English Law of Contract (JUS 5260)

Spring 2021

Exam question: guidance notes

[**Overall remarks:** A major challenge presented by this exam is that students were only permitted to write an answer with a maximum of 3,000 words and yet the exam raises quite a large number of issues. Tackling each of these issues in depth would easily exceed the word limit, so students' treatment of them (or at least some of them) will necessarily be superficial. Students were informed prior to the exam that they ought to be very concise in their answers and that they could use bullet-points if they needed to, also for the 'essay' style part of the exam (question 2). Accordingly, brevity or use of bullet-points should not be penalized. It is also important to note that, due to the pandemic, all teaching at the Faculty of Law has been carried out online in the Spring semester 2021 and access to student reading rooms has been subject to significant restrictions. As the pandemic has made the study situation extremely demanding, grading must take this into account. Finally, although the scenario in question 1 plays out at least partly in Scotland, there is an implicit assumption that the relevant law is English law of contract. Students ought not to be penalized for failing to raise the possibility that the result of the legal resolution of the disputes at hand might differ on minor points were Scottish law of contract applied.]

Answer both of the following questions. They are given equal weight in the determination of the final grade. Note that the first question has three parts.

1(a). Whizz Wheels (WW) is a German company that sells small electric scooters that are predominantly intended for use on footpaths and cycle paths. Lazy Customer (LC) is a UK-based company that plans to get into the business of hiring out electric scooters to people in Glasgow who want to get quickly from one spot in the city to another spot in the city without much physical effort. Given the large size of Glasgow, LC wants the scooters to have a minimum range of 70km on one battery charge. With such a range, LC believes that its scooters would rapidly dominate the scooter rental market in Glasgow, which is serviced by scooters with a considerably shorter range.

In August 2020, LC contacts WW to find out if WW can supply the scooters it wants for its planned Glasgow business venture. The communication between LC and WW takes place via a sales agent of WW. In the course of the communication, LC asks the sales agent whether the scooters that WW sells have a 70km minimum range. The sales agent responds: 'I believe that the scooters have that range. Although I have not personally tested their range, I am pretty sure they can easily do 70km with a full battery. After all, the scooters have the best batteries on the market'. As for price, the sales agent says that LC can get a 'bargain deal' in which it pays £200 per scooter if it purchases a minimum of 1,000 scooters.

There is no further communication between LC and the sales agent for two months. During that period, LC considers several scooter models marketed by other companies. LC also engages an investigative firm to look carefully into the accuracy of the sales agent's claim regarding the range of the WW scooter. The firm manages to find a 'best-value-for-money' scooter survey published by a consumer organisation in California. In the survey, the range of the WW scooter is specified as 75km. LC management is informed of this. After reviewing

alternative scooter models, LC decides that the WW scooter deal is the best one for its purposes. In mid-October, LC resumes contact with the WW sales agent, ordering 1,200 scooters at the price of £200 per scooter. The agreement also specifies that the scooters shall be delivered in four instalments of 300 scooters each, over a 12 months period. The agreement does not contain any specification of the range or battery life of the scooters.

The first instalment of 300 scooters is delivered in late November. Unfortunately, LC soon finds out that the scooters' range is considerably less than 70km when the air temperature is cold – which it usually is in Glasgow during the autumn and winter. And LC finds out that the Californian survey was undertaken in Los Angeles, where air temperatures are regularly a lot warmer than in Scotland.

LC plans to sue WW for damages for breach of contract. It also plans to bring the contract to an end before the remaining three instalments of scooters are delivered. Alternatively LC plans to sue WW for misrepresentation. Advise LC on the legal prospects of all three plans, and give reasons for your advice. You are not required to assess the measure of damages in any detail.

[**Answer:** There are three lines of analysis here: one concerns the ability to sue for damages; the other the ability to discharge the contract; and the third the ability to sue for misrepresentation. Resolution of the first two lines of analysis depends on whether or not the statement by WW's sales agent regarding the scooters' range is a term of the contract. The latter issue ought to constitute a large part of a good answer. Resolution of the third line of analysis (concerning misrepresentation) also turns on the status of the agent's statement, more particularly whether or not the statement constitutes a misrepresentation.

An additional preliminary point is that the agent can be assumed to have the proper legal authority to enter into contractual relations on behalf of WW (the principal) with respect to sale of the scooters. Students who fail to raise this point should not be penalized as, firstly, the lectures do not elaborate on the legal complexities of agent-principal relationships, and, secondly, the case scenario does not suggest that the sales agent is acting outside the authority provided by WW.

On the issue as to whether the statement by the sales agent regarding the scooters' range is a term of the contract, a good answer would note that, in order to be a term, the statement must be more than a mere representation. This means that the statement must involve a promise as to its truth or, formulated alternatively, the statement maker must take personal responsibility for the statement. In this particular situation, it is not entirely clear-cut that the statement meets this test as the sales agent's estimate of the scooters' range is couched with the qualifications 'I believe' and 'I have not personally tested'. Nonetheless, the statement is rounded off firmly and in a way that arguably gives the impression that the agent takes personal responsibility for its truth. Thus, there are solid grounds for arguing that the statement is more than a mere representation.

This does not mean, though, that the statement is necessarily a term of the contract given that the written agreement (or part of the agreement) omits reference to the scooters' range. Hence, a good answer would go on to note that for the current situation where the agreement (or part of the agreement), which is set out in writing, omits an oral statement made during contractual negotiations, English courts have placed weight on a number of factors to help determine whether or not the statement is a term. At the same time, a good answer would

observe that all of these factors are simply points of departure for resolving what is essentially a question of fact; no single factor is decisive.

One factor is that the contract has been reduced to writing. This can give rise to an assumption that the statement's omission from the written agreement shows that the parties did not view the statement as sufficiently important to be a term. Further, it gives rise to application of the parole evidence rule that restricts the ability of LC to submit evidence extrinsic to the contractual document alleging the existence of terms other than those in the written document. Other factors include the importance of the statement for inducing LC to enter the agreement, the timing of the statement relative to when the agreement was made, the strength with which the sales agent expressed the statement, and the degree to which the agent has special knowledge or expertise regarding the statement's subject matter. An excellent answer would reference some of the 'classic' case law on these points, such as *Bannerman v White*, *Routledge v McKay*, *Schawel v Reade*, and *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd*. Applying the case law to the fact situation at hand, a good answer would note that the parole evidence rule is nowadays subject to so many exceptions that it has little traction. So, for example, if LC argues that the written document was not intended to set out all of the terms agreed between it and WW, LC may adduce extrinsic evidence of the alleged term regarding the scooters' range. A good answer would also observe that two factors support LC's case that the statement regarding range is a term: (i) the range was important to their choice of that particular scooter model; (ii) WW's sales agent was better placed to have the relevant knowledge about range than was LC. However, a good answer would further observe that several other factors weaken LC's case: (i) it is unclear whether LC communicated to the sales agent the importance of range for its choice of scooter; (ii) the considerable length of time between the making of the statement and the conclusion of the agreement; and (iii) the sales agent's statement was less than emphatic. A good answer is not expected to reach a definite conclusion as to whether LC would win its case on this point; what is important is that the answer lays out the various factors and discusses their weight, with some references to case law. However, a good answer would probably conclude that LC will face an uphill battle to persuade a court that the statement is a term.

A good answer would then move to the issue of damages, noting briefly that if the statement is a term, LC will be entitled to damages. There is no need to consider the measure of damages.

A good answer would next deal briefly with the issue of discharge, noting, first, that if the statement is a term with the status of condition or is an innominate term breach of which has serious consequences, LC can elect to bring the contract to an end (in addition to claiming damages). In this particular case, the scooters' failure to meet the range desired by LC most likely constitutes a breach of a condition or, possibly, a breach of an innominate term with sufficiently serious consequences as to permit discharge (again, assuming that the stated scooter range is a term of the contract). Moreover, since not all of the scooters have been delivered, the breach would, in part, technically amount to anticipatory repudiatory breach (assuming that the other 900 scooters also fail to have the requisite range). Further, a good answer would note that LC may elect to treat the contract as discharged (and claim for damages) *before* the rest of the scooters are delivered. Examples of supporting authority are *The Mihalis Angelos* and *Decro-Wall International SA v Practitioners Marketing Ltd*. However, an excellent answer might also warn that if LC does elect this course of action, it may itself run a risk of engaging in anticipatory repudiatory breach of the contract should the statement on range not be a term with the status of condition or should WW's behaviour

otherwise not amount to repudiatory breach. There is no need to elaborate on the test(s) for anticipatory repudiatory breach as set out in, e.g., *Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd*.

Finally, a good answer would consider the issue of misrepresentation, noting that if the agent's statement regarding the scooters' range is not a contractual term, LC might nonetheless be able to get damages for misrepresentation, assuming that the requirements for misrepresentation are met. A good answer would note that a threshold question here is whether the statement is an untrue statement of fact, meaning that it is more than simply a statement of opinion. In this regard, a good answer would observe that particular elements of the statement ('I believe', 'I have not personally tested', and 'I am pretty sure') suggest that the sales agent is merely providing a non-expert opinion, somewhat similar to the situation in the case of *Bisset v Wilkinson*. On the other hand, a good answer would also note that the agent may reasonably be regarded by LC as relatively expert on the matter: the agent's business (or at least part of their business) is marketing WW's scooters. Hence, the agent ought to know the scooters' specifications, and is certainly much better placed than LC to know their range. Moreover, even though the agent's statement is not emphatic, it is, taken as a whole, made quite firmly and confidently ('I am pretty *sure* they can *easily* do 70km with a full battery. After all, the scooters have the *best batteries* on the market': emphasis added). Thus, the character of the statement and statement maker is quite different to what was the case in *Bisset v Wilkinson*. A good answer is not expected to reach a definite conclusion as to whether the statement is more than simply opinion, but it is important that the answer lays out the various factors and discusses their weight, with some references to case law. Nonetheless, a good answer would probably conclude that WW will face an uphill struggle to persuade a court that the statement is merely an opinion.

The next issue that a good answer would address is whether the agent's statement induced LC to enter the agreement. Inducement is another prerequisite in an action for misrepresentation. A good answer would observe, with reference to Bowen LJ's judgment in *Edgington v Fitzmaurice*, that the misrepresentation does not have to be the sole reason for LC entering the agreement but LC's management must have had the agent's statement 'actively present in its mind' when considering whether to contract. The problem for LC is that it hired the investigative firm to examine the accuracy of the sales agent's statement and was informed by that firm of the Californian survey specifying the scooters' range as 75km. Thus, on the face of the scenario, LC seems to have placed decisive weight on the findings of the firm, not the agent's statement. Hence, the situation is reminiscent of that in *Attwood v Small* – a case which a good answer would reference. Nonetheless, an excellent answer would also note that LC could argue that it always had the agent's statement 'active in its mind', and, in making this argument, rely on the following passage from Bowen LJ's judgment in *Edgington*: 'The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact. […] [T]he balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the Plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required.' Again, though, a good answer need not arrive at a firm conclusion on the issue of inducement but note that it is ultimately a question of fact the resolution of which will depend on the evidence adduced.

Next, a good answer would deal very briefly with the consequences for LC if it successfully argues that WW is guilty of misrepresentation. These consequences will depend firstly on whether or not the misrepresentation is fraudulent, negligent or innocent. It is quite clear that fraud is not involved; thus, the consequences will be primarily determined by the Misrepresentation Act 1967, particularly section 2(1). A good answer need only note that section 2(1) sets up a 'burden of disproof' rule, meaning that WW will have to prove, in effect, that its agent's misrepresentation was not made negligently. If WW cannot prove this, it will have to pay LC damages as if the misrepresentation was fraudulent, thus giving rise to a potentially high measure of damages. A good answer would further note that case law shows that meeting this burden of disproof can be difficult, and cite *Howard Marine & Dredging* in support. Lastly, a good answer would point out that if WW can satisfy the burden of disproof, its misrepresentation will be categorized as 'innocent', thus attracting the operation of section 2(2) of the Misrepresentation Act, which gives a court discretionary power to order damages.]

1(b). Consider the following variation to the above scenario. The agreement between LC and WW specifies as a 'condition' that the scooters shall be painted in the light green colour that is the colour used for the entire range of LC products. Unfortunately, the first instalment of scooters are painted with a purple colour. However, the range of the scooters is indeed 70km, even in the relatively cold temperatures of Glasgow.

LC plans to sue for damages for breach of contract and to request that the measure of damages covers the cost of repainting the scooters in the light green colour that it specified in the terms of the agreement. LC argues that having the scooters painted in that colour is an integral part of building up its unique business profile. The cost of repainting each scooter is estimated to be £40 per scooter. Advise LC on the legal prospects of its plan to sue for damages according to the 'cost of cure' measure.

[**Answer:** The task is limited to LC's ability to claim for 'cost of cure'. Thus, a good answer is not required to discuss the issues related to causation (i.e. is the loss for which damages are claimed caused by the breach?) or remoteness (i.e. does the loss for which damages are claimed satisfy the rule in *Hadley v Baxendale*?). What is required here is a consideration of the issue of measure of damages, and a good answer would first note that the usual aim in respect of measure is to cover 'expectation loss' (i.e. to put LC in the position it would have been had the contract been properly performed). A good answer would go on to note that there are two usual methods of assessing such loss, one focusing on the difference in value between the promised performance and the actual performance, and the other focusing on the cost of achieving what was promised (i.e. 'cost of cure'). Furthermore, a good answer would note that a cost of cure award will only be given if reasonable in the circumstances of the case. Here the decision of the House of Lords in the leading case of *Ruxley Electronics* should be cited in support. On the basis of that decision, a good answer would state that reasonableness hinges partly on whether the cost is proportionate to the benefit that LC will obtain, and that the intention of LC to use the money in order to repaint the scooters will also be a relevant factor. A brilliant answer (i.e. A+) might also observe that the exact role played by the intention factor is rather uncertain and contested (see, e.g., Solène Rowan, 'Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure', *Cambridge Law Journal*, 2017, vol. 76, pp. 616-641 – which is not course pensum), and that courts will not police how LC actually uses a cost of cure award once given. Nonetheless, intention is definitely one factor to be taken into account when a court determines whether such an award is to be made. An excellent answer would also note that other factors are relevant, such as the

extent and seriousness of the defect and its ramifications, and whether the remedial work is necessary to achieve the promised performance. A good answer would conclude that, from the case facts, solid grounds exist for arguing that the reasonableness test is satisfied. This is because the light green colour seems important for LC's business profile as it is used for all of LC products, and even though the scooters' colour does not impact on their functionality, the scooters are part of a larger commercial endeavour by LC for increasing its market traction. Accordingly, it is quite likely that LC will use the cost of cure award to repaint the scooters. Further, the term regarding colour is most likely a condition due primarily to the Sale of Goods Act 1979 (see particularly section 13(1A)); in other words, the term is an important one and its breach carries significant consequences for LC. Further, the cost of repainting, while far from cheap, is not completely disproportionate to the benefit involved.]

1(c). Consider yet another variation to the above scenario. Smooth Rider (SR) is a company that is long established in the scooter rental business in Edinburgh, and it is considering extending its operations to Glasgow. SR gets wind of LC's difficulties and thinks it might be able to take advantage of these. SR's sales manager sends LC's sales manager an email in which she asks: 'I've heard you're having some problems with the new scooters. Would you be interested in divesting your scooter fleet and if so, what price?'. LC's sales manager replies: 'We would not accept less than £150 per scooter'. SR's sales manager replies: 'Fine, you've got a deal'. Shortly afterwards, LC receives an offer to buy its scooter fleet for £175 per scooter from Easy Undercut (EU), another scooter rental company. LC accepts the offer. SR is angry and threatens to sue LC for breach of contract. Advise LC whether SR is likely to win the legal action it is threatening.

[**Answer:** This part of the exam concerns whether or not a contract between SR and LC exists. From the scenario, resolution of the issue turns on the status of the communications between SR and LC. What is the status of SR's first communication? A good answer would note that it is not an offer as there is no intention on the face of the email that SR intends to be bound by its communication or, concomitantly, that the communication is capable of acceptance by LC without further negotiation. It is simply a request for information, similar to the plaintiff's telegram in *Harvey v Facey*. What is the status of LC's reply? A good answer would note that it is not an offer but a statement of the minimum price LC would accept, again similar to the status of the defendant's response in *Harvey v Facey*. Thus, a good answer would conclude that there is no offer which SR can accept and that no contract has arisen between the two parties.]

2. Discuss the validity of the following claim: 'English courts have placed overly narrow and arbitrary limits on the scope of application of the doctrine of promissory estoppel'.

[**Answer:** A good answer would first set out briefly the scope of application of the doctrine, citing relevant case law, such as the landmark *High Trees* case or, for a more recent exposition, *MWB v Rock Advertising* (per Kitchin LJ). Essentially, the doctrine comes into play when there is cumulatively: (i) a pre-existing contractual relationship; (ii) a clear promise by one party to the contract that they will not fully enforce their legal rights (under that contract); (iii) an intention by the promisor that the promise be relied upon; (iv) reliance by the promisee on the promise; and (v) a situation in which it would be inequitable for the promisor to resile from their promise. A good answer need not list these criteria in exactly the same way as they are listed here, but replicate them in substance. Nor does a good answer need to deal with each of these criteria in detail.

An excellent answer would also note that there exist additional limits on the doctrine's scope of application, namely that promisory estoppel cannot: (i) ground a cause of action (it is only a defence in the situation where a promisor attempts to resile from their promise); (ii) be applied to a situation of 'increasing pacts' (i.e. where the promisor promises to pay or do more than what the contract originally requires); (iii) be applied when the promisee acts inequitably; and (iv) fully extinguish the promisor's legal rights under the contract (promissory estoppel's effect is primarily suspensory). Relevant case law to be cited on these points includes *High Trees*, *Combe v Combe* and the *Tool Metal* case.

A brilliant answer (A+) might further note that some of the limits on the doctrine's scope of application follow from its origins in equity, which has traditionally operated with special rules, such as 'he who comes into equity must come with clean hands'.

A good answer would also set out the basic rationale for the doctrine; this rationale is useful for structuring the subsequent discussion as to whether the limits placed on the doctrine's scope of application are overly narrow or arbitrary. In this regard, a good answer would note that the doctrine is essentially concerned with preventing inequitable or unconscionable behaviour (thus reflecting its origins in equity as opposed to common law). A brilliant answer (A+) might also elaborate on what precisely is inequitable or unconscionable about the sort of behaviour to which the doctrine applies, noting that the unconscionability essentially inheres in the detrimental effects for the promisee caused by the inconsistency of the promisor's actions. The latter point builds on Cooke's characterization of estoppel generally as a mechanism 'for enforcing consistency' (Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000), pp. 1-2 – not course pensum).

Elaborating on whether the limits placed on the application of promissory estoppel are overly narrow and arbitrary, a good answer would note that some of them are controversial, particularly those that arise from the courts' concern to uphold the doctrine of consideration. In this respect, an excellent answer might bring in Denning LJ's famous line in *Combe v Combe* that the doctrine of consideration 'is too firmly fixed to be overthrown by a side-wind' (the side-wind being promissory estoppel). A good answer would note that if one accepts the need to uphold the doctrine of consideration then the limits placed on the application of promissory estoppel may be viewed in a charitable light (i.e. as not being overly narrow and arbitrary). Yet, a good answer would also observe that there is an ongoing tension between the two doctrines and that there are solid grounds for arguing that this tension has not been resolved by the courts in a logically satisfying way. This point could be illustrated by referencing the tension between *High Trees* and *Foakes v Beer* and by the apparent illogicality of not permitting promissory estoppel to be applied in 'increasing pact' situations (such as *Williams v Roffey*) yet permitting its application to promises to accept less ('decreasing pacts'). Another example of an overly narrow limit in its application concerns the need for a pre-existing contract. Here a good answer might reference developments in other common law jurisdictions, such as Australia, where the courts have dispensed with this requirement and apply promissory estoppel to pre-contractual negotiations. In this regard, an excellent answer might reference the decision of the High Court of Australia in *Waltons v Maher*. A brilliant answer (A+) might further argue along the lines of Chen-Wishart who states: 'If the nub of promissory estoppel is the promisor's unconscionability in inducing reliance on his promise and then reneging on it, it should not matter whether or not there is a pre-existing contractual or other legal relationship between the parties' (M. Chen-Wishart, *Contract Law* (Oxford University Press, 2005), pp. 180-181).]