Examiners’ report 2012

LA1040 Elements of the law of contract – Zone B

Introduction

This document sets out the Chief Examiner’s report for the examination paper in Elements of the Law of Contract – Zone B. It begins with general remarks pertaining to the examination scripts as a whole before considering each examination question.

Many candidates answered the questions well. At times, however, some candidates struggled in the attempt to answer the problem set. Three common difficulties were exhibited. One was a very fundamental one: an inability to recognise that certain areas of law were involved in resolving the hypothetical problem. A second difficulty occurred when candidates did not carefully consider the facts presented in a problem question; the resulting legal reasoning was often not directed at the issues presented by the facts. A third, somewhat less fundamental difficulty, was an inability to recognise the particular and specific issues involved within a broad area of law which the candidate had recognised as relevant. Candidates might, for example, identify that the area of law involved was one of contractual formation – was there an offer made to which an acceptance had been given? – without identifying that there were problems surrounding the communication of the offer by the offeror to the offeree. At times, this problem seemed to arise because candidates appeared to be covering legal issues which had formed examination questions set in previous years.

Some candidates, in other words, appeared to be reproducing answers to past examination questions. It must be emphasised that a purpose of the Examiners’ report is to give an indication of a method by which particular questions can be answered and some indication of the law necessary to answer these questions. The Examiner’s report is not intended to form a base of specific knowledge which is to be recited as the answers to future examination questions.

It is extremely important that candidates apply the law to the issues presented in a problem. Candidates should consider the principles developed within the relevant cases and the reasons behind these particular principles. These must then be applied to the problem to resolve it. For many candidates, however, their answer to a problem question resembled a ‘shopping list’ of cases dutifully recorded in the examination booklet. The reason for this is likely twofold: first, it is often hard for intermediate candidates to discern the relevant from the irrelevant and caution encourages a complete list of cases to ensure that none are omitted; secondly, it is tempting to produce a lengthy answer in the hope that the Examiner will be impressed by the breadth of knowledge acquired by the candidate. A successful answer identifies the issues and applies the relevant law to them. Such an answer displays not only knowledge, but also understanding of the subject being examined. The recitation and discussion of cases which are irrelevant to the question serve to highlight a candidate’s uncertainty as to which issues are involved in the question. In other instances, some answers appeared chaotic, as if the candidate had hurried into an issue without full consideration of the question as a whole. Candidates who prepare a careful plan of their answer before writing it in full will find that the time
spent in making such a plan is repaid by the clarity of the final answer. Among other things, it allows candidates to see the interaction of issues before they have committed themselves to one course or another. It should also prevent candidates from omitting points they had intended to discuss. Many candidates struggled to answer essay questions thoroughly. Their attempts were often, and unfortunately, confined to the recitation of everything they knew about a particular subject. In so doing, such candidates often presented a great deal of material; this presentation was marred by an apparent inability to discern the relevant from the irrelevant and a lack of analysis as to the underlying nature of the question. Candidates must consider whether or not they are addressing their answer to the question as asked. A part of this answer will, necessarily, involve legal analysis. In other instances, candidates were unable to answer the question asked in an essay question. They chose, instead, to adapt the question to a topic that they did know something about. Such an attempt is not, however, an answer to the question asked. It also leaves the Examiners with the impression that the candidates are unable to answer four questions from the examination paper.

Finally, many candidates suffered from an inability to budget their time. In these instances two or three good answers would be followed by a weak (and in some cases non-existent) effort to answer the balance of the paper.

It goes without saying that it is difficult to succeed where all of a candidate’s efforts are concentrated on two or three answers when the examination paper requires four questions to be answered. A number of candidates did not appear to have sufficient knowledge of contract law to attempt four questions. Lastly, the Examiners for Elements of the law of contract wish to emphasise the importance of writing the answers clearly. It is difficult, and sometimes impossible, to assess the illegible.

**Specific comments on questions**

**Question 1**

On June 5 Alvin wrote to Bob offering to sell 500 bags of sand at £20 per bag. On June 7 Bob posted a reply in which he accepted Alvin’s offer but added that if he did not hear to the contrary he would assume that the price included delivery to his (Bob’s) yard. The following morning, before Bob’s letter arrived at Alvin’s office, Alvin read a posting on the internet which stated that the price of sand was about to fall and he immediately sent an email to Bob stating ‘our price of £20 includes delivery’.

On receiving Alvin’s email at 11am on June 8, Bob posted a letter to Alvin confirming his acceptance of Alvin’s terms. By mid-day, however, Bob also saw the posting on the internet which indicated that sand prices were about to fall and, having considered the matter, sent an email to Alvin stating ‘Decline your offer of sand’.

The price of sand did fall to £15 per bag and Bob refuses to accept any sand from Alvin.

Advise Alvin.
General remarks
This was a popular question and most candidates attempted to answer it. On the whole, the attempts were good ones. The question requires a consideration of the law surrounding offer and acceptance with a particular focus on the formation of contracts at a distance using different methods of communication. Candidates were required to break the problem down into its constituent stages and analyse each in turn.

On the basis of the existing case law, Alvin’s initial letter is clearly an offer but is Bob’s reply of the 7th an acceptance or a counter-offer? On balance, the authorities indicate it is a counter-offer – the difficulty is that it requires an acceptance by silence. As a general rule (see, for example, Felthouse v Bindley (1862)) there can be no acceptance by silence. Alvin’s email is thus a new offer but it ‘crosses’ with B’s counter-offer. The crossing of offers, on the existing authorities, generally does not result in a contract. When Bob writes to accept the offer in A’s email, has this acceptance been communicated and thus a contract formed? The resolution of this question turns on an application of the postal acceptance rules (for example, Household Fire & Carriage Insurance v Grant (1879), Holwell Securities Ltd v Hughes (1973)) and the rules concerned with instantaneous communications. Finally, can B withdraw his purported acceptance by a later email? A resolution to this difficulty requires an examination of the few authorities dealing with electronic communications and their relationship to the earlier authorities concerned with communications at a distance. A good attempt to answer the question might also consider the applicability of Manchester Diocesan Council of Education v Commercial & General Investments (1969)) to the problem.

Poor answers to this question...
Most commonly presented a two-fold weakness in their attempts to answer the question. The first weakness was presented in those attempts which were not clear as to what specific issues were established on the facts given. In these cases, a general discussion of offer and acceptance were substituted for a suggested resolution of the problems.

The second weakness presented was in those attempts which avoided a consideration of the nature of an acceptance and, in particular, in relation to electronic methods of communication. English law has not settled on a definitive answer to these problems. It is for this reason that the Examiners have sought to raise the matter in this examination question because it allows them to assess the ability of candidates to explore the possibilities on the basis of analogous cases.

Question 2
‘The doctrine of consideration is highly unsatisfactory since it often seems that the courts simply “find” consideration where they believe that parties should be bound by their agreement. In addition, it is difficult to justify the different treatment given to promises to pay more (as occurred in Williams v Roffey Bros) and those to accept less (as occurred in Foakes v Beer).’

Discuss.

General remarks
This was also a popular question with candidates.
This broad essay question called for a discussion of the courts’ approach to the doctrine of consideration and some of the inconsistencies that can be found within the body of case law. It also asked candidates to discuss whether the expansion of consideration through the notion of practical benefit in cases where the promise is one to pay more (*Williams v Roffey Bros* (1989)) but not where the promise is one to accept less (for example, *Foakes v Beer* (1884), *Re Selectmove* (1993)) can be justified. A good attempt at answering the question would also include a discussion of how promissory estoppel might operate to enforce promises to accept less, but not those promises to pay more.

**Poor answers to this question…**

Consisted of a recitation of all the candidate remembered about consideration with little or no detailed application of this knowledge to answering the question set.

**Question 3**

Chloe is the managing director of a whisky distillery, Glencrows. In an effort to increase sales across Europe, she enters into negotiations with Derek, a European distributor of alcoholic beverages. She tells Derek that Glencrows’ new whisky, Burns, is of the finest quality yet and that this type of dry whisky always sells well across Europe. She also informs Derek that McDougal, the famous whisky connoisseur, works at Glencrows and, if Derek distributes the whisky, he will get to work with him. Derek has never heard of McDougal and is not interested in celebrity culture. However, he finds Chloe very attractive and wishes to get to know her better. He also wants to use this opportunity to expand his business into the whisky market, having formerly concentrated his business solely on wine and beer. He therefore contracts with Chloe to distribute Burns across central Europe.

Derek’s attempts to break into the European whisky market are disastrous. It is well known in the whisky industry that dry whisky is unpopular in Europe and will not sell. Derek realises, however, that McDougal is a hugely popular television celebrity in Europe and believes that his association with Glencrows will help Derek to sell the whisky. However, Derek now discovers that a week before he signed the contract with Chloe, McDougal gave Chloe notice to leave Glencrows and no longer works there. Derek is distraught. In addition, the failure of his whisky venture means that he has been unable to invest in a new brandy liqueur which is proving extremely profitable in Europe.

**Advise Derek.**

**General remarks**

This popular question called for a discussion of the law relating to misrepresentation. A number of issues are presented by the facts given. These issues were best dealt with in order.
The general issue presented by these facts called for a discussion on the law relating to misrepresentation. The first particular issue raised is whether Chloe’s statements are warranties or representations. On the facts given, and on the basis of the existing case law, it would seem that they are likely to be the latter.

**A good answer to this question…**
Might consider the possibility of whether or not the statements are both.

The next particular presented is whether statements are actionable as misrepresentations. In relation to the statements concerning the quality and selling potential of the whisky, candidates should discuss, in particular, whether they may be statements of fact or mere puff or opinion. An application of the criteria in the cases was necessary to resolve these points. Good attempts to answer the question explicitly applied the legal criteria to the facts given. Thus, in the determination of whether the statements were opinion, and the possibility that they might be actionable as such, the relative expertise of Chloe and Derek with regard to the whisky market is relevant. In relation to the statement concerning McDougal, the attempted answers needed to consider whether the statement induced Derek to enter into the contract. In addition, attempts to resolve this issue also needed to address the law, both statutory and common law, relating to continuing representations.

In the event that the requirements of an actionable misrepresentation are met, candidates then needed to consider the remedies available to Derek. A good attempt to answer the question would consider the nature of the various forms of actionable misrepresentation with a comparison of the different remedies available for each form.

A good attempt to answer the question would also focus on the desirability of s. 2(1) of the Misrepresentation Act 1967 and the factors that made this the most desirable form of remedy available to Derek. In this consideration the decision in *Royscott v Rogerson* (1991) should be applied to determine whether there could be a recovery for the loss of an opportunity (the inability to invest in brandy liqueur).

**Poor answers to the question…**
Either failed to identify the issues presented by the problem; or failed to isolate the particular issues presented. In these cases, the attempts to answer the question consisted of largely irrelevant material or material that was not applied to the resolution of the particular problem.

A frequent weakness encountered by candidates in attempting to answer this question was to ignore the application of the Misrepresentation Act 1967 and consider, instead, the tort of deceit.

**Question 4**

John and Kester Ltd contract for John to sell Kester 50 acres of land. The contract was entered into on February 13 and the land was to be conveyed to Kester on March 1. The purchase price was £2,000,000. On February 1 Parliament passed the (fictitious) Planning and Restriction of Residential Development Act. The Act came into force on February 10 and its effect was to prohibit the residential development of the 50 acres.
Neither party was aware of the legislation at the time of contracting. Kester paid to John a deposit of £200,000. Kester subsequently discovered the planning restrictions before March 1 and refused to complete the contract of sale. John sued for specific performance of the contract and Kester counter-claimed for the return of its deposit. The land, so restricted, is worth £100,000.

Advise John.

General remarks
Many candidates attempted to answer this question. Most of these attempts successfully identified that the problem presented issues concerned with contractual mistake. To resolve this problem, candidates needed to consider whether or not a sufficiently fundamental mistake had been made such that the formation of the contract was called into question. The particular mistake is a mistake as to the quality of the subject matter. The treatment of such a mistake in English law is unpredictable and this unpredictability gave candidates a wide scope to discuss the relevant cases (eg Bell v Lever Bros (1931), Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (2002)) and apply this law to the facts given.

A good answer to this question would...

Also consider the potential scope, if any, for the application of the decision in Solle v Butcher (1949) following Great Peace Shipping. Is it still possible for a contract to be voidable as a result of a mistake? A good attempt to answer the question would consider the distinction between a void and a voidable contract. In addition, is an action for specific performance available in these circumstances?

A very good attempt to answer this question might also consider whether the particular mistake is a mistake of law rather than fact and the difficulties presented by such a mistake (as are apparent in the decision in Brennan v Bolt Burdon (2004))

Poor answers to this question...

Most commonly produced a general, and largely irrelevant, discussion of contractual mistake. Many candidates also attempted to answer the question on the basis that the particular mistake concerned was the sale of a non-existent subject matter within the application of cases such as Couturier v Hastie (1856).

Question 5

‘English law provides that a stranger to a contract can neither be bound by the contract nor derive an enforceable benefit from the contract. Such restrictions are justifiable.’

Discuss.

General remarks
This was not a popular question with candidates.
A good answer to this question would…

Consider the doctrine of privity and the reasons for the doctrine. In particular, what are the justifications for privity?

The question also called for a consideration of the ways in which the doctrine can be avoided or circumvented, both at common law, or under the Contracts (Rights of Third Parties) Act 1999.

Good attempts to answer this question also considered those cases which have interpreted the 1999 Act.

Poor answers to this question…

Mostly took one of two forms. The first was to produce an answer which discussed largely irrelevant matters or focused in an unduly narrow fashion upon one common law device to circumvent privity. These attempts were weak because they did not address the question set by the Examiners.

Another form of weakness was to produce a précis of the 1999 Act; in some cases, candidates merely copied portions of the legislation from their statute book into their examination booklet. Again, these were weak attempts because they did not address the question set by the Examiners.

Question 6

Chardonnay regularly visits a London nightclub called Sensations. She always leaves her coat in the nightclub cloakroom and is given a ticket in exchange before entering the nightclub. On the back of the ticket is some small print which reads: “Sensations’ liability for loss or damage to personal property caused by any act or omission by an employee of Sensations is limited to £20.”

Chardonnay has recently bought a new leopard print coat worth £400. As usual, she leaves her coat with the cloakroom attendant. The nightclub is busier than usual and the cloakroom attendant forgets to give her a ticket this time. While Chardonnay is in the nightclub, the cloakroom attendant leaves the cloakroom open for ten minutes while he has his break. Hazel takes this opportunity to enter the cloakroom and steal Chardonnay’s coat.

Wayne also frequents Sensations on a regular basis since it is the perfect venue for entertaining his business clients. He has recently decided to become a member of the club since the membership allows him access to the VIP area at the back of the nightclub and free champagne. On joining, his membership package contained the following term and condition: “Sensations reserves the right to alter elements of its membership benefits without prior notice.”

Wayne brings one of his clients to Sensations. He tries to enter the VIP area but is denied access. The attendant explains that only celebrities are now able to use this area. When ordering some champagne, he is charged £300.

Advise Chardonnay and Wayne.
**General remarks**
A large number of candidates attempted this question. The question is concerned with the incorporation of terms into a contract, whether the terms are applicable to the circumstances that have arisen and the statutory regulation of the terms.

**A good answer to this question would...**

Begin by identifying the particular issues raised by the given facts and consider each in turn.

The first issue that arises is in relation to Chardonnay and whether or not the limitation clause on the back of the ticket is incorporated into the contract. To resolve this issue it was necessary to examine and apply the criteria established in those cases concerned with the incorporation of terms by notice. A good answer would also consider the possible applicability of the cases concerned with incorporation by way of previous dealing (because ‘Chardonnay regularly visits a London nightclub called Sensations’).

If the clause were found to be incorporated, it is then necessary to consider whether or not the clause would cover the breach of contract which occurs when the attendant leaves the cloakroom.

The next issue to be resolved is the effect of the legislation upon the clause. Candidates needed to consider and apply the statutory controls (the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999) which would regulate such a clause in a consumer contract. Both s.2(2) of the Unfair Contract Terms Act 1977 is relevant as well as Reg. 5 of the Unfair Terms in Consumer Contracts Regulations 1999. In relation to the former sub-section, candidates would need to consider, through an application of the relevant case law, whether or not Sensations can show that the clause is reasonable under s. 11 of the Unfair Contract Terms Act. In relation to the latter regulation, candidates would need to consider, through an application of the relevant case law, whether the clause was unfair. In relation to the consideration of unreasonableness under s. 2(2) of the Unfair Contract Terms Act 1977, candidates needed to discuss the case law that has interpreted s.11 (for example, *Mitchell Ltd v Finney Lock Seeds Ltd* (1983)). Candidates should display an awareness that although Schedule 2 only applies to ss.6 and 7 of the Unfair Contract Terms Act 1977, it has been applied as a general guide to reasonableness by the courts (for example, *Granville Oil v Davis Turner* (2003), *Overseas Medical Supplies Ltd v Orient Transport Ltd* (1999)).

Having resolved the issues arising in relation to the limitation clause which pertains to Chardonnay, candidates needed to consider Wayne’s situation. Once again, the first issue to be determined, by an application of the case law, is whether or not the particular term was incorporated into the contract. On the facts it seems that reasonable notice of the clause was given at the time the contract was formed (‘on joining’) but there is some ambiguity on this point and a good attempt to answer the question considered this point. If incorporation was effective, candidates then needed to consider whether the clause covered the circumstances that have arisen. The final issue to be considered was how, if at all, statutory controls applied to the term. A complication in this consideration is whether or not Wayne deals as a consumer in relation to his membership with Sensations. This is particularly relevant in relation to the Unfair Terms in Consumer Contracts Regulations 1999. If he does come within the particular definition of a consumer, then the application of Reg. 5 of the Unfair Terms in Consumer Contracts Regulations 1999 is relevant. In addition,
the application term 1(k) of Schedule 2 needed to be considered. A good attempt at the answer would identify that, in practice, terms which appear on this indicative list would raise a presumption of unfairness. A good attempt at the answer would also consider the possible application of s. 3(2) of the Unfair Contract Terms Act 1977 and whether or not the clause was reasonable within the meaning of the legislation and the relevant cases identified above.

The most common weakness presented in attempts to answer this question was to assume that the particular terms were incorporated into the contract without any attempt to explain on what basis this incorporation occurred. Another weakness exhibited in many attempts was to discuss the regulatory regimes created by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 without any examination or application of the cases which have interpreted the relevant provisions of these legislative schemes.

Question 7

Violet has just purchased an old farmhouse that she plans to convert into a stylish hotel. She enters into two contracts:

i) The first is with a local building company, BotchUp Ltd, to build a timber roof for £20,000. She specifies that the builders source the timber from the local forests. This is because she wants to minimise the environmental impact of the hotel's construction as well as to align the colouring of the roof with the hues of the natural landscape. BotchUp Ltd instead use their usual timber suppliers, importing the wood from Germany. Violet is furious. The hue of the timber is slightly different from that of the local timber, although it is difficult for anyone but an expert to perceive the difference. She is also angry because the use of foreign wood will harm the advertised image of the hotel as a building in peaceful harmony with its natural habitat. She insists that she needs to employ another company, Woodies, to tear down the roof and re-build another one, this time using local timber. Woodies have quoted £25,000 for the work.

ii) The second contract is with a local artist, Percy, whom Violet commissions to paint her portrait for the hotel entrance. Percy has a reputation for painting his subjects in a flattering light and Violet is delighted to secure his services. However, on the day of her first sitting Percy telephones Violet to say that he has been offered more profitable work and will not be coming. Violet is furious and demands that he attend the sitting.

Advise Violet.

General remarks
This question was infrequently attempted and, when it was, candidates struggled to identify the relevant issues. The question is concerned with breach of contract and the remedies available for breach.
A good answer to this question would...

Need to consider the nature of Violet’s contracts with each of BotchUp and Percy and whether or not either (or both) of these contracts had been breached. If they have been breached, it was important to consider what, if any, remedies might be available to Violet.

In relation to BotchUp, candidates needed to establish whether the use of timber from Germany, rather than local forests as specified by Violet, constitutes a breach of contract. If so, then the question of remedies arises. Candidates needed to discuss the problem as to the basis on which damages should be awarded. It seems clear from the facts that Violet wishes to claim damages to reflect cost of cure. However, cost of cure damages are likely to overcompensate. Are diminution of value damages likely to undercompensate Violet? Good attempts to answer this question considered whether Violet’s claim that foreign wood might damage the advertised image of the hotel as in harmony with the natural habitat and the difficulties involved in quantifying such a loss.

In relation to Percy, candidates needed to discuss the limitations in the award of specific performance. On balance, it seemed unlikely that Violet would be able to enforce performance of the contract through such an award. If, as is likely, the only remedy available would be damages, then candidates should discuss the difficulty in establishing the loss to Violet caused by Percy’s breach.

Question 8

Sarah agrees to give William private tuition for his Law of Contract examination to be held in eight months’ time. The fee is £2,000, of which William pays £300, with the balance to be paid on completion of the tuition. Sarah spends £400 in the preparation of some printed tuition notes. After two months Sarah goes to Spain for a week long holiday at Christmas. Whilst on holiday she is wrongly arrested, having been mistaken for a notorious criminal, and detained for two months. On her return to England she discovers that William has engaged another tutor and is demanding the return of his £300. Sarah sues for the balance of the £2,000.

Advise Sarah.

How would your answer differ, if at all, if Sarah had been convicted and detained for shoplifting?

General remarks
This question was infrequently attempted by candidates. The question is concerned with two principal problems. First, was Sarah’s detention in Spain for two months a matter which frustrated the contract between her and William?

Consider the common law cases concerned with establishing frustration and, in particular, those concerned with the provision of personal services.

Second, assuming the contract has been frustrated, how are the liabilities between these parties resolved through the application of the Law Reform (Frustrated Contracts) Act 1943?
The variant to the question invites candidates to consider that if Sarah were detained for shoplifting the detention would be her fault and thus result in a breach of her contract with William rather than a frustration of that contract.

**A good attempt to answer the question would...**

Compare the remedial differences which attend the different reasons for the detention.

**Poor answers to this question...**

Were exhibited in those answers which were concerned entirely with the question of breach without any apparent awareness of the possible application of frustration.