed by parties in a way that better aligns with its self-imposed nature. For example the parole evidence rule,[194] by creating a dividing line between what is and what is not considered to be part of a contract, provides an incentive for parties to write down only those terms and conditions which they intend to be bound by.

However, the argument a relational approach would cause unnecessary uncertainty rests on the assumption that sufficient certainty is already achieved by the black letter rules in the area of contract formation. The previous chapter demonstrated that the legal certainty provided by offer and acceptance quickly fades away when confronted with a case outside the traditional paradigm. A neoformalist response, however, may be that adopting a relational analysis to

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[189] I.e. the reasonable bystander equipped with the all the background knowledge of the parties to the particular arrangement. See generally John McCaughran "Implied terms: The journey of the man on the Clapham Omnibus" (2011) 70 CLJ 607.
[190] At 615.
[191] Neuberger, above n 187, at [21]. Note, however, that here Neubrger was discussing contextual approaches to interpretation generally, but because relational theory is essentially a brand of contextualism, the practical concerns involved are the same.
[192] Mitchell, above n 153, at 188.
[193] See generally Rex Ahdar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39.
[194] The parole evidence rule states that "when a transaction has been reduced to or recorded in writing by agreement of the parties, extraneous evidence is in general inadmissible to contradict, vary, add to or subtract from the terms of the document." *Edwards v O'Connor* [1991] 2 NZLR 542 at 548.

remedy this is akin to using a sledge hammer to crack a walnut—the problem transactions discussed can be dealt with simply by adjusting the current rules or creating sub-categories formation.[195].

E. Justifying a Relational Approach to Contract Formation

Against the aforementioned criticisms there are two arguments for adopting a relational approach to contract formation. First, it can be demonstrated using cases that judges are already sensitive to relational concerns, but this is obscured through the fiction that outcomes are reached in the formation process through the application of legal rules. Relational theory, on the other hand, encourages judicial transparency by expanding our conceptions of what counts as contract law. While neoformalists deny the relevance or impact of social and commercial norms on contract law, relational theory embraces them as forming "the greater part of the legal understanding of the relationship over express contract terms and contract law doctrines". [196] This does not prevent the application of classical rules and doctrine, but prevents them from limiting the scope of the court's inquiry into the nature of a particular contract. Instead of beginning and ending the analysis of disputes through the application of rules and classical assumptions of behaviour, the court is encouraged to begin by looking at the context of the relationship between the parties.[197]

Furthermore the criticism that a relational approach to formation is outside judicial capacity overlooks the extent to which this type of analysis is already undertaken under the guise of the application of legal rules.[198] Even in determining something as simple as an 'invitation to treat' courts may already engaging in the type analysis required by relational theory.

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[195] For example, multilateral signed contracts could be dealt with simply by adopting the suggestion the act of signing is a manifestation of assent, and the contract is thus formed at the moment of 'execution'. Similarly to better account for commercial flexibility in contracts formed through the 'course of dealing', we might adopt the Vienna Convention on Contract for the International Sale of Goods, art 19 which allows for a contract to arise where " as a result of practices which the parties have established between themselves or of usage" the offeree has indicated assent "performing an act, such as one relating to the dispatch of the goods or payment of the price".

[196] Mitchell, above n 153, at 190.

[197] For example, if the relationship is self-interested and representative of the norms of planning and consent, then an analysis in discrete terms—placing significant weight on express terms in the contractual documents—by the classical law will be appropriate; whereas strong evidence of the norms of flexibility and contractual solidarity might lead a court to place less weight on the written terms of the contract.

[198] See the earlier discussion on contracts formed through the 'course of dealing' in Chapter III Part C.

In *Boots Cash Chemists,*[199] the court was asked to consider whether the defendant, by allowing customers to pick medicines off the shelves in their store before paying for them at the counter had breached s18(1) of the Pharmacy and Poisons Act 1993 requiring supervision by a qualified pharmacist of the sale of medicines "at the point of sale". The plaintiff argued that the drugs were offered to the public and 'accepted' when a customer placed a drug in their basket—therefore in breach of the act. Prima facie displaying goods in a store seems consistent with them being "offered for sale". However, the court held it was a mere 'invitation to treat' and the bringing of items to the counter by a customer amounted to an 'offer' which was then 'accepted' by the store owner when the items were rung up on the till.[200]

At face value contract law students might presume the case involved the mechanical application of the rules offer and acceptance—offer constituted the second-to-last act, acceptance the last. However, when analysed in closer detail we can see that to determine when a sale took place the court undertook a semi-relational inquiry into how transactions occur in self-service stores. Finding there was an offer and acceptance, and a sale effected, at the moment the customer put an item in their basket the court observed would be inconsistent with the ability to change their mind about their purchase and substitute items in the basket before deciding. This finding was reached not simply applying the rules of offer and acceptance, but from interpreting a pre-existing social norm, derived from the factual matrix, as informing the basis of all exchange relationships between the defendant and potential customers.

McGechan J in *Foulds*[201] and the Privy Council and High Court in *Scancarriers*[202] framed their enquiries into formation with reference to the terms of the specific relationships between the parties as influenced by background commercial norms. In *Foulds* the relationship between the buyer and the seller of the car—and the question of when a contractual promise to purchase the car was brought into existence—was informed by the background assumption that in "such dealings over cars… the deal is not actually done until the car is delivered and money paid over." In *Scancarriers* the High Court and Privy Council phrased their enquiries

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[199] *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, above n 127.
[200] At 402.
[201] *John Woolhouse Motors v Foulds*, above n 133.
[202] *Aotearoa Ltd v Scancarriers A/S*, above n 138.

in terms of the specific relationship between the parties as informed by the background way in which freight bookings are made in New Zealand. They observed the Court of Appeal's attempt to imply a term against arbitrary refusal would "create a contractual relationship which certainly the parties had not expressed for themselves".[203]

Eisenberg's criticism that it is impossible to formulate an adequate system of relational theory overlooks the fact that MacNeil never intended for his work to serve as a replacement or appendage to the classical law. As Mitchell explains:

> MacNeil's relevance lies not in yield concrete proposals for the reform of contract law, but in bringing to the fore, and making us confront directly, the elements of contracting behaviour that may remain relatively obscured through the application of legal doctrine.[204]

The second justification of relational theory's relevance to contract formation is that it encourages transparency in judicial reasoning. In response to the uncertainty allegation, it can be argued that uncertainty arises not just from the content of the law formation itself but its application to contracting behaviour. Straightforward legal rules provide no greater judicial guidance for navigating commercial relationships. MacNeil's main grievance, was not with the use of legal rules, but their application based on discrete assumptions of contracting behaviour.[205] It also overlooks that indeterminacy is an inherent feature of all legal language. Not only is it impossible to create a law for formation that provides adequate guidance in advance to all issues of content, timing and commitment for the infinite varieties of contracting behaviour, any to attempt to do so would be inconsistent with the self-imposed nature of contractual obligations. Predetermining how parties *should* form their agreements undermines the ability of parties to structure their transactions to suit commercial needs, and the evolving nature of contractual relations. The freedom of contract should not relate simply to *what* parties agree to, but *how* they choose to create those obligations in the context of their specific relationship.

The aforementioned cases on formation demonstrate that judges are already dealing with the indeterminacy inherent in the law of formation by engaging in an interpretation of the specific relationship of the parties as informed by background social norms and expectations.

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[203] At 528
[204] Mitchell, above n 153, at 199.
[205] At 200.

The judges in *Foulds* and *Scancarriers* should be commended for admitting the extent their determinations were influenced by background commercial understandings. However, in *Boots Cash Chemists* and *Brogden* the impact of relational factors and pre-existing social understanding (on how items are paid for in a self-service store) is obscured through judicial backpedalling to give the appearance of the mechanical application of legal rules. David MacLauchlan was inadvertently guilty of this same fallacy in his analysis of the decision in *Scancarriers*. He argues the difficulty encountered in *Scancarriers* was blown out of proportion and the case should have been decided "as a relatively straightforward example of an invitation to treat".[206] This statement suffers from the formalist assumption that the terms 'invitation to treat', 'offer' and 'acceptance have any freestanding explanatory power. The diversity of contractual relationships and the inherent limits of language (whether through offer and acceptance or some other formula) mean that determining what is an 'offer' or an 'invitation to treat', is impossible without reference to some extra-legal consideration.

A relational approach does not exclude the use of these terms. Its strength, however, lays in the open acknowledgment of the impact that extra-legal norms have on their application. To this end it appreciates the full range of norms which affect contractual behaviour—not simply those which fit within the classical liberal ideal. Not only is this more consistent with the self-imposed nature of contractual obligations, but by ensuring a better formulation of the factors which are already influencing the court's decision making process more guidance can be provided for those that choose to contract.

F. Conclusion

Adopting a relational analysis is only radical to the extent we choose to believe the myth judges decide issues of contract formation solely using the black letter law. The inherent limits of legal language and the complexity of contractual behaviour mean a judge's determination of the formation process will always be impacted by factors outside the traditional definition of the law. By expanding our concept of what counts as valid legal analysis relational theory encourages a more open engagement with these social elements. Not only does this promote better formulation and guidance on the factors which impact

[206] MacLauchlan, above n 140, at 145. Though oddly he still submits that the correct approach was that of Wallace J in the High Court who sought to give effect to the background commercial assumptions of the parties by sifting through all the different evidence as to the interpretation of the evidence. Wallace J's task was unlikely made any easier by simply keeping in mind he was looking for an 'invitation to treat' not an 'offer'.

judicial determination of the formation process, but by appreciating the full range of norms which define actual contracting behaviour it also leads to results which are more consistent with the self-determined nature of contractual obligations. Therefore whenever attempting to analyse the formation process, and answer issues as to *timing, content* and *commitment,* the starting point must always be the particular contractual relationship as defined by the parties and the social matrix which they are a part of. Any presupposed method of contract formation must only be used as secondary to this inquiry.

Chapter IV: Relational Sensitivity in the Supreme Court of New Zealand

The recent Supreme Court decision in *Savvy Vineyards v Kakara Estate*[207] provides a further case study on the insights that relational theory can provide to contracts formed through the 'course of dealing'. Two related companies, Kakara Estate Ltd and Weta Estate Ltd (KEWE) purchased land to be developed into vineyards. As part of the purchase they entered into an agreement with Goldridge Estate Ltd for the management of the vineyards, with KEWE as the owner and grower of the grapes and Goldridge as the manager and purchaser. In the management agreement KEWE had a right to terminate in the event of liquidation by Goldridge and, significantly, Goldridge had a right to assign its interest without KEWE's permission. In 2009 Goldridge informed KEWE of its wish to incorporate two new companies, Savvy Vineyards 3553 Ltd and Savvy Vineyards 4334 Ltd ("the Savvy Companies") to take over management of the vineyard. In August 2009 deeds for transfer of Goldridge's rights and duties in the management contract were signed by Goldridge and the Savvy Companies. On 11 September 2009 these were forwarded to KEWE for their execution.

KEWE began dealing solely with the Savvy companies—with Savvy providing its management services and purchasing grapes from KEWE—however, the transfer deeds remained unexecuted by KEWE. By 2010 the relationship soured and KEWE attempted to terminate its agreement with Savvy. In November Goldridge went into liquidation and KEWE attempted to terminate the agreement on this basis.

The appeal turned on whether the transfer of Goldridge's interest in the management agreement to the Savvy companies was novation or assignment. The deeds executed by Goldridge contained a term indicating they were to be of the former. Novation would amount to the formation of an entirely new agreement with the Savvy companies and would require KEWE's assent. It would also mean the original contract with Goldridge would cease to exist along with KEWE's right to termination in the event of their liquidation. If the transfer to the Savvy companies was merely assignment then the right to terminate upon Goldridge's liquidation would be still in effect.

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[207] *Savvy Vineyards 3552 Ltd v Kakara Estate Limited*, above n 11.

In the High Court Andrews J held the evidence strongly suggested KEWE intended to deal with the Savvy Companies not merely as assignees, but parties to the management agreement in substitution for Goldridge.[208] Emphasis was placed on various factors indicating KEWE had, by their conduct, accepted the transfer deed. In particular:

a) The failure of KEWE to voice their concern with the transfer and express their wish that Goldridge remain a party to the agreement;[209]
b) Notices to Remedy Defaults were sent solely to the Savvy Companies;
c) initial attempts to terminate the management agreement were addressed exclusively to the Savvy companies, instead of Goldridge; and
d) When KEWE engaged formal disputes resolution procedures with the Savvy Companies, Goldridge was not involved.

The enquiry of the Court of Appeal, however, was framed around the failure by KEWE to execute and return the deeds of assignment.[210] The subsequent conduct by KEWE treating the Savvy companies as substituting Goldridge was found to be insufficient to displace the orthodox position that "when a party refused to sign a written agreement that was a strong indication that it did not wish to be bound, in the absence of clear evidence to the contrary."[211]

Elias CJ and McGrath J for the minority agreed with the Court of Appeal. The question of whether novation had been effected boiled down to "ordinary contractual principles concerning formation of a contract".[212] The failure of KEWE to execute the assignment deed was a significant factor. Their honours observed subsequent conduct may sometimes be sufficient to displace a failure to execute documents, however, KEWE's treatment of the Savvy Companies as replacing Goldridge on this point was "neutral". Ultimately at they found:

> [T]hat an analysis of the circumstances in terms of offer and acceptance does not point to a concluded contract of novation in terms of the proffered deeds. We are

[208] At [14].
[209] At [3].
[210] At [17].
[211] At [74].
[212] At [29]

satisfied that reasonable persons on both sides would take the view that a contract was not concluded.[213]

A pivotal distinction of the majority's decision was that the original management agreement provided Goldridge a right to novate without KEWE's assent. Although the parties had on a number of occasions used the language of assignment in an "unorthodox way"—the contract referred to a right of "assignment"—their Honours found the envisaged effect was undoubtedly novation. [214]

However, they nonetheless went on to consider in obiter whether the dealings of the parties indicated assent had been obtained for novation. The deed of transfer clearly intended to transfer Goldridge's obligations as well as rights, which ruled out the possibility that "an assignment theory" could explain "how the Savvy companies came to be in contact with Kakara and Weta."[215] Importantly, the failure by KEWE to execute the deeds was found not to be of "controlling significance" in resolving the question of whether novation had occurred. [216] Citing *Brogden v Metropolitan Railway* [217]they observed that an unsigned contract would have contractual effect if "the course of dealing and conduct of the party to whom the agreement was propounded…" led to the conclusion that the agreement had nonetheless been accepted. The Savvy Companies had dealt with KEWE as the successors to Goldridge; invoices were paid to the Savvy Companies; and there were "many documents in writing and signed by the representatives of the appellants and respondents which proceed on the basis that the contracts had been novated".

The majority and the High Court can be commended for their choice to engage with the question of novation in terms of the relationship of the parties as defined by their conduct and the specific context of the case, rather than viewing the facts through the lens of orthodox conceptions of how formation should occur. By beginning their inquiry in terms of the "ordinary contract formation principles" the decision of the minority, on the other hand, forms a example of the failings of adopting a discrete classical analysis. As explained earlier,

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[213] At [42].
[214] At [94–100].
[215] At [109]. Also significantly at [92] they observed the possibility of assignment under the contract they would be inconsistent with 11(1) of the Contractual Remedies Act 1979 which does not provide for the burden of a contact to be assigned—for to do so amounts to novation.
[216] *Savvy Vineyards 3552 Ltd v Kakara Estate Limited*, above n 11, at [62].
[217] Above n 146.

discreteness in classical contract can be defined by its amplification of the contractual norms of implementation of planning and effectuation of consent. Contractual parties are assumed to plan and structure their affairs through the use of formal documentation. Although acceptance by conduct was recognised as a possibility, insofar as KEWE had actually assented to novation, the minority assumed the best indicator would have been an execution of the deed. Accordingly they effectively marginalised through textual-objectivity, the impact that other significant behavioural norms such as flexibility or contractual solidarity could have on the formation process. As a result it failed to recognise how contractual relationships change and evolve in ways that do not always reflect the traditional rules of offer and acceptance and formal documentation.

The majority's obiter comments are consistent with a growing trend in the United Kingdom to decide contract cases on the basis of commercial substance of legal relationships rather than legal form.[218] In particular Savvy can be compared to a similar course of dealings case decided by the UK Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH& Co KG (UK Productions*).[219] Just as the Supreme Court in Savvy decided the conduct of the parties was inconsistent with a finding KEWE had not assented to a novation, the UK Supreme Court found the subsequent installation of equipment meant the failure to execute a formal contract within a specific time limit did not preclude it being in effect. Catherine Mitchell explains that *Molkerei* illustrates one of the biggest weaknesses with classical analysis: "documents are taken as a free-standing explanatory framework according to which the actions and motivations of the parties are judged, and conclusions drawn about the extent of their obligations."[220]

A. Conclusion

[218] See generally the law on contractual interpretation, implied terms and remoteness of damages.. *Investors Compensation Scheme* above n 57; Belize Telecom above n 56; *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 4 All ER 159 (UK HL). Also see generally *West Bromwich Building Society Durham Tees Valley Airport v BMIBaby Ltd* [2010] EWCA Civ 485 (CA). There in a case involving certainty of agreement Mitchell, above n 153, argues a similarly "less doctrine driven" approach was taken.

[219] *RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh & Company KG (UK Production)* [2010] UKSC 14. The plaintiff contracted with the defendant for the installation and manufacture of equipment for packaging in the defendant's yogurt factory. A letter of intent and a draft contract was drawn up, which contemplated the execution and exchange of a formal contract within four weeks. Although the equipment was installed, a formal contract was never executed and the letter of intent expired. When the equipment latter broke down, and the relationship between the parties deteriorated, the defendant alleged that no contract was in force. The UK Court of Appeal agreed that the failure to execute formal documentation meant that no contract had arisen, and the rights and liabilities of the parties were determined by the law of restitution.

[220] Mitchell, above n 153, at 252.

The obiter comments by the majority of the Supreme Court are by no means an endorsement of relational theory. But, it is nonetheless a welcome step in the right direction and bears striking analogies to the approach taken by the UK Supreme Court in *Molkerei*. By analysing formation in terms of the events that shaped the contractual relationship, rather than the assumptions of the traditional rules they were able to provide a more complete analytical picture of how contractual obligations arose. The approach adopted by the minority, on the other hand, further illustrates how an analysis in terms of discrete assumptions of contracting behaviour can distort a court's view of formation as viewed by the parties' themselves.

Conclusion

The aim of this dissertation was to challenge the perception that offer and acceptance is the most reliable method for analysing formation.

This dissertation began with the belief that contractual obligations are self-imposed and the result of undertaking promises. It was argued that offer and acceptance should be confined to its conceptual limits. To account for contracts outside the paradigm it was proposed formation should be analysed in terms of the process contemplated by the parties themselves. Beever's insights into the normative events underlying formation were introduced and expanded to explain that contractual obligations arise from the actions of the parties creating, and satisfying the conditions of, external states of affairs.

However, this expanded view failed to account for contracts formed through the 'course of dealing' because it was still based on discrete assumptions of contracting behaviour. To provide a more complete analysis of contract formation it was argued the insights of relational contract theory should be adopted. The inherent limits in legal language and the complexities of contracting behaviour mean judges have always been sensitive to relational issues, but this has been largely obscured through the myth that they simply apply the law. It was argued relational theory proposes an approach which is more consistent with the self-imposed nature of contractual obligations by providing a more transparent and accurate analysis of the social norms which define the formation process.

Admittedly this conclusion is difficult to reconcile with the view contract law is promissory in nature. Relational theory rejects the idea that contracts are created at a specific moment in time and can be subsumed into the single concept of promise. One weakness was therefore the failure to consider if other analytical accounts might provide a better fit with the relational nature of contracting behaviour. A further paper may wish to consider if the concept of reliance, for example, can better track the ebbs and flows of commercial relationships.[221]

[221] Conspicuously absent from this dissertation was also discussion on the 'battle of the forms' and standard form contracting. These two topics were excluded to not run to avoid failing to give them the depth they deserve.

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