
Examiner's report 2009

266 0017 Commercial law Zone B

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.

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

'Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act.'

(US Restatement (Third) of Agency (Tentative Draft No. 2) (2003))

Discuss how accurate this is as a description of agency.

This is a broad question that requires candidates to be able to illustrate their answers by drawing on well-chosen cases. A good answer would consider this definition of agency and its flaws, then move on to a discussion of the third party, with whom the agent enters into a transaction on the principal's behalf, and how they might be incorporated into a definition of agency (subject guide, Chapters 2 and 3). Some candidates merely provided a narrative of the different ways in which an agency is created without directing their discussion to the particular question asked.

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. The banker is, therefore, required to exercise judgment whether the requirement has been fulfilled.'

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 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

'It is often difficult to differentiate between fob and cif contracts.'

Discuss. Why is the difference important?

A good answer would discuss the various differences between these types of contract (subject guide, Chapter 7) and also give some indication of the variations within each type, which confuse the clarity of the distinction between them (subject guide, Chapter 7). The House of Lords discussion regarding *Scottish and Newcastle International Ltd v Othon Ghalanos Ltd* (in particular, the contributions of Lord Mance), which was noted in the most recent *Recent developments* update, would provide some valuable insights into the issues.

Question 5

'Where there is a contract for the sale of goods by description, there is an implied condition that the goods correspond with the description.'

Discuss.

A few candidates treated this as a question about all implied terms (subject guide, Chapter 5) and so wasted a large part of their answers on irrelevant issues. A good answer would recognise that this invites an analysis of section 13 and would provide a discussion of its meaning, referring to relevant cases. Candidates could also consider why the courts in *Harlingdon* – a case which, although very important, was not mentioned by many students – appeared to restrict the application of the section. Many candidates seemed to struggle with their discussion of how the courts have defined 'description', which is fundamental to an understanding of this section.

Question 6

Fred sells leather on 30 days' credit to companies that make various types of leather goods. He is concerned that some of these companies may become insolvent before he is paid and seeks your advice as to how he might try to tackle this problem by means of a retention of title clause. Advise him as to the likelihood that such a clause will resolve all the legal issues that might arise.

An answer to this question should describe the retention of title clause, its roots (in case law and the Sale of Goods Act) and its objectives (subject guide, Chapter 6). This would then lead to a consideration of the various types of clause and their effectiveness, illustrated by looking at cases. These conclusions should then be applied to Fred's situation and the effectiveness of clauses in relation to the goods, the product, funds received or debts owed, etc. Several candidates mentioned the role of the fiduciary relationship in *Romalpa*, but few gave a clear explanation of how the buyer might become a fiduciary and why this was significant.

Question 7

Watson's business of manufacturing cars is taken over by Holmes ('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 £500,000 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. When Lestrade Ltd discovers that Watson is working for Holmes, Lestrade Ltd no longer wishes to go

ahead with the transaction because in the past it has experienced difficulty in obtaining payment from Holmes.

(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) there was an opportunity to discuss *Watteau*, but, although many mentioned the case, few entered into a consideration of whether it was still good law. Others discussed *Said v Butt*, but the best answers engaged in criticism of the case and referred to contrary decisions. 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 8

Colour Co. ('Colour'), a manufacturer of paint, buys a quantity of cans from Tinny Co. ('Tinny') for a new brand of paint that Colour is planning to make and sell. Immediately after securing this agreement, Colour launches an expensive advertising campaign for the new paint.

The cans are filled with paint, but Colour discovers that a chemical reaction between the paint and the material from which the cans have been made causes 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.

As a result, the paint cannot be sold. This means Colour has to refund large sums of money paid in advance by customers waiting for the new paint and loses a lucrative contract with the government to repaint all its offices. It also means Colour's reputation is damaged because of the disappointment caused to customers, who had been attracted by the advertising campaign.

Advise Colour Co.

A good answer to this question would recognise that what is required is a discussion of s.14(2), s.14(3) of the Sale of Goods Act and *Ashington Piggeries* (subject guide, Chapter 5). Unfortunately, many candidates either failed to mention *Ashington* or did not demonstrate a good understanding of the case. The best candidates questioned the legal significance of whether Tinny could assume Colour would know about the problem since they are in the paint business. Assuming there is a breach, there is also the issue of remedies, which would allow the best candidates to demonstrate an understanding of this important area in respect of the potential losses suffered.