

## Narrative

### Chronological order of events

1. Xavier wrote to YY stating, “I hear you have a Nokia 7600 mobile for sale. I would be interested in buying it for \$2,000 if it is in good condition.”
2. YY wrote back to Xavier, “I agree to sell the phone to you but there are still a few things which need doing to it before it is fully usable.” However, the letter was lost in the post.
3. Xavier wrote a week later stating, “As I have not heard from you I assume the price was not enough. Will you accept \$3,000?”
4. YY replied by e-mail to Xavier’s e-mail address in her office saying, “I accept the offer.” Unfortunately, Xavier was away and did not check her e-mails and three weeks later returned to check the e-mails and found the message from YY. Meanwhile, YY having heard nothing sold the phone to Tommy for \$2,500.

## Advise

### Synopsis

- To advise Xavier, needed to consider whether or not a contract had been formed with YY.
- In order to determine whether there are contract formed, it is necessary to conduct the traditional analysis of offer and acceptance.
- Was Xavier’s written statement, e.g. letter to YY to be an offer or an invitation to treat [Gibson v. Manchester City Council (1979) and Storer v. Manchester City Council (1974)] or a preliminary statement as to price [Clifton v. Palumbo (1944)] or request information [Harvey v. Facey (1893)]?
- Firstly, “invitation to treat”, where it is a statement of willingness to contract on certain terms if the other party offers to deal on those terms – an invitation to others asking them to make offers.
- Secondly, offer is defined as “an expression of willingness to contract on certain terms, made with the intention that a binding contract will exist once the offer is accepted.” [The Common Law of Obligations, 3<sup>rd</sup> Edition, Cooke & Oughton, Butterworths 2000, p.28]
- Thirdly, a request of information is not an offer and neither is a reply to such request unless the respondent so indicates.
- To be an offer (whether an original offer or a counter offer), a statement must

contain a promise or promises and not just a fact or information, as was indicated in *Harvey v. Facey* (1893). So the question becomes did Xavier intend his statement to be a promise to buy the mobile phone on condition that he expected in good condition as he thought?

- Admittedly, Xavier's statement/letter was objectively exhibited the request of information or a preliminary statement as to price. In other words, Xavier did not create a firm offer with the intention to commit legally binding. Nevertheless, Xavier introduced unclear or vague term/condition in his letter/statement that he was willing to buy the mobile phone priced at \$2,000 in such that the mobile was in good condition. In this contrast, it is questionable in whether Xavier would buy the mobile or not, as if it did not in good condition as Xavier expected. Consequently, it would be possible to encourage further negotiations between the parties in constitution of variation to the terms and price to Xavier's offer previously made.
- Therefore, Xavier's letter/statement will be "an invitation to treat" in regarding of "an offer to consider offers", because the offer must be unconditional or else it will be treated as "an invitation to treat", *Partridge v Crittenden* (1968).
- Unfortunately, YY regarded that Xavier's letter/statement was served as an offer to him of buying the mobile phone, because YY wrote a letter/statement in acceptance to sell the mobile.
- At this stage, there was no contract formed, until YY accepted an offer unconditionally.
- Nevertheless, YY (the offeree) put such query as ".....there are still a few things which need doing to it before it is fully usable" in his acceptance.
- Moreover, YY wrote letter/statement that did not amount probably made a counter-offer [*Hyde v. Wrench* (1840)] and the original offer given by Xavier was not destroyed.
- However, the query appears to be simply that – a query – which follows upon the acceptance of the offer, in virtue of the effect of this query is not introduce a new term such that YY's communication is not a counter-offer to revoke the original offer.
- The question then becomes, where YY's communication is effective or not to give rise the acceptance?
- In this situation, where it is contemplated that the post would be used, or its use was authorised or reasonable in the circumstances [*Household Fire Insurance v. Grant* (1879) and *Henthorn v. Fraser* (1892)], so a letter of acceptance is effective when posted.
- Under this circumstance, it appears reasonable for YY to accept by post

because Xavier originally communicated her offer by post.

- Now, it turns to question whether the postal rule applied or not, then accept occurred (that is at the time of posting – *Adams v. Lindsell*). Whether, the contract would be formed when the letter is posted.
- Before postal rule applied, it is necessary to understand its doctrine that the rule depends on whether the offeror has contemplated and expressly or impliedly approved the post as a mode of acceptance. If the offer was made verbally, then probably the Postal Rule did not apply.
- It is inferring from YY's written statement/letter. Even though, the query did not introduce the new term of counter-offer to revoke the original offer. In addition, the postal rule would be applied when YY's written statement/letter posted, even the post had never received by Xavier. However, such query would require further clarifications to negate the general rule of acceptance, whereas the acceptance must be "unqualified assent to the terms and to be bound". Because, YY's written statement/letter is a conditional assent subject to further clarifications that it is not enough to be the acceptance, so the contract is not formed at this stage.
- At this circumstance, Xavier gave formal and more definitive offer to YY and stated "Will you accept \$3,000". Obviously, he deliberately believed that his written statement/letter made at the past that did not amount to be an offer.
- It would be appear that Xavier's letter/statement was an offer because Xavier objectively exhibited an intention to commit himself legally, without further negotiation, to the terms he was proposing. [*Storer v. Manchester City Council* (1974)]
- At this stage, the contract would be formed and until YY accepted with Xavier's offer unconditionally.
- Unfortunately, YY did not chose the contemplated his acceptance by post as effective mean of communication to reply Xavier's offer in the same via written statement/letter. Instead of communication by post, YY used the simultaneous method of communication by e-mail, so YY's acceptance would be ineffective, unless it actually reached Xavier (offeror) [*Entores v. Miles Far East Corporation* (1955)].
- YY as offeree used e-mail to reply his acceptance, YY should require to take additional step to ensure Xavier actually received his message, i.e. by making phone call directly to Xavier. Because postal rule did not apply to this kind of simultaneous method by e-mail to communicate the offer.
- Under this circumstance, there is no communication and the exception did not apply (by postal rule), YY has not validly accepted Xavier's offer. On balance,

no contract arises in this situation and YY is at liberty to sell the mobile phone to Tommy.