

**MARK SCHEME for the May/June 2011 question paper
for the guidance of teachers**

9084 LAW
9084/32 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, which would have considered the acceptability of alternative answers.

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

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

Cambridge is publishing the mark schemes for the May/June 2011 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 arguments 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 Silence never amounts to an actionable misrepresentation.

Using case law to support your arguments, critically assess the truth of this statement.

In order to set the response in context, candidates should define (untrue statement of fact etc) and explain the term misrepresentation and explain that, if proven, it is a factor recognised as vitiating the consent given to a contract and renders the contract voidable at the innocent party's option.

Some candidates will venture to explain the different types of misrepresentation in detail, but only marginal credit should be given for this as it is not technically called for by the question.

In general, only active misrepresentations made orally, in writing or by conduct are considered actionable. Silence does not usually amount to a false statement, even if highly significant facts are withheld or concealed. Candidates should be aware of the maxim caveat emptor which imposes a duty on the buyer to ask questions which commit the seller to make known particular facts which he would otherwise have withheld. Equally, there is no duty to correct what has clearly been a misunderstanding.

However, four exceptional circumstances should be identified by candidates and discussed: contracts uberrimae fidei (where vital facts are known by one party only and the other party has no independent means of ascertaining those facts); subsequent falsity (true when made, but by the time the contract is made become false due to changed circumstances – *With v O'Flanagan*); partial disclosure (what is said is true, but misrepresentation occurs because of what has been left unsaid – *Dimmock v Hallett*); fiduciary relationships (where trust is placed in another to disclose relevant facts).

Responses based purely on factual recall will be limited to maximum marks within band 3.

2 The *contra proferentem* rule no longer serves as a useful tool for the interpretation of exemption clauses in contracts. Discuss.

Once it has been established that an exemption clause has been incorporated into a contract, the scope of the clause needs to be established. Does it cover the sort of and extent of the breach that has occurred?

Candidates should recognise that whilst the interpretation and validity of exclusion clauses is now largely controlled by statute (UCTA & UCTRR), there still remain many types of contract to which they do not apply.

The courts use the contra proferentem rule when trying to reach such decisions. Candidates are expected to provide a rudimentary explanation of the Latin phrase to the effect that if the wording of an exemption clause is in any way ambiguous, it will be interpreted in the least profitable way for the party seeking to rely upon it to limit or exclude liability. The extent to which this interpretation tool is "useful" must be debated.

Given that exemption clauses are commonly constructed in vague and unclear language so as to conceal their true purpose, the probable conclusion that needs be drawn is that it is a very useful tool indeed. Candidates might give example cases such as *Houghton v Trafalgar Insurance Co (1954)* or *Middleton v Wiggins (1995)* to support this view.

Better candidates will also point out that whilst applicable to all types of exemption clause, rigorous application is commonly reserved for attempts to exclude rather than just limit liability.

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3 The intention to create legal relations is the least important of the elements of contracts.

Critically assess this statement, using decided case law to support your conclusions.

It is indeed rare for cases to be brought in contract which involve problems with the requirement of intention to create legal relations. The reason, simply put, is that most of the relatively trivial agreements, which would otherwise be excluded by this requirement, are already excluded by the need for consideration.

The requirement of intention to create legal relations is only questioned when valuable consideration is present but, nevertheless, someone may wish to argue that the agreement is not a contract.

Candidates must cite cases and explain their outcomes. Typical examples that could be cited and discussed are: *Carlill v Carbolic Smoke Ball Co* (merely a 'puff'); *Esso Petroleum v Customs and Excise* (trivial – no contractual right); *Rose and Frank v Crompton Bros* (negative intention expressly stated); *Balfour v Balfour* (domestic agreements).

Responses based purely on factual recall will be limited to maximum marks within band 3.

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Section B

4 Discuss Lena's legal rights to the reward if Jay refuses to give it to her.

An outline of the essentials of a valid contract; emphasis expected on offers and invitations to treat and acceptance in relation to unilateral contracts. Credit for possible reference to consideration, but nothing for other essentials.

Binding contract requires definite offer and corresponding, unconditional acceptance. Was there an offer made? Advertisement is an invitation to treat, not a firm offer to sell (*Partridge v Crittenden*). Does the advertisement of a reward amount to a firm offer?

Even if it does, candidates should also consider whether the offer had been effectively communicated to Lena. Did she communicate acceptance to Jay? (*Carlill v Carbolic Smoke Ball Co.*)

Even if she did communicate acceptance and a contract was formed, candidates might consider the possibility that the contract may be rendered void for operative mistake as to the existence of the subject matter on the grounds that the parties had contracted for *res extincta*.

Candidates must discuss the issues, draw a clear, compelling conclusion and advice given should be clear, concise and conclusive.

5 (a) Advise Sarah whether she is bound by the contract.

(b) Advise Gurdeep of the likely remedies that he might obtain if he decides to sue her.

Candidates are not required to know anything about contracts in restraint of trade.

There are two issues that require attention in this question. The first is whether Sarah might be able to wriggle out of the signed contract and the second addresses the possible equitable remedies that Gurdeep could seek against her if the contract is valid.

Candidates should address these issues in turn.

Discussion of the case. There is potential to discuss the issue of mistake in the light of the decision in *L'Esrange v Graucob* etc re written contracts. Candidates might identify that Sarah would need to raise successfully a plea of non est factum (must be defined). However, this plea is unlikely to succeed on two counts: firstly, she signed a contract of employment, which is precisely what she thought she was signing, and, secondly, there appears to have been no fraud present (*Foster v McKinnon*, *Saunders v Anglia Building Society*). Candidates should conclude that the contract was, therefore, binding on Sarah; she had simply been careless.

Gurdeep could seek compensation as of right or he might seek an equitable remedy instead. Candidates should emphasise that, unlike damages, these are only awarded at the courts' discretion. Discussion of equitable principles is not required here. Specific performance is one conceivable remedy, but would not be granted for a contract of personal services such as this one. That leaves an injunction. This is one of those borderline cases where, if awarded, an injunction can be used to bring about the same effect. This is exemplified in the case of *Warner Bros v Nelson*. However, more recent cases, such as *Page One Records v Britton* and *Warren v Mendy*, suggest that the courts are watching out for the use of injunctions as a way of achieving specific performance by the back door and the general view is that Gurdeep is unlikely to obtain an injunction to stop Sarah working for Kuldip unless it would leave her with some other reasonable means of making a living.

Candidates must discuss the issues, draw a clear, compelling conclusion and advice given should be clear, concise and conclusive.

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- 6 Using case law to support your answer, analyse the rules relating to mistake and contract and advise Usain as to any consequent remedy that he might realistically pursue against Valda.

Candidates are expected to explain the meaning of mistake and distinguish clearly between operative and non-operative mistakes. In the light of the case facts, common and mutual mistakes should be discussed: did both believe that the offer was made for the same chair or was there a cross-purpose mistake? No credit should be given for discussion or analysis of unilateral mistake.

Discussion should then move on to discuss the effect of operative and non-operative mistakes – contract void if, say, a fundamental mutual mistake (e.g. *Raffles v Wichelhaus*) and to remedies for breach in the event that an enforceable contract exists. The common law and equitable position as regards to mistakes as to the quality (e.g. *Bell v Lever Bros*; *Leaf v International Galleries*) rather than identity (e.g. *Couturier v Hastie*) of the subject matter also need to be explored.

Candidates must perform the required analysis, draw a clear, compelling conclusion and advice given should be clear, concise and conclusive.