

English Law of Contract (JUS 5260)

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 seven questions. Expressed as percentages of the final grade, the answers to questions 2 to 5 will each count approximately 20% of the final grade, while the answers to questions 1, 6 and 7 will each count approximately 6%.

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".

At 10a.m. the next day, Frank, who has had to go to his office to print out some personal documents, sees the advertisement for the motorcycle and rings Solveig. However, she is busy cleaning up her parents' garden and does not answer the call. Frank then sends her a text message as follows: "Saw your offer of the Ducati. Will buy. What's lowest price you'll accept?"

Solveig does not respond to either Brian or Frank 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 and Frank each ring Solveig under the assumption that they have a legal right to the Ducati. She tells them she is not selling the motorcycle, and they respond 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, Frank 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 Frank, a good answer would firmly conclude that there is no contract for the sale of the motorcycle to him. His text message is clearly not an offer but a request for information. Solveig has not gone further with it.

Regarding Patrick, a good answer would firmly 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. James owns and runs a large shoe store, which needs renovation. In January 2022, he enters into a contract with Glamour Builders (GB) to renovate the store, with 25 March 2022 as the stipulated date by which the renovation work must be complete. The contract contains a clause stating that GB must pay James £12,000 for every week the work is not completed after the stipulated date. Due to a skilled labour shortage, GB is four weeks late in finishing the work. Before the renovation work began, James was making a profit of £6,000 per week. During the renovation process, the profits dropped to £3,000. James claims that he is entitled to £40,000 from GB arguing that this follows from the clause in the contract and that GB had agreed to this clause when it entered the contract.

Is James' claim valid under English law of contract? Give reasons for your answer.

[Answer: This question tests students' knowledge of the validity of liquidated (agreed) damages clauses. NB: there is a mathematical error in the case scenario—application of the agreed damages clause in the scenario ought to have resulted in James asking for £48,000 rather than £40,000. This error is not significant for how students tackle the question.

A good answer would first note that agreed damages clauses are valid as long as they do not constitute a penalty imposed by one party over the other party. It would then note that the test for determining whether such a clause is penal is to assess whether 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”, as per the Supreme Court in the companion cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis*, para 32. In these cases, the Supreme Court makes clear that the fact that a clause is not a genuine pre-estimate of loss does not make it necessarily penal. This is in contradistinction to the earlier test laid down by the House of Lords in *Dunlop v New Garage Motor Co Ltd* (1915). The Supreme Court's test necessitates holistic consideration of all relevant factors under the aegis of an overarching proportionality assessment. While the focus of the *Dunlop* test is no longer valid, the Supreme Court permits some use of the guidelines developed in *Dunlop* 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.

A good answer would conclude, in light of the above, that the sum payable in the scenario is most likely to be regarded as excessive. Hence, James's claim is probably not valid.]

6. Jenny sees photos posted on Instagram of a colourful street parade that occurs on 1 June each year in a picturesque village in Yorkshire. She thinks that it'd be cool to watch the parade live so she decides to hire a room with large windows overlooking the street where the parade usually takes place, the hire being for just one day: 1 June 2022. She enters into a hire agreement for the room on 15 May 2022 and pays a £100 deposit. Unbeknown to both Jenny and the landlord, the parade was cancelled on 12 May 2022 for security reasons. Jenny claims that the hire agreement is frustrated and that she is entitled to get back the deposit money.

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

[Answer: This question tests students' knowledge of the doctrine of frustration. The answer is straightforward: Jenny's claim is not valid because the event that allegedly gives rise to frustration occurred before the contract was entered into. If she has a remedy, it is by applying the doctrine of mistake, but students are not expected to apply that doctrine as it is not covered in the course. Students are, however, expected to know that a prerequisite for discharge of a contract through frustration is that the frustrating event occurs after the contract is entered into. Given that reimbursement of the deposit money is also governed by the doctrine of mistake, a good answer does not need to deal with this aspect of Jenny's claim.]

7. In *Avon Insurance plc v Swire Fraser Ltd*, Mr Justice Rix stated that “a misrepresentation should not be too easily found”. Why did he make this statement?

[**Answer:** This question tests students’ knowledge of the doctrine of misrepresentation. A good answer does not need to give a lengthy account of the doctrine but focus on that aspect of it that causes the statement by Justice Rix. Essentially, his statement is due to the extensive damages available in cases of misrepresentation under s. 2(1) of the Misrepresentation Act 1967. A good answer would note this and elaborate briefly on the operation of s. 2(1), highlighting the fact that damages under that provision are to be assessed as if the misrepresentation was fraudulent, thus opening up for recovery for all direct losses suffered as a consequence of the misrepresentation, regardless of their foreseeability. A good answer would cite relevant case law on point, such as *Royscot Trust Ltd v Rogerson*, *Doyle v Olby (Ironmongers) Ltd* and *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*. A very good answer would also note the role played by the onerous burden of proof (or, more accurately, disproof) under s. 2(1) as this increases the likelihood of misrepresentation leading to damages payouts pursuant to that section. In this regard, the case of *Howard Marine & Dredging Co Ltd v A Ogden & Sons Ltd* could be cited. A very good answer might (but does not have to) note some of the controversy surrounding all of this case law. A very good answer might also note that the Court of Appeal recently cited the statement by Justice Rix with approval in *SK Shipping Europe Ltd v Capital VLCC 3 Corp* [2022] EWCA Civ 231 (25 February 2022).]