English Law of Contract (JUR 1260)

Spring 2022

Exam question: guidance notes

[**Overall remarks:** This exam is not especially difficult and students should easily be able to tackle the various questions within the permitted word length. When marking, the indicated grade percentages do not need to be followed precisely; they are simply a rough indication to the students of the relative extensiveness of the answer required.]

Answer all of the following five questions. Expressed as percentages of the final grade, the answers to questions 2 to 5 will each count approximately 22% of the final grade, while the answer to question 1 will count approximately 12%.

1. Adam loses his mobile phone and thinks he probably lost it at the supermarket in his neighbourhood. He places a paper notice on a billboard at the supermarket entrance which reads: "Mobile phone lost. Samsung Galaxy S22 (grey with long scratch on back). Reward of £50 for its return". The notice also has Adam's contact details. Miriam finds the phone shortly after Adam loses it. A day later, she reads the notice and returns the phone to Adam, who then gives her £10 for her effort. Miriam protests that this amount is insufficient. Adam, irritated, tells her that she is not legally entitled to any money for returning the phone to him.

Is Adam's last claim correct? Give reasons for your answer.

[**Answer:** This question tests students' knowledge of the requirements of offer, acceptance and consideration in the context of unilateral contracts. A good answer would conclude that Adam's claim is incorrect and explain this conclusion as follows. First, the reward notice constitutes an offer. Second, the return of the phone constitutes acceptance. Third, the return of the phone also constitutes consideration for the promise to pay the reward. For each of these three points, a very good answer would cite relevant case law, such as the classic judgment in the Carbolic Smoke Ball Co case. Fourth, the fact that Miriam finds the phone before she reads the reward notice is legally irrelevant; what is important is that she returns the phone because of that notice. In respect of the latter point, a very good answer would cite *Williams v Cawardine* and also distinguish the present set of facts with those in *R v Clarke*. Finally, Adam cannot retract his offer because acceptance has already occurred.]

2. Harald agrees to rent out his apartment in Manchester to Erik, who is from South Africa and on a four year contract to work for a UK company. The rental agreement is to run for four years starting on 1st March 2021, and it stipulates a monthly rent of £1500. In December 2021, Erik loses his job due to the economic downturn induced by the Covid-19 pandemic. Harald agrees to reduce the rental amount by 30% until Erik's financial situation improves. In February 2022, Erik wins a large amount of money from the UK national lottery scheme but does not inform Harald of this windfall. In May 2022, Harald finds out about Erik's win. He demands that Erik pay full rent for the remainder of the rental period and repay the outstanding arrears.

What is Erik's legal position and what legal remedies, if any, does he have? Give reasons for your advice.

[**Answer:** This question tests students' knowledge of the doctrine of promissory estoppel. A good answer would first address the four main requirements for the doctrine to apply and conclude that all of these requirements, bar one, are met. The requirement that Erik may have difficulty in meeting is that it would be inequitable for Harald to resile from his promise to accept less payment. The reason for the difficulty is that Erik has not been completely honest in his dealings with Harald. Although Harald's promise to accept less rent was not extracted through deception or duress, the effect of the promise has been allowed to continue for a period beyond what Erik financially needs, due to Erik's failure to update Harald about his improved financial situation. In this sense, Erik is guilty of inequitable behaviour and may fall foul of the general maxim that only those with "clean hands" may benefit from remedies under equity.

A good answer would then address the degree to which Harald can claim a resumption of the original rental agreement and payment of arrears. If Erik's deceptive behaviour is judged as so egregious as to deprive him of any remedy under equity, Harald will be able to demand all of the arrears using *Pinnel's Case* and *Foakes v Beer* as support. These cases basically permit a creditor to resile from their promise to accept less unless the debtor provides extra consideration specifically for the promise. While the cases are controversial they are still valid law. Erik appears not to have provided extra consideration. If, however, Erik is able to plead promissory estoppel as a defence, this would have the effect of preventing Harald from claiming back the arrears but it would not prevent Harald from asking for a resumption of the payment of full rent upon the giving of reasonable notice. On these points, a very good answer would cite cases such as *Central London Property Trust Ltd v High Trees House Ltd* or *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*.]

3. Solveig, who lives and works in Birmingham, wants to sell her Ducati motorcycle. Early on a Friday afternoon, she posts an advertisement for the motorcycle on a noticeboard at her workplace. The noticeboard is for workplace employees to post notices for the exchange and sale of used consumer goods. The advertisement states: "Ducati for sale. Excellent condition. One owner only. £10,000 or nearest offer will be accepted. Telephone (+44) 98692362." Shortly after posting the advertisement, she leaves for Oslo to visit her elderly parents over the weekend and does not return to England until the Monday evening. At 5:30 p.m. on the Friday evening, Brian who is working late sees the advertisement and rings Solveig to make an offer of £8,000 for the motorcycle. Solveig, who is then about to board an airplane for Oslo, answers: "Thanks, your offer is very tempting". Brian then says to her: "Unless you ring me back by 5pm tomorrow, let's assume you've accepted my deal". Solveig answers: "Fair enough".

Solveig does not respond to Brian for the rest of the weekend as she is preoccupied helping her parents with urgent practical matters. When she returns to her house in Birmingham on the Monday, she finds that the man with whom she shares her house—Patrick—has polished the Ducati and repaired some scratches in its paintwork. Solveig is pleased with the sight of the shiny Ducati and regrets that she had intended to sell it. She tells Patrick that she'll pay him £50 for his polishing and repair efforts. The next day, Brian rings Solveig under the assumption that he has a legal right to the Ducati. She tells him she is not selling the

motorcycle, and he responds angrily. Shortly thereafter Solveig and Patrick have a quarrel and Solveig tells him: "you can forget about the £50 I promised you".

What are the respective legal positions of Brian and Patrick under English law of contract? Give reasons for your answer.

[**Answer:** This question tests students' knowledge of the requirements of offer, acceptance and consideration in the context of bilateral contracts. Regarding Brian's legal position, the first issue is whether the advertisement is an offer or an invitation to treat. A good answer would conclude that the advertisement is most likely an invitation to treat and cite *Partridge v Crittenden* in support. Although the advertisement might be seen as an offer because it contains all essential items of information and is pitched in terms of a promise that can be accepted without further negotiation, there is a long-standing tradition to treat advertisements as invitations to treat. Moreover, Brian and Solveig appear to treat the advertisement in the same way. The next issue is the status of Brian's offer to buy the motorcycle for £8,000. This is clearly a valid offer. So the more decisive issue is whether Solveig accepts it. Her initial response ("Thanks, your offer is very tempting") is insufficiently unequivocal to constitute acceptance. As for her second response ("Fair enough"), this is probably best interpreted as agreement to Brian's proposal as to what will constitute valid acceptance of his offer rather than acceptance of the offer itself. A very good answer would also discuss the relevance of the rule laid down in *Felthouse v Bindley* that an offeror cannot stipulate silence as valid acceptance. A rigid application of that rule would further undermine Brian's argument that his offer has been accepted. However, the fact situation here is a bit different from that in *Felthouse* as Solveig seems to respond positively to Brian's suggestion whereas the nephew in *Felthouse* did not respond at all. Furthermore, subsequent case law, particularly *obiter dicta* of Gibson LJ of the Court of Appeal in *Re Selectmove*, recognises that there may be exceptional circumstances in which silence may constitute acceptance, one such circumstance being when the offeree (rather than the offeror) proposes that silence is sufficient. An argument could be advanced that Solveig's statement "Fair enough" can be read as equivalent to such a proposal. But a very good answer would also note that her statement is perhaps too ambiguous to qualify as such, and that it is not she who initiates the proposal but Brian. Furthermore, Gibson LJ in *Re Selectmove* refused "to express a concluded view" on whether an offeree could propose silence as valid acceptance. Overall, a good answer would conclude that it is highly unlikely that there is a contract for the sale of the Ducati.

As for Patrick, a good answer would conclude that he cannot advance a legally enforceable claim for the remuneration that Solveig promised because he has not provided consideration for that promise. His polishing and repair efforts occurred prior to Solveig's promise; they therefore fail to comply with the basic rule that "consideration must not be past". Here a good answer would cite relevant case law, such as *Roscorla v Thomas* or *Re McArdle*. A very good answer might also discuss whether the relationship between Solveig and Patrick is so close or intimate that it raises the issue of intention to create legal relations. At the same time, not enough information is provided about the nature of their relationship to be able to conclude on this point.]

4. Howard Drake is the Director of Construction Dynamics (CD), a company in the business of sourcing and supplying special types of hardwood timber. He enters into negotiations with Build Big (BB) with a view to CD selling BB a large amount of timber. BB sends Howard a letter in the following terms: "We enclose our detailed order and require your written

confirmation of acceptance of the order". The attached detailed order specifies the type, amount and price of the timber, how payment is to be made, and how shipment is to be made. Howard replies in a letter as follows: "As you have made the order direct to me as opposed to my company, I am unable to confirm on my usual printed form which would have standard force majeure and war clauses, but I assume that we agree that the usual conditions of acceptance apply. I am pleased to inform you that my suppliers state they will be able to ship at least 15% of the timber by the end of the month and might even be able to ship more than this, and they will update me on their capacity within a few days. I look forward to this as the first of numerous transactions together to our mutual advantage. Yours sincerely, Howard Drake." CD subsequently fails to supply the timber and BB sues CD for breach of contract. Howard argues that a contract never came into existence because the agreement was too vague and uncertain.

Is Howard's argument valid under English law of contract? Give reasons for your answer.

[**Answer:** This question tests students' knowledge of the requirements of certainty and completeness. A good answer would conclude that Howard's argument is invalid and explain this conclusion utilising all or most of the following points. To be enforceable, an agreement must be certain in the sense that its essential terms must be sufficiently precise and clear to be operationalised, and it must be complete in the sense that all of the essential terms are present. English courts have shown they are willing to go a long way to operationalise an agreement even when its terms are rather vague. If a vague term is inessential, a court may sever it from the rest of the agreement and enforce that which is left. An example of such severance occurring is the case of *Nicolene Ltd v Simmonds* which, like the scenario involving Howard, CD and BB, involved a reference being made to "the usual conditions of acceptance"—a reference that was basically meaningless given that there was no prior history of contracting between the parties. A very good answer is not expected to recognise the direct relevance of *Simmonds*, but might well do so. The important point is that the reference is not necessary to operationalise the agreement between BB and CD and can thus be severed from it.]

5. In two landmark cases handed down in 2015, the UK Supreme Court reformulated the test for validity of liquidated damages clauses. What is the basic thrust of that reformulation and do you think it is a sensible development?

[**Answer:** This question tests students' knowledge of the evolution of case law regarding the validity of liquidated (agreed) damages clauses. A good answer would note the following.

First, such clauses are valid as long as they do not constitute a penalty imposed by one party over the other party.

Second, the original test of assessing the validity of a liquidated damage clause was to ask whether it is a genuine pre-estimate of loss. This test was laid down by the House of Lords in *Dunlop v New Garage Motor Co Ltd* (1915). If the clause was deemed a genuine estimate of loss, it would be upheld. The House of Lords laid down guidelines to assist in the assessment. According to the guidelines, a clause would be penal either if it specifies payment of a sum of money that is greater than the greatest possible loss, or if a larger sum is payable after the non-payment of a smaller sum, or if a single lump sum is payable on occurrence of one or more events, some of which may cause serious and some minor damage.

Third, the Supreme Court's reformulation of the test a century later in the companion cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis* focuses on whether a clause is penal, not whether it is a genuine pre-estimate of loss. A clause will be penal if it "imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation": *Makdessi* [32]. The Supreme Court also held that the fact that a clause is not a genuine pre-estimate of loss does not make it necessarily penal. In other words, the existence of a penalty and of a pre-estimate of loss is not mutually exclusive.

A good answer must also discuss whether the Supreme Court's reformulation of the test is sensible. In this regard, a good answer could argue that the reformulation is welcome because it injects greater realism and flexibility into the assessment. The realism inheres in the recognition that a liquidated damages clause may serve other legitimate functions than simply being a genuine pre-estimate of loss. The flexibility inheres in the holistic consideration of all relevant factors under the aegis of an overarching proportionality assessment. A very good answer would note, however, that at least one aspect of the Supreme Court's reformulation may be criticised, and this is that the Court limited the penalty rule to cases where the specified sum is payable on breach of contract. So if the sum is payable on some other event, it falls outside the penalty rule, even if the sum is penal in nature.]