

MARK SCHEME for the May/June 2007 question paper

9084 LAW

9084/03

Paper 3, maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began.

All Examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes must be read in conjunction with the question papers and the report on the examination.

- CIE will not enter into discussions or correspondence in connection with these mark schemes.

CIE is publishing the mark schemes for the May/June 2007 question papers for most IGCSE, GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.

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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

- recall, select, use and develop knowledge and understanding of legal principles and rules by means of example and citation

Analysis, Evaluation and Application

- analyse and evaluate legal materials, situations and issues and accurately apply appropriate principles and rules

Communication and Presentation

- use appropriate legal terminology to present logical and coherent argument and to communicate relevant material in a clear and concise manner.

Specification Grid

The relationship between the Assessment Objectives and this individual component is detailed below. The objectives are weighted to give an indication of their relative importance, rather than to provide a precise statement of the percentage mark allocation to particular assessment objectives.

Assessment Objective	Paper 1	Paper 2	Paper 3	Paper 4	Advanced Level
Knowledge/Understanding	50	50	50	50	50
Analysis/Evaluation/Application	40	40	40	40	40
Communication/Presentation	10	10	10	10	10

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Mark Bands

The mark bands and descriptors applicable to all questions on the paper are as follows. Maximum mark allocations are indicated in the table at the foot of the page.

Indicative content for each of the questions follows overleaf.

Band 1:

The answer contains no relevant material.

Band 2:

The candidate introduces fragments of information or unexplained examples from which no coherent explanation or analysis can emerge

OR

The candidate attempts to introduce an explanation and/or analysis but it is so fundamentally undermined by error and confusion that it remains substantially incoherent.

Band 3:

The candidate begins to indicate some capacity for explanation and analysis by introducing some of the issues, but explanations are limited and superficial

OR

The candidate adopts an approach in which there is concentration on explanation in terms of facts presented rather than through the development and explanation of legal principles and rules

OR

The candidate attempts to introduce material across the range of potential content, but it is weak or confused so that no real explanation or conclusion emerges.

Band 4:

Where there is more than one issue, the candidate demonstrates a clear understanding of one of the main issues of the question, giving explanations and using illustrations so that a full and detailed picture is presented of this issue

OR

The candidate presents a more limited explanation of all parts of the answer, but there is some lack of detail or superficiality in respect of either or both so that the answer is not fully rounded.

Band 5:

The candidate presents a detailed explanation and discussion of all areas of relevant law and, while there may be some minor inaccuracies and/or imbalance, a coherent explanation emerges.

Maximum Mark Allocations:

Question	1	2	3	4	5	6
Band 1	0	0	0	0	0	0
Band 2	6	6	6	6	6	6
Band 3	12	12	12	12	12	12
Band 4	19	19	19	19	19	19
Band 5	25	25	25	25	25	25

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Section A

- 1 The range of common law and equitable remedies available to complainants suggests a solution is available for every breach of contract.**

Using suitable examples from case law, analyse the truth of this statement.

Cursory examination of the remedies available for breach of contract might indeed suggest that there is a solution for every sort of breach. However, closer examination discloses two main gaps in provision: in relation to *interests protected* and to *practicalities*.

The law focuses mainly on one type of loss: financial loss to the innocent party to the breach. In general, the law ignores mental distress, anxiety and inconvenience caused by breach. Candidates might consider the sort of situation where, for example, under the terms of a contract, a customer pays a builder a large sum of money to buy materials and get a job started, only for the builder to start the job, having spent very little of the customer's money and then fail to return to do any more. If the builder fails to return to do the job, not only is the customer financially out of pocket, but s(he) will often experience considerable mental distress trying to cope with the financial loss, which is seldom if ever recoverable.

Even where available remedies would provide an adequate solution, it would often be totally impractical for a claim to be made, because the costs and/or the time and effort required to undertake litigation are disproportionately high when compared with the amount that could be claimed.

- 2 Compare and contrast the roles played by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 in controlling the use of contract clauses that attempt to limit or exclude liability.**

Candidates are expected to draw comparisons, showing areas of overlap and similarity as well as highlighting significant differences in approach and effect. Some examples might include:

Unfair Terms in Consumer Contracts Regulations 1999	Unfair Contract Terms Act 1977
Restricted to contracts between 'consumers' and 'sellers or suppliers'. Consumer = human being only.	Broader approach to cover anyone who 'deals as a consumer'. Consumer = humans and bodies corporate
Applicable to all manner or contract terms.	Applicable simply to exclusion clauses
Applicable only to terms that have not been individually negotiated	Takes account of relative bargaining strengths, inducements accepted etc.
Terms do not need to be in writing	Terms expected to be in writing
Test of unfairness	Test of unreasonableness

Candidates who simple recount a list of facts relating to one piece of legislation followed by a similar list relating to the other will only warrant marks in band 3, however detailed, unless a clear attempt has been made to actually draw comparisons and make contrasts; this must not be left for the examiner to deduce or infer.

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3 Assess the contribution of equity to the rules limiting the effects of mistake in the formation of a valid contract.

Candidates should start their response by clarifying the general principle of law relating to contracts induced by mistake. The law takes the general view that the parties negotiating a contract should take sufficient care that they are not entering that contract under any sort of misapprehension and that no relief will be offered if one or both fail to do so. However, certain types of mistake of fact which precede and induce the contract have been recognized by common law as sufficiently fundamental as to undermine the true consent given by the parties and, as a consequence, render the contract void. Candidates should go on to **outline** the key types of mistake that have this effect: common mistake as to the existence of the subject matter, mutual mistake as to the identity of the subject matter, unilateral mistake as to the identity of the other contracting party and mistakenly signed documents.

The focus should then turn to the role of equity from historical and present day perspectives. Candidates should examine the areas in which equity has historically granted relief supplementary to the common law and the significance of it.

The impact of the Court of Appeal’s decision in *Great Peace Shipping Ltd v Tsavlis Salvage International Limited* should then be explored and assessed.

Historically, the main contribution of equity would appear to be in the realms of common mistake. Common mistakes as to the existence of the contract’s subject matter render the contract void at common law (e.g. *Couturier v Hastie*; *Cooper v Phibbs*), but similar mistakes as to its quality have had no such effect, even if the quality of goods is a major factor (e.g. *Harrison & Jones v Buntin & Lancaster*). Equity took the view that this can be a very harsh approach and has consequently allowed contracts to be rendered voidable in these instances and thus achieved a more just solution to the problem (e.g. *Bell v Lever Bros*). In some circumstances, however, the just solution has resulted in equity setting contracts aside and imposing terms on which that can be done (e.g. *Solle v Butcher*). These principles have been impacted significantly by the decision in *The Great Peace*; the Court of Appeal concluding that the decisions in *Solle v Butcher* and *Bell v Lever Bros* could not be reconciled and that, therefore, there is no role for equity: wherever the contract is valid at common law, it should also be valid in equity. The Court of Appeal expressed the view that it is for Parliament to permit any necessary flexibility to our law of mistake.

In the area of mutual mistake, equity follows the law and rarely allows it to affect a contract unless it is to refuse specific performance and in the case of unilateral mistake, again, equitable relief has been very rare indeed. In the case of mistakenly signed documents, in some instances, the equitable remedy of rectification may be allowed to alter a contract so that it does coincide with the true agreement of the parties.

Candidates should conclude with an assessment of whether the overall contribution of equity has been significant or not.

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Section B

4 Consider Cecil’s potential contractual liability towards Peter and the possible remedies that Peter might seek from Cecil.

Candidates should explain that when statements are made in order to persuade the other party to enter into a contract, those statements are called representations, but if they turn out to be untrue they are known as misrepresentations. Given the maxim, caveat emptor or let the buyer beware, the onus is on buyers to make sure, as far as they possibly can, that they are very careful when entering contracts. However, active misrepresentations of fact are recognized as vitiating factors undermining the consensus ad idem required and thus render a contract voidable at the innocent party’s option.

Key points to be emphasized: statement should be of fact (*Bisset v Wilkinson*); made before the contract was made and did not become a term of the contract; one of the causes to induce the contract (*Redgrave v Hurd*). Conclusions should then be drawn re the case in question. Were Cecil’s statements factual? Were they made with the intention that Peter should rely upon them? Did Peter rely upon them when entering the contract?

If so, the contract is voidable, so provided that an unreasonable amount of time has not elapsed, Peter would be free to avoid the contract at least and possibly sue for rescission if Cecil refuses to co-operate. He might also be able to obtain compensation too, but that would depend on whether the misrepresentation was made innocently, negligently or fraudulently. Definition, discussion and conclusion is expected for each possibility.

Candidates are expected to debate the issues and draw clear, compelling conclusions, fully supported by case law references.

Candidates may argue the case on the basis of offer and acceptance and terms alone. Credit will be given, but limited to a maximum mark within mark band 3.

5 Using relevant case law, discuss Nazir’s potential liability towards Abdul for the £700 that he still owes, even if he does dig Abdul’s garden.

Part payment of a debt does not discharge the debt, even if the creditor agrees to forego the outstanding amount because no consideration is given for the promise to forego payment. However, there are exceptions to this somewhat harsh common law rule: in *Pinnel’s Case*, it was recognised that payment of a lesser sum could discharge a larger debt if the mode of payment is changed (as the original contract would then be discharged by accord and satisfaction).

Candidates need to consider whether the circumstances of this case would allow the courts to discharge Nazir from his contractual liability. Nazir contracted to pay £7000 by ten equal instalments and he has defaulted on the last one. Clearly, unless the doctrine of equitable or promissory estoppel is invoked, Nazir would be liable for the £700 unpaid. However, Abdul has promised to forego the £700 due if Nazir digs his garden. Whether or not Nazir completes the digging, would the court consider the promise to perform that act sufficient fresh consideration in return for the promise to forego the £700?

Candidates may also consider the position should the doctrine of equitable or promissory estoppel be invoked. Are all the conditions present for the doctrine to be deemed applicable?

Candidates are expected to debate the issues and draw clear, compelling conclusions, fully supported by case law references.

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6 Advise the two parties regarding their respective legal positions in this dispute.

The crux of this question lies in the remedies provided by the law for non-fulfillment of a contract. Has a contract been breached and what remedy is available to the parties concerned?

It would appear on the face of it that the boat-builder has completed his part of the bargain. He has built and delivered the boat to his customer. It would appear, therefore, that, if nothing else, the supplier is entitled to receive payment and to bring an action for the price if payment is not made. Questions of quantification and remoteness would not arise as Garfield would simply claim the £10 000 purchase price agreed when the contract was made. All other things being equal, such a claim would apparently succeed as long as Winston accepted delivery of the boat. Had he rejected delivery on the grounds that it was too late, time being of the essence to the contract, (i.e. if he repudiated the contract) then such liability to pay the agreed price may not exist.

So what of the compensation agreed in the contract for late delivery? Whilst it is not uncommon for such terms to be included in contracts, they are not always enforceable as agreed. Before Winston can successfully make a counterclaim against Garfield, the court would have to be satisfied that the £100 per day compensation which was agreed amounted to a genuine attempt to estimate the loss likely to be suffered as a consequence of the boat not being ready on time (i.e. liquidated damages). If that can be proven, then the court would permit a counterclaim for the £1500 apparently payable. If, on the other hand, the courts think that the amount of compensation agreed are simply there as a threat in order to compel performance (i.e. a penalty clause), the agreement would be held invalid (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Company Ltd*). That is not to say that a court would not award damages for any actual loss caused by the delay in delivery of the boat; it simply means that the previously agreed amount would not necessarily be awarded.

Candidates are expected to debate the issues and draw clear, compelling conclusions, fully supported by case law references.