NATIONAL UNIVERSITY OF SINGAPORE

FACULTY OF LAW

LC1003 LAW OF CONTRACT

AY2018-2019

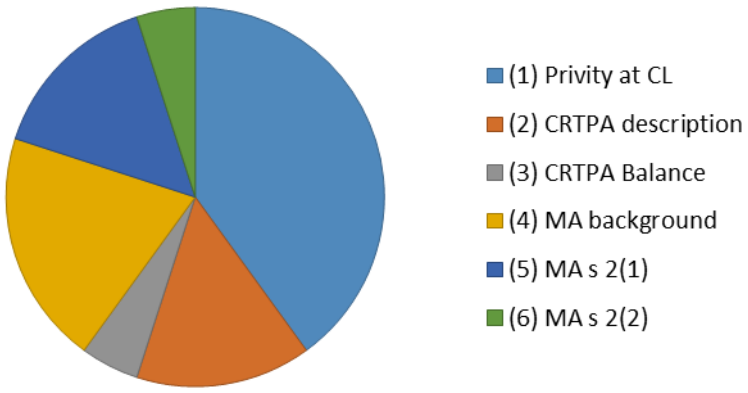
FINAL EXAMINATION – EXAMINERS' REPORT

Question 1

1. **General remarks.** The responses to this question were a little disappointing. Most responses chose to compare the *Contracts (Rights of Third Parties) Act* with the *Misrepresentation Act*; some opted for the *Frustrated Contracts Act* or *Unfair Contract Terms Act*; and a few entirely forgot to discuss another Act. The latter approach was unwise.

2. **Typical response.** A typical response went like this: (1) discuss the development and operation of the privity rule at common law; (2) describe some of the provisions of the CRTPA, e.g., ss 2, 4 and 6; (3) make a comment about balance; (4) describe the law on misrepresentation before the enactment of the MA; (5) discuss the measure of damages under s 2(1) (fraud vs negligence); and (perhaps) (6) say something about rescission under s 2(2). The conclusion usually was: 'The CRTPA is generally good; the MA (or some of it) is bad".

   The allocation of material among these topics was often:



3. **Critique.** You will notice a few things about this kind of response:
   (a) A large proportion of the answer is descriptive ((1), (2), (4)), rather than critically evaluating the question ((3), (5), (6)). Of course, you must supply some background to identify the main deficiencies in the common law. But many answers launched into a fairly detailed discussion of the intricacies and conflicts in privity at common law. That degree of explanation did not suit the question well, particularly given time constraints.
   (b) Many responses dwelled upon straightforward points at the cost of neglecting other issues. Section 2(1) of the MA was the main culprit. The tension between culpability (lack of reasonable grounds / negligence) and measure (fraud) in s 2(1) can be identified and explained succinctly. Some responses devoted 20-25% or more of their material to it. This often meant that they failed to canvass other issues adequately, e.g., the onus of proof point in s 2(1); or other provisions such as s 1, s 2(2) or s 3.
   (c) The question asked about balancing the interests of all relevant parties. There were a few common weaknesses here:
      (i) In relation to the CRTPA, the commentary was often added as an afterthought, following a sequential description of its provisions. It should have been an integrated argument.
      (ii) For both CRTPA and MA, there was a tendency to think that favouritism in opposing directions among different provisions produced balance (e.g., s 2(1) favours the representee but s 2(2) favours the representor, therefore the statute is OK). Where the provisions deal with different matters, that reasoning does not necessarily follow. It sounds suspiciously like a "two wrongs make a right"-type argument.
      (iii) There was also a tendency to assert a conclusion about balance, without justifying it. Sections 3 and 8(2) of the CRTPA are good examples, because there is room for reasonable differences of opinion. Some responses asserted that these provisions struck an appropriate balance while others asserted that they did not. Relatively few students explained *why* they held this view.

4. **Other Acts.**
   (a) The *Frustrated Contracts Act* was a courageous choice. The interplay among its provisions is challenging and a proper evaluation requires some knowledge of the law of unjust enrichment, which you have not yet studied. Most responses managed to point to difficulties in its operation, but few managed a compelling analysis on the issue of balance.

(b) The *Unfair Contract Terms Act* appeared to be a softer target but no student managed to conquer it. There were a few problems. First, some responses confused construction of an exclusion clause with its validity. Secondly, almost all responses took a narrow or superficial approach, typically, by focusing on s 2(2) and saying that an assessment of "reasonableness" balanced the interests of the parties. But there are bigger questions, e.g., (1) is it appropriate to prevent exclusion of liability for death or personal injury but not other harm inflicted negligently? (2) is it appropriate that s 2 applies only to "business liability" (s 1(3))? (3) is it right to treat negligence differently from other kinds of breach, as in s 3, and add the gateway requirements in s 3(1)?

(c) Responses that considered more than one Act apart from the CRTPA rarely did well. The usual problem was that quality of analysis was sacrificed for quantity.

5. **Written expression.** We do not expect you to write perfectly under exam conditions. There were, however, some common errors that are avoidable and should be fixed:

(a) TMAAA (too many acronyms and abbreviations). Using the first letter of a party's name is fine as a shorthand in an exam, as are acronyms for Acts. Beyond that, don't compress uncommon expressions into acronyms just to save typing.

(b) Punctuation and paragraphs help the reader follow your argument. Some responses, unfortunately, imitated James Joyce's famous final episode (Penelope) in *Ulysses*.

(c) The set of facts which entitles a plaintiff to a remedy is a "cause of action", not a "course of action".

(d) Not all litigants and judges are men.

Question 2

There was a range of responses to this question in terms of the issues raised, the depth of discussion, as well as the lucidity, coherence and overall quality of expression.

It is important that students answer all relevant parts of the question. The examiners set out clearly and explicitly the three main parts of the question, so that students know precisely what is expected of them when organising their answers for this question. Apart from a minority of scripts, most students managed to organize their answers in a clear manner to address each of these main parts, namely:

> (i) whether Eric has to pay for the drinks under the first contract with Joe;
>
> (ii) whether Eric can recover the $20,000 which he paid Joe pursuant to the second contract; and
>
> (iii) whether Eric can recover from Joe for Eric's $100,000 potential loss of profits.

It would aid clarity of expression for students to address these three substantive parts separately.

Prominent headings to distinguish between the three aforementioned parts of a student's answer would be helpful as signposts to the reader (examiner). And these headings would also be helpful as visual reminders to the writer (student), to ensure that the student has adequately addressed all three substantive parts.

Furthermore, it is essential that students exercise careful – and disciplined – time management in future examinations. This is something which some students failed (to their detriment) to achieve in this examination. First, students should not spend an inordinate proportion of their time on one (or two) of Questions 1, Question 2 and Question 3, at the expense of the remaining two (or one). Generally, students should not allocate more than 45-50 minutes on any one question. Secondly, students should not spend an inordinate proportion of the allocated time on a couple of issues within one question, at the expense of the other significant issues which should also have been addressed in that same question.

In Question 2, the substantive points of contention which students are expected to address include the following.

(i) Whether Eric can recover (from Joe) the $20,000 payment under the Second Contract.

It is convenient to start with the second contract.

Pursuant to this second putative contract, Eric had already paid the $20,000 price to Joe, but Joe has not yet delivered the drinks. As such, Eric is interested in recovering the

$20,000; however, this requires Eric to assert that this second putative contract is void for illegality or should be rescinded for misrepresentation and, then, to seek restitution of the $20,000 payment. Alternatively, Eric may try to recover the $20,000 as damages for misrepresentation at common law (fraudulent misrepresentation or negligent misrepresentation if a duty of care was breached) or under s 2(1) of the Misrepresentation Act.

The chief issue is whether this second putative contract is invalid for illegality.

If this second putative contract is illegal, the next issue to consider is whether Eric (buyer) should be allowed to sue Joe (manufacturer-seller) to recover the $20,000 already paid over to Joe. This is a claim by Eric for restitution of Joe's unjust enrichment at Eric's expense, on the basis of failure of consideration (no contract and no delivery of drinks) or payment under a mistake (Eric's mistaken belief that the drinks are compliant with the Sugar Control Act or Eric's mistaken belief as to the second putative contract's validity and legality).

Fundamentally, these are issues which turn on public policy (Ochroid Trading Ltd v Chua Siok Lui; Ting Siew May v Boon Lay Choo). The Sugar Control Act simply says that a seller of non-compliant drinks will be liable to pay a fine, without explicitly saying whether any contract to sell / buy non-compliant drinks is effectual. Nonetheless, is there some underlying public policy mandating that the second putative contract be struck down (for illegality)? If so, then there is no effective contract and, hence, Joe has no contractual basis to retain the $20,000 if Eric asserts a valid claim thereto.

Will such public policy also strike down Eric's (extra-contractual) right to seek restitution (of the $20,000)? Put another way: would allowing Eric to assert a restitutionary claim stultify or fly in the face of the public policy underlying the Sugar Control Act (which struck down the second putative contract as illegal in the first place)?

In any event, should the courts treat Eric differently from Joe? Afterall, Eric entered into this second putative contract, only because Joe's (arguably fraudulent) misrepresentation induced Eric to mistakenly believe that the offending drinks were compliant with the Sugar Control Act. Should public policy prohibit Eric from seeking restitution from Joe? And, should public policy prohibit Eric from seeking the $20,000 as damages for Joe's misrepresentation (Shelley v Paddock; Ochroid Trading Ltd v Chua Siok Lui)?

If this second putative contract is not illegal (because not afflicted by any relevant public policy), then Eric's position is straight forward. Eric simply needs to establish an actionable (whether fraudulent or non-fraudulent) misrepresentation; rescind the contract for misrepresentation; and recover the $20,000 as damages or by way of restitution, without any significant public policy interference.

(ii) Whether Eric has to pay Joe under the First Contract.

Here, Eric's objective is to avoid having to pay for the drinks he received from Joe under the first putative contract. However, Eric has already sub-sold the drinks to Eric's customers (who have presumably paid Eric).

Essentially, this main part of the question turns on:

(a) whether the first putative contract was void for illegality; and

(b) whether Joe should be allowed to sue Eric for the contract price of the drinks or for restitution of Eric's unjust enrichment at Joe's expense (when Eric sub-sold the drinks to Eric's customers) (Ochroid Trading Ltd v Chua Siok Lui; Ting Siew May v Boon Lay Choo).

Fundamentally, these are policy questions. Is there some underlying public policy mandating that the first putative contract be struck down (for illegality)? If so, there is no effective contract and, hence, Joe has no right to sue for the contract price.

Will such public policy also strike down Joe's (extra-contractual) right to seek restitution (rather than the contract price)? In other words, would allowing Joe to assert a restitutionary claim in unjust enrichment stultify the public policy underlying the Sugar Control Act (which struck down the putative contract for illegality)?

In any event, should the courts treat Eric better than Joe? Afterall, Eric entered into the first putative contract, only because Joe's misrepresentation induced Eric to mistakenly believe that the offending drinks were compliant with the Sugar Control Act. As such, should public policy prohibit Joe from seeking restitution from Eric for the value of the sub-sold drinks?

If we assume that the first contract is not illegal, the analysis becomes very different.

It is still possible to argue that the impugned contract might be void for common fundamental mistake at common law, voidable for common fundamental mistake in equity, or voidable for misrepresentation. Some scripts erroneously suggested that there is no actionable misrepresentation unless Joe's mis-statement was made fraudulently. However, the right to rescind for non-fraudulent misrepresentation is established beyond peradventure (Redgrave v Hurd).

If we assume that the first putative contract was not illegal, was it nonetheless void (at law) or voidable (in equity) for common fundamental mistake (Olivine Capital Pte Ltd v Chia Chin Yan)? This turns on how serious or fundamental the mistake was, whether the mistake was attributed to Eric's or Joe's fault, and whether the contracting parties (Eric and Joe) had allocated between themselves the risk of the mistake eventuating.

However, Eric's potential right to rescind, whether for mistake in equity or for misrepresentation, might possibly be barred since Eric had already sub-sold all the drinks (under this first contract) to Eric's customers. As a result, if Eric's right to rescind

has been barred, because restitutio in integrum may not be substantially achievable, then the contract subsists and Eric must pay the contract price. If rescission is still possible, this must be on the assumption that substantial restitutio in integrum is still achievable, which is in turn based on requiring Eric to make restitution to Joe (for Eric's sub-sale to Eric's customers). Therefore, it is unfruitful for Eric to seek rescission for mistake or misrepresentation, since this will lead to Joe obtaining restitution from Eric (for the sub-sale of the drinks to Eric's customers); which in turn defeats Eric's purpose (of not having to pay Joe for the drinks).

Likewise, it would be unfruitful for Eric to assert that the first putative contract was void for common fundamental mistake at common law. Establishing mistake at law would mean that there would be no effective contract, and it follows that Eric would not have been required to pay Joe the contract price for the drinks. However, Eric did profit from the sub-sale of Joe's drinks to Eric's customers. So, again, Joe could obtain restitution from Eric (because Eric was enriched at Joe's expense (by Eric's sub-sale)).

As such, this first main issue – whether Eric has to pay Joe for the drinks under the first contract – turns on illegality and public policy, more so than on mistake or misrepresentation.

This is not to say that misrepresentation has no role to play in Question 2.The significance of misrepresentation lies elsewhere, in founding Eric's potential claim for damages, rather than in founding rescission.

(iii) Whether Eric can recover (from Joe) for Eric's $100,000 loss of profits.

When the HSD issued a warning to Eric, that triggered Eric's major customers to cancel their contracts with Eric, thus causing Eric to suffer loss (potentially amounting to $100,000). Eric's objective here is to recover his $100,000 loss from Joe. It is possible for Eric to recover this from Joe as damages flowing from Joe's misrepresentation (at common law or under s 2(1) of the Misrepresentation), if Eric can prove this loss and also show that it was not too remote and was caused by Joe's actionable misrepresentation. The damages might be recoverable at common law (if Joe's misrepresentation was fraudulent or in breach of a duty of care) or under s 2(1) of the Misrepresentation Act.

Joe's initial misrepresentation (that the drinks were compliant with the law) was made prior to the first contract and before Joe knew the truth. This misrepresentation remained effective and continued to influence Eric's mind, thus inducing Eric to enter into the second contract, but this happened after Joe found out that the drinks were not statute-compliant. If Joe's initial misrepresentation is treated as a continuing representation which is deemed to have been repeated when Eric entered into the

second contract (With v O'Flanagan), then the second contract was induced by Joe's fraudulent (continuing) misrepresentation.

A number of students erroneously asserted in their scripts that Eric is not entitled to recover from Joe this $100,000 loss, because this is loss suffered by third parties – loss suffered by Eric's customers (not by Eric). It is difficult to see how such an error could have arisen: students are reminded to read the question carefully.

The real issues here are whether Eric's $100,000 loss was caused by Joe's actionable misrepresentation; whether such loss is too remote; and whether there is any public policy preventing Eric's claim for damages.

If either the first or second putative contracts are illegal because contrary to the public policy underlying the Sugar Control Act, then will that policy strike down Eric's damages claim for misrepresentation? Given that Eric only entered into both putative contracts because of Joe's misrepresentation that the drinks were compliant with the law, what public policy would be served by prohibiting Eric from suing Joe for damages for misrepresentation under s 2(1) of the Misrepresentation Act or at common law?

Question 3

General comments

Structure – most students organised their answers well and in a clear manner. However, there were some who lumped two or more of the parties together when discussing their legal positions. This should be avoided as it can be confusing given that, in most cases, the parties' legal positions are different.

Time management – some answers are half a page or three quarter of a page long with accompanying comments like "ran out of time" or "sorry, couldn't finish on time". Unfortunately, they don't help, especially if what is written is irrelevant. Ideally, you should allocate 45 minutes (excluding reading time) for each question.

Miscellaneous – take care to ensure that you cite the correct parties in your answers. It can be confusing to the examiner who is unlikely to give you the benefit of the doubt throughout.

Charlie v Dr Leong

One of the main issues involving the parties is on unconscionability. Most students correctly laid out the applicable law spelt out in Bom v Bok. To invoke unconscionability, Charlie (C) must demonstrate that he was suffering from an infirmity which Leong (L) exploited in procuring the transaction. Upon satisfaction of these requirements, the burden is then shifted to L to show that the transaction was fair, just and reasonable.

It is arguable on the facts that C was suffering from an infirmity at the time the transaction was entered into. C was able to compose himself and proceeded to talk business. This can be distinguished from the facts in Bom v Bok. On the other hand, it might be possible to argue that the emotional trauma was still operating on C since the discovery of his wife cheating on him and asking for a divorce, had just happened that very morning. Even if C was suffering from an infirmity, the question arises whether it was exploited by L. While L knew of C's fragile emotional past, it was C himself who suggested the amount to be invested be increased to $4 million albeit on account of what L had done in the past. In the event both requirements are satisfied, the burden is on L to show that the transaction was fair, just and reasonable. On the facts, the transaction was at an undervalue as C was paying twice the price for the same stake. In addition, there was no independent legal advice given the circumstances. In the result, the transaction is rendered voidable.

Another issue to consider is undue influence. It would be more beneficial for C to proceed by way of Class 2 as it raises a presumption in his favour. This should be a Class 2B category. There were some students who applied Class 2A on account of C being a "patient" of L in the past, thus giving rise to a doctor-patient relationship. This is plainly incorrect.

The facts would suggest a relationship of trust and confidence. The transaction also calls for an explanation, for example, given the large sum involved in return for the same stake in Powerplus which is in financial difficulty. A relevant factor is the magnitude and proportionality of the risk or disadvantage to C. It would appear that the presumption raised cannot be rebutted by L as there was no free exercise of independent will by C. Class 1 undue influence should also be considered. It would appear that the 4 requirements laid down in the case law (Bom v Bok, Aboody) are satisfied. The transaction will also be rendered voidable for undue influence.

For both unconscionability and undue influence, there is no affirmation on the facts as Charlie, upon learning of the true situation, immediately sought legal advice.

Mutual mistake may also be considered which will result in the transaction being rendered void (Raffles v Wichelhaus) and not merely voidable. It may be argued, on the facts, that there was a mismatch as to the subject-matter of the contract which is the amount C will be investing in Powerplus and the corresponding stake therein. The parties are at cross-purposes as to the latter. It is arguable that C was careless (cf Tamplin v James) given the circumstances under which he signed the document and in light of what L had said which persuaded C to sign.

Unilateral mistake at common law is unlikely to work. L had no actual or Nelsonian knowledge of C's mistake (Digilandmall). In equity, it might be argued that there was no constructive knowledge on L's part of C's mistake. Given the circumstances (especially where mutual mistake is likely to arise), it could be argued that L had no suspicion (constructive knowledge) that C was mistaken as to terms of agreement (Broadley). C could have taken a cursory glance at both the amount invested and his stake as stated in the agreement (which are important terms), in addition to his name.

There is no common mistake on the facts as both parties have not even reached agreement on the stake of C in Powerplus. Rectification is, thus, unlikely to be available here. There is also no duress as there was no threat and demand by L on the facts. Similarly, misrepresentation would not be made out on the facts.

<u>Charlie v Ann</u>

Almost all students discussed the issue of duress.

C will need to prove that Ann (A) had exerted illegitimate pressure on him through her threats and demand, and this illegitimate pressure caused him to enter into the transaction. The facts would appear to support a case of lawful act duress.

A's threat to disclose information is not prima facie an unlawful act. However, her demand that C invest $50,000 in her cosmetic business which she was desperate to develop might amount to illegitimate pressure. A had an ulterior, improper motive of trying to exploit C's situation by coercing him to enter into the contract with her. In

addition, the amount C had to invest is not a small sum which he was unwilling to invest in the cosmetic business in the first place and it is likely that the demand would be held to be unreasonable. On the facts, causation is also satisfied (Pao On). Duress will render the contract voidable. There is no affirmation on the facts as C sought legal advice promptly on learning the truth.

Mutual mistake, discussed above, should also be considered. It is not entirely clear on the facts that A knew for a certainty that C would only like to invest in the spa business. If it is determined objectively at the time the contract was entered into that the parties were at cross-purposes, this will make the contract void.

If it is determined that A knew for a fact that C was only interested in investing in the spa (and not cosmetics) business based on their conversation, then unilateral mistake at common law would be made out which renders the contract void (Digilandmall). Unilateral mistake in equity could arguably be made out as well. A would have constructive knowledge of C's mistake and in deliberately not bringing the suspicion of a possible mistake to the attention of C would constitute impropriety on A's part (cf Broadley). Rectification might possibly apply as it appears that the requirements are satisfied (Sheng Siong Supermarket).

There is no misrepresentation on the facts. There is likely self-induced misrepresentation on the part of C (Opera Gallery). Common mistake, undue influence and unconscionability would also not apply as the requisite elements are not present.

Some students applied non est factum to both contracts. This is a narrower doctrine given the requirements thereunder (Saunders) and is unlikely to succeed on the facts. The 2 documents/contracts which C entered into are not radically different from what he had in mind (cf Mahidon and Sourgrapes Packaging). In any event, C was careless when he signed the contracts.