Contents

1. Introduction..... 2
2. Contractual effect of the advertisement 2
3. Offer by telephone by Rob..... 3
4. Rob's reply by letter 3
5. Sale to Sunita 5
6. Bibliography 5

1. Introduction

In dealing with problems of offer and acceptance, the Courts have taken a strict approach, stating that there must be clear offer and acceptance in order to create a binding contract. As such, offers must be clear on their terms and capable of acceptance and can only be accepted on terms that mirror the offer, as established in the case of **Gibson v Manchester City Council (1979)** [1]. There are dicta in certain cases, notably in the judgments of Lord Denning MR, which have attempted to mitigate this harsh approach, in the case of **Butler Machine Tools Co Ltd v Ex-Cell-o Corporation (England) Ltd (1979)**[2]. However, as Lord Denning's approach in the Court of Appeal was firmly rejected by the House of Lords in **Gibson v Manchester City Council (1979)**[3], it is submitted that these dicta do not represent the current law.

However, it is necessary to consider each communication that took place between the parties in this case, to see if the formalities of offer and acceptance have been fulfilled and if so, with whom the contracts exist with.

2. Contractual effect of the advertisement

Usually in contract law, advertisements are not considered to be offers, but are invitations to treat **Partridge v Crittenden (1968)** [4]. An invitation to treat is an invitation to commence negotiations. It is known as an invitation to mark an offer. Offers must consist of a specific promise to be bound providing certain terms are accepted. However, an advertisement is normally considered mere attempts to induce offers and cannot be considered offers themselves. The policy behind this distinction is clear to see, as construing advertisements as offers would bind advertisers potentially into legal contracts with anyone

[1] *Gibson v Manchester City Council* (1979) 1 All ER 972
[2] *Butler Machine Tools Co Ltd v Ex -Cell-o Corporation (England) Ltd* (1979) 1 All ER 965
[3] Gibson v Manchester City Council (1979)
[4] *Partridge v Crittenden* (1968) 2 All ER 421

who accepted the offer, i.e. **Grainger & Son v Gough (1896)**[5] . In effect, adverts would be offers to the entire world, as established in the case of **Carlii v The Carbolic Smokeball Co. Ltd (1893)**[6], which would lead to potentially unlimited contractual liability. It is submitted in the age of the Internet, such an interpretation is even more important.

It is submitted that there is nothing in this advert to suggest that there is anything in this advert, to rebut the normal presumption that this is an invitation to treat. However, this is clearly that there was only one car for sale; there is nothing in the advert to indicate that Rob intended to be bound by the first offer he received.

3. Offer by telephone by Rob

As such, Tom offered to buy the car for £4,500, an offer that was rejected by Rob. However, he made a specific offer in reply that was capable of acceptance, namely that he would accept £5,000 from Tom and that Tom should respond by Wednesday evening. This establishes that it was clearly capable of acceptance, being clear on its terms and also containing a specific time at which the offer will lapse.

4. Rob's reply by letter

Rob responded by post. According to the traditional postal rule, posted acceptances are binding from the moment that they are posted. The postal rule is reflected in the case of **Adams v Lindsell**[7], where acceptance is deemed to have been effective at the instant, when Tom dropped the acceptance letter into the post box, provided it is properly addressed and adequately stamped. If the offeror takes the contractual risk of the letter being lost in the post, as stated in the case of **Household Fire Insurance Co v Grant (1879)**[8]. However, this depends upon the use of the postal service being reasonable, which was established by the case of **Holwell Securities Ltd v Hughes (1974)** [9]. It is submitted that in this case, the use of the post is not reasonable, as Rob has always previously dealt with Tom by telephone. The contractual risk of the letter not arriving must therefore be deemed to fall on Tom, who therefore cannot rely upon the postal rule to create a binding contract.

[5] Grainger & Son v Gough (1896) AC 325 per Lord Herschell at 334
[6] Carlii v The Carbolic Smokeball Co. Ltd (1893)
[7] Adams v Lindsell
[8] Household Fire Insurance Co v Grant (1879) 4 Ex D 216
[9] Holwell Securities Ltd v Hughes (1974) 1 All ER 161

Additionally, even if the letter had arrived, there is also some doubt whether the terms of the letter can constitute an acceptance as the acceptance must mirror the offer as was stressed by the House of Lords in **Gibson v Manchester City Council (1979)**[10]. However, Tom was asking for payment by instalments. As such, this letter is potentially a counter-offer, capable of acceptance but not sufficient to create a binding contract. The normal status of counter-offers is that they extinguish the original offer, so the original offer cannot be accepted i.e. **Hyde v Wrench (1840)**[11]. However, the document must be construed carefully, as intermediate communications have, on occasion, been construed as mere enquiries and not counter offers, as shown in the case of **Stevenson v McLean (1880)** [12]. However, the Courts have said that it must be made clear that the offer would be accepted even if the amended payment terms were refused, as established in this case, **G Percy Trentham Ltd v Archital Luxfer Ltd (1993)** [13]. As Tom, did not hear anything from Rob, when he sent the letter. Tom stated that if he heard nothing from Rob, he assumed that he had a deal with Rob. . Can the silence amount to an offer, which it cannot, as silence does not equal acceptance. Only if there is an agreement between both parties, this was established in the case of **Felthouse v Bindley (1862)[14],** were the offeror cannot assume acceptance if there is silence as it is not consented. However, if the silence is accepted, as shown in the case of **Empirnall Holdings Pty Ltd v Machon Paull partners Pty Ltd (1988)[15]**. The court held that they had a duty to communicate rejection and as they had not, the court implied a contract.

On the facts that are presented, it is submitted that the Courts may have some sympathy with the argument that this is a mere enquiry and not a counter-offer. However, the letter stated that Tom wanted to buy the car, he was asking for clarification as to payment terms. Parallels can be drawn to the facts in issue in **Stevenson v McLean (1880)[16]**, where Lush J stated:

> *The form of the telegram is one of enquiry. It is not "I offer forty for delivery over two months" which would have likened the case to Hyde v Wrench. Here there is no counter proposal ... There is nothing specific by way of offer or rejection but a mere enquiry, which should have been answered.*[12]

[10] Gibson v Manchester City Council (1979)
[11] Hyde v Wrench (1840) 49 ER 132
[12] Stevenson v McLean (1880) 5 QBD 346
[13] G Percy Trentham Ltd v Archital Luxfer Ltd (1993) 1 Lloyd's Rep 25
[14] Felthouse v Bindley (1862)
[15] Empirnall Holdings Pty Ltd v Machon Paull partners Pty Ltd (1988)
[16] Stevenson v McLean (1880)

It is establishes that an enquiry over the terms of payment can equally be construed as an enquiry that should have been answered and not a counter-offer.

5. Sale to Sunita

As the letter either has no contractual effect as acceptance was not communicated, or was a mere enquiry and not a counter-offer, it is submitted that Rob was not free to sell the car to Sunita when she made her contract on Wednesday morning. Rob knew that he had given Tom until Wednesday evening to accept his earlier offer over the car and so could not sell the car to another until Thursday. However, if Tom still wishes to purchase the car for £5,000 and can pay the money immediately, it is submitted that he can force Rob to sell the car to him. As the car is a vintage car, damages for breach of contract may not be an adequate remedy and may not even be calculable, so a court may order specific performance of the contract. Naturally, Rob would also be in breach of the implied term in his contract with Sunita, namely that he had good title to the car he was selling, as stated in the **s12 of the Sale of Goods Act (1979)** [17].

He would also be liable for damages caused to her.

WORDS: 1284

6. <u>Bibliography</u>

Statutes

Sale of Goods Act 1979

Cases

Gibson v Manchester City Council (1979) 1 All ER 972
Butler Machine Tools Co Ltd v Ex-Cell-o Corporation (England) Ltd (1979) 1 All ER 965
Partridge v Crittenden (1968) 2 All ER 421
Grainger & Son v Gough (1896) AC 325 per Lord Herschell at 334
Household Fire Insurance Co v Grant (1879) 4 Ex D 216
Holwell Securities Ltd v Hughes (1974) 1 All ER 161
Hyde v Wrench (1840) 49 ER 132
Stevenson v McLean (1880) 5 QBD 346
G Percy Trentham Ltd v Archital Luxfer Ltd (1993) 1 Lloyd's Rep 25

Textbooks

Smith & Thomas: A Casebook on Contract, 2000 (Sweet & Maxwell)

[17] S12 Sale of Goods Act 1979

Cheshire, Fifoot & Furmston's: Law of Contract, 2001 (Butterworths)

G.H. Treitel: The Law of Contract (9th Ed), 2003 (Sweet & Maxwell)