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LAW

Law of Contract Special Study

G156/RM

SPECIAL STUDY MATERIAL

Thursday 27 January 2011
Morning

Duration: 1 hour 30 minutes

OCE/36226

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- This is a clean copy of the Special Study Material which you should already have seen.
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- This document consists of **8** pages. Any blank pages are indicated.

G156 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

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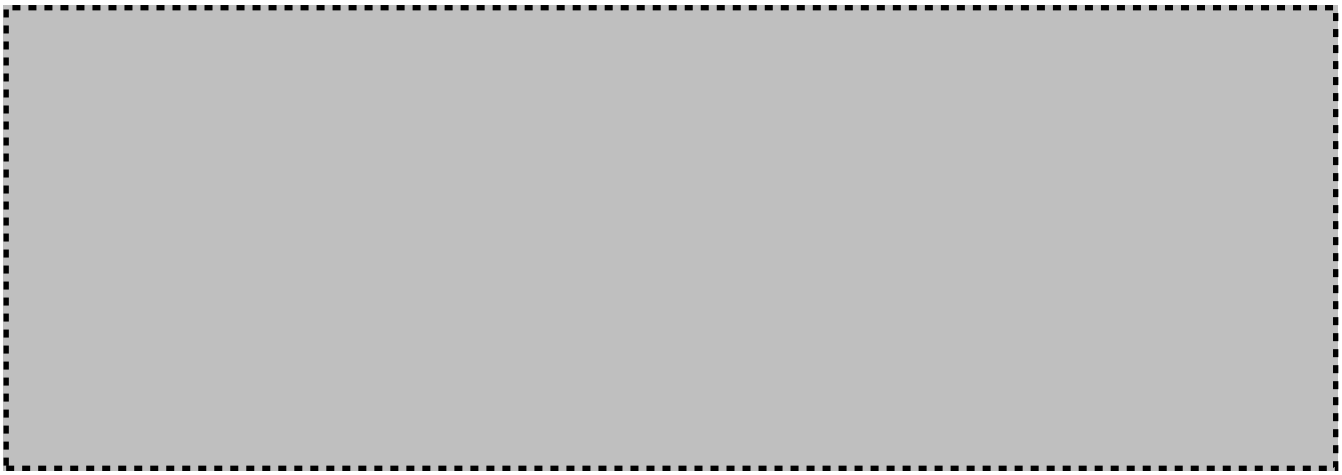

SOURCE 2

Extract adapted from *Contract Law.* 6th Edition. Ewan McKendrick. Palgrave Macmillan Law Masters. 2005. Pp 32-34.

[T]he courts adopt the 'mirror image' rule of contractual formation; that is to say they must find a clear and unequivocal offer which is matched by an equally clear and unequivocal acceptance ….

[O]n a number of occasions … great difficulty is experienced in accommodating many everyday transactions within the offer and acceptance framework ….

An offer is a statement by one party of a willingness to enter into a contract on stated terms ….

Care must be taken, however, in distinguishing between an offer and an invitation to treat. An invitation to treat is simply an expression of willingness to enter into negotiations which, it is hoped, will lead to the conclusion of a contract at a later date. The distinction between the two is said to be primarily one of intention; that is, did the maker of the statement intend to be bound by an acceptance of his terms without further negotiation or did he only intend his statement to be part of the continuing negotiation process? Although the dichotomy is easy to state at the level of theory, it is not so easy to apply at the level of practice, as can be seen from the case of *Gibson v Manchester City Council* [1978] 1 WLR 520 (CA) and [1979] 1 WLR 294(HL) ….

The difficulty in a case such as *Gibson* arises from the fact that it is not easy to ascertain when the preliminary negotiations end and a definite offer is made. The court must examine carefully the correspondence which has passed between the parties and seek to identify from the language used and from the actions of the parties whether, in its opinion, either party intended to make an offer which was capable of acceptance. *Gibson* shows that judges can and do differ in the results which they reach in this interpretative exercise and that each decision must ultimately rest on its own facts ….

SOURCE 3

Extract adapted from *Contract Law in Perspective.* 4th Edition. Linda Mulcahy and John Tillotson. Cavendish Publishing. 2004. Pp 60-61 and 65.

Critics of [the] formalist approach assert that the offer – acceptance – consideration model presents an unrealistic, rigid and oversimplified view of business arrangements. They argue that undue emphasis is placed on the idea of binding promises, or on the notion of offer and unqualified acceptance. … [They] complain that the degree of certainty required by the law offends against the need for a degree of flexibility in business ….

In the everyday world of business, promises seldom occur in the manner suggested by the case law ….

However, although the courts' rules relating to agreement are based to a great extent on the relatively simple contractual situations of a century or more ago, it could be argued that they are not as immobile or 'black letter' as some would suggest ….

Collins suggests that many of the leading cases can be much better understood if seen as attempts to determine the exact point at which it is *reasonable* for the parties to rely on what the other has said rather than an analysis of whether they have done particular things at particular points … this alternative construction may get no closer to determining whether there has been a true agreement but it does produce results which are more flexible and attuned to business culture and practice. Lord Wilberforce argued in a similar vein:

> It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations in life, e.g. sales at auctions; supermarket purchases; boarding [a bus]; purchasing a train ticket; tenders for the supply of goods … these are all examples which show that English law, having committed itself to a rather technical and schematic doctrine, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the worked slots of offer, acceptance and consideration ….

A number of problems have arisen over whether the display of goods in a shop window or on the shelves of a shop with prices attached amounts to an offer. One would think so … However, as early as the mid-19th century, the courts have taken a different view, which was endorsed in the supermarket case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* (1953) [1 QB 401] …. When did the sale take place? The society argued that it was when the customer put the goods into her wire basket, so accepting the offer constituted by the display on the shelves …. However, the Court of Appeal disagreed and ruled that the sale took place at the cash desk. They argued that the display of the goods did not mean that they were an offer. Instead, they argued that an offer to buy was made by the customer at the cash desk subject to supervision and possible refusal. In their view the display of goods was merely an invitation to treat.

The decision really rests on a policy choice which supported commercial innovation and convention rather than on orthodox analysis of contract formation ….

SOURCE 4

Extract adapted from the judgment of Lord Langdale MR in *Hyde v Wrench* [1840] 3 Beav 334.

The defendant offered to sell his farm to the plaintiff for £1,000. The plaintiff, instead of agreeing, offered to pay £950 instead which the defendant then rejected. The plaintiff at a later stage then claimed to accept the original offer and brought an action for specific performance. The court rejected the claim that there was a contract since the original offer had been rejected and was no longer open to acceptance.

LORD LANGDALE MR:
Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties; the demurrer must be allowed.

SOURCE 5

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SOURCE 6

Extract adapted from *The Modern Law of Contract.* 5th Edition. Richard Stone. Cavendish Publishing. 2003. Pp 51, 52 and 62-63.

In the modern world, contracts may well be made by much more sophisticated means of communication than the post. Telexes, faxes and e-mail are all widely used, in addition to letters and the telephone, as means of transmitting offers, counter-offers, acceptances and rejections ….

The starting point for the law in this area is the case of *Entores v Miles Far East Corp.* [1955] 2 QB 327. This was concerned with communications by telex machine. The primary issue … was the question of where the acceptance took effect, if it was sent from a telex machine in one country and received on a telex machine in another country ….

The leading judgment in the Court of Appeal was given by Lord Denning. His approach was to take as his starting point a very simple form of communication over a distance … two people making a contract by shouting across a river …he argued there would be no contract unless and until the acceptance was heard by the offeror … he argued by analogy, that the same approach should be applied to all contracts made by means of communication which are instantaneous or virtually instantaneous (as opposed to post … where there is a delay) ….

The same answer is generally presumed to apply to all other forms of more sophisticated electronic communication which can be said to be more or less instantaneous in their effect. They will all take effect at the place where they are received. It is at least questionable, however, whether Lord Denning's analogy with a face to face conversation does really hold up when applied to telexes, faxes and e-mails. The only true instantaneous types of communication are face to face, by telephone, or possibly, by the kind of electronic message service where both participants are on line at the same time. A telex and a fax can sit unread in somebody's in-tray for some time, and an e-mail may not be opened as soon as it arrives. In that respect they are more analogous to posted communications ….

Revocation of an offer must be communicated to be effective. This was implicit in the decision in *Byrne v Van Tienhoven* (1880) 5 CPD 344 where the withdrawal of an offer, which was sent by telegram, was held not to take effect until it was received. The *Adams v Lindsell* postal rule does not apply to revocation of offers, but there may still be difficulties as to what exactly amounts to communication, and when a revocation takes effect ….

As soon as an acceptance takes effect, then a contract is made, and both parties are bound. It would seem, then, that in the normal course of events … revocation, of an acceptance will be impossible …. [A broad based] exception is now to be found in the Consumer Protection (Distance Selling) Regulations 2000.