

UNIVERSITY OF CAMBRIDGE INTERNATIONAL EXAMINATIONS

GCE Advanced Level

MARK SCHEME for the November 2005 question paper

9084 LAW

9084/03

Law of Contract maximum raw mark 75

This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which Examiners were initially instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began. Any substantial changes to the mark scheme that arose from these discussions will be recorded in the published *Report on the Examination*.

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*.

The minimum marks in these components needed for various grades were previously published with these mark schemes, but are now instead included in the Report on the Examination for this session.

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

CIE is publishing the mark schemes for the November 2005 question papers for most IGCSE and 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	Paper1	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

Question 1

‘Silence, even as to known defects, does not amount to an actionable misrepresentation’.

Using case law to support your arguments, discuss the validity 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).

Question 2

‘An uneasy balance is frequently struck in English Law between rules based on freedom of contract and doctrines designed to protect those in society unable to protect themselves’.

Consider the current rules relating to the use of exclusion clauses in contracts and, using examples, discuss the extent to which such a balance has been achieved?

All contracts are agreements. The term agreement implies a meeting of the minds of those involved. Such agreement (or consensus) is commonly reached as a result of negotiation. Terms are proposed, which may then be refined or declined, but at the end of negotiation are agreed upon. If terms are not deemed acceptable, then a person is free to reject them; there is no compulsion to accept them. At least, that's the theory of freedom of contract.

However, in all too many instances, that real freedom fails to exist. Monopolistic suppliers of goods and services are in a position to dictate terms to potential customers. Customers are still free to decline terms, but if the supplier will not negotiate, the customer is left struggling to find an alternative supplier. Likewise, any commercial supplier can adopt a take it or leave it attitude when dealing with the humble consumer.

Consequently, statutory intervention has been the answer in order to offer protection to those who might otherwise be taken advantage of in the market place. This has taken many forms, but as far as exclusion clauses are concerned, the most significant pieces of legislation have been the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999.

Candidates are expected to consider whether the contents of this legislation have gone too far, such that the desired balance is still not really achieved.

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Question 3

Of the requirements for a binding contract (agreement, consideration and intention), intention to create legal relations is the most recently developed and the least practically important.

Using decided case law to evidence your conclusions, critically assess the truth of this statement.

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 wishes to argue that the agreement is not a contract.

Candidates must cite cases and explain their outcomes. Typical examples that should be cited and discussed are: *Carlill v Carbolic Smoke Ball Co*; *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).

Section B

Question 4

Consider Mustapha's liability for his breach of contract and any remedies that Abdul may pursue.

This question concerns the breach of contract caused by delay and the term in the contract by which the measure of damages to be paid for delay has been agreed from the output.

The focus of discussion should not be about whether a breach occurred, but whether the agreed sum of damages or a higher sum should be paid, given that greater losses than anticipated have accrued.

Predetermined compensation such as this will be called liquidated damages, if the amount specified represents a reasonable attempt to estimate the likely losses to accrue should the contract be broken. In such instances, the court would invoke the contract term and award the amount agreed, regardless of actual losses suffered.

However, if the court feels that the 'agreed' measure of damages to be paid were simply inserted in the contract *in terrorem* in order to frighten the other party into performance, the court would make an assessment of the losses actually suffered, whether they were too remote or not and make its own award of unliquidated damages.

Candidates should debate this issue and draw a clear, compelling and fully reasoned conclusion supported by case law references – failure to do so will impact severely on marks awarded.

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Question 5

Philippe fails to honour the contract with Jean to pay for the cars. Discuss the legal position of (i) Jean and (ii) Philippe's customers.

It is anticipated that candidates will recognise that there is an issue here with the formation of a contract. Essentials of a valid contract may be outlined by way of introduction only, but limited credit will be given.

Candidates should identify the fact that apparently validly formed contracts can become void or voidable if the required consensus ad idem has been undermined by operative mistake, actionable misrepresentation or by duress or undue influence. Focus should then be turned to misrepresentation and unilateral mistake which should be defined, explained and illustrated by reference to case law.

Candidates should recognise the general rules of caveat emptor and caveat vendor and the attitude of the law towards those who do not look out for their own interests and are consequently misled or mistaken.

Candidates should recognise the potential application of the Nemo Dat rule and that ownership in goods passes to the innocent purchaser who buys in good faith from the seller whose own title to goods is voidable by reason of fraudulent misrepresentation. That said attention should be drawn to unilateral mistake (*Cundy v Lindsay*, *Kings Norton Metal Co v Edridge Merrett*) that renders contracts void and no ownership rights pass, hence leaving property recoverable even from innocent third party purchasers.

General, all-embracing and ill-focused responses are to be awarded a maximum mark within mark band 3.

Question 6

Explain the basis of any liability that Jill may have to honour her promise to pay Jack and discuss any remedies that may be granted against her.

Candidate responses should be focused on principles associated with the formation of a contract in general and the doctrine of consideration in particular.

Consideration must be defined (*Currie v Misa* or suitable paraphrase) and explained in order to set the response in context. Candidates are expected to outline the rules of consideration, but should then focus on the rule which says that consideration must not been in the past relative to the promise which it is to support. If Jill fails to pay Jack the money promised, Jack will have to prove that he gave her valuable consideration for her promise to pay him. The consideration that he gave was the air-ticket, the visa and all the hard work it took to obtain them, but this was clearly done in the past relative to the promise to pay him. On that basis, any claim would fail (*Re McArdle*).

However, there are exceptions to this rule of consideration. One such exception, exemplified by the cases of *Lampleigh v Braithwaite* and *Re Casey's Patents* suggests that if services are rendered in circumstances that would give rise to the belief that they will be paid for, a later promise to pay merely fixes the amount and there is no need for further consideration to make that later promise binding.

Candidates should debate this issue and draw a clear, compelling and fully reasoned conclusion supported by case law references – failure to do so will impact severely on marks awarded.