Chapter 2: Formation of the contract

The question

Alan wrote letters to Barbara and other collectors of paintings by the artist Charisse, stating: 'I wish to sell my Charisse painting, entitled 'Dancer', and I would like it to go to someone like you, who will really appreciate it. I may be prepared to sell it to you for £75,000'.
Barbara immediately faxed a response, stating that she 'accepted Alan's offer'.
Alan immediately sent a fax back stating that, 'I am prepared to sell the painting to you, Barbara but, on second thoughts, for £80,000, and that price is open until 5.30pm on Wednesday'. On the following Monday morning, Alan sold the Charisse painting to David, for £85,000. On Monday afternoon, Barbara saw in an internet chat room for art collectors that David had bought a Charisse painting. It did not identify the painting as 'Dancer'. On Tuesday morning, Barbara posted a correctly stamped and addressed letter, stating that she 'accepted Alan's offer' to sell her 'his Charisse painting for £80,000'. The letter arrived on Thursday morning.
Advise Barbara as to her contractual position.

Guidance on how to answer

Before you begin

You should always familiarise yourself with the relevant area of law before attempting to answer a question. Here it is offer and acceptance, and chapter 2 of *Koffman & Macdonald* should be digested. You need to be familiar with the whole area, or you will miss issues. You should not simply try to spot the relevant parts of the chapter without reading the whole, or you may well miss the true significance of some of the facts, and omit relevant issues. Obviously if a question is coursework, then you can read chapter 2 immediately before embarking upon it. If it is a question in an exam, you have to have undertaken sufficient revision in the area, to have the principles or rules, and the authority for them in your memory. Even if it is an open book exam, you need to have most of it in your memory, in order to be able to spot the relevant issues and construct your basic answer. When the exam is open book, it is generally impractical (unless the exam is over a very extended time period) to use the materials available to you as more than a 'security blanket', to relieve some of the stress of exams, and as a 'safety net' in relation to the odd case name you have forgotten.

Writing your answer

In a coursework answer you would need to footnote the references for the cases, and any other type of material, such as an article or textbook, but find out what your institution will regard as acceptable in an exam: it may be that you just need to use a shortened, but identifiable version of the case name, or author and title of book, or author of an article (just enough for the examiner to recognise what you are referring to).

A question which students sometimes ask is: 'should I state the facts of cases?' The answer is: it will depend upon how much they will help you to answer the question. If they are merely authority for a well-established basic principle or rule which you are going to apply, they probably will help little. However, if they closely resemble the facts of a problem, you may well need to go through them, and state the facts which are relevant for you to use to show, for example, why the problem leads to a different conclusion, or the same conclusion despite some differences. It may be particularly relevant to state the facts of a case where it is in doubt as to what the case is authority for, and which of its facts are crucial to the application of the same approach.

In answering any question, you need a beginning, a middle and an end or, as it would normally be put: an introduction, the substance of your answer, and a conclusion. In other words, say what you are going to say in broad terms, say it, sum up what you have said.

After your introduction, work logically through the problem, dealing with each issue in turn. You must use authority in relation to each of the points made. You have been told to advise Barbara, but do not write as if you are speaking or writing to Barbara. It is simply that each of your points should be made with reference to the impact of the law on Barbara, whether it is what she would want to read or not. You do not just set out the points which might help Barbara. You must set out the whole of the legal position in relation to each of the issues raised.

Identify each legal issue then go on to deal with it, setting out the principle, or rule, and authority, and then applying it. Consider viable alternatives, otherwise you may cut yourself off from answering part of the question. When you are considering an alternative, make that clear. Do not simply appear to be contradicting yourself eg. saying definitively that a particular communication is an invitation to treat one moment, and then treating it as an offer the next. Explain that you are dealing with a different possibility eg. 'However, if that communication was an offer, then we should consider the impact of that ….' (It does not impress the examiner when students simply contradict themselves, or appear to do so. The examiner can only mark what is there, not what students might have intended).

Do not label your paragraphs as has been done here: that is just to make clear the need to divide your text sensibly, into paragraphs.

Introduction

Set out the basic legal issues which arise in relation to the particular problem. Do not start with some very general statements about contract law. Do not include some statement as to the outcome for Barbara in your introduction. That is for your conclusion, after you have reasoned your way to it. (Any statement as to the outcome at this point, particularly in an exam, will simply be your initial 'gut reaction' and you may well end up contradicting yourself, by the time you have reasoned your way through the problem, and, again, it does not impress the examiner when students contradict themselves.)

Keep your introduction brief. Do not start to provide a lengthy answer to the points identified. That is for the body of the essay, and you will start repeating yourself, wasting words in a coursework, and valuable time in an exam.

Here a brief introduction might say something like:

In this problem it is necessary to consider if Barbara has made a contract with Alan for the sale of the painting. What must be looked at is whether Alan's letter, or fax to Barbara, is an offer or an invitation to treat. If there was an offer, it will need to be considered whether there was an effective acceptance, and this will require revocation, and the postal rule, to be looked at.

First paragraph

The first paragraph should then deal with the first issue. It might say something like:

The first issue which needs to be decided is whether Alan's letter was an offer or an invitation to treat. If it was an offer, Barbara's fax would be an acceptance and Alan would have been contractually bound to sell Barbara the painting for £75,000. What distinguishes an offer from an invitation to treat is the intention to be bound, as shown in, for example, *Gibson v Manchester City Council* [1979] 1 WLR 294. However, Alan's letter to Barbara may be like an advertisement, which are generally found to be invitations to treat, rather than offers, as in *Partridge v Crittenden* [1968] 1 WLR 1204. One of the reasons put forward for this general approach to advertisements is that sellers would not want to be bound to sell more of an item than they have, so the intention to be bound is generally seen not to be present, as in *Grainger & Son v Gough* [1986] AC 325, and followed in *Partridge v Crittenden*. Here Alan has not written just to Barbara, but to others as well, so the situation could be analogous. Alan obviously knows that he has written to more than one person, so he would not subjectively intend to be bound to sell the painting to more than one person. However, the situation will not be judged

subjectively, but objectively, as has been made clear in numerous cases such as *Storer v Manchester City Council* [1974] 3 All ER 824 at 828. The question is what the reasonable person would think in relation to the letter: whether it was only Barbara who was being approached or other people as well. However, even if the argument can be dismissed that the letter is not an offer because of the way in which it is like an advertisement, the particular wording of the letter, clearly indicates the lack of an intention to be bound by Alan. He states that he 'may be prepared to sell' the painting to Barbara for £75,000. It does not say that he 'is prepared to sell' it for that price. Even if his prior statement, 'I wish to sell my Charisse painting', could be seen as indicating an intention to sell, clearly he was still doubtful about either, or both, selling to Barbara, or at the price of £75,000. In *Gibson v Manchester City Council* the phrase 'may be prepared to sell', was indicative of the lack of intention to be bound, and of an invitation to treat, rather than an offer. On the basis of the above, Barbara's fax was not an acceptance, there was no offer to accept, and Alan was able to change his mind as to the price.

[See *Koffman & Macdonald* 2.2, 2.7-2.10, 2.17-2.18].

Note the references to Alan's letter and Barbara's fax. A general word, like communication, might have been used, but the particular communication being discussed should be made clear, to avoid confusing yourself, and the examiner. Students often use the word 'offer' in different senses in answering this sort of question: colloquially and technically. So one might find an answer stating 'the question is whether Alan's offer is an offer or an invitation to treat'. The first use of the word 'offer' may have been meant colloquially, but it is not a sufficiently clear written style in which to accomplish a good analysis of the law. Words matter in law. Students must get used to writing with sufficient accuracy to convey their analysis clearly and, in fact, not to confuse themselves.

It is unlikely that many students would have included all of the above in answering the question. Some students might have simply dealt with the specific wording: 'may be prepared to sell'. Others may have dealt with the advertisement point to a greater or lesser degree – from simply stating the general position in relation to advertisements to also explaining whether, and why, it might be applicable to Barbara's situation. Marks obtained are a combination, and balancing, of how much of the relevant issues have been covered, how well, how clearly and how effectively authority is used.

Second Paragraph

The second paragraph might say:

Alan's letter made no offer, so Barbara's fax could not be an acceptance. However, it would seem that she clearly intended to be bound to buy the painting for £75,000, so her

fax was an offer, which Alan could accept or reject. Plainly he does not accept it. He introduces a new price, and in those circumstances, even a communication which said that it was an acceptance would merely purportedly be that, and not an effective acceptance as was shown in *Jones v Daniel* [1894] 2 Ch 332. It may however, itself, be an offer, and as it is a response to an offer from the other party, it could be termed a counter offer, as in *Hyde v Wrench* (1840) 3 Beav 334, rather than just an offer, but that is not significant here. It would seem that Alan did make an offer / counter offer. The setting of a time limit for an effective response makes the fax look as if it is of much more significance than the letter, and, most importantly, he said 'I am prepared to sell'. The intention to be bound is clear.

[See *Koffman & Macdonald* 2.36-2.38]

There is no need to make a major point about Alan's fax being a counter offer, rather than an offer. Alan does not attempt to subsequently accept Barbara's earlier offer, so it is not relevant to make the point that after making a counter offer, Alan could not accept Barbara's earlier offer, which was the core point in *Hyde v Wrench*.

If you should conclude that there is still no offer from Alan, then state that, as far as Barbara is concerned, that is an end of the matter. If Alan never made an offer, then there was never anything for her to accept, and no room for her letter to create a contract. All her letter was doing was making another offer, which clearly Alan never accepted. However, do not cut yourself off from addressing the rest of the question. Consider the alternative: that Alan had made a counter offer. You can then address the question of the impact of whether her letter was an effective acceptance in the context of that alternative. Just make it clear that you are considering an alternative, and not just contradicting yourself, by saying that there was no offer, in one sentence, and then non-sensically discussing the effectiveness of an acceptance, in the next.

Third paragraph

Either having decided that Alan has made an offer in his fax, or on the basis that it has been clearly stated that that alternative is now being dealt with, the third paragraph might then say:

What must now be addressed is the impact of Alan's sale to David. In itself that has no effect on the potential contract with Barbara. The issue is whether or not Alan's offer has been revoked. Alan had stated that the offer was to remain open until Wednesday. However, such a promise is not binding on Alan unless it is, itself, contractual, and, as was stated in *Routledge v Grant* (1828) 4 Bing 653, that would require consideration to have been provided for it. There is nothing to indicate any such consideration, and Alan's offer

can be revoked, the question then becomes whether that has occurred. Again, there is nothing to indicate any communication of revocation by Alan to Barbara, but what must be considered is the case of *Dickinson v Dodds* (1876) 2 Ch D 463 and communication by a third party, who was not an agent of the offeror, that the land which was the subject of the offer, had already been sold to someone else. The question arises as to what communication by a third party should suffice. The case is often qualified by saying that it must be a reliable third party. More generally, it would seem that the source and content of the communication must be such that the reasonable person would think that Alan no longer intended to contract with Barbara. So the nature of the chat room arises and the content of the communication. Here the chat room is for art collectors, so that might give the information some weight, but as the painting is not identified as 'Dancer', it would seem to be insufficient for the reasonable person to believe that Alan no longer intended to sell to Barbara, although how common such sales are would also impact. If Alan's offer was revoked, then there can be no question of a subsequent effective acceptance.

[see *Koffman & Macdonald* 2.26 – 2.29]

Fourth paragraph

The fourth paragraph needs to deal with the situation in which Alan's offer was not revoked. If that was not your conclusion in the prior paragraph, deal with it as an alternative. It might say:

If Alan's offer had not been revoked, Barbara could still accept it, and the question is whether she effectively did so. Alan had stated that it was open until Wednesday at 5pm, and the problem is that, although it was posted on Tuesday, it did not arrive until Thursday morning. Prima facie, Barbara's letter was too late to be an effective acceptance, which would normally be required to be communicated, as stated in *Entores v Miles Far East Corporation* [1955] 2 QB 327. However, the postal rule, which stems from *Adams v Lindsell* (1818) B & Ald 681, must be considered. The postal rule has long meant an acceptance which is posted will be effective upon posting. This is generally qualified by stating that it must have been properly stamped and addressed, and Toulson J commented to that effect in *L. J. Korbetis v Transgrain Shipping BV [2005] EWHC 1345 (QB)* , at [15], but there is no issue about that here. What must be considered here is that other qualifications have been stated in relation to the postal rule. In particular, it was stated in *Henthorn v Fraser* [1892] 2 Ch 2 that it must have been reasonable to use the post. Here Alan's initial communication was by post, but then Alan and Barbara communicated by fax. It might therefore be seen to be unreasonable to have used the post, for the acceptance, particularly when it was close to the time when the offer would expire.

[See *Koffman & Macdonald* 2.44-47]

Conclusion

Just as an essay should always start with a brief introduction, setting out, in broad terms, what is to be discussed, it should always finish with a conclusion, stating what has been discussed, and what that means for the party to be advised. Here it might say:

As has been shown, Alan's letter was not an offer, but merely an invitation to treat, as it did not show the intention to be bound. Barbara's fax could not therefore be an acceptance, but was itself an offer, and Alan was not contractually bound to sell to Barbara for £75,000. He increased the price, and made a counter offer, which Barbara needed to have effectively accepted in order to have a contract to buy the Charisse painting. She could not effectively accept if the offer had been revoked by what she saw in the chat room, but the information was not sufficiently clear, so the offer remained open. The question then was as to whether the postal rule would make the posted acceptance effective, even though it arrived after the offer expired. It would seem unreasonable for Barbara to have used the post when faxes had been used, and the offer was soon to expire, and so Barbara should be advised that she did not have a contract.

If different conclusions were reached en route, then the consequences of that for Barbara should be stated, with the alternative contentions clearly stated as such, eg

… Alan's offer was effectively revoked by what Barbara read in the chat room, so that her posted acceptance could not be effective, and Barbara should be advised that she has no contract. If Alan's offer had not been so revoked then …

Other points

The above does not supply 'The Answer'. Other points could be made in addition to those above. The point could be made that even a more definite statement of a price does not make a communication an offer, as in *Harvey v Facey* [1893] AC 552 or *Gibson v Manchester City Council*. There is also some scope for you to make use of more depth of knowledge as to a particular debate, or academic argument. You could, for example, include a quick comment as to the likelihood of a court using the postal rule today, when there is a justification to be found for not doing so in the 'unreasonableness' of its use, when the postal rule makes no sense as a rule in relation to lost or delayed acceptances. However, do not go off at too much of a tangent. This is not an essay about the postal rule. Such points

can be added to impress the examiner, but they must be made circumspectly, with the issue of degree of relevancy to the particular question, and the constraints of a time or word limit, borne in mind.

[On the limited justifications for the postal rule see *Koffman & Macdonald* paras 2.44 – 2.60]