

## **Problem questions in the area of agreement.**

Problem questions in the area of agreement often test your knowledge and application on a number of principles within a particular area. For instance, you may initially have to decide whether a statement or document constitutes a formal offer, or whether it has not yet reached this stage and is simply an invitation to commence negotiations, or to use its correct term, **an invitation to treat**. We can appreciate, having looked at the facts in the case of *Harvey v Facey* that it is not always easy to distinguish between the two.

When faced with such a dilemma, do not randomly choose one conclusion over the other. Carefully look at the wording of the statement. If it is ambiguous in anyway, this should alert you to the fact that the words might not meet the strict requirements of an offer. Remember the definition of an offer? It must be a clear statement of terms upon which the offeror indicates that he intends to be bound, should an acceptance be forthcoming. Anything short of this should alert us to delve deeper. The statement may well fall short of a formal offer and if so, the next correspondence may constitute the actual offer – exactly what happened in *Harvey v Facey*.

Where an offer is clear and unequivocal, there is a high likelihood that it will be a formal offer. Although again, do exert caution, as in some areas, the law is clear that certain methods of communication fall firmly within the ambit of an invitation to treat. Advertisements, for example will rarely constitute an offer, but watch out – they can sometimes constitute a unilateral offer. For example, we saw in the leading case of *Carlill v Carbolic Smoke Ball Company*, an advertisement for a product with a promise to pay £100 to – an offer to the whole world. No-one would ever suggest that the distinction between an invitation to treat and an offer is a simple matter.

So what do you do if you simply cannot decide? The best advice is to discuss the arguments for both possibilities. You can then move forwards and say, “If the words are deemed to be an invitation to treat, then X will apply, or on the other hand “if the words are deemed to be an offer, then Y will apply”. Although both alternatives can be discussed, do not sit on the fence completely. Explain which of the two alternatives you think is applicable with the reasons that you have reached this conclusion. Then move on to the next part of the problem.

Another area that can sometimes be tricky is when you find yourself having to distinguish between an acceptance and a counter offer. So go back to basics. Remember the mirror image rule? The acceptance must fully match the offer. Anything less will amount to a counter-offer. Think back to the facts of *Hyde v Wrench*? This case provides a simple illustration of a counter-offer. Sadly the facts that you are presented with are not always as clear cut as in *Hyde v Wrench*. You will often need to determine whether the words of a purported acceptance are simply a request for further information. If so, there is no counter-offer and the offer will remain alive and open for acceptance. See the case of **Stevenson, Jaques & Co v MCLean** for an illustration of where this was determined. However, if the purported acceptance changes the terms of the offer in anyway, then it might well be a counter-offer. Remember a counter-offer will destroy an original offer. The offeree cannot later try to come back and accept the original offer. That said, the counter-offer will constitute a new offer which can be accepted by the original offeree.

- A frequent area that is tested in a problem question on offer and acceptance surrounds an attempted revocation by the offeror. Remember that an offer can be revoked at any time before acceptance takes place, even if the offeror has agreed to keep the offer open for a set period of time. The important task to undertake is to ascertain whether the revocation has been made before or after acceptance. Not as easy as it sounds. You need to know the rules on revocation and acceptance and remember that the postal rule for acceptance by post is a departure from the normal rule that an acceptance is valid when communicated. A revocation is also effective when the offeree is notified of it, this also applies to revocations sent in the course of the post. There is a wealth of case law in this area. You need to discuss cases such as **Entores v Miles Far East Corporation**, the Brimes and Brinkibon v Stahag Stahl. Then having analysed the precedent in the area you must decide in your given scenario when it can be deemed reasonable for the revocation to have been received. If this is before communication of acceptance, the revocation will be effective. However if communication of acceptance comes before revocation, then there will be a valid contract – too late for the offeror to revoke. If the acceptance is by post, and post is deemed to be an effective method of acceptance, then if the letter is posted before revocation is communicated, then acceptance will have taken place and a contract formed – again too late for the offeror to revoke. The case of Byrne v Van Tienhoven is a good case to illustrate this point.