

LAW OF CONTRACT I

LLAW1001 – JDOC1001

ACADEMIC YEAR 2024–25

Examiners' Report

Question 1

Question 1 raised issues of offer and acceptance, intention to create legal relations, and certainty and enforceability. Answers in or above the B+ range tended to address all three of these issues. Within this range, the better answers engaged more deeply with the facts and thoroughly explored both sides of an argument. For example, is Eloise's edgy, "you only live once" persona germane to the question of intention to create legal relations? How about her frequent engagement in irreverent banter and endorsement of socially controversial positions on her Twitch livestreams? Does it matter that no other members of the Livestream audience rushed to accept Eloise's supposed offer? Could there be a fruitful analogy here to *Blue v Ashley* [2017] EWHC 1928 (Comm)?

Answers in the B or B- range either missed an issue, conflated issues, or did not devote sufficient time to the crux of the legal problem. To illustrate, specificity and completeness of a proposal bear on the question of whether a statement is an offer or at best an invitation to treat. They also speak to the certainty and enforceability of the proposed terms. Nonetheless, offer and acceptance and certainty are distinct elements and should not be run together. In addition, a fair number of scripts spent significant time and space addressing consideration and even estoppel. There is clearly consideration here. The consideration for a unilateral contract is the promisee's performance. In this case, that would be proving to Eloise—"right now"—that marijuana is harmful to the human body. Difficulties in establishing whether performance has been rendered raise doubts about certainty and enforceability, not consideration.

Answers in the C+ and below range did not spot at least two of the three major issues or made serious errors that demonstrated a lack of understanding of the law. Surprisingly, some answers asserted that intangible things cannot constitute consideration. Most contracts consist of bilateral promises to do or give something, yet no one has ever seen or touched a promise! Perhaps the mistake here is to think that because some things that are intangible have been held not to be consideration, e.g. *Bret v JS & Wife* (1600) Cro Eliz 756, everything that is intangible cannot be good consideration. This proposition does not follow from logic and whether it is a reasonable inference from precedent depends on the ratio decidendi of these rulings.

Overall, most answers can improve by analysing in greater depth the core issues raised by the hypothetical and making full use of the given facts insofar as they are relevant.

Question 2

Question 2 concerned misrepresentation and exemption clauses.

Students mostly spotted that the statement made by Ocean to Alex was a representation, and came to that conclusion by applying the objective test (*Oscar Chess*) and the three indices (*Bannerman v White*, *Dick Bentley v Harold Smith*, *Ecay v Godfrey*). Some students suggested that there was also a term implied in law under Section 16 of SOGO, relying on the fact that Alex had told Ocean that she intended to use the land for a particular purpose, namely to grow bananas. This was in error given that SOGO applies to ‘goods’ rather than real property.

Most students also considered the other elements of misrepresentation: whether the statement was false; what kind of statement it was; whether there was inducement. On the type of statement, various students saw Ocean’s statement as a statement of fact; however, it would have been more correct, as the majority of students did, to classify this statement as one of opinion and to establish whether it was made dishonestly or without reasonable basis (*Brown v Raphael*, *Bisset v Wilkinson*). On inducement, most students correctly applied the test for innocent misrepresentation, under *Assicurazioni Generali*.

Students mostly found problems in the context of setting out the remedies for misrepresentation, and in dealing with the exemption clause. As to remedies, numerous students addressed them after having discussed the exemption clause, which makes little logical sense as only should remedies be available would an exemption clause be relevant. There were two possible remedies: rescission and damages. In relation to rescission, students correctly considered whether there was any bar to it. Some students argued that it would have been impossible to make mutual restitution, because it was not possible to give back the land to Ocean in the exact state in which it was sold. This is not a convincing argument, because it overlooks that what is important is that the land can be given back to Ocean, and it can. There was no bar to rescission. Those students who thought that there was a bar to rescissions incorrectly discussed damages in lieu under s3(2) of the Misrepresentation Ordinance. However, relevant was only s3(1) of that Ordinance, concerning damages in addition. Even those students who correctly considered damages in addition did not do so particularly well, as they did not, by and large, address the requirements in s3(1) in turn (i.e., loss and defence). It should be noted that a significant number of students neglected to address the remedies available.

The exemption clause caused more problems. Students generally were good to understand that incorporation by notice was the issue. However, when it came to interpreting the exemption clause they sought to apply the *Canada Steamship* principles. This was incorrect. It may be true that the misrepresentation by Ocean was negligent. However, this does not mean that there was a negligent breach of contract, which alone would have required application of the *Canada Steamship* principles. Instead, students should have interpreted the exemption clause according to the ordinary rules on construction of contracts (e.g., reasonableness test and contra proferentem rule). The last part of the question concerned statutory controls. The relevant authority was s4 of the Misrepresentation Ordinance, but few students referred to it. Instead, many went into the provisions of the Control

of Exemption Clauses Ordinance, such as ss7, 8 and 11. All of those sections are irrelevant to an exemption clause in connection with a claim in misrepresentation, as they only apply to cases of breach of contract. What students should have done was to apply the criteria for reasonableness under s3 and sch2 to the Control of Exemption Clauses Ordinance, as required by s4 of the Misrepresentation Ordinance.