The University of Hong Kong
Department of Law

Academic Year of 2022-2023

Examiner's Report

[This report will be posted onto intranet immediately after the release of exam results]

Course code: JDOC1002 **Course title:** Law of Contract II

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General comments

Overall performance was good. The main areas where students can improve are:

- Issue identification. Students may improve by reading the questions carefully and thinking closely on the topics/legal principles covered in the course to identify all relevant issues.
- Analyse the principles on the facts more closely. Students were often able to set out relevant legal principles but failed to analyse closely the factual details which may affect how the legal principles are to be applied in the case at hand.

Question 1

The main issues raised by this question were:

- whether the contract was frustrated
- whether Green playing was a term of the contract
- whether there was any actionable misrepresentation.

Frustration:

Seeing Green play would be important to many ticket-purchasers but frustration is unlikely to be established because it is unlikely that Green playing is a *common purpose* of Promoters and ticket-purchasers that goes to the root of the contract. What is fundamental, at least from Promoters' perspective, is that there is a match between England and Hong Kong, irrespective of whether any particular player is injured and cannot play. Also, it may be that a player not being able to play because of injury is foreseeable (being something that is common in sports) and hence this is another basis to conclude that there is no frustration.

Whether Green playing is a term

The issue here is whether Promoters' representation of Green playing is a term of the contract or a mere representation. See the principles in *Oscar Chess v Williams* and other cases. Note that if there is such a term, it is an express term and not an implied term.

Whether there is an actionable misrepresentation

A common error on the part of many students was to assume or to assert that there was necessarily a misrepresentation of *fact* because Green did not play. When the advertisements were made, it was (subject to the comments below) unknown whether Green would in fact play at the future date. Promoters' statements about Green playing were statements of intention about the future (or statements of opinion that they believe

that Green will play). Accordingly, the mere fact that Green ended up not playing does not mean that there was a misrepresentation of fact.

There are, however, implied facts that could potentially give rise to a misrepresentation, namely either:

- in the case of a statement of intention: the implied fact that the maker of the statement holds the stated intention (at the time when the statement was made); or
- in the case of a statement of opinion: the implied fact that the maker holds the opinion and has reasonable grounds to make the opinion.

Thus, if Promoters, at the time of the advertisements, already knew that Green was injured and would not play, there is a fraudulent misrepresentation (ie the implied fact that Promoters holds the intention of Green playing is false). Alternatively, if Promoters was aware that Green suffered from injury but did not know definitively whether Green would recover in time, there would be a negligent misrepresentation if Promoters did not take reasonable care in making the assertion that fans could see Green in action (ie the implied fact that Green has reasonable grounds for the opinion is false).

But if the rumours were false and Promoters only realised recently that Green suffered from injury and could not play (well after the contracts were already made for the sale of the tickets), then there is no actionable misrepresentation (not even an innocent one).

Assuming there was a misrepresentation of fact, was Tong induced by the misrepresentation to contract? Many students did not analyse this issue. The facts indicate that Tong was a fan of the English team. It is well arguable that Tong would have purchased the tickets anyway even if he knew that Green would not play. The “but for” test would not be satisfied. Negligent misrepresentation would not be made out; although fraudulent misrepresentation can still be established (since it is sufficient here if the misrepresentation was a material influence in contracting even if the but for test cannot be satisfied).

Mistake

Students could also be given credit for discussing mistake; but this must be on the basis of an assumption that at the time when the tickets were purchased, it was already a fact that Green was injured and could not play as a result. (So here, the doctrine of mistake is relevant instead of frustration.) If both Tong and Promoters were mistaken (ie neither knew at the relevant time that Green would not play), then the issue is common mistake, though an operative common mistake is unlikely to be established (because one injured player not playing arguably does not lead to the contract being fundamentally different). If only Tong was mistaken, then there may be operative unilateral mistake if Promoters knew that Tong was under a mistake as to an intended term (see *Smith v Hughes*).

Question 2

The main issues raised by this question were:

- unconscionability
- breach of contract / repudiation
- damages.

Before commenting on these matters, a preliminary point is that prima facie Casey is bound by the written document which she signed, and that it is unlikely that *non est factum* could be raised. Note that the *Interfoto* rule that onerous terms need to be pointed out to the other party before they will be incorporated into a contract only applies for cases of incorporation by notice and not incorporation of terms by signature.

Unconscionability:

The UCO does not apply as Casey is not dealing as a consumer.

The common law doctrine of unconscionability potentially applies (*Amadio* principles, as accepted by the CFA in *Ming Shiu Chung v Ming Shiu Sum*). Mere imbalance in bargaining power does not mean that there is some special disadvantage or disability of one party to ground unconscionability, but the young age and inexperience of Casey in business matters can potentially amount to a "special disadvantage" within *Amadio* in view of the significant disparity in business experience between Casey and Marco. The disadvantage would be known by Marco. But more contentious is whether Marco acted unconscionably in taking advantage of Casey's inexperience. Factors indicating unconscionability: Marco did not really give Casey a chance to read the document, and the contract contained onerous terms. Opposing factors: although Marco benefits significantly from the terms, he is also bringing his highly-regarded skills and experience to benefit Casey. Better students analysed the issue closely to support a view as to whether Marco acted unconscionably.

Although it was sufficient to discuss unconscionability without discussing undue influence, students could also be given credit for discussing the latter. But any undue influence (actual undue influence) would only arise if, at the time of contracting, Casey was already reposing trust and confidence in Marco.

If unconscionability (or undue influence) can be established, then Casey can rescind the contract under the common law and Casey would not be liable to Marco.

If unconscionability (or undue influence) cannot be established, then there is an issue of whether Casey's conduct amounts to breach of contract giving Marco a right to terminate or whether there is repudiation of future obligations also giving Marco a right to terminate. But is there any term that Casey has breached or is repudiating? The contract is prima facie an agency/management contract under which Marco agrees to provide agency/management services in return for payment. The facts do not indicate any express terms imposed on Casey regarding her work efforts or outputs. But could there be an implied term requiring Casey to act reasonably in making good faith efforts to write songs and to act reasonably in making public performances? (See the *BP Refinery* and *Marks and Spencer* cases regarding the legal requirements for implied terms in fact.) Such an implied term is potentially arguable on the basis that it seems that a significant part of Marco's remuneration depends on Casey's output.

If there is such an implied term, it is likely to be an intermediate term. It may be arguable that there are sufficiently serious breaches or that there is repudiation giving rise to a right to terminate. Marco can elect to keep the contract on foot or elect to terminate (and sue for damages). Students answered well regarding the principle that specific performance would unlikely be ordered against Casey. Overall students also discussed well the principles on damages that Marco could obtain for breach.

Question 3

The main issues raised by this question were:

- consideration and variation of contracts
- economic duress.

A number of students failed to identify the issues regarding consideration and thus did not perform as well as others who canvassed both those main issues.

Payment of $800,000

Is there any consideration from Chips being given in return for ECL's promise to pay the $800,000? Arguably yes, on the basis of either the agreement being a binding settlement agreement (Chips gives up its claim for $1 million which was made bona fide); or that Chips provides the benefit of agreeing to enter into the contract renewal.

But is there duress by Chips? Any duress here is lawful act duress (since the threat not to renew the contract is lawful). See *Pakistan International Airlines*. Similar to that case, it is unlikely that duress is made out as Chips is simply taking advantage of its monopoly position and was not acting unconscionably in manoeuvring ECL into a vulnerable position.

Payment of $200,000

Prima facie ECL is not liable for this amount as Chips had given up its claim to this amount under the binding agreement in 2022 (see above).

But is there a *new* agreement to pay that is binding? Is there consideration flowing from Chips to support ECL's promise to pay? Arguably not. Maintaining good commercial relations with Chips is a benefit from Chips to ECL that can amount to good consideration, but the benefit must be given in exchange as quid pro quo for ECL's promise to pay. Here, Chips did not say anything about not continuing the relationship with ECL if the payment was not made. Nothing was actually said by either party about whether continuation of the business relationship would be dependent on the sum being paid. It seems that the benefit here would not constitute valid consideration because the necessary link between the benefit and ECL's promise to pay is not established (cf *Combe v Combe*).

Some students discussed duress but it was clear from the facts given that no threat was made by Chips (whether expressly or impliedly).

Estoppel is also not so relevant to prevent Chips from claiming the $200,000: the 2022 agreement by Chips to waive the claim to $200,000 is already binding on the basis of contract. The real issue is whether there was a new agreement that was contractually binding. In any event, it seems that estoppel cannot be used as a sword by ECL to recover the amount already paid.

Increase in 10% price

Performing an existing legal duty is no consideration (*Stilk v Myrick*) but conferral of a practical benefit through performance of an existing legal duty may amount to valid consideration: *Williams v Roffey*. There is practical benefit here from Chips to ECL (to support ECL's promise to pay more) as the continued supply from Chips will ensure that ECL can perform (and benefit from) its contracts with its own customers.

But there may be economic duress. Here, it would be unlawful act duress, as the unlawful threat from Chips to breach its contract is illegitimate pressure (*The Atlantic Baron*). The elements of causation and no reasonable alternative are also likely to be established.

But was there undue delay on the part of ECL to prevent ECL from relying on duress? Arguably not, since ECL sought redress immediately after a reasonable alternative became available (to rely on the new supplier).