
Examiner's report 2009

2650040 Elements of the law of contract – Zone B

Introduction

This document sets out the Examiners' 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 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 the 1st of May Arnold offered by email to sell his car to Bertha for £10,000. He also stated that he would send his wife to Bertha's house on the 8th of May to receive Bertha's reply. On the 6th, Bertha sent an email to Arnold saying, 'Would like to have the car. Can you offer a six-month guarantee against mechanical breakdown?' On receiving the email the same day Arnold sold the car to Christopher and sent a messenger with a note to Bertha's house to tell her of this. Before this note arrived, Bertha changed her mind about the need for a guarantee and posted a letter to Arnold accepting the latter's offer. This letter was lost in the post.

Advise Arnold.

This question is concerned with issues surrounding contractual formation. 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 Arnold's email to Bertha. Does it possess the requisite degrees of intention to commit necessary to form an offer? If it does, the second issue that arises is whether or not Arnold has prescribed a mode of acceptance such that no other method will suffice or will suffice provided that it is no less advantageous than the method specified (*Manchester Diocesan Council for Education v Commercial and General Investments* (1970)). If the latter, does Bertha's email suffice? Another issue which arises in relation to her email is whether or not her request with regard to the six-month guarantee is a counter-offer or not (*Hyde v Wrench*). If it is a counter-offer, then Arnold is not obliged to continue his discussions with Bertha and is free to sell the car to another. If it is not a counter-offer, such that the offer of Arnold is destroyed, is it an acceptance such that a contract is formed?

A good candidate would consider the cases concerned with the instantaneous and near instantaneous formation of contracts. If Bertha's email is an acceptance, is the contract complete when she posts her letter? The letter itself is unlikely to have any effect: a consideration of the postal acceptance rules indicates that they are unlikely to apply here.

Material necessary to answer this question is set out in Chapter 2 of the subject guide. Candidates might also wish to consider a past newsletter on the VLE, 'Contractual formation by email' in which *Allianz Insurance Co-Egypt v Aigaion Insurance Co SA* [2008] was discussed.

Question 2

Damien and Elizabeth plan to get married on the 15th of August. Elizabeth decides that she would prefer to have the reception at home and she hires a marquee from CELEBRATE Ltd, a firm specialising in event management. Their representative, Mr Smooth, visits them and it is agreed that CELEBRATE Ltd will provide a marquee to house 100 guests, delivery and erection on the 14th of August and collection on the 16th of August.

On the 10th of August, Elizabeth receives a telephone call from Mr Smooth, informing her that the marquee had been used in Scotland earlier that week and had yet to be returned. In order to obtain it in time for the wedding reception, a special lorry would have to be hired, costing £2,500. Frantic, Elizabeth agrees to pay the extra £2,500. On hearing of the conversation, Damien telephones Mr Smooth himself and tells him that 'if the marquee appears on time, you will be £250 better off.'

On the 14th of August, Elizabeth receives a telephone call from Mrs Bun. She has delivered the wedding cake as agreed, but complains that Elizabeth has yet to send her the cheque for £500. Elizabeth, worried about the rising costs of the wedding, tells her: 'It is £200 or nothing!' Mrs Bun agrees to accept £200.

Elizabeth seeks your advice whether she and Damien are required to pay the extra sums to CELEBRATE Ltd. She is also concerned that Mrs Bun is threatening to sue her for £300.

Advise Elizabeth.

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.

Elizabeth promises to pay CELEBRATE more money to perform the same service that they have already contracted to provide her with. This 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 Elizabeth?

Elizabeth's attempt to settle the debt with Mrs Bun raises the issue of whether or not part payment of a debt can ever satisfy the whole debt. To resolve this question, candidates needed to consider and apply the decisions in *Foakes v Beer* (1884) and *Pinnel's Case* (1602). A good candidate might also raise the issue of duress, in the unlikely event that the consideration is good.

Damien's promise to Mr Smooth raises the issue of whether or not there is sufficient consideration to support the promise as a contract if the promise is made to CELEBRATE. 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)). A good answer would consider what effect the promise would have if made to Mr Smooth in his personal capacity.

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

Question 3

George enters the annual Hilldon Car Rally. The rally is a cross-country race in which participants are expected to drive over 20 miles of rough terrain. To enter the rally George is required, as are all rally participants, to pay £500 to the rally organisers, Hilldon Cars Ltd, and to sign an agreement which provides, inter alia, that:

- (a) all contestants agree to abide by the published rules contained within the Hilldon Car Rally rule booklet;
- (b) all contestants agree that they will pay for any damages caused by any breach of these rules; and
- (c) in the event of doubt, these terms are for the benefit of Hilldon Cars.

During the rally, George's car is struck by Ian's car. Ian had, in contravention to the rules, although without negligence on his part, sought to overtake George at a corner when the accident occurred. George's car is completely destroyed because of this accident.

Advise George.

This question is concerned with the application of the Contracts (Rights of Third Parties) Act 1999. To answer these questions, candidates needed to analyse the facts given, ascertain the relevant issues and apply the law to resolve these issues.

Central to the resolution of this case is whether the terms in the agreements entered into between Hilldon on the one side and contestants on the other provide a term enforceable by contestants against each other. Ian's accident-causing action has occurred in contravention of the rules but without negligence on his part. If George is to succeed in an action against Ian, he needs to be able to rely on clauses (a) and (b) of the contract. A good candidate would consider whether clause (c) prevented him, under the application of the 1999 Act, from seeking such a benefit. A good answer would also consider whether George was able to raise a common law right to enforce the term of the contract between Ian and Hilldon.

A common error in answering this question was an inability to realise that privity of contract and the rights of third parties were at issue in this problem. Some candidates considered at length the application of the Unfair Contract Terms Act 1977 without any apparent realisation that George was a third party to the contract between Ian and Hilldon.

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 *Aavramides v Colwill* [2006]; and 'Privity of contract and the rights of third parties' concerned with *Prudential Assurance Co Ltd v Ayres* [2007].

Question 4

'The twentieth century saw English courts develop a confused, incoherent and inconsistent doctrine of mistake. Twenty-first century decisions have done little to resolve these problems.'

Discuss.

This essay question required candidates to analyse the doctrine of mistake developed in the twentieth century. A good answer would critically analyse leading cases such as *Bell v Lever Bros Ltd*, *Solle v Butcher*, *Phillips v Brooks*, *Lewis v Averay* and *Ingram v Little*. Such an analysis provides great support for the proposition advanced. Candidates then needed to consider the decisions of the twenty-first century that have dealt with mistake (such as *Shogun Finance v Hudson*, *The Great Peace*, *Brennan v Bolt Burdon*). Two common weaknesses in answering this question were either to recite cases with little attempt to relate them to the question set or to avoid almost entirely the later cases.

Material necessary to answer this question is set out in Chapter 8 of the subject guide. Candidates might also have found the following past newsletters on the VLE of use in answering this question: 'Mistakes of law' largely concerned with *Brennan v Bolt Burdon* [2004], 'Mistake in contract law' concerned with *Smithson v Hamilton* [2007] and 'Recent judicial observations on mistake'.

Question 5

Benjamin owns a printing press. He has a number of lucrative contracts to print leaflets for local businesses. He is contacted by Cheshire, who is interested in purchasing the printing press as part of his publishing empire. Benjamin informs Cheshire that the business is doing well and he can see why Cheshire would wish to buy the press. He tells him that he has just obtained 10 lucrative publishing contracts for a fixed term period of two years. Cheshire is impressed, particularly when Benjamin informs him that the business made a profit of over £100,000 last year. He insists, however, that he will only purchase the business if Benjamin (now in his 60s) retires. Benjamin assures him that, having sold the business, he intends only to relax. Benjamin mentions, however, (falsely) that Fifoot has also shown interest in purchasing the printing press, knowing Cheshire and Fifoot to be great rivals. Cheshire immediately offers to buy the printing press at the price stated by Benjamin.

Having bought the press, Cheshire becomes suspicious of the correctness of the figures mentioned by Benjamin and asks his accountant to check the accounts. These show a profit of only £10,000 for the previous year. Further, he receives notification of the termination of the 10 lucrative publishing contracts (the terms of these contracts expressly permit termination on change of ownership of the printing press). He also discovers that Benjamin has started up a new printing business 50 miles away and is likely to be awarded the 10 lucrative contracts.

Advise Cheshire.

This question is concerned with the problem of misrepresentation. To answer this question, candidates needed to analyse the facts given, ascertain the relevant issues and apply the law 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 Benjamin's statements. Are Benjamin's statements about the nature of his business mere puff? If they are not, are they actionable as misrepresentations? The statement concerned with the profitability of the business (£100,000 per annum) appears to be actionable as a misrepresentation if it was an inducement for Cheshire to contract. A good answer would also consider whether or not Benjamin's false statement that another purchaser was coming to view the business was actionable. Finally, is Benjamin's statement that he intends to retire a statement of intention, honestly held, or not?

A common error encountered in a problem such as this is 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 existed, candidates then needed to consider what form of action to take and what remedies might be available. A common error 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 6

Rocky works as a landscape gardener, using his own tools and priding himself on his excellent service. He needs a new spade and notices that the local hardware store, Dig It, has a special offer on 'spades'. On entering the shop, he is attracted by a large spade on display. A sign above it states 'Today's special offer. Terms and conditions apply.' The shop assistant, Charlie, tells him that it is a real bargain: 'It is the toughest spade on the market and yet at a knockdown price!' Rocky takes the spade to the till where he sees a sign listing a number of terms and conditions. These include a term that Dig It are not liable for any damage causing by any defect in the equipment, and that Dig It bear no responsibility for any statements of any kind made by their staff or representatives to customers in the store. Rocky is also given a piece of paper to sign which contains the same terms and conditions, but which Rocky assumes to be a receipt as he had paid for the spade by credit card.

The following day, Rocky goes to work on Mrs Eden's garden and starts digging a trench for her roses. Leaning on the spade, it snaps in half. Rocky falls backwards and lands on Mrs Eden's ornamental fountain. The fountain smashes under his weight and Rocky's back is seriously injured. He is not sure that he will be able to work again.

Advise the parties as to their remedies in contract law.

This question is concerned with the nature of the terms of the contract between Rocky and Dig It and the statutory regulation of these terms. To answer this question, candidates needed to analyse the facts given, ascertain the relevant issues and apply the law to resolve these issues.

The question required candidates to consider whether or not Dig It's exemption clauses pertaining to liability for damage and exclusion of any pre-contractual statements and representations are validly incorporated into the Rocky/Dig It contract either by notice (*Olley v Marlborough Court Hotel*) or signature (*L'Estrange v Graucob*). A good answer might also consider those terms implied into the contract by the Sale of Goods Act 1979. On balance, it seems more probable than not that the terms are incorporated in the contract. The next issue that arises for consideration in relation to the case law is whether or not the terms cover the loss which occurs in this instance. The third issue that arises for consideration is the effect of the statutory regulation of such clauses. The principal statutes to be considered are the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967. Do these Acts apply to this contract? If so, what effect do these Acts have upon the terms?

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

Question 7

Zaza Ltd is a construction firm. In 2007, it purchases Blackacre, a large plot of land just outside Mudgeville with a view to building a housing estate upon the land. The purchase is largely financed by a mortgage granted by X2U Mortgages Ltd.; the term of the mortgage is 10 years and interest is to be one percent below the Bank of England's base rate, which is then 5.75 per cent. Zaza orders 20 ready to assemble timber frame houses from a German manufacturer, Yost, at a cost of 75,000 euros each. Five houses arrive and Zaza erects the houses on Blackacre in the last six months of 2008. Zaza has hired five men ('the workers') to erect the houses and develop the site.

An unexpected liquidity crisis causes a monetary depression within eighteen months of the contract being agreed. The Bank of England reduces the base rate of interest each quarter until it reaches half a percent. X2U write to Zaza and inform them that in the current circumstances they require the immediate return of the money advanced to Zaza. Sterling has depreciated 40% against the euro since Zaza ordered the houses from Yost. Because credit has largely disappeared, house purchasers face great difficulty in obtaining financing to purchase houses. Zaza is struggling to pay the workers.

Advise Zaza.

This question is concerned with the performance and non-performance of contracts. Zaza will want to know if the sudden changes in the world's financial markets are such as to frustrate the various contracts entered into by Zaza. To answer this question, candidates needed to analyse the facts given, ascertain the relevant issues and apply the law to resolve these issues.

It is best to consider each contract in turn in connection with the case law concerned with frustration (e.g. *Davis Contractors Ltd v Fareham Urban*

District Council (1956) and *National Carriers Ltd v Panalpina (Northern) Ltd* (1981)). The contract to purchase Blackacre is complete and cannot now be frustrated. Is the mortgage with X2U Mortgages Ltd frustrated? A good answer would consider the fact that it is impossible to pay interest under the mortgage because of the rapid decline in the Bank of England's base rate. What effect, if any, does this have upon the mortgage contract? The third contract to consider is the contract with Yost. Has it been frustrated because of the rapid devaluation of sterling against the euro? Or is it simply more expensive to perform a subsisting contract? The fourth set of contracts to consider are those with the workers hired to construct the houses. If the other contracts are frustrated, are their contracts also frustrated? A good answer would indicate that if the contracts are not discharged by frustration then Zaza will be in breach of contract if it refuses to perform the contracts.

Candidates also needed to give an indication of the application of the Law Reform (Frustrated Contracts) Act 1943, and those cases which interpret this legislation, to the particular contracts in this case.

Material necessary to answer this question is set out in Chapter 15 of the subject guide. Candidates might also have usefully employed the material set out in past Contract newsletters available on the VLE, notably 'Contracts discharged by frustration' concerned with the decision in *CTI Group Inc v Transclear SA* [2008] and 'The development of the doctrine of frustration' concerned with the topic in more general terms.

Question 8

'[W]here the breach of contract causes physical damage, the test of remoteness in such cases is similar to that in tort. The contractor is liable for all such loss or expense as could reasonably have been foreseen, at the time of the breach, as a possible consequence of it.' (Lord Denning M.R. in *H. Parsons (Livestock) Ltd. v Uttley Ingham & Co Ltd* (1978))

Does this represent the modern test of remoteness in the law of contract?

This question required candidates to consider how remoteness operates to limit damages awards for a breach of contract. In particular, to what extent, if any, have more modern cases deviated from Lord Denning's statement in *Parsons v Uttley Ingham*?

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].