National University of Singapore
Faculty of Law

LC1003 Law of Contract

Final Examination AY2015-2016 – Examiners' Report

Question 1(a)

"Despite the inherent flexibility of the common law, the law of contract cannot do without statutes to achieve just results."

Critically discuss this statement with reference to 2 of the 3 following topics: (1) *Privity of Contract*; (2) *Misrepresentation*; (3) *Illegality*.

Candidates' performance

This question was on the whole competently, though not outstandingly, answered.

The top performers structured their responses argumentatively, considering how the common law in a selected topic demonstrated flexibility to respond to a variety of legal problems, but also had their limitations in achieving just results. They then went on to explain how statutory intervention addressed the particular problems in the common law, with specific reference to the relevant provisions of the statute. Moreover, they engaged *critically* with the statement – that is, not just demonstrating the 'truth' of the assertion in the question but pointing out areas where they disagreed. For example, one could highlight the various deficiencies in statutory drafting or interpretation that hamper the ability of statutes to achieve just results. Finally, the best scripts also considered the accuracy of the statement *across* their selected topics, comparing the necessity or efficacy of statutory intervention in, for example, the area of privity as compared with misrepresentation, or privity as compared with illegality.

Scripts which lacked one or more of the above elements would not do as well, though it was certainly possible to get a very decent grade with a competent 'one-sided' exposition of the assertion in the question, even without a critical response. The grade given in these instances would depend on the quality of the exposition. For example, some students devoted much of their efforts to explain the common law devices created to circumvent the privity rule, going on for a couple of pages, but spent

only a short 'touch-and-go' paragraph on how the Contracts (Rights of Third Parties) Act (CRTPA) addressed the problems with the common law, without any provisions cited. This sort of 'imbalanced' discussion would affect the grade given.

Scripts which did not fare well tended to be purely descriptive (no attempt to engage with the question) but simply a short write-up on the relevant topic; exhibited poor time management (e.g. giving an answer which was less than a page); showed major conceptual errors (see further below); and/or included poor analysis and much waffling (e.g. going on for a few paragraphs on the greatness of the common law without discussing case law or statute).

Selected content points for topics

- Privity of Contract:
    - It was important to distinguish between promisee actions via the narrow and broad grounds, and third party actions via common law devices such as collateral contracts, agency, tort, joint promisee exception, Himalaya clauses etc. A selected few should have been briefly elaborated upon with a view to pointing out their flexibility as well as limitations.
    - It would be useful to show an understanding of the motivations driving privity statutory reform as set out by the UK Law Commission (Report no. 242), e.g. difficulties in commercial life for contractors, injustice to third parties, piecemeal and complex common law exceptions to the privity rule etc.
    - It would be essential to highlight specific provisions of the CRTPA to show how they improve upon the common law, particularly section 2 and its various sub-sections, which are the key operative provisions giving third parties statutory rights of enforcement. A secondary priority would be to explain the operation of related provisions such as sections 3 (variation and rescission), 4 (defences available to promisor) and 6 (protection from double liability); to show how these also come together to achieve just results for all parties.
    - Credit would be given for critical evaluation of the statute, such as the uncertain scope of section 2(1)(b); section 3's arguably unfair default presumption that contract parties intend to forgo their rights of variation/rescission; the third party's limited protection from UCTA (see e.g. section 8(2));

and potential double liability for the promisee's *broad* ground action and the third party's statutory right of enforcement (not addressed by section 6). These may potentially undermine the ability of the statute to achieve just results.

- Misrepresentation:
    - Contrary to the approach taken by a number of candidates who launched immediately into a description of the Misrepresentation Act (MA), it would be logical to first outline the common law on misrepresentation, and draw attention to its flexibility or lack thereof. Hence, a good script would have set out the common law on fraudulent misrepresentation under the tort of deceit, and non-fraudulent misrepresentation, as well as the available remedies. Good scripts would have highlighted that negligent misrepresentation at common law under *Hedley Byrne* was a later development that parallels section 2(1) of the MA, though its requirements are different, which may arguably still call for statutory intervention.
    - This sets the context for a discussion of the MA and how it improves upon particular aspects of the common law, e.g. making it easier to mount certain claims by shifting the burden of proof under section 2(1); plugging a gap in the common law by creating a new statutory cause of action for 'negligent' misrepresentation under section 2(1); creating a discretion to award damages in lieu of rescission under section 2(2); removing bars to rescission under section 1(a) or (b) etc.
    - In critically evaluating this area, most candidates did pick up on the 'fiction of fraud' problem for negligent misrepresentation highlighted by the Court of Appeal decision in *RBC*, though the better scripts would also have alluded to other problems with the statute which may undermine the assertion that statutory intervention is necessary to achieve just results, for e.g., the difficulties of finding a measure for damages in lieu of rescission, and controversies regarding the availability of damages in lieu of rescission, under section 2(2).
- Illegality
    - Most candidates who selected this topic showed an awareness that this topic could serve as a contrast with the areas of

privity and misrepresentation, since statutory reform has been contemplated by both the UK Law Commission and our local Law Reform Committee, but not implemented in statute.

- Some students missed this point by structuring their discussion only around statutory and common law illegality. Some credit could be awarded for this, since it can relate to the assertion in question (e.g. arguing that common law is in fact inherently flexible, while statutory illegality is more limited); but these scripts would not fare as well as those who devoted some time to discussing the need for statutory intervention as contemplated by law reform bodies.
- Credit was awarded to students who demonstrated a keen understanding of the scope and limits of common law approaches at present, in particular *Ting Siew May*'s 'proportionality' approach which draws upon English authorities such as *ParkingEye* and *Madysen*. Some students also alluded to Lord Sumption's judgment in *Les Laboratoires Servier*, which (though not directly on contractual illegality) may point towards a less discretionary approach to resolving illegality issues.
- A good discussion of the common law would then allow a candidate to assess the need for statutory intervention in this area. Most students concluded that this was not necessary to achieve just results, since the common law was sufficiently flexible. A few students developed this conclusion well by highlighting, for e.g., that the UK Law Commission has intentionally left the development of illegality in the context of contract law to the courts; and that *Ting* already 'incorporates' the recommendations of both UK and Singapore law reform bodies in developing the proportionality jurisprudence.

Common/significant errors

Most of these errors were not fatal, but may have affected a student's grade for this question:

- Lack of references to case law or statutory provisions
- Major imbalances/prioritisation: too much on common law and too little on statutory provisions, or vice versa; too much on one topic and too little on another; a few scripts made the egregious error of only discussing one topic

- Certain conceptual errors, e.g.: section 2(2) addresses the fiction of fraud problem in section 2(1) of the MA (!)
- Lack of clarity in writing, e.g. the CRTPA or MA now gives legal 'recourse', without explaining the type of recourse given
- Careless writing, e.g. there are two types of illegality, 'statutory illegality and statutory integrity' (!)

Question 1(b)

"The doctrine of *Mistake* in contract law is incoherent and unnecessary"

Critically discuss this statement.

Candidates' performance

This question was a significantly less popular choice than 1(a), with only about 30% of the cohort attempting an answer. However, most students who chose this question did a competent job of addressing some of the most controversial aspects of this vitiating factor and were awarded above average grades as a result.

The top performers organised their answers in one of two ways. More commonly, their answers were structured around the two key assertions of the statement – the "incoherence" and "necessity" of doctrine of mistake. These answers tended to focus on the different aspects of the mistake doctrine that lacked clarity and might, arguably be replaced by other contract law doctrines. Other good answers organised themselves around the different species of mistake – mutual mistake, common mistake and unilateral mistake. These answers then analysed the coherence (or lack thereof) and functional or conceptual significance of these branches of the law relative to other contract law doctrines.

On the other hand, there were less impressive answers which adopted a 'scattershot-stream-of-consciousness' approach which discussed various of the issues identified below without relating their analysis back to the question. These scripts did not engage with the broader implications of the question: Does the law of mistake in contract law *make sense*? Does mistake place a *distinct and irreplaceable function* as a vitiating factor in contract law? Why has contract law developed rules that apply to contracts where one or both parties is mistaken? The weakest answers (thankfully, just a handful of them) were either unjustifiably brief

(probably the result of poor time management) or out-of-point (dealing with the doctrine of misrepresentation instead).

Substantive content coverage

Students were not expected to cover all the following issues in detail, and some answers were awarded high grades based on their critical discussion of a smaller selection of the following key points. In general, the better answers went beyond merely stating the issue with supporting illustrations from the case law, but went further to reflect on the reasons for why the law has developed in particular way (e.g. policy reasons for a particular risk allocation posture) and conveyed a considered viewpoint overall.

(1) Mutual mistake:

- Is there a separate doctrine of mutual mistake that is distinct from the offer & acceptance framework of rules? A brief discussion of the kinds of mistake that fall into this category and how they can (or cannot) fit within an objective theory of contract framework of analysis would suffice – many candidates also brought in comments made by the Singapore judiciary on the necessity of this "doctrine".

(2) Common mistake:

- What kinds of mistakes might trigger the doctrine of common mistake, and how is this vitiating factor related to the doctrine of frustration? If the doctrine of frustration is regarded as a necessary concept in contract law, does it follow that a doctrine of common mistake is equally essential? Or are the courts able to resort to other tools – implied terms, more specific legal doctrines (res extincta?) or simply by constructing/interpreting the terms of the contract?
- What is the difference between common mistake at common law and in equity? Is an equitable counterpart desirable – to provide remedial "flexibility"? But at what price? Have the courts provided any clarity as to the differences between the substantive tests for common mistake at common law and in equity?

(3) Unilateral mistake:

- Is the law governing the validity of contracts in mistaken identity cases coherent? Should different presumptions apply when the parties are contracting face-to-face, and when they are

contracting via correspondence? Why did the House of Lords maintain this distinction and does it make sense? Should all these cases be treated the same way if third party purchasers (who have also been conned by the fraudster-rogue) are involved?

- Can the doctrine of unilateral mistake be replaced effectively by the doctrine of misrepresentation in mistaken identity cases? Should such contracts only be voidable (at best) rather than void?
- Can unilateral mistake cases, including mistakes as to terms of a contract, be rationalised within an offer & acceptance framework of analysis? Especially at common law, where the non-mistaken party has actual knowledge of the mistake held by the mistaken party – should this not prevent a meeting of minds/coincidence of wills that gives rise to a valid contract?
- Is there a need for an equitable jurisdiction in unilateral mistake, with a less stringent mental element on the part of the non-mistaken party? Why are the Singapore courts so taken with developing an equitable jurisdiction for mistake in this context alongside the common law rules?

Question 2

This was a challenging question that raised issues of misrepresentation, mistake, breach and privity. Common problems were missing out issues, weak discussion of the law and poor application to the facts. There was no overt illegality issue and it was not productive to invent any – such as imaginary legislation that had been breached.

Misrepresentation by Cora/DDS rendering the placement contract voidable

This issue was probably the best handled. Most students covered the elements of an actionable misrepresentation reasonably well: false statement of past or present fact (not opinion, intention or puff) that materially induced Daisy to contract with DDS. Relevant cases would include *Bisset, Esso, Smith*, *Dimmock*. However, many answers spent too much time discussing whether these elements were met, and left too little time for the many other aspects that called for discussion. Assuming the

elements are met (and it was a mistake to conclude they were not and stop there), the remedies were rather more poorly discussed.

Subject to bars to rescission, rescission is available under the common law for all misrepresentations. Relevant bars here would include affirmation (*Long v Lloyd*), lapse of time (*Leaf*) and Misrepresentation Act, s2(2). Many answers thought that Daisy needed to get out of the placement contract in order to stop working for Violet – in fact, it is not apparent that Daisy has any on-going obligations pursuant to the placement contract. However, if she rescinds, she can seek the return of her placement fee. Daisy might also seek damages, eg for medical expenses and possibly mental distress. Although she can seek damages under the common law if the misrepresentation was fraudulent or negligent, the Misrepresentation Act, s 2(1) offers the advantage of requiring Cora to prove that she (Cora) was not fraudulent or negligent in making the statements. The measure of damages was controversially said to be the fraud measure in *Royscott Trust*, but this has since been questioned in Singapore in *RBC Properties v Defu Furntiture.* Many answers were too hasty in concluding that it was a fraudulent misrepresentation, ignoring that fraud is hard to prove and the facts were not unequivocal on this point.

Mistake rendering the placement contract void (unless equitable – voidable)

A unilateral mistake as to Daisy's identity is best discussed as a defence by Cora to Daisy's misrepresentation claim as Cora would be the mistaken party. Such a mistake must be fundamental to be operative. The operation of such a mistake is usually resolved with reference to the written and face-to-face distinction. Here we had a scenario where there was telephone contact followed by a face-to-face meeting. In the circumstances, it is hard to sustain an argument that Cora intended to contract with anyone other than Daisy. Many answers said the facts were analogous to *Shogun Finance* and should be treated as a written contract but this overlooks a crucial distinction: in *Shogun* the mistaken party (the finance company) did not meet the rogue; and the car dealer, who did meet the rogue, was not regarded as the agent of the finance company. Many answers claimed that even if there was no operative mistake, the contract would be voidable. In the cases you have studied this is correct because they involved a fraudster who made a misrepresentation about his identity. Here it is not so clear - you would have to argue that Daisy

misrepresented who she was and that it was not cleared up in the subsequent meeting.

Quite a number of answers discussed mutual mistake (*Raffles v Wichelhuas*) ie Cora thought she was contracting with Denker and Daisy thought Cora wanted to contract with her. The outcome should be the same as for the mistaken identity analysis since, after they met, the mistake was surely sufficiently cleared up. A common mistake analysis was less convincing – it requires the parties to be labouring under the same mistake which looks unlikely.

Breach of the service contract by Violet

Many answers neglected this issue, and took it for granted that Violet was in breach. To establish breach, it was necessary to interpret the relevant clauses: eating leftovers and sleeping with four cats is arguably not breach of 'three full meals a day and a room of her own'. To ascertain if there was a breach, it is necessary to ascertain the parties' intentions using contextual interpretation (*Zurich Insurance*, *Sembcorp*).

Privity

Assuming breach of the service contract is established, Daisy faces a privity problem. Her best solution is via the CRTPA. Many answers unnecessarily went into the common law solutions, particularly the broad and narrow grounds. Both require Cora to sue - unlikely since Daisy is also suing Cora, and the narrow ground is particularly inapposite on the given facts. Failure to see the Act as the most suitable solution was a weakness. Most answers dealt quite well with the CRTPA, s 2 requirements:

- S2(1)(b): contract 'purports to confer a benefit' on Daisy; contrast incidental benefit;
- S2(2): construing the whole contract, does it appear Daisy was not intended to enforce?
- S2(3): Daisy must be expressly identifiable – here probably by description or class.

Many answers regrettably went no further. Some went on to deal with the remedies available under the Act, such as damages, including perhaps non-pecuniary damages: eg *Addis, Kay Swee Ping, Jarivs*. The courts would be mindful not to allow Daisy to over-recover by obtaining the same damages from both Cora and Violet. Specific performance came up

quite often but its suitability in a home employment context must be doubted.

Many said that Daisy could terminate the service contract. Although the CRTPA is not explicit on this point, the Law Commission apparently did not intend that the 3P should be able to terminate and it excluded this remedy in s2(5) by saying that the 3P had any remedy available **in an action for breach** - termination is a self-help remedy that does not require an action. Furthermore, Daisy has little to gain from terminating the service contract. She owes no obligations under it; she wants to get out of the employment contract. A few answers perceived this problem and tried to argue that the contracts were inextricably linked so that termination of one would bring all/both contracts crashing down. A handful of answers saw scope for an implied term in the employment contract, that Violet would meet some minimum standard of treatment for Daisy. If this was a condition, or innominate term breach of which substantially deprived, Daisy would be able to terminate the employment contract. Credit was given to those who discussed termination even if it was of the service contract.

A sorely neglected issue was Violet's defences to Daisy's claim for breach of the service contract. Using CRTPA s 4, Violet could raise eg Cora's misrepresentation about Daisy's experience and possibly mistake, although the latter is surely doomed as Daisy and Violet met and it is not apparent Violet was expecting Denker.

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.

Issues and application of legal principles – once an issue is identified, the applicable legal principles should be applied to the facts given to arrive at a conclusion. This was sadly lacking in some of the answers. It serves little purpose to state a particular legal principle without discussing whether or not it applies in a given scenario.

Time management – some answers are a page or one and a half 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.

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. Another point to note – write legibly as this will help you and the examiner.

Carson

The two main issues involving Carson and Robert are undue influence and restraint of trade (illegality). On the facts, there is no threat from Robert and so the issue of duress does not arise which some answers seemed to suggest otherwise. It is also clear that there is no issue with respect to the employment contract entered into by Carson as the focus of undue influence is in respect of the employee loyalty deed signed subsequently by him.

On the issue of undue influence (UI), Singapore courts (such as *Susilawati, Citibank NA and Tan Teck Khong*) continue to recognise the class 1 and 2 UI classification. On the facts, class 2A would appear to be inapplicable as this is not a recognised established relationship. Class 2B would be more appropriate given the relationship of trust and confidence between the parties. However, for the presumption of UI to arise, the transaction involving the loyalty deed must also call for an explanation (see generally *Etridge* and *Allcard*). Some answers take the view that the transaction does not call for an explanation as it is normal for an employee to sign on to such a deed. The better view is that the transaction does call for an explanation given that the deed is onerous and harsh. The evidential burden then shifts to Robert to rebut the presumption (the legal burden remains throughout on Carson to prove UI). Robert may do so, for example, by showing that Carson obtained independent legal advice (see *Inche Noriah*). The facts are insufficient in this regard. In the event that Robert fails to rebut the presumption, the transaction would be voidable for UI and Carson can set aside the deed.

Where Robert succeeds in rebutting the presumption, Carson may try to rely, alternatively, on class 1 actual UI. The elements for actual UI laid down in *Aboody* and applied in *Pek Nam Kee*, which Carson must prove, should be discussed.

Even if Carson fails on UI in respect of the deed, he may still go by way of the doctrine of restraint of trade to try to set aside the deed. The facts involved an employment contract situation, not one involving a sale of business. This distinction is important as courts are stricter when dealing with the former situation due to unequal bargaining position. In any event, the starting position is that all restraint of trade clauses are *prima facie* void. This equally applies to the employee loyalty deed in question which, in substance, is a restraint of trade clause.

However, a restraint of trade clause may be upheld where: (1) the employer has a legitimate proprietary interest to protect; and (2) the clause in question is reasonable as between the parties and in the public interest. Almost all answers correctly stated that Robert has a legitimate proprietary interest to protect in having a stable and well-trained workforce (*Man Financial*). The factors to consider in determining the reasonableness of the restraint clause were also correctly noted, namely, area, duration, activities and consideration for the restraint (*Man Financial*). Most answers concluded that the restraint was too wide and unreasonable on the given terms in the clause.

In regard to severance or reading down of the restraint clause, it appears that this is not workable. For example, it would not be possible to delete the duration of 10 years as this would provide for an indefinite restraint in its place. Also, in an employment context, the courts would be slow to effect severance on policy grounds (*Smile Dental*). In the result, the restraint clause would be struck down.

As for the payment of salaries by Carson in the event of breach of the loyalty deed, some answers draw analogy from the case of *Mano Vikrant Singh* to say that this amounted to a forfeiture clause (i.e. restraint clause) in respect of his earned salary (which is already vested), while others dealt with this issue on the basis of a penalty. In either case, the discussion is a reasonable one to make.

Bates

To enable him to not continue to work for Rosamund , Bates best bet would be to show duress on Rosamund's part i.e. a threat emanating from her as disclosed on the facts. Some answers talked about UI which, unfortunately, is not supported on the facts. As to the type of duress which Bates can successfully plead, it would appear to be that of lawful

act duress. Given the facts, duress to person (threat of injury) or economic duress (threat to trade or business) is unlikely to work here.

To amount to duress, there must be illegitimate pressure and the pressure caused/compelled the claimant to enter into the contract (i.e. causation) (*Tam Tak Chuen*). Rosamund's threat to disclose Bates' past dark secret is not unlawful. However, factors which would render a threat of lawful action a lawful act duress are usefully set out in *Tam Tak Chuen* i.e. abuse of legal process, demand made in bad faith, demand is unreasonable and threat is unconscionable. On the facts, there is likely to arise illegitimate pressure applied by Rosamund because she is forcing Bates to end his career at AFI (unreasonable) and the demand made is for her own benefit (bad faith).

Having made out illegitimate pressure, the burden of proof is reversed and it is for Rosamund to show that there is no causation (*Tam Tak Chuen*). In this regard, the standard is likely the "but-for" test. The factors to consider are set out in *Pao On* i.e. did claimant protest, practical alternatives available to him, independently advised and did claimant take steps to avoid the transaction? The facts showed that Bates was indeed intimidated by Rosamund's threat ("mortified by the prospect of being shamed") – hence the lack of protest from him and no reasonable alternatives open to him. Emphasis should not be placed on the year-end salary bonuses as a factor as these were purely speculative. In the result, Bates' contract with Rosamund is voidable for lawful act duress and may be set aside by him.

Anna

To get out of the contract with Rosamund, Anna would first have to show that Bates exercised undue influence on her and that Rosamund was "infected" by Bates exercise of undue influence. This would make her contract with Rosamund voidable which Anna can then set aside. The facts do not appear to support an argument based on duress (in the absence of a threat) as was otherwise suggested in some of the answers.

Given that the classification of UI into class 1 and class 2 applies in Singapore (see above), one should advise Anna to go first for class 2 presumed UI, if possible. The reason is that a presumption of UI in her favour arises if she can successfully plead class 2 UI.

It is arguable that the given facts might plausibly support a plea of class 2B UI on account of trust and confidence reposed by her in Bates given

her upbringing. It could also be argued that her agreement to follow Bates calls for an explanation. She is a valued staff in AFI and there is no reason, in the circumstances, for her to change job and switch to CC not knowing how things will turn out for her in CC. That explains her initial reservations in following Bates to join CC. (As noted above, not much weight should be placed on the year-end salary bonuses as these were purely speculative.) Given that the presumption of UI has arisen, the evidential burden shifts to Bates to rebut it (in this regard, see discussion above in relation to Carson), failing which Anna's agreement with Bates will be tainted by UI.

Alternatively, if Bates succeeds in rebutting the presumption, Anna may try to rely on class 1 actual UI. The elements for actual UI which Anna must prove and laid down in *Aboody* and applied in *Pek Nam Kee* should be discussed.

In the event that UI is successfully established by Anna against Bates, the further issue that arises is whether the employment contract entered into by Anna with Rosamund is infected by Bates UI. If so, Anna can leave CC. Many answers creatively discussed the doctrine of infection established in *Etridge* even though the facts are not the same as in *Etridge*. On the facts, it could possibly be argued that there were red flags to put Rosamund on notice (*Hsu Ann Mei*), especially when it was she herself who threatened Bates to also get Anna to join CC ("…threatens to disclose Bates' embarrassing secret … if the couple do not agree to quit AFI and join CC…") and given the gravity of her threat to Bates.