



14-19 CHANGES
A LEVEL

Support Materials

GCE Law H534:

**Teacher Support Booklet:
Contract Law**

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Exemplar candidate work Law of Contract (G155)

These materials should be read alongside the approved specimen question paper and mark schemes and specification.

Question: (from unit 2574: Law of Contract 1, specification 3839/7839, June 2006)

'The presumptions relating to an intention to create legal relations serve an important purpose in the formation of a contract.'

Discuss the law relating to legal intent, in the light of the above statement.

[50]

Example A Grade Answer:

Legal intent is one of four components needed to form a contract. It means that for a contract to be valid parties must have had an intention for it to be legally binding **AO2**. Legal intent is split into two groups. The first being social and domestic arrangements and the second is commercial arrangements.

Social and domestic arrangements are contracts made between family members and sometimes friends. The presumption is that it is not legally binding. This is because most of the times members of a family don't really intend for the contract to be binding **AO2**. A leading case on this is *Balfour v Balfour*. Here a husband went away promising to give his wife £30 per week for maintenance when he defaulted on the payments she sued. The court held that there was no intention for this to be legally binding therefore the wife did not succeed **AO2**. Sometimes however a contract between husband and wife can be legally binding. In the case of *Merit v Merit* the husband said the wife could have the house if she finished paying the mortgage. When the husband refused and went back on the contract she sued. In contrary to the first case this was held to have legal intentions **AO2**. The husband and wife were legally separated meaning there was, to some extent **AO2**, an intention on both parties side for it to be binding.

The courts have dealt with these cases to bring out a fair outcome **AO2**. To do this they must look to both parties and see if there were any intentions for their agreements to be binding. In *Jones v Padvatton* a mother rented out a house for her daughter while she studied law. Later on the mother wanted to repossess the house. This case involved a mother and daughter and so from first sight you can see there was no intention for them to be bound by it. The court didn't rebut the presumption and the daughter could stay in her house.

Sometimes the courts do rebut these presumptions only if it seems fair and just to do so **AO2**. It can be rebutted on occasions where a formal letter of agreement over child maintenance is present, and this can rebut the presumption between family members. This was established in

Dark v Strout.

There must be a genuine intention to create a contract AO2. Agreements between friends is not seen as legally binding as it is just an extension of the family role that states family members agreements are not binding. In Buckpit and Oats a friend paid for petrol in return for a ride. The other friend agreed. When an incident happened the passenger sued for damages. Even though he gave money for petrol, which was his consideration, it was not seen as binding. A clear contract has been formed by the friends AO2 however legal intent is missing making it void. The plaintiff failed to rebut the presumption. If this case was to come to court today the outcome may be different AO2 due to compulsory passenger insurance, which would probably pay out damages.

If there is no intention to create a contract but an event causes the parties to go to court sometimes the presumption is rebutted. In the case of Simpkin v Pays a granddaughter lodger and the house owner entered a competition under the house owner's name. They all agreed that if they won the prize money would be shared. When they did win the house owner refused to share. The plaintiff (the lodger) sued asking for her share. She succeeded. The court held that the presence of a lodger made it more than just a social arrangement therefore legal intent was present and the presumption rebutted.

In commercial arrangements the presumption is that the contract will be binding. However this can also be rebutted. An example of this was seen in Edwards v Carter where a pupil barrister sued claiming his contract was made under a business context. This was true and so he would have prevailed. However at that time AO2 pupil barristers were not paid and so the lack of money didn't make it a commercial agreement which then rebutted the presumption.

Honourable pledge clauses can also come under this type of arrangement. If a clause states that the contract is not enforceable in court then it cannot be taken to court. In Jones v Vernon Pools a man won while playing football pool. On the back of his receipt an honourable pledge clause was present. This prevented him from claiming his win. A similar situation arose in Rose v Crompton Brothers where an honourable pledge clause prevented the plaintiff from succeeding.

These cases have shown that legal intent is an important factor when forming a contract AO2. Along with offer and acceptance, consideration and capacity to contract, legal intent is needed to form a valid contract. The cases mentioned have shown that it is an important factor because if legal intent was not needed then the courts would be dealing with a lot of cases AO2, for example if a father asked his daughter to fix his car in return for money and she did. If the father didn't pay it would be a breach of contract, however legal intent would be missing so no contract would be formed. The courts made sure legal intent is present when forming agreements because if not myriad of cases would find themselves in court unnecessarily AO2.

So presumptions relating to an intention to create legal relations do serve an important purpose in the formation of a contract AO2. Without the presumptions everyday agreements would be presumed to be binding between families and not binding when dealing with commercial arrangements.

Examiner's commentary

General comments

This is a good example of a Level 4 answer, there is a good level of detail and content for the allocated time. The AO1 mark is comparatively higher than the AO2 mark; there is a good range of material to illustrate the presumption in domestic cases and situations where it has been rebutted. Cases are explained well with a good account of the facts. The answer does not get to Level 5 because the law on commercial cases is not as detailed, the answer does not have a case to clearly illustrate the presumption for intent in commercial cases and the comments on *Rose v Crompton* are brief and undeveloped.

There is a good range of AO2 comments but these lack depth and in most cases are not developed. There is some repetition of an evaluative point towards the end of the answer and on the whole the comments are stated but not elaborated.

There is good communication and general structure in this answer, it has a logical sequence and makes use of appropriate legal terminology in an accurate way, it therefore gains 5 marks for AO3.

Mark

AO1	19
AO2	13
AO3	5
Total mark	37

Synopticism

The candidate has a good appreciation of the topic area in general and the candidate has taken care to conclude the answer with a reference back to the particular quote in the question. In the second paragraph there is a reference to the actual intention of the contracting parties, there is a comment on the justice of the situation in the fourth paragraph and an appreciation of how modern day insurance requirements would relate to the situation of the parties in the fifth paragraph. The evaluation at the end shows an appreciation of how the law relates to real situations.

Stretch and challenge

The comments outlined above where the candidate shows an appreciation of the application of the law to real situations are a hint at stretch and challenge. In general the lack of development of AO2 reasoning shows a lack of stretch and challenge although the explanation of the reasoning behind some of the cases is an indication of deeper appreciation of the topic.

Examiner's advice

This candidate has a clear appreciation of the law and for the most part has made good use of case authorities. In order to gain further marks for AO1 they need to make sure they cover all aspects of the question in equal depth, in this case paying further attention to intention in commercial cases.

For AO2 the points need to be further developed in terms of what has been mentioned above, going beyond stating critical points and explaining them in more detail.

Example E/D Grade Answer:

In contract law the intention to create a legally binding relationship is one of the key factors in actually determining whether or not a binding contract exists between the two parties AO2. When this area is being examined the kind of relationship between the parties can be classified as either a social/domestic one or a commercial one. Different presumptions are made for each of these classifications. With social/domestic agreements there is an automatic presumption by the courts actually intended to create / enter into a legally binding contract with each other. With commercial agreements there is an automatic presumption by the courts that both parties did intend to create / enter into a legally binding contract with each other.

These presumptions do serve an important purpose in the formation of contracts AO2. The presumption related to commercial contracts is especially important as it is instrumental in providing consumer protection AO2 because if businesses weren't bound to contracts with consumers they could disown responsibility AO2.

The presumption related to social / domestic agreements is important in the way that it reinforces that theory of 'freedom of contract' AO2. It does this because in these kinds of circumstances neither party is actually expecting to enter into anything legally binding and so they should not be made to AO2, as seen in a case a husband who was abroad was sending his ill wife regular sums of money after making an agreement with her that he would do so. The husband ceased the payment and the wife claimed that there had been a contract between the two of them and that he (the husband) was in breach of it. The court held that as the husband and wife were still very happily married at the time of this agreement, that it was a domestic agreement and that there was no presumption of legal intent.

Parties are able, however, to rebut (prove wrong) these presumptions if they can provide proof that there was (or was no) intention, but this can prove difficult AO2.

A unanimous and amicable way of stating intention is through an honourable pledge clause. This is merely a statement from both parties affirming that neither of them wish to enter into a legally binding contract with each other. These are very useful as they automatically rebut presumption and create certainty AO2.

Another very important advantage concerning presumptions of intention is that they create certainty within this area of law.

Examiner's commentary

General comments

This answer has a good level of general understanding but is hindered by a lack of case law, one case is described but not named. There are clear descriptions of the way the area of law works but without supporting authorities it is limited to Level 2.

This candidate has made several evaluative points throughout the answer but for the most part they are not developed. An example of this is the point about businesses disowning responsibility in the second paragraph, this could be developed into an excellent AO2 comment but in the end is left as a bald statement. In the second paragraph there is a very good point made on the freedom of contract issue, this raises the AO2 mark to the top of Level 3.

The answer is quite clearly written and quite well structured with a good use of English; it is therefore Level 4 for AO3.

Mark

AO1	10
AO2	12
AO3	4

Total mark	26
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Synopticism

There is some evidence of synoptic thinking in the first and second paragraphs as the candidate has recognised the importance of the topic in relation to contract formation as a whole.

Stretch and challenge

In the quality of the AO2 comments there is some evidence of higher level skills. The candidate has recognised that there is a strong link between the courts approach in this area and the requirement of certainty in contract law. Several of the undeveloped evaluative points have the potential to be expanded into higher level comments as well. The candidate has also used appropriate terminology effectively, without which there can be little hope of a higher level answer in this topic. The 'freedom of contract' comment has also got the potential to be developed into an advanced comment if it was further elaborated.

Examiner's advice

This could have been a sound answer if the AO1 content was boosted. This candidate would probably have answered Section C questions very well as they are able to explain the law and their thinking clearly, for an essay question however they need to make use of a range of relevant cases on both domestic and commercial cases in order to raise the standard of their AO1.

Question: (from unit 2574: Law of Contract 1, specification 3838/7839, June 2006)

In April Damian agrees with Great Gardens that they will landscape his garden. The work is to be finished by the end of June as he wants to hold his daughter's wedding reception there in July. Great Gardens inform Damian at the beginning of June that they are short of workers and money and will not be able to complete the work by the agreed deadline. Damian agrees to pay an extra £1000 to Great Gardens to complete the work on time.

Damian also agrees with Careful Caterers that they will provide food and a waitress service for the reception for an agreed fee. On the day of the wedding Careful Caterers arrive to carry out these tasks. While Damian and his family are at the wedding service Careful Caterers decide to decorate the house and marquee with bouquets of flowers and balloons. After several glasses of champagne Damian, delighted with the work, promises to pay £200 to Careful Caterers for this service, on top of the original fee.

Advise Damian whether he is obliged to pay the extra £1000 to Great Gardens and the extra £200 to Careful Caterers.

[50]

Example A Grade Answer:

This case is an example of consideration AO2. It could be stated that according to the rule of consideration that consideration must have some value. Damian would have to pay the £1000 extra AO2. This is because it would have to follow the case of Williams v Roffey Bros. Damian had agreed to pay the extra amount of £1000 in order to prevent the inconvenience of hiring other workers to do the work instead AO2, or to prevent his daughter's wedding from suffering AO2. Therefore he would be obliged to pay the amount agreed. The claim of Great Gardens therefore for the £1000 would be successful AO2. However the fact that this decision follows Williams v Roffey can be questioned as to whether it is the correct decision AO2. This is because Great Gardens are not doing anything more than what they initially contracted to do AO2. Therefore there is no consideration on their behalf which would go against the rule of consideration that both parties should benefit. This would go against the fact that consideration must have some value. There is also the fact that the courts have not followed Williams v Roffey in later cases as shown in Re Selectmove. This shows how the decision in Damian's case is unlikely to follow this AO2. It could be stated that the court may decide to follow the obiter dicta in Pao On and use economic duress as a defence against Damian's obligation to pay £1000 AO2. This is because the case of Williams v Roffey was not a case of duress as decided by the courts. This is another reason why this case should not be followed AO2.

The fact that Great Gardens did not go beyond their existing duty can also result in Damien following the Stilk v Myrick case, where the fact that the crew members didn't go beyond their existing duty meant they did not provide consideration and were doing what they were contractually obliged to do and could not receive the money. If this decision is followed Damien would not have to pay the £1000 AO2.

This case can be rejected by the fact that if you go beyond your existing duty if the work is made more dangerous, as shown in Hartley v Ponsonby, the money would have to be paid. This however would not be the case for Damian because Great Gardens work was not made too dangerous or unbearable to continue with and could be fixed by employing more workers AO2.

In addition it could be stated that Damian was benefiting from the work being done before the wedding in July. The fact that the contract was beneficial to him could mean he should continue to pay the £1000 AO2 as this would be consideration on his behalf for the work to be done, following Ward v Byham.

In addition it could be stated that it is up to the courts to decide whether the £1000 is paid depending on which situation seems to be reasonable AO2.

In terms of giving the extra £200 to Careful Caterers this can be seen in the light of past consideration is no consideration. This means that a party cannot rely on an act or promise that has already taken place as the consideration for an upcoming contract. This was shown in Roscorla v Thomas, Damian can be seen to follow this because the work they had done was before the promise to pay £200 AO2. They could not rely on this promise so Damian is not liable to pay. The facts of this case are similar to the facts of Re McArdle. This is because the wife painted and decorated the house before the siblings offered to pay her out. As the same with Damian where the house was decorated before he offered the extra £200. Thus following this cases decision Damian would not be liable to pay AO2.

However it could be said that there was an intention to get a sum for the work carried out by Careful Caterers as seen in the case of Lampleigh v Braithwaite. Even though Braithwaite offered the £100 after the job was done Lampleigh was entitled to the money because there was always an intention that he would get rewarded for the work AO2. The later deal confirmed the amount. However Damian would not be able to follow this case because it only occurs where the promisor asks for the job to be done AO2. Had Damian asked Careful Caterers to do the work he would have had to pay AO2. This shows how he is not entitled to give the extra £200 to the company.

Drunk people have a reduced capacity to contract, if one person is under the influence of alcohol and makes a contract, if the other party is unaware of this the contract is unenforceable as a person under the influence of alcohol may not be fully aware of the actions they take so the law takes a more paternalistic role AO2.

Examiner's commentary

General comments

There is a very good level of understanding of the law shown in this answer. The candidate has made full reference to relevant case law, going beyond the obvious cases required for a basic answer to the question, and has included enough information on the cases used to show a good grasp of their relevance to the question. This is a good example of Level 5 content for AO1.

The law has been thoroughly applied in each of the issues raised in the question. The candidate has discussed a range of possible outcomes according to the different ways in which the case law may be interpreted. There is a particularly good discussion of how *Williams v Roffey* may apply to this case, the candidate looking at reasons why the case may not be followed here and making good reference to other cases. This is an excellent example of AO2 application skills at Level 5.

The communication of the material in this answer is clear and well structured, a good Level 5 answer for AO3.

Mark

AO1	22
AO2	18
AO3	5
Total mark	45

Synopticism

There is evidence of a synoptic approach in this answer as the candidate has linked different areas of the law of contract to the obvious ones raised in the question, particularly economic duress as another strand to the reasoning in *Williams v Roffey*. Although this is not absolutely required for this answer it does show wide ranging thinking and understanding on the part of the candidate. In a similar way the candidate has shown good background knowledge on the purpose of the rules on consideration before focussing on the specific content required for the answer. The candidate has also commented on the development of the common law on the enforceability of second promises for the same obligation, suggesting reasons why the courts have made certain decisions rather than just reciting the law from those cases.

Stretch and challenge

This candidate has shown higher reasoning skills in their discussion of the limitations of *Williams v Roffey* in the later case of *Re Selectmove*, showing more than a surface level of understanding of the approach of the courts. There is also a comment on the paternalistic approach of the courts in relation to incapacity and intoxication that goes beyond a mere comment on what the law is.

Examiner's advice

This is a well balanced and detailed answer that shows an excellent understanding of the material. In order to gain further marks the candidate could be more explicit about the reason why the courts have not followed certain decisions, such as in *Re Selectmove*.

Example D/E Grade Answer:

This situation deals with consideration **AO2**, consideration is when something is offered in exchange for a gain that the offeror will receive. So Damian's consideration is the money to be paid to Great Gardens **AO2** and Great Garden's consideration is to landscape the garden for Damian **AO2**.

When Great Gardens are unable to finish the work due to lack of workers and funds, Damian is left with no choice but to find someone else to finish the work or to pay Great Gardens the extra £1000 to finish, he decides to pay them the extra £1000.

When the date for payment is due Damian would have to pay Great Gardens. This would follow *Williams v Roffey* where the carpenters were paid more money in order to complete the carpentry for building by the set date. The builders paid Roffey extra money to avoid meeting a liquidated damages clause and for not having the inconvenience of finding more carpenters. This is similar to Damian's case **AO2** because there was a limited amount of time and the inconvenience would have been too much.

In respect to Careful Caterers they were only contracted to provide food and a waitress service for the reception at an agreed price. They were not told to decorate the house and marquee with bouquets of flowers and balloons. Because Damian likes what they have done he promises to pay £200. However he will not be obliged to pay this to them **AO2**. This situation connects to the fact that consideration cannot be past consideration **AO2**. This follows the case of *Re McArdle* where a house was repainted and instalments were made to accommodate an elderly lady in the house. Some women inspected the house and loved what they had done and promised to pay money for their work after it had been completed. When no payment had been made the parties sued. However they were unsuccessful due to past consideration. If however Careful Caterers were expecting pay for decorating the house they could have expected payment **AO2**. This situation should have followed *Lampleigh v Braithwaite* where a man was given a pardon for murder that was asked by someone else for them. The man being pardoned provided to pay £100 for the others effort and when no money was received he sued and successful won, because for that sort of action there was expected to be payment even though the promise was made after the pardon.

After looking at the 2 situations of Damian's he would not have to pay Careful Caterers but would have to pay Great Gardens **AO2**.

Examiner's commentary

General comments

This is an answer that shows a competent understanding and explanation of the law but is limited to Level 3 by the lack of development and the inclusion of only three relevant cases. There are clear statements of legal principle and the candidate has focussed well on the specific law required to answer both parts of the question. Without elaboration it is possible to answer the first part of the question citing just *Williams v Roffey*, and the second part citing cases for the rule and the exception for past consideration.

The candidate has recognised the relevant parts of the law for each part of the question and has applied the law to the facts to come to a conclusion. The application is brief however and there is little discussion of alternative outcomes or possible weaknesses in the arguments. The AO2 content for this answer is Level 3.

Communications skills are Level 3 in this answer, the general structure is clear but there are too many grammatical inaccuracies for the answer to get to Level 4.

Marks

AO1	13
AO2	9
AO3	3

Total mark	25
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Synopticism

There are elements of synopticity in this answer, regarding the comments on following case and the possibility of distinguishing the main rule on past consideration.

Stretch and challenge

Although a Level 3 answer, there is a hint of stretch and challenge in the comment on *Lampleigh v Braithwaite* concerning the reason for the exception to past consideration in that case; that the parties were expecting to be paid and so it was understood that the actions would be rewarded.

Examiner's advice

This candidate needs to concentrate on increasing the amount of AO1 in their answer, in terms of citation of relevant cases. The AO2 comment is not well developed but with greater citation a more detailed commentary and analysis would be more likely to follow.



Question: 8

Sue owns a hotel and is having 20 rooms redecorated before the summer season. The work is to be completed by Hamish at a cost of £400 per room. Hamish completes 12 of the rooms and then informs Sue that he is unable to purchase materials he needs in order to complete the other 8 rooms. Sue does not have time to look for another decorator and is worried that she will have unfinished rooms for the summer season. She offers Hamish an extra one-off payment of £600 to help pay for the materials. Hamish accepts and continues with the work. As Hamish is grateful he also promises to paint the entrance hall. Some time later Sue is refusing to pay the extra £600 and Hamish has not painted the entrance hall.

Evaluate the accuracy of each of the four statements A, B, C, D individually as they apply to the facts in the above scenario.

[20]

Example A Grade Answer:

Hamish has provided good consideration for the extra payment

Every promise must be matched by consideration in order for it to be enforced. A second promise needs further consideration in order to be enforced.

Where the person who makes a further promise gains some benefit from making that second promise that may be seen as consideration from the person to whom the promise is made. When Sue ensures the work is done in time for the summer season, the consideration that comes from Hamish will be allowing Sue to avoid that detriment AO2.

Sue would be estopped from going back on her promise to pay the bonus.

Promissory estoppel requires a promise to be made not to enforce a contract, which is subsequently relied on. In this case Sue makes a promise to Hamish and he relies on it AO2, however here the promise is to give something extra rather than not to enforce a contract AO2, this is using estoppel as a sword and not a shield AO2, which is not its correct usage AO2. Sue would not therefore be estopped from going back on her promise AO2.

Sue can avoid paying the £600 on the basis of economic duress.

Economic duress will apply if an illegitimate threat was made by Hamish which left Sue with no alternative but to comply AO2. When Hamish said he could not complete the work on time that may be seen as an illegitimate threat AO2 however it is not certain that Sue was left with no alternative AO2, it might have been seen as reasonable to sack Hamish and take on another decorator AO2. If the court decides this is the case, Sue cannot rely on economic duress AO2.

Sue has not provided any consideration for Hamish's promise to paint the entrance hall.

Hamish promised that he would paint the entrance hall after Sue promised the extra money, AO2 her consideration is past and this is not generally good consideration AO2.

There are exceptions to the rule against past consideration, these would apply if Sue requested Hamish to paint the entrance hall AO2, or if some payment for the work was always expected AO2. The exceptions are unlikely to apply here AO2 as there was never any expectation that Hamish painted the entrance hall at the time that Sue made the promise and she did not request the work AO2.

Examiner's commentary

General comments

This is a well structured answer that applies the principles in each of the scenarios clearly and is able to both explain the relevant legal principles and apply them to give a reasoned conclusion.

This would be a grade A answer, the candidate has explained the relevant legal principles in each case and has applied them clearly to the problem. They have explained their reasoning and given an answer to each question. Case law is not expected in these answers as all the marks are for AO2 application.

In A there is a rather lengthy explanation of the law but the AO2 content at the end is accurate and applies the principle of the law clearly.

In B the principles of promissory estoppel are applied in turn to form a sensible conclusion, looking not only at the elements of estoppel but also the limitations.

In C there is a discussion of the principles of economic duress without any unnecessary elaboration and a clear conclusion has been formed.

In D again each element of the law on past consideration is clearly applied and the candidate has come to a justified conclusion that shows good understanding of the law.

There are no AO3 marks available for this question.

Mark

AO2 17

Stretch and challenge

There is ample evidence of stretch and challenge here. The candidate has good perception and incisive legal reasoning skills and also understands perfectly the demands of the different style of assessment.

Examiner's advice

The candidate shows good levels of confidence in their answer and has scored high marks. They need to make sure that their answer is AO2 orientated in all parts and does not drift towards an explanation of the law with less application shown as in part A.

Example E Grade Answer:

Hamish has provided good consideration for the extra payment

Consideration is the value that someone gives to the other person in a contract. Hamish did not do any extra work AO2 and so did not give any consideration AO2.

Sue would be estopped from going back on her promise to pay the bonus.

Estoppel is where someone is stopped from doing something, Sue would be estopped because she has promised to pay the money AO2 and so she can't go back on her promise AO2.

Sue can avoid paying the £600 on the basis of economic duress.

Economic duress is where someone uses force to make someone else do something. As Hamish said he would not go on with the work AO2 Sue had to agree the extra money as there was nothing else she could do AO2.

Sue has not provided any consideration for Hamish's promise to paint the entrance hall.

Sue's consideration is the £600 she has to pay to Hamish AO2. She offered this after the contract was made AO2 and so she does not have to pay it AO2.

Examiner's commentary

General comments

This would be an E grade answer; the candidate has identified some of the legal rules but without discussion of details or the possible exceptions. In some answers there is no clear conclusion although there is an effort to relate the rules to the question in each case.

In A there is a very basic understanding of the concept of consideration but no appreciation of the rules developed in *Williams v Roffey* and the way in which they could impact on this case.

In B there is a promising start but no real understanding of the rules in estoppel and when they apply.

In C there is a slightly better comment when the candidate discusses both the nature of duress and the concept of the threat leaving the other side with no choice but to comply.

In D again there is a basic understanding of past consideration but no elaboration of the rules and exceptions to the rule.

There are no AO3 marks available for this question.

Mark

AO2 8

Stretch and challenge

As would probably be expected of a grade E answer there is little evidence of stretch and challenge. The candidate probably has an understanding of the area of law and there is evidence of application in each of the four answers. There is no detailed legal reasoning however and no higher level skills are apparent.

Examiner's advice

This candidate appears to understand the legal principles but lacks confidence in elaborating their answer with the extra detail required. They need to practice pulling the law on a topic apart and applying each small part to a question with a comment on how each separate part applies.



Exemplar candidate work Law of Contract Special Study (G156)

These materials should be read alongside the approved specimen question paper and mark schemes and specification.

Question:

- 1) Discuss the extent to which the precedent in *Chappell & Co Ltd v Nestle* [Source 2 page 2 and Source 3 page 3 Special Study Materials] represents a development of the law on sufficiency of consideration.

[16]

Example Grade A Answer:

Consideration was defined in *Dunlop v Selfridge*, the promise of one thing is the price for which the promise of another thing is bought. As it says in source 2 in lines 1 to 2 'the courts will not enquire into the "adequacy" of consideration'. AO2 This means that it is possible to contract to pay a price which looks well below the actual value of the thing bought, AO2 as was the case in *Thomas v Thomas*.

However, consideration must be sufficient, a legal term meaning that the consideration must be real and tangible and have some economic value. In *Chappell v Nestle* the issue was whether chocolate bar wrappers that would be thrown away could count as consideration. AO2 The case represents a development because the House of Lords said that they could. AO2 Even though they were going to be thrown away the chocolate bar wrappers were consideration because the offer of the record for the price of postage plus the three wrappers was aimed at selling more chocolate bars so this was of real economic value to Nestle. AO2 Lord Somervell's famous quote on what amounts to sufficient consideration is in lines 5 to 7 of source 3 AO2 and shows why things that will be thrown away like the chocolate bar wrappers can be consideration.



Examiner's commentary

General comments

The candidate here has first of all defined consideration using an appropriate case, gaining credit and has put the answer also in the context of adequacy using the linked case of *Thomas v Thomas* to show contrast. Possibly another case on sufficiency could have been used to show development within the principle itself, although sufficiency is itself defined.

Nevertheless the candidate has explained why the case represents a development and has not laboured on the facts of the case, only using those that are essential for showing the development.

The candidate has also made a number of comments for AO2, including that something that would be thrown away can still be consideration, and why this is the case, because there is an economic value to be gained. The candidate also includes in a sensible way by citing precise lines two points made by Lord Somervell in the case and easily achieves a grade A mark.

As a result the candidate achieves Level 5 for AO2 because of good explanation and discussion of three key points at a high level and for excellent use of the source materials.

Communication of the points or precise use of the source is very effective and so the candidate achieves Level 4 for AO3.

Mark

AO2	12
AO3	4
Total mark	16

Synopticism

There is clear evidence of synopticism in the answer because the candidate has shown good understanding of the case in the context of the overarching theme, and has discussed both development and judicial creativity, and has also shown evaluative and analytical skills of a high level.

Stretch and challenge

For the reasons identified in 'Synopticism' there is clear stretch and challenge in the answer. While there is no AO1 requirement, the candidate has deployed both AO1 and AO2 skills, the latter at a high level. More importantly the candidate understands the very different demands of the specific type of question and of source based questioning. This is a clear A* answer.

Examiner's advice

This is an excellent answer achieving maximum marks. The candidate might have made it even more impressive with the addition of another case on sufficiency to identify development.

Example Grade E Answer:

Consideration does not have to be adequate but it must be sufficient. In Chappell v Nestle the plaintiffs owned the copyright in a dance tune. Nestle offered records of the tune to the public for 1s 6d but required, in addition to the money, three wrappers from chocolate bars. When they received the wrappers they threw them away. Their main object was to advertise the chocolate but they also made a profit on the sale of the records. AO2 The plaintiffs sued the defendants for infringement of copyright. The defendants offered royalty based on the price of the record. The plaintiffs refused the offer, contending that the money price was only part of the consideration and that the balance was represented by the three wrappers. The House of Lords by a majority gave judgment for the plaintiffs. It was unrealistic to hold that the wrappers were not part of the consideration. AO2 The offer was to supply a record in return, not simply for money, but for wrappers as well.

Examiner's commentary

General comments

The candidate here has fallen into the trap of merely copying verbatim from Source 2 (lines 14 – 24) which is not good exam technique. If a candidate feels that specific parts of the source are particularly relevant to their answer they would do better to cite those lines, but must remember to also use them to develop a point. In any case where the source is repeated in answer then the part copied should be put in inverted commas, as should any quoted material.

Fortunately for the candidate they have prefixed the part copied from the Source with a basic point about consideration that is relevant to the examination of the case. Also they have selected some material from the Source which is relevant to the development made by the case, that something that will be thrown away can still be good consideration. Taken together these represent sufficient marks for a grade E but the candidate would have gained much greater marks for carefully analysing the case in their own words.

For AO2 the candidate has made a basic point on adequacy and sufficiency, and then two points on why the chocolate bar wrappers were identified as good consideration. These are good points but are taken straight from the source and lack any real development and so only achieve Level 2.

For AO3 the candidate has taken a limited amount of information straight from the source and so effective communication is limited also for Level 2.

Mark

AO2	5
AO3	2
<hr/> Total mark	<hr/> 7

Synopticism

There is very little evidence of synopticism in the answer. What evaluative comment there is has been taken directly from the source without development.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has made some evaluative points but these are taken directly from the source so none of the higher level skills are evident to any extent.

Examiner's advice

The candidate could have increased their marks dramatically with better preparation and better technique. The candidate does understand the demand of source based papers and is aware of material within the source, but rather than citing appropriate lines of the source or crediting the source through the use of inverted commas the candidate has merely copied wholesale from the source. Besides this there was additional information in the source that the candidate might have used to make even more points, for instance Lord Somervell's observation. In any case the points made needed further development to secure higher mark e.g. the candidate has identified that there is a difference between adequacy and sufficiency but could have defined these terms; and the candidate could have done more to show why the chocolate bar wrappers were accepted as consideration; and have examined 'real, tangible and of value' in the context of the case.

Question:

- 2) According to Major and Taylor [Source 11 page 8 lines 1-3 Special Study Materials] *“If a party performs an act which is merely a discharge of a pre-existing obligation, there is no consideration, but where a party does more than he was already bound to do, there may be consideration.”*

Consider the extent to which the development of the rules on performance of an existing duty mean that, for there to be consideration for a fresh promise, a party must do ‘more than he was already bound to do’ under the existing duty.

[34]

Example Grade A Answer:

Consideration is the second requirement to show that a contract has been properly formed, the other two being offer and acceptance and intention to create legal relations. Consideration was first defined AO2 in *Currie v Misa* as a benefit gained by one party and a detriment suffered by the other. In the twentieth century judges moved more towards the idea of an exchange of promises AO2 and in *Dunlop v Selfridge* the court defined consideration as the promise of one thing is the price for which the promise of another thing is bought.

Consideration has a number of different rules. One rule is that a party cannot use what he is already bound to give under an existing contract as consideration for a fresh promise. This was established AO2 in the case of *Stilk v Myrick*. In *Stilk v Myrick* two sailors had deserted and the captain of the ship promised the remaining nine crew members that they could share the two deserter’s wages if they sailed the ship safely back to port. The ship owner then refused to pay the men and they sued. The court held that the crew were only doing what they were bound to do anyway. It was part of their contract to deal with all the different emergencies and the two men deserting was just one of these. This actually seems quite unfair in the circumstances. AO2

In contrast with this AO2 in *Hartley v Ponsonby* only nineteen members of a crew of thirty six was left when the captain made the same promise to the remaining sailors. The court in this case enforced the promise to pay the men extra wages because the journey was much more dangerous with a much smaller crew and therefore the court felt that they had done much more than they were already bound to do. AO2 In this respect Major and Taylor are correct. AO2 The promise to pay is only upheld by the court because the men have gone beyond what they were bound to do under their contract and done extra. However, it could be said that the difference between the two cases is only in the numbers of men in the two cases that were left to sail the ships. AO2

The principle also applies not just to contracts but when a person is carrying out a legal duty. AO2 In *Collins v Godefroy* a police officer was a witness in a trial. The defendant wanted to make sure that the police officer did attend and give evidence so he promised him a sum of money for doing so but then he failed to pay him. The court would not enforce the payment by the defendant because the police officer was already under a duty to attend the trial so he wasn’t doing anything more than he would have already had to do by law.

On the other hand AO2 in *Glasbrook Brothers v Glamorgan County Council* there was a strike by miners and the colliery owner asked the police to supply him with extra policemen for protection.

RECOGNISING ACHIEVEMENT

Because the police would have only normally used a small number of policemen to patrol they said that they would only provide the extra men for a payment. The colliery owner agreed but then failed to pay. The court held that the police force were doing more than they would normally have done and therefore the colliery owners were bound to pay the money they had agreed to pay. This again shows that the quote is accurate. AO2 Shadwell v Shadwell is a different type of case AO2 but it makes the same point. AO2 At one time if a person was engaged to be married this was legally binding. As a result of this an uncle promised to pay his nephew a regular sum of money till he qualified for the bar. The nephew was able to sue when the uncle failed to pay because getting married was seen as extra consideration so the quote is accurate in a sense AO2 because by getting married the nephew is doing more than he was bound to do by qualifying for the bar.

However, sometimes courts will enforce agreements when the claimant doesn't seem to be doing anything more than they were already bound to do under their contract. AO2 In Williams v Roffey a carpenter under quoted in a contract for sub-contract work on flats and then ran into difficulties trying to complete the work on time. Because the main contractors would have to pay penalties in their contract for late completion of the work they offered to pay Williams another £10,000 if he agreed to complete the carpentry on time. He did so but then the main contractors did not pay him the extra money they had promised. On the surface it seems as though the carpenter's claim would fail AO2 because he was only doing what he was already bound to do, complete the work by the agreed date in his contract. However, the court distinguished AO2 from Stilk v Myrick and said that there was consideration for the later agreement and this was the extra benefit gained by the main contractors in not having to pay penalties if they completed the work late. Consideration must be real, tangible and have economic value. In Williams v Roffey there is nothing extra being done as there was in Hartley or in Glasbrook so it seems as if the case contradicts the quote. AO2 However, the court was satisfied that the extra benefit did have economic value. Pao On v Lau Yiu Long is another case where the claimant only appeared to be doing what he was already bound to do under his existing contract but the court enforced the second agreement.

In conclusion the quote is generally true AO2 but there are some cases that don't seem to fit absolutely to the rule AO2 despite the justifications given by the judges. AO2

Examiner's commentary

General comments

The candidate has written at reasonable length and detail and there is also some creditable comment for AO2. Although in general the AO1 is more extensive and developed than the AO2.

For AO1 the candidate has included a wide range of cases, not just the obvious ones on performing existing contractual duties but a range on performing public duties also. As is often the case with Law of Contract answers the candidate gives a great deal of detail on the facts of cases but has also been careful to examine the legal principles carefully as well. Besides this the candidate has provided definitions of consideration and used two appropriate cases in doing so. The candidate has in any case used most of the main cases associated with the area and scores high AO1 marks.

RECOGNISING ACHIEVEMENT

The critical comment is possibly not always as developed as the AO1 but the candidate has tried to include comment throughout. The candidate contrasts cases where the rule has applied rigidly with those where something extra has been provided, and has shown the very different approach in *Williams v Roffey* and has tried to link back to the question and reach conclusions.

For AO1 the candidate has used a wide range of cases, as well as some good definitions, and recognition of the principles and so easily achieves Level 5.

There is some good comment and the candidate has tried to comment at each point in the essay and reach conclusions at the end, but the candidate achieves a high mark through breadth of comment rather than the depth of insight and so just achieves Level 5 for AO2.

There is a good structure and the explanations are generally very clear and the candidate achieves Level 5 for AO3 also.

Mark

AO1	16
AO2	13
<u>AO3</u>	<u>4</u>
Total mark	33

Synopticism

There is evidence of synopticism in the answer. The candidate comments in every paragraph and so does demonstrate a critical awareness of the subject. Development is considered in the 1st, 2nd, 4th, 5th and 6th paragraphs. Comparisons are drawn in the 1st, 3rd, 5th, 6th and 7th paragraphs. There is discussion on justice in the 2nd and 5th paragraphs. The role of judges is acknowledged throughout.

Stretch and challenge

The candidate has achieved a very high mark but gained greater marks for the quality and breadth of the information more than for the higher level skills. The candidate does comment in every paragraph and so shows advanced critical awareness, but there might have been more depth of analysis. There are two excellent areas of comment, at the end of the 3rd paragraph and on *Shadwell v Shadwell* towards the end of the 5th paragraph. With more comment on *Williams v Roffey* and even on *Pau On* (which was also referred to) this would have been a secure A* essay.

Examiner's advice

The candidate has fallen only just short of maximum marks but undoubtedly has done more than is required for AO1, covering a wide range of case law. Possibly the use of case facts was excessive and more could have been written critically on the principles, particularly *Williams v Roffey* which at the least strains the existing principles. Besides this the candidate may have made more use of the source materials.

Example Grade E Answer:

The basic rule from *Stilk v Myrick* is that doing something that you are already bound to do under an existing contract won't be classed as consideration for any new agreement that you reach. You must do something more than you were already bound to do for it to be consideration. *Stilk v Myrick* was about sailors who were promised extra money to do the work of other sailors who had deserted but they already had to sail the ship anyway so the court would not let them have the extra money because they hadn't done anything extra.

Hartley is another case where sailors were promised money when there was only half the crew left to sail the ship. The court let the sailors have the money in this case because it was much more dangerous to sail the ship when they were so short handed. However, there doesn't seem to be a lot of difference between the two cases other than the number of sailors in each case. AO2 The court did the same thing AO2 in the case where the miners were on strike and the pit owner had to pay for more policemen.

Williams v Roffey is another case where the court took a different approach. AO2 *Williams* was sub-contracted to *Roffey* but couldn't do his work by the set date. So *Roffey* offered him more money if he promised to do the work on time because if the work wasn't done on time they would be paid less. They didn't pay him when he did the work so he sued. The judge said that he should be paid the extra money because *Roffey* gained a commercial benefit from not getting paid less for the work not being finished on time. The judge said it was different to *Stilk v Myrick* AO2 even though *Williams* wasn't doing anything more than what he was already supposed to do.

Examiner's commentary

General comments

This is a fairly limited answer which would have benefited from more explanation and certainly more development. It is also fairly narrative in style with little real critical comment which is typical of a grade E answer.

For AO1 the candidate gains credit for explanations of *Stilk*, *Hartley* and *Williams v Roffey* and also for the reference to *Glasbrook* although without naming it. There is some understanding of the principles of these cases and how they are different, although it relies too much on the facts of cases. However, the fact of using the critical cases allows the candidate to just achieve Level 3 for AO1.

There is not much in the way of AO2. However, the candidate does gain credit for pointing out the contrast between *Stilk* and *Hartley* and for the brief comment that on the facts there does not appear to be too much difference between the cases and for the undeveloped comment on *Williams v Roffey*. However, there is no real discussion, only a smattering of comment and so the candidate achieves Level 2 only for AO2.

As the answer is quite limited in scope the candidate achieves Level 2 only for AO3.

Mark

AO1	8
AO2	4
<u>AO3</u>	<u>2</u>
Total mark	14

Synopticism

There is very little evidence of synopticism in the answer. The answer is mostly narrative and, while there are a couple of reasonable comments, the AO2 is undeveloped and the higher level skills are not really evident.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has shown only limited AO2 skills, some bald comment but little in the way of analysis or evaluation.

Examiner's advice

The candidate has achieved a secure grade E, largely as a result of the use of some key cases. The AO1 itself could be improved significantly with less case facts and more explanation of principles, particularly in relation to *Williams v Roffey*. Even with the few cases used a more detailed answer might have gained Level 4. Additional case law might also have been used, the obvious cases being those concerning public duty, *Collins v Godefroy* and *Glasbrook Bros*.

The AO2 is quite limited, the only point of note really being the first comment in the second paragraph, on the contrast between *Hartley* and *Stilk*, but even this is undeveloped. The candidate could have discussed the basic principle from *Stilk* in the context of the definitions of consideration, both those based on benefit and detriment and those based on exchange. The reasons for the exception in *Hartley* could also have been covered in depth and there is a wealth of comment that could have been made on *Williams v Roffey*. Even without going into further cases these additions could have secured a much higher mark.



Question:

3) Clare, Maureen and Pauline all work in the law school where Chris is a lecturer.

Consider whether or not each of them could enforce the following agreements.

- a) Chris asks Clare if she will type out the manuscript for his latest Contract Law text book. No mention is made of payment but after the work is completed Chris says that he will pay Clare £300. [10]
- b) Maureen, who has previous experience as a proof reader, volunteers to proof read the manuscript. Chris gratefully accepts. After the work is done Chris promises to pay Maureen £100. [10]
- c) When the typed manuscript is completed and proofread, Chris has lectures all day and cannot get to the post. He promises Pauline that in future he will try to stop moaning about his workload if she will take the manuscript to the post and send it to the publishers for him. [10]

[30]

Example Grade A Answer:

(a)

Past consideration is no consideration.

Here consideration is past because Chris' promise to pay £300 comes after Clare does the work.

AO2

However this is like the exception in *Lampleigh v Braithwaite* AO2 because Chris has requested the service so there is an implied promise that he will pay. AO2

Clare can claim the money. AO2

(b)

Here consideration is past and past consideration is no consideration. AO2

Maureen cannot claim the £100 AO2 which Chris only promises to pay after the work is already done. AO2

(c)

Here Chris' promise is made before Pauline agrees to go to the post for him AO2 so it is not past consideration. AO2

However the situation is like *White v Bluett* AO2 where the son also promised to stop complaining.

The consideration is too vague AO2 and there is nothing for Pauline to claim. AO2

Examiner's commentary

General comments

The candidate here has answered in a brief note form but is perfectly acceptable for a question 3 answer. The key issue is whether the candidate correctly identifies and applies the principles of law.

The candidate secures sufficient marks for grade A because appropriate principles are applied to all three scenarios and because most marks for question 3 are given for AO2. The candidate has given a reasoned application for each situation. For both (a) and (c) the candidate has applied the correct law with some detailed application and appropriate case law.

The answer to part (b), although correct as far as it goes, lacks a case for AO1 and the candidate could also have secured higher marks for spotting the possibility of *Re Casey's Patents* applying. Part (c) also might have included explanation that consideration must be real, tangible and of economic value. However, there is still enough here for a grade A mark.

For AO1 the candidate achieves Level 4 as the candidate has clear understanding of past consideration, and of the effect of vagueness and has included appropriate case law for both (a) and (c). A higher mark would have been possible with explanation of the requirement that consideration must be real, tangible and of value for (c), and with either a mention of a past consideration case e.g. *Re McArdle* or of *Re Casey's Patent* for (b)

For AO2 the candidate has applied the law well although additional points could have been made but still manages to achieve Level 5.

Mark

AO1	8
AO2	<u>16</u>
Total mark	24

Synopticism

There is clear evidence of synopticism in the answer because the candidate has shown excellent identification skills and good legal problem solving skills effectively in all three situations.

Stretch and challenge

There is some evidence of stretch and challenge in the answer. The candidate is able to move freely between different situations and identify the appropriate law for individual aspects of each situation. The candidate is also able to respond to the different style of problem solving in the Special Study paper and answer succinctly. However, a little more detailed application would have been required to achieve a A* grade.

Examiner's advice

The candidate needed a little more development of both AO1 and AO2 for higher marks but this could easily have been achieved.



RECOGNISING ACHIEVEMENT

For AO1 this would have involved the principle and cases identified above.

For AO2 the candidate could have considered the application of *Re Casey's Patent* for (b), and applied the requirement that consideration must be real, tangible and of value to (c) rather than moving straight into vagueness.



Example Grade E Answer:

(a)

Chris offers to pay Clare £300 after she has already typed out his manuscript. Therefore consideration is past and past consideration is no consideration. AO2 In *Re McArdle* a woman was not able to claim for improvements that she had done to her mother in law's house because these were already done before the family promised to pay her for them.

(b)

Chris offers to pay Maureen £100 after she has already proof read his manuscript. Therefore consideration is past and past consideration is no consideration AO2 *Re McArdle*.

(c)

This is like the case where the son promised his father that he would stop moaning in return for the father letting him off his debts on an IOU that the father had. AO2 Stopping moaning wasn't consideration in that case and it wouldn't be here either. AO2

Examiner's commentary

General comments

The candidate shows some understanding of the past consideration rule and also some implicit understanding of the rule that consideration must not be too vague.

The application lacks detail and also conclusions. For (a) the candidate has also omitted to apply the exception to the past consideration rule in *Lampleigh v Braithwaite*. The answer to (b) is also quite thin and again the possibility of applying *Re Casey's Patents* is ignored. For (c) the candidate does not actually get as far as identifying that consideration must not be too vague, although this is hinted at with the use of *White v Bluett*, although the case is not named. The candidate would have clearly gained much higher marks for inclusion of any of these.

The candidate does gain limited credit for recognising the relevance of the past consideration rule to (a) and (b) and the use of the case, and for (c) again for recognising the similarity to *White v Bluett*.

For AO1 the candidate's knowledge is quite limited. There is awareness of the basic rule on past consideration and on vagueness and two appropriate cases are used so this justifies Level 2.

For AO2 the candidate has only really made one effective point for each scenario without reaching real conclusions and therefore only achieves Level 2 for application.

The candidate could in any case have secured much higher marks by developing all of the points that were made.

Mark

AO1	4
AO2	8
Total mark	12

Synopticism

There is little evidence of synopticism in the answer because the skills deployed are quite limited. The candidate has some reasonable identification skills for problem solving but misses many significant points and the application is undeveloped.

Stretch and challenge

As would be expected from a grade E answer there is no evidence of stretch and challenge. The candidate has deployed both AO1 and AO2 skills but in a limited way and none of the higher level skills are evident to any extent.

Examiner's advice

The candidate needs to apply the law in depth so both AO1 and AO2 need more development.

For AO1 the candidate could have explained the past consideration rule in more depth and the exceptions in both *Lampleigh v Braithwait* and *Re Casey's Patent*. The requirement that consideration must be real, tangible and of value could also have been considered and explained as well as the point on vagueness being positively stated rather than implied.

For AO2 the candidate has some good identification skills, but on the whole has missed critical aspects in all three scenarios. Both the past consideration rule itself and its exceptions could have been considered in depth for (a) and (b); and a definition of consideration applied to (c) as well as more depth to the answer on vagueness.

Sample Classroom Activity: GCE Law (H534): Law of Contract - G155

Review activity for status of terms

Explanation – this would be a suitable review activity to follow up on formal teaching of the subject. Students are revising and explaining the basic concepts, they are also encouraged to develop their critical understanding to support AO2 skills.

Activity 1

Some terms are seen as conditions because the courts have decided that those kinds of terms will always be seen as conditions.

Bunge Corp New York v Tradax Export SA Panama

The issue in this case was whether a breach of a time clause was serious enough to justify termination. This was a contract for the purchase, sale and shipment of Soya bean meal. The purchaser was obliged under the contract to give the seller fifteen days' notice nominating a port and vessel for shipment. The purchasers were four days late in giving this notice. The sellers then said that they treated this as a repudiatory breach and terminated the contract and sued for damages.

The buyers (not surprisingly) argued that, although they were late, this was a trivial breach and should be tested by reference to the Hong Kong Fir approach, namely, to assess what effect being four days late had on the contract as a whole. On this argument, so the buyers said, the breach did not justify termination.

The House of Lords took a very hard-nosed approach. They held that the time clause was essential (a "condition" in terms of the language of condition/warranty). Lord Wilberforce said that applying the Hong Kong Fir approach to a time clause was fundamentally flawed because the reason for the approach adopted in Hong Kong Fir was that the clause in that contract, like many contract clauses, could be broken in so many different ways. But, as Lord Wilberforce so wisely said, there is only one way to break a time clause, and that is to be late.

All the law Lords stressed that in mercantile contracts like this, time clauses are very important because they provide certainty. In other words these sorts of contracts are not the place for rubbery time clauses. This case also reflects the very important role that the English courts play in sorting out shipping disputes. Shipping litigation is a major and successful export industry for the UK and so it must deliver what the shipping world wants in terms of the applicable law. There is, for understandable reasons, a premium on certainty and security in these types of contracts (they are not "rubbery").

Questions:

1. Explain what is meant by the term '*repudiatory breach*'.
2. Why would the Hong Kong Fir approach have benefited the buyers in this case?
3. Why was the approach of the HOL said to be *hard nosed*?
4. Why would it be '*fundamentally flawed*' to use the Hong Kong Fir approach in this case?

Activity 2

Some terms are seen as conditions because the parties have labeled them as a condition in the contract.

Schuler v Wickman Machine Tools [1974] AC 235

Wickman were the exclusive selling agents in the UK for Schuler's goods. The agency agreement provided that it was a condition that the distributor should visit six named customers once a week to solicit orders. This entailed approximately 1,500 visits during the length of the contract. Clause 11 of the contract provided that either party might determine if the other committed 'a material breach' of its obligations. Wickman committed some minor breaches of this term, and Schuler terminated the agreement, claiming that by reason of the term being a condition they were entitled to do so.

The House of Lords held that the parties could not have intended that Schuler should have the right to terminate the agreement if Wickman failed to make one of the obliged number of visits, which in total amounted to nearly 1,500. Clause 11 gave Schuler the right to determine the agreement if Wickman committed a material breach of the obligations, and failed to remedy it within sixty days of being required to do so in writing.

The House of Lords had regard to the fact that the relevant clause was the only one referred to as a condition. The use of such a word was a strong indication of intention but it was not conclusive. Lord Reid felt that it would have been unreasonable for Schuler to be entitled to terminate the agreement for Wickman's failure to make even one visit because of the later clause. The word 'condition' made any breach of the clause a 'material breach', entitling Schuler to give notice requiring the breach to be remedied. But not, as Schuler sought, to terminate the contract forthwith without notice.

Questions:

1. What does the expression *exclusive selling agent* mean?
2. What was Schuler's argument for being able to terminate the agreement?
3. What did the HOL think that the parties could not have intended?
4. Why would it have been unreasonable to allow Schuler to terminate the contract?
5. What was the actual outcome in the case (who would have been liable to pay damages)?

Sample Classroom Activity: GCE Law (H534): Law of Contract - G155

Explanation – An activity that encourages students to analyse a recent and important case, to look at phrases within the original judgment and to look at AO2 reasoning behind the decision. Although this activity would support able students it should be accessible to students across the ability range as they are directed to key passages rather than just being given the whole judgment to analyse.

Great Peace Shipping Limited v Tsavlis (International) Limited COA 2002

Facts

The facts of the case are fairly straightforward. In September 1999, the *Cape Providence* was sailing from Brazil to China when she suffered serious structural damage in the South Indian Ocean. Tsavlis Salvage offered their services (which were accepted) and arranged for a tug to assist. However, it was going to take about five or six days for the tug to reach the ship and there were concerns over the safety of the vessel and her crew in the meantime.

Tsavlis' brokers contacted Ocean Routes (an organisation which provides reports about vessels at sea) who said that the nearest ship was the *Great Peace* and gave her position. Unfortunately, that position was wrong. Unaware of this, the broker negotiated terms with Great Peace Shipping to charter the vessel on a daily hire basis to escort the *Cape Providence* until the arrival of the tug. The contract was for a minimum of five days at US\$16,500 per day.

Shortly afterwards, it became known that the vessels were in fact 410 miles away from each other. Had the information from Ocean Routes been correct, they would have been only 35 miles apart. Tsavlis told the brokers that they were looking to cancel the charter, but not until they found out if there was a nearer available vessel. As it turned out, there was, the *Nordfarer*. Tsavlis contracted with the owner directly and instructed the brokers to cancel the *Great Peace* agreement.

Great Peace Shipping's claim was for \$82,500, representing five days' loss of hire at a daily rate of \$16,500.

The case, therefore, concerned a "common" mistake of fact as to the position of the *Great Peace*. The issue was whether that mistake rendered the contract (1) void in law for fundamental mistake or (2) voidable in equity for mistake, entitling Tsavlis to rescind the contract.

Background - Mistake and common law

In certain, very limited circumstances, a mistake can render a contract void at common law. The leading authority on this is *Bell v Lever Brothers Limited*. In that case, an employer, Lever Brothers, entered into agreements with the two defendants to terminate their employment for substantial amounts of compensation. In fact, the defendants had committed serious breaches of their contracts of employment that would have justified their summary dismissal. But the defendants were not aware of this. The agreements were, therefore, entered into under a common mistake as to the respective rights of the parties.

The House of Lords held that the agreements were not void for mistake. The starting point is to decide whether there has been an agreement between the parties and on what terms. **Those terms are paramount and should be observed.** Only in certain, very limited circumstances will the parties'

RECOGNISING ACHIEVEMENT

agreement be rendered void by a mutual mistake. Examples include mistakes as to the quality of the subject matter. This raises difficult questions. What distinguishes a mistake as to quality from normal run-of-the-mill misrepresentations and breaches of warranty and their remedies? The mistake must mean that the subject matter of the contract is "*essentially and radically*" different from what the parties believed it to be, anything less than that and the parties will be held to their bargain, however bad.

Where, for example, a purchaser and seller believe a picture to be an old master when it is not, the essential quality of the picture is not affected (it is still a picture), and, in the absence of a representation or warranty by the seller, the buyer has no remedy. This is, of course, the ***caveat emptor*** rule ("let the buyer beware").

In *Bell*, ***an agreement to terminate a contract that had already been broken, and an agreement to terminate a contract which had not been broken, were not essentially different***. The result was the same. It was immaterial that the party could have got the same result in another way or that, if he had known the true facts, he would not have entered into the bargain.

Mistake and equity

Then along came Denning LJ in the Court of Appeal. In *Solle v Butcher*, he held that a contract which did not satisfy the very stringent *Bell* test, could, nevertheless, be voidable and the court could set it aside on terms "*if the parties were under a common misapprehension either as to facts or to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault*".

The question therefore is, what sort of mistake is "*fundamental*" and so gives rise to the equitable doctrine, and how does this differ from the sort of mistake that would at common law make the subject matter of the contract "*essentially and radically different*" from what parties believed it to be?

Judgment at First Instance

This was the question that troubled Toulson J at the first instance hearing of *Great Peace Shipping*. If deciding what is, or is not, fundamental in equity depends on whether the mistake induced a party to enter the contract, or on the seriousness of its effect on the parties, that would enable the court to interfere when the parties had simply made a bad bargain (destroying the *caveat emptor* rule in the process), which is not the court's role. If the issue depends on what the court considers important on the facts of a particular case and in the interests of general justice, this "***puts palm tree justice in place of party autonomy***".

The key question was whether the 'Great Peace' was so far away from the 'Cape Providence' at the time of the contract as to defeat the contractual purpose – or in other words to turn it into something essentially different from that for which the parties bargained. This was a question of fact and degree, but in the judge's view the answer was no. ***He found the reaction of the defendants on learning the true position of the vessels a telling point***. They did not want to cancel the agreement until they knew if they could find a nearer vessel. Evidently, the judge said, the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once. Accordingly, he held them to their bargain and gave judgment for Great Peace.

The Court of Appeal shared the judge's concerns. *Solle v Butcher* had left the precise parameters of the equitable jurisdiction unclear. By deciding that there was a category of equitable mistake where the contract was not void at common law, Denning LJ had dramatically extended any jurisdiction exercised up to that point in a way that was ***impossible to reconcile with the House of Lords' decision in Bell v Lever Brothers***.

A common factor in *Solle* and the cases which followed it was that the contract turned out to be a particularly bad bargain for one of the parties. But it is not for the court to interfere just because the parties have made a bad bargain. There are already established rules to deal with cases of fraud, misrepresentation and undue influence. In cases of common mistake, the House of Lords had drawn a very strict line as to when relief was available. This left no room for any further relief in equity.

So, after detailed consideration, the Court of Appeal concluded that there was no judicial basis for allowing equity to grant rescission in cases of common mistake where the common law did not make the contract void.

That left the question whether the mistake as to the position of the *Great Peace* meant that the services it could provide were something essentially different from that which the parties had agreed? Like the judge at first instance, the court of appeal thought not. The fact that the vessels were further apart than had been believed did not mean that those services were essentially different. They too placed particular reliance on the fact that, when Tsavliris found out about the true position of the *Great Peace*, they did not immediately cancel the agreement until an alternative was found. Judgment for *Great Peace* was therefore confirmed.

Briefly explain what the following extracts mean...

1. Those terms are paramount and should be observed
2. *Caveat emptor*
3. An agreement to terminate a contract which had already been broken, and an agreement to terminate a contract which had not been broken, were not essentially different
4. "Puts palm tree justice in place of party autonomy"
5. He found the reaction of the defendants on learning the true position of the vessels a telling point
6. Impossible to reconcile with the House of Lords' decision in *Bell v Lever Brothers*
7. So, after detailed consideration, the Court of Appeal concluded that there was no judicial basis for allowing equity to grant rescission in cases of common mistake where the common law did not make the contract void.

Sample Classroom Activity: GCE Law (H534): Law of Contract - G155

Exclusion problem plan activity

Comments – An activity like this is useful when studying topics with different stages. As each stage is studied in class it can be applied to the question. Studying the whole topic and then trying to apply it to a problem question can be overwhelming for students.

Pippa owns a washing machine which has needed regular repair over the past two years. On the latest occasion on which it breaks down, she phones David, who has mended the machine on previous occasions. He agrees to come out on the basis of an 'all inclusive' charge of £50. When he has repaired the machine, he asks Pippa to sign a form stating that all work has been completed satisfactorily; that David will replace any parts which break down within three months; but that otherwise David accepts no liability for loss or damage caused by his work. Pippa signs the form.

The next time that Pippa uses the machine it floods, causing £500 worth of damage to Pippa's carpet. When Pippa tries to turn the machine off she receives a severe electric shock from the casing which severely burns her arm.

Advise Pippa.

In relation to the Pippa question...

Is the term properly incorporated into the contract?	
Can the term be interpreted to give protection to David?	
Is the term void or subject to reasonableness under UCTA?	
Is the term unenforceable under the Unfair terms in Consumer Contracts Regulations?	

Sample Classroom Activity: GCE Law (H534): Law of Contract Special Study - G156

Note

These activities are based on the special study theme and materials for the equivalent unit from the GCE Law H124/H524 specification. The nature of the classroom activities remains the same regardless of the special study theme.

Please seek advice from OCR as to what the current special study theme is.

Activity 1 – Identifying the key points in cases for question 1

Read Source 6, Source 9 and Source 10 on *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* and the case or other text materials on the case and identify the critical points from the judgment of the case. Use the completed list as a revision aid.

Suggested list of critical points that can be found in the case:

- The basic principle in *Stilk v Myrick* is that merely completing an existing contractual obligation is insufficient to be consideration for a fresh agreement;
- The Court of Appeal distinguished *Williams v Roffey* from *Stilk v Myrick*;
- It did so because unlike in *Stilk v Myrick*, Roffey was actually receiving an 'extra benefit' from Williams under the second agreement;
- This extra benefit was in avoiding the inconvenience and expense of having to pay penalties for late completion – so it is said to have commercial value;
- The court identified that the modern approach to consideration is where a party derives a benefit from a contractual variation even though one party does not suffer a detriment there can still be consideration for the fresh agreement;
- But there appears to be potential inconsistency with the existing principle;
- The illusory character of 'extra benefit' has caused extra confusion in an already difficult area;
- The judges in the case were eager to ensure that promises made in a commercial context should not be broken, aimed at promoting justice.

Activity 2 – Identifying critical comment in Sources in the Special Study Materials booklet for AO2 in question 2

Read Source 2 and identify critical points as a series of bullet points citing the lines in which the critical comment can be found. Use the completed list as a revision aid.

Suggested list of critical comment that can be found in source 2:

- ‘the courts will not enquire into the adequacy of consideration’ (lines 1 to 2);
- ‘they will not seek to measure the comparative value of the defendant’s promise and of the act or promise given by the plaintiff in exchange for it’ (lines 2 to 4);
- ‘nor will they denounce an agreement merely because it seems unfair’ (line 4);
- ‘the courts will not balance one side against the other’ (line 9);
- ‘The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium’ (lines 9 to 11);
- ‘it was unrealistic to hold that the wrappers were not part of the consideration’ (line 24).

Suggested Reading List GCE Law Contract Law (G155)

Chris Turner <i>Contract Law</i> Hodder and Stoughton	A good all round textbook with clear summaries of cases and some good exercises.
Chris Turner <i>Contract Law Key Facts</i> Hodder	A good revision aid or basic guide to the topics required for the A level.
Elliott and Quinn <i>Contract Law</i> Longman	Good commentaries and material to support AO2 development.
Chris Turner <i>Unlocking Contract Law</i> Hodder and Stoughton	A more advanced textbook, good for more able A level students.
Roger Halson <i>Contract Law</i> Longman	Very analytical, good to challenge the more able students and a useful text for differentiation.
Nutcases <i>Contract Law</i> Sweet and Maxwell	A basic casebook with brief comments on each case.
Briefcase <i>Contract Law</i> Cavendish	A more detailed casebook, a good compromise between textbooks and looking at original case judgments.
Jill Poole <i>Casebook on Contract Law</i> Oxford	A detailed casebook with lots of comments, more of a teachers reference than a student resource.
Lawteacher.net http://www.lawteacher.net/contract.htm	An online law site, textbook like in style.
Website from Kent University http://www.kent.ac.uk/lawlinks/speciallegaltopics.html	A website with a large amount of law links.

Suggested Reading List GCE A2 Law of Contract Special Study (G156)

Candidates should be familiar with the Special Study Materials.

Where available to candidates they should research the appropriate chapters in the texts and reports on the cases used in the Special Study Materials.

Suggested text:

Chris Turner. *Contract Law 2nd Edition*. Hodder Arnold. 2007. Chapter 6.2