

**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 there was a contract formed for the purchase of the camera
- whether there was any actionable misrepresentation
- whether there was any operative mistake.

Whether contract formed for sale of the camera that was advertised on the internet:

Students generally demonstrated good knowledge on the basic principles on offer and acceptance (including distinguishing offers from invitations to treat in the context of advertisements), as well as on revocation. Students generally were also able to identify the relevance of the Electronic Transactions Ordinance and the issue of whether the postal acceptance rule applies to email communications.

Although most students were able to apply the law to conclude that the revocation of the offer from the purchaser (received by the seller on the afternoon of 6 March) would be effective if the postal acceptance rule did not apply to the email acceptance from the seller (sent on 2 March but which appears to have been received on 8 March), many students failed to consider further issues, as follows.

- Could the seller's acts of arranging for delivering of the camera on the morning of 6 March amount to acceptance? There may have been a note or letter from the seller delivered with the camera indicating acceptance of the offer from the purchaser; in which case, does the postal acceptance rule apply to delivery by courier? Or alternatively can there be acceptance by conduct? If acceptance was effective on the morning of 6 March, then the revocation came too late and there is a contract formed.
- Further or in the alternative, could there be a unilateral contract formed once the seller arranged for delivery? This depends on the terms of the offer from the purchaser. The email from the purchaser specifically requested delivery to the stated postal address. Is it possible that there was implied dispensation with the

need for specific communication of the acceptance (*Carlill v Carbolic Smoke Ball*)? If so, then again the revocation may have been too late.

Students should remember to think about each factual matter set out in the question and to think closely whether the fact raises any issue. Many students failed to identify the potential significance of the seller's arranging of delivery by courier on the morning of 6 March.

Whether there was misrepresentation by the seller on the model of the camera in the internet advertisement:

The issue here was whether there was an actionable misrepresentation in the advertisement by the seller which renders any contract formed voidable.

Students generally discussed well the principles on misrepresentation, including whether "half-truths" or literally true statements can still be misleading and give rise to an actionable misrepresentation. Better students analysed the principles on the facts more closely by considering whether the photo of the camera (in the advertisement) would have indicated clearly that the camera was the Mark 6 model, in which case arguably there would not have been any misrepresentation.

Whether there was an operative mistake rendering the contract void:

Students generally discussed satisfactorily the principles on unilateral mistake and mutual mistake. If it was not objectively possible to determine what model of the camera was being sold, then there is mutual mistake and the contract is void. If it is objectively possible to determine that it was the Mark 6 model being sold, then there would only be a unilateral mistake on the part of the purchaser and the contract is not necessarily void. The contract could be void if the seller induced the unilateral mistake. For example, even if there is no actionable misrepresentation, was the advertisement still confusing such that the seller can still be regarded as being at fault in inducing the mistake on the part of the purchaser?

Question 2

The main issues raised by this question were:

- whether the contract for hire of the ballroom was frustrated
- whether clause 68 is enforceable.

Frustration:

Most students identified that there was an issue of whether the contract was frustrated due to the illness of Mrs Tran. Better students analysed carefully whether there was frustration of purpose and the issue of whether there was a common purpose on the part of both the hotel and the Trans for the ballroom to be used only for the Trans' anniversary party. Even if there was such a common purpose which could not be fulfilled, there was also an issue of whether the contract terms dealt with the frustrating event such that the contract would not be regarded as frustrated. This latter issue relates to clause 68 and whether it is enforceable.

Whether clause 68 is enforceable:

Clause 68 in the contract provided that the total cost of hire is payable in the event of cancellation of the hire by the hirer for any reason whatsoever.

A minor preliminary issue is on incorporation of clause 68 into the contract. Note that the document containing clause 68 was signed and there would be incorporation of the term by signature. It is unnecessary to consider the principles on incorporation of terms by

notice.

As to whether clause 68 may be set aside, one issue is whether the clause is unconscionable under the Unconscionable Contracts Ordinance. Generally students discussed the legal principles satisfactorily. Many students concluded that the clause was unconscionable without adequately considering the counter-arguments though. For example, does the hotel have legitimate interests to be protected by the clause (eg consider what costs the hotel would have to incur and its potential losses if the hire is cancelled)? While students can legitimately argue and conclude that the clause is unconscionable, the issue is not as clear cut as many answers indicated.

Unconscionability in equity would be less relevant. Note that in the *Amadio* case, there was no benefit to the Amadios at all in the contract, different to the present situation. Moreover, it is doubtful on the facts in the present question whether there was any conduct of the hotel representative that could be regarded as unfairly taking advantage of the Trans. For instance, there is no indication in the facts that the hotel representative rushed the Trans to prevent them from reading the entire contract.

Undue influence is also less relevant on the facts. There is no indication of any trust and confidence placed by the Trans on the hotel representative, nor any impairment of the independent will of the Trans in contracting.

Some students discussed clause 68 under the Control of Exemption Clauses Ordinance. But is clause 68 an exemption clause?

It was relevant to consider whether clause 68 amounts to a penalty under the common law and also whether the deposit paid is a genuine deposit that may not be recovered or whether it is a penalty. Better students were able to address these issues.

Question 3

The main issues raised by this question were:

- whether there was an implied term as argued by the renovation company
- consequences if there was repudiation or breach of contract by the renovation company (regarding inability to complete the works by the contractual deadline of 31 December).

A minor issue was whether the contract was frustrated by the court injunction that results in the delayed completion. Generally students dealt with this issue well by distinguishing the *Codelfa* case, noting that the injunction in the present case was foreseen and in any event the duration of delay would be relatively short.

Implied term

The factual information given in the question expressly raised the issue of implied terms, with the facts stating that the renovation company had sent a letter to the building owner arguing that there is an implied term in the contract that completion by the stipulated deadline of 31 December was conditional on the renovation company being able to carry out the work on the basis of the Three Shift Schedule. Surprisingly then, some students did not address this issue of the alleged implied term. If there was such an implied term, then the renovation company would not be in breach of contract by failing to meet the above deadline.

For the students who did deal with the issue of implied terms, many did not do so adequately. The basic principles on terms implied in fact (see the *BP Refinery* and the *Marks and Spencer v PNB Paribas* cases) should have been discussed and analysed in detail on the facts.

Consequences if there was repudiation or breach of contract

Assuming that there was no implied term as argued by the renovation company, then the indication by the renovation company to the building owner that they cannot complete the renovation works by the contractual deadline of 31 December is a statement of inability or unwillingness to perform a contractual obligation. Is there repudiation giving the building owner a right to immediately terminate? This depends on whether the deadline is a condition or warranty or an intermediate term. If it is an intermediate term, then it is necessary to consider whether the effects of the breach would be sufficiently serious to give the innocent party a right to terminate. Generally, students' performance in addressing these issues was fair.

If the building owner had a right to immediately terminate, or if there was no termination and the renovation company does not in the end complete the works by 31 December, then the renovation company would be in breach of contract (assuming still that there was no implied term as argued by the renovation company). As regards damages that may be recovered for breach, generally students performed well in applying the principles on remoteness of damage from *Hadley v Baxendale*.