
Examiner's report 2009

2650040 Elements of the law of contract – Zone A

Introduction

This document sets out the Chief Examiner's report for the examination paper in **Elements of the law of contract** Zone A. It begins with General remarks pertaining to the examination scripts as a whole before each examination question is considered. The guidance for each question concludes with an indication of where candidates can find the material necessary to attempt the question in the subject guide and, where relevant, newsletters on the Contract section of the VLE.

General remarks

Most candidates answered the questions well and displayed a knowledge of the materials placed on the Contract section of the VLE and used these materials well in answering their questions.

However, at times, many candidates struggled to identify the particular issue within the area of law the question focused on. 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. Some candidates, for example, failed to recognise that, in a contract between A and B for the possible benefit of C, C was not a party to the contract. By failing to recognise this issue, they could not consider the problems presented by privity of contract. 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 in a broad area of law, which the candidate had identified as relevant. Candidates might, for example, have identified 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 that had formed part of examination questions that had been 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' reports* 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 *Examiners' reports* are not intended to form the basis of specific knowledge that is to be used when answering future examination questions.

It is extremely important that candidates apply the law to the issues presented in a question. 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. However, many candidates' answers 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 them to compile 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. However, 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 that are irrelevant to the question serve to highlight a candidate's uncertainty as to which issues are relevant to the question.

In other instances, answers appeared chaotic, as if the candidate had hurried into an issue without fully considering the question as a whole. Candidates who prepare a careful plan of their answer before writing it in full will find that the time they spend in making such a plan is repaid by the clarity of their final answer. Among other things, a plan 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 reciting 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 that has been 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 attempts do not, however, answer the question that has been asked. It also leaves the Examiners with the impression that the candidates are unable to find four questions in the examination paper that they are able to answer.

Finally, many candidates suffered from an inability to manage 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 remaining question(s). It goes without saying that it is difficult for candidates to succeed if all their efforts are concentrated on only 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 in Contract wish to emphasise the importance of candidates writing the answers clearly. It is difficult, and sometimes impossible, to assess illegible answers.

Specific comments on questions

Question 1

On Monday, Albert inspected Betty's car at her house in Woking and offered to pay £10,000 for it. Betty wanted £12,000. Later in the day, Betty wrote to Albert and stated that she would take £11,000. The letter was received by Albert at his home on Tuesday morning. At 4.00 pm on Tuesday afternoon, Albert at his office in London wrote a letter to Betty accepting her offer. On his way to post the letter Albert met Cuthbert who told him, 'I gather that Betty has finally sold her car.' Betty had, indeed, sold the car. Albert posted his letter and, upon arriving home at Woking, discovered a message on his answer phone from Betty. The message had been left at 3.00 pm; Betty had stated, 'I withdraw my offer.' Albert bought a similar car for £12,500.

Advise Albert.

This problem style question is concerned with issues of contractual formation, notably offer and acceptance. The question to be addressed is whether or not Albert and Betty have a contract for the purchase of Betty's car and, if so, at what price. To answer this question candidates were required to analyse the given fact pattern, isolate the issues to be resolved and apply the relevant cases to resolve these issues.

A good answer would begin by considering the nature of an offer in relation to the case law (e.g. *Storer v Manchester City Council* (1974) and *Gibson v Manchester City Council* (1979)). The first issue to be resolved is the effect of Albert's offer to purchase Betty's car after his inspection. It would appear that this would be recognised in law as an offer. However, Betty replies telling him that she wants £12,000. Is this a counter-offer within the meaning of *Hyde v Wrench*? Or is it a statement of information? If it is an offer, it must either lapse or be revoked when Betty writes to Albert to tell him that she would take £11,000. Betty's letter appears to meet the necessary criteria for an offer, which is good upon communication. What is the effect of Albert's letter informing her that he accepts her offer? Generally, an acceptance, to be good, must be communicated, but this case may fall within a recognised exception – the postal acceptance rules. A good answer would consider whether or not these rules were applicable here by an examination of the relevant case law (e.g. *Household Fire Insurance v Grant* (1879), *Henthorn v Fraser* (1892), *Holwell Securities v Hughes* (1974)). A very good answer would consider whether the rules were displaced by the fact that Albert is informed by Cuthbert before Albert posts the letter that Betty has sold her car. Is there a role for *Dickinson v Dodds* here? If there is, what effect does it have? The final issue for resolution is the effect of Betty's telephone

message. If postal acceptance applies in this case, the contract is good when the letter is posted. Betty's later revocation is of no effect: see *Byrne v Van Tienhoven*. A very good answer might observe that this result is achieved only by straining the application of the authorities as much as possible. It also seems, practically, unlikely that Albert will want Betty's car since he has bought his own. If neither party wants a contract to have been formed in such an instance, is it likely that a court will find one?

Material necessary to answer this question is set out in Chapter 2 of the subject guide.

Question 2

Alexandra purchases a hotel in Devon. It requires renovation and she employs Bertram to install a new kitchen for £50,000. She plans to reopen the hotel in time for the summer trade and so stipulates in the contract that the kitchen must be completed by the end of March. By the end of January, it becomes clear that the work will not be completed on time. Alexandra promises to pay Bertram a further £6,000 which will enable him to hire extra staff to ensure completion on the due date. Her husband, Charles, concerned at the pressure being placed on his wife, promises Bertram a further £1,000 'bonus' if he completes on time.

Meanwhile, Alexandra owes money to the decorators, Décor Ltd. She speaks to their managing director in January and promises to pay a further £700 of the £1,000 due immediately (the money is due at the end of March), provided that this extinguishes the debt. The managing director agrees and Alexandra pays the £700.

Bertram completes the work at the end of March, but Alexandra and Charles now refuse to pay him more than the £50,000 due under the contract. Alexandra also receives a demand for £300 from Décor Ltd at the end of March.

Advise the parties.

This problem question required candidates to consider: (1) whether or not promises to pay additional amounts for the same work are binding; and (2) whether promises to pay for work when the promisee is already contractually obliged to another to perform the work are binding. To answer these questions, candidates needed to analyse the facts given, ascertain the relevant issues and apply the law to resolve these issues.

Alexandra makes two promises: first to pay Bertram a further £6,000 to complete the work on time; and second, to pay Décor Ltd a lesser sum to discharge a greater debt. The first promise involves the issue of consideration; namely, is there sufficient consideration to support a variation of the original contract? *Stilk v Myrick* would indicate not, but perhaps the situation falls within *Williams v Roffey Bros*? Candidates needed to apply the criteria of that case to the facts at hand. A good candidate would consider the extent to which *Williams v Roffey Bros* can be considered good law, given later cases such as *Re Selectmove* and *South Caribbean Trading Ltd (SCT) v Trafigura Beeher BV* [2004]. What effect do such considerations have upon potential advice to Alexandra?

The second promise, to Décor Ltd, gives rise to the question of whether part payment of the debt can be satisfaction of the whole. To resolve this question, candidates needed to consider and apply the decisions in *Foakes v Beer* (1884) and *Pinnel's Case* (1602).

Charles's promise to Bertram raises the issue of whether or not there is sufficient consideration to support the promise as a contract. To resolve this issue, candidates needed to consider the circumstances in which the promise to perform under a contract with another party can constitute good consideration (*Pao On v Lau Yiu Long* (1979)).

Material necessary to answer this question is set out in Chapter 3 of the subject guide.

Question 3

'While the common law doctrine of privity prevented a third party to a contract from ever receiving an enforceable benefit, the Contracts (Rights of Third Parties) Act 1999 and the cases which interpret the Act ensure that a third party will always have an enforceable benefit.'

Discuss.

This question required candidates to discuss the nature of the common law doctrine of privity and critically examine the proposition that it always denied a third party from receiving an enforceable benefit. A good answer would analyse and discuss the relevant cases which set out how, at common law, a third party could receive a benefit – either by an enforcement action by the promisee (although there could be a problem with the remedy available) or by one of the mechanisms which allowed a third party to enforce a benefit in their own right (e.g. a Himalaya clause, a restrictive covenant or bailment). It is unlikely that the proposition as stated can be supported when such an examination is undertaken.

Candidates then needed to consider the nature and purpose of the 1999 Act. Integral to this answer was a consideration of those cases in which courts have interpreted the 1999 Act. This critical consideration of the cases needs to be directed to answering the question of whether or not the interpretation of the Act always ensures that a third party will have an enforceable benefit. It appears, from the very provisions of the 1999 Act and cases such as *Avramides v Colwill* [2006], that this proposition, as stated, cannot be sustained.

The most common difficulty encountered by those candidates who struggled to answer the question was that they did not address the question asked. This could occur by avoiding discussion of the common law cases or avoiding the 1999 Act or, more commonly, by omitting any mention of the cases which had been decided under the 1999 Act.

Materials covering the relevant subject matter of this question can be found in Chapter 11 of the subject guide. Useful material can also be found in previous VLE newsletters, notably '*Offer-Hoar v Larkstore Ltd* [2006]' concerned with *Offer-Hoar v Larkstore Ltd* [2006]; 'The rights of third parties to enforce a contract' concerned with *Avramides v Colwill* [2006]; and 'Privity of contract and the rights of third parties' concerned with *Prudential Assurance Co Ltd v Ayres* [2007].

Question 4

Dr Anson decides to sell his private medical practice. In May, Dr Chitty expresses an interest in purchasing the business and negotiations begin. Dr Anson, in the course of the negotiations, tells Dr Chitty that 'everything is splendid at the moment. I have more work than I could possibly want' and that his practice would be 'an excellent opportunity for a young doctor such as yourself'. Dr Anson offers to show Dr Chitty the accounts, which show a profit of £80,000 per annum, but Dr Chitty is so impressed that he decides not to bother. He is relieved to hear that Dr Anson is planning to retire, as he knows him to be popular with his patients. He asks, however, for more time to consider his position. Dr Anson (falsely) tells him that he has two more doctors coming to visit the practice the next day and he fully expects one of them to make him an offer. This prompts Dr Chitty to offer the full asking price immediately, which Dr Anson accepts.

Having operated the practice for six months, it becomes clear to Dr Chitty that there is no way the practice could possibly have shown a profit of £80,000 per annum. His own accountant examines the accounts and informs him that the sum was greatly exaggerated. He has also found out that, having taken a round-the-world cruise, Dr Anson plans to set up a private medical practice nearby and has already been contacting his former patients to inform them of this fact. Dr Chitty fully expects many of his patients to move to Dr Anson's practice and, if this occurs, his accountant informs him that the practice will no longer be financially viable.

Advise Dr Chitty.

The facts of this question give rise to problems concerned with misrepresentation. To answer this question required candidates to analyse the given fact pattern, isolate the issues to be resolved and apply the relevant cases to resolve these issues.

A good answer would begin by considering the requirements necessary to make a statement actionable as a misrepresentation. These considerations, and the relevant case law from which they are derived, needed to be applied to each of Dr Anson's statements to Dr Chitty. Are Dr Anson's statements about the nature of his practice mere puff? If they are, they do not form misrepresentations. Dr Anson appears to tell Dr Chitty that the practice shows a profit of £80,000. Can he still rely on this as an actionable misrepresentation? Does it induce the contract? It appears unlikely that he can rely on the accounts themselves being poorly prepared since he does not look at them before he purchases the property. If Dr Anson has stated that he intends to retire, is this actionable as a misrepresentation or is it a statement of intention? Dr Anson does tell Dr Chitty that he has two other prospective purchasers coming when he does not. Does this statement induce the contract? A good answer should display a strong grasp of the law regarding what is actionable as a misrepresentation and what is not. A common error encountered in answers was to immediately launch into a consideration of the different forms of misrepresentations and the remedies available for them. If there is no actionable misrepresentation, or it is doubtful, such a discussion of relief is misplaced.

Having established that an actionable misrepresentation exists, candidates then needed to consider what form of action to take and what remedies might be available. A common error that was made was to jump to the immediate assumption that there was clearly a fraudulent

misrepresentation, actionable as the tort of deceit, without any consideration of the application of the Misrepresentation Act 1967.

Material necessary to answer this question is set out in Chapter 9 of the subject guide. Candidates might also find the newsletter on the VLE entitled 'Misrepresentation and negligent misstatement' concerned with *IFE Fund SA v GSI International* [2007] useful.

Question 5

Cyril Hedge, a financier and well known customer of Nichollod's Stores, needs to leave London for a period of time to tend to his business. He hires Peter Dastardly, on the recommendation of a local employment agency, as a caretaker at his Chelsea home whilst he is abroad.

Dastardly uses Hedge's email account to send a message to Nichollod's and, describing himself as Hedge, arranges to have a home entertainment system priced at £5,000, delivered to Hedge's Chelsea address. When the system is delivered, Dastardly takes it in and then sells it to Shady, a second-hand electronics dealer near Oxford Street. Shady is unaware of how Dastardly obtained the system and displays it in his window. A Nichollod's employee notices the system and Nichollod's seeks the return of the system from Shady.

Advise Shady.

To what extent, if any, would your answer differ if Dastardly had visited Nichollod's Stores to arrange the purchase of the home entertainment system?

This question is concerned with the effect of a mistake of identity upon the formation of a contract. To answer this question candidates were required to analyse the given fact pattern, isolate the issues to be resolved and apply the relevant cases to resolve these issues.

The first issue is the effect of Dastardly's use of Hedge's email account to portray himself as Hedge and have the home entertainment system delivered. The difficulty in resolving this issue is that the authorities are by no means agreed as to the best resolution of such a problem. To some extent, the House of Lords' decision in *Shogun Finance v Hudson* resolves these problems, but many of the outstanding difficulties are presented by the apparently irreconcilable decisions of *Cundy v Lindsay* and *Phillips v Brooks*. A good answer would consider the extent to which the dissenting judgments in *Shogun Finance v Hudson* could be applied to this circumstance. In particular, does it make sense that the form of communication employed by a rogue to work his deception should determine whether or not the contract is void or voidable? If Dastardly's deception renders the contract void *ab initio*, Shady cannot obtain any title to the goods. If, however, the contract is voidable and Shady purchases these goods without notice of these matters, Nichollod's right to set aside the contract is likely lost upon Shady's purchase and Shady obtains title to the goods.

The problem also posed a variant factual situation in which Dastardly visited Nichollods to purchase the goods. Candidates needed to consider the application of *Phillips v Brooks* to such actions. Does the face-to-face presumption arise? It would appear that the effect of the visit is to render the contract voidable. A very good answer would take a critical view of the

law of mistake as to identity – it is difficult to predict how a future court might resolve such a case.

A common error made by many candidates was to consider the problem solely as a fraudulent misrepresentation. It may be that such cases more properly fit within this body of law than mistake; not to consider the latter, however, was to leave the impression that the candidate was unaware of the law in this area.

Material necessary to answer this question is set out in Chapter 8 of the subject guide.

Question 6

Duff was a supplier of radio equipment who was registered as required by the (fictitious) Radio and Wireless Dealers Act 1969. Duff supplied a Zelco radio to Yvette, without providing the statutory invoice describing the radio as required by the Act, after Yvette had said that as far as she was concerned none was necessary. The agreed price was £500, but Yvette subsequently refused to pay for the radio.

Duff delivered to Xanthea an Accro radio for £250. Again, Duff failed to provide a statutory invoice. Two weeks later the radio suffered an electrical short, stopped working and cost £50 to repair.

Duff supplied a Betco radio to Winifred for £300. Winifred ran a brothel, although Duff did not know this. Winifred refused to pay for the radio, which she put in the room used to greet clients.

Advise Duff.

What difference, if any, would it make to your advice if Duff's licence had expired before the above transactions were entered into though Duff was unaware of this?

Duff requires advice as to the effect of illegality upon a contract. To answer this question candidates were required to analyse the given fact pattern, isolate the issues to be resolved and apply the relevant cases to resolve these issues.

This question deals with various issues of illegality in the formation and performance of contracts. The question calls for a determination of the extent to which courts will enforce a contract despite the taint of illegality. Here the illegality is created by statute. Most candidates realised that the initial starting point in such an answer was to consider the purpose behind the statutory requirements. Following *St John Shipping v Rank*, the issue to be considered in each of the parts is the purpose behind the statute. Is the statute intended to penalise conduct or to prohibit contracts? The requirement to provide an invoice appears to regulate the conduct of the business rather than the legality of the business. This would indicate that contracts which do not comply with this requirement are illegal as performed rather than as formed. On the other hand, the requirement that the supplier must be licensed indicates that the purpose of the requirement is to make unlicensed agreements illegal as formed. A good answer would also consider the effect of Yvette's statement that no invoice was necessary. It may be that both are assenting to a performance they know is illegal. If the parties are *in pari delicto* neither can sue on the contract.

Similar issues arise with respect to Xanthea – is the contract illegal as formed or illegal as performed? If the latter, Xanthea should be able to seek redress for the electrical fault.

The sale to Winifred raises a slightly different aspect of illegality and candidates need to consider the application of *Pearce v Brooks* (1866).

Material necessary to answer this question is set out in Chapter 12 of the subject guide.

Question 7

Norman operates his own window cleaning business. He purchases a new ladder from LADUP, a cut-market retail outlet. The ladder is considerably cheaper than the prices offered by other suppliers. Before purchasing the ladder, Norman tests it and the sales assistant hands him a piece of paper which he is told to read.

The paper states: 'Please read carefully and do not sign unless you are entirely happy with our terms.' LADUP offer the cheapest prices in the market, but, to do so, our customers agree that:

- i LADUP are not liable for any damage caused by any defects in our equipment. Customers are advised to examine the equipment carefully prior to purchase.
- ii LADUP agree to repair the equipment free of charge within six months of purchase on production of a valid receipt. NO responsibility is taken, however, for the quality of the repair service by our employees, servants or agents.

Norman does not read the piece of paper as he has not brought his reading glasses, but when asked to sign it by the assistant, does so. He takes the ladder home, but, when using it the next day to clean Mr Grimsdale's windows, one of the rungs of the ladder breaks under his weight. Norman falls off the ladder on to Mr Grimsdale's prized orchids, worth over £1,000, and smashes his watch, worth £50.

Fortunately Norman is not badly hurt and takes the ladder back to LADUP for repairs. Their employee, Pitkin, is busy and simply glues on a new rung. The ladder is returned to Norman. Because of the poor quality of the repair work, the rung gives way one day later and Norman falls, this time suffering serious personal injuries.

Advise Norman.

This question was concerned with the extent of the terms incorporated in Norman's contract with LADUP and the extent to which they are regulated under the Unfair Contract Terms Act 1977. To answer this question candidates were required to analyse the given fact pattern, isolate the issues to be resolved and apply the relevant cases to resolve these issues.

The first issue to be resolved is whether or not terms (i) and (ii) are incorporated into the contract by reason of Norman's signature. *L'Estrange v Graucob* indicates that a signature incorporates all terms. A good answer would consider the effect of Norman's visual problems – has he brought these to the attention of the clerk? Assuming that the terms are incorporated into the contract, candidates needed to consider whether the Unfair Contract Terms Act 1977 applied to the contract – and to what effect. Candidates also needed to consider the effect of the Sale of Goods Act 1979 upon the contract.

Material necessary to answer this question is set out in Chapter 6 of the subject guide.

Question 8

'It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed... This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule.' (Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries* (1949))

Critically evaluate this statement.

This question required candidates to consider and critically analyse the purpose behind an award of damages (e.g. *Robinson v Harman* (1848)) with reference to those devices that are used to limit an award of damages. In *Victoria Laundry v Newman Industries* the court was particularly concerned with remoteness in relation to what was within the 'reasonable contemplation' of the parties in the 'two limb' test established in *Hadley v Baxendale* (1854). The question gave candidates the possibility of exploring remoteness as a means by which courts limit awards of damages more generally and beyond these two cases. A good answer would consider the House of Lords' recent decision in *Transfield Shipping Inc v Mercator Shipping Inc (The 'Achilleas')* [2008] in the context of the previous case law in the area.

The most common error committed by candidates who fared poorly in this question was to recite everything they knew about damages, with little consideration of the particular issues raised by the question.

The material necessary to answer this question is set out in Chapter 16 of the subject guide. Candidates might also have found material in the VLE newsletters of use, notably 'Damages – a new approach to *Hadley v Baxendale*?' which reviews the decision in *Transfield Shipping Inc v Mercator Shipping Inc (The 'Achilleas')* [2008].