Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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2. Offer and Acceptance

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter outlines a number of questions that need to be posed in answering exam questions about the rules of offer and acceptance and certainty of terms. First, has an offer been made? Secondly, if an offer has been made, has the offeree unequivocally accepted this offer? Thirdly, has the acceptance been communicated effectively? Fourthly, at the moment when the acceptance is deemed to have been effective, is the offer still open? Fifthly, are there any exceptions to the aforesaid rules of offer and acceptance? Finally, is an agreement sufficiently certain?

Keywords: contract law, offer, acceptance, offeree, offeror, unilateral contract, certainty of terms

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The principles used to determine the existence of an agreement;
- The distinction between an offer and an invitation to treat (ITT);
- What constitutes acceptance;

- The problems arising from the ‘battle of forms’;
- Communication of acceptance;
- Methods of terminating an offer;
- The problems relating to unilateral contracts;
- What is meant by certainty of terms.

Key debates

Offer and acceptance is a fairly settled area of law, but a number of questions arise in relation to the application of the relevant principles.

Debate: communication of acceptance.

When does the postal acceptance rule apply, and does it apply to methods of communication other than letters of acceptance sent through the post?

Debate: unilateral contracts.

On what basis will the law prevent the revocation of an offer in respect of a unilateral contract once performance of the requested act has commenced but before the requested act is complete?

Question 1

p. 5 ↵ Andrea has decided to sell her caravan. She parks it outside her house with a notice on the front windscreen stating: ‘For sale. Pristine example—one owner. £4,750 or near offer. Please call at number 34 or tel: 713850, only. First person to agree a price WILL get the caravan.’

On Monday at 9am, Bernice sees the caravan but, as she is late for the dentist, she telephones Andrea from work at 10am and makes an offer of £4,500 which Andrea says she would like to consider. Bernice says that she will assume Andrea has accepted unless she hears from her by 9pm that evening, a proposal to which Andrea agrees.

At 11am on Monday, Curtis calls at Andrea’s house, but she is not at home. He leaves a note reading: ‘Monday 11am. Please keep caravan for me—here is a cheque for £4,750, Curtis.’

At 2.15pm on Monday, David sees the notice and, within a few minutes, has posted a letter of acceptance and cheque for £4,750, using the post-box at the end of the street. Unfortunately, David misaddresses his letter, so it only arrives on Friday.

At 3pm on Monday, Andrea decides to accept Bernice's offer and posts a letter to Bernice's business address saying: 'I agree to sell on your terms. Because of the lower price can you pay in cash?'

At 9.30pm on Monday, Andrea reads Curtis's acceptance and immediately telephones Bernice's business address, leaving a message on the recorded answering service: 'Ignore the letter you will receive—deal off. Andrea.' Bernice is away on business and only listens to the tape on Wednesday evening.

Advise each party as to their legal position.

Caution!

■ The topic of offer and acceptance at one level seems quite straightforward but the applicable law depends upon assessing the intention of the parties which is not so straightforward.

■ Always establish that there is, at least, an argument for the existence of an offer *before* you consider any possible argument for the existence of an acceptance. In problem questions it is illogical to consider acceptance in the absence of an offer.

■ With offer and acceptance questions a number of possible answers may arise, depending upon how the facts of the question are interpreted (for example, one party may have an *arguable* case that a particular statement is an offer, whereas the other party may have an *arguable* case that the same statement is actually an invitation to treat). It is advisable that a draft plan is used to identify the pathways for an answer and so that your answer can be structured in a logical way.

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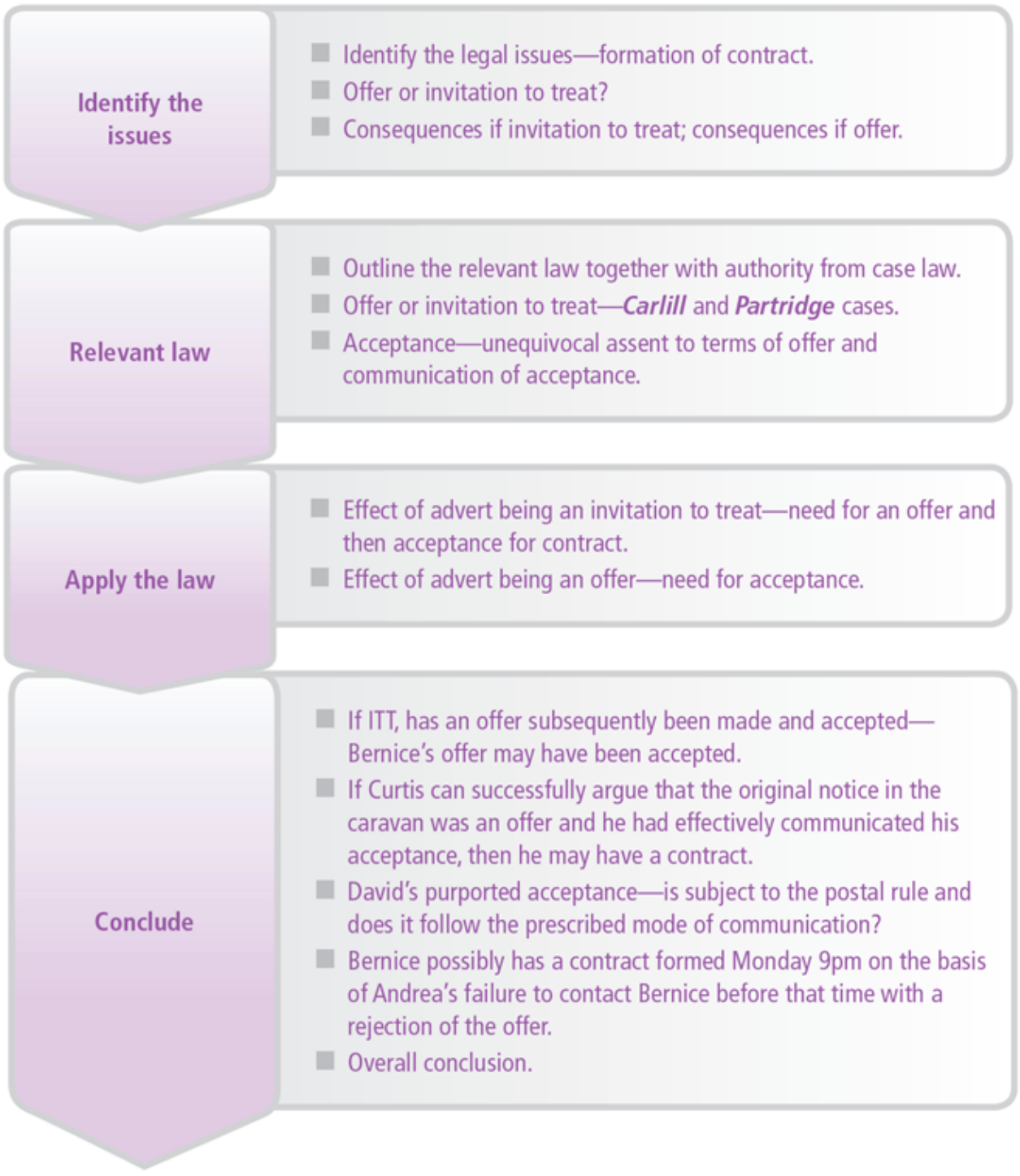
Diagram answer plan



Suggested answer

This question concerns formation of contract, particularly agreement. In order to determine the existence of an agreement it is usually necessary to find an offer and acceptance of that offer (***Gibson v Manchester City Council* [1979] 1 WLR 294**).[1] The first issue is whether the windscreen notice constitutes an offer or an invitation to treat (ITT),[2] for if it is an ITT Curtis's and David's offers are never accepted. Does the notice demonstrate a clear willingness to be bound without any need or desire for further negotiations? The notice states a definite price, the ↵ caravan is subject to an external inspection and there is a prescribed method of communication. Use of the word 'WILL get the caravan' arguably demonstrates clear intent and is similar to ***Carlill v Carbolic Smoke Ball Co. Ltd* [1893] 1 QB 256** where an offer was held to have been made. Moreover, the stipulated methods of communication allow Andrea to vet each acceptance personally and thereby avoid any confusion as to who is the 'first person'. The notice may be an offer.

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[1] Indicate in your opening sentence what is the overall subject area raised by the question.

[2] Here there is the identification of the first legal issue for consideration.

Conversely, the price stated invites different bids ('or near offer'), it is unlikely that a buyer would come forward without an *internal* inspection of the caravan and test drive, and an advertisement is normally considered to be an invitation to treat. Following ***Partridge v Crittenden* [1968] 1 WLR 1204**, there is a presumption that where individuals attempt to conclude private contracts, they will prefer to make the final decision as to whom they will sell, particularly where there is a limit on available stock[3] (although Andrea's comment that only the 'first person gets the caravan' potentially eliminates this problem). Moreover, is a notice on a windscreen any different from a displayed price in a shop window (eg ***Fisher v Bell* [1961] 1 QB 394**)?

[3] An explanation of a key case is given here.

Consequently, as the contractual status of the notice is debatable, the following answer will assume that either proposition is valid.[4]

[4] A conclusion is reached. Note that due to the facts of the question being unlike any decided case, arguments may be raised, but no definitive conclusion reached. The answer then considers the consequence of each possible interpretation, ie is the notice an offer or is it an ITT?

Assuming the Windscreen Notice is an ITT

Andrea v Bernice

If Bernice is making an offer to buy the caravan for £4,500, Andrea attempts to accept this offer by posting a letter asking that payment be made in cash. What is the effect of this letter? First, by introducing this new element of payment in cash, Andrea's response may be a counter-offer, rather than an acceptance.[5] If so, the counter-offer destroys Bernice's original offer (***Hyde v Wrench* (1840) 3 Beav 334**) and Bernice would need to accept this counter-offer before any contract came into existence (of which there is no evidence). Moreover, Andrea's subsequently recorded telephone message would effectively revoke this counter-offer, at the very latest when Bernice listened to it on Wednesday morning. An alternative interpretation is that by asking whether payment could be made in cash, Andrea may simply be clarifying the position.

[5] Identification of the next issue, ie what is acceptance.

Assuming Andrea's acceptance to be unqualified, when is it effective? As the letter is posted, the postal rule may apply, whereby acceptance is effective on posting (***Adams v Lindsell* (1818) 1 B & Ald 681**).[6] If so, case law would lean towards Andrea's subsequent retraction being ineffective (eg ***Wenkheim v Arndt* (1873) 1JR 73 (NZ)**). However, one should question the reasonableness of using the postal rule in these circumstances. The notice on the caravan required would-be purchasers to visit Andrea's home or telephone her personally. ↵ An instantaneous communication is arguably contemplated by the parties. A court might declare the postal rule inapplicable, particularly as Bernice (the offeror) would not have expected a posted response. If so, the letter cannot be effective prior to its receipt, making the final result dependent upon whether the letter was delivered *before* or *after* Bernice listened to Andrea's recorded message on Wednesday.[7]

p. 8

[6] Note that when a rule is stated it is immediately followed by authority. Remember, the case name will often suffice so there is often no need to include the full reference.

[7] You might also wish to consider whether Andrea's retraction is effectively communicated when it was recorded or only when Bernice heard it—see extended analysis of this point in **Question 2**.

One final possibility must be considered, when Bernice offered to pay £4,500 she stated that unless Andrea responded by Monday 9pm she would assume that her offer had been accepted.[8] Imposing silence as a means of acceptance is not normally permissible (***Felthouse v Bindley* (1862) 11 CB NS 869**) and should therefore leave Andrea free to sell to anyone else. However, in ***Re Selectmove Ltd* [1995] 1 WLR 474**, the Court of Appeal recognized, *obiter*, that if an offeree *agrees* to silence being a means of acceptance, then failure to communicate with the offeror is equivalent to acceptance. As Bernice did not *receive* any further communication from Andrea before Monday 9pm, a court is entitled to conclude that Bernice had bought the caravan at that moment in time.

[8] Another legal issue is identified. The remainder of the paragraph briefly explains the rules, applies the law to the facts of the question, and reaches a conclusion.

Andrea v Curtis

If the windscreen notice is only an ITT, Curtis will actually be making an offer to Andrea and, in the absence of acceptance, no contract can yet exist. Andrea's mental acceptance of Curtis's offer would be insufficient.

Andrea v David

David is in the same position as Curtis.

Assuming the Windscreen Notice is an Offer

Andrea v Bernice

Should the notice be an offer, Bernice's reply would probably constitute a counter-offer as she offered a lower price. Andrea's subsequent request for payment in cash would either be another counter-offer, in which case no contract would yet exist, or an acceptance of that counter-offer. If the latter, the final result would be determined by the following two points: (a) whether Andrea's acceptance was communicated to Bernice before Andrea's attempted retraction, or afterwards (see the previous

section); and (b) whether Andrea's failure to communicate with Bernice before Monday 9pm resulted in a contract coming into existence anyway on grounds of acceptance by conduct (following ***Re Selectmove Ltd***).

Andrea v Curtis

Curtis has accepted Andrea's offer without qualification. When is his acceptance effective: when the note is left at Andrea's house (ie delivery) or when Andrea actually reads it (ie actual receipt)?

p. 9 ↵ In support of the delivery theory it could be argued that Curtis complied with the terms of the notice, by leaving an acceptance at Andrea's house. There is nothing to suggest that Andrea's notice required face-to-face communication. If this argument is successful, then a contract is formed at 11.05am Monday, leaving other prospective purchasers with no redress as Andrea's offer will have impliedly lapsed in accordance with the notice on the caravan which specified 'first person'. It is unlikely that Curtis could rely upon any *obiter dictum* in ***The Brimnes*** **[1975] QB 929** to the effect that a letter that has been delivered will normally be deemed to have been opened within a reasonable time as this probably applies to communications with businesses rather than with private individuals (compare ***Newcastle Upon Tyne NHS Foundation Trust v Sandi Haywood*** **[2017] EWCA Civ 153**).

If this argument fails, Curtis's acceptance may only be effective when it has been communicated to Andrea—presumably when she read it on Monday at 9.30pm (see ***Entores v Miles Far East Corp.*** **[1955] 2 QB 327**, a case which, although subjected to some criticism, in the context of instantaneous communications, by Lord Sumption JSC in ***Brownlie v Four Seasons Holdings Inc*** **[2017] UKSC 80** and Leggatt JSC (in his partial dissent) in ***FS Cairo (Nile Plaza) LLC v Lady Brownlie*** **[2021] UKSC 45**, probably still governs this situation). By this time Andrea has potentially formed a contract with Bernice (eg if the postal rule applies to Andrea's 'acceptance' sent at 3pm on Monday), or Andrea is deemed to have accepted Bernice's offer by not communicating with Bernice before Monday 9pm. If so, either Andrea's advertised offer will have impliedly lapsed or, if a court felt that the offer remained in force until it had been positively withdrawn, Andrea would be in breach of contract to Curtis by selling the caravan to Bernice.

Andrea v David

David will argue that his posted acceptance has created a contract with Andrea. Two questions arise: (a) does the postal rule apply to his letter of acceptance; and (b) by using a different means of communication than specified in the notice, was his acceptance valid?

For the postal rule to apply, the acceptance must be properly addressed, the rule must not be excluded by the terms of the offer (eg ***Holwell Securities Ltd v Hughes*** **[1974] 1 WLR 155**), and the post must be a reasonable means of communication.[9] In the present case David fails on all three counts. First, he has misaddressed his letter. Secondly, the terms of the offer stipulate a personal visit or a telephone call.

Thirdly, as the situation presumably requires direct communication between the parties (in order to avoid unknown acceptances in the post creating unexpected liabilities), it would appear unreasonable for the postal rule to apply.

[9] This paragraph makes plain the limits to the operation of the postal rule.

p. 10 ↵ If the postal rule does not apply, perhaps David's letter is effective when it is delivered on Friday morning? The general rule is that the offeree must adhere to the prescribed mode, otherwise the acceptance is invalid; whereas if the offeror's intentions are at all ambiguous, the offeree may choose an equally expeditious means of communication (***Yates v Pulleyn* (1975) 119 Sol Jo 370**). In the present case, Andrea has used the word 'only' in her offer, thereby arguably excluding use of the postal service, so David's acceptance is unlikely to be valid on receipt. Moreover, even if alternative forms of communication were not excluded by the terms of the offer, one would still expect an instantaneous means of communication to be used. As the post is not as fast as the telephone, nor as immediate as a personal visit, David's attempted acceptance appears invalid.

In conclusion,[10] unless Curtis can successfully argue that the original notice in the caravan was an offer and that he had effectively communicated his acceptance by delivering it to Andrea's house, it seems that Bernice has the best chance of securing the caravan at a price of £4,500, with the contract probably being formed at 9pm on Monday on the basis of Andrea's failure to contact Bernice before that time with a rejection of the offer.

[10] Remember to include an overall conclusion to your answer.

Looking for extra marks?

■ Use the IRAC method to ensure that you demonstrate the relevance of the law and how it applies to the facts.

■ When a question begins with an advert, never assume it is definitely an offer or an invitation to treat. Explain why either is possible, explicitly stating your analysis.

■ Make sure you send a clear signal to the examiner that you do not expect the answer to be clear-cut, with only one possible solution. For example, it is arguable that Curtis's acceptance is effective either when it physically arrives at Andrea's house or when she actually reads it.

Question 2

Margaret, the sales director at TechMech, is approached by Philip, a local businessman, who outlines the size and nature of his business enterprise and asks Margaret to quote a price for the installation of TechMech's new accounts software system. Margaret, realizing that her monthly sales quota has not yet been reached, replies: 'I am sure that for a business of your size we can ↵ guarantee a price of £3,000, covering all installation costs and appropriate staff training. But please get back to me quickly; I cannot hold that price for more than a week.'

p. 11

Later that day, Philip receives an advertisement by email from CostPlus Ltd which states: 'We can offer "state-of-the-art" accountancy software for small businesses at a price guaranteed not to exceed £2,500.' He immediately telephones CostPlus and places an order. However, after discussing the matter further with a CostPlus representative, it becomes apparent that the actual costs of installation would exceed £4,000. Philip thereupon withdraws his order.

The next day, Philip telephones TechMech. He leaves a message on the answering machine accepting the offer of £3,000 made by Margaret, at the same time asking whether the cost could also include on-site training for any new staff he takes on over the next six months.

Subsequently, Philip has second thoughts and telephones TechMech to cancel his order. The secretary, now on duty, points out that she has passed all the answering service tapes over to Margaret who would be listening to them shortly, but that she would make a note of his wishes.

Advise Philip whether he has concluded a contract with TechMech and/or CostPlus and, if so, on what terms?

Caution!

■ Do not make assumptions, for example there is an advert, therefore it must be an invitation to treat (it may be an offer!). Explain the law and explain how it might apply to the facts of the problem.

■ The facts of offer and acceptance questions may lack clarity. This is deliberately so to allow room for discussion of alternatives.

■ In complicated questions of this nature, an examiner will place a premium on answers that adopt a logical structure. Consider the possible use of subheadings as a means of avoiding unnecessary confusion. It is best to check with your module tutor that this an acceptable format to employ.

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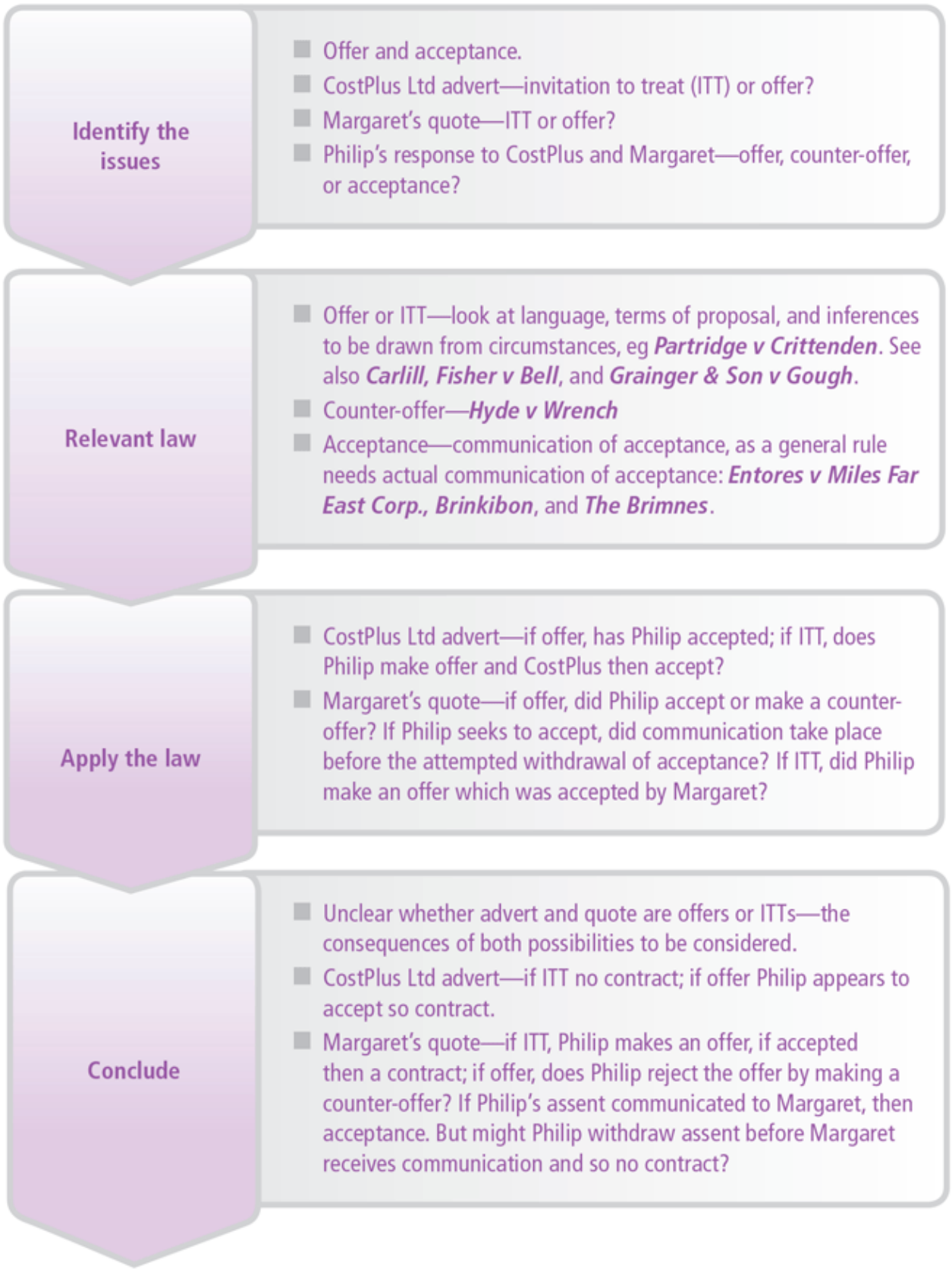
Diagram answer plan



Suggested answer

In advising Philip it is necessary to discuss formation of contract, particularly an analysis of offer and acceptance. The question is whether Philip is contractually bound to purchase the relevant accounts software from either/both of the two firms, CostPlus Ltd or TechMech.

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CostPlus Ltd Advertisement

Does the advertisement constitute an offer or an invitation to treat (ITT)? Whereas an ITT merely represents a preliminary stage in negotiations, an offer is a definite proposition by the offeror signifying a willingness to be bound by the terms stated as soon as it has been accepted by the offeree. The basic distinction between an offer and an ITT is that an ITT lacks the required objective intent and specific terms of an offer.[1] Traditionally, the courts have preferred to view an advertisement as an ITT for two reasons. First, the wording of advertisements is often too vague (compare ***Grainger & Son v Gough* [1896] AC 325**).[2] Here the advertisement states a maximum price that presumably means that a lower price might be negotiated; moreover, no precise details are included about the software specifications, nor its inherent limitations or performance targets relevant to its intended business use. Secondly, sound business sense may dictate that a business 'supplier/seller' would prefer to choose its customers so as to avoid being inundated with acceptances that could not be fulfilled from existing stock (see ***Partridge v Crittenden* [1968] 1 WLR 1204**). Moreover, there seems little difference between shops advertising goods in windows or on shelves, either of which are normally viewed as ITTs (see ***Fisher v Bell* [1961] 1 QB 394**) or advertising them via some other medium. This reasoning points to the advertisement being an ITT, reinforced by the subsequent conversation which demonstrates that CostPlus required further information before it could actually quote a definite price. Indeed, if the advert was an offer, what is the price at which Philip is accepting—£2,500, or less? The fact that no definite answer can be given again suggests that the advert lacked the certainty required of an offer.[3]

[1] This paragraph is a good illustration of IRAC. In the opening sentences, there is identification of the legal issue, together with an explanation of the terminology.

[2] The use of IRAC continues with statements of relevant law and then immediate application to the facts.

[3] This is a running conclusion, ie the advert is unlikely to be an offer. This could be reinforced by using the facts of ***Harvey v Facey* [1893] AC 552**.

However, there are two points that might arguably alter the position here.[4] First, in ***Partridge v Crittenden***, Parker LJ, in a strong *obiter dictum*, excluded manufacturers' catalogues from the presumption that an advert represented an ITT. Should this approach be extended to the supplier of specialist software who quotes a definite upper limit? Secondly, in ***Carlill v Carbolic Smoke Ball Co. Ltd* [1893] 1 QB 256** an advert was held to be an offer because the clarity of its wording, linked with an intention to be bound as evidenced by the deposit of money with the bank, demonstrated the required degree of intent and specificity. Similarly, does CostPlus Ltd's advert incorporate a statement of clear intent or is it a mere advertising puff? One might emphasize, for example, that the words 'price guaranteed not to exceed £2,500' demonstrates a clear contractual intent and that any further discussions will result in a lower price being agreed.

[4] The counter-arguments suggesting the existence of an offer are considered here. This shows an appreciation of the need to deal with counter-arguments.

In the end, the argument that an ITT was made initially is probably stronger, in which case no contract will result (at any price).[5] What is ↵ important here is that if the advertisement does constitute an offer, Philip has accepted its terms before CostPlus increased its quote (ie offer) to £4,000. Specifically, the normal rule is that an offer can be accepted, subject to the need for communication, at any time before notice of its withdrawal has reached the offeree (see ***Byrne v Van Tienhoven* (1880) 5 CPD 344**). Thus, if a contract was formed when Philip placed his order, any post-contractual attempt by CostPlus to increase the quote would represent a breach of contract.

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[5] This paragraph concludes on the above arguments indicating the consequences of the advert being an ITT or an offer.

Discussions with TechMech

Does Margaret's statement of price represent an offer or an ITT? Adopting the analysis in the previous section, the required degree of intent and clarity of language must be isolated. Margaret has used the words 'I am sure', arguably suggesting a clear intent to be bound. Compare this with ***Gibson v Manchester City Council* [1979] 1 All ER 972** where the defendants' statement that they 'may be prepared to sell' was viewed by the House of Lords as an ITT—especially when linked with the later statement in the letter inviting the tenant to 'make a formal application'. In our facts, a specific price has been given, with a definite time limit. It is therefore more likely that the price constitutes an offer.[6] One final point is that the offer can be withdrawn at any time before acceptance, unless Philip has provided consideration for the offer to be kept open (eg payment).

[6] Note that questions on offer and acceptance give rise to possible arguments on the facts of the question; if the communication from Margaret was definitely an ITT, the remainder of the question would have no purpose!

Unqualified Acceptance?

Has Philip unequivocally accepted the terms of TechMech's offer? At first glance, he appears to have added a new term; namely, that the cost includes the training of new staff recruited over the next six months. If this represents a counter-offer then the placing of his order cannot constitute an acceptance—TechMech can choose to accept or reject this counter-offer (see generally ***Hyde v Wrench***).

Could Philip argue that he was simply requesting information in order to clarify the position; that is, is it clear that the quoted price applied only to the training of existing employees? This seems a weak argument as Philip's recorded message is not really phrased as a question of clarification, but rather as a request. However, he may use ***Society of Lloyds v Twinn*** **(2000)** ***The Times*****, 4 April** where the Court of Appeal recognized that there was no reason why an offeree should not unconditionally accept an offer while, at the same time, making a separate collateral offer to modify the contract. If the collateral offer was rejected, then the unconditional acceptance of the original offer still created a binding agreement. On the facts, Philip's acceptance seems unconditional with his plea for indulgence regarding the training of subsequently recruited staff representing a collateral offer that TechMech is free to accept or reject.

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Communication of Acceptance

Philip attempts to accept by telephone. The general rule is that acceptance must be communicated to the offeror or their agent in order to be effective. In this case Philip's acceptance has been recorded on an answering machine: is it effective when recorded or when it has been listened to? In ***Entores*** the Court of Appeal suggested that, generally, if the offeror does not hear the acceptance, it is not effective.[7] On this basis no contract has yet come into existence. But there are arguable alternatives and, indeed, in ***Brownlie v Four Seasons Holdings Inc*** **[2017] UKSC 80** Lord Sumption JSC suggested that aspects of the ***Entores*** case may need to be reconsidered in the future.

[7] The answer here avoids a superficial consideration of communication of acceptance, ie communication is effective on receipt, by considering what in law is meant by receipt.

First, it is possible that the answering machine is a mechanical agent (see ***Thornton v Shoe Lane Parking Ltd*** **[1971] 2 QB 163**). If so, a contract has been formed and Philip has no chance of withdrawing from it.

Secondly, in ***The Brimnes*** **[1975] QB 929** where the plaintiffs exercised their right to withdraw from the contract, the question was whether the plaintiffs' telex of withdrawal was effective when it was received during designated office hours or when it was read the following morning. The Court of Appeal concluded that the telex was effective on receipt as the plaintiffs had been told that it was the defendants' ordinary practice to read such telexes immediately. Whether this reasoning can be applied to communications of acceptance is unclear.[8] If applicable the following arguments might be advanced: (a) if the answering service implied that recorded messages would be listened to before the end of normal business hours of that day, then acceptance would have been effectively communicated at some time during that day and a contract would come into existence, subject to the timing of Philip's attempted withdrawal; (b) if the answering service suggested that messages would be listened to on the following day, then it would seem (the facts are not entirely clear) that Philip's revocation would have already become effective; that is to say, no contract would come into existence (see ***Mondial Shipping & Chartering BV v Astarte Shipping Ltd*** **[1995] CLC 1011**).

[8] As ***The Brimnes*** is a case on notice of withdrawal, it is possible to argue that the rule established should not extend to acceptance.

In ***Brinkibon Ltd v Stahag Stahl und Stahl*** **[1983] 2 AC 34** Lord Wilberforce said, *obiter*, the time at which a telexed acceptance was effectively communicated would depend on the intentions of the parties, sound business practice, and even a judgement as to where risks should lie.[9] Is the receipt of a telexed acceptance similar to the telephone recording of an order? If so, can one assume that the intention of the parties was that Philip's order would only be communicated when his recorded message was heard, thereby allowing him the freedom to withdraw the order until that time? Conversely, does the use of an answering machine imply that a busy company does not wish to miss any opportunity to receive an order and that tapes will be ↵ listened to as quickly as possible, thereby suggesting that recording is tantamount to communication?

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[9] In this paragraph, alternative arguments are raised, again showing the inherent flexibility in applying the normal rules of offer and acceptance.

To conclude, if Philip's acceptance is effective only when his message has been listened to, then his revocation may be effective—an offeree can withdraw any acceptance provided the withdrawal is communicated prior to the acceptance. If his acceptance is effective when recorded, then a contract is immediately created, preventing him from attempting a revocation.

Looking for extra marks?

■ Although a technical, schematic approach is demanded, there is considerable scope for better students to demonstrate their analytical abilities. For example, the average student will apply the general rule of communication of acceptance in ***Entores v Miles Far East Corp.*** **[1955] 2 QB 327** whereas the good student will explain the limitations possibly imposed upon this principle by the subsequent decisions in ***The Brimnes*** **[1975] QB 929** and ***Brinkibon Ltd v Stahag Stahl und Stahl*** **[1983] 2 AC 34**.

■ The ability to identify arguments and counter-arguments will reap rewards in terms of marks as this shows an appreciation of how to use the law effectively. Weighing up the strengths and weaknesses of opposing arguments is also an important part of this process.

Question 3

On Wednesday Oftmark Ltd offers to sell 100 tonnes of steel to Aftercool Ltd at £500 per tonne. The offer to Aftercool states: 'Please telephone or email an acceptance by noon today. Delivery will take place next Monday.'

Aftercool Ltd faxes an acceptance at 10am, the fax machine informing the clerical assistant that the message has been properly relayed to Oftmark. Unfortunately, the Oftmark fax machine has not been fitted with a new printing cartridge so the acceptance is not received. Moreover, as Aftercool Ltd believes that a firm contract exists, it enters into a binding contract with Torquecar Ltd to produce car body panels, using the anticipated delivery of steel on Monday.

Advise Aftercool Ltd whether there is a binding contract with Oftmark Ltd.

Would your advice differ in the following alternative circumstances?

a **Aftercool emailed a withdrawal of its acceptance before noon, but the email was accidentally deleted by an Oftmark employee.**

b **Aftercool telephoned an acceptance to Oftmark in the afternoon.**

c **Instead of a telephoned acceptance Oftmark's offer had specified: 'Please notify us of your acceptance by first-class registered post sent before noon.' Aftercool sent a letter of acceptance before noon by unregistered post, which was never received by Oftmark Ltd.**

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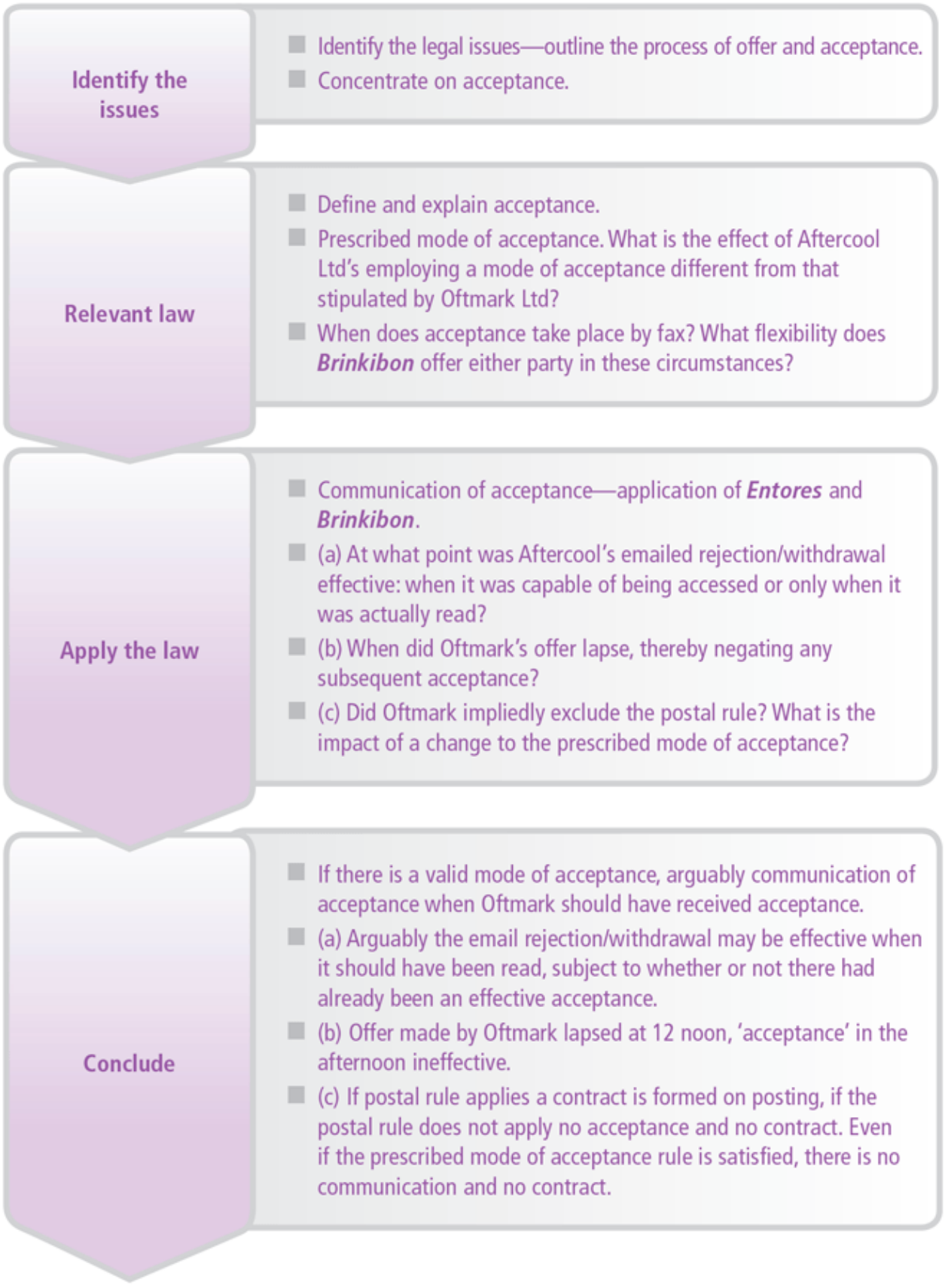
Caution!

■ The question makes clear that there is an offer. In consequence, do not spend time explaining what is needed to establish an offer. The focus of the question is clearly upon problems relating to acceptance.

■ The facts of problem questions are designed to raise a variety of legal issues. When reading a question, carefully note the issues raised by a particular fact or set of facts.

Diagram answer plan



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Suggested answer

It would appear that the requirements of an offer have been made out[1] in that there is sufficient certainty (price and quantity) and intention (business context). The question focuses on issues relating to acceptance of an offer. The significant feature here is that the offeror has clearly prescribed a mode of acceptance.[2] The general rule is that the offeree must adhere to the prescribed mode provided it is mandatory and if he/she does not, the acceptance is invalid (***Eliason v Henshaw* (1819) 4 Wheat 225**).[3] However, if the prescribed mode of acceptance is not mandatory, it seems that the offeree may choose another equally expeditious means of communication (***Tinn v Hoffman & Co*. (1873) 29 LT 271**). Into which category does this offer fall? On the one hand, the mode of acceptance is clearly specified but, on the other hand, use of the word 'please' suggests a degree of informality rather than a curt prescription. It is arguable that there is some room for manoeuvre here and, perhaps, the offeree is placed in a difficult position—does O want speed or a particular mode? If speed is of the essence, then A has clearly complied with O's wishes by an immediate near-instantaneous communication which should have the added benefit of a permanent record (ie the printed fax).[4] However, if the telephone or email mode is an absolute requirement, then Aftercool's acceptance is invalid.

[1] The answer acknowledges the existence of an offer, as indicated in the question, but does not dwell on this.

[2] This sentence identifies the issue, ie what is the legal significance of an offer prescribing a mode of acceptance?

[3] The relevant rule of law is clearly stated and supported by authority.

[4] The possible application of the law to the facts is considered and a supportable conclusion drawn.

Assuming A has employed a valid *mode* of acceptance, has a contract been formed? When does the acceptance take place?[5] The general rule is that acceptance is only effective once it has been 'communicated' to O (***Entores v Miles Far East Corp.***); normally this means receipt by O. In the instant case O does not receive any acceptance because of the malfunctioning fax machine. Does this mean that the acceptance is invalid?

[5] This is the next legal issue.

Entores does not, however, provide an inflexible rule (and remember that in ***Brownlie v Four Seasons Holdings Inc*** **[2017] UKSC 80** Lord Sumption JSC suggested that aspects of the ***Entores*** case may need to be reconsidered in the future). The rule can be modified in various situations, for example if O is at fault with his defective communications equipment (turning off his 24-hour telex machine), then acceptance may be deemed to occur at the moment when it would have been received (see generally ***Brinkibon v Stahag Stahl und Stahl*** and ***The Brimnes***). If this is the case then A may argue that, as O was at fault in failing to replace the printing cartridge on his fax machine, acceptance was deemed to be effective at 10am (subject to the following comments). As fault and business usage are the determining factors, a different answer might be forthcoming if A clearly recognized that the fax had not been properly transmitted.

p. 19 ↵ There is a further line of argument based on estoppel. In ***Entores***, Lord Denning considered the possibility of O's telex machine running out of ink and, therefore, being incapable of receiving A's acceptance. His Lordship suggested that if an offeree reasonably believed that the acceptance had been received, and the offeror was at fault, then the latter would be estopped from saying that the acceptance was not received. This estoppel might be more easily established on the present facts as Aftercool Ltd relied to its detriment upon the assumed communication by entering into a binding agreement with Torquecar Ltd (compare ***Argy Trading Development Co. Ltd v Lapid Developments Ltd*** **[1977] 1 WLR 444** where it was questioned whether a promissory estoppel could operate without a pre-existing contract).[6]

[6] This shows a wider appreciation of difficulties in using a concept.

Difference with (a)

The case law on the use of email communication in the context of offer and acceptance is still developing. To some extent one must seek to apply relevant principles from existing authority that might be appropriate to deal with the current situation. The basic principle stays the same: to be effective a revocation of an offer must be communicated prior to the time when any effective acceptance has occurred. In the context of faxes, we have seen that communication normally occurs on receipt (***Entores***) but that this rigid rule is subject to flexible interpretation (***Brinkibon***), taking account of the parties' intentions, sound business practice, and a judgement as to where risks should lie. In ***Thomas v BPE Solicitors*** **[2010] EWHC 306 (Ch),** it was recognized, in a very strong *obiter* statement, that where email is an expected form of communication, an email sent during 'expected working hours' becomes effective very soon after transmission. Thus, Aftercool could argue that:[7] (i)

sufficient communication of the withdrawal had taken place (relying on ***Thomas v BPE Solicitors* [2010] EWHC 306 (Ch)**); (ii) no estoppel could operate in Oftmark's favour as Aftercool's actions could not have induced any alteration of position; and (iii) neither party should be allowed to take advantage of their own fault in order to create or prevent the formation of a contract (see ***The Brimnes***).

[7] Drawing on the previously stated law, a number of arguments are highlighted.

Difference with (b)

What is the effect of A telephoning an acceptance after the noon deadline?[8] An offer will lapse in accordance with its terms or, if this is unclear, a reasonable time after it has been made (see ***Ramsgate Victoria Hotel Co. v Montefiore* (1866) LR 1 Exch 109**). 'Reasonable' will depend on the circumstances, such as the implicit need for urgency displayed in ***Quenerduaine v Cole* (1883) 32 WR 185** and the nature and perishability of the goods. On the present facts O has stipulated a reply before noon by telephone or ↵ email. It would seem, therefore, that the offer has impliedly lapsed by the time A attempted to accept the terms of the offer. (Note: the offeror would have expected to receive an acceptance before noon.) Another possible argument is that A, by not complying with the conditions of the offer, has made a counter-offer which was not accepted by O (***Wettern Electric Ltd v Welsh Development Agency* [1983] QB 796**).

p. 20

[8] Part (b) raises the issue of lapse of offer.

Difference with (c)

Two issues arise to be discussed.[9] First, does the postal rule apply? The postal rule provides that acceptance is complete when a letter of acceptance is posted, ***Adams v Lindsell* (1818) 1 B & Ald 681**. The post is clearly contemplated as the expected medium for communicating acceptance. However, the postal rule can be excluded by express contrary intent, provided it is specified in the terms of the offer. For example, when completing a football pools coupon there is a clear statement that the coupon must be received by a certain time before any liability ensues. The present facts are similar to ***Holwell Securities Ltd v Hughes* [1974] 1 WLR 155** where the offeree was requested to exercise his option by 'notice in writing'. These words were held to exclude the postal rule as the offeror was specifying the need to see the acceptance (ie have 'notice' of it) before any contract was formed. Equally, O appears to be imposing a similar condition. If so, no contract would come into existence as the postal acceptance never reached O.

[9] This part raises two legal issues: operation of the postal rule; and the rule as to prescribed mode of communication. Note the use of IRAC.

The alternative argument is that the court in ***Holwell*** was applying the provisions of **s. 196 of the Law of Property Act 1925** in which, *inter alia*, the exercise of an option by post was deemed effective 'at the time at which the … letter would in the ordinary course be delivered'. Thus, ***Holwell*** is limited to contracts affecting interests in land. Moreover, whereas 'notice in writing' implies delivery, notification by post might suggest that the act of posting is sufficient; in particular, only O can 'notice' an acceptance, but only A can notify it. If this argument were accepted the postal rule would be applied; the acceptance would be effective on posting irrespective of its subsequent loss.

Secondly, by using unregistered post has Aftercool sent a valid acceptance? Previous comments have suggested that this will depend upon the contents of the offer. If registered post is a precondition for acceptance, no contract will exist, whereas if any equally expeditious means of communication is acceptable, a contract should be formed since registered and unregistered delivery have the same timescale for delivery, ***Manchester Diocesan Council for Education v Commercial and General Investments Ltd*** **[1970] 1 WLR 241**. Moreover, what is the purpose of stipulating registered post? It

p. 21 ↵ cannot help O as the acceptance is either delivered, in which case it is known, or not delivered, in which case it remains unknown. In ***Yates Building Co. Ltd v RJ Pulleyn & Sons (York) Ltd*** **(1975) 119 Sol Jo 370**, the court concluded that the instruction to use registered post was intended to protect the offeree, so, if A took a risk by using unregistered post (thereby lacking proof of transmission if the letter was lost in transit), his acceptance would still remain valid on proof of delivery.

In conclusion, if the postal rule applied, then A's acceptance is effective on posting, provided there is sufficient evidence that the letter was actually posted. If the postal rule does not apply, no communication of acceptance has taken place so no contract can exist.

Looking for extra marks?

■ To provide a complete answer to this question, students must have a reasonable knowledge of the decisions in ***Entores Ltd v Miles Far East Corp.*** **[1955] 2 QB 327**, ***The Brimnes*** **[1975] QB 929**, and ***Brinkibon v Stahag Stahl*** **[1983] 2 AC 34**. In particular, the *obiter* comments made in the judgments will address the problem of Oftmark's fault in not maintaining the fax machine properly and the reliance of Aftercool Ltd in entering into a contract with Torquecar Ltd.

■ This question requires an appreciation of the problems of adapting the rules of offer and acceptance to new developments in communications technology. Using existing authority, particularly an ability to use the various *obiter dicta*, will ensure top marks.

■ A first-class answer might also include the following point: in **reg. 11(2) of the Electronic Commerce (EC Directive) Regulations 2002, SI No. 2013** (applicable to internet contracting rather than email exchanges), it is assumed that communications over the internet take place once the recipients 'are able to access them'. This might suggest a useful way of treating emails sent during or outside normal office hours—the former being effective almost immediately whereas the latter only becoming effective the following morning (as hinted at in ***Thomas v BPE Solicitors***). On the other hand, what is meant by 'able to access'? Would this include remote access outside work hours?

Question 4

Sweatshirt Ltd, which manages a chain of sports fitness centres, places the following advertisement on its website, dated 5 January:

Pay for one year's standard membership at a Sweatshirt Fitness Centre, and swim 400 consecutive lengths in one of our pools by 10 January, and you will be rewarded with a free one-year membership for your spouse. Happy Swimming and Good Luck!

p. 22 ↵ Owing to bad publicity, resulting from some of its new members suffering heart attacks in its swimming pools, on the morning of 8 January Sweatshirt Ltd placed a prominent notice on its website withdrawing the promotional membership campaign contained on its website.

Discuss the legal position of the parties in the following separate situations:

a **Andrew paid for a year's membership at his local Sweatshirt Fitness Centre on 7 January. The following day he logged on to the Sweatshirt website and noticed the revocation. Nevertheless, he attempted to swim the 400 lengths that afternoon but found that he did not have the stamina to complete more than 25 lengths.**

b **Bernice applied for a year's membership on the morning of 10 January. While arranging for payment of her membership fee she was informed of Sweatshirt Ltd's promotion. As Bernice was a long-distance swimmer, she immediately rushed into the changing rooms to prepare for the challenge. However, before entering the pool, she was told of Sweatshirt Ltd's revocation by the pool attendant.**

Caution!

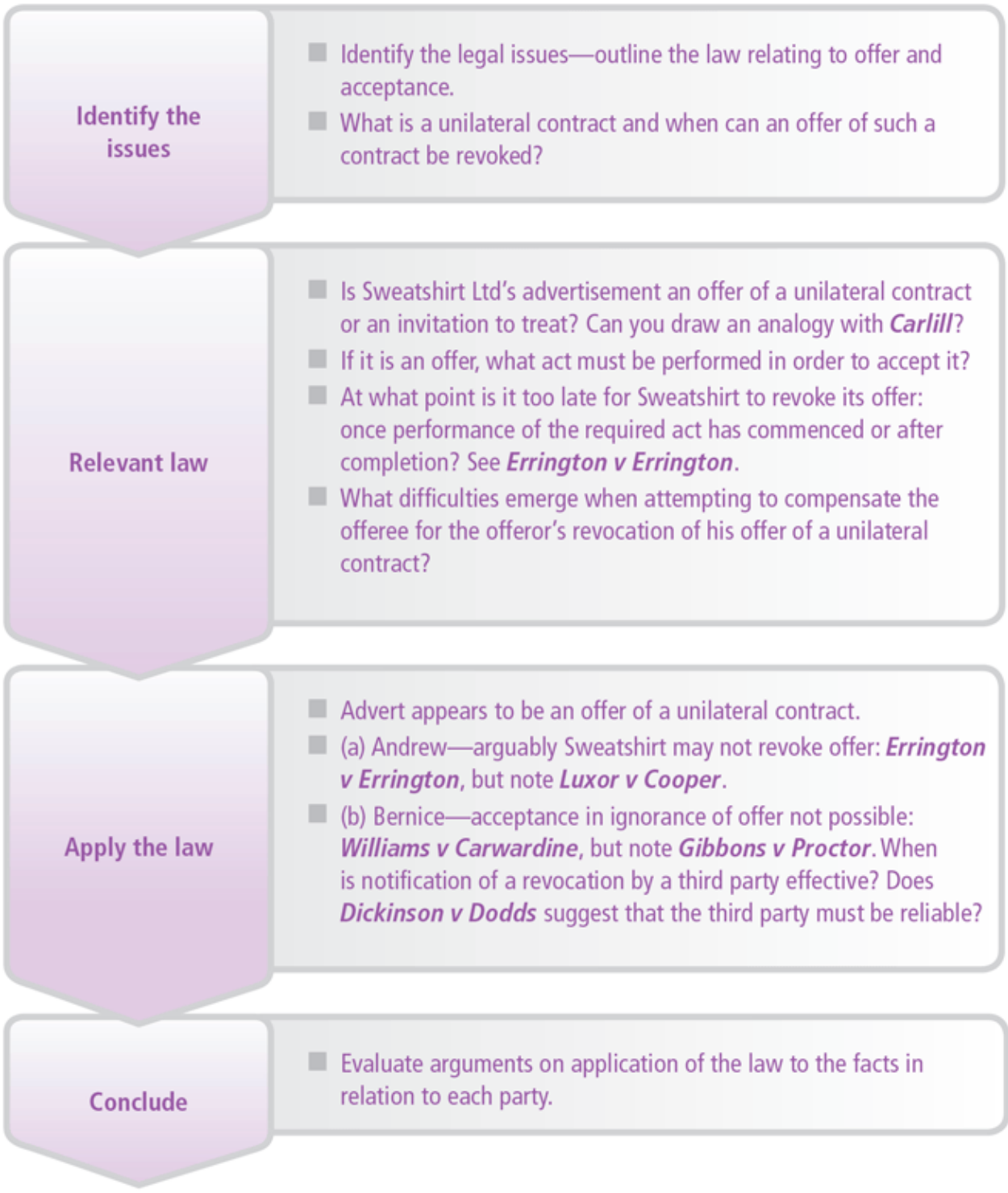
■ The nature of a unilateral contract and the associated difficulties should be explained in your answer.

■ Offers of a unilateral contract often require acceptance to be performed over a period of time, for example, ***Carlill v Carbolic Smoke Ball Co Ltd***. This gives rise to the question of when does acceptance take place? An offeree may argue that commencement of the stipulated act is an acceptance, whereas the offeror's response will inevitably be that he/she bargained for nothing short of a completed performance.

■ A related difficulty is whether such an offer can be revoked legitimately once the offeree has commenced performance. An understanding of the competing interests and how the law seeks to protect them is necessary to successfully answer a question on unilateral contracts.

p. 23

Diagram answer plan



Suggested answer

This question focuses on the difficulties associated with the offer of a unilateral contract.

The first issue to consider is whether the advertisement of Sweatshirt Ltd (S) was an offer or an invitation to treat (ITT).[1] An ITT is essentially an opening gambit in negotiations and is therefore incapable of acceptance, whereas an offer is an unequivocal proposition made with an intention to be legally bound.[2] The advertisement contains a definite proposal and, arguably, as it emanates from a business the court may be more inclined to construe it as an offer ↵ (see ***Carlill v Carbolic Smoke Ball Co. Ltd* [1893] 1 QB 256**). The language used by S in the advert is consistent with an intention to be bound by the specific proposal made. It would be difficult for S to argue that the advertisement's tone suggested a lack of relevant intent as it incorporates both an immediate benefit and detriment: earn free membership for a spouse in return for paying for your own membership and enduring the physical challenge of swimming 400 lengths.[3] Consequently, the advertisement appears to represent an offer of a unilateral contract which will be converted into a binding contract once an appropriate act of acceptance has occurred. Note that if the advertisement was held to be an ITT,[4] none of the parties would have any realistic prospect of claiming the reward as their swimming feats would simply be viewed, at most, as the making of an offer, with an unfettered discretion as to whether to allocate free membership to any of the parties' spouses.

p. 24

[1] This sentence identifies the first issue raised by the question.

[2] An explanation is given of the nature of an invitation to treat and an offer.

[3] Note the immediate application of the law to the facts of the problem.

[4] An explanation is given of the consequences should the advert be viewed as an invitation to treat.

Andrew (A)

Assuming that the original advert was an offer, when does A's acceptance occur? The presumption in unilateral contracts is that only the completion of the stipulated act can amount to acceptance as, in the majority of cases, this is what the offeror bargained for. In our facts, Sweatshirt (S) does not

therefore appear to be under any liability to A as he failed to complete the 400 lengths, nor was there any suggestion that S would compensate for any failed attempts. Support for this conclusion can be found in ***Luxor (Eastbourne) Ltd v Cooper*** **[1941] AC 108** where the client (the offeror) agreed to pay the estate agent (the offeree) £10,000 if he could find a purchaser for two cinemas at a minimum price of £185,000.[5] The estate agent introduced a prospective purchaser who agreed, subject to contract, to pay that price. The client ignored this offer and, instead, sold the cinemas to a third party. The House of Lords held that any acceptance would necessarily entail a completed sale to the purchaser introduced by the estate agent and, accordingly, the client was free to revoke his offer at any time before that acceptance had been completed.

[5] Note that usually it is sufficient to state a rule and the authority for a rule, in this answer the facts of ***Luxor v Cooper*** are used to argue a particular point.

Moreover, the House refused to imply a term that the client would not revoke his offer in these circumstances as this was not necessary to give business efficacy to both parties' intentions. This appears to undermine any argument by A that S was prevented from withdrawing its offer (thus preventing A from completing, if there is time, by 10 January as originally stated).

However, A possesses a very strong counter-argument. In ***Errington v Errington and Woods*** **[1952] 1 KB 290**[6] a father promised his son and daughter-in-law that, if they paid the existing and future mortgage instalments on his house as they fell due, the house would belong to them. Various *obiter* statements in the Court of Appeal suggested that ↵ the father's promise was irrevocable once the couple had 'entered on performance of the act' but that this limitation disappeared if they left it 'incomplete and unperformed'. Indeed, whereas in ***Luxor*** the extravagant commission (£10,000 on a sale price of £185,000) demonstrated the estate agent's acknowledgement of both the risk of not finding a purchaser and the client's right to revoke before completion, in ***Errington*** the couple would have never assumed an equivalent *business* risk while diligently paying off the instalments[7] (see also ***Ward v Byham*** **[1956] 1 WLR 496** where a refusal to countenance any revocation by the father could be similarly justified). Moreover, the couple conferred a *tangible benefit* on the father with every payment made, thereby making any attempted revocation more inequitable as time progressed. Might it be argued that the payment of membership fees provides an equally important benefit to S?

p. 25

[6] This is a key case in understanding the law concerning revocation of an offer of a unilateral contract once performance of an act has commenced.

[7] This section demonstrates an appreciation of the interrelationship of the cases of ***Luxor v Cooper*** and ***Errington v Errington***.

In conclusion,[8] the court will need to balance three competing interests in reaching a satisfactory conclusion: *reliance* of the offeree (payment of fees in order to secure the advertised benefit), *benefit* conferred on the offeror (receipt of fees), and the inherent *risk* being accepted by the offeree (who may be unable to complete the stipulated challenge). The current weight of authority (eg ***Daulia Ltd v Four Millbank Nominees Ltd* [1978] 1 Ch 231**) is that once the offeree has 'embarked upon a course of performance' that is intended to lead to completion of the required act, the offeror will be prevented from revoking the offer (see also ***United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104**). On the facts, it must surely be the case that A did embark upon the required course of performance once he had signed a contract to pay membership fees for one year. Consequently, the subsequent revocation will not have an immediate effect as A will have until the end of 10 January to improve his swimming performance and comply fully with the terms of the offer!

[8] The conclusion states the interests that have to be considered in determining whether an offer of a unilateral contract may be withdrawn and potential consequences.

Bernice (B)

B's position is different from that of A. In S's favour is the uncertainty of whether B entered a contract of membership before being told of S's advertisement.[9] The general rule is that one cannot accept an offer without knowledge of it (eg ***Williams v Carwardine* (1833) 5 C & P 566**). On our facts, B was informed of the promotion 'while arranging for payment of her membership fee'. If knowledge of the promotion was acquired *after* the offer and acceptance had taken place, S would rely upon ***Williams*** to argue that B had no right to claim free membership for her spouse, even if she had actually completed the required number of lengths. B's only defence would be to cite ***Gibbons v Proctor* (1891) 64 LT 594** which suggests that, where an offer of ↵ reward is advertised, a person can claim the reward provided he/she was informed of this offer *before completion* of the required act. As B was notified of the reward *before* embarking upon her marathon swim, she may yet succeed on this point. At present the law is very unclear on these matters (especially as ***Gibbons*** has been doubted) so a definitive answer is not possible.[10]

p. 26

[9] This is the next legal issue that needs to be considered, ie is it possible to accept in ignorance of an offer?

[10] This sentence sums up the legal position noting that the authorities appear inconsistent. Commentary on authority is a good way to get extra marks.

If the decision in ***Gibbons*** prevails, and B is entitled to accept S's offer, she will presumably adopt the same argument as Andrew with regard to the timing of S's revocation; namely, that she had already embarked upon performance before being notified of any attempted revocation. However, B can strengthen this argument by pointing to the manner in which S's revocation was communicated to her. It was held in ***Shuey v US*, 92 US 73 (1875)** (a US decision and therefore of only persuasive authority) that an offer of reward was revocable by giving the revocation 'the same notoriety' as that given to the offer, even if the offeree A had no actual knowledge of it. This is justifiable where the offeror does not know the potential offerees (in ***Shuey*** the offer was made to the public) but S will have a record of all of its new members (names, addresses, and telephone numbers presumably). Indeed, B was actually present in the fitness centre when signing up for membership. In such circumstances the court may decide that S should have communicated directly, and individually, with all of its new members, including B. If B failed on this point her case would be weakened, since it was recognized in ***Dickinson v Dodds*** **(1876) 2 Ch D 463** that a reasonable third party may communicate the offeror's revocation even though not authorized by the offeror to perform this task. One must assume that knowledge of revocation acquired from a paid employee of S would be covered by the same principle.

Finally, there is the problem of the measure of damages. If B is entitled to accept S's offer, and S's revocation is ruled ineffective, how should B be compensated now that she has been discouraged from swimming the required lengths within the stipulated time? The contract for the free one-year membership does not exist until B has completed all of the stipulated acts, so S cannot be in breach of that contract. In the light of B's manifest ability to comply with the swimming challenge, the court may consider S to be in breach of a *collateral* contract not to revoke. Alternatively, perhaps a compromise can be reached which allows S to revoke its offer subject to an obligation to reimburse B to the extent of her justifiable reliance on the offer. While not a perfect solution, in that it leaves open the question of how reliance is to be quantified, it would enable a court to *apportion* loss rather than take the all-or-nothing approach evidenced in ***Errington*** and ***Luxor,*** respectively (see also certain *obiter* comments regarding a *quantum meruit* raised in ***Morrison SS Co. v Crown*** **(1924) 20 Ll LR 283**).

Looking for extra marks?

■ Questions concerning unilateral contracts require an appreciation of what constitutes acceptance and when revocation of an offer may take place. The general rule is that revocation of an offer is permissible at any time prior to its acceptance (completion of the stipulated act), but strict adherence

to this rule might appear inequitable in unilateral contracts once the offeree has begun to perform the stipulated act (and potentially incurred expenditure on the faith of the offer remaining open). Should the offeree be afforded some measure of protection against a premature revocation?

■ If the relevant cases are unclear or the rules in cases need to be reconciled or you are relying on an *obiter dictum* rather than a *ratio decidendi*, it is important to make a comment. This shows an appreciation of the rules of judicial precedent in presenting an argument.

Question 5

It is a basic axiom of the Law of England and Wales that, although the courts cannot make a contract for the parties, they will strive to uphold a bargain wherever possible.

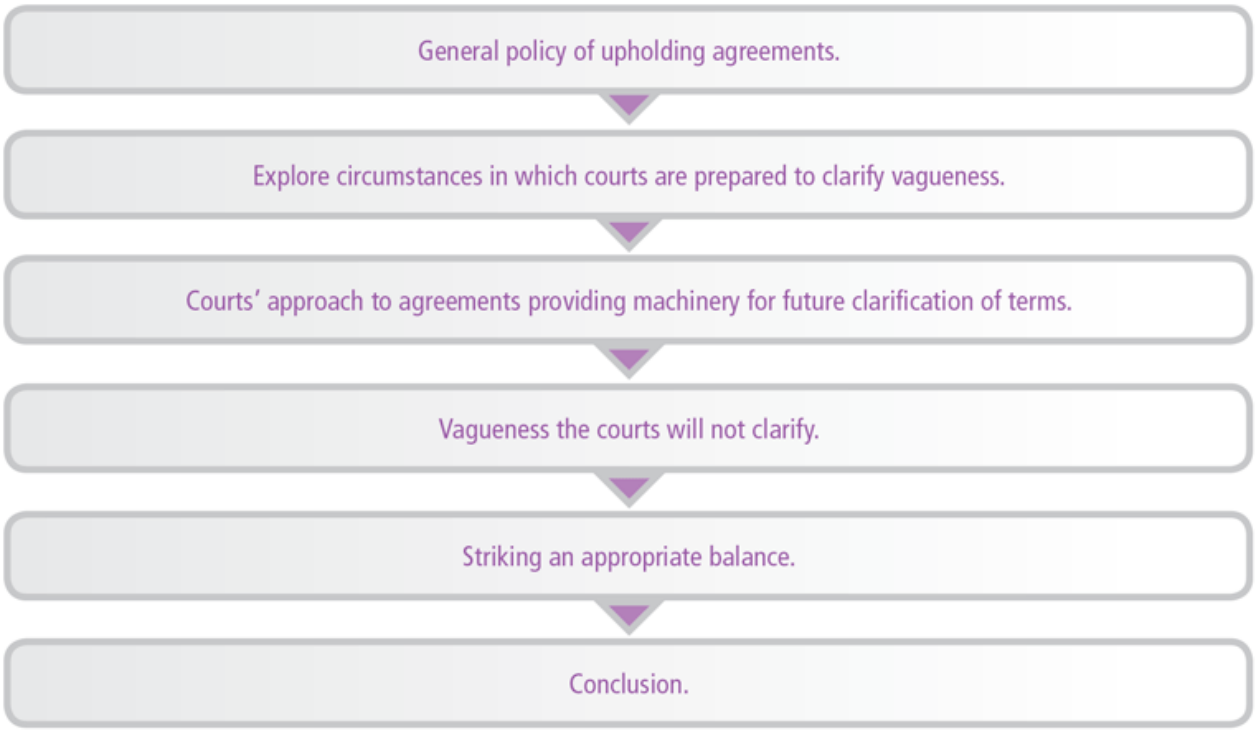
Discuss in relation to the principles of certainty of terms.

Caution!

■ When answering an essay question, avoid writing all you know about the topic in an indiscriminate fashion. Tailor your knowledge to the specific question being posed. To this end it is important to take the essay title apart and identify its constituent elements.

■ With essay questions, careful attention must be paid to planning your answer. Unlike problem questions, which will usually have an inherent structure, answers to essay questions may be organized in a variety of ways.

Diagram answer plan



p. 28

Suggested answer

In general terms, it is the parties who make the contract and fix its boundaries, while the courts enforce the bargain thus created. It follows that if the agreement is too uncertain or imprecise the courts will be unable to enforce it.[1] For example, in ***Scammell (G) and Nephew Ltd v Ouston*** **[1941] AC 251** there was an agreement to acquire goods 'on hire-purchase terms' but the House of Lords held that this could not be a binding contract as it was 'so vaguely expressed that it cannot, standing by itself, be given a definite meaning' (as there are many different types of hire-purchase terms!).

[1] This paragraph outlines the issue of certainty of terms and the effect of a lack of certainty.

Nevertheless, the courts have traditionally sought to uphold bargains where possible and, as Lord Wright emphasized in ***Hillas & Co. Ltd v Arcos Ltd*** **(1932) 147 LT 503**, have not been 'too astute or subtle in finding defects', even where the commercial agreement has been crudely drafted by businessmen.[2] In ***Hillas***, the plaintiffs agreed to buy from the defendants a quantity of Russian softwood timber of a particular quality, the agreement containing an option for the plaintiffs to buy

more timber at a later date but with no particulars of size or quality. When the plaintiffs sought to exercise the option, the defendants argued that the clause was vague and indeterminate. The House of Lords held that, having regard to previous dealings, there was sufficient intention to be bound and the agreement could be rendered certain by referring to the parties' previous dealings and the normal practice in the timber trade. ***Hillas*** was considered in ***Baird Textile Holdings Limited v Marks & Spencer Plc* [2001] EWCA Civ 274** where the Court of Appeal, focusing on Lord Thankerton's speech in ***Hillas***, made a distinction 'between cases where the contract provides for an objective standard which the court applies by ascertaining what is reasonable and those where, there being no such standard, the test of reasonableness is [illegitimately] being used to make an agreement for the parties which they have not made for themselves'.

[2] The main point of the essay is outlined here.

p. 29 ↵ ***Hillas*** is illustrative of the courts' willingness to sometimes imply terms that make commercial sense of the agreement, but an alternative method of resolving uncertainty is to delete a meaningless, subsidiary provision, leaving the remainder of the contract complete and enforceable.[3] In ***Nicolene Ltd v Simmonds* [1953] 1 QB 543**,[4] the words 'we are in agreement that the usual conditions of acceptance apply' were held to be meaningless. As Denning LJ commented, if the opposite conclusion had been reached in ***Nicolene,*** defaulters would be 'scanning their contracts to find some meaningless clause on which to ride free'. However, the ***Nicolene*** principle cannot function if the meaningless clause is intended to govern an undertaking *central* to the agreement, for such uncertainty would potentially vitiate the whole agreement.

[3] The point concerning defects in an agreement is explained with reference to cases by way of example.

[4] The discussion of this case follows the PEA formula.

The courts also look favourably on agreements which, although leaving some issue to be resolved in the future, provide the machinery or criteria for its resolution.[5] Thus, an agreement will normally be upheld if it provides for the resolution of outstanding issues by arbitration (***Brown v Gould* [1972] Ch 53**). This approach was extended in ***Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444** where a lease gave the tenant an option to purchase the premises 'at such price as may be agreed upon by two valuers' who were to be appointed by each party. The landlord refused to appoint a valuer, but the House of Lords held that the option did not fail for uncertainty. *The substance of the undertaking was an*

agreement to sell at a reasonable price, to be determined by valuers, and the extra stipulation that each party should nominate a valuer was 'subsidiary and inessential'. But while a court may choose to follow this analysis and substitute its own procedures for resolving uncertainty where the original machinery breaks down, the Court of Appeal decisions in ***Gillatt v Sky Television Ltd*** **[2000] 2 BCLC 103** and ***Infiniteland Ltd v Artisan Contracting Ltd*** **[2005] EWCA Civ 758, [2005] All ER (D) 236** suggest that such discretion is severely circumscribed as it is not always easy to separate the *process* by which an agreed price is to be reached (eg ***Sudbrook***), from the essential *criteria* for determining that price (which a court will not substitute in accordance with ***May and Butcher v R*** **[1934] 2 KB 17**).

[5] A new point is raised by this paragraph and then explained and analysed.

On the other hand, the courts have not always been deterred from clarifying uncertainty where the vagueness in question relates to a fundamental obligation which the parties have deliberately left open-ended.[6] This may occur, for example, where both parties are reluctant to finalize every aspect of a long-term agreement, preferring to leave some flexibility around questions, such as the price

p. 30 ↵ (which may, of course, be affected by changing market conditions) and the manner of payment. In such cases, the parties may agree to agree the outstanding aspects of the agreement at a later stage. In ***May and Butcher v R***, an agreement for the sale of tentage provided that the price should be agreed 'from time to time'. The House of Lords held that the agreement was incomplete as it was an agreement to agree in the future. If the agreement had been silent on these issues, the House said s. 8(2) of the Sale of Goods Act 1893 **(now** 1979*)* might have led to a reasonable price being payable, but the parties had shown that this was not their intention by providing for a further agreement. However, ***May and Butcher*** has been distinguished and, although it is difficult to generalize in this area, it seems that if the courts identify substantial agreement between the parties some points may be left for future resolution without vitiating the agreement. For example, in ***Foley v Classique Coaches Ltd*** **[1934] 2 KB 1**, the plaintiff owned a petrol station and adjoining land which he agreed to sell to the defendants on condition that they should agree to buy all the petrol for their coach business from him. The agreement regarding the petrol was executed and provided that it was to be supplied 'at a price to be agreed by the parties in writing and from time to time'. The land was conveyed and the petrol agreement was acted on for three years but the defendants then argued that it was incomplete in relation to the price of the petrol. The Court of Appeal held that the agreement was enforceable and that, consequently, the defendants must pay a reasonable price for the petrol. The most influential factors in the decision appeared to be that the contract had been acted upon for several years[7] and that the petrol agreement formed part of a linked bargain with the sale of the land, the defendants paying a price for the land which no doubt reflected the fact that they would buy their petrol from the plaintiffs. However, performance may not be sufficient to save an agreement where the evidence shows that the parties have failed to reach any agreement on particular essential terms, for example ***British Steel Corp. v Cleveland Bridge and Engineering Co. Ltd*** **[1984] 1 All ER 504**.

[6] These words raise the difficult issue of agreements to agree and are then followed by an explanation of case law relevant to the issue.

[7] An important factor is that of performance of the agreement, but performance within itself may not be enough to render an agreement enforceable.

Case law has also cast doubt upon the notion that the courts will strive to uphold the parties' bargain where possible.[8] In ***Walford v Miles* [1992] 2 AC 128** parties were negotiating over the sale of the defendant's business. An agreement was reached by which the plaintiff would provide the defendant with a letter of comfort from their bankers confirming that a loan would be granted to the plaintiff and, in return, the defendant agreed to terminate any negotiations with third parties and not to consider any alternative offers. ↵ The comfort letter was provided but the defendant withdrew from the negotiations and sold the business to a third party. The House of Lords held that the plaintiff's action must fail. The House of Lords said it was possible to have an enforceable lock-out contract (ie an agreement *not* to negotiate with third parties) provided the duration of the 'lock-out' was specified expressly (which was not the case here). Moreover, the House of Lords held that the parties could not be 'locked in' (as the plaintiff had also argued) to negotiate *positively* as this would amount to an uncertain and unenforceable contract to negotiate.

p. 31

[8] The answer then explores the limits on the enforceability of agreements. The key case of ***Walford v Miles*** is explored in some detail.

Walford arguably illustrates the laissez-faire principles of self-reliance and judicial non-interventionism.[9] It is suggested that such decisions ignore English law's basic tenet that agreements should be validated wherever possible and, in so doing, potentially encourage bad faith in commercial transactions. Consequently, the Court of Appeal decision in ***Petromec Inc. v Petroleo Brasiliero SA Petrobas (No. 3)* [2005] EWCA Civ 891** is to be welcomed. The facts involved a provision within an *existing* contract that required the parties to negotiate in *good faith* the costs of upgrading that contract (the possibility of upgrading was permitted and acknowledged within the contract). This provision was held to be enforceable. Longmore LJ was not put off by the difficulty of determining the result of 'good faith' negotiations (ie in calculating the costs of upgrading) as this would be a relatively easy task. Moreover, while withdrawing from negotiations in 'bad faith' (ie a potential breach of contract) would be difficult to ascertain, to ignore that possibility would unfairly undermine

the expressed and reasonable intentions of the parties. However, it is not necessarily the case that an agreement to agree contained in an existing agreement will be enforceable (see ***Morris v Swanton*** [2018] EWCA Civ 2763).

[9] The implications of ***Walford v Miles*** are addressed in this paragraph and the primacy of the intention of the parties considered.

In conclusion,[10] basic principles in the case law support the position taken by the question. The courts have sought to uphold 'uncertain' bargains through reference to the previous dealings of the parties, by disregarding meaningless clauses and, sometimes, even by substituting its own machinery to resolve uncertainty. Moreover, the courts have been reluctant to not enforce an agreement where there has been part performance of that agreement. However, there are limits and the courts have often been unwilling to enforce agreements where further negotiation or agreement is required. Nevertheless, the case law developments question whether such a position is absolute. So, while the traditional notion that courts seek to uphold rather than destroy contracts has, to some extent, come under attack in recent times, the sentiments expressed in the original question still retain validity in the law today.

[10] A conclusion is reached; seeking to link the discussion in the body of the answer to the requirements of the question.

p. 32

Looking for extra marks?

■ This question calls for an understanding of certainty of terms. Students must be able to make an accurate analysis of the lengths to which the courts will go in enforcing contracts. The decisions tend to make technical distinctions, but students should be aware of the important substantive issues raised in ***Walford v Miles*** **[1992] 2 AC 128**.

■ The tension in the law between the courts refusing to write contracts for parties but also not wanting to be perceived as the destroyer of bargains should inform your answer. The limits that the courts will go to in order to uphold a bargain should be clearly drawn and any underlying principles revealed.

Taking things further

■ Brown, I. and Chandler, A., 'Intent and Contract Formation' [1991] Conv 149.

Explains the decision and implications of ***Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*** **[1990] 1 WLR 1195**.

■ Hill, S., 'Flogging a Dead Horse—The Postal Acceptance Rule and Email' (2001) 17(2) JCL 151.

Considers whether the postal rule of acceptance extends to communication of acceptance by email.

■ Macdonald, E., 'Dispatching the Dispatch Rule? The Postal Rule, E-Mail, Revocation and Implied Terms' (2013) 19(2) Web JCLI; http://webjcli.org/article/view/239 *<http://webjcli.org/article/view/239>*.

Considers the basis of the postal rule and its merits in the light of modern forms of communication; especially email.