

LOCATION: SWANSEA

LLEOLIAD: ABERTAWE

LEVEL 6

LEFEL 6

**EXAMINATION PERIOD
MAY 2020**

**CYFNOD ARHOLIADAU
MAI 2020**

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**MODULE CODE: M6X01292
PROCUREMENT AND CONTRACT LAW**

**TIME: 4 HOURS (09:00 WEDNESDAY 13TH MAY 2020 – 13:00
WEDNESDAY 13TH MAY 2020)**

ATTEMPT ALL FOUR (4) QUESTIONS

1. Citing cases from the attached list and your own knowledge to support your argument read the scenario and give your advice:

Fred, George's friend, lets it be known that he has a Blu-ray player for sale. George immediately offers Fred £20 for the player as his own machine has recently broken down. Fred tells George that £20 is not enough and he will only accept £35.

On his own way to work George passes a local TV and video shop which has a DVD player in the window with a price tag of £30. Impressed by the great offer he enters the shop and immediately asks to buy the player in the window display. Mike, the shop owner, realises that the tag is wrong and tells George that the price is £40, not £30. Despite arguing Mike refuses to sell the player for any less than £30 and George, now thoroughly annoyed decides to leave the shop empty-handed.

The following morning but George decided to go back to the shop and buy the player from there for £30 and later in the afternoon on the same day Fred sends a letter to George accepting the offer of £20 for his DVD player. A few days later Fred's letter arrives and George phones Fred to let him know that he has already bought a DVD player from Mike's shop.

Advise the parties on any legal issues raised regarding the rules of offer and acceptance.

(25 marks)

George offers £20 for Fred's Blu-ray player, but Fred refused the offer so the offer was not existing anymore. Then, Fred sent a letter to George accepting the offer of £20 but actually it was a counter-offer, so since George didn't accept it, they were not legally bound to each other by any contract. According to **Hyde v. Wrench (1840)**, George's claim was rejected and since the original offer has been destroyed, it is no longer open to Fred to accept.

Even if the price of the DVD player was shown at £30 but was actually at £40, the seller can still sell the DVD player at £40 because according to **Partridge v. Crittenden (1968)** or **Fisher v. Bell (1961)**, the price shown in the store was an invitation to treat and not an offer.

Also, the postal rule, stating that the offer is accepted by the post of a letter and not the delivery as in **Adams v. Lindsell (1818)**, cannot be used because first the offer was no longer to accept it was a counter-offer and second because the letter was posted after that George bought the DVD player on the morning. And it was to George to accept or not the offer of Fred and not Fred to accept the previous offer of George.

2. The general rule for the discharge of a contract is that the parties must perform precisely all the terms of the contract in order to discharge their obligations.

- a. Briefly describe the circumstances of *Cutter v Powell* (1795) 6 Term Rep 320 and *Bolton v Mahadeva* [1972] 2 All ER 1322 and evaluate whether the judgements made at the time would be upheld today making use of appropriate Acts of Parliament and other cases listed to support your argument. (20 marks)

Cutter v. Powell (1795): A sailor was working on a ship. The contract said he will be paid for his service at the end of the trip. Unfortunately, he died on that trip. His widow asked to be paid for the work of her husband. However according to justice, as he had not finished his job, the widow could not receive the money.

Today: The 1970 Merchant Navy Act now allows for compensation in the event of death. The undertakings are covered by the industry agreement of 18 June 1976 on the establishment of a death and invalidity insurance scheme for aircrew. A breakdown of the contribution is made and necessary (Employer share: 60% – Officer share: 40%). In the event of the death of the officer, the severance pay shall be paid to his widow/widower or, failing that, his successors.

Bolton v. Mahadeva (1972): Bolton installed central heating in the Mahadeva house. The price of the agreed contract was £560. The accused was not satisfied with the work (smoke, the house less hot) and refused to pay. The plaintiff needed to pay £174 to correct the defects. The plaintiff's action to enforce the payment failed because the court found that there was no substantial enforcement and therefore the plaintiff could not recover anything.

Today: by following **Hoenig v. Isaacs (1952)** trial, Hoenig decorate Isaac's home but Isaac didn't like it and so didn't wanted to pay for it. However, as Hoenig did the job, Isaacs needed to pay for the decoration done minus what she didn't liked. As in **Bolton v Mahadeva (1972)** trial, the performance has been done but wrongly, so Mahadeva need to pay for what have been done but can claim for the £174 of damages that has been corrected for fault.

- b. An agreement to extinguish a contract is itself a binding contract, provided that it is made under seal or consideration is exchanged otherwise the court must decide whether the discharge is bilateral or unilateral. What are the differences between bilateral and unilateral discharge of a contract? (5 Marks)

A unilateral contract is made when a person promises to pay a sum of money, or give a service in exchange for something. However, there are no promises. There are "Ifs" in a unilateral contract. To illustrate this type of contract, we can take the case of **Carlill v. Carbolic Smoke Ball Company Ltd (1893)**. The Offeror had a promise (£100) but the applicant was not obliged to propose. In a bilateral contract, there are promises in both parties. In this case we can take the case of a person who does his shopping: he undertakes to pay for products and the seller undertakes to provide the store and guarantee products.

3. Drawing examples from the attached list of cases and your own knowledge as appropriate:

- a. Express terms of a contract can be oral statements or written statements. When can oral statements form part of the terms of the contract or be considered a representation? (10 marks)

A representation is a statement that induces a party to enter into a contract (but does not form part of it). (Contract law, 2019) A term is a promise or undertaking that becomes part of the contract itself. (Contract law, 2019)

To illustrate a representation, it is possible to take the example of **Ecay v. Godvfrej (1947)**. The claimant proceeded to purchase a sailboat to the price of £750 from the claimant. He also said that the boat was in good condition but still suggested that it might be a good idea to have the boat inspected by an expert. The plaintiff purchased the boat without having it inspected. It later turned out that the boat was not in a very good condition and the buyer therefore brought legal proceedings against the seller. The court had to judge the meaning of the declaration on the solidity of the boats, made by the seller. The court held that this was a representation since the defendant offered to ask the plaintiff to have the boat inspected. The declaration on the state of a boat was only an opinion and not an expert opinion. By this the statement is not absolute and therefore is not a term. An oral statement will be a representation when it is a written contract and that a statement has been made orally but not repeated in the written agreement. It shows that the parties did not view the statement as important.

A term is a promise or undertaking which itself becomes part of the contract due to its importance. We can take the example of **Bannerman v. White (1861)** 10 CBNS 844. The defendant decided to buy hops from the plaintiff, on the verbal condition that they were not treated with sulfide. The applicant stated that the hops were not processed. They therefore proceeded to carry out a contract. When the defendant discovered that the hops had been processed, he broke the contract. The plaintiff decided to sue the defendant on the grounds that the discussions were not part of the contract. However, the court held that the statement was very important to the defendant and that without it he would not have carried out a contract. The declaration therefore became a term of the contract. Also, when a statement is so important that a party would not have entered into the contract otherwise, the oral statement is likely to be viewed as a term.

An oral statement can be part of the term if a statement is made by a party with special knowledge and expertise on matter, it is more likely to be viewed as a term of the contract. The more time between statement and conclusion of the contract, the less likely is statement to be held a term of the contract.

- b. There are three groups of implied terms, name them and discuss how and why they may be read into a contract by a court. (15 marks)

Implied terms are provisions that are not written but assumed by the court. There are three different types of implied terms:

- The first represents the terms introduced by the court. They can be done in fact or by law. They are implicit in fact when they are necessary to confer commercial efficiency on the contract. They are implicit in the law when they are incorporated into the contract without the agreement of the parties. This makes it possible in particular to protect the interests of the weakest party during the completion of the contract. We can take the example of "**The Moorcock**" (1889) to illustrate that. The plaintiff moored his boat at the defendant's wharf and proceeded to unload it. However, the tides have made the boat move and damaged the plaintiff's boat. The court held that the fact that the boat would not be damaged represents an implicit term in the contract. **The Liverpool City Council v Irwin (1976)** case can also be taken for example. Irwin was a tenant in a building owned by The Liverpool City Council. The common areas have fallen into ruins; therefore, the tenants have decided to stop paying the rents. The plaintiff wished to evict the defendant due to the non-payment of rent. Irwin defended himself by stating that there was a breach of repair obligations. No such clause was present in the rental contract, but the court held that there was an implicit term in the rental agreement, it is a legal duty for the owner to keep the common parts in good condition.
- Terms can be introduced by statute to protect parties that are not on an equal footing and lacking strength. These fragile parties are protected by the Consumer Rights Act 2015 and the Sale of Goods Act 1979. When these statutes are violated the consumer can refer to article 19 of the Act. It is stated that he has:
 - o The short term right to reject the goods;
 - o The right to repairs or replacement of the goods;
 - o The right to a price reduction or the final right to reject the goods.
- Last, implied terms can be introduced by custom. It is stated that parties can imply a term into a contract if other contracts in the same market, trade or context can be presumed to have it. We can take an easy example of a plumber, there is an implied term introduced by custom that he will bring his own tools, as this is a standard in the industry for the plumbers to take their own tools. To imply this type of implied terms you need to prove that the custom or usage exists and that the term is so obvious that everyone will assume that it will be part of the agreement. We can take the example of **Hutton v. Warren (1936)** in which Hutton worked on the land and waited to be paid for the work he did but Warren never said he will pay Hutton for his work. However, the payment was an implied term by custom as all work has to be rewarded.

4. What are the three types of misrepresentation and what remedies exist to the injured party? Cite cases from the attached list and your own knowledge to support your discussion. (25 marks)

The three types of misrepresentation are fraudulent, negligent and innocent.

A fraudulent misrepresentation is the most serious misrepresentation. It is proved when a false representation has been made knowingly; without belief in its truth or recklessly, careless whether it be true or false. For example, we can use **Derry v. Peek (1889)** trial, Peek stated that the company had the permit to use trams powered by steam rather than by horses. However, it was not true, they didn't ask for the permission because they thought it was just a formality for them. However, the Board finally refused their claim to be able to use steam and the individuals that had purchased a stake of the business brought a claim against the Peek after it became liquidated. In this case, the statement was not fraudulent because it was not proven that the director of the company was dishonest in his belief so the plaintiff could not claim for deceit. But, most of the time, in a case of fraudulent misrepresentation, the remedies for the injured party is rescission and/or damages.

A negligent misrepresentation at common law can be represented by **Esso Petroleum & Co. Ltd v. Marden (1976)**, Esso stated that the gas station will sell 200,000 gallons of fuel annually but didn't stated that work was going to change the entrance of the gas station from the busy road to a side street. Because of this, the gas station sells only 85,000 gallons of gas and Marden lost all the money. Esso was well aware of this work and had all the knowledge about gas station but still negligently stated with the intention of inducing him to enter a contract with Marden. Marden was entitled to damages based on negligent misstatement. For that, Esso Petroleum is liable in negligent misrepresentation. The remedies for the injured persons in the case of a negligent misrepresentation is also rescission and/or damages

An innocent misrepresentation is a material misrepresentation of fact made by the defendant, who was not aware, at the time of signing the contract, that the statement was false. We can take the example of **Salt v Stratstone Specialist Ltd (2015)**, in which case the accused sold a Cadillac to an individual. It was declared as new but the individual noticed significant defects on the car. He tried to return the car and be refund but the accused refused. The judge said there was a misrepresentation on the part of the accused. In this case, the remedy was the cancellation of the contract despite the car has been recorded and used by the individual. The lapse of time between the purchase and the discovering of defects remains "reasonable" and therefore normal to grant cancellation. The remedy in this situation is usually the cancellation of the contract. According to Act 1967, section 2(2), a person who has entered into a contract after a false declaration, has the right, because of the incorrect declaration, to terminate the contract. In some cases, the judge may declare the contract in effect and award damages based on the nature of the misrepresentation and the loss the victim may have lost. If cancellation had not been possible, Section 2(2) should not be used as an additional means of claiming damages but as an additional restriction. The availability of damages makes it possible to compensate for termination.

List of cases (to be attached to the Examination paper given to students)

Adams v Lindsell (1818)
Archer v Brown (1984)
Avery v Bowden (1855)

Bannerman v White (1861)
Bisset v Wilkinson (1927)
Blackpool Aero Club v Blackpool Borough Council (1990)
Bolton v Mahadeva (1972)
Brogden v Metropolitan Railway Co. (1877)
Butler Machine Tool v Excell-o-Corp (1979)

Car & Universal Finance v Caldwell (1965)
Carlill v Carbolic Smoke Ball Co (1893)
Chappell v Nestlé (1960)
Charles Rickards v Oppenheim (1950)
Cutter v Powell (1795)

Dakin & Co Ltd v Lee (1916)
Denton v GN Railway (1856)
Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd (1965)
Downs v Chappell (1996)
Doyle v Olby (Ironmongers) Ltd [1969]
Dunlop Pneumatic Tyre Co v Selfridge & Co (1915)

East v Maurer (1991)
Ecay v Godfrey (1947)
Entores v Miles Far East Corp. (1955)
Esso Petroleum v Mardon (1976)

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (The Fibrosa Case) (1943)
Fisher v Bell (1960)

Glassbrook Brothers v Glamorgan County Council (1925)

Hartley v Ponsonby (1857)
Harvela Investments v Royal Trust Co. of Canada (1985)
Harvey v Facey (1893)
Hochster v De la Tour (1853)
Hoenig v Isaacs (1952)
Holwell Securities v Hughes (1974)
Household Fire Insurance Co. v Grant (1879)
Hutton v Warren (1836)

Krell v Henry (1903)

Liverpool City Council v Irwin (1976)

Maple Flock Co Ltd v Universal Furniture Products (1934)

Mersey Steel & Iron Co v Naylor Benzon & Co (1884)

Oscar Chess Ltd v Williams (1957)

Partridge v Crittenden [1968]

Payne v Cave (1789)

Pilbrow v Pearlless de Rougemont & Co (1999)

Pinnel's Case (1602)

Planche V Colburn (1831)

P.S.G.B. v Boots Chemists [1953]

Re McArdle (1951)

Re Casey's Patent (1892)

Re London and Northern Bank (1900)

re Moore & Re Moore & Co Ltd v Landauer & Co Ltd (1921)

Reigate v Union Manufacturing Co (1918)

Roberts v Havelock (1832)

Routledge v McKay (1954)

Royscott Trust Ltd v Rogerson (1991)

Schawel v Reade (1913)

Shirlaw v Southern Foundaries (1926)

Smith v Hughes (1871)

Smith New Court Securities v Scrimgeour Vickers (1996)

Startup v M'Donald (1843)

Stilk v Myrick (1809)

Sumpter V Hedges (1898)

Taylor v Caldwell (1863)

Thomas v Thomas (1842)

TSB Bank Plc v Camfield (1994)

Whittington v Seale-Hayne (1900)

Wilkie v London Passenger Transport Board (1947)

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