
Examiner's report 2009

266 0017 Commercial law Zone A

General remarks

General comments made by the Examiners in previous years continue to be relevant to some of the papers this year. In particular, candidates must be careful to supply the appropriate authority (case, statute) for statements of law made. Care should be taken when giving an authority to state the principle of law it supports. The Examiners will not give credit for a case cited which does not support the assertion made. Citing an irrelevant case gives the impression that the candidate has not read it. When referring to a case it is important to make clear the principle of law it set out and why it is relevant to the examination answer.

Candidates must avoid simple assertions. It is important to provide the reasoning that leads to a conclusion. Candidates must be careful to explain the statements they make and, of course, any explanation needs to be supported by the citation of relevant authority.

Some candidates did not read the question carefully enough – this was a particular problem among those who tackled Question 8. In other instances candidates did not answer the question asked (this was a particular problem with Question 3).

Specific comments on questions

Question 1

'English Commercial Law seeks to maintain a difficult balance between protecting the interests of the parties to a transaction and protecting the interests of third parties, who are not directly involved in that transaction but who may be affected by it.'

Discuss by reference to issues raised during your studies for this course.

Some candidates wrote general essays on commercial law in answer to this question, but failed to address the question asked. The best essays did not need to reach a firm conclusion either way, but did discuss this issue through reference to examples drawn from a part or parts of the course. For example, passing title and the exceptions to the *nemo dat* rules (subject guide, Chapter 4) and the law relating to ostensible authority might both be seen as protecting third parties (subject guide, Chapter 2); while, on the other side, the law relating to undisclosed agency might be seen as not providing such protection (subject guide, Chapter 3).

Question 2

'An agent is someone who acts on behalf of another.'

How accurate is this as a description of the legal nature of agency?

The best candidates tried to address the question asked rather than simply undertaking a sweeping account of the different ways in which an agency relationship can be created. This is a broad question and so the best answers would be those that illustrate a discussion of the question through well-chosen examples drawn from the law of agency (subject guide, Chapters 2 and 3).

Question 3

'The strict compliance rule in relation to letters of credit does not require exact literal compliance in all circumstances and as regards all documents.'

Discuss.

Many candidates tended to provide lengthy descriptions of the different types of letters of credit, the stages involved in issuing letters of credit and the parties, without addressing the question asked, or, more often, leaving the question asked until the very end, thereby reducing the time in which to answer. This question is directed clearly at a particular aspect of letters of credit – namely, the strict compliance rule – and requires that candidates focus on that issue and refer to other matters only in so far as they are relevant (subject guide, Chapter 8). The best candidates would set out clearly what the strict compliance rule is and its purpose by reference to UCP 600 and case law. They would consider the distinction between strict compliance and literal or mirror compliance by the use of examples on either side of that divide and look at the issue of trivial discrepancies.

Question 4

Kerr J referred to cif contracts as containing 'a duality of obligations relating respectively to the goods which are the subject matter of the contract and the documents covering the goods which have to be tendered to the buyer'.

Discuss. What legal problems does this create?

Some candidates embarked on a straightforward definition of cif contracts and did not really address the question asked or only did so at the end of their answers. A good answer would focus throughout on the debate surrounding the nature of cif contracts, the meaning of the phrase 'duality of obligations' and why controversy has arisen. It would illustrate the discussion through reference to appropriate cases (subject guide, Chapter 7). There is no expectation that a candidate should hold, or argue for, a particular view, but the best candidates would be able to reflect the range of opinions that have been expressed by the judges.

Question 5

'The judicial interpretation of Romalpa clauses means they are not effective in protecting the seller in the event of the buyer becoming insolvent before payment.'

Discuss.

A good answer to this question would define *Romalpa* clauses and their objectives, and indicate the roots of these clauses in the Sale of Goods Act and the cases (subject guide, Chapter 6). It would look at the different variations that have appeared before the courts and, where possible, illustrate the types of clause that are likely to succeed in their objectives and those that are not – although with some versions examples on both sides cannot be found. A good answer would also draw conclusions about the clauses and their effectiveness from the discussion of the cases.

Question 6

Watson's business of manufacturing cars is taken over by Holmes Ltd ('Holmes'). As part of that deal, Holmes agrees to employ Watson to purchase materials for car manufacture, but prohibits him from undertaking transactions above £1 million and from buying materials made by rival car manufacturers without the prior authority of the Board of Directors of Holmes. Advise Holmes on ALL of the following actions by Watson.

- (a) **Watson orders £2 million of steel from Moriarty Ltd, a steel producer. Moriarty Ltd has never had any previous dealings with Watson or Holmes, and Watson fails to identify himself as an agent of Holmes. Moriarty Ltd later discovers the existence of the agency and, because it has found that it can obtain a better price for the steel, Moriarty Ltd tells Holmes that it is not going ahead with the deal. Holmes wishes to continue the transaction.**
- (b) **Watson orders £3 million of steel from Lestrade Ltd, a steel producer that had sold steel to Watson when he still ran his car manufacturing business. Lestrade Ltd is unaware that Watson no longer owns the business. Holmes does not wish to go ahead with this transaction.**
- (c) **Watson orders £100,000 of car door handles from Baker Ltd, a car manufacturer. Baker Ltd is rather surprised to receive this order since it knows Watson is buying for Holmes and that Holmes has publicly stated its wish never to buy parts from other car manufacturers. Baker Ltd is, however, reassured when Watson explains that the policy has changed and produces a letter that appears to have been signed by the Board of Directors of Holmes giving Watson authority to enter into transactions 'with any seller'. As a result, Baker goes ahead and agrees the deal. The letter has been forged by Watson. Holmes has not changed its policy and does not wish to go ahead with the transaction.**

Some candidates prefaced their answers to these questions by a long description of how an agency is created, but the best candidates went straight to answering the questions asked and brought in discussion of these other issues only as necessary (subject guide, Chapters 2 and 3). In parts of this question (as in some of the other problem questions) some candidates read into the scenario additional facts that had not been provided. This meant they failed to discuss the question properly. For example, in (a) some candidates assumed that there was a representation by Holmes, which gave Watson apparent authority, and ignored the

possibility that no such representation had been made, which, after all, is what the facts suggest.

In (a), many candidates got into difficulties trying to decide whether there was an undisclosed agency or whether it was a matter of ratification. In (b), the question invites a discussion of *Watteau* and the criticisms made of that case, but many candidates simply asserted that it was wrong without giving reasons. A good answer would consider, for instance, the *Sign-O-Lite* decision, but acknowledge that it was not an English decision and so discuss whether its reasoning might apply in the English law. In (c) many candidates referred to *Said v Butt* and *Dyster v Randall* without demonstrating an understanding of the important distinctions between these cases and without considering whether *Said* is correct; others asserted that *Said* was wrong without explaining why. Some candidates referred to the decision in *First Energy*, but missed the decision of the House of Lords in *Armagas*, which is, arguably, the more significant of the two cases, and so lost the opportunity to distinguish between the decisions.

Question 7

Colour Co. ('Colour'), a manufacturer of paint, orders a quantity of cans from Tinny Co. ('Tinny') for a new brand of paint that Colour is planning to make and sell. Each can is to have a capacity of 1 litre, and Tinny agrees to deliver them in packs of 100 tins.

The cans are delivered on 1 January. Some of the packs contain 120 cans and 10 per cent of the cans have a capacity of 1.1 litres. Colour does not realise that there are these discrepancies until the cans are filled with paint on 10 January.

On 17 January, Colour discovers that a chemical reaction between the paint and the material from which the cans have been made has caused the paint to deteriorate. Tinny knew that this reaction might happen as the result of the chemicals used in some paints, but not all paints contain these chemicals. Tinny was unaware that Colour's paint contained the chemicals and did not mention the chemical reaction to Colour at the time of the contract.

Advise Colour Co.

A good answer to this question would discuss s.13 of the Sale of Goods Act, including consideration of the issue of reliance and, in particular, *Re Moore* and *Arcos*. It would also show awareness of s.15A(1), whether the goods had been accepted under s.35 and the consequence – in terms of the remedies available – of such acceptance. It would discuss the issue of satisfactory quality (s.14(2)) and fitness for purpose (s.14(3), subject guide, Chapter 5). An ideal illustration of many of the issues (even though decided before the new s.14(2)) is *Ashington Piggeries*, but, while several candidates referred to the case, only a few were able to discuss it in a way that showed a good understanding of that decision.

Question 8

Hamlet Ltd ('Hamlet'), a retailer of oil and petrol, seeks legal advice about its rights and obligations in ALL of the following situations.

(a) Hamlet agrees to buy from Macbeth Ltd 100,000 litres of crude oil from a cargo of 500,000 litres at present in a container ship, *The Shakespeare*. Three other buyers each purchase 100,000 litres from the same source. All the buyers pay 50 per cent of the purchase price at the time of the contracts. When *The Shakespeare* eventually arrives in port and unloads its cargo, it is discovered that some of the oil has leaked from the vessel and there are only 300,000 litres left.

(b) Hamlet buys and pays for the entire cargo of 100,000 litres of oil on board *The Marlowe*. While the vessel is still at sea, Hamlet agrees to sell 100,000 litres of oil to Duncan Ltd, intending to supply the oil from *The Marlowe*. Later, *The Marlowe* sinks and the entire cargo is lost. Hamlet has told Duncan Ltd that because of this the oil cannot now be delivered.

(c) Hamlet buys 100,000 litres of oil, which are stored in a tanker at an oil refinery owned by Romeo Ltd. Payment is to be made in six months. The tanker contains 200,000 litres. There is no express term in the sale contract for the delivery of the oil. After four months, the tanker is damaged by unusually bad weather and the oil deteriorates.

In answering (a), the best candidates showed a good command of the provisions on passing property in the Sale of Goods Act 1979 where the goods sold form part of a bulk. They recognised that part of the requirement was that a payment in part or in full must have been made (subject guide, Chapter 4). Some candidates considered the issue of frustration in answering (b), which is interesting, but the best answers recognised the need to consider the facts a little more closely – the question does not state that Hamlet has agreed to supply 100,000 litres from *The Marlowe*, so its loss may not excuse non-performance. The fact that the seller intended to supply the oil from *The Marlowe* does not mean that this was the agreement of the parties. In (c), a good answer would realise that risk, usually, passes when property passes, but that this presumption can be overridden and that the facts here might lead to such a situation. The answer would also carefully work through a consideration of whether property had passed and if not, why it had not. It would then discuss situations in which risk may pass even though property has not (subject guide, Chapter 4).