CONTRACT LAW
Q&A

Private Law Tutor Publishing

CONTRACT LAW Q&As

Private Law Tutor Publishing

Chapter 1 - Introduction/Overview

Chapter 2 and 3 – offer/Acceptance/Revocation
Question and Answers
- Offer and Acceptance problem 1
- Offer and Acceptance Problem 2
- Battle of the Forms Essay
- Postal Rule and Instantaneous Communication Essay

Chapter 4 - Consideration
Question and Answers
- Consideration Essay Question
- Consideration Problem Question

Chapter 5 – Duress
Question and Answer
- Duress Essay Question

Chapter 6 – Promissory Estoppel
Question and Answer
- Promissory Estoppel Essay

Chapter 7 - Intention to Create Legal Relations
Question and Answer
- Problem Question Intention to Create Legal Relations

Chapter 8- Privity of Contract
Question and Answer
- Privity of Contract Problem Question

Chapter 9 - Terms of the Contract
Question and Answers
- Problem question on Implied Terms
- Terms of Contract Essay Question
- Terms of Contract Problem Question

Chapter 10 - Exemption Clauses
Question and Answers
- Unfair Contract Terms Act 1979 Essay
- Exclusion clause Problem Question

Chapter 11 – Misrepresentation
Question and Answer
- Misrepresentation Problem Question

Chapter 12 - Mistake
Question and Answer
- Mistake Problem Question

Chapter 13 - Remedies
Question and Answers
- Remedies Problem Question

Chapter 1 - Welcome/Introduction/Overview

This book provides you with basic information as a basis for you to form your own critical opinions on this area of law. Once you have mastered the basics, you will be inspired to question contract principles in your essays and apply them in mock client advisory scenarios. Again, for your convenience, we have provided you with examples of how to answer such questions and how to apply your knowledge as effectively as possible to help you get the best possible marks.

This aid is a fully-fledged source of basic information, which tries to give the student comprehensive understanding for this module. However, it is recommended that you compliment it with the further reading suggestions provided at the end of each topic, as well as read the cases themselves for more in-depth information. This book provides an analysis of the basic principles of modern Contract Law. The following is a summary of the Book content:

- An introduction to the Law of Contract;
- How contracts are formed;
- What goes into a contract: Its content;
- The means of obtaining remedies when there is a breach of contract;

The aim of this Book is to:

- Provide an introduction to anyone studying or interested in studying Law to the key principles and concepts that exist in the Law of Contract.
- To provide a framework to consider Contract Law within the context of examinations.
- Provide a detailed learning resource in order for legal written examination skills to be developed.
- Facilitate the development of written and critical thinking skills.
- Promote the practice of problem solving skills.
- To establish a platform for students to gain a solid understanding of the basic principles and concepts of

Contract Law, this can then be expanded upon through confident independent learning.

Through this Book, students will be able to demonstrate the ability to:

- Demonstrate an awareness of the core principles of Contract Law.
- Critically assess challenging mock factual scenarios and be able to pick out legal issues in the various areas of Contract Law.
- Apply their knowledge when writing a formal assessment.
- Present a reasoned argument and make a judgment on competing viewpoints.
- Make use of technical legalistic vocabulary in the appropriate manner.
- Be responsible for their learning process and work in an adaptable and flexible way.

Studying Contract Law

Contract is one of the seven core subjects that the Law Society and the Bar Council deem essential in a qualifying law degree. Therefore, it is vital that a student successfully pass this subject to become a lawyer. Additionally, a knowledge and understanding of contractual principles is needed in order to study other law subjects such as company, employment, international trade, commercial, or even family law. The primary method by which your understanding of the law of contract will develop is by understanding how to solve problem questions. You will also be given essay questions in your examinations. The methods by which these types of question should be approached are somewhat different.

Tackling Problems and Essay Questions

There are various ways of approaching problem questions and essay questions. We have provided students with an in-depth analysis with suggested questions and answers at the end of each chapter.

Chapter 2 and 3 - Offer and Acceptance and Revocation

Questions and Answers

- Offer and Acceptance problem 1
- Offer and Acceptance Problem 2
- Battle of the forms essay
- Postal rule and instantaneous communication essay

Offer and Acceptance Problem Question One

On 9th December 2009, Abdul placed a notice on the University noticeboard as follows:

"Second-hand computer. Good condition. Worth £1,000. Selling for £175. Will sell to the first person to notify me by 13th January 2010. Telephone: 020 7320 9876. Email abdul0231@xyz.com Address: 1A, High Street, New Town, London E1."

Samson posted a letter on 8th January 2010, by first class recorded delivery post, agreeing to buy the computer for £175. Owing to the negligence of the Post Office, the letter was delivered to Abdul only on 14th January 2010.

Diana read the notice, telephoned Abdul on 12th January and left a message on his answer-phone, agreeing to buy the computer for £175. She also asked whether she could pay for the computer when she received her student loan money. Abdul listened to this message only on 14th January.

Maggie sent an email on 10th January, agreeing to buy the computer for £175. Abdul read the email on the 12th and sent a reply to Maggie, giving her an appointment to collect the computer on 16th January at 8 pm. Maggie responded by email, saying that she would pay the money when she collects the computer.

On 16th January, a leading computer shop in London decides to do a clearance sale and is selling good, brand new computers at £150 each.

Samson, Diana, and Maggie no longer wish to buy Abdul's computer.

Advise Abdul whether Samson, Diana and Maggie are under a contractual obligation to buy his computer.

Offer and Acceptance Problem Question One: Answer

Introduction

This paper is an advice for Abdul, Samson, Diana and Maggie in relation to the recent negotiation in relation to the sale of the computer. First, this paper will advise the parties as to whether a legally enforceable contact has been formed. The paper will do this by advising on the issue of the advertisement, and whether this will be viewed by the courts as a unilateral offer or an invitation to treat. Second, this paper will discuss the issue of Samson's acceptance by post, using the relevant case law. Third, this paper will discuss the issue of whether Diana's message was capable of acceptance. Fourth, this paper will critically discuss whether Maggie's acceptance through email was valid. Lastly, this paper will conclude its findings.

Unilateral offer or invitation to treat

For a contract to exist one party ("the offeror") needs to make a clear and certain offer and the other party (the offeree) needs to communicate their equally clear and unequivocal acceptance. It is important to establish whether the advertisement placed on the notice board is an invitation to treat or an offer. If it is an offer, it will be capable of being accepted by the parties. However, if it is an invitation to treat, the parties must make the offer to Abdul, who may then choose to accept or reject it.

On 9th December 2009, Abdul, placed a notice on the University notice board as follows: *"Second-hand computer. Good condition. Worth £1,000. Selling for £175. Will sell to the first person to notify me by 13th January 2010. Telephone: 020 7320 9876. Email abdul0231@xyz.com Address: 1A, High Street, New Town, London E1."*

Generally, advertisements are regarded by the courts as statements inviting further negotiations or invitations to treat. An example of

this was seen in **Partridge v Crittenden**[1] where a notice reading *'Bramblefinch cocks and hens, 25s each'* was placed in the classified advertisement page of a periodical. The Court of Appeal held that newspaper advertisements are ordinarily to be treated as invitations to treat and not offers. The logic of this decision was set out by Lord Parker CJ, who noted the *"business sense in* [advertisements] *being construed as invitations to treat and not as offers"*[2]. Moreover, Lord Parker CJ in agreement cited Lord Herschell in ***Grainger & Son v Gough***[3], where he made the point that it would be wrong to regard these types of advertisements as offers because *"the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out,"* because the merchant would have a limited supply.

A possible line of argument that might be raised by the parties is that this advertisement constitutes a unilateral contract. A unilateral offer is where one party makes an offer or proposal, which is open to the world and is capable of acceptance by anyone. The other party 'accepts' the offer by performing the act in accordance with the requirements of the offer. Using **Carlill v Carbolic Smoke Ball Co.**[4], which is the authority on unilateral contracts, it can be argued the advertisement is in very firm terms and because the price and description of the computer are stated, it requires no further negation and is capable of being accepted by performance of payment. The advertisement states Abdul "[w]*ill sell to the first person to notify* [him] *by 13th January 2010".* This may be interpreted by the court to be a unilateral offer.

However, the opposing argument to this can be drawn from what was argued by Finlay, Q.C., and T. Terrell for the defendant Smoke ball company in **Carlill** that *"the offer, the terms of which are too vague to be treated as a definite offer"*[5]. This argument is on a balance of probabilities likely to prevail because the advertisement is not clear, precise and unequivocal. For example, although the advertisement has a good description of the computer,

[1] [1968] 1 WLR 1204
[2] Partridge v Critenden [1986] 1 WLR 1204 per Lord Parker para 1209
[3] [1896] AC 325
[4] (1893) 1 QB 256
[5] (1893) 1 QB 256 at p 257

it lacks information about the way in which acceptance should take place through performance or the way in which payment should be made, i.e. how is Abdul to be contracted. It is, therefore, merely an invitation to treat and not an offer. This means that the parties must make the offer to Abdul, who can choose to accept or reject it.

Furthermore, Abdul is stipulating when acceptance must take place. This would suggest the offer is only open until *13th January 2010* and will lapse after this time. The leading case on this point is **Ramsgate Victoria Hotel Co. v Montefiore,** in which the courts stated, even an offer that has not been formally withdrawn would expire after "a reasonable time". In this case, the offer was for the sale of shares and the court felt six months was beyond what was reasonable.

Samson

Samson has posted a letter on 8th January 2010 by first class recorded delivery post, agreeing to buy the computer for £175. Owing to the negligence of the Post Office, the letter was delivered to Abdul only on 14th January 2010. If the advert is deemed a unilateral offer, then acceptance is normally effectual and the contract binding once acceptance is received by the offeror. However, the courts have introduced the postal rule to overcome the problem of the time a letter spends in the postal system. The problem with the postal system is that it creates a period of uncertainty for the parties, because the offeror is unaware if the offer has been accepted and the offeree is unaware whether the offer has been revoked. The postal rule was laid down in **Adams v Lindsell**. [6] Where post is deemed to be the proper means of communication, the acceptance takes effect from the moment the letter of acceptance is properly posted.

We are not told whether the post was Abdul's preferred method of communication. It would appear the postal rule that applies Samson's acceptance is valid, even though it was only read by Abdul on 14th January 2010. An illustration of this was seen in **Henthorn v Fraser**.[7] Fraser offered, in writing, to sell certain

[6] (1818) 1 B & Ald 681
[7] [1892] 2 Ch 27

houses to Henthorn, with the offer to remain open for 14 days. Henthorn received the offer in person. The next day, at midday, the society posted a letter to Henthorn revoking the offer. At 3:50pm, Henthorn posted a letter to the society accepting the offer. At 5:00pm, Henthorn received the society's revocation. The court in this case held a contract was made at 3:50pm when Henthorn posted his letter of acceptance.

Therefore, applying both cases above, it would appear Samson has benefited under the postal rule and accepted the offer and has a binding contract. However, the lawyers for Abdul may alternatively argue that Samson should not be allowed to benefit under the postal rule and there is no binding agreement, because the advert was at all times an invitation to treat; therefore, his letter will be construed as an offer. The authority for this proposition is **Thornton v Shoe Lane Parking Ltd**[8], which concerned the purchase of a ticket from the machine where he parked his car. In this case, Lord Denning went to great lengths to describe where an offer takes place and where an acceptance takes place.

Diana

Diana read the notice, telephoned Abdul on 12th January and left a message on his answer-phone, agreeing to buy the computer for £175, but asked whether she could pay for the computer when she received her student loan money. Abdul listened to this message only on 14th January. Again, if the advertisement is deemed invitation to treat using **Thornton v Shoe Lane Parking Ltd,** Diana's telephone call will be an offer, which Abdul can choose to accept or reject. If the court views this as a unilateral contract, then the offer of £175 could be a binding acceptance.

However, a reason why there is no binding acceptance is because acceptance must communicated. Here, Abdul listened to this message only on 14th January once the offer had expired. The onus is on Diana to communicate acceptance. This principle is found in the case of **Entores v Miles Far East** [9] where Lord Denning said:

[8] [1971] 2 QB 163
[9] [1955] 2 Q.B. 327

> *"Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound."*[10]

Another reason why the courts will not submit to the view that this is a unilateral offer and Diana's message is a valid acceptance is because Diana has varied the contract by asking for late payment. One of the general principles in contract law is that the acceptance must mirror the offer. The "mirror image rule" stipulates that, if Diana wants to accept the offer, she must accept an offer *exactly*, without any modifications; because Diana has changed the offer, this hypothetically becomes a counter-offer that kills the original offer, as seen in the case of **Hyde v. Wrench**.[11] Therefore, we are left in the same position that Diana's message is an offer that Abdul can either accept or reject. Diana may argue that this was only a request for further information as in **Stevenson v McLean**, in which the judge said there was no counter-offer, merely an enquiry that should have been answered. This line of argument is unlikely to succeed, however, because in **Stevenson v McLean**, a variation of delivery was sought. Here, there is late payment that is varying the contract.

Maggie

Maggie sent an email on 10th January agreeing to buy the computer for £175. The advertisement is deemed a unilateral offer that will be binding. However, this is unlikely because it may have already have been sold. Thus, Maggie's email will be an offer. Abdul read the email on the 12th with the prescribed period of acceptance **Ramsgate Victoria Hotel Co. v Montefiore** and sent a reply to Maggie giving her an appointment to collect the computer on 16th January at 8 pm. This can be seen as the acceptance of the offer. **Thornton v Shoe Lane Parking Ltd.** Maggie responded by

[10] [1955] 2 Q.B. 327 at 332
[11] (1840) 3 Beav 334

email, saying that she will pay the money when she collects the computer, which can be seen as an acknowledgement of the acceptance.

Conclusion

Abdul has no contract with Samson because he should not be allowed to benefit under the postal rule, and there is no binding agreement because the advert was at all times an invitation to treat. Abdul has no contract with Diana because acceptance must communicated by Diana. Here, Abdul listened to this message only on 14th January once the offer had expired. Also, Diana varied the offer and made a counter offer. Abdul has a binding contact with Maggie.

Offer and Acceptance Problem Question Two

On Monday, Golden Antiques places the following advertisement on their website: 'For sale, three Victorian style beds, gorgeous, £5000 each, cash, will brighten up any bed room!'

David, the manager of White Halls Ltd. Email Golden Antiques, immediately replies: 'White Halls Ltd. Will buy all three beds at £4500 each, please advise if credit facility is available'.

On Tuesday morning, Golden Antiques replies by email to say, 'We are not prepared to sell for less than £5000 each. Credit facility only available if your grantor is acceptable to us. Please confirm by close of business today if interested'.

On Tuesday afternoon, David faxes Golden Antiques to say he is willing to accept their original terms and will buy all three beds at £5000 each. He also faxes a letter he receives from Black Halls Ltd. (the guarantor) which states: 'It is our policy to ensure that our subsidiary, White Halls Ltd., remain solvent at all times". However, the fax was not properly transmitted, as indicated by the status report. David then posts a letter at 5pm accepting Golden Antiques' terms on Tuesday evening, although he knows there is a postal strike that day.

Roger, an accountant, telephones Golden Antiques on Wednesday morning stating that he wants to buy Victorian beds. He persuades the manager of Golden Antiques to sell the beds to him, on the basis that he had prepared the financial accounts for Golden Antiques the year before for half the fee he normally charges. Golden Antiques agrees to sell to Roger, so they send David a fax on Wednesday evening saying that the beds are no longer available for sale.

Golden Antiques receive David's letter at 3.45pm on Thursday. David does not read the fax from Golden Antiques until 4.00pm on Thursday.

Advise the parties as to their legal positions.

Offer and Acceptance Problem Question Two: Answer

Introduction

This paper is an advice for Golden Antiques, David, the manager of White Halls Ltd., and Roger, the accountant, ("the parties") in relation to the recent negotiation regarding the sale of three Victorian style beds. This paper will advise the parties as to whether a legally enforceable contact has been formed. The paper will do this by first, advising on the issue of the advertisement, and whether this will be viewed by the courts as a unilateral offer or an invitation to treat. Second, this paper will advise whether a valid offer has been made by Golden Antiques. Third, this paper will critically discuss whether David's acceptance through fax was valid. Fourth, this paper will critically discuss the issue of David's acceptance by post, using the relevant case law. Fifth, this paper will discuss the issue of the sale of the beds to Roger and whether this agreement provided the necessary consideration. Sixth, this paper will discuss whether Golden Antiques revocation took place before David's acceptance. Lastly, this paper will conclude its findings.

Unilateral offer or invitation to treat

For a contract to exist one party ("the offeror") needs to make a clear and certain offer and the other party (the offeree) needs to communicate their equally clear and unequivocal acceptance. It is important to establish whether the advertisement placed on their website is an invitation to treat or an offer. If it is an offer, it will be capable of being accepted by David. However, if it is an invitation to treat, David must make the offer to Golden Antiques who may then choose to accept or reject it. On Monday, Golden Antiques places the following advertisement on their website *'For sale, three Victorian style beds, gorgeous, £5000 each, cash, will brighten up any bed room!'*.

Generally advertisements are regarded by the courts as statements inviting further negotiations or invitations to treat. An example of

this was seen in **Partridge v Crittenden**[12], where a notice reading 'Bramblefinch cocks and hens, 25s each' was placed in the classified advertisement page of a periodical. The Court of Appeal held that newspaper advertisements are ordinarily to be treated as invitations to treat and not offers. The logic of this decision was set out by Lord Parker CJ who noted the *"business sense in* [advertisements] *being construed as invitations to treat and not as offers"*[13]. Moreover, Lord Parker CJ in agreement cited Lord Herschell in ***Grainger & Son v Gough***[14], where he made the point that it would be wrong to regard these types of advertisements as offers because *"the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out,"*, because the merchant would have a limited supply. Ewan Mckendrick points out *"this argument is not conclusive because it could be implied that the offer is only capable of acceptance while stocks last".*[15]

A possible line of argument that might be raised by Golden Antiques is that this advertisement constitutes a unilateral contract.[16] A unilateral offer is where one party makes an offer or proposal that is open to the world and capable of acceptance by anyone. The other party 'accepts' the offer by performing the act in accordance with the requirements of the offer. Using **Carlill v Carbolic Smoke Ball Co.,**[17] which is the authority on unilateral contracts, it can be argued the advertisement is in very firm terms, and because the price and description of the bed is stated, it requires no further negation and is capable of being accepted by performance of payment. [18]

However, the opposing argument to this can be drawn from what was argued by Finlay, Q.C., and T. Terrell for the defendant Smoke ball company in **Carlill** that *"the offer, the terms of which are too vague to be treated as a definite offer"*[19]. This argument is

[12] [1968] 1 WLR 1204
[13] Partridge v Critenden [1986] 1 WLR 1204 per Lord Parker para 1209
[14] [1896] AC 325
[15] Mckendrick E, Contract Law, Palgrove Macmillan Law Masters 7th Ed
[16] G.H. Treitel, The Law of Contract, 11th ed
[17] (1893) 1 QB 256
[18] G.H. Treitel, The Law of Contract, 11th ed
[19] (1893) 1 QB 256 at p 257

on a balance of probabilities likely to work because the advertisement is not clear, precise and unequivocal. For example, although the advertisement has a good description of the bed, it lacks information about the way in which acceptance should take place or the way in which payment should be made. It is, therefore, merely an invitation to treat and not an offer. This means that David must make the offer to Golden Antiques who can choose to accept or reject it.

A valid offer?

David is the manager of White Halls Ltd. and is acting in his capacity of agent for the White Halls Ltd. He has emailed Golden Antiques saying: *'White Halls Ltd. Will buy all three beds at £4500 each, please advise if credit facility is available'.* It is likely the advertisement is an invitation to treat; therefore, his email will be construed as an offer to Golden Antiques.

Another reason why the courts will not submit to the view that this is a unilateral offer and David's email is a valid acceptance is because David has varied the price of each bed to £4,500. One of the general principles in contract law is that the acceptance must mirror the offer. The "mirror image rule" stipulates that, if David wants to accept Golden Antiques offer, he must accept an offer *exactly*, without any modifications;[20] because David has changed the offer, this hypothetically becomes a counter-offer that kills the original offer, as seen in the case of **Hyde v. Wrench**.[21] Therefore, we are left in the same position that David's email is an offer that Golden Antiques can either accept or reject.

On Tuesday, Golden Antiques replies by email *'We are not prepared to sell for less than £5000 each.* This can be interpreted as a firm refusal by Golden Antiques of the offer presented by David. They have reaffirmed the price of the bed being £5,000. Using the authority of **Hyde v. Wrench** Golden Antiques have made a counter-offer which can now be accepted or rejected by David. Golden Antiques email further reads: *Credit facility only available if your grantor is acceptable to us.'* The statement about

[20] Mckendrick E, Contract Law, Palgrove Macmillan Law Masters 7th Ed
[21] (1840) 3 Beav 334

the credit facility is quite ambiguous because of the use of the phrase '*if your grantor is acceptable to us*'. Golden Antiques have not specified what the criteria are for the grantor to be acceptable. Lastly, the email reads: '*Please confirm by close of business today if interested'*. Golden Antiques are stipulating by when acceptance must take place. This would suggest the offer is only open for one day and will lapse at close of business. The leading case on this point is **Ramsgate Victoria Hotel Co. v Montefiore**[22], in which the courts said even if an offer has not been formally withdrawn, it would expire after "a reasonable time". In this case, the offer was for the sale of shares and the court felt six months was beyond what was reasonable.

The statement *'please advise if credit facility is available'* will be seen by the courts as a request for further information. Similarly in **Stevenson, Jacques & Co. v McLean**[23], when a customer asked for delivery over two months the courts held the plaintiff had not made a counter-offer but had made a mere enquiry which did not serve to reject the offer. A binding contract had been made when the plaintiffs sent the telegram accepting the offer.

David's acceptance through fax

On Tuesday afternoon, David faxes Golden Antiques to say he is willing to accept their original terms and will buy all three beds at £5000 each. David is accepting Golden Antiques offer, but the fax was not properly transmitted, as indicated by the status report. The general principle in contract law is that the acceptance must be communicated to the offeror. This principle is found in the case of **Entores v Miles Far East** [24], where Lord Denning said:

> *"Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance*

[22] (1866) LR 1 Ex 109
[23] (1880) 5 QBD 346
[24] [1955] 2 Q.B. 327

so that I can hear what he says. Not until I have his answer am I bound."[25]

Furthermore, in **Brinkibon v Stahag Stahl**[26], Lord Wilberforce suggested there was no general rule that could cover all the possible situations in these types of cases. He added each case should be resolved with reference to the intention of the parties, to sound business practice, and, in some cases, to a judgment as to where the risks should lie. The case of Entores suggests that acceptance should take place only upon receipt of the fax. Therefore, the onus is on David to retransmit the fax until he is sure that Golden Antiques have received his acceptance. Failing this, there is no valid or enforceable contract between David and Golden Antiques.

David's acceptance by post

David then posts a letter at 5pm accepting Golden Antiques' terms on Tuesday evening; although he knows there is a postal strike that day. Acceptance is normally effectual and the contract binding once acceptance is received by the offeror. However, the courts have introduced the postal rule to overcome the problem of the time a letter spends in the postal system. The reason for this rule is to facilitate business and *"promote certainly within contractual formation at a time when the principle method of communication was slow"*.[27]

The postal rule was laid down in **Adams v Lindsell**. [28] Where post is deemed to be the proper means of communication, the acceptance takes effect from the moment the letter of acceptance is properly posted. We are not told whether the post was Golden Antiques preferred method of communication. But, because David has failed to successfully send the fax, he has opted for the post as a method of acceptance. An illustration of this was seen in **Henthorn v Fraser**.[29] The court, in this case, held a contract was

[25] [1955] 2 Q.B. 327 at 332
[26] [1982] 1 All ER 293
[27] Capps D, 'You've got Mail' 153 New Law Journal 906
[28] (1818) 1 B & Ald 681
[29] [1892] 2 Ch 27

made at 3:50pm when Henthorn posted his letter of acceptance.

Therefore, applying both cases above, it would appear David has benefited under the postal rule and accepted the offer and has a binding contract. However, the lawyers for Golden Antiques may alternatively argue that David should not be allowed to benefit under the postal rule and there is no binding agreement for two reasons:

First, the offer has lapsed under the **Ramsgate Victoria Hotel Co. v Montefiore**.[30] Golden Antiques stated in their email '*Please confirm by close of business today if interested'*. David had posted the letter at the close of business i.e. 5 o'clock. Thus the acceptance has come a moment too late. Another case which could be used in support of this argument (although this concerns telex and is not directly relevant) is **Tenax Steamship v The Brimnes (The Brimnes)** [31], where Cairns LJ felt that the sender should not rely on the recipients' reading every communication at once, and that, in some circumstances, a notice arriving late in the working day might quite legitimately not be "received" until the following morning.

Second, it could be argued that, because David knows there is a postal strike that day, it would be wrong to allow the postal rule to operate in this way. Lawton LJ in **Holwell Securities v Hughes** [32] seemed to support this proposition, when he said that the rule will not be applied where it would lead to: *'a manifest inconvenience and absurdity.'*[33] However, in the absence of authority on this point, the courts may feel it right to allow the postal rule to apply.

Sale of the beds to Roger

Roger, an accountant, telephones Golden Antiques on Wednesday morning stating that he wants to buy Victorian beds. He persuades the manager of Golden Antiques to sell the beds to him, on the basis that he had prepared the financial accounts for Golden

[30] (1866) LR 1 Ex 109
[31] [1974] 3 All ER 88
[32] [1974] 1 WLR 155
[33] [1974] 1 WLR 155 at 161

Antiques the year before for half the fee he normally charges. Golden Antiques agrees to sell to Roger. This is a breach of contract because the contract with David is binding if the postal rule applies.

If Golden Antiques want to change their mind and ultimately sell to David, they are able to do so, because the contract with Rodger may be unenforceable due to lack of consideration. The classic definition of consideration, found in the case of **Currie v Misa**,[34] is that consideration, *'may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other'.* This means Roger must provide something in return of the beds, i.e. money. We are told *'the manager of Golden Antiques to sell the beds to him'*. If Roger has paid money, this will be valid consideration.[35] If, however, Roger has not paid any money for the beds and he is relying on the fact he had prepared the financial accounts for Golden Antiques the year before for half the fee he normally charges, this will not be valid consideration for two reasons:

First, consideration must not be past. It is not possible to use consideration as some act that has taken place *prior* to the contract. Consideration must be given *in return* for the beds. This is a matter of fact and it is unlikely that the earlier work done at a discount by Roger will be valid consideration as payment for the beds. The discount was provided probably in order to secure the work rather than as consideration for the future.

The general rule that consideration cannot be past was illustrated in **Eastwood v Kenyon[36].** In this case, it was held a promise was insufficient where the consideration was wholly past. Moreover, in ***Roscorla v Thomas***[37], Roscorla bought Thomas' horse for £30. After the sale, Thomas promised Roscorla that the horse was sound and free from vice. The horse proved to be vicious. The court held there was no consideration to support Thomas' promise

[34] (1875) LR 10 Ex 153 per Lush J
[35] Chappell v Nestlé [1959] 2 All ER 701
[36] (1840) 11 A & E 438
[37] (1842) 3 QB 234

and he was not bound. The sale itself could not be valuable consideration, for it was completed prior to the promise being given.

However, in Roger's case, it can be argued that, because this is a transaction of a commercial nature, an implied promise to pay arises. This was acknowledged in the case of **Re Casey's Patents**[38], where the owners of patent rights promised their manager a share in those rights as consideration for his previous services for them. Bowen LJ said,

> *'The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in a subsequent document a promise to pay, that promise may be treated as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered.'*

However, the success of this argument swaying the courts is unlikely, because the courts will view this as past consideration.

The second reason this will not be valid consideration is because this is an existing obligation under a contract. The authority for this is **Stilk v Myrick**[39], in which the captain of a ship promised his crew that, if they shared between them the work of two seamen who had deserted, the wages of the deserters would be distributed out between them. The court held that the promise was not binding because the seamen gave no new consideration: they were already contractually bound to do any extra work to complete the voyage.

We have to ask whether Roger has done any more than what he was bound to do under a previous contract with the Golden Antiques. If the answer is no, then there is no consideration. It is unlikely that the earlier work done at a discount by Roger will be valid consideration as payment for the beds. The discount was provided probably in order to secure the work.

[38] [1892] 1 Ch 104
[39] (1809) 2 Camp 317

Golden Antiques revocation

Golden Antiques sent David a fax on Wednesday evening saying that the beds were no longer available for sale. Golden Antiques received David's letter at 3.45pm on Thursday. David did not read the fax from Golden Antiques until 4.00pm on Thursday. The revocation of the offer can only take place if the offer has not been accepted. This will all hinge on whether the courts will apply the postal rule. If the Court applies the postal rule, then acceptance has taken place before revocation and there is a binding contract with David. The authority for this is **Byrne v Van Tienhoven**[40], where an offeror posted a letter on 1 October offering to sell the offeree a quantity of tinplate, then posted another letter on 8 October withdrawing the offer. The first letter reached PP on 11 October and they accepted the offer at once by telegram, following with a confirmatory letter four days later. The second letter purporting to withdraw the offer arrived on 20 October, by which time the offer had been accepted and it was too late for DD to withdraw.

Conclusion

First, the advertisement of the beds is not clear, precise and unequivocal and therefore likely to be an invitation to treat. Second, David's email is an offer that Golden Antiques can either accept or reject. Golden Antiques have reaffirmed the price of the bed as £5,000; this is a counter offer. Third, the statement *'please advise if credit facility is available'* will be seen by the courts as a request for further information. David's acceptance by fax is incomplete; he must communicate his acceptance. Fourth, it would appear David has benefited under the postal rule and accepted the offer, and thus has a binding contract. Fifth, if the Court applies the postal rule, then acceptance has taken place before revocation and there is a binding contract with David. If Golden Antiques decides to sell to Roger, this is a breach of contract with David. Lastly, if Golden Antiques want to change their mind and does ultimately sell to David, they can because the contract with Roger may be unenforceable due to lack of consideration.

[40] (1880) LR 5 CPD 344

Endnote

We hoped you enjoyed the sample and found it to be of assistance. Our website offers the opportunity to buy the whole book. In the case of Private Law Tutor Publishing, our goal is to give students (of all levels) with straightforward, understandable, and complete legal education resources that are free of commercial bias. Private Law Tutor is produced and published by a group of barristers who are also law tutors who have banded together to create resources for law students all around the world. Private Law Tutor is a free resource for law students.