

## Chapter 3

On Monday, Fitz wrote to Olivia and Cyrus as follows: 'I own Usain Bolt's running shoes, which he used in the 2012 Olympics. I am prepared to sell the shoes to the highest bidder. Please submit your best bid by 09:00 next Thursday.'

On Tuesday, Olivia sent Fitz a letter which said: 'I will pay £30,000 or £500 more than the highest fixed-price bid, subject to a maximum of £45,000.' This letter arrived the following day but was ignored by Fitz.

On Thursday at 08:55 (just before the deadline), Cyrus emailed Fitz: 'I can pay £40,000 by instalments over the next six months.' Fitz replied by email at 08:59: 'Let's keep it simple. I assume that you're bidding £40,000 for immediate payment.' Cyrus replied at 09:01: 'Agreed; I'll pay £40,000 in cash on delivery.'

On Thursday at 15:00, Fitz received a telephone call from Huck, who offered £50,000 for the shoes.

**Advise Fitz.**

In order to determine whether Fitz has entered into a legally binding contract with either Olivia, Cyrus, or Huck, the parties' exchange of messages has to be analysed by reference to an offer and acceptance framework.

### Fitz's letter to Olivia and Cyrus

When Fitz wrote to Olivia and Cyrus, it is submitted that he was merely making an invitation to treat and not extending an offer to them. It is necessary for offers to contain a promise, and Olivia or Cyrus may contend that Fitz's statement that he '[was] prepared to sell the shoes to the highest bidder' satisfies this requirement. Although a similar statement was held to not be an offer in *Gibson v Manchester City Council [1979]*, it is notable that the court came to that result because the local council there simply stated that it 'may be prepared to sell', whereas Fitz's language here is more unequivocal and thus arguably evinces the requisite willingness to be bound. Be that as it may, their argument is likely to fail because unlike the defendant council in *Gibson*, Fitz did not stipulate a purchase price at all – as was the case in *Harvey*, 'everything else [had been] left open'. This lack of precision is characteristic of a mere invitation to treat.

However, it is possible that the letter may constitute an offer pertaining to a separate collateral contract which binds Fitz to sell to the highest bidder. The validity of such collateral agreements was confirmed in *Barry v Davies [2000]*, albeit in the context of auction sales. But there is no reason why they cannot exist elsewhere and indeed, Willes J opined in *Spencer v Harding [1870]* that an express undertaking to award a sale to the highest tender is sufficient to qualify as an offer to enter into a contract that is to be differentiated from 'a mere proclamation...to receive offers for the purchase of [goods]'. Application of the objectivity test set out in *Destiny 1 Ltd v Lloyds TSB Bank plc [2011]* suggests that a reasonable person in Olivia or Cyrus's position would in all probability have believed that Fitz was promising to sell to the bona fide highest bidder, and so he should be bound. Borrowing the reasoning of Lord Diplock in *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd [1986]*, it may be said that Fitz's invitation gave rise to two unilateral contracts as between him and each of his addressees, under which he was obliged to enter into a synallagmatic contract of sale to 'whichever promisee had offered...the higher sum.'

**Comment [A1]:** This is of course orthodoxy. Are there any (worthwhile) exceptions?

**Comment [A2]:** Do these sentences link well together? The question is whether or not F makes an offer – and here it seems that he does (subject to the interpretation of 'prepared').

**Comment [A3]:** I think the use of *Harvela* is more convincing than *Barry v Davies* – this is not an auction.

### Olivia's reply

As has been discussed, Fitz's letter was not an offer for sale per se, so by natural extension Olivia's message cannot be an acceptance – the postal rule from *Adams v Lindsell [1818]* hence does not apply and no contract was formed on Tuesday. If, however, it is taken that Fitz made a binding collateral promise to sell to the highest bidder, Olivia may seek damages from him for breach of that agreement, but the success of her claim hinges on whether or not her bid to pay £500 more than the highest fixed price bid qualifies as an offer. Unfortunately for her, the House of Lords in *Harvela* rejected the validity of 'referential' bids that are dependent on other bids for quantification, citing the lack of certainty and frustration of business purpose that would ensue if they were deemed effective. It is of no help to Olivia that Lord Templeman in that case thought referential bids could very well be valid if they specified a maximum sum that the bidder was willing to pay just as she did; absent of any indication in Fitz's letter that he welcomed such bids in the first place, her 'offer' of £45,000 can only be invalid. She was thus not the highest bidder, and Fitz did not breach his collateral contractual obligation.

**Comment [A4]:** And if not whether any other sum would constitute an offer.

**Comment [A5]:** Why could Olivia's best bid not be interpreted to be £45,000?

Still, Olivia may assert that by outrightly ignoring her letter, Fitz breached a different promise to consider all bids – in *Blackpool and Fylde Aeroclub Ltd v Blackpool Borough Council [1990]*, the Court of Appeal held that an invitation to tender contained an implied promise to consider all tenders received by the deadline. Although it is conceded that Fitz, much like the defendant council, had 'solicited bids from selected parties all of them known to [him]' and specified an absolute deadline, several factors remain to distinguish that case from the instant one: a course of prior dealing between the claimant and council, the complex and time-consuming tendering procedure prescribed by the latter, and its status as a public body. Furthermore, Bingham LJ reiterated that contracts are not to be lightly implied, declaring that '[h]aving examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create legal relations and that the agreement was to the effect contended for.' It is submitted that that confidence will be lacking here and moreover, *Liverpool City Council v Irwin [1977]* is authority for the principle that a term shall not be implied solely because it would be reasonable to do so. Olivia is hence unlikely to win any action she brings against Fitz.

**Comment [A6]:** Compare, on one view, the decision of the PC in *Belize*, seemingly since departed from in *Marks & Spencer* – see Chapter 13.

**Comment [A7]:** But if she can establish an implied obligation to consider all properly submitted bids, what would her damages be? Has she suffered any loss here? See Chapter 28.

**Comment [A8]:** Assuming Fitz is happy to conduct dealings by email.

### Cyrus's first email

This is a valid offer because it specifies a fixed price and complied with the deadline set by Fitz. It is immaterial that Cyrus chose to reply via email instead of post like Fitz had – the former is not a disadvantageous means of communication when compared to the latter. However, the mention of an instalment plan essentially means that Cyrus was in fact offering to buy the shoes in exchange for six payments of approximately £6666.70.

### Fitz's response

It follows then, that when Fitz replied with a preference for Cyrus to pay a lump sum of £40,000 instead, he could not have been accepting the offer and was actually proposing a counter-offer. An acceptance is meant to be the final expression of assent to the exact terms of an offer, so they must coincide precisely with each other. This 'mirror-image' rule was laid down in *Hyde v Wrench [1840]*, where a counter-offer of £950 to buy a farm was held to have nullified the original offer of £1,000. Upon receipt, the later offer 'kills' the earlier one so that it was no longer open for acceptance, as Lord Denning put it in *Butler Machines v Ex-Cell-O Corporation [1979]*. Admittedly, Lush LJ in *Stevenson, Jacques & Co v McLean [1880]* warned that 'a mere inquiry...should [be] answered and

not treated as a rejection of the offer', but it is difficult to see how Fitz's message could be perceived as a simple request for more information, given the omission of any real question and his expressed inclination to 'keep it simple.' He purported to change the key terms of Cyrus's bid by adding something different, so it is reasonable to believe that he did not wish to accept it. On Cyrus's part, his initial offer was extinguished once he received this counter-offer from Fitz.

#### Cyrus's second email

Even though Cyrus sent off this message after the deadline, it makes no difference: the deadline only applies to the submission of offers and this response is an acceptance of Fitz's counter-offer. Unlike the post, instantaneous means of communication such as email are not exempt from the general rule that an acceptance needs to be communicated to the offeror before a contract is held to be validly made. Since the mirror-image rule is satisfied, it is likely that a contract was formed upon Fitz's receipt of Cyrus's second email.

#### Huck's telephone call

It is not clear whether Huck had notice of Fitz's deadline of 09:00 and so may not be bound by it, but even if it were a valid offer, it is nonetheless the case that the shoes are already sold to Cyrus, so it is advisable that Fitz go through with the agreed deal. If Fitz were to decide to renege on his agreement with Cyrus in order to contract with Huck anyway, Cyrus would be able to sue him for breach of contract to get damages or an order of specific performance to acquire the shoes as promised.

**Overall essay feedback: Very good indeed – clear and careful use of the facts of the problem with appropriate authorities in support. This answer may well be awarded a First in the exam.**

**Comment [A9]:** Your analysis of the first email is very good but I am not convinced by your analysis of the second email. Can it really be said that Cyrus has submitted his best bid by 09.00? Or are you saying that Fitz is bound to sell to Cyrus because there was no deadline set on his "new" offer? This may be important when considering what Fitz is contractually obliged to do.

**Comment [A10]:** Why would specific performance be granted here? Worth considering whether the goods are 'unique' and damages 'adequate' – see Chapter 28.

**Comment [A11]:** So for Cyrus the question is whether Fitz is free to accept the offer – which depends on whether he is bound to O or C.