**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘The “battle of the forms” when applied to businesses trading using their own standard term contracts may be resolved through the “first shot” or “last shot” approach. This is a wholly unsatisfactory situation and must be remedied through legislative action.’

Discuss the statement with reference to case law and judicial pronouncements.

**Indicative content outline answer:**

* The battle of the forms refers to the use of standard form contracts. When two contracting businesses, each with its own standard form contract, attempts to use it in a legally enforceable agreement, it may need to be settled by the courts, which is the operative contract.
* This is largely because in the course of negotiations an agreement is undertaken and action is taken on that agreement, but a full and unconditional acceptance may not been reached establishing a contract. It must be decided whether a legally enforceable contract has been established.
* The issue of the ‘battle of the forms’ was determined in the cases *Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] and in British Road Services v Arthur Crutchley Ltd [1968].
* In *British Road Services*, the claimants delivered a consignment of whisky to the defendant’s warehouse and the claimant’s delivery driver handed the defendants a note to be signed that contained, among other things, the claimant’s terms and conditions. This note was stamped by the defendants as ‘received under Arthur Crutchley Ltd.’s conditions’ and handed back to the driver. It had to be decided on which terms the contract was based, as the consignment of whisky was stolen. It was held that by stamping the delivery note, this established a counter-offer, that was impliedly accepted by the driver delivering the consignment. Therefore, the contract had been made on the defendant’s conditions. This was an example of the ‘last-shot’ approach.
* The party with the last contract provided which was not overtly disputed / rejected by the other will become the operative contract.
* There are practical reasons for adopting the ‘first / last shot’ approach to determining the contract to be used. Given that if no contract is found to be present between the two commercial parties, it would be necessary to identify the benefit gained by the party using (for example) a product supplied by the other party, to apportion this value, distribute it, and identify the depreciation of the product itself before returning this to the supplier.
* Commercial companies have to be able to begin taking action on an agreement which has yet to reach the stage where a full contractual agreement is present. As such, whilst it may appear somewhat harsh and unfair, the courts have to adopt a mechanism to identify the operative contract, and the ‘first / last-shot’ approach is that mechanism.
* It would be difficult to see how legislation could effectively resolve this problem without making it a requirement that companies conclude a contract before taking action, and as a matter of business efficacy, this may be more problematic and unfair than the present, common law, system.

2. At what point does a display in a shop window become an offer to sell rather than an invitation to treat? Compare and contrast the cases of Pharmaceutical Society of Great Britain v Boots Cash Chemists, Fisher v Bell, and Leftkowitz v Great Minneapolis Surplus Stores.

**Indicative content outline answer:**

* An offer is an agreement to a set of terms under which the offeror is willing to be bound. This offer is made to the offeree, who may be an individual, company, group of people or even the entire world (*Carlill v Carbolic Smoke Ball Co.*).
* Only the offeree can accept on the contract and he/she must accept in the method expressed (if stipulated) by the offeror.
* An invitation to treat is the term used when a party invites offers (essentially the positions of the parties are reversed whereby the party with the goods / services to trade invites offers which he/she is able to accept or decline). In this context, the word ‘treat’ means to negotiate, and hence it can be viewed as an invitation to negotiate for a good or service.
* Cases that have established the general rule of where an invitation to treat exists did so in light of traders selling goods; advertisements; auctions; and negotiations. It should be noted that for businesses, it may be wise to sell goods under ‘invitation to treat’ rather than ‘offers’ as this provides the company with flexibility in its sales strategy.
* *Pharmaceutical Society of Great Britain v Boots Cash Chemists* involved a self-service shop selling goods that had to be sold in the presence of a registered pharmacist. The Court of Appeal held that items in a shop with a price tag attached did not constitute an offer to sell, binding the shop keeper to sell to whoever entered the shop and selected an item. This is necessary to prevent a shop from displaying goods with an incorrect price tag on and then being compelled to proceed with the contract on the basis of an innocent mistake.
* *Fisher v Bell* involved the display of a flick-knife (an ejector-knife) with a price tag attached. It was held that such an item could not establish an offer to sell but would be held as an invitation to treat.
* *Leftkowitz v Great Minneapolis Surplus Stores* involved a company advertising a sale with specific details regarding the sale items, the restricted number of items, the time of the sale and details of when it would end. It was held to be an offer to sell the items rather than an invitation to treat.
* *Leftkowitz* demonstrated an alternative view to the general rule of advertisements being an invitation to treat, and demonstrates the importance of the correct drafting, and the legal significance, of advertising materials. It was the level of detail in the advertisement that elevated this situation to constitute an offer rather than an invitation to treat. The more definite the detail and description of what is for sale and under what terms the sale will take place, the more likely the court will hold the advertisement as an offer.

**PROBLEM QUESTIONS**

1. Jack is considering selling his prized collection of comedy books to Diane. On Monday Jack writes to Diane offering to sell the collection for £100 and he further provides that he will keep the offer open until Thursday at 5pm. On Tuesday, following a change of mind, Jack sends a fax to Diane revoking the offer; however, Diane’s fax machine is out of paper and she does not receive the message until Wednesday morning.

On Tuesday, Diane had already posted to Jack her acceptance of the offer. Jack never received the letter of acceptance and as such at 6pm on Thursday Jack sold the collection to Bill.

Advise the parties of any legal rights and liabilities.

**Indicative content outline answer:**

* A contract may be created through an exchange of documents via the post. Where offer and acceptance takes place through written communication rather than face-to-face negotiations, there exists the possibility that such communication may be lost, undelivered, or delayed through postal strikes or public holidays. The general rule established with the post (where it is a valid means of acceptance) is that acceptance is valid on posting.
* *Adams v Lindsell* is a significant case as it established that if the post is a valid means of acceptance (usually because the offer has been made through the post or the offeror asks for the post to be the means of acceptance) then acceptance is binding upon posting, not the receipt of the acceptance, insofar as the correct address and postage were included in the sent letter.
* The rationale for the decision was that if the offeror was not bound under a contract until the acceptance by the offeree had been received, then the offeree should not be bound until he received notification that the offeror had received his acceptance and assented to it. This system could not enable businesses to carry out their operations with any certainty and consequently the decision was based on business efficacy. Even if the letter was delayed, as long as this is not the fault of the offeree, there was still valid acceptance (*The Household Fire and Carriage Accident Insurance Company v Grant* [1879]).
* The postal rule is not effective, however, in situations where the express terms of the contract state that the acceptance must be received and in writing. This was demonstrated in *Holwell Securities v Hughes* where Lawton LJ in the Court of Appeal stated that the postal rule would not be used where to do so would ‘produce manifest inconvenience and absurdity.’
* Clearly there are situations where the postal rule will not be used – where it is expressly prohibited, where the offeror requests another form of acceptance and so on, but its value is in business efficacy. It would ultimately be difficult, even with the postal system today than it was in 1818, not to be able to rely on the postal rule. Especially for businesses, it provides certainty in the business relationship.

2. Mortimer wished to sell his antique gold watch. He therefore sent his chauffeur with a note to Randolf offering to sell him the watch for £50,000 and asking Randolf to give his reply to the chauffeur.

Being undecided, Randolf did not give his reply to the chauffeur and sent him back to Mortimer. One hour later Randolf posted a letter to Mortimer accepting his offer.

Has a valid contract come into existence?

**Indicative content outline answer:**

* The offeror has stipulated the method of acceptance of his offer. This must be provided to chauffeur who delivered the offer.
* Having established that an offer has been made, the offeree has the option to accept or decline. This creates the agreement that will begin the process of substantiating the essential features of a legally binding contract.
* Outward evidence of the offeree’s intention to accept an offer has to be demonstrated and communicated in order for effective acceptance.
* The question involves the offeree sending his acceptance through the post. The general rule is that acceptance takes place upon posting (*Adams v Lindsell*) however this is only where the post is a valid means of acceptance.
* In this situation, the method of acceptance has been deviated from. The general rule is that the method of acceptance may be deviated from, but only where this means is as quick or quicker than that which had been stipulated in the offer.
* Hence, if the letter arrives with the offeror before the chauffeur returns, then this will be effective acceptance and the contract will have been formed. If not, then there will have been no acceptance, and in essence Randolf’s letter will amount to an offer to buy which Mortimer is entitled to accept or decline.