

Business Law Now!:

Exercises

Part II

Caterina Crucitti



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Business Law Now!

Exercises



Business Law Now!: Exercises

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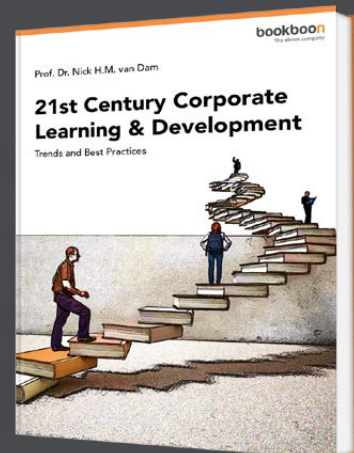
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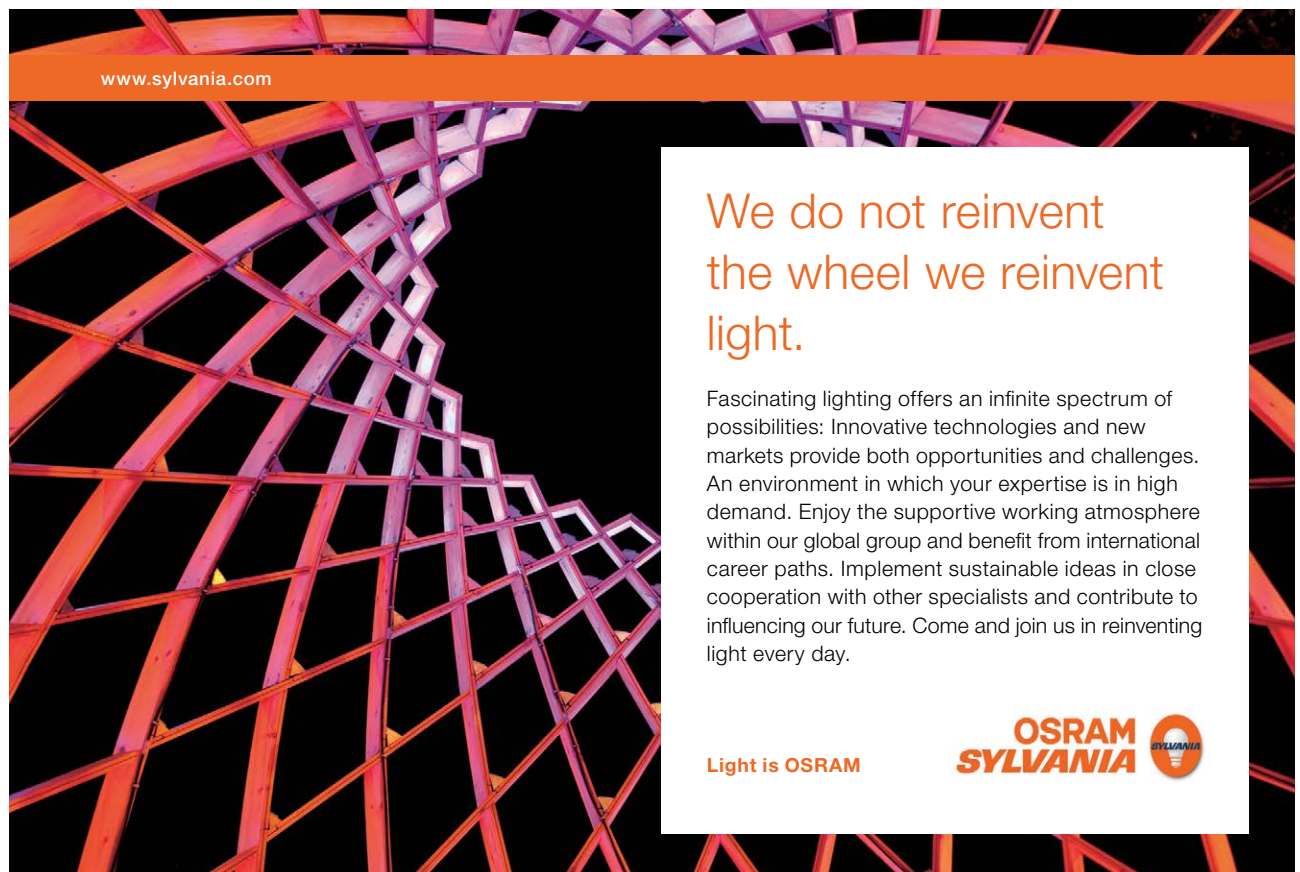
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Module 1 Introduction to law

1.1 Essay questions

Question 1

How would you define the “Law”?

Answer:

Law is simply defined, as a set of rules that have been developed over a long period of time that regulated people’s interactions with each other and such Law operates to set standards of conduct between individuals and other individuals and individuals and the government for the common good and to ensure public obedience and legal order in any society in order to eliminate or minimise anarchy and chaos and promote social cohesion and legal order.

Question 2

Are all so called ‘rules’, automatically converted into Laws?

Answer:

NO – Even though it is often true to say that the law consists of a set of rules within society governing people’s interactions with one another, it does not, however, automatically follow that all “rules” are or ever will become “Law”. It is not always an easy task to try to ascertain when a “rule” actually becomes “Law” but some factors that should be considered in such determination are:

- Where the rule comes from;
- How an offender will be dealt with when the rule is broken;
- How the offender will be punished; and
- By whom.

Question 3

What fundamental values and beliefs are actually embodied in the Law?

Answer:

Essentially, Law embodies what society believes is right, fair and just. Accordingly, justice in any society means that everyone is entitled to a fair trial under a set of rules that applies equally to both sides in an open court.

Question 4

Within any society and legal system, what is meant by the ideal of the ‘rule of the law’?

Answer:

The rule of law in any democratic society, embodies three main propositions that are based on the ideals of democracy, fairness and justice and include that:-

- No person must be punished except for a breach of law which means that a person should be able to know whether what they may want to do is lawful or unlawful. It also recognises the law as the highest authority in society.
- All persons are equal before the law irrespective of status or position.
- The rights or freedoms of citizens are enforceable in the courts.

The question also seeks individual opinion as to the validity of these propositions.

Question 5

What are the main differences between common law and statute law?

Answer:

The main differences between common law and statute law in any legal system whether common law or civil (code) law are in the manner in which they are created and in the actual way they exist.

- **Common Law**
Common law is judge made law. It is created through case law and the interpretation of statutes. Because of the importance of the doctrine of precedent in the development of the common law, by its very nature it is resistant to drastic or sudden change. It can be very difficult to get rid of inappropriate principles. On the other hand, it enables appropriate principles to be established on a firm basis and so provides an element of certainty and the development of the law in a coherent and consistent manner.
- **Statute Law**
Statute law is the law made by parliament and while statute law assumes the existence of the common law, in the event of a conflict between the two, statute law will always prevail. Common law principles will only be maintained to the point where they conflict with statute law. Statute law is always able to respond quickly to changing community needs but often lacks some of the flexibility of the common law as there can be difficulties in ascertaining the intention of Parliament because language is imperfect.

Question 6

What are the three main purposes of the hierarchy of courts within a legal system?

Answer:

In any legal system, the hierarchy of courts serves a threefold purpose:-

- provides a system of appeal;
- allows different forms of hearing according to the gravity of the case; and
- is instrumental in the building up of precedent.

1.2 Multiple choice questions

Question 1

The law as a regulatory tool in a society is important for a number of reasons including the that it:

- a) Prescribes what people cannot do.
- b) Informs people of what they can do.
- c) Informs people what they must do.
- d) All of the above.

Answer: **d**

Question 2

Which of the following statements regarding the definition of ‘the Law’ is more accurate?

- a) The Law consists of rules of and principles of conduct that are enacted by Governments, embedded in Constitutions, Statutes and decisions in Courts.
- b) The Law is a set of rules that has been codified in some States.
- c) The Law is created by the Queen.
- d) All of the above.

Answer: **a**

Question 3

The law in a society assists in regulating human behaviour, and through this regulation, it promotes:

- a) A legal order and social cohesion.
- b) Human rights and freedoms.
- c) Prevention and deterrence of crime.
- d) All of the above.

Answer: **d**

Question 4

What are the two main general sources of law?

- a) Courts and Governments.
- b) Courts and Parliaments.
- c) Governments and Parliaments.
- d) Parliaments and the Queen's/King's Representatives.

Answer: **b**

Question 5

Which of the following is not one of the methods which differentiates civil law from criminal law?

- a) In a civil case the party bringing the action is called the Plaintiff; while in a criminal case it is the Crown.
- b) In a civil case the party bringing the action must establish their case on the balance of probabilities; in a criminal case they must establish their case beyond all reasonable doubt.
- c) The outcome of a civil trial is usually punishment of the defendant; the outcome of a criminal trial is usually compensation paid by the defendant to the victim.
- d) Civil law is concerned with disputes between citizen and citizen; criminal law is concerned with disputes between the State and an accused.

Answer: **c**

Question 6

Which of the statements below is the correct description of how a legal rule differs from a non-legal rule?

- a) Legal rules are rules made by the state (i.e. government); non-legal rules are rules made by bodies other than the state.
- b) Breach of a legal rule will result in a more serious level of punishment than breach of a non-legal rule.
- c) Breach of a legal rule will result in punishment; breach of a non-legal rule will not result in punishment.
- d) Legal rules are written; non-legal rules are not written.

Answer: a

1.3 True and false questions

1. The conception of law that is adopted in any society directly affects decisions that concern the existence or non-existence of law in that particular society.
[True]
2. Civil law is a code-based legal system and is the English (Westminster) system of law.
[False]
3. In society law serves an important function as it assists to maintain social order and cohesion and to prevent chaos.
[True]
4. Common law emphasises remedies while civil law emphasise rights.
[True]
5. Laws made by judges are often called judge made law, case law or precedent law, in any legal system, are referred to as statute law.
[False]
6. Fairness refers to a state of affairs in which conduct or action is perceived as being both fair and right in the given circumstances.
[True]

Module 2 Legislation and constitutional law

2.1 Essay questions

Question 1

Within the context of law making and precedent what is the meant by the term *res judicata*?

Answer

The term *res judicata* translates to mean, ‘a matter that has been decided upon’ by a court of law. It applies only to the immediate parties to the dispute, the decision and final order of the court that binds the actual parties to the proceedings, however, other parties in similar disputes in the future are not bound. However, the legal reasoning upon which the decision in that case was based may be used by judges in future cases when confronted with similar facts. This is known as the *ratio decidendi*, the “reason for deciding”. The *ratio decidendi* is the basis for the doctrine of precedent. Anything said about the law in the course of a judgment that does not form part of the matters at issue is not binding, however persuasive it may be. Such comments are called obiter dicta, “sayings along the way”. However they can exercise an extremely strong influence in a lower court and even in a court of equivalent standing.



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Question 2

List some arguments for and against the system of judicial precedent (judicial activism) within any legal system.

Answer

Listed below are some of the arguments that are generally mentioned as being for and against the system of judicial precedent within any legal system.

List of Advantages of Judicial Precedent

1. Provides a firm basis on which the law can be developed.
2. Encourages the development of the law in a consistent and coherent manner as legal principles are gradually developed.
3. Fosters the development of principles which are appropriate and relevant to the situations and social circumstances at the time.
4. Encourages predicability as citizens are aware that they can act in the confidence that what was decided previously will be applied for consistency in future similar cases.
5. Based on predicability, precedent encourages fairness and equality because people know that if a person was dealt with in a certain way previously, then they ought to be dealt with in the same manner.
6. The obligation to follow precedent encourages the exercise of judicial discretion and deterring bias, as well as protecting judges from professional criticism, thus encouraging the effective operation of the legal system.

List of Disadvantages of Judicial Precedent

1. Precedent is resistant to sudden change, thus, when a principle is established, it is often very difficult to change it quickly in order to meet changing community attitudes, accepted norms, standards and social conditions.
2. If an improper principle of law has been determined by the highest court in the court hierarchy of that particular legal system, then only that court or parliament has the power to change that principle. However, Lower courts remain bound by the decision of the higher court if they cannot distinguish the earlier case and if parliament does not change the law.
3. Courts are often reluctant to overturn a body of 'established and accepted' law, even where the law is regarded as being unsatisfactory because of changing social or legal conditions.
4. Precedent encourages a great deal of time-wasting in court in argument as to the true meaning or scope of a particular rule.
5. It does not encourage certainty because sometimes it is difficult to precisely define the ratio of a case or to know exactly how far to extend the application of a decision.
6. Certainty in the operation of the law and flexibility are in some ways incompatible.

Question 3

Distinguish the legal expressions used in the creation of precedents, *ratio decidendi* and *obiter dicta*.

Answer

The expression *ratio decidendi* means the reason for deciding, in the particular case and establishes the binding precedent that all lower courts in the same court hierarchy are bound to follow. Conversely, the expression *obiter dicta*, means ‘things that are say by the way or asides’ and only give rise to a persuasive precedent (influential only) and does not bind the lower courts.

Question 4

How does a persuasive precedent differ from a binding precedent and are courts always bound by such precedents?

Answer

In general, a persuasive precedent does not bind the court but it can influence its decision. Examples of persuasive precedents are judicial statements which are obiter from a court of binding status within the same hierarchy or decisions of equivalent or higher standing courts from other hierarchies. In the case of a binding precedent, each court is bound by the decision of courts higher than it in the same hierarchy of courts, whether or not it believes a decision is correct. A persuasive precedent does not bind the court but it can influence its decision. Examples of persuasive precedents are judicial statements which are obiter from a court of binding status within the same hierarchy or decisions of equivalent or higher standing courts from other hierarchies.

Question 5

What is the main purpose for the courts using extrinsic methods to interpret statute (legislation)?

Answer

By using extrinsic methods of statutory (legislative) interpretation, the primary purpose is to enable the courts to hopefully attain a better understanding and view and actual purpose of what the parliament was trying to achieve by passing the particular Bill in dispute in the first place, prior to the Bill being formally passed and pronounced as law.

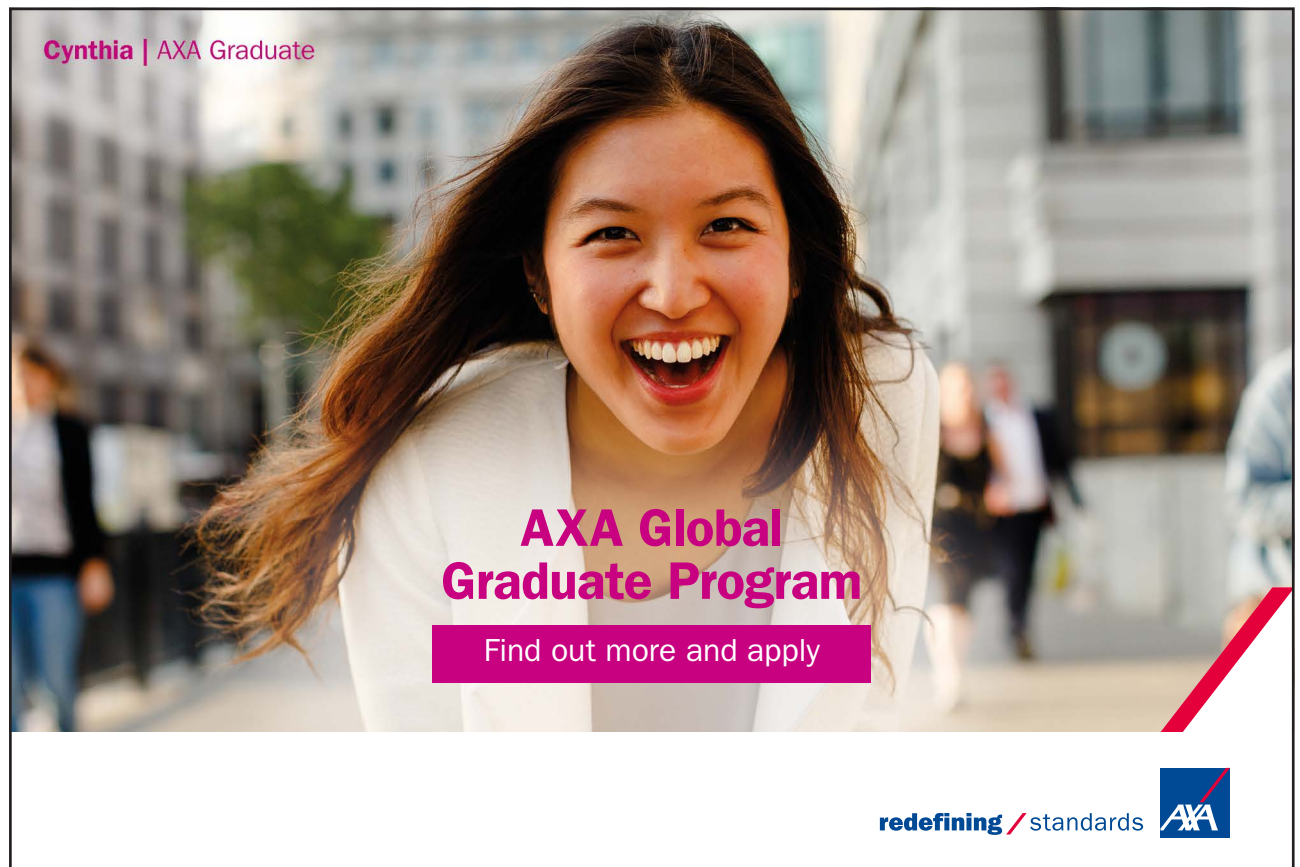
Question 6

What are the three main methods in which the doctrine of precedent operates within a legal system?

Answer

The three main ways in which the doctrine of Precedent operates within a legal system is as follows:

1. In relation to courts in the same hierarchy, a court lower in the hierarchy must follow the decision of a higher court.
2. For fairness and consistency Courts generally follow their own prior decisions.
3. In general, courts are not bound by courts outside their hierarchy, although they recognise the value of judgments from courts within their own legal system (however classified) as well as judgments from common law countries. Decisions can perhaps be ranked in the following way:
 - Higher Court decisions on appeal from a nation state are binding on the domestic states, but only on the *ratio decidendi* (reason for deciding) of a case.
 - A decision of a Supreme (or similar ranked) Court is generally of the highest persuasive value in other state Supreme Courts.
 - Decisions of similar ranked courts in other common law countries will be of persuasive value only, to decisions in civil law (code) legal system, though the closer the common law system is to a nations system, then, the more significance the precedent will have.



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2.2 Multiple choice questions

Question 1

Where statute law and common law (case law) conflict which law prevails?

- a) Case law prevails.
- b) Statute law prevails.
- c) The matter will be referred to court for a decision.
- d) The matter will be referred to Parliament for a decision.

Answer: ***b***

Question 2

Which of the following types of law, would be distinguished with 'common law' when that term is used to describe an all-inclusive legal system?

- a) Equity Law.
- b) Statute law.
- c) Civil law.
- d) Canon law.

Answer: ***c***

Question 3

Which of the following is the best definition of the '*ratio decidendi*' of a case?

- a) The final order of the court is binding on the immediate parties to the action.
- b) The legal reasoning upon which the decision in a case was based.
- c) Anything said about the law in the course of a judgement that does not form part of the matters in issue.
- d) The doctrine of precedent; 'to stand by a decision.'

Answer: ***b***

Question 4

Which of the following is the most accurate meaning of the *'obiter dictum'* of a case?

- a) 'Let the decision stand.'
- b) 'Through lack of care.'
- c) 'A matter which has been adjudicated upon.'
- d) 'A saying by the way.'

Answer: *d*

Question 5

Which of the following statements accurately reflects the doctrine of precedent?

- a) Cases with similar facts should be decided in a similar manner.
- b) All previous decisions must be followed except if they lead to an absurd result.
- c) Cases must be similar to previous decisions or they cannot be heard.
- d) Cases on different facts should be decided in a similar manner.

Answer: *a*

Question 6

Which of the following is the main advantages of the doctrine of precedent?

- a) The use of precedent promotes consistency in the law.
- b) Precedent may not be relevant to today's circumstances but still has to be followed.
- c) Precedent may require an Act of Parliament to change.
- d) Precedent is slow to respond to community changes.

Answer: *a*

2.3 True and false questions

1. The Laws made by and enacted by parliaments are called statute law.
[True]
2. The Laws made by the courts and that create precedents are referred to as statute laws.
[False]

3. Within a legal system, the general common law and equity law are generally administered in separate courts.

[False]

4. The doctrine of separation of powers is a reference to the division of powers between the supreme law making powers of the commonwealth and the states.

[False]

5. In a legal system, when a commonwealth statute (enacted federal legislation-higher law) clashes with a State enacted statute, the state statute (enacted state legislation-lower law) must always be followed for consistency.

[False]

6. The draft form of a proposed statute law is called a Bill.

[True]

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Module 3 The law of torts

3.1 Essay questions

Question 1

How would you define a Tort?

Answer

A Tort is defined as a 'civil' wrong other than a claim for breach of contract. Essentially, a tort involves an act or omission by the defendant that directly or indirectly interferes with some right of the plaintiff which causes damage or injury.

Question 2

What is the difference between a direct (or intentional) tort and an indirect (or unintentional) tort?"

Answer

A direct (or intentional) tort is a tort (civil wrong) where the defendant intentionally (*mens rea – wilful mind*) and knowingly carried out the wrongful act (*actus reas*) that causes damage to the plaintiff, such as trespass, defamation or any of the economic torts. An indirect tort is one where the action was unintentional and is based on an action on the case with the main example being negligence.

Question 3

What is the main difference between a contract and a tort?

Answer

Even though both a contract and a tort, both give rise to a civil action, that is, where the onus of proof is placed on the plaintiff to prove their case on the balance of probabilities, the main difference them is that contracts are concerned with promises to do or not to do something and are based in agreement. Thus, they are only concerned with the performance of promises. Alternatively, torts are not dependent on promises. Thus as such, tortious duty is imposed independently of any consent that may have been given between the parties, although it is possible for the parties to vary or amend the rights and duties between them contractually that is via exclusion clauses or other such disclaimer clauses. Additionally, a major difference between contracts and tort is that the interests that can be covered under the law of Tort are wider than in contract law, because they extend to cover both person and property losses due to negligence actions by the defendant.

Question 4

If you had been injured by a defendant's breach of duty of care thereby causing injury or damage to your property or person, under which law would you prefer to take action and why?

Answer

The answer will depend on the outcome that the plaintiff is seeking to achieve. Some plaintiffs may take action under both the criminal and civil law concurrently. Thus, criminal law will punish the offender, by causing him/her to be fined, be put into jail, seeking monetary compensation if you have suffered an injury or loss that can be quantified in money terms. However, if you prefer to take the action under Tort, the defendant will not suffer any criminal penalty but will be called upon to pay you compensation for any loss that was caused by his or her negligence.

Question 5

Sophia went for a walk listening to her favourite Italian music on her iPod around the block in her hilly neighbourhood, but unforeseen by Sophia, Carlo for no apparent reason rolled a heavy wooden log on the ground from the top of the hill towards where Sophia was walking on the footpath and which hit Sophia on her legs, the impact of which was so great that it made her slip and fall on the footpath. Do you think that an assault and/or battery has occurred in this situation?

Answer

The answer is twofold. Firstly, a battery (civil personal wrong) may have been committed by Carlo by setting into motion a potential dangerous object, the wooden log, which touches or hits a plaintiff, in this case Sophia, as has happened when Carlo rolled the wooden log if Carlo had actually intended (if intent was present giving rise to the guilty mind) to hit Sophia. Thus, if the intention was to harm it will constitute a battery, but in these facts it can be assumed that there is no intention to hit Sophia as was an unfortunate incident. Secondly, the action by Carlo in rolling the log would not constitute an assault because Sophia, did not see let alone hear the log coming towards her as she was listening to her music, and therefore, she was not placed in fear or apprehension of an immediate battery.

Question 6

Peter approached David, a chartered accountant, and asked his advice as to the financial position and profitability of a business that he was interested in investing. David, prepared a business report for Peter and concluded that it would be a profitable, secure and viable investment, in fact David made the comment that: “The business is booming and is a gold mine!” which in fact, induced Peter to enter into the investment. However, in preparing the business report David overlooked the fact that the proposed business to be invested in by Peter, had not provided sufficiently for bad debts. Thus, on reliance of David’s statement and business report, Peter went ahead and invested his money in the business, but within three months the business Peter invested in was in serious financial difficulty and Peter was in serious danger of losing the majority of his investment.

Does Peter have any claim against David in this situation? Explain in detail outlining the elements of negligence by the professional David.

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Answer

YES – Peter does have a claim against David in this situation. The common law elements of negligence, mainly duty of care (was owed and breached by David), breach of duty of care (Yes there was a breach by David in his professional capacity (chartered accountant) acted unprofessionally, recklessly and negligently) and damage (Yes – loss of money invested by Peter acting on David's negligence advice that he relied on) caused by the breach have been satisfied in this situation. David in his professional capacity has fallen below the required standard of care expected of accountants in general, especially in respect to checking financial records in that David overlooked (acted negligently/recklessly) the fact bad debts were not adequately provided for in the business that Peter was interested in investing. Thus, Peter in reliance on the professional advice by David, invested money and has been financially damaged as a result, therefore enabling him to sue David for negligence.

3.2 Multiple choice questions

Question 1

The diverse range of interests which torts protects does not include:

- a) Direct interferences with persons and property.
- b) Liability for breach of duty to take reasonable care.
- c) Liability for failure to abide by the terms of a contract.
- d) Breach of statutory duty.

Answer: **c**

Question 2

Which of the following is the correct definition of a 'Tort'?

- a) A right to sue another person for damages.
- b) A civil wrong other than a claim for breach of contract.
- c) An infringement of the interests of a person which entitles them to compensation.
- d) A civil wrong involving a claim for breach of contract.

Answer: **b**

Question 3

Which of the following is not an element of the definition of a Tort?

- a) An act or omission of the defendant.
- b) An infringement of the interests of the plaintiff.
- c) An infringement which the law recognises as actionable.
- d) The plaintiff proving beyond all reasonable doubt that their version of the facts is more believable.

Answer: *d*

Question 4

As an alternative to an action in Tort, a victim may choose to seek compensation by way of:

- a) A workers' compensation scheme.
- b) A criminal injuries compensation scheme.
- c) A motor accident compensation scheme.
- d) Any of the above.

Answer: *d*

Question 5

What is meant by a Tort is '*actionable per se*'?

- a) The tort is actionable only with proof of damage.
- b) The tort is actionable without proof of damage.
- c) The time limit commences from the date the damage occurs.
- d) The time limit commences from the date the damage is discovered.

Answer: *b*

Question 6

Which of the following is the best description of 'Assault'?

- a) An intentional or negligent act that brings about an immediate or direct harmful or offensive contact to another.
- b) An intentional, direct and total restraint upon the liberty of another person.
- c) A statement that is made to another person in a manner that was intended to cause physical injury and that does in fact cause a reasonably foreseeable physical harm to them.
- d) An intentional act which causes another to reasonably believe that they are in imminent danger of harmful or offensive contact.

Answer: d

3.3 True and false questions

1. A Tort is a civil wrong other than a criminal wrong.
[True]
2. The law of torts is mainly concerned with compensation.
[False]
3. The main purpose of an action in tort law is to punish the wrongdoer.
[False]
4. The entering or remaining on another person's land without their permission is deemed to constitute a trespass to land.
[True]
5. The throwing or dumping of rubbish onto another person's land and/or property is a direct interference so cannot constitute a trespass to land.
[False]
6. Where the advice is given to a person who the advisor knew would rely upon it, and it is reasonable for that person to rely upon the advice in the circumstances, the advisor must ensure that the information provided is correct.
[True]

Module 4 The tort of negligence

4.1 Essay questions

Question 1

What must the plaintiff establish in a cause of action under the tort of negligence against the defendant to be successful?

Answer

In simple terms at both the general common law and under any relevant civil liability laws, in respect to the tort of negligence, in order for a Plaintiff to succeed in an action in negligence the Plaintiff must successfully establish the following three things:

- A duty of care was owed by the defendant to the plaintiff;
- That there was a breach of that duty of care by the defendant;
- That as a consequence of the breach of the defendant's duty of care, the plaintiff suffered actual loss or damage.

If the plaintiff is able to establish each of these elements, and the defendant has no defences to raise to the plaintiff's claim, the plaintiff will be entitled to claim damages.



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Question 2

In the tort of negligence, how is the reasonable person defined?

Answer

The reasonable person is someone of normal intelligence who is credited with such perception of the surrounding circumstances and such knowledge of other pertinent matters as a reasonable person would possess.

Question 3

Why did Donoghue not sue in contract or under the sales of goods legislation in the case of *Donoghue v Stevenson* [1932] AC 562 at 580 (manufacturer)?

Answer

Donoghue did not sue in contract, or under the *Sale of Goods Act* for that matter, because she did not purchase the drink, but instead, her friend did. Thus, this meant that Donoghue did not have a contractual relationship with the shopkeeper who sold the drink to her friend or the manufacturer of the soft drink who sold the drink to the retailer. This meant that the only possible way Donoghue would be able to recover damages for the injury (emotional shock/gastro illness) she suffered was to sue the manufacturer under the law of Tort, thus, giving rise to the modern tort of manufacturers liability.

Question 4

List some examples of that constitutes questions of both, fact and law in a negligence case.

Answer

Questions of Fact are generally determined by a Jury if present, if not then also by the Judge, in negligence cases and include the following:-

- Resolving any conflicts within the evidence submitted to the Court and determining what the circumstances surrounding the case were and what the parties to the legal action actually did;
- Evaluating the actual conduct of both of the parties in the light of the known facts and deciding whether it constituted a failure to take reasonable care, taking into account the required standard of care of the defendant/s in the given situation;
- Deciding in regard to the established and known facts whether the damage was directly caused by the defendant and the actual extent of the damage.

Questions of Law, normally decided by a Judge alone if a jury is present and, if no jury is present than also by a Judge sitting alone who will also determine questions of fact and include:-

- All relevant questions of duty of care owed, if breached and subsequent damage;
- The relevant standard of care that was required and owed in the given situation;
- Any questions of factual causation, scope of liability and remoteness in relation to damage, whether there was any evidence of such damage and whether all heads of damage have been taken into account.

Question 5

What is meant by the standard of care required under the tort of negligence?

Answer

The standard of care in negligence under both the general common law and any relevant civil law provisions, is that of the reasonable person and is an objective test. This standard of care in negligence, refers to the standard of conduct required in any situation and it is measured by what the reasonable person of ordinary prudence would do in a particular situation and is determined by taking into account a number of factors including the relationship between the defendant and the plaintiff, whether the defendant has any special skills, and the plaintiff's level of knowledge. The standard of care varies in different circumstances as required and in the case of a child is that of the same age.

Question 6

Under the tort of negligence, is the defendant is liable for all the damage sustained by the plaintiff? Why or why Not?

Answer

Under the general common law, even if the plaintiff is able to establish the duty of care, breach of that duty and damage, the defendant may not be held liable for all the loss. For example, where the damage caused by the action of the defendant is deemed to be too remote and was merely a result of the careless act by the defendant, then damages cannot be recovered. The issue of whether or not the damage is too remote embedded within the issue of scope of liability of the defendant and factual causation which are questions of law that must be determined by the Judge and is an objective test of the reasonable person that is also applied by using the test of foreseeability, that is "could a reasonable person foresee such a thing happening?". Accordingly, a determination of whether a breach of duty on the part of the defendant actually caused the particular harm to the Plaintiff, involves careful consideration of two important elements:-

- Factual causation – that is, if the defendant had acted carefully, would the plaintiff have suffered this particular loss. That is, did the defendant actually cause the harm?; and
- If it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability). That is, should the defendant be held responsible for all the harm? And sometimes this is not the case due to defences of voluntary assumption of risk and or contributory negligence and the egg shell skull issue (Plaintiff had a medical or other pre-existing condition).

In the case of exceptional circumstances, where a breach of duty is actually established but does not satisfy the requirement of “factual causation”, the court is required to consider, amongst other things, whether or not and why responsibility for the harm should be imposed on the defendant.

In deciding the first question, that is factual causation, it is necessary to determine what the person who suffered harm would have done if the negligent person had not been negligent and in this instance, the issues of the case are decided subjectively, that is, what would the injured person have done, in respect of all relevant circumstances as distinct from the objective test and conduct of a reasonable person. In relation to the second issue, that is, deciding the scope of liability, the court would include a value judgment in ascertaining whether or not, and why, responsibility for the harm should be imposed on the defendant.

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4.2 Multiple choice questions

Question 1

In the case of *Donoghue v Stevenson* [1932] AC 562 at 580 (manufacturer), why did Donoghue sue Stevenson in negligence and not contract?

- a) The law of contract cannot be used to recover compensation for personal injury.
- b) As it was Donoghue's friend who bought the ginger beer, and Stevenson was not the retailer, there was no contract between Donoghue and Stevenson.
- c) The contract between Stevenson and Donoghue expressly excluded liability for contaminated ginger beer.
- d) The contract was between Donoghue and the retailer of the ginger beer. Stevenson was the manufacturer of the beer.

Answer: *b*

Question 2

Which of the following is not one of the three essential elements of an action in negligence?

- a) The plaintiff has suffered reasonably foreseeable loss which was caused by the defendant's breach of duty.
- b) The plaintiff has failed to do what a reasonable person would have done in the same circumstances.
- c) The defendant owes the plaintiff a duty of care.
- d) The defendant has breached their duty of care.

Answer: *b*

Question 3

Which of the following is a question of law in a negligence action?

- a) Does the defendant owe the plaintiff a duty of care?
- b) Has the defendant breached the requisite standard of care?
- c) Which evidence is to be relied upon?
- d) Did the defendant cause the damage suffered by the plaintiff?

Answer: *b*

Question 4

Which of the following is a question of fact in a negligence action?

- a) Does the defendant actually owe the plaintiff a duty of care?
- b) What is the requisite standard of care in the given situation?
- c) Is the damage suffered by the plaintiff actually too remote and unforeseeable?
- d) Did the defendant actually cause the damage suffered by the plaintiff and there was factual causation and scope of liability is established?

Answer: *d*



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Question 5

The range of interests that are protected by the law of torts does not include the following:

- a) Direct interferences with persons and property.
- b) Liability for breach of duty to take reasonable care.
- c) Liability for failure to abide by the terms of a contract.
- d) Breach of statutory duty.

Answer: *c*

Question 6

Which of the following is not an essential element of the definition of a Tort?

- a) An act or omission of the Defendant.
- b) An infringement of the rights and interests of the Plaintiff.
- c) An infringement of the rights and interest of the Plaintiff which the law recognises as actionable.
- d) The plaintiff proving beyond all reasonable doubt that their version of the facts is more believable in the given situation.

Answer: *d*

4.3 True and false questions

1. In the famous case of *Donoghue v Stevenson* [1932] AC 562 at 580 (manufacturer) the plaintiff sued the manufacturer for breach of contract.

[False]

2. A person who professes to have special skills must show the same standard of care that would be expected of a reasonably competent, qualified and skilled person in that particular profession or trade.

[False]

3. People owe a duty of care if it is reasonably foreseeable that their conduct could cause harm and or injury to others and that there is reasonable proximity.

[False]

4. A plaintiff who was aware of the obvious risks had in fact, voluntarily assumed the foreseeable risk of harm or injury and will not recover any damages in a negligence action.

[True]

5. Under the tort of negligence a person cannot claim for injury as a result of something that was an obvious risk in the given situation.

[True]

6. The standard of care under the tort of negligence is a fixed and inflexible standard.

[False]



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Module 5 Introduction to contracts

5.1 Essay questions

Question 1

List and explain four aspects of your daily life which would be drastically different if the law of contract could not be used to enforce promises.

Answer

This question calls for personal opinion. However some aspects among many others would include:

- Buying a house or a business and that title will be transferred upon settlement.
- Buying consumer goods in person and online that the goods will be transferred upon payment of the price (Consideration).
- The guarantee that manufactured products whether white goods or cars will not cause harm or injury.
- The guarantee that any items for human consumption will not cause any harm or injury.

In all of these areas and more the promise is implied and if there is a breach then there are remedies available to the plaintiff for such breaches of the promises to sue for monetary compensation (damages) in most instances.

Question 2

Explain what it means to say that the policy of upholding contractual agreements is observed by the courts.

Answer

The courts strive to uphold agreements giving rise to contracts instead of striking them down as they form three basis of commercial activity in the marketplace. For business efficacy and commercial activity, the courts will imply terms into contracts and will at times, seek for a meaning under a contract when the actual terms or basis of the contract have not been clearly expressed by the parties to the contract, in order to enable the contract to be effective.

Question 3

When can an offer made by the Offeror to an Offeree be revoked?

Answer

An offer made by the Offeror to an Offeree can be revoked at any time before its acceptance.

Question 4

Delilah makes a written offer to Samson to sell her car for € (\$) 10,000. In her offer Claudia states, that ‘this offer will remain open for seven days’. Two days later Delilah tells Samson that she has changed her mind.

Discuss whether Samson can still accept the offer and hold Delilah to the sale of her car to him for € (\$) 10,000.

Answer

Delilah has promised to keep the offer open for seven days as mentioned. Samson should be advised that Delilah can change her mind two days later because Samson has not supported her promise with any form of consideration such as a down payment of deposit to hold the offer open (option). If, however, Samson had supported Delilah’s promise to keep the offer open for seven days such as for example even giving her €(\$)¹⁰⁰ as a deposit, then Delilah would be bound to honour her promise and to keep the offer open for Samson for the seven days, that is the offer would be irrevocable. Also, if Delilah had sold the car to someone else, before the seven days had expired then she would be liable in damages to Samson for breach of the option contract, as the exercise of an option must be in strict accordance with its terms.

Question 5

Over the centuries, predominantly in common law nations, such as Britain, America and Australia the Federal Courts have extended and modified the rules of contract law in order to apply them to new technologies such as currently social and other technological media and online shopping forums in this globalised world.

Why do you think that the application of contract law to increased online transactions required the enactment and passing of specific *Electronic Transactions* legislation at state, federal and international levels?

Answer

The main reason for the enactment of *Electronic Transactions* legislation was mainly for consumer protection via the online platform. Some of the main features of the *Electronic Transactions* legislation are among others as follows:-

- That the transaction is not invalid because it was conducted online;
- The requirement for some contracts to give information in writing can be satisfied if the person provides the information electronically;
- The requirement to provide a signature can be satisfied in respect to an electronic communication if there is a started method used such as a digital signature;
- The requirement to record information in writing and to retain a hard copy of the document is satisfied by producing the document in electronic form.

Essentially, the formation of an e-contract is no different from the information of a traditional or conventional contract and the fundamentals of contract still apply. That is, there must be an intention to create legal relations and in the case of electronic transactions the price is paid upon submission and acceptance of terms and conditions.

Question 6

In this technological age what sort of problems may arise in contract law for users of e-commerce? Discuss.

Answer

E-commerce, also known as electronic commerce, refers to commerce that has been conducted by means of computer, the internet and other telecommunications links such as electronic data exchange. Nowadays with the increased use of technology in the ever changing globalised world, this means that the use of electronic methods to complete business transactions is rapidly increasing, instead of the use of the traditional method of doing business face-to-face and exchanging paper-based documents, is becoming commonplace. Thus *Electronic Transactions Acts* of nations provides a legal framework to support and encourage businesses and consumers to use e-commerce by providing that the law shall treat electronic and paper-based commerce equally, as well as providing a template for the uniform legislation now in place across the globalised world as a result of treaties, convention and the general common law and contract law. Students should refer to the traditional methods of commerce such as 'face to face' and 'agreements by post' and compare and contrast these methods with the new technology which has given rise to e-commerce.

5.2 Multiple choice questions

Question 1

Which of the following in respect to the law of contract is the most accurate?

- a) A contract is a type of agreement.
- b) The terms 'contract' and 'agreement' mean the same thing.
- c) An agreement is a legally enforceable contract.
- d) Not all contracts are agreements.

Answer: **a**

Question 2

Which of the following is not an essential prerequisite for all contracts?

- a) The parties must have capacity to contract.
- b) The parties must consent to the contract.
- c) The purpose of the contract must be legal.
- d) The contract must be in written form.

Answer: **d**

Question 3

Which of the following statements is the best description of a ‘Void’ contract?

- a) The contract remains valid and binding unless and until it is repudiated by the injured party.
- b) There are no legal rights or obligations from the outset, and the contract cannot be enforced by either party.
- c) While the contract is valid on its face, no legal action can be brought on it.
- d) The purpose of the contract contravenes a statute or the common law.

Answer: **b**

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Question 4

Which of the following situations is not an example of a contract?

- a) The lease of a house.
- b) The hiring of an employee.
- c) The purchase of food from a takeaway.
- d) The payment of tax.

Answer: **d**

Question 5

Which of the following is the best description of a contract that is ‘unenforceable’ and of no legal effect?

- a) The contract remains valid and binding unless and until it is repudiated by the injured party.
- b) There are no legal rights or obligations from the outset, and the contract cannot be enforced by either party.
- c) While the contract is valid on its face, no legal action can be brought on it.
- d) The purpose of the contract contravenes a statute or the common law.

Answer: **c**

Question 6

In the context of contract law, which of the following statements is the best description of ‘agreement’?

- a) Something of value passing from one party to another in return for a promise to do something.
- b) An offer by one party and an acceptance by the other.
- c) Something of value passing from one party to another in return for a promise to do something.
- d) The parties must intend that their promises create legally enforceable obligations.

Answer: **b**

5.3 True and false questions

1. For the creation of an apparent simple contract, intention, agreement and consideration must be shown to be present.

[True]

2. A valid contract is a contract that can be enforced by both parties under the contract.

[True]

3. A formal contract derives its validity from its form alone and does not require consideration to be present for its validity.

[True]

4. One of the rules for the existence of consideration under contract law is that it must be present in every type of contract.

[False]

5. There are no legal rights or obligations under a void contract.

[True]

6. An executed contract is usually performed and finalised at the time the contract is made and all contractual elements have been satisfied.

[True]



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Module 6 Contract law in business

6.1 Essay questions

Question 1

Are invitations to treat the same as an Offer?

Answer

NO – Invitations to treat are not the same as an offer. In the case of an invitation to treat, the rules relating to offer and acceptance are varied. An invitation to treat is not an offer, but rather is an offer to consider offers. This is because the person making the statement does not intend their words or conduct to constitute an offer, such as for example, in the case of advertisements.

In the case of an offer, the person making the offer does intend to be bound by the offer. In other words, if it is clear in the circumstances that a party intends their words or conduct to constitute an offer, such as for example, where an advertisement contains the words 'rain check', then the courts will construe it as an offer.

Question 2

According to the postal acceptance rule, where the parties contemplate the use of the post as a method of communication, an acceptance to an offer is deemed to be effective as soon as it is posted.

Why do you think the courts originally developed this postal acceptance rule? Do you think those reasons are still valid today?

Answer

The courts originally developed this postal acceptance rule, as it was the only viable means of acceptance to an offer at that time, and the post was the only form of communication. Thus for business efficiency the postal acceptance rule was developed in the mid-1800s which stipulated that where the parties contemplate the use of the post as a medium of exchange of promises, the Offeror must have contemplated and intended that the offer can be acted by the act of posting the letter of acceptance to the offer, in which case the rules as to the time of acceptance change and accordingly:-

- an offer made by letter is not effective until it is actually received by the Offeree; and
- Acceptance of an offer is effective as soon as it is posted by the Offeree (See *Adams v Lindsell* (1818) 106 ER 250).

In light of modern technology and instantaneous communications, the reasons are in fact still valid, and still underpin the rules of acceptance to an offer by post even today. However, where the communication of acceptance is instantaneous, such as email, fax or SMS or almost so, then the postal rules do not apply and the contract is formed when the acceptance is actually received. Therefore this means that in situations where agreements being communicated are made by means of telephone, teleprinter or fax then the contract is formed when and where the Offeror hears or receives the Offeree's acceptance to the offer.

Question 3

You had to go food shopping as the fridge and pantry was empty and your baby sitter was not available so you take your baby daughter, Mary in a stroller to do the weekly shopping at the local Aldi Supermarket. After you completed the shopping, and while you are waiting in the queue at the checkout to pay for the groceries, your daughter Mary, reaches out of the stroller and takes a chocolate bar from the shelf. At this point, the checkout girl has nearly finished totalling the cost of the groceries. She noticed that what Mary had done and, as you did not come forward with the payment of the chocolate your daughter Mary has taken from the shelf, the checkout girl tells you that you must pay for the chocolate (by now mostly eaten by Mary). What will you do in this instance?

Answer

This situation gives rise to the difference between an invitation to treat and an offer. As the child is a minor she is unable to enter a contract as such and would not realise the consequences of her actions. Accordingly, in this given situation, as you are the parent (guardian) of the child will have to pay for the cost of the chocolate even though you had not intended to purchase it in the first place. Even though there was no contract in this situation as the child does not have legal capacity, the mother as a matter of social courtesy and as the parent of the child is not obliged to pay for the chocolate, but on moral grounds will be compelled to do so (especially if she wants to shop there again).

Question 4

Lawrence, the manager of the delicatessen counter, at the Aldi Supermarket noticed a customer who had requested specific goods, such as chilli olives, cold meats (cut to his liking) and cheese from the delicatessen counter on his way to the checkout dumped them amongst the frozen food section. What is the legal significance (if any) in the customer's conduct in this situation?

Answer

In this situation, the customer has breached the contract as the food items selected and purchased did not constitute an invitation to treat but a direct offer and acceptance by the customer buying the food items. In this situation the delicatessen foods on display are not deemed to be an invitation to treat an offer to buy the goods at the stipulated price, as the customer cannot pick them up and then put them back on the shelf. This is because the items that he requested at the delicatessen counter were picked by the delicatessen staff and the olives and cheese and the cold meats were cut to his specification and wants. Thus, by the customer, dumping them in the frozen food section constitutes an actual breach of the contract, and he is compelled and required to pay for them.

Question 5

In contractual situations, where the traditional (conventional) approach of determining the Offer by the Offeror and Acceptance by the Offeree cannot be applied, how would the Court then, determine whether an actual agreement has been satisfactorily negotiated and actual valid contract reached concluded between the parties?



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Answer

In cases where the traditional or conventional approach of offer and acceptance cannot be applied, the court generally determines whether or not an agreement has been reached between the parties by looking at the 'conduct' of the parties in the given situation. Thus, in some negotiations, 'contracts may be inferred from the acts and conduct of parties as well as or in the absence of their words.' Additionally, the court must consider whether or not the specific facts, when considered objectively, and as a whole in the light of the relevant circumstances, demonstrates that, from the perspective of a reasonable person on both (or all) sides of the agreement, it can be determined that a concluded agreement has been reached.

If the parties have not yet agreed upon the essential or critical terms that they regard as necessary for the creation of a binding agreement, the court then, cannot find that such an agreement exists and nor has a valid contract been formed in the circumstances.

Question 6

If the Offeror indicates a particular method of acceptance of an offer, such as for example 'send me an email or SMS by 5.00pm tonight,' but the Offeree sends a letter by normal post instead, will this action, constitute a valid acceptance?

Answer

NO – This would not constitute a valid acceptance of the offer made by the Offeror. This is because if the Offeror indicates a particular mode of acceptance of the offer, such as 'send me an email or SMS by 5.00pm tonight', and the Offeree sends a letter by normal post instead, this will probably not constitute a valid acceptance as the response was not immediate or instantaneous. If however, there was no specified form of acceptance to the offer and the Offeree posted the letter of acceptance than under the postal acceptance rule, this would constitute a valid acceptance of the offer, but not in this situation as the manner or mode of acceptance was specified by the Offeror, and was not complied with by the Offeree.

6.2 Multiple choice questions**Question 1**

Which of the following statements is the most accurate in respect to contracts?

- a) A contract is a type of agreement.
- b) The terms 'contract' and 'agreement' mean the same thing.
- c) An agreement is a legally enforceable contract.
- d) Not all contracts are agreements.

Answer: **a**

Question 2

Which of the following is the best description of 'agreement' in the context of contract law?

- a) Something of value passing from one party to another in return for a promise to do something.
- b) An offer by one party and an acceptance by the other.
- c) The parties must intend that their promises create legally enforceable obligations.
- d) None of the above.

Answer: **b**

Question 3

Which of the following is the best description of 'intention' in the context of contract law?

- a) Something of value passing from one party to another in return for a promise to do something.
- b) An offer by one party and an acceptance by the other.
- c) The parties must intend that their promises create legally enforceable obligations.
- d) The parties must consent to the contract.

Answer: **c**

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Question 4

Which of the following is not an essential requisite for all contracts?

- a) The parties must have capacity to contract.
- b) The parties must consent to the contract.
- c) The purpose of the contract must be legal.
- d) The contract must be in written form.

Answer: d

Question 5

Which of the following is the accurate definition of an 'express contract'?

- a) A contract that requires a special form or method of creation.
- b) A contract created by written or oral words.
- c) A contract created by conduct or the actions of parties.
- d) A contract that does not require a special form but must have consideration present.

Answer: b

Question 6

In order to reach a legally enforceable agreement, the parties to a contract:

- a) Must agree to more than just the substance of the contract.
- b) Must expressly agree to every term of the agreement.
- c) Cannot leave any details to be worked out later.
- d) Need only reach broad agreement on the substance of the contract.

Answer: d

6.3 True and false questions

1. Bills of exchange and cheques are required by statute to be wholly in writing.

[True]

2. The onus is on the defendant to establish that the parties didn't intend to create legal relations in a business arrangement.

[True]

3. Promissory words in a commercial/business agreement will usually suggest that the parties intend to be bound.

[True]

4. If the consequences are serious, the courts are prepared to find that intention may be present in a social arrangement.

[True]

5. In commercial or business agreements, the courts assume that the parties did intend to create legal relations.

[True]

6. If an agreement is made between two parties of unequal bargaining power then the court will not enforce the agreement if the pressure used by the stronger party was unconscionable.

[True]



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Module 7 Fundamental basics of contract law

7.1 Essay questions

Question 1

What are the sources of Contract Law?

Answer

The law of contract is fundamental to the study of Business Law. The general fundamental basics of contract law and the right to freedom to contract is part of the law received from England and the common law courts that eventually gave rise to the law merchant. Contract law is primarily derived from three main sources:-

- Common law (case law);
- Equity (case law) (giving rise to equitable principles of promissory estoppel and unconscionable contracts); and
- Statute law (which is playing an increasingly more important daily role in contract law in the modern marketplace where contracts are entered into daily with increased online contracts via e-commerce – commerce by means of computer, the Internet and other telecommunications links such as electronic data exchange (EDI) and also referred to as ‘electronic commerce’).

Nowadays, this general common law applicable to contract law is supplemented by a nation’s statute law such as for example *Sales of Goods* legislation and consumer protection legislation. Additionally, today contract law is derived not just from this general common law and statute law but also from various international treaties and conventions in respect to business and the sale of goods in the marketplace such as the Vienna Convention for International Sales of Goods conducted in the conventional manner and online.

Question 2

Define an ‘objective test’ of the reasonable person.

Answer

Contracts are generally entered into voluntarily by the parties. In most cases, contracts evolve as agreement subsequent to negotiations, and even though not all agreements are intended to have legal consequences or to be enforced in a court of law. For this reason it is essential to ascertain whether the agreement was actually intended to be regarded as being ‘valid and enforceable’, hence a valid contract, or simply a ‘mere’ agreement and not intended to be enforceable.

In this context, wherever possible the courts attempt to give 'effect' to the intentions of the parties for business efficacy by applying an 'objective test' based on what a reasonable person in the circumstances would conclude. Essentially, this means that the courts will look at the actual words and conduct of the parties involved in order to determine if they actually intended to be legally bound by their agreement. That is, what conclusions would a reasonable person have derived from the words or conduct of the parties and taking into account all of the relevant circumstances. Thus, if a reasonable person would assume that there was no intention by the parties to be actually bound, then there is deemed to be no valid and legally enforceable contract.

Question 3

How does a 'formal' contract differ from a simple contract?"

Answer

A Formal Contract, is described as a contract where it is in the form of a Deed (legal document) and derives its name from the requirement that it is prepared in a specific manner. A Formal Contract, evidences a promise that must be in writing, signed by the party or parties to the contract, witnessed by at least one independent person who is not a party to the contract, sealed or expressed to be a Deed, and delivered (or intended to be delivered) without any other conditions attached. For its validity as it is written in a specific legal manner, a formal contract does not require any consideration. Other examples of formal contracts, are court records and other legal contracts of record can arise independently of the wishes of one of the parties, so they are independent of agreement.

However, Simple Contracts are all other contracts and unlike Formal Contracts, valuable consideration must be present for a simple contract to be valid and legally enforceable. Apart from a few statutory exceptions which require a simple contract to be wholly in writing (such as cheques and bills of exchange) or at least evidenced in writing under respective sale of goods legislation, consumer protection legislation, there are no formal requirements that have to be adhered to expect that all the essential elements of a valid simple contract are satisfied.

Question 4

Why is it necessary today for some contracts to be wholly in writing and some contracts to be evidenced in writing? Discuss.

Answer

Under the general common law a valid contract can be in writing, evidenced in writing, verbal or implied by conduct. Obviously, if a contract is verbal or implied by conduct, it becomes very difficult to prove the exact terms of the contract and in some instances, the existence of the contract. While this will not affect the validity of the contract, having the contract in writing or evidenced in writing, makes proving the contract and/or its terms easier.

The requirement that some contracts be ‘in writing’, or ‘evidenced in writing’ in order to be valid and/ or enforceable is a statutory one. Certain simple contracts, to be valid and enforceable, are required by statute to be wholly in writing. If they are not, they are void. Thus a contract ‘in writing’ (or ‘wholly in writing’) is one in which all or nearly all of the terms are included in the one document, there is no need to look further to discover what the parties agreed to. Some examples of these are bills of exchange and cheques. Consumer protection legislation such as the Consumer Credit Code require the contract to be in writing and go even further by specifying matters which must be included.

A contract ‘evidenced in writing’ is one in which there is some documentary proof that a contract exists, but the document may not contain all the terms of the agreement. The absence of writing will not affect their validity, but may make them unenforceable. Two examples are contracts of guarantee, and contracts for the sale or disposition of an interest in land.

Question 5

Discuss some of the types of problems that can arise in Contract Law for consumers that use electronic commerce (e-commerce)?

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Answer

In today's highly globalised and technological international marketplace, 'electronic commerce' also known as 'e-commerce' simply refers to business or commerce that is conducted by way of computer, the internet and other telecommunications links such as electronic data exchange (EDI). Accordingly, the use of electronic means to complete commerce (business) transactions, instead of the conventional method of doing business F2F (face-to-face) is becoming increasingly popular and more common in today's technological world. Consequently, the *Electronic Transactions Acts* in many nations and international business treaties and conventions now provide a common (universal but not yet uniform) legal framework in order to support and encourage businesses and consumers to use electronic commerce (e-commerce) by providing that the general contract law will in fact deal with electronic and paper-based commerce equally, as well as providing an international framework for consumer protection legislation for contracts entered into in these two different platforms, conventional and online

Reference should be made to the traditional methods of commerce such as F2F (face to face) and 'agreements by post' and make comparisons of these traditional methods with the new technology which has given rise to electronic commerce (e-commerce). A discussion should be made of the following aspects, such as:-

- When was the offer and acceptance actually made;
- What is the impact of e-commerce and an invitation to treat which is different to an offer;
- How can the parties be adequately identified and where they are physically located.
- If a contractual dispute arises, how can the other party be contacted and how can any legal documents in the event of a dispute be served;
- That the terms of the contract and have they been brought to the attention of the other party?; and
- Methods of payment and delivery.

Question 6

Grace decided that it was time to sell her old car and get a new red Alpha Romeo Giulietta. However, Grace was not sure of its value and accordingly, when Grace advertised her old car, she left out the price. When Stefan responded to the advertisement, he asked for the price of the car. Grace responded by saying, 'I do not know the value of the car. I guess a fair price would be around a couple of thousand Euros (Dollars)'. When Stefan went to Grace's house the next day with € (\$) 2000 for the car, Grace told him that she really meant € (\$) 2500. Do you think that a contract exists in this situation?

Answer

For a valid and binding agreement with respect to the sale of Grace's car, the actual price (consideration) of the car is an essential term. Therefore, unless Stefan is happy with, and actually agrees to the price of € (\$) 2500, then Grace and Stefan have not come to an agreement with respect to this critical matter, and, as such, no contract has been formed between them.

7.2 Multiple choice questions**Question 1**

Which of the following statements in respect to determining when an agreement is not necessarily a contract is inaccurate?

- a) The courts are not concerned the intention of the parties as it is a private matter.
- b) The parties in an agreement do not always intend to create legal relations.
- c) Sometimes the Law implies the existence of a valid contract.
- d) An agreement will not give rise a legally enforceable contract is not all of the elements that create a valid contract have been satisfied.

Answer: a

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Question 2

Which of the following statements is the most accurate in respect to the nature of a contract?

- a) A contract is a type of agreement.
- b) The terms 'contract' and 'agreement' mean the same thing.
- c) An agreement is a legally enforceable contract.
- d) Not all contracts are agreements.

Answer: **a**

Question 3

For a contract to exist, the agreement that was negotiated between the parties must:

- a) Contain a promise which is exchanged for something of value.
- b) Contain a commitment or undertaking to abide by the agreement.
- c) Clearly evidence the promise between the promissory and the promise.
- d) All of the above.

Answer: **c**

Question 4

There are three main elements that must be present in order for an apparent simple contract to exist. Which of the following is not one of these elements?

- a) There must be an agreement.
- b) There must be genuine consent.
- c) There must be valuable consideration.
- d) There must be a real intention to be bound.

Answer: **c**

Question 5

If an agreement is made between two parties of unequal bargaining power:

- a) The court will nevertheless enforce the agreement.
- b) The court will not enforce the agreement.
- c) The court will not enforce the agreement if the pressure used by the stronger party was unconscionable.
- d) The court will only enforce the agreement if the weaker party could have chosen to deal with another person, but did not do so.

Answer: **c**

Question 6

In order to be contractually binding on the parties, an agreement:

- a) Must be expressed in writing and signed.
- b) Must be expressed in writing but need not be signed in all cases.
- c) Must be either expressed in writing or expressed verbally.
- d) May arise by implication as a result of the conduct of the parties.

Answer: **d**

7.3 True and false questions

1. For the creation of an apparent simple contract, intention, agreement and consideration must be shown to be present.

[True]

2. A valid contract is one which can be enforced by both parties.

[True]

3. A unilateral contract is one where both parties still have to perform their obligations.

[False]

4. Under a void contract there are no legal rights or obligations.

[True]

5. A formal contract derives its validity from its form alone and does not require consideration to be present.

[True]

6. An invitation to treat is an offer to consider offers.

[True]

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Module 8 Intention to create legal relations

8.1 Essay questions

Question 1

What is the legal presumption concerning intention in domestic or social arrangements?

Answer

For domestic or social arrangement the legal presumption is that agreements of a family, domestic or social nature are not intended to be legally enforceable contracts.

Question 2

What is the legal presumption concerning intention where there are commercial transactions?

Answer

For commercial or business transactions the legal presumption is that agreements of a business or commercial nature are actually intended to be legally enforceable contracts and such breach can be remedied by court action or remedies for any breach.

Question 3

Helen offered to sell her house to Troy for € (\$) 150,000. Troy said that he would take the house for € (\$) 130,000. Helen refused to sell her house to Troy at this price. A day later Troy agreed to pay the original price for the house. Explain whether Helen is obliged to sell her house to Troy?

Answer

NO – Helen is not obliged to sell her house to Troy as he rejected her initial offer (counter offer) to sell her house to him for € (\$) 150,000. However, it is still up to Helen to consider the offer made to her by Troy and to accept or reject the offer to purchase the house again by Troy at the original price of € (\$) 150,000.

Question 4

ProClean placed an advertisement in a teenage magazine that read as follows:

ProClean is guaranteed to work wonders on problem teenage skin. If used according to the instruction for 3 months and you will experience blemish free and clear skin. If this does not happen we will refund your money and pay you \$(€) 200.

Anthony, a teenager read the advertisement and purchased a three month supply being 3 tubes at \$(€) 10 each and used it according to the instructions. However, at the end of the three month period his skin was damaged and looked much worse than prior to use of the product.

Explain whether Anthony has an enforceable contract with ProClean that he can make a successful claim under for breach of contract and his worse skin condition.

Answer

Anthony in this situation, will claim that he has an enforceable contract with ProClean. The advertisement to teenagers was an offer because its 'guaranteed' terms are clear and definite. Anthony's use of the product that he purchased based on the advertisement constituted the actual acceptance. Thus because of the definite nature of the advertisement by ProClean, Anthony will argue that notification of acceptance was waived by ProClean (see *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256). The reason for his successful action will be based on the fact that the product did not work as had been promised and guaranteed. Therefore Anthony has an enforceable claim as purchaser and as a consumer for breach of contract and damage sustained as a result of the use of the product that made his skin condition worse.

Question 5

Lawrence advertises in the local newspaper that he has lost his expensive wallet and offers a reward of cash. John who has not read the advertisement finds the wallet and returns it to Lawrence. John later finds out that there is a reward for the return of the wallet and he asks Lawrence for the cash reward. Is Lawrence legally obliged to pay John the reward? Explain whether your answer would be different if John knew of the reward before he found Lawrence's wallet?

Answer

Acceptance of an offer must be made in strict reliance of the offer. John had not read the offer of reward when John acted, so he was not acting with the offer in his mind at that point. Thus, there has been no acceptance of the offer made by Lawrence and therefore Lawrence is not legally obliged to pay the cash reward to John. However, if John knew of the reward John would be able to show that he acted within the offer in mind and thus, this would constitute a valid acceptance of the offer and that therefore on this basis John would be entitled to the cash reward from Lawrence for finding his lost wallet.

Question 6

Take in consideration the following event and scenario and ascertain if a valid contract is formed:

Offeror: 'I will sell you my car for \$(€) 10000.'

Reply by Offeree: 'I will give you \$(€) 9000.'

Answer by Offeror: 'No deal.'

Counter Response: 'Ok, I will give you \$(€) 9500.'

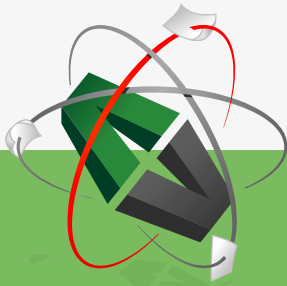
In this scenario of events is there a valid contract formed? Why or why not?

Answer

There is no valid contract in this sale of car example because the 'reply' is a rejection or revocation of the original offer that was made. The 'counter response' or 'counter offer' is therefore not an acceptance of the initial offer but rather it constitutes a counter offer which the seller of the car may accept or reject.



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8.2 Multiple choice questions

Question 1

In determining whether the parties to an agreement actually intended to form a contract, why do the courts often rely upon legal presumptions?

- a) Mainly because that is the Law.
- b) As it is unusual for both parties to actually have the same intention.
- c) Since parties frequently lie about their intention.
- d) Since parties negotiating a contract seldom express their intention.

Answer: *d*

Question 2

In determining whether the parties to an agreement intended to form a contract, the courts often rely upon rebuttable legal presumptions. In this context, a 'rebuttable' presumption is:

- a) One which can be disputed by the party disadvantaged by the presumption.
- b) One which cannot be disputed by either party.
- c) A reasonable presumption.
- d) A presumption based upon the evidence.

Answer: *a*

Question 3

In which type of agreement is the onus (proof) on the defendant to show that legal relations were not intended?

- a) Commercial agreements.
- b) Social agreements.
- c) Domestic agreements.
- d) Voluntary agreements.

Answer: *a*

Question 4

Parties to a commercial agreement who do not wish the agreement to be legally binding:

- a) Need not do anything.
- b) Can expressly exclude the jurisdiction of the courts.
- c) Are unable to prevent the agreement from being legally enforceable.
- d) Can expressly declare that they do not intend to create legal relations.

Answer: d

Question 5

When a merchant advertises their product, the courts generally presume that:

- a) The merchant did not intend to immediately create legal relations with viewers of the advertisement.
- b) The merchant intended their statements to be legally binding.
- c) The merchant did not intend to enter into contracts with purchasers of their product.
- d) The merchant intended any contract with a purchaser to be legally binding.

Answer: a

Question 6

When a merchant (shop keeper/store) whether in the conventional form or online via the internet advertises its product(s) for sale, the courts normally presume that:

- a) The merchant intended their statements to be legally binding.
- b) The merchant did not intend to immediately create legal relations with viewers of the advertisement.
- c) The merchant did not intend to enter into contracts with purchasers of their product.
- d) The merchant intended any contract with a purchaser to be legally binding.

Answer: b

8.3 True and false questions

1. In social agreements the law presumes that the negotiating parties intend to create legal relations.
[False]
2. Domestic agreements can never be binding.
[False]

3. A clause that excludes or attempts to limit the jurisdiction of the courts is invalid.

[True]

4. In order to determine the state of minds of the parties to a contract a subjective test of the reasonable person is used.

[False]

5. In a commercial agreement an honour clause can be used by the negotiating parties to rebut the presumption that the parties did intend to create legal relations.

[True]

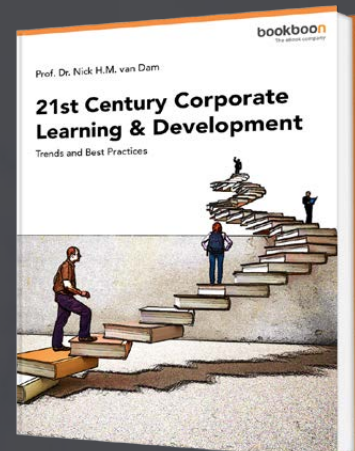
6. In commercial agreements, the courts presume that the negotiating parties did actually intend to create legal relations.

[True]

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Module 9 The offer

9.1 Multiple choice questions

Question 1

In general a court will enforce an agreement:

- a) But only if there has been an actual 'meeting of the minds'.
- b) If in fact, both parties intended to reach agreement.
- c) By ascertaining the actual subjective state of mind of each party.
- d) If a reasonable person in the given circumstances would deem that an agreement had actually been reached between the parties, based on their conduct.

Answer: d

Question 2

The negotiating parties, in order to reach a legally enforceable agreement:

- a) Should agree to more than just the substance of the contract.
- b) Must expressly agree to every term contained in the agreement that forms the basis of the contract.
- c) Cannot leave any details to be worked out later.
- d) Are only required to reach broad agreement on the actual substance of the contract that was negotiated.

Answer: d

Question 3

Which of the following statements is not a requisite of a valid offer?

- a) The offer must be made to a specific Offeree.
- b) The offer must be more than a request for information.
- c) All terms must be brought to the notice of the Offeree and must be followed exactly.
- d) The offer must be kept open via an Option if supported by consideration.

Answer: a

Question 4

An invitation to treat is described as:

- a) An offer.
- b) An offer to consider offers.
- c) An offer to offer an offer.
- d) An offer to accept an offer.

Answer: b

Question 5

A promise to keep an offer open for a specified period:

- a) Is just unenforceable.
- b) Is unenforceable unless it is supported by the offeree's consideration referred to as an option.
- c) Is unenforceable unless supported by the offeror's consideration.
- d) Is unenforceable unless it is expressed in writing.

Answer: b

Question 6

When a customer shops at a supermarket, the offer is accepted and the contract is actually formed:

- a) At the checkout, when the supermarket accepts the customer's offer to buy the goods
- b) As soon as the customer enters the supermarket.
- c) When the customer accepts the goods on offer on the shelves by placing them in their basket.
- d) At the checkout, when the customer accepts the supermarket's offer to sell the goods.

Answer: a

9.2 True and false questions

1. In every agreement there must be an offer made with a corresponding acceptance of all the terms.

[True]

2. The offeror is the person who is making the offer to the offeree.

[True]

3. An offer of goods or services may be made to the world at large.

[True]

4. An invitation to treat is simply described as an offer to consider offers and mainly refers to goods on shop windows and shelves and does not include goods displayed in vending machines.

[True]

5. A mere request for information does not destroy the original offer that was made to the offeree by the offeror.

[True]

6. The offer made by the offeror can only be accepted by proper communication by the person or persons to whom the offer was actually made and are capable of accepting the offer.

[True]



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Module 10 The acceptance

10.1 Multiple choice questions

Question 1

In which type of the following agreements is the onus on the defendant to show that legal relations were in fact, not intended?

- a) Commercial agreements.
- b) Social agreements.
- c) Domestic agreements.
- d) Voluntary agreements.

Answer: a

Question 2

The definition of an agreement as an offer made by one party and an acceptance by another is:

- a) Important in determining the time and place of the agreement.
- b) Useful in determining the content of the agreement.
- c) Not always used by the courts.
- d) All of the above.

Answer: d

Question 3

In order to reach a legally enforceable agreement, the parties to an agreement:

- a) Must agree to more than just the substance of the contract.
- b) Must expressly agree to every term of the agreement.
- c) Cannot leave any details to be worked out later.
- d) Need only reach broad agreement on the substance of the contract.

Answer: d

Question 4

When goods are sold by tender, the offer is accepted and the contract is formed:

- a) As soon as the announcement is made by the seller.
- b) When the tendered accepts the seller's offer by submitting a tender.
- c) When the seller accepts the tenderer's offer by accepting the tender.
- d) When the tendered accepts the seller's offer to accept the tender.

Answer: d

Question 5

Which of the following statements is consistent with the postal rule?

- a) An offer made by letter is effective as soon as it is posted.
- b) A revocation of an offer is effective as soon as it is posted.
- c) A correctly posted letter containing an acceptance of an offer need not be received by the offer or in order to be effective.
- d) An acceptance must be sent by mail in order to be effective.

Answer: c

Question 6

When a customer shops at a supermarket, the offer is accepted and the contract is formed:

- a) As soon as the customer enters the supermarket.
- b) When the customer accepts the goods on offer on the shelves by placing them in their basket.
- c) At the checkout, when the customer accepts the supermarket's offer to sell the goods.
- d) At the checkout, when the supermarket accepts the customer's offer to buy the goods.

Answer: d

10.2 True and false questions

1. Under the postal acceptance rule, an offer is not communicated until it is actually received by the offeror.

[True]

2. The acceptance to an offer made by the offeror must be expressed in writing.

[True]

3. Acceptance of an offer must be made strictly in accordance with the actual terms of the offer.

[True]

4. If the offeror waives communication of acceptance, then no agreement can take place.

[False]

5. For the creation of an apparent simple contract, intention, agreement and consideration must be shown to be present.

[True]

6. In every agreement that is negotiated there must be an actual acceptance of all the terms of the offer.

[True]



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Module 11 Meaning of consideration

11.1 Essay questions

Question 1

What is meant by ‘consideration’ in contractual terms?

Answer

Consideration has been defined in various ways by the courts and in decided cases. For instance in *Currie v Misa* (1875) LR 10 Exch 153, the presiding judge, Lush J defined consideration as:-

“A valuable consideration in the sense of the law may consist of either in some right, interest, profit or benefit to one party, or some forbearance, detriment or loss or responsibility, given suffered or under-taken by the other”.

Similarly, in a later case, in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Sir Frederick Pollock’s definition was adopted and used by Lord Dunedin in his judgment by defining consideration as being: “an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable”.

Thus, consideration is defined as the price you pay to buy the other person’s promise and it is this concept of ‘price paid’ that was adopted by Sir Frederick Pollock and accepted by the House of Lords in this famous English case. Fundamentally, in this context then the promisor is the person undertaking the promise, while the Promisee is the person who is receiving, or the recipient, of the promise in any simple contract. In essence then, consideration is the *bargain element* of a contract and refers to the actual price paid, the thing given, or promised, the detriment suffered by one party in exchange for the other party’s promise.

Question 2

What is meant by the expression “consideration must move from the promisee”?

Answer

In simple terms, the expression “consideration moves from the promisee”, means that a person who wants to enforce a promise must have actually aid for it. Thus, only by providing sufficient and valuable consideration can a person under the agreement establish a right to have it enforced in the event of a breach or loss (detriment) that arose in reliance of the representation that was made by the other party. For fairness this requirement is strictly construed by the law. Consequently, consideration must flow from either the promisee or from someone acting on the promisees’s behalf, such as, for instance, from an agent appointed for the purpose of making the required payment, that is, the price being the consideration required to support the simple contract and make it valid and enforceable.

Question 3

In respect to the rules regarding consideration, under what circumstances will past consideration, if ever, be deemed to be good consideration?

Answer

A past act can be good consideration where a subsequent promise to pay a specific amount to the plaintiff can be directly connected to the defendant’s original request to the plaintiff to perform some service: the performance of that service and of the subsequent promise to make payment become part of the one transaction.

Question 4

In a simple contract what is the main purpose of consideration? Discuss.

Answer

In the case of *formal* contracts, there is no need for consideration, as due to the specific legal structure and form in which formal contracts are expressed, the concluded contract is valid because of its actual legal form. In the case of all other contracts, they are called *simple* contracts and in all instances valuable consideration is required for the agreement in order for it to become a valid and enforceable contract. This is the major difference between a Formal contract and a Simple contract.

Formal contracts are also referred to as *deeds* or *contracts under seal*. There are a number of necessary formalities in respect to Formal contracts that must always be satisfied and they must be:

- in writing, signed by the parties;
- witnessed by an independent third party;
- sealed or expressed to be a deed; and
- actually delivered to the recipient.

If then, the particular agreement does not satisfy these requirements, it is just a simple contract. Alternatively, a simple contract may be formed verbally, impliedly, written (expressed), or evidenced in writing and must have consideration to support its validity and enforceability.

The reason why consideration is very important is because only promises that are given (subject to the bargaining between the parties) because they are paid for are enforceable. The main reason for the requirement of consideration to be present and of some value in simple contracts is to enable a distinction to be made between promises that are gratuitous (merely gifts) and that are freely given and between those that are onerous or 'paid for' by the incurring of some obligation. Therefore, by insisting on some form of consideration, the courts can identify a benefit to each party and therefore conclude that they did intend to enter into a legally binding and valid contract.

Question 5

What is meant by the expression 'valuable consideration'?

Answer

In respect to the law and enforceability of agreements that turn into contracts, then, for there to be 'good consideration' in respect to the enforceability and validity of that agreement, it must have a *value* in the eyes of the law. This important fundamental issue in respect to a valid contract is realised in the expression '*consideration needs to be sufficient, but it need not be adequate*'.

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This, means that the consideration promised by the Promisee need not necessarily be equal in value to the promisor's promise must have some value that is recognised under the law and hence, consideration provided to support the promise under the simple contract (unless it is a formal contract) the, it must always be present and have *some* value.

Generally, the courts do not worry about the *adequacy* of the consideration but insist on valuable consideration. Contracts are viewed as agreements that have been negotiated and entered into freely by the parties and it is not viewed as being the role of the courts to ascertain whether or not adequate value has been given, or whether or not the agreement is harsh or onerous, as long as there is at least some consideration given. Accordingly, 'good' consideration must always be present in order to support a simple contract at common law, it can also be nominal or trivial, but it must be always be sufficient, and this means that it must have some legal value recognised by the Courts in all instances, otherwise it is deemed to be insufficient consideration.

Most things that make up consideration will have an intrinsic value, although sometimes the acts or omissions that form and provide the consideration may be very small or even of no apparent intrinsic value. For instance, in the past the leasing of houses, schools and city buildings at a rental of one peppercorn per year is another example where the courts are not concerned with the adequacy of the consideration and are prepared to hold that the trivial nature of the peppercorn rental may make up sufficient consideration to support a simple contract in some situations in order to necessitate business efficacy.

Question 6

How would you define the term 'consideration'? In your answer also explain the distinction between executed consideration, executory consideration and past consideration.

Answer

Consideration is the 'price' paid by the Promisee for the Promisor's promise. If the Promisee wants to enforce a promise, he or she must first prove that the promise has actually been "bought" by having something of value exchanged for it. Promises that are not supported by consideration are called "gratuitous promises" and they are not legally enforceable.

Thus, consideration may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. In simple terms, it is the *price* paid by one party in exchange for the other party's promise.

Consideration is said to be *executed* (or present) when one party performs an act in exchange for the other party's promise. It is *executory* (future) where one party has given a promise to do, or refrain from doing, something in exchange for the other party's promise. Consideration is *past* when the promise is given after an act has been performed.

11.2 Multiple choice questions

Question 1

In the context of contract law, 'consideration' is defined as:

- a) The price paid by each party for the other party's promise or performance.
- b) The monetary value of the contract.
- c) A sum paid by one party for the other party's offer.
- d) The act of considering the terms of a contract before agreeing to them.

Answer: a

Question 2

One of the rules in respect to consideration is that, consideration must be:

- a) Valuable, adequate and sufficient.
- b) Valuable and adequate, but need not be sufficient.
- c) Valuable and sufficient, but need not be adequate.
- d) Valuable and either adequate or sufficient.

Answer: c

Question 3

Which of the following situations is the best example of executed consideration?

- a) Anton pays Bruce (\$) € 10.00 today in return for Bruce giving Anton, an orange today.
- b) Anton promises to pay Bruce (\$) € 10.00 tomorrow in return for Bruce giving Anton, an orange tomorrow.
- c) Anton promises to pay Bruce (\$) € 10.00 tomorrow in return for Bruce giving Anton, an orange yesterday.
- d) All of the above.

Answer: a

Question 4

Which of the following statements is not a requirement of 'valid' consideration?

- a) The consideration must be valuable.
- b) The consideration must be adequate.
- c) The consideration must be possible.
- d) The consideration must be legal.

Answer: **b**

Question 5

Which of the following situations is the appropriate example of executory consideration?

- a) Anton pays Bruce (\$) € 10.00 today in return for Bruce giving Anton, an apple today.
- b) Anton promises to pay Bruce (\$) €10.00 tomorrow in return for Bruce giving Anton, an apple tomorrow.
- c) Anton promises to pay Bruno (\$) €10.00 tomorrow in return for Bruno giving Anton, an apple yesterday.
- d) All of the above.

Answer: **b**



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Question 6

One of the rules in respect to consideration is that, consideration is sufficient if it is:

- a) The performance of an existing legal duty.
- b) The performance of an existing contractual duty owed to the promissory.
- c) The performance of an existing contractual duty owed to a third party.
- d) All of the above.

Answer: c

11.3 True and false questions

1. Consideration must be present or future, it cannot be past consideration.
[True]
2. Consideration must be present in every simple contract.
[True]
3. Consideration must have a value that is actually recognised by the law.
[True]
4. Future consideration is also known as executed consideration.
[False]
5. A moral consideration cannot amount to good consideration.
[True]
6. A promise to accept a lesser sum in satisfaction of a greater sum will be enforceable if it is contained in a deed.
[True]

Module 12 Operation of consideration

12.1 Essay questions

Question 1

How is consideration distinguished from motive in respect to contractual promises?

Answer

In respect to the important element of consideration which is required to validate and support all simple contract, motive and consideration are very different. In respect to consideration the promisor, actually gets something in return for the promise, while with motive, that is not the case and there is no reciprocation of promises. In terms of consideration, the reason by the offeror makes the offeree is immaterial, since the actual motive behind the offer neither confers a benefit on the promisor nor imposes a detriment on the promisee. Consequently, motive then is not consideration and under the rules of consideration, can never be good consideration.

Question 2

Catherine promised her still minor son, Lawrence that if he refrained from smoking and drinking until he was 21, that she would buy him a Black BMW. Lawrence has just turned 21 but Catherine refuses to buy the Black BMW, saying that Lawrence not smoking or drinking has been good for his finances as he has some savings and more importantly his health.

Advise Lawrence.

Answer

In this situation Lawrence has not given any consideration to his mother Catherine, to support her promise to buy him a Black BMW when he turns 21 years of age. This arrangement and promise was motivated by her concern, love and affection for her son in order to prevent him from drinking and smoking. Clearly, Catherine, the offeror had a motive for making the offer to her son Lawrence, and that was to prevent him from taking up drinking and smoking. The only motive was her desire to get the reciprocal act or obligation from her son Lawrence that she asked of him, the promisee, and that was to stop him from drinking and smoking. Even though Lawrence's (the promisee's) reciprocal act or obligation did in fact constitute good consideration, one of the general rules of consideration, is that moral obligations as well as those of natural love and affection will not convert a promise by the promisor into good consideration.

In this situation, the law does not recognise gratuitous promises and unfortunately for Lawrence he will be unable to enforce the promise.

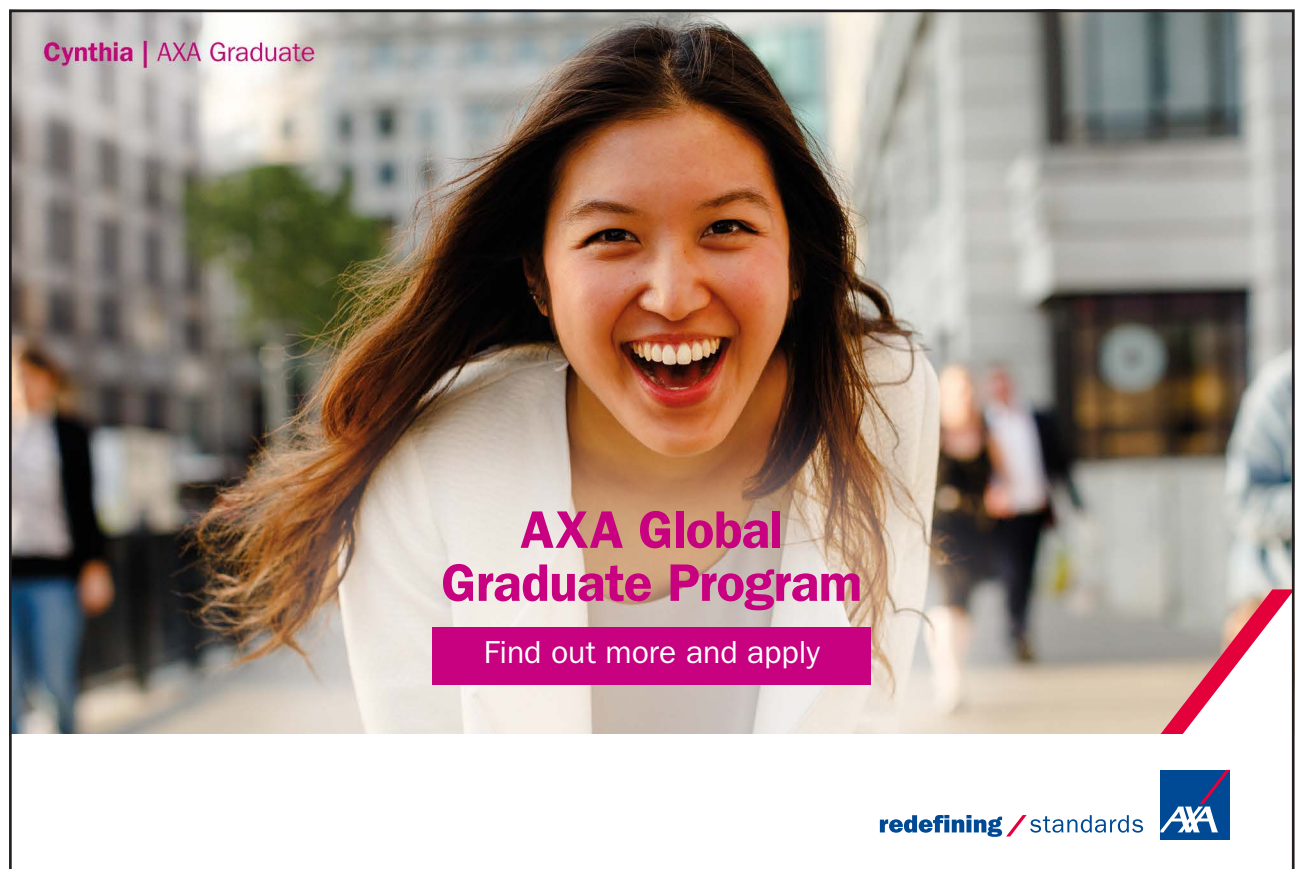
Question 3

In what instances will a forbearance to sue be deemed to be ‘good’ consideration?

Answer

The word ‘forbearance’ simply means, deliberately not doing something or not exercising some right a person may have under the contract, usually on the request of another person, and can constitute good consideration. As illustrated by the case of *Dunton v Dunton* (1892) 18 VLR 114, the alleged consideration does not have to be an act or thing, and it can simply also be a promise not to do something that the promisee was entitled to do. Thus, a person not exercising a present right under the contract, at the request of the promisor, can be good and sufficient consideration in some instances.

A specific type of forbearance that is often used in contractual situations, as being sufficient and ‘good’ consideration is referred to as “forbearance to sue”. This situation arises where one party has either commenced proceedings or is threatening to commence proceedings for an alleged breach of a right under the contract. Thus, if the other party asks that the action is not commenced or if proceeded with, that it is terminated in exchange for some smaller or part payment of the debt, then the difficulty arises: “Does a promise not to institute, or to terminate, an action constitute good consideration?”



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The answer lies in the fact of whether or not the consideration had some value and benefit to the promisor in not taking action or not proceeding with the action. Therefore, in order for 'forbearance to sue', to be deemed to be good and sufficient consideration, the promisee must show that:

- The claim on which the action was based was reasonable, that is, it was not merely vexatious or frivolous, but was necessary for business efficacy (efficiency);
- He or she honestly believed that there was a good chance of success; and
- He or she had not concealed from the defendant (the promisor) any fact that could affect the validity of the claim.

Question 4

What is meant by the following terms of consideration and how to they differ: (a) acts, promises and forbearances in performance of an existing duty; and (b) acts, promises and forbearances in discharge of an existing duty?

Answer

Under the essential element of consideration in a simple contract, sometimes things without intrinsic value are regarded as having some value for the purposes of consideration. This would normally occur in instances where acts, promises or forbearances are not considered as being good consideration, even though they have some value. These acts, promises or forbearances generally fall into these two categories: (a) acts, promises and forbearances in performance of an existing duty; and (b) acts, promises and forbearances in discharge of an existing duty.

The main differences between these two categories is that under category (a) acts, promises and forbearances in performance of an existing duty, the mere performance of an existing duty cannot constitute good consideration and accordingly the promisee neither gives nor gives up anything which he or she was already obliged to either give or give up. The general principles underlying this category is that acts or forbearances in performance of an existing duty are not good consideration is the idea that if a promisee is already under a duty to do or to forbear from doing something, then he or she is neither conferring an additional benefit nor incurring an additional detriment simply by doing or forbearing from doing that thing, whatever it may be, under the circumstances.

Alternatively, under category (b) acts, promises and forbearances in discharge of an existing duty, the parties to a contract can agree to discharge their mutual obligations or merely the obligations of one of them, so that strict performance of what they had originally contracted for will not take place and the contract obligations are mutually discharged. Thus, if this happens as it is does normally in a unilateral discharge of contracts, then the agreement not to demand the strict performance must, still be supported by consideration. If this does not occur then it is of no contractual effect and the original contractual obligations between the parties which they had believed were terminated by mutual discharge may therefore still exist and be valid and enforceable.

Question 5

Angelina promised her son Bruno, that in consideration for his love and affection that she will provide him with an annual allowance of € (\$20000). After Angelina had a falling out with Bruno's new wife Claudia, Angelina told her son that there will be no further payments and that she never wanted to see them again. Explain to Bruno, taking into account relevant legal principles whether he can enforce the future payments owed to him by his mother, Angelina?

Answer

In this situation Bruno has not given any consideration to his mother Angelina, to support her promise to pay him an annual allowance. In the context of the rules relating to consideration, motivations of love and affection under the law of contract does not constitute sufficient consideration. Additionally the law does not recognise gratuitous promises and as Bruno has not given anything to Angelina in return, Bruno will be unable to enforce future payments.

Question 6

Domenic a fruit and vegetable market store proprietor, agreed with you an orchardist and fruit grower, in April to buy your apple and orange crop in September, when the fruit have ripened and to pay you, the cost of the fruit at that time in September, when Domenic receives the fruit crop. Has a valid contract been formed in this situation between you and Domenic? If so, why?

Answer

This question is concerned with consideration and the type of consideration that supports the promise made between you and Domenic in April. In this situation as delivery of the fruit crop your produced occurs sometime in the future, in September, the contract will not be finalised until then. Thus, in terms of the consideration, in this instance it is 'executory' consideration which means that the act of delivery (of the apple and orange crop upon ripening) will occur subsequent to the forming of the contract with anticipated delivery in September. In this situation, the parties have agreed in April, to do something in the future, that is, in September. Hence, there is a valid contract and liability on the part of both parties to this the contract, that is, delivery of the crop by you and payment of monies owed to you by Domenic for the supply of the ripened apples and oranges in September.

12.2 Multiple choice questions

Question 1

In which of the following circumstances will payment of a lesser amount fail to discharge a debt, despite a creditor's promise to accept the lesser amount in full satisfaction of the debt?

- a) Where the creditor has requested that the debtor pay the lesser amount by cheque instead of cash.
- b) Where the creditor has requested that the debtor pay the lesser amount on an earlier date.
- c) Where the creditor has requested that the debtor pay the lesser amount at a different place.
- d) Where the creditor has requested that the debtor accompany payment of the lesser amount with some other act they were not originally bound by the contract to perform.

Answer: a

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Question 2

Which of the following is not one of the criteria which must be satisfied in order for 'past' consideration to in fact, be 'good consideration'?

- a) The promise would be enforceable if it had been promised in advance of the past consideration.
- b) The past consideration was provided at the promise's request.
- c) The past consideration was provided after the promissory made their promise.
- d) At the time the past consideration was provided, the parties understood that it would be remunerated either by payment or the conferment of some other benefit.

Answer: *c*

Question 3

Which of the following rules of consideration is an essential requisite of 'valid' consideration?

- a) The consideration must be present or future but not past.
- b) The consideration must be definite.
- c) The consideration must move from the promisee.
- d) All of the above.

Answer: *d*

Question 4

The payment of a lesser amount than the actual amount that was already owed:

- a) Discharges the debt if the lesser payment is accepted by the payee.
- b) Is not sufficient consideration for the payee's promise to discharge the debt.
- c) Can be revoked at any time by the payer.
- d) Is an act detrimental to the payer and therefore good consideration.

Answer: *b*

Question 5

Which of the following is not one of the rules for consideration?

- a) Is not essential in every simple contract.
- b) Should be present or future but not past.
- c) Must be possible of performance.
- d) Must be something more than the promise of an existing obligation.

Answer: a

Question 6

Which of the following rules of consideration is not a requirement of 'valid' consideration?

- a) The consideration must be legal.
- b) The consideration must be valuable.
- c) The consideration must be definite.
- d) None of the above.

Answer: d

12.3 True and false questions

1. Consideration must be present or future, it cannot be past.
[True]
2. Consideration must be present in every simple contract.
[True]
3. Consideration must have a value that is recognised by the law.
[True]
4. Future consideration is also known as executed consideration.
[False]
5. To support a promise and the contract being negotiated, the consideration must be of some sufficient value in the eyes of the law.
[True]
6. A moral consideration cannot amount to good consideration.
[True]

Module 13 Promissory estoppel

13.1 Essay questions

Question 1

What is the essence of the equitable doctrine of estoppel?

Answer

The essence of the equitable doctrine of estoppel as developed by the English common law courts, is essentially to ensure that a person should be responsible to another person, if that person makes to the other a representation that was actually intended to be acted upon by that other person (reliance of that representation), and which is in fact acted upon to the others detriment. Thus, in other words the person who made the statement will be 'estopped' or prevented from going back on, or acting inconsistently with, the representation regardless of the fact that no consideration (or at times insufficient) consideration has been given for it. Additionally, common law estoppel in its traditional form was restrained and applied only in certain situations, for the purpose of upholding the value and integrity of the doctrine of consideration. Thus estoppel is only applied and limited to only those representations that consisted of existing or past facts and not of mere intention of the parties (see the English case of *Jorden v Money* (1854) 5 HL Cas 185 in respect to the development of estoppel).

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Question 2**Outline the essential elements of the doctrine of promissory estoppel?***Answer*

The essential elements of promissory estoppel as determined by the English common law courts in various cases includes the following:

- An assumption is created by the defendant by a promise or representation.
- Unequivocal action is required.
- The assumption may be one of fact or law, present or future.
- Reliance by the plaintiff on the assurance or assumption occurs.
- Detriment to the plaintiff occurs as a result of the reliance.
- Unconscionability would result if the promisor were to resile from the representation.

Question 3**What are the limitations on the doctrine of promissory estoppel?***Answer*

There are two definite limitations on the doctrine of promissory estoppel and they are, that:

- *It is not a new cause of action:*
From its inception the courts, recognised that promissory estoppel does not actually create a new cause of action. It also does not override the requirement for consideration and it also does not make voluntary promises actually enforceable. Essentially promissory estoppel only operates where the concepts of equity and fairness demand that tht it has to be used and applied in order to avoid an absurdity or an injustice where one party has acted on an assumption that representation and positively prompted by the other. See for example *Combe v Combe* [1951] 2 KB 215; *Central London Property Trust v High Trees House Ltd* [1947] KB 130 and *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
- *It suspends the rights of the promisor:*
The doctrine of promissory estoppel is generally limited to the suspension of the promisor's rights and does not normally terminate them. This, this means that the promise need not be forever and the promise has not "bought" the promise and, cannot demand that it is upheld in all situations. Accordingly, the promisor can withdraw the promise, but only after satisfying three specific conditions, that is, notice must be given of the promisor's intention to resile; notice must be given within a reasonable time and it must be possible for the promises to resume their former positions. The suspension of a promisor's rights is illustrated by *Central London Property Trust v High Trees House Ltd* [1947] KB 130).

Question 4

A spinster daughter Laura, promised to take care of her elderly parents, their household bills and financial affairs for as long as they lived. Consequently, in return for the Laura's promise, her mother promised to transfer to Laura, her eldest daughter, her 'interest' in some of 'her' property and estate upon her death. Is such a promise by the mother enforceable under the law? Discuss.

Answer

This question is concerned with promises and consideration. The primary issue is whether or not the spinster daughter's promise to look after both her elderly parents until their death, is consideration for her mother's promise to leave property to her. Under the rules of consideration a promise of this nature would not be considered enforceable as based on moral obligation or natural love.



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Thus, under these types of situations, the courts are not prepared to accept that moral obligation, or natural love and affection, without some additional factor that the court could place a value on, and that was actually something that amounted to good consideration. Additionally, in this situation the promise in this instance was too vague to be of any value and hence there is no valuable consideration to support the promise made by the mother by saying: “...*daughter her ‘interest’ in some of ‘her’ property...*” Thus normally consideration must be real and identifiable, as well as being able to be expressed in economic terms, which is not the case in this situation. As it is indefinite and too vague in nature, the promise will not amount to real consideration anyhow, despite it being in the nature of a moral obligation, as well as natural love and affection), which at law will not convert a promise into good consideration (See English case *White v Bluett* (1853) 23 LJ Ex 36).

Question 5

David leases a coffee shop to Thomas, in a new shopping centre for € (\$) 2000 a week on the outskirts of the city away from the hub of central business district. Unfortunately, the shopping centre is not very successful or viable and many of the shopkeepers are forced out of business or choose to leave voluntarily. Consequently, Thomas approaches and asks David, if his rent can be reduced to € (\$) 1000 a week. David considers this request and under the circumstances agrees to reduce the rent to € (\$) 1000 a week. Accordingly for the next six months Thomas paid David, the reduced rental on the lease of € (\$) 1000 a week. Meanwhile, David becomes aware, through rumours in the shopping complex that Thomas is considering giving notice and terminating the lease at the end of the six months. David then proceeds to take action and commences suing Thomas to recover the € (\$) 24000 arrears in rent.

Advise Thomas of the likelihood of David’s success in suing him for the arrears?

Answer

From the given facts, Thomas was contractually bound to pay € (\$) 2000 per week for rental of the business premises from David. Thomas did not provide any consideration for David’s promise of the reduced rent of € (\$) 1000 per week due to the downturn of business and lack of customers in the shopping centre. Thomas has taken the lesser amount of rent for 24 weeks (six months) which had led Thomas to believe that this could continue to be the ongoing arrangement as agreed negotiated and agreed upon. Thus, Thomas has acted and relied on this representation due to the fact that the shopping centre due to its location at the outskirts of the city was not successful.

It can be assumed that Thomas, would have left the business and shopping centre if the rent had not been reduced and remained at € (\$) 2000 per week which would have caused Thomas some obvious financial difficulty. It appears from the given facts that Thomas did not consider this option of leaving or was denied taking up this option. The actual detriment to Thomas of having to now pay € (\$) 24000 in back rent (arrears) all at once can definitely argued that it is very onerous and also unconscionable. Thus, it would be unconscionable to allow David on hearing the rumour and acting on it without being certain of the facts (ideally by asking Thomas directly if he was thinking of leaving) to insist on the payment of € (\$) 24000. Accordingly, Thomas is able to raise the equitable remedy of promissory estoppel as a shield to David's claim for the full arrears amount of € (\$) 24000 on the basis of unconscionability and preventing Thomas from going back on his representation.

Question 6

Sandra owes Tanya € (\$) 2000. Sandra knows that Tanya is experiencing some personal difficulties as well as being in financial difficulties and needs the money urgently. Accordingly, when Sandra is approached by Tanya she delays payment, but Sandra finally offers Tanya a cheque for € (\$) 1500 in full satisfaction of the debt that she owes Tanya. Tanya accepts the cheque from Sandra for € (\$) 1500 immediately. Advise Tanya as to her legal right to recover the balance of € (\$) 500 from Sandra.

Answer

The principle (or rule) in the English case of *Foakes v Beer* (1884) 9 App Cas 605 states that, where there is payment of a lesser sum in discharge of a debt, there is usually not sufficient consideration to support the discharge. The debtor is not promising to do anything more than he or she is already contractually bound to do. However, there are a number of exceptions to this, one of which is that, if payment is in a different form (the cheque instead of cash) to that requested by the creditor, it could amount to good consideration in some situations.

The issue in this question, is whether or not the payment of the lesser amount of € (\$) 1500 by Sandra by cheque instead of by a cash payment actually constitutes good consideration in order for Tanya to forgo the balance. The facts are similar to the English case of, *D & C Builders Ltd v Rees* [1966] 2 QB 617, in which the court came to the conclusion that no sensible distinction could be drawn between payment by cash and payment by cheque, other than it was a conditional payment. However, when the cheque was honoured, it amounted to actual cash. Thus, in respect to the *Foakes v Beer* principle, Tanya has an ongoing legal right to the full payment of the money borrowed by Sandra and is entitled to seek the balance of the € (\$) 500 as in this case Sandra has not fulfilled her part of the promise to pay back the full amount borrowed and this the full € (\$) 2000 and not just € (\$) 1500 and by cheque (payment of a different kind).

The equitable principle of promissory estoppel applies in this situation and it generally operates by allowing a promise to be enforced even though the Promisee, Sandra (as in this case) has not provided sufficient consideration for that promise. Promissory Estoppel, operates where it would be inequitable or unconscionable for the promisor (Sandra) not to be held to his or her promise, that is to pay the full amount borrowed, in this case the € (\$) 2000 that she owed to Tanya.

In order to establish promissory estoppel, the following elements must be satisfied:

- there must be an assumption (of fact or law) created in the mind of the plaintiff (promisee) by the defendant (promisor);
- the defendant must be responsible for the assumption;
- the defendant must have intended the plaintiff to act on the assumption;
- the plaintiff must have acted to their detriment, in reliance on the assumption;
- unconscionability would arise if the defendant were allowed to go back on his or her promise.

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As promissory estoppel is an equitable principle, the debtor is going to have to show that he has entered into the transaction with 'clean hands'. That is, he is not using the principle of promissory estoppel to avoid a legally incurred obligation. See the Australian case of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 which is based on the unconscionable conduct of the party making the representation. Thus, in this case, as it was Sandra who approached Tanya over accepting payment of the lesser sum and cheque, the facts are such, that Sandra in this instance is unlikely to be able to show that she has suffered a detriment in reliance of Tanya's representation. Tanya in this instance has a legal right to seek payment of the remaining balance of € (\$) 500.

13.2 Multiple choice questions

Question 1

The equitable doctrine of promissory estoppel:

- a) Can be used as a defence to a civil action, but not to commence a civil action.
- b) Can be used to commence a civil action but not as a defence to a civil action.
- c) Can be used to commence a civil action and/or as a defence to a civil action.
- d) All of the above.

Answer: c

Question 2

Which of the following is not one the elements of promissory estoppel?

- a) The promise sought to be enforced is supported by consideration.
- b) It would be unconscionable to allow the promissory to go back on their promise.
- c) The promise has relied on the promise.
- d) The promise has acted to their detriment on the basis of the promise.

Answer: a

Question 3

The circumstances in which the doctrine of promissory estoppel applies is in circumstances where:

- a) There is a pre-existing contractual relationship between the parties.
- b) The promise is made with the knowledge and intention that it would be acted on by the promisee.
- c) The promisee acts on the promise and suffers a detriment through altering their position in reliance on the promise; and
- d) It would be unjust or inequitable to allow the promissory to 'resile' that is go back on the promise.

Answer: d

Question 4

Which of the following statements is correct in respect to the issue of consideration and promissory estoppel?

- a) It is necessary to establish reliance, detriment and unconscionability when arguing promissory estoppel as a defence.
- b) Promissory estoppel may be argued to enforce promises where there is no consideration provided, or where there is insufficient consideration to support the promise.
- c) Courts generally have a wide discretion on the provision of relief once promissory estoppel is established.
- d) All of the above.

Answer: d

Question 5

Generally, the payment of a lesser amount than that already owed:

- a) Discharges the debt if accepted by the payee.
- b) Is not sufficient consideration for the payee's promise to discharge the debt.
- c) Can be revoked at any time by the payer.
- d) Is an act detrimental to the payer and therefore good consideration.

Answer: b

Question 6

Which of the following is an essential element of Promissory Estoppel?

- a) An assumption is created by the defendant by a promise or representation.
- b) Reliance by the plaintiff on the assurance or assumption occurs.
- c) Unconscionability would result if the promisor were to renege from the representation.
- d) All of the above.

Answer: d

13.3 True and false questions

1. Promissory estoppel has made some voluntary promises enforceable.

[True]

2. Promissory estoppel prevents promissory from renegeing (going back) on their promises where it would be unconscionable (unfair) to allow them to do so.

[True]

3. Consideration has nothing to do with promissory estoppel.

[False]

4. One of the elements of promissory estoppel is that there must be a detriment or disadvantage which the plaintiff has suffered as a result of the misrepresentation.

[True]

5. The doctrine of promissory estoppel was developed in response to the unfairness that the strict rule for the requirement of consideration in a contract can sometimes cause.

[True]

6. The doctrine of promissory estoppel no longer just operates as a defence or shield for a promise, but can now also be used to commence an action.

[True]

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Module 14 Introduction to terms

14.1 Essay questions

Question 1

Distinguish between terms and mere representations that are made during contractual negotiations between parties?

Answer

The courts generally have methods in place to ascertain if a statement made by the offeror is merely a representation, which induces the offeree to enter into the contract, or an actual term, which forms part of the whole contract and indicates how it should be performed.

In some instances it is difficult to ascertain if a statement is a representation or a term. Accordingly, to assist with this determination, the courts apply an objective test based on the standard of the reasonable person and will take into account the following factors:

- the time lapse between the making of the statement and the final agreement;
- whether the person making the statement asks the other person to check or verify it;
- whether the statement was made with the intention of preventing the other party from finding any defects (see *Hopkins v. Tanqueray* [1854]);
- the importance attached to the statement by the parties;
- whether the person who has made the representation has some special skill or knowledge not possessed by the other party (see *Oscar Chess v. Williams* [1957]).

Question 2

What is the distinction between the contractual terms ‘condition’ and ‘warranty’?

Answer

The distinction of contractual terms ‘condition’ and ‘warranty’ is important when establishing whether a statement is a term of the contract, because of the remedy that is available to the injured party. Thus, depending on whether a condition or warranty was breached the type of remedy will differ. Accordingly, if it is determined that a statement is a term, it must then be ascertained whether it is a:

- Condition: This type of term is vital and goes to the root of the contract, allowing the injured party the option of rescission and/or damages (see case is *Poussard v. Spiers & Bond* (1876); or a
- Warranty: Is a term of lesser importance that allows the injured party to only recover damages (*Bettini v. Gye* (1876)).

Essentially, a condition is a vital term which goes to the root or heart of the contract and which, if broken, entitles the injured party to (generally) rescind the contract and/or seek damages. A warranty is subsidiary to the main purpose of a contract and is not really the substance of the contract. It is more a promise of a minor nature or collateral to the main purpose of the contract and only entitled the injured party to claim for damages.

Question 3

What is the 'parol evidence rule'?

Answer

The parol evidence rule is a rule of evidence that applies in respect to the construction of a contract especially in relation to the inclusion or variation of terms after the contract has been finalised. Accordingly, if the contract is wholly in writing (expressed/written down) generally the courts will not admit evidence of acts or words of the parties prior to the execution of the document if this has the effect of adding to, varying, or contradicting the written agreement. Thus, in this instance, the courts will strictly take the view that, if the parties have taken the time to reduce the agreement to writing, then the contract is a complete record of what the parties intended to create. This is known as the 'parol evidence rule'.

Question 4

What must a party do in order to be able to rely on an exclusion clause?

Answer

In order for a party to rely on an exclusion clause in a contract they must be able to show that the clause is in fact, an actual term of the contract.

As a general rule, if the contract is a signed document, the exclusion clause will be effective unless fraud, misrepresentation or a statutory defence can be established.

In the case of an unsigned document, they must show:

- that the customer knew of and consented to the clause or that a reasonable person would have expected to find such a clause in that type of document;
- that reasonable steps were taken to give notice of the term; or
- if the terms have not been brought to the notice of the customer, that they can be implied by trade usage or custom.

Question 5

James agrees to survey land owned by Matthew. The negotiated contract consists of a statement made by James that he will charge \$1000 and an agreement by Matthew to pay this amount upon completion of the survey of her land. What are some terms that would be implied in the contract?

Answer

In this given situation, it would be implied that James will conduct himself professionally and will use his best efforts in order to complete the serviced he was asked to provide for Matthew, by surveying Matthews's land. There is also an implied term that Matthew upon completion of the survey of the land by James, will pay James for the service within a reasonable time.

Question 6

What is a collateral contract? What must be satisfied before the courts will infer a collateral contract?

Answer

A collateral contract is a preliminary contract on which the main contract is based. Accordingly, if a statement can be regarded as a collateral or preliminary contract, so that the main contract would not have been entered into in the absence of the earlier statement, the courts may be prepared to enforce the promises made by the parties before they entered into the main contract.



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In order to establish a collateral contract, it is necessary to show that the person making the statement, actually:

- intended the collateral or preliminary contract to be relied on;
- guaranteed the truth of the collateral or preliminary contract; and
- relied on and acted on the belief that of the existence of the collateral contract.

14.2 Multiple choice questions

Question 1

Which of the following principles of law is not one, that is applied by the court in ascertaining whether or not a person is bound by an exclusion clause?

- In the absence of fraud, a person signing a written contract containing an exclusion clause will be bound by the exclusion clause.
- If the exclusion clause is contained in a document which the reasonable person would not have regarded as one which would contain contractual terms it is not binding.
- Knowledge of the exclusion clause may be inferred where the person has entered into that type of contract many times before.
- The person must have actually been made aware of the exclusion clause before the making of the contract.

Answer: *d*

Question 2

What is the correct name for a term in an agreement which provides that the agreement does not become a contract until the happening of a certain event?

- A condition antecedent.
- A condition subsequent.
- A condition precedent.
- A condition consequent.

Answer: *c*

Question 3

Which of the following statements is the best description of a ‘condition subsequent’?

- a) A term in a contract, the consequences of breach of which cannot be determined until after the breach has occurred and the seriousness of the effects of the breach can be ascertained.
- b) A term in a contract which provides that the contract will terminate on the happening of a particular event.
- c) A term which must be satisfied before a contract can come into existence.
- d) A term in a contract not essential to the main purpose of the contract, non-performance of which will not entitle the plaintiff to rescind the contract.

Answer: b

Question 4

Which of the following statements is the best description of a ‘condition precedent’?

- a) A term in a contract, the consequences of breach of which cannot be determined until after the breach has occurred and the seriousness of the effects of the breach can be ascertained.
- b) A term in a contract which provides that the contract will terminate on the happening of a particular event.
- c) A term in a contract, non-performance of which may result in rescission of the contract and/or damages to the plaintiff.
- d) A term which must be satisfied before a contract can come into existence.

Answer: d

Question 5

Which of the following statements is the best description of an ‘innominate term’?

- a) A term in a contract, the consequences of breach of which cannot be determined until after the breach has occurred and the seriousness of the effects of the breach can be ascertained.
- b) A term in a contract which provides that the contract will terminate on the happening of a particular event.
- c) A term in a contract, non-performance of which may result in rescission of the contract and/or damages to the plaintiff.
- d) A term in a contract not essential to the main purpose of the contract, non-performance of which will not entitle the plaintiff to rescind the contract.

Answer: a

Question 6

When is a particular statement more likely to be a term of the contract rather than a mere representation?

- a) A long time has passed between the making of the statement and the final agreement.
- b) The other party was asked to check or verify the statement.
- c) The statement was made with the intention of preventing the other party from finding any defects.
- d) Both parties placed considerable importance on the statement.

Answer: d

14.3 True and false questions

- 1. Breach of warranty allows the injured party to rescind and/or recover damages.
[False]
- 2. Liability for negligent acts may be excluded by the incorporation of an exclusion clause into the contract.
[True]
- 3. The parol evidence rule states that if a contract is entirely written, the document itself contains all the terms of the contract.
[True]
- 4. Express terms of a contract are those terms that have been actually agreed upon by the parties to the contract.
[True]
- 5. Terms can be implied in contracts by the general law as well as consumer protection legislation.
[True]
- 6. If the stated terms in a contract fail to clearly indicate the actual intentions of the parties, the negotiated contract will be void for lack of certainty.

Module 15 Implied terms in contracts

15.1 Essay questions

Question 1

Why are terms implied into contracts for sales of goods?

Answer

In order to assist consumer in their dealings with traders and businesses, governments have enacted consumer protection legislation, which insert specific terms into contracts for the sale of goods and in some instances services. Accordingly these terms are implied by statute into every contract for sales of goods and services conducted in the traditional manner in person, that is F2F or online via the internet.

Question 2

What are some of the implied terms or guarantees that apply to the supply of goods and services in trade and commerce to consumers?



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Answer

Generally the implied terms or guarantees that apply to the supply of goods and services in trade and commerce to consumers include the following:

- Guarantee as to title – that is the right by the seller to sell the goods to the buyer who gets a ‘good title’;
- Guarantee as to undisturbed possession of the goods as long as the supply is not of limited title;
- Guarantee as to acceptable quality of goods if they are:
 - Fit for all purposes for which goods of that kind are commonly supplied;
 - Acceptable in appearance and finish;
 - Free from defects;
 - Sage; and
 - Durable
- Guarantee as to fitness of goods for any disclosed purpose that was made known by the buyer to the seller at the time of the transaction in the normal course of trade or commerce;
- Guarantee as to description and that the goods actually correspond to the description;
- Guarantee as to repairs and spare parts;
- Guarantee as to due care and skill relating to the supply of services
- Guarantees as to fitness of services for a disclosed purpose;
- Guarantee as to reasonable time for supply

Question 3

What are two general purposes of statutory trade practices and consumer protection legislation?

Answer

The purpose of two general purposes is basically twofold:-

1. To regulate various restrictive trading practices with the aim of preventing monopolistic and anti-competitive activities between traders, thus achieving more effective competition in the marketplace for the benefit of consumers and business generally; and
2. Provide protection to consumers against unconscionable conduct, false representations and other unfair practices by traders in relation to the supply of goods or services, and land.

Question 4

Can the consumer guarantees that are implied under sales of goods and consumer protection legislation be excluded by agreement between the consumer and the supplier?

Answer

In general law, statutory implied consumer guarantees that are embedded in statutory sales of goods and consumer protection legislation expressly prohibit the consumer and supplier in the sales and services transaction to exclude the operation of the implied consumer guarantees. Accordingly, any such term within a contract entered into between the consumer and the supplier will be void. However there are some limited exceptions to this prohibition. If the contract entered into between the consumer and the supplier is solely for the supply of recreational services, it is possible for the supplier in this instance to exclude the consumer guarantee provisions and are not generally caught by the statutory sales of goods consumer protection provisions.

Question 5

Samuel went to a caravan dealer in his local area and said that he wanted a caravan for an extended trip. The caravan dealer recommended a particular type of caravan and Samuel bought it and commenced his extended trip. After a day or so, Samuel hit a pothole on the highway, and the axle broke. It was discovered that the caravan was not designed for rough roads or in fact extended trip and was really only designed to be parked in an actual caravan park where it would have been stationary for most of the time. Samuel had to have the caravan towed at great expense and he arranged to have it returned to the caravan dealer.

Discuss giving reasons and any remedies that Samuel can obtain against the dealer as a consumer under general sale of good legislation.

Answer

Samuel as a consumer and prospective purchaser of the caravan relied on the seller's skill and judgment. The seller was a caravan dealer and Samuel told the dealer the specific purpose for which he wanted the caravan. Samuel will argue that the implied conditions and guarantee as to correspondence with description, fitness for specific purpose as well as acceptable merchantable quality in respect of the caravan he was sold have been breached by the seller. This is because the caravan was not fit to travel on ordinary highways, let alone being able to go on any extended road trips as was Samuel's desire to do so, and the reason he bought the caravan on the reliance of the seller judgment and expertise as a caravan dealer. Thus, Samuel as an aggrieved consumer is entitled to seek damages for breach of the implied conditions or can treat the breach of condition as a breach of warranty under the sales of goods legislation.

Additionally, if the caravan dealer was in fact a corporation instead of a sole trader or other non-corporate trading entity, (we are not told that in this instance) then Samuel would also be able to seek remedies under consumer protection legislation for the breach of the statutory implied guarantees of fitness for specific purpose and acceptable merchantable quality and will be able to rescind the contract for such breach.

Question 6

Lana, purchased a pair of woollen thermal underwear from ‘Merino Australian Wool Products’ in their store in Rome, and she sought the assistance from the salesperson. As a result of wearing the woollen underwear without washing them first before wearing and the salesperson did not tell her that she ought to do so, Lana contracted dermatitis which has caused her some distress due to the severe rash and itching. Upon further investigation, it was found that the woollen underwear contained traces of the cleaning product, sodium bisulfate, which it was found had been left in the underwear during the manufacturing process. The thermal underwear were packaged in a clear cellophane wrap (and not actually handled) prior to purchase, which meant that the traces of the sodium bisulfate could not be seen or even smelt upon a reasonable inspection of the by either the retailer, Merino Australian Wool Products, or even by the buyer (consumer) in this instance, Lana.

Do you think that Lana has any remedy or remedies available to her for the damage and injury that she has sustained by wearing the woollen thermal underwear against the retailer that is Merino Australian Wool Products under the general sales of goods and statutory consumer protection legislation?

Explain what Lana would need to establish in order to succeed in an action for the harm and damage that she has sustained and whether, in your opinion, she would be successful.



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Answer

This question is concerned with the consumer implied guarantees as to fitness for any disclosed purpose; and acceptable quality in contracts for the sale of goods.

Accordingly, in applying the general law as well as aspects of the consumer protection legislation applicable at all levels of sales of goods whether in person or online if Lana to succeed under on the basis that the woollen thermal underwear were not fit for the specified purpose or for that matter not of acceptable merchantable quality than Lana will need to establish that:-

- Lana made known, either expressly or impliedly, the particular purpose for which the goods were required and from the given facts, this is not an issue as it is satisfied;
- Lana relied on the seller's skill or judgement and no doubt she would have received advice from the salesperson and thus, reliance need only be partial to satisfy this proviso and it need not be express;
- the goods bought by Lana, were of a description that was in the course of the seller's ordinary business to supply and given the nature and type of specialised business here, this is not an issue; and
- Lana relied on the seller's skill and judgment, rather than buying the goods under their trade or patent name.

Thus, goods are of acceptable quality if they are fit for all the purposes for which goods of that kind are commonly supplied, free from defects and safe.

Generally in these types of consumer situations in establishing if the goods are of acceptable quality as well, as fit for their specified use, the following matters will be taken into consideration:

- the actual nature and type of the goods;
- the price of the goods (if relevant);
- any statements made about the goods on any packaging or label on the goods;
- any representation made about the goods by the supplier or manufacturer of the goods; and
- any other relevant circumstances relating to the supply of the goods.

If the consumer guarantee as to acceptable quality under the general as well as statutory law is not complied with, then under both the general law of negligence for product/manufacture's liability where any owed duty of care was breached and damage caused and sustained by a consumer then allows the affected person, the aggrieved consumer, to recover damages as a result of the defective product directly from the manufacturer.

From the given, Lana should have little difficulty in establishing that the woollen thermal underwear that she bought from Merino Australian Woollen Products were not fit for the purpose and had only one purpose, and were not acceptable quality. Thus the court would find in favour of Lana and hold that the woollen thermal underwear were not reasonably fit for their only proper purpose for personal wear and for warmth. Also from the given facts, Lana the plaintiff relied on the retailer's choice of a quality woollen product that could not be worn without being washed first and the salesperson failed to advise Lana and thus there was a breach of the implied guarantee of fitness for purpose and Lana should also be successful in a claim for breach of the guarantee of acceptable quality for the reasons set out above against both the retailer as well as the manufacturer (See *Donoghue v Stevenson* [1932] AC 562 at 580 and *Grant v Australian Knitting Mills Ltd* [1936] AC 85).

15.2 Multiple choice questions

Question 1

When is a particular statement more likely to be a term of the contract rather than a mere representation?

- a) A long time has passed between the making of the statement and the final agreement.
- b) The other party was asked to check or verify the statement.
- c) Both parties placed considerable importance on the statement.
- d) The statement was made with the intention of preventing the other party from finding any defects.

Answer: c

Question 2

Which of the following statements is the best description of a 'condition'?

- a) A term in a contract, the consequences of breach of which cannot be determined until after the breach has occurred and the seriousness of the effects of the breach can be ascertained.
- b) A term in a contract which provides that the contract will terminate on the happening of a particular event.
- c) A term in a contract, non-performance of which may result in rescission of the contract and/or damages to the plaintiff.
- d) A term which must be satisfied before a contract can come into existence.

Answer: c

Question 3

Which of the following statements is the best description of a ‘Warranty’?

- A term in a contract which provides that the contract will terminate on the happening of a particular event.
- A term in a contract, non-performance of which may result in rescission of the contract and/or damages to the plaintiff.
- A term which must be satisfied before a contract can come into existence.
- A term in a contract not essential to the main purpose of the contract, non-performance of which will not entitle the plaintiff to rescind the contract.

Answer: *d*

Question 4

Which of the following statements is the best description of an ‘innominate term’?

- A term in a contract, the consequences of breach of which cannot be determined until after the breach has occurred and the seriousness of the effects of the breach can be ascertained.
- A term in a contract which provides that the contract will terminate on the happening of a particular event.



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- c) A term in a contract, non-performance of which may result in rescission of the contract and/or damages to the plaintiff.
- d) A term in a contract not essential to the main purpose of the contract, non-performance of which will not entitle the plaintiff to rescind the contract.

Answer: *a*

Question 5

Which of the following is not one of the principles applied by the court in ascertaining whether or not a person is bound by an exclusion clause?

- a) In the absence of fraud, a person signing a written contract containing an exclusion clause will be bound by the exclusion clause.
- b) If the exclusion clause is contained in a document which the reasonable person would not have regarded as one which would contain contractual terms it is not binding.
- c) Knowledge of the exclusion clause may be inferred where the person has entered into that type of contract many times before.
- d) The person must have actually been made aware of the exclusion clause before the making of the contract.

Answer: *d*

Question 6

What is the correct name for a term in an agreement which provides that the agreement does not become a contract until the happening of a certain event?

- a) A condition antecedent.
- b) A condition subsequent.
- c) A condition precedent.
- d) A condition consequent.

Answer: *c*

15.3 True and false questions

1. If one of the parties had a specific skill or knowledge with regard to the subject – matter of the contract, then a statement is probably a term.

[True]

2. In the case of a written contract, the Courts assume that the intention of the parties is contained within the 'four corners of the contract.'

[True]

3. Breach of condition allows the injured party to only sue for damages.

[False]

4. An intermediate or innominate term is neither a condition nor a warranty.

[True]

5. Terms may be read in or implied from previous dealings between the parties.

[True]

6. In order to establish that a collateral contract exists, it is necessary to show that the person making the statement intended it to be acted upon and that the person to whom the statement was made relied upon the statement.

[True]

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Module 16 Implied terms by statute

16.1 Essay questions

Question 1

How can terms generally be implied into contracts?

Answer

Terms in contracts can be implied under the common general law or under statute. Terms may be implied from previous conduct of the parties by not just under sales of goods and consumer protection legislation, but also by reference to custom or trade usage, by the court to give business efficacy to the contract.

Question 2

If a buyer purchases goods from a seller who has a voidable title, what sort of title will the buyer have? Explain.

Answer

As a general rule, when a person takes goods purchased, they will only get the same rights to the goods as the person from whom they took delivery of them. This rule is expressed in the Latin maxim *nemo dat quod non habet*, that is, 'one cannot give what one does not possess.'

Thus, the rightful owner of goods, in cases where they may have been stolen, is that they are entitled to recover their goods from those who have no title to them. Note this rule is subject to a number of exceptions, one of which is sale under a voidable title. If a seller has a title that is voidable (for example, for misrepresentation) that title will be said to be voidable. Provided that the goods were bought in good faith, and without notice of the seller's defective title, the buyer acquires a good title that remains valid and binding unless and until it is repudiated.

Question 3

Distinguish a contract for the sale of goods from a contract for work done and materials supplied.

Answer

A contract for the sale of goods is a contract in which the seller transfers or agrees to transfer ownership of goods to the buyer for a money consideration (the price). Accordingly, a contract for the sale of goods is distinguished from a contract for work done and materials supplied (that is mainly for labour and materials) by considering the main purpose of the contract.

If the main purpose of the agreement is in fact, the skill and experience to be displayed by one of the parties in performance of the contract, and the transfer of title to the materials is of minor importance, then it is a contract for work and labour and the supply of materials. These contracts are basically a hiring of service or of skill, and delivery of the item is secondary, as the actual item (good or product) is merely a means for demonstrating the skill possessed by the seller.

Question 4

Explain the '*nemo dat* rule' and provide at least three exceptions to the rule.

Answer

As a general rule, the buyer gets only the same title to the goods as the person from whom he or she obtained them. This is referred to as the '*nemo dat* rule' – *nemo dat quod non habet* ('no one can give what they do not have').

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There are a number of exceptions to the rule:-

- Special powers of sale: in situations where some persons possess special powers of sale under the sale of goods legislation given to them by the court;
- Estoppel: where the conduct of the owner in some instances is such that the owner is estopped (or prevented) from denying the authority of the seller to sell the goods.
- Sale under a voidable title – the contract must not have been rescinded at the time of sale, and the buyer must have purchased in good faith and without notice of seller's lack of title

Question 5

In the context of sale of goods legislation, distinguish between a 'sale' and an 'agreement to sell'.

Answer

In situations where there is a sale of goods, ownership (or property) transfers from the seller to the buyer at the time of the contract is made (executed contract). Where there is an agreement to sell, property in the goods is to be transferred at some later date or when some condition has been fulfilled, such as payment of the price. This type of contract is executory and when the time elapses or the conditions are fulfilled, the agreement to sell will become a sale.

Question 6

The seller has remedies under sales of goods legislation against the buyer, and conversely the buyer also has certain remedies?

Answer

Under a sales of goods transaction, the buyer's remedies against the seller actually depends on whether the goods have been delivered to the buyer or not.

For instance where the goods have not been delivered due to the seller wrongfully neglecting or refusing to deliver them, the buyer is entitled to sue the seller for damages for the non-delivery of the purchased goods. Consequently, where the seller fails to deliver the specific goods under the sales of goods transaction, and they are of a unique kind or quality, if damages are not an adequate remedy then the buyer may be able to seek an equitable order through the court of specific performance.

Also, in situations where there has been a breach of warranty of quality by the seller, or where the buyer has elected to treat the breach as an actual breach of warranty, the buyer is entitled to seek damages or seek a reduction or extinction of the price (consideration) that was sought by the seller. Accordingly, where there is a breach of condition, the buyer is entitled to actually rescind the contract and reject the goods and if this amounts to a total failure of consideration, then the buyer is able to recover the full purchase price that was paid to the seller.

16.2 Multiple choice questions

Question 1

Terms protecting the buyer are not implied into the contract:

- a) If the quality or fitness of the goods are apparent on an inspection by the buyer.
- b) Unless the quality or fitness of the goods are apparent on an inspection by the buyer.
- c) If the buyer has to rely on the special knowledge or expert judgement of the seller.
- d) Unless the seller has to rely on the special knowledge or expert judgement of the buyer.

Answer: *a*

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Question 2

Terms may be implied into a contract under the general law or by statute on the basis of a variety of reasons. Which of the following is not one such reason?

- a) That the term follows a well-known trade custom in a particular industry.
- b) That there is a provision in a relevant statute which requires that the term should be implied into every contract of a particular kind.
- c) That by implying the term it would make a fairer bargain.
- d) That by implying the term it would cure an obvious omission and give the contract business efficacy.

Answer: a

Question 3

In respect to the implied guarantee as to fitness for any disclosed purpose which of the following conditions must be always satisfied?

- a) Has the consumer made know either expressly or impliedly the particular purpose for which the goods are required?
- b) Has the consumer relied on the supplier's skill and judgment?
- c) Are the goods of a description that were supplied in the course of normal trade or commerce?
- d) All of the above.

Answer: d

Question 4

Which of the following is a contract pursuant to general provisions of sale of goods legislation?

- a) The supply of a computer system including hardware and software, installation of the equipment, training of staff and after sales service.
- b) Servicing a motor vehicle including installing new spark plugs, brake fluid and oil.
- c) A visit to the dentist to get a filling.
- d) Painting a person's portrait.

Answer: a

Question 5

If a service provider breaches the obligation to provide the service with due care and skill implied by general consumer protection legislation of any jurisdiction, the consumer is generally entitled to:

- a) Monetary compensation.
- b) Terminate the contract.
- c) A full refund of all monies paid to the service provider.
- d) All of the above.

Answer: a

Question 6

In respect to the implied guarantee of acceptable merchantable quality of goods which of the following conditions must always be satisfied?

- a) If there has been a sale by description and the goods have been bought from a seller dealing in good of that description.
- b) If the buyer had an opportunity to examine the goods.
- c) If the goods have more than one purpose.
- d) All of the above.

Answer: d

16.3 True and false questions

1. There is an implied condition in every sale of goods that the seller has the right to sell the goods.
[True]
2. If a seller does not have title to the goods at the time of transfer, then there is a total failure of consideration.
[True]
3. Where goods are sold by description, description goes to both identity and quality of goods.
[False]

4. Where goods are sold by description, there is an implied warranty that the goods will correspond with the description.

[True]

5. The terms 'property' and 'possession' mean one and the same thing in law.

[False]

6. A consumer guarantee as implied under statute for consumer protection is neither a condition nor a warranty.

[True]



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Module 17 Sales of goods legislation

17.1 Multiple choice questions

Question 1

In what cases must a buyer treat a breach of condition as a breach of warranty?

Answer

There are two cases where a buyer must treat a breach of condition as a breach of warranty, namely, where a buyer has accepted the goods or part of them and when the contract is for specific goods and the property in them has actually passed to the buyer.

Question 2

Under what circumstances can the implied conditions and warranties contained within consumer protection legislation be limited or excluded?

Answer

Generally the implied conditions and warranties of consumer protection legislation can be limited or excluded when the seller is not a corporation and the buyer is not a 'consumer' as defined under such legislation, and also if a supply of the goods and services is not the usual and normal course of a business.

Question 3

When does the implied condition as to fitness for specific purpose do not apply?

Answer

The implied condition generally found in sale of goods and consumer legislation as to fitness for specific purpose does not apply when a person requests to buy goods under a patent or trade name and indicates that no reliance is placed on the seller's skill or judgment.

Question 4

Differentiate between a sale and an agreement to sell and when title to the goods passes in each case.

Answer

In a sale transaction, under a sales of goods legislation property in the goods purchased passes immediately upon payment of the price (the consideration) unless an agreement between the parties provides otherwise. However, under an agreement to sell, the actual property in the goods does not pass immediately but instead passes at a future time.

Question 5

What does it mean to say that implied terms are non-excludable?

Answer

This means that any attempt by sellers to exclude the jurisdiction of the court or the implied guarantees of fitness for specified purpose or acceptable quality in order to deny the rights and benefits of the consumer under the implied terms and guarantees are rendered void.

Question 6

Samuel went to a caravan dealer in his local area and said that he wanted a caravan for an extended trip. The caravan dealer recommended a particular type of caravan and Samuel bought it and commenced his extended trip. After a day or so, Samuel hit a pothole on the highway, and the axle broke. It was discovered that the caravan was not designed for rough roads or in fact extended trip and was really only designed to be parked in an actual caravan park where it would have been stationary for most of the time. Samuel had to have the caravan towed at great expense and he arranged to have it returned to the caravan dealer.

Discuss giving reasons and any remedies that Samuel can obtain against the dealer as a consumer under general sale of good legislation.

Answer

Samuel as a consumer and prospective purchaser of the caravan relied on the seller's skill and judgment. The seller was a caravan dealer and Samuel told the dealer the specific purpose for which he wanted the caravan. Samuel will argue that the implied conditions and guarantee as to correspondence with description, fitness for specific purpose as well as acceptable merchantable quality in respect of the caravan he was sold have been breached by the seller. This is because the caravan was not fit to travel on ordinary highways, let alone being able to go on any extended road trips as was Samuel's desire to do so, and the reason he bought the caravan on the reliance of the seller judgment and expertise as a caravan dealer. Thus, Samuel as an aggrieved consumer is entitled to seek damages for breach of the implied conditions or can treat the breach of condition as a breach of warranty under the sales of goods legislation.

Additionally, if the caravan dealer was in fact a corporation instead of a sole trader or other non-corporate trading entity, (we are not told that in this instance) then Samuel would also be able to seek remedies under consumer protection legislation for the breach of the statutory implied guarantees of fitness for specific purpose and acceptable merchantable quality and will be able to rescind the contract for such breach.

17.2 Multiple choice questions

Question 1

Which of the following statements in respect to the sale of goods is the best description of the '*nemo dat*' rule?

- a) Good title to goods may be given by a person who is not the owner of the goods.
- b) A buyer who acquires goods from a seller who does not own the goods may bring an action against the seller for breach of an implied term.
- c) A buyer cannot acquire ownership of goods from a seller who does not have ownership to give.
- d) An owner of goods can only transfer title to a person who does not already have title to the goods.

Answer: c

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Question 2

Which of the following would be classified as 'goods' within the meaning of general sale of goods legislation?

- a) Apples picked from an apple tree.
- b) A house.
- c) A cheque.
- d) The repair of a watch.

Answer: **a**

Question 3

Generally, sale of goods legislation only applies to contracts for the actual sale of goods which have been transferred upon payment of the price (consideration). Which test do you think, is applied in order to distinguish between a contract for the sale of goods and a contract for work and materials?

- a) If the contract involves the transfer of ownership of goods it must be a contract for the sale of goods.
- b) If the contract involves the provision of services it cannot be a contract for the sale of goods.
- c) If the main part of the contract is the skill and experience of one of the parties and the transfer of goods is of secondary importance, it is a contract for the sale of goods.
- d) If the main part of the contract is the skill and experience of one of the parties and the transfer of goods is of secondary importance, it is not a contract for the sale of goods.

Answer: **d**

Question 4

Which of the following examples is in fact a contract for the sale of goods?

- a) The supply of a computer system including hardware and software, installation of the equipment, training of staff and after sales service.
- b) Servicing a motor vehicle including installing new spark plugs, brake fluid and oil.
- c) A visit to the dentist to get a filling.
- d) Painting a person's portrait.

Answer: **a**

Question 5

How can a service provider avoid the obligation imposed by consumer protection legislation in order to render the service with due care and skill?

- a) By verbally informing the consumer that the warranty is not implied.
- b) By including in the written contract a term that the warranty is not implied.
- c) By ensuring that the consumer signs a written acknowledgement that the warranty is not implied.
- d) The implied warranty cannot be excluded.

Answer: d

Question 6

Which of the following terms implied by the sale of goods legislation would be classified as a condition instead of a warranty?

- a) The implied term that the seller has title to the goods.
- b) The implied term that the buyer will enjoy quiet possession of the goods.
- c) The implied term that the goods will be free from encumbrances.
- d) None of the above.

Answer: a

17.3 True and false questions

1. The property in goods refers to the control or custody of goods.
[False]
2. In law the term 'property' and 'possession' mean one and the same thing.
[True]
3. Possession of goods refers to the control or custody of goods.
[False]

4. Chattels refer to things which the law deems to be public property.

[False]

5. The United Nations Convention for the International Sale of Goods (CISG) applies automatically to all signatory states.

[False]

6. The general rule under sale of goods legislation is that any damage or loss to the goods before property passes to the buyer is carried by the seller.

[True]

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Module 18 Operation of sale of goods legislation

18.1 Essay questions

Question 1

Who is an unpaid seller? Briefly explain.

Answer

An unpaid seller includes any person who is in the position of the seller (for example, an agent) and who has not been paid the full price, or has been paid with a bill of exchange or cheque which has been dishonoured.

Question 2

What is the legislature's rationale for implying certain terms into contracts for the sale of goods? Do you agree with this rationale?

Answer

Simply the legislature's rationale for implying consumer terms and guarantees is for the purpose of ensuring and maintaining consumer protection, market integrity and investor confidence in the marketplace.

Question 3

Why is it that the sale of goods legislation is based on the crucial aspect of 'title' to the goods?

Answer

This issue is fundamentally concerned with title under the sale of goods legislation and its direct link to and the application of the seller's right to sell the goods.

The sale of goods legislation implies a condition into every contract for the sale of goods that the seller has the right to sell the goods at the time when the property in those goods is to pass. This amounts to a guarantee of undisturbed possession by the seller. Therefore, if the buyer's title is lost because the seller has no title, then the buyer is entitled to a refund from the seller even if the buyer has had some use or enjoyment of the goods.

Question 4

While in England, olive farmer Silvio, enters into a contract to sell his crop of olives located in Calabria, Southern Italy to Tesco Supermarket Chain located in Knightsbridge, London. However unbeknown to Silvio, as he was on holidays the sheds where the olive crop was stored were totally destroyed by fire the previous day. What are the rights and liabilities of the parties in this situation?

Answer

This question is concerned with the classification of the goods in this instance the olive crops. The olive crop in the storage shed are known as specific goods as they are identified as the 'olive crop' and are of a perishable kind. Thus as the olive crop perished before the contract was able to be formed, renders the contract void. Accordingly the parties have no legal rights or obligations under the contract.

Question 5

What are some of the remedies and orders that are available under consumer protection legislation to aggrieved consumers?

Answer

The remedies and orders that are available under consumer protection legislation to aggrieved consumers where they have sustained damage as a result of a defective product or service are common law monetary compensation (damages), seeking an injunction and also empowers the court to make a wide range of orders to rectify the situation, such as declaring a contract is void, directing repayment of money to the injured or aggrieved consumer or the return of defective property.

Question 6

Tina purchased a hair dryer from a retailer in his local shopping centre called Small Appliances Pty Ltd, an incorporated company. Upon using the hair dryer Tina, sustained an electrical shock due to the hair dryer and burns to her hand. It was proved that the hair dryer that Tina bought and used from the store, was in fact recalled for an internal defect after Tina purchased it and for which she was unaware.

Advise Tina the injured party, of her rights as a consumer for the damage caused to her (if any) by using the defective hair dryer.

Answer

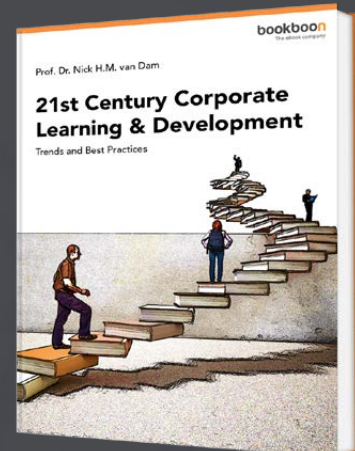
Tina will firstly ascertain any legal and jurisdictional aspects of the sales transaction to determine if her remedies for injury caused by the 'defective' product, the defective hair dryer, will be under implied conditions of both the sales of goods and consumer protection legislation or whether he can also bring an action against the supplier and/or manufacturer of the undergarments that were not fit for the specific purpose and not of acceptable merchantable quality as they caused harem and injury to Tina, and potentially other consumers. It should be noted tht Small Appliances Pty Ltd., is a corporation in trade and commerce manufacturing and distributing the hair dryer.

Accordingly Tina can argue tht there has in fact been a breach of the implied conditions (sale of goods) and implied guarantees (consumer protection legislation), as to acceptable merchantable quality and fitness for purpose and has remedies available to him for damage caused by the defect that was not reasonably seen or discoverable upon inspection at the time of purchase (See *Donoghue v Stevenson* [1932] AC 562 at 580 and *Grant v Australian Knitting Mills Ltd* [1936] AC 85).

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18.2 Multiple choice questions

Question 1

Which of the following terms implied by the general sale of goods legislation is a condition rather than a warranty?

- a) The implied term that the seller has title to the goods.
- b) The implied term that the buyer will enjoy quiet possession of the goods.
- c) The implied term that the goods will be free from encumbrances.
- d) None of the above.

Answer: a

Question 2

Which of the following is not one of the reasons why it is important to determine when ownership of goods passes from the seller to the buyer?

- a) Risk of loss or damage to the goods passes with ownership.
- b) Possession of the goods passes with ownership.
- c) Until ownership passes to the buyer, the buyer cannot pass on title to third parties.
- d) Once ownership has passed to the buyer, the buyer generally cannot reject the goods for breach of a condition.

Answer: b

Question 3

Which of the following is not one of the requirements which must be satisfied before the condition that goods will be fit for their purpose will be implied into contracts for the sale of goods?

- a) The buyer must expressly or by implication make known to the seller the particular purpose for which the goods are required.
- b) The buyer must rely upon the judgement or skill of the seller.
- c) The seller must normally sell goods of that description.
- d) The buyer must specifically request the goods by their patent or trade name.

Answer: d

Question 4

Which of the following is not one of the requirements which must be satisfied before the condition that goods will be of merchantable quality will be implied into a contract for the sale of goods?

- a) The goods must be sold by description.
- b) The buyer must rely upon the judgement or skill of the seller.
- c) The seller must normally sell goods of that description.
- d) The defect must not be apparent from a reasonable examination of the goods.

Answer: **b**

Question 5

Which of the following statements is not one of the factors that are taken into account into deciding whether or not goods are of 'acceptable merchantable quality'?

- a) The price paid for the goods.
- b) The way the goods were described.
- c) The income earned by the buyer.
- d) The purpose of the goods as made known to the seller.

Answer: **c**

Question 6

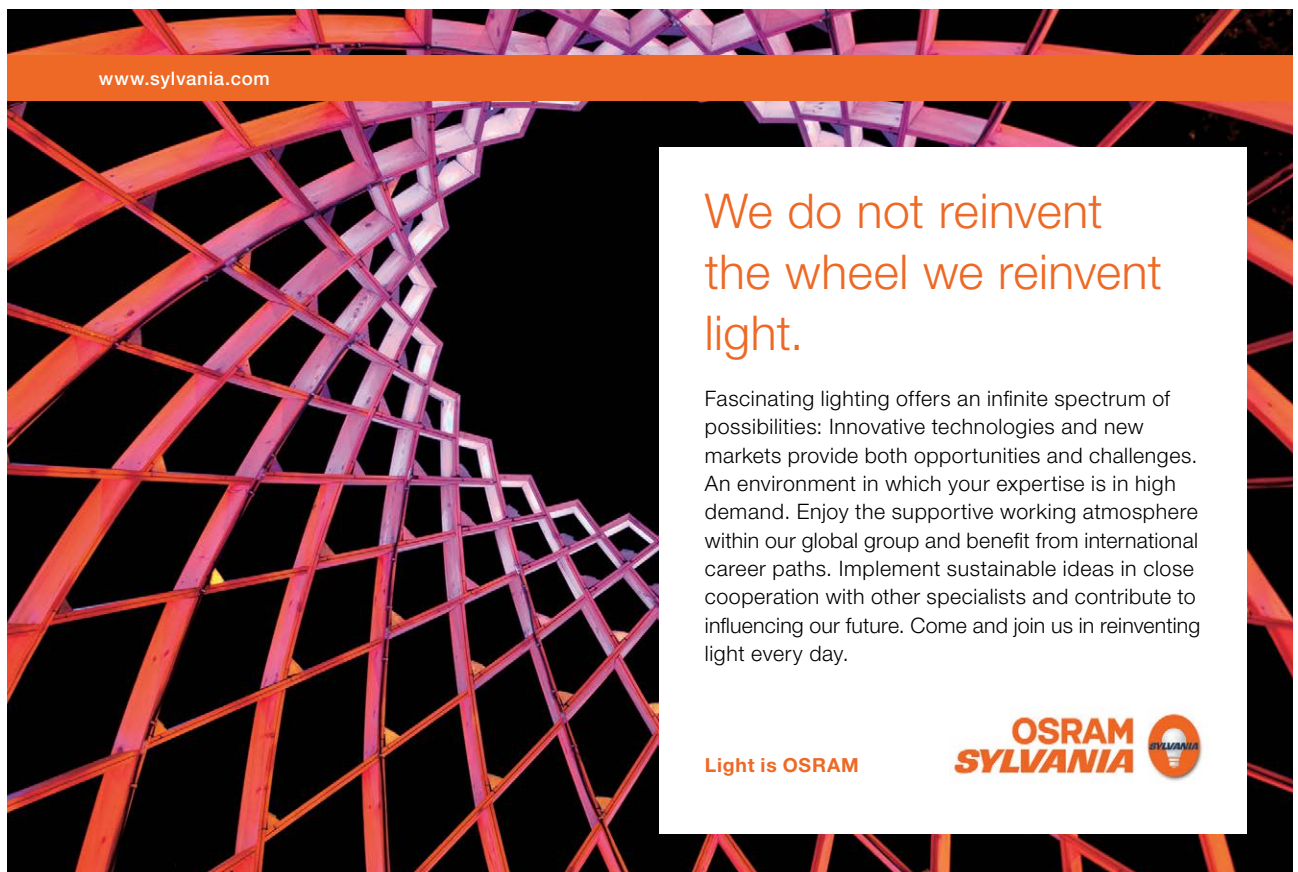
The protection given to consumers by the sale of goods legislation is deemed to be generally incomplete and unsatisfactory because:

- a) The legislation can be excluded by a clause in the contract.
- b) The legislation only applies to contracts for the sale of goods and services.
- c) The legislation has been made irrelevant by many amendments to sale of goods and consumer legislation.
- d) All of the above.

Answer: **a**

18.3 True and false questions

1. The term 'property' and 'possession' mean one and the same thing in law.
[True]
2. Unascertained goods are goods that are defined by description only.
[True]
3. Future goods are goods identified and agreed upon at the time of the contract sale.
[False]
4. It is the duty of the seller under a sales of goods contract to deliver the exact quantity.
[False]
5. Under a sale of goods contract, risk and ownership are linked together.
[True]
6. It is the duty of the seller to deliver the exact quantity purchased to the buyer.
[True]




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Module 19 Vitiating factors in contracts

19.1 Essay questions

Question 1

Discuss how undue influence differs from unconscionable conduct and its impact on genuine consent.

Answer

Undue influence and unconscionable conduct are referred to as vitiating factors and impact on the essential element of genuine consent between parties in a contract.

These vitiating factors are different from one another in the type of conduct and outcomes for the injured (aggrieved) party.

The vitiating factor of undue influence involves the improper use of influence or power that is possessed by one person over another in order to induce the other person to act for their benefit. In these types of situations, the defendant stands in an unequal relationship and bargaining position to the plaintiff in regard to the confidence held and the influence exercised.

On the other hand, unconscionable (unfair or unjust) conduct or unconscionability is an equitable principle that enables a court to set aside a contract where there has been an abuse by the defendant of their superior bargaining position in their dealings with the plaintiff. It is a question of fact. For a contract to be deemed to be unconscionable, the plaintiff must prove:

- They were in a position of special disadvantage at the time of the contract.
- It must have substantially affected their ability to protect themselves.
- The defendant must have known, or should have known, of the plaintiff's disability and taken advantage of it.
- The actions of the defendant were unconscionable (unfair or unjust).

Question 2

What is the difference between an innocent misrepresentation and a misstatement of fact?

Answer

An innocent misrepresentation is a misstatement of fact, made by one party and not known to be false, which induces the other party to enter into a contract.

A fraudulent misrepresentation is distinguished by the fact that the misstatement of fact is known to be false, or so recklessly made that the truth doesn't matter, and intended to be acted upon.

Question 3

What are the remedies available under mistakes of fact and a mistake of law to the injured party?

Answer

In situations where the vitiating factors of mistakes of fact and law have occurred then the remedies to the injured party differ. For instance, only mistakes of fact can render a contract void and then only in certain limited cases. A mistake of law cannot render a contract void because ignorance of the law is no excuse.

Question 4

Can a misrepresentation and in particular a statement of opinion can form the basis of an action in misrepresentation?

Answer

In order for a false statement to give rise to an action in misrepresentation, it must be a statement of an existing or past fact which induces the contract. Statements of opinion will generally not found an action in misrepresentation because the person making them is not warranting its truth. If the person making that statement, has made it clear that what they have said is just his or her own opinion, then a reasonable person is expected to make further enquires to check its validity. If they fail to make such enquires, they do so at their own risk. However, if it can be shown that the person making the statement and knew that the other party would rely on that statement and he had no such opinion, or it was expressed on a another matter upon which the person making the statement was not even aware of or even entirely ignorant, it may be considered in law to be a misstatement of an existing fact.

Question 5

A securities and finance dealer John, carried out legal work for a property investor and developer, Anthony. Upon completion of his work John submitted his huge invoice (bill), to Anthony, the property investor and developer for the work he carried out for him. Also as the same time the Anthony, the property investor and developer, mentioned to John that he may consider reducing his huge invoice (bill) in exchange for a taking a share in the property and development venture. Anthony, the developer repudiated the agreement, claiming that he did not have to share the profits with the John the securities and finance dealer because the contract was voidable for undue influence.

Is the property developer Anthony correct, or is the contract between him and John enforceable? Discuss.

Answer

The issue raised here is undue influence. Undue influence involves the improper use of a position of influence or power possessed by one person over another in order to induce the latter to act for the former's benefit. As a result, there is a lack of genuine consent to the agreement. Undue influence is presumed in certain classes of relationships, one of which is solicitor and client. The onus of rebutting this presumption lies on the defendant, and they must prove that the transaction was a voluntary act and that the plaintiff understood the contract. In this case the presumption would not apply as it is the solicitor who would be the plaintiff. There is no evidence of any undue pressure being exerted to obtain the contract, and it is the developer who has obtained the benefit. The developer is not correct and the contract is enforceable.

Question 6

Flavio gave away his red Alpha Romeo that he owned to Frank, unaware that he was giving it away forever. Flavio is illiterate, has limited English and has only limited business experience and is of low intelligence. Frank had been a close friend of the family for many years and Flavio had relied on him for advice, comfort and friendship. When Flavio learnt and became fully aware that he had actually given away his car forever, he tried to recover it back from Frank.

Do you think Flavio would be successful in getting back his red Alpha Romeo?

Answer

YES – Flavio will be successful in getting back his red Alpha Romeo.

This is because in this situation there is a vitiating factor and conduct by Frank, and it is concerned with undue influence and that class of contracts where the presumption is that no special relationship exists but merely conduct that is unfair and unjust.

In order to succeed in his claim and to get his car back, Flavio has to attempt to get the purported contract with Frank to be set aside. By so doing, the contract between Flavio and Frank should be treated as voidable at the option of Flavio on the grounds of undue influence on the basis that no special relationship exists. Accordingly, the onus lies on Flavio to prove that Frank exerted undue influence over him in order for him to give his car.

Flavio is illiterate, of low intelligence and only had limited business experience and limited English. Thus, he was unaware that he was giving away his Alpha Romeo forever. Frank had been a close friend of the family for a number of years and had been relied on by Flavio for advice. In these types of situation, the courts generally uphold the fact that, it is important that the decision in question, that is, for Flavio to give away his Alpha Romeo to Frank actually resulted from the exercise of personal free will. Also evidence of independent advice was needed to rebut any presumption of undue influence. Thus as Frank was in a position of influence over Flavio, and the supposed 'gift' of the red Alpha Romeo from Flavio to Frank was presumed to be a result of that undue influence.

Accordingly as there was no evidence that such independent advice had been available to Flavio from the given facts, and because of the relationship that existed between the Flavio and Frank, then Frank will be successful in recovering the red Alpha Romeo car.



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19.2 Multiple choice questions

Question 1

Which of the following situations appears to involve ‘undue influence’ thereby negating genuine consent which is an essential element of a valid contract?

- a) An elderly Italian couple sign a mortgage in favour of a Bank guaranteeing their son’s debts; the Bank manager knows that the couple are unaware of the son’s financial difficulties.
- b) A man induced another to sign a contract by telling him that if he did not, he would report his son to the police for committing a criminal offence.
- c) A woman gave all of her property to the religious order of which she was a member.
- d) All of the above.

Answer: c

Question 2

Which of the following statements is the best description of ‘mutual mistake’ that has arisen between two parties to a contract?

- a) One of the parties is mistaken as to the nature of document which they have signed.
- b) Both parties are mistaken about a material fact that is important to the subject matter of the contract.
- c) Both parties have made the same mistake about the existence or identity of the subject matter of the contract.
- d) One of the parties is mistaken about a material fact regarding the subject matter of the contract, and the other party takes advantage of this mistake.

Answer: b

Question 3

Which of the following statements is the best description of ‘unilateral mistake’ made by one party only?

- a) One of the parties is mistaken as to the nature of document which they have signed.
- b) Both parties are mistaken about a material fact that is important to the subject matter of the contract.
- c) Both parties have made the same mistake about the existence or identity of the subject matter of the contract.
- d) One of the parties is mistaken about a material fact regarding the subject matter of the contract, and the other party takes advantage of this mistake.

Answer: d

Question 4

Which of the following situations appears to involve the principle of *non est factum*?

- a) Andrew, a beneficiary and an insurance company negotiated a life insurance policy, both unaware that the subject matter of the life insurance policy was in fact already dead.
- b) Two parties, James and Matthew had agreed to send goods by a carrier ship called 'the Black Pearl', but there were two ships with that name and each party was thinking of a different ship.
- c) Anton purchased goods on credit from Bruno, thinking Bruno was Carlo and unaware that Bruno had purchased Carlo's business. Bruno was aware of Anton's mistake.
- d) Adam signed a document granting Ben an option, believing that he was only signing a receipt. Adam spoke little English, and his mistake was encouraged by Ben.

Answer: *d*

Question 5

Which of the following statements is the best description of 'common mistake' between parties to a contract?

- a) One of the parties is mistaken as to the nature of document which they have signed.
- b) Both parties are mistaken about a material fact that is important to the subject matter of the contract.
- c) Both parties have made the same mistake about the existence or identity of the subject matter of the contract.
- d) One of the parties is mistaken about a material fact regarding the subject matter of the contract, and the other party takes advantage of this mistake.

Answer: *c*

Question 6

Which of the following statements are regarded as being representations (and hence misrepresentations)?

- a) Statements of law.
- b) Statements of fact.
- c) Statements of opinion.
- d) Statements as to future conduct or intention.

Answer: *b*

19.3 True and false questions

1. Only mistakes of law can render a contract void.
[False]
2. A common mistake must involve the existence or identity of the contracts subject matter.
[True]
3. When raising a plea of *non est factum*, the onus of proof lies on the person raising the plea.
[True]
4. Where mutual mistake is pleaded, the courts apply an objective standard of the reasonable person.
[True]
5. Where one of the parties is mistaken, and the other knows or ought to be aware of this, the contract may be void on the grounds of unilateral mistake.
[True]
6. A contract that is induced by fraud is voidable at the option of the deceived (injured) party.
[True]

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Module 20 Application of vitiating factors

20.1 Essay questions

Question 1

What is duress to the person at the general common law and what is the actual effect, if any, on the contract that was formed between the two parties?

Answer

A contract is voidable for duress at common law when there is actual or threatened physical violence or imprisonment or threatened criminal proceedings by one party against the other or the others loved ones.

Question 2

What are the situations in which undue influence arises?

Answer

Undue influence is found in three situations mainly where the facts show that it has arisen; where there is a recognised relationship of confidence or where a particular relationship of confidence exists and has been breached by one of the parties rendering the contract void.

Question 3

What are the three types of duress that are recognised under the law as vitiating factors that render the contract void?

Answer

The types of duress that are recognised at law and as vitiating factors can arise to the person, to goods and economic duress.

Question 4

When does an unconscionable conduct occur?

Answer

Unconscionable conduct occurs where one party is at a special disadvantage and an unfair advantage is gained by a person in a dominant and superior position and bargaining power.

Question 5

Frederick had been accustomed to dealing with Mario, the owner of a music store with which he had a running account. Frederick sent an order to Mario's music store for the supply and delivery to his home of some classical CDs. However, the music store had that same day been sold to Charlie the actual supplier of the CDs, vinyl records and other musical goods. Upon delivery of the CDs, Frederick used the CDs that he had ordered and bought from the store through Mario. When Frederick, subsequently became aware of the change of ownership of the music store, he refused to pay for them, claiming that he had intended to deal directly with Mario personally as he had a set-off arrangement with Mario, that is, he was actually owed money by Mario. In this situation is Frederick liable for the price of the purchased CDs, the goods?

Answer

This question is concerned with the issue of unilateral mistake and its effect on the contract. Thus the issues in this situation can be viewed in two ways. The first issue is on the basis of agreement, that is, whether acceptance by someone other than the offeree constitutes acceptance; and secondly, do the principles governing unilateral mistake apply making the contract void *ab initio*?

At law an acceptance is a final and unqualified assent to the terms of the offer. Only the person or persons to whom the offer was made can accept the offer. If anyone else tries to accept the offer, that acceptance is generally only at best an offer, which the original offeror, who is now the offeree, can accept or reject. The court would no doubt hold that there was no contract and so Frederick would not be liable to pay. Frederick is able to show that he had only intended to deal with Mario, the original owner of the music store and with whom he had a set-off, and had at no time intended doing any business with Mario. Consequently, acceptance by someone other than the offeree will not result in an agreement and so there was no contract between Frederick and Charlie that would actually give rise to the debt. If Frederick is able to prove that he only intended to deal with Mario, and in fact Charlie was aware of this, then there has been no acceptance and therefore no valid contract.

In the case of unilateral mistake, as with mutual mistake, there is a lack of agreement between the parties. However, here the other party knows, or ought to be reasonably aware, of the mistake. Again, in this situation, Charlie it can be assumed knew that Frederick actually intended to deal with Mario and supplied the goods, the CDs without informing him of the music store business being sold to Charlie. Frederick had no intention of contracting with Charlie, and Charlie was aware of this but thought that it was not a real issue and did not really matter. Thus, Frederick would need to show, as Charlie, actually know that Frederick had intended to only deal Mario and if Frederick can show this, then the contract would be void *ab initio* (that is void from the beginning) for the operation of the vitiating factor of, unilateral mistake, but he is unable to prove this then the court will not set aside the initial agreement and Frederick will have to pay for the CDs, the goods he initially bought from Mario under the sale of goods contract.

Question 6

Giorgio an elderly Italian, had a very poor understanding of English. When Frank approached him with a document for his signature, Giorgio was under the honest and mistaken belief that what he was signing was only a letter of introduction to his agent, Tony. However, what he actually signed and was totally unaware of, was a lease of his shop premises to Frank for a minimal lease and was not his intention or wanted to do. Frank is now suing Giorgio for specific performance and damages for breach of contract. Advise Giorgio.

Answer

This question is concerned with the vitiating factor of unilateral mistake as to the contents of a written document and in particular the defence of *non est factum*. It often occurs that a person will sometimes sign a document, in haste and even without reading it, and later discovers that what they had signed was actually fundamentally different to what they thought it was and what had been agreed to with the other party. Thus in such cases, the plaintiff in this instance Giorgio, would argue that the agreement was void because of the remedy and defence of *non est factum*, which means that is, that it is 'not my deed'.



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Accordingly in order for Giorgio to succeed in a defence of *non est factum*, the party raising the defence, Giorgio, must establish on the balance of probabilities (civil action) that:

- The document is drastically different from what they believed it to be and that the mistake must go to the fundamental nature of the document, not its contents; and
- Failure to read and understand was not due to carelessness or negligence.

Thus, there is a heavy burden or onus of proof on the person raising the defence. Accordingly, Giorgio will have to show that he acted carefully and not recklessly or negligently. This defence is not automatic and there are only two classes of persons who can raise the defence in cases where a document has been signed without having been read:

- Those who are unable to read owing to blindness or illiteracy and who must rely on others for advice about what they are signing; and
- Those who through no fault of their own are unable to understand the meaning of a particular document.

It is clear that what Giorgio signed is fundamentally different from what he believed it to be at the time and that it was never his intention to lease his shop premises to Frank and especially at such a low rental. However, the main problem that Giorgio may encounter is in actually establishing that the mistake was not due to his carelessness, but this is unlikely as he speaks little English.

20.2 Multiple choice questions

Question 1

Which of the following situations appears to involve 'duress' thereby negating genuine consent?

- a) An elderly Italian couple sign a mortgage in favour of a Bank guaranteeing their son's debts; the Bank manager knows the couple are unaware of the son's financial difficulties.
- b) A man induced another to sign a contract by telling him that if he did not, he would report his son to the police for committing a criminal offence.
- c) A woman gave all of her property to the religious order of which she was a member.
- d) All of the above.

Answer: *b*

Question 2

Which of the following statement is the best description of ‘undue influence’ that indicates that genuine consent is lacking?

- a) The improper use of a superior bargaining position to induce a contract.
- b) The improper use of violence or of threats of violence to induce a contract.
- c) The improper use of a position of influence or power to induce a contract.
- d) All of the above.

Answer: *c*

Question 3

Which of the following situations appears to involve the conduct of ‘undue influence’?

- a) An elderly Italian couple sign a mortgage in favour of a Bank guaranteeing their son’s debts; the Bank manager knows the couple are unaware of the son’s financial difficulties.
- b) A man induced another to sign a contract by telling him that if he did not, he would report his son to the police for committing a criminal offence.
- c) A woman gave all of her property to the religious order of which she was a member.
- d) All of the above.

Answer: *c*

Question 4

Which of the following statements is the most accurate description of conduct of ‘unconscionability’?

- a) The improper use of a superior bargaining position to induce a contract.
- b) The improper use of violence or of threats of violence to induce a contract.
- c) The improper use of a position of influence or power to induce a contract.
- d) All of the above.

Answer: *a*

Question 5

Which of the following situations appears to involve conduct that amounts to ‘unconscionability’?

- a) An elderly Italian couple sign a mortgage in favour of a Bank guaranteeing their son’s debts; the Bank manager knows the couple are unaware of the son’s financial difficulties.
- b) A man induced another to sign a contract by telling him that if he did not, he would report his son to the police for committing a criminal offence.
- c) A woman gave all of her property to the religious order of which she was a member.
- d) All of the above.

Answer: **a**

Question 6

Which of the following statements are more accurate in respect to fiduciary acts and relationships?

- a) Fiduciary relationships are relationships of confidence.
- b) A fiduciary acts on behalf of another person.
- c) A fiduciary’s powers must not be used for self-dealing.
- d) All of the above.

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20.3 True and false questions

1. Rescission is an equitable remedy which means that it is always available to the innocent party and it is discretionary.

[True]

2. The vitiating factors of duress and undue influence are similar and provide the same remedies to an injured or innocent party.

[False]

3. The equitable doctrine of unconscionable bargains refers to a situation where one party is at a special disadvantage relative to the stronger party in the contract.

[True]

4. Where Rescission pleaded, this remedy is not available unless the parties can be returned entirely or at least substantially to their pre-contractual position.

[True]

5. Vitiating factors operate to render contracts void or voidable due to lack of true and genuine consent by one of the party to the contract.

[True]

6. A claim in misrepresentation allows the injured party, the plaintiff the right to rescind.

[True]

Module 21 Vitiating factors applied to business

21.1 Essay questions

Question 1

What is a fiduciary relationship and why is it important in business?

Answer

A fiduciary relationship another relationship of confidence. This fiduciary relationship has been found to exist trustee-beneficiary, director-company, solicitor-client and certain business arrangements, such as partnerships, banker and customer, agent and principal. These are all instances where one party is deemed to be vulnerable to abuser because they rely on the confidential guidance and advice of the other party that they are relying on for guidance. In this situation, the other party is aware of that reliance and may obtain a direct benefit from the transaction or have some other interest in it being finalised and concluded between the, that may or may not be known by the other party being abused. In all cases the presumption of undue influence may be rebutted. The best method of rebutting is by showing that the other party had independent legal advice and where there is no presumption of undue influence then it must be proved by the person relying on it. According if undue influence is actually proved then the contract is voidable.

Question 2

What are the duties of a fiduciary?

Answer

The fiduciary must exercise power in the interest of the person to whom the duty is owed. Thus, no secret profits or commissions may be made and there must be no conflicts of duty in entering in commercial and business transactions. Breach of the fiduciary obligations means that the fiduciary will be deprived of any profit (account of profits) and will be liable to compensate the beneficiary for loss suffered under the circumstances.

Question 3

Why is it considered that there could be an abuse of power in contract situations where there is evidence of fiduciary relationships?

Answer

An abuse of power in situations involving fiduciary relationships may result because of the fact that one party relies on the confidential guidance and advice of their fiduciary who is aware of that reliance and may have an interest in having the particular transaction concluded for his or her benefit, to the detriment of the other party who relied on the advice.

Question 4

Why is the vitiating factor of economic duress difficult to prove by the plaintiff in some cases? Provide an example.

Answer

The reason why economic duress is difficult to prove is that, economic duress may be present when the pressure was one of the reasons behind the plaintiff (the victim) to enter into the contract without there being real and genuine consent. In this instance the pressure was such that it went beyond that which the law considers legitimate and in most provable instances the court will find in favour of the plaintiff. Economic duress may render a contract voidable. However it is not easily proved because it can sometimes be very hard to differentiate from ordinary commercial or financial pressure.

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Question 5

Reno a very persuasive salesperson, induces Marco a newly arrived immigrant to America to enter into a contract to purchase a computer. On reflection, Marco wishes to avoid this contract as he does not need the computer nor does he have any computer skills or knowledge. Advise Marco of any available legal avenues to give back the computer and get a refund of monies paid to Reno.

Answer

Marco can determine if under the circumstances he can rely on undue influence to avoid the contract. The relationship between Reno and Marco is not a fiduciary relationship where undue influence is often presumed. Marco will be obliged to prove undue influence in this situation. Reno is described as being 'a very persuasive salesperson', which leads us to assume that he may have exerted undue pressure on Marco into entering the contract and in fact may have induced him to buy the computer by such excessive coercion. Even though the facts state that Reno induced Marco to enter a contract, there is no evidence or description of how this may have occurred, or for that matter if in fact it did occur. If it was not more than normal sales pressure, Marco would not have strong grounds or basis for arguing undue influence by Reno, if he was merely doing his job.

However, we need to look at the fact that he is an immigrant to America. Thus the question arises, does the fact that Marco is a newly arrived immigrant lead us to conclude that there is any special disability, such as illiteracy and lack of English speaking skills. Marco then, may argue that on this basis alone there was unconscionable conduct. If Reno is an experienced salesperson and used excessive coercion and was 'very persuasive' in the circumstances where Marco's lack of knowledge, experience or for that matter even Marco's age or poor understanding of English were evident, then Reno's dominant position may be demonstrated as being unconscionable if Marco's weaker position has in fact been taken advantage of by Reno in order to secure an advantage in the form of a sales commission for Reno.

Thus, for Marco to actually succeed in his action and return the computer he will have to prove that he had a special disability and was taken advantage of by Reno, and from the given facts, it is highly likely that Marco will succeed.

Question 6

Enzo was the managing director of Marble Pools Pty Ltd (a private company), which was a company that manufactured unique marble pools for the top end domestic housing and general building and construction industry. Due to the downturn housing building approvals and market due to tight financial markets, Marble Pools Ltd went into financial difficulties and Italian Marble Importers Ltd (a public company), which actually supplied the Italian marble for their marble pool construction threatened to stop supplies of the marble, unless Enzo provided a reasonable guarantee. Enzo mistakenly understood (from his discussion with Italian Marble Importers Ltd's managing director) that the guarantee would be for Marble Pools Pty. Ltd.'s future debts to Italian Marble Importers Ltd. This belief by Enzo, was wrong but of which Italian Marble Importer's Ltd's managing director was fully aware and which he encourage. Marble Pools Pty Ltd.'s financial position worsened and it was placed into liquidation as it could not pay its debts as and when they fell due and was severely insolvent. Italian Marble Importer's Ltd, then sued Enzo the managing director of Marble Pools Pty Ltd under the guarantee for the full €(\$150,000 it was owed, namely €(\$100,000 for the marble already supplied before the guarantee was given and €(\$50,000 for the marble supplied after the guarantee was given. Enzo does not want to pay.

Can Enzo have the guarantee set aside on the grounds of duress and/or unconscionability?

Answer

YES – Enzo is entitled to seek the assistance of the court to have the guarantee set aside on the grounds of duress as well as unconscionable conduct on the part of Italian Marble Imports' Ltd managing director. The issue here is whether or not, in its dealings with Enzo, Italian Marble Importers Ltd's managing director has behaved unconscionably in all the circumstances, which based from the given facts he did.

For a contract to be set aside on the grounds that it was unconscionable, the plaintiff Enzo in this situation must prove that:-

- His company and him, was in a position of 'special disadvantage' at the time of the contract;
- it had the impact of substantially affected their ability to protect themselves financially;
- the defendant, the managing director of Italian Marble Importers Ltd was aware and had known, or should have known, of the plaintiff's mistake and financial and economic disability and has taken advantage of it; and
- the actions of the defendant, the managing director of Italian Marble Importers Ltd were unconscionable (that is, unfair or unjust).

In this respect, what amounts to a 'special disadvantage' is difficult to accurately define, but includes poverty, need, sickness, age, sex, drunkenness, illiteracy or lack of education, or lack of assistance or explanation where assistance or explanation is necessary. Thus, any disparity in bargaining power would not be enough to constitute special disability. Thus, in these situations the general law and statute law in respect to consumer protection operate to prohibit a person from engaging in unconscionable conduct when supplying goods or services to consumers. This area of consumer protection in business transactions is aimed at restoring the imbalance in bargaining power between sellers and buyers, suppliers of products and goods, such as the Italian marble, to businesses and this law is generally limited to goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption and in the ordinary and usual course of business.

The term 'unconscionable' conduct is based on unfair and unjust situations, along for the benefit of the court and the parties, including:-

- the bargaining positions of the supplier and the consumer;
- whether it would have been reasonably difficult to comply with any terms in the contract;
- whether the terms were reasonably necessary to protect legitimate interests of the supplier;
- whether the form and wording of the contract was clear;
- whether any undue influence, pressure or unfair tactics were used; and
- the cost of purchasing, and the circumstances under which the consumer could have purchased, identical or equivalent goods or services elsewhere.

Enzo will need to be able to show that he suffers from a special disadvantage that was known to Italian Marble Importers Ltd in order to succeed. Enzo's argument, will be based on his financial distress, the inequality of bargaining power between himself and Italian Marble importers Ltd, and the excessive price of the goods supplied in the circumstances.

21.2 Multiple choice questions

Question 1

Which of the following situations appears to involve 'duress'?

- a) An elderly Italian couple sign a mortgage in favour of a Bank guaranteeing their son's debts; the Bank manager knows the couple are unaware of the son's financial difficulties.
- b) A man induced another to sign a contract by telling him that if he did not, he would report his son to the police for committing a criminal offence.
- c) A woman gave all of her property to the religious order of which she was a member.
- d) All of the above.

Answer: *b*

Question 2

In which of the following situations is the plaintiff least likely to succeed in claiming unconscionability on the part of the defendant?

- a) The plaintiff sought independent expert advice.
- b) The plaintiff was elderly.
- c) The plaintiff was illiterate.
- d) The language of the transaction was complex.

Answer: a

Question 3

Which of the following statements is the best description of a ‘negligent’ misrepresentation?

- a) A false statement of fact made knowingly, which the other person relies upon and suffers loss.
- b) A false statement of fact made with the belief that it is true, which the other person relies upon and suffers loss.
- c) A false statement of fact made carelessly, which the other person relies upon and suffers loss.
- d) All of the above.

Answer: c

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Question 4

Which of the following statements is the best description of an 'innocent' misrepresentation?

- a) A false statement of fact made knowingly, which the other person relies upon and suffers loss.
- b) A false statement of fact made with the belief that it is true, which the other person relies upon and suffers loss.
- c) A false statement of fact made carelessly, which the other person relies upon and suffers loss.
- d) All of the above.

Answer: b

Question 5

Which of the following statements is the best description of a 'fraudulent' misrepresentation?

- a) A false statement of fact made knowingly, which the other person relies upon and suffers loss.
- b) A false statement of fact made with the belief that it is true, which the other person relies upon and suffers loss.
- c) A false statement of fact made carelessly, which the other person relies upon and suffers loss.
- d) All of the above.

Answer: a

Question 6

Contracts between which of the following parties will not be presumed to involve undue influence?

Answer: a

- a) Between husband and wife.
- b) Between parent and child.
- c) Between doctor and patient.
- d) Between religious advisor and devotee.

21.3 True and false questions

1. Where no legally recognised special relationship exists between the parties there is still a presumption of undue influence.
[False]

2. Fraudulent misrepresentation is distinguished from innocent misrepresentation by the intentional deceit of the defendant.
[True]

3. An unconscionable conduct action is concerned with how the stronger party behaves towards the person with a special disability.
[True]

4. Duress involves the use of violence or threats to induce a person to enter a contract.
[True]

5. Undue influence occurs where one person uses their position of influence or power over another in order to get them to enter into a contract.
[True]

6. Undue influence is an equitable doctrine that is wider than common law duress.
[True]

Module 22 Effect of discharge of contract

22.1 Essay questions

Question 1

In what ways may a contract be discharged?

Answer

A “discharge” of contract simply refers to the process whereby a valid and enforceable contract is brought to an end, thereby releasing the parties to it from all further obligation. Thus contracts can be discharged in the following five ways:

- By performance
- By agreement between the parties
- Through frustration
- Through breach either actual or anticipatory breach; and
- By operation of the law.



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Unless one of these types of discharge occurs, then the contract remains and is valid and the obligations of the contracting parties under the contract can be enforced by either party. But, if the contract is brought to an end then the parties' rights, duties and liabilities depend on the type of termination and discharge of the contract involved.

Question 2

In respect to discharge by breach of contract, what is the effect of repudiation or renunciation by one of the parties to the contract?

Answer

Repudiation or renunciation by one of the parties to a contract of their essential contractual obligations effectively discharges the contract if repudiation is accepted by the innocent or aggrieved party. The innocent party in this instance may elect and has to option to do so, to discharge or affirm the contract. If however, the repudiation is not accepted then the contracts remains in existence. Repudiation of performance may be express (written) or implied for the conduct of the defaulting party. Repudiation or renunciation may occur either before performance is actually due, that is as an anticipatory breach or alternatively after performance has commenced and before it is completed, that is, there must be an actual breach.

Question 3

What would be the grounds for termination of a contract for breach of an essential term?

Answer

A breach of an essential term, that is a condition (term of vital importance that goes to the heart or root of a contract) will enable the injured party to have grounds to elect to discharge the contract and to sue for monetary compensation (damages) for such breach. Where there is a breach of a lesser term, that is a warranty, then the contract continues and the innocent party may only sue for damages.

Question 4

If performance of their obligations becomes impossible through no fault of the parties, the parties' contractual obligations are automatically discharged.

Answer

Frustration can only arise when:-

- an unforeseen event outside the control of the contracting parties (a *supervening event*) has significantly or radically changed the obligations of the parties from their original intentions;
- neither party caused the supervening event (*no fault*);
- the event was *unforeseen* so there was no provision in the contract for it; and
- the new circumstances would make it *unjust* to hold the parties to their original contract.

Question 5

Under what circumstances will the *quantum meruit* rule operate?

Answer

The term *quantum meruit*, means 'as much as he has earned' and only arises in cases of part performance of a contract. The contract may be discharged by breach, but where the contract is for goods or services, there is a new implied contract imposed by the operation of the law on the party taking the benefit that they will pay a reasonable amount for the quantum or portion given. It is not available if the party is in breach.

Quantum meruit can arise in the following situations:

- where a defendant has prevented a plaintiff from carrying out the remainder of their contractual duties;
- where the parties cannot agree on payment; and
- where the parties agree on payment for the part-performance but not the actual amount.

The court can make an award on the basis of what is deserved under the circumstances and as deemed appropriate.

Quantum meruit is usually confined to those cases in which a person renders some service at the request of another and no payment has been determined. The person providing the service bases their claim on an implied term that they will be paid a reasonable amount for the work already done. Other actions for a *quantum meruit* can be found in quasi-contract where there is no express agreement or where such agreement has been frustrated, avoided or is unenforceable.

Question 6

Explain the difference between an entire contract and a divisible contract?

Answer

Contracts as formed can be either entire or divisible. This distinction is significant as it related to the manner in which the contracts are to be actually performed and discharged. Thus contracts can be of an entire or divisible kind in performance.

An entire contract is one that its operation requires that one party must complete the whole of their obligation under the contract before being entitled to demand performance of the contract and then to be paid by the other party for competing and hence performing the contract.

On the other hand divisible or severable contracts provide that payment falls due on a *pro rata* basis, as particular promises are performed by the other party. Thus in either of these cases, partial performance (where a contract is divisible or severable) operates in that it confers no rights on the party that has partially performed his or her obligations under the contacts. However, if the part performer is able to show substantial performance, such as, that the defects were minor, that the job was partially performed and not abandoned, and that the cost of rectification is minor then the part performer may be able to seek some payment on the basis of *quantum meruit* (for as much as he or she has earned) which is a remedy only available under partial performance.

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22.2 Multiple choice questions

Question 1

Which of the following situations involves the discharge of a contract by operation of law?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: a

Question 2

Which of the following situations involves the discharge of a contract by agreement?

- a) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- b) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.
- c) One of the parties becomes bankrupt.
- d) Each party discharges the obligation of the other to perform the contract.

Answer: d

Question 3

Which of the following situations involves the discharge of a contract by performance?

- a) Each party discharges the obligation of the other to perform the contract.
- b) One of the parties becomes bankrupt.
- c) One of the parties fails to completely carry out their obligation, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: c

Question 4

Which of the following situations involves the discharge of a contract by frustration?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: d

Question 5

Which of the following situations will not result in the discharge of a contract by operation of Law?

- a) The merger of a simple contract into a formal contract.
- b) The material alteration of a written contract without the consent of the other party.
- c) The death of one of the parties to a contract other than for personal services.
- d) The bankruptcy of one of the parties.

Answer: c

Question 6

Which of the following is least likely to be classified as a breach of contract?

- a) A failure by one party to exercise reasonable care in carrying out their obligations under the contract.
- b) A delay by one party in carrying out their obligations where time is of the essence.
- c) A failure by one party to comply with one of the terms of the contract.
- d) An announcement by one party that they do not intend to carry out their obligations under the contract.

Answer: a

22.3 True and false questions

1. The parties are discharged from any obligations, provided that performance corresponds exactly with the terms of the contract.

[True]

2. A contract can be terminated by agreement between the parties to the contract.

[True]

3. Merger of a simple contract into a formal one discharges the simple contract.

[True]

4. Where a contract is frustrated, all parties are discharged from their past, present and future obligations.

[True]

5. Contracts for personal services are frustrated and, therefore, discharged by the death of the person who was hired to perform the services.

[True]

6. Contracts for personal service will be frustrated if the performer dies.

[True]



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Module 23 Operation of discharge of contract

23.1 Essay questions

Question 1

What is the effect of a clause stating tht time is 'of the essence' in the contract?

Answer

In respect to the actual performance of a contract and its discharge, generally performance must take place within the actual time specified, of if no time is specified within a reasonable time. However if there is a clause within the contract stating tht time is 'of the essence' this presumes an element of haste and urgency, thus if there is a breach of this contractual stipulation that there are grounds for termination for no compliance.

Question 2

Explain how the rules of payment by post is applied in respect to discharge of contract?

Answer

In respect to the postal rule and the discharge of contract the medium of the acceptance of an offer made by the offeror to an offeree is important and needs be determined at the time of negotiations. However, if no medium is mentioned for the acceptance of the offer, it is assume that the post is acceptable. However, if a creditor requests payment by post, then the post office and postal medium is their agent and thus posting a letter of acceptance is considered as a discharge from liability, even if the letter is lost in transit.

Accordingly the debt itself is discharged when the cheque is debited to the debtor's account and if no claim is made on the debtor's cheque account because of the loss of the cheque, then the debtor is not discharged and he/she will be required to send another cheque after they have stopped payment on the first cheque. If the creditor has not expressly indicated that payment must be by post, loss of the letter and its contents is born by the debtor, irrespective of what past practice may have been, unless payment is in another city or a great distance away.

Question 3

Explain the operation of discharge by actual performance?

Answer

The usual method in contract law by which a contract is discharged is by performance. Accordingly if both parties have performed what they had agreed to do under the terms of the contract then that contract as performed is discharged. However, performance must be exact, that is it must be made strictly in accordance with the actual terms of the contract.

Discharge by actual performance may consist of the following:

- Payment by legal tender or cheque, bill of exchange or promissory note if the contract allows it and is provided for within the terms and operation of the contract;
- The performance of the act promised, for example the actual supply of the goods or services.

Question 4

What are the categories of events that the courts have generally considered to be frustrating events that causes the contract to be discharged as between the contracting parties?

Answer

Categories of unforeseen and supervening events that render contracts impossible to be performed by the parties as considered and determined by the courts to be frustrating events include the following:

- Physical impossibility because of the destruction of the subject matter.
- Physical impossibility under a contract of personal services.
- Change in the law rendering performance impossible.
- Impossibility due to the non-occurrence of an event basic to the contract.
- Where the particular state of affairs ceases to exist.

Question 5

A ship was chartered to proceed ‘with all convenient fast speed’ from Copenhagen to Amsterdam. One of the terms of the agreement read: ‘all and every danger and accident of the seas excepted’, giving rise to an exclusion clause in the event of any unforeseen delays. The chartered ship left Copenhagen but ran onto rocks the following day, and it was over three months before it could be towed off. After the ship was towed for repairs, it was found that many months of work and repairs would be needed on the ship before the ship would be seaworthy again. Was the contract frustrated, despite the inclusion and operation of the exclusion clause and term in the contract regarding accidents that occur out at sea?

Answer

This question is concerned with the problem of discharge of contract and the effect on the parties where the commercial venture that was negotiated and envisaged by the parties was frustrated.

The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract has made performance physically or commercially impossible or transformed performance into a radically different obligation from that which the parties agreed to under the contract. Under this doctrine, performance must be *impossible* owing to a *supervening event* over which *neither party has any control* and to the extent that, if the parties did perform their obligations, they would be doing something *radically different* from their original intentions. The doctrine would generally not apply if the parties had made specific provision in the contract for a frustrating event, or should have foreseen such an event, or the event was self-induced by the party making the plea.

It is arguable that, even though some accident or delay was foreseen and provided for in the contract, the time to get the ship off the rocks and seaworthy is so long that it will make the contract commercially impossible or transform performance into a radically different obligation from that which the parties agreed to under the contract. If the foundation of the contract (to proceed with all convenient speed) is gone, for example, by reason of such long interruption or delay that the performance is really in effect that of a different contract, the performance of the contract is to be regarded as frustrated despite the term in the contract.



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Question 6

Bjorn a licensed plumber, agrees to supply and install a domestic heating service for Frida for € (\$) 1000. After the work is completed Frida refused to pay Bjorn, stating that the heater has not been properly installed. It is clear and evident from the water visibly leaking from the heater, that the domestic heater leaks due to the poor service and workmanship in the plumbing.

Discuss whether Bjorn is able to recover the € (\$) 1000, or any other sum of money for his plumbing work and installation of the domestic heater from Frida if:

- 1. It will cost €(\$)**500** to remedy the defects in the work; or**
- 2. It will cost €(\$) **200** to remedy the defects in the work**
- 3. It will cost €(\$) **50** to remedy the defect in the work;**

Answer

This question is concerned with the issues of performance, defects in workmanship, issues of abandonment and claim for payment for work done under the contract.

In this first situation, (i) where the cost of rectifying the defect by Bjorn will only cost € (\$) 50, it can be argued that Bjorn has in fact substantially performed the contract. It is evident from the cost of rectification that the defect is slight in comparison to the total job completed, accordingly in this instance Bjorn would be able to recover an adjusted amount from Frida.

In the second situation (ii), where the defect to rectify would only cost € (\$) 200, even though Bjorn has not abandoned the job, he has not substantially performed either, to Frida's satisfaction. It can be argued that the defect in this instance is not minor and the cost of rectification is not insignificant when compared to the initial contract price.

In this last situation (iii), it is evident that Bjorn has not abandoned the job, but has not substantially or even completely performed it to Frida's satisfaction, and can ne assume that he acted recklessly. Accordingly, in this situation the cost of rectification € (\$) 500 is high in comparison to the initial contract price of € (\$) 1000, and Bjorn will fail to recover the full contract price from Frida in this instance.

23.2 Multiple choice questions

Question 1

Which of the following conduct will not result in the discharge of a contract by the operation of law?

- a) The merger of a simple contract into a formal contract.
- b) The material alteration of a written contract without the consent of the other party.
- c) The death of one of the parties to a contract other than for personal services.
- d) The bankruptcy of one of the parties.

Answer: **c**

Question 2

Which of the following situations involves the discharge of a contract by agreement?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: **b**

Question 3

Which of the following situations involves the discharge of a contract by performance?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to completely carry out their obligation, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: **c**

Question 4

Which of the following involves the discharge of a contract by frustration?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: **d**

Question 5

Which of the following situations reflects the best description of discharge by waiver?

- a) One party leads the other to reasonably believe that strict performance will not be insisted upon.
- b) A new agreement is substituted for the old by the parties.
- c) Both parties abandon their original agreement while it is still executory.
- d) A party who has already performed their obligation agrees to relieve the other party from performing their obligation in return for their doing something different.

Answer: **a**

Question 6

Which of the following situations is not one of the requisites which must be satisfied before a contract will be frustrated?

- a) It would be unjust to hold the parties to the original contract.
- b) The frustrating event was foreseen and referred to in the contract.
- c) The frustrating event was outside of the control of the parties.
- d) The frustrating event has significantly or radically changed the obligations of the parties.

Answer: **b**

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23.3 True and false questions

1. A partial breach arises where one party breaches a less important term of a contract.
[True]
2. The parties are discharged from any obligations provided that performance corresponds exactly with the terms of the contract.
[True]
3. If there has been substantial performance of the contract, the doctrine of substantial performance may permit the defaulting party to still obtain the contract price.
[True]
4. A party to a contract who indicates to the other party that they will not perform their contractual obligations prior to the time for performance commits an anticipatory breach of the contract.
[False]
5. Where one party is prevented from performing, the other party may regard the contract as at an end.
[True]
6. A waiver is where one party leads the other to reasonably believe that strict performance will not be insisted upon.
[False]

Module 24 Purpose of discharge of contract

24.1 Essay questions

Question 1

Will payment otherwise than by legal tender (money) give a debtor an absolute discharge of the contract?

Answer

Under general contractual law, payment by cheque or other negotiable instrument for goods or services rendered is a conditional payment only and giving rise to discharge of contract by performance, however this payment by cheque as the consideration for the goods or services rendered is conditional because if the cheque is dishonoured, then the creditor has a right to and is entitled to sue for the debt.

Question 2

Explain how novation operates in respect to discharge of contract and how it is different from assignment?

Answer

Novation (creation of new contract) differs from an assignment (transfer of rights and obligations only) because an assignment is the act of one contracting party only, whereas novation requires the actual agreement of both contracting parties. Novation is a complete transfer of obligations whereas in an assignment, the original promisor remains liable for the proper performance of the contract.

Question 3

Where an offer that has been made by the offeror to the offeree has no stated duration (time period) as to when the actual offer made should be accepted, how do the courts determine when it lapses, or does the offer made remain open indefinitely?

Answer

The length of time an offer remains open depends on the nature of the contract, but it will not for business efficacy remain open indefinitely. In their determination the courts will look at each case on its merits and decide what would be a reasonable time period to keep the offer open. In so doing the courts normally take into account whether the goods are perishable, whether they are subject to market fluctuations, demand and supply and other market forces and factors.

Question 4

Maria contracts to deliver arts and crafts goods such as beads and crystals, to Carmela on or before 18 February. On 1 February Maria telephones Carmela and says that she is having production difficulties. As a result, Carmela agrees to allow an extra month for delivery. However, four days later, Carmela changes her mind and notifies Maria that she will treat the contract as discharge if the original deliver date of 18 February is not met. Advise Maria.

Answer

By agreeing to allow an extra month for delivery, Carmela has waived her right to insist upon delivery by Maria at the time specified in the initial contract. Normally a buyer is bound by such a waiver and cannot for business efficacy and fairness subsequently rely on late delivery terms of the original agreement, as a breach of contract.



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Question 5

Boris and Anton entered into a charter-party contract whereby Anton was to load rice in a Russian port for delivery by Boris via his charter boat to the port of Rome, Italy. Due to diplomatic breakdown, a trade war (sanction) was declared between Russia and Italy before the actual performance of this contract for the delivery of the rice, which meant that Anton would be involved in trading with an enemy nation as a result of the trade wars (sanction and boycotts) should he try to carry out the terms of the contract. This would be an illegal act. Advise the parties as to their contractual position.

Answer

This question is concerned with the problem of discharge of contract and the effect of frustration where there has been a change in the law, rendering performance of the contract illegal if it was actually performed.

Under the doctrine of frustration, performance must be impossible owing to a supervening event over which neither party has any control and to the extent that, if the parties did perform their obligations, they would be doing something radically different from their original intentions. However, if the parties have made specific provision in the contract for a frustrating event, or should have foreseen such an event, or the frustrating event was self-induced by the party making the plea, the claim will generally fail.

A change in the law or other interference by the government, such as an actual war, trade wars such as sanctions and boycotts and other diplomatic issues, can cause a contract to become frustrated if, as a result of the change, the performance of the contract is rendered illegal. This can be particularly important in time of actual war, trade wars and barriers via sanctions and boycotts, when emergency laws and regulations that have come into effect and force have a detrimental and severe impact and affect the basis of private contracts, such as the one between Boris and Anton.

Thus, in this case, the outbreak of trade wars and barriers between Russia and Italy prior to performance of the contract means that any future attempt to perform the contract would be rendered illegal and in this situation and circumstances the contract should be discharged by frustration.

Question 6

In June, Joseph engaged Tony as a courier in his express courier company. Tony was supposed to commence work on 1 July. However, on 25th June, Joseph wrote to Tony to tell him that unfortunately despite their agreement for Tony being employed as a courier, the downturn in the market and economic circumstances were such that now Tony is no longer required for his services.

Can Tony sue Joseph in this situation? Why or why not?

Answer

This question is concerned with the problem of discharge of the contract by as a result of a breach.

In circumstances, such as in the situation between Joseph and Tony, where a party fails to perform their obligations as agreed, they are then liable for breach of contract.

Generally in contract law here are two main categories of breach, namely *actual breach* where there is a total or partial failure to perform by one party when performance becomes due; and *anticipatory breach* where it is clear by the actions or words of a party prior to the time for performance of the contract that they will not be carrying out their obligations as promised in the first instance.

Thus, where one party indicates that they will not be performing their part of the contract prior to the time for performance, the innocent party, in this case Tony, is able at law to immediately treat the contract as at an end and sue for breach of the employment contract by Joseph, and generally there is no need to wait until actual breach occurs.

From the facts given in the question it is apparent that Tony has entered into an employment contract with Joseph, to commence from 1 August. Accordingly the letter dated 25th June from Joseph to Tony, was an express repudiation of that initial employment agreement and, as it clearly informed Tony that the contract will no longer be performed, it was a clear case of anticipatory breach, thereby entitling Tony to damages.

In conclusion from the given facts, Tony will be able to successfully sue Joseph for damages on the basis of express anticipatory breach.

24.2 Multiple choice questions

Question 1

Which of the following involves the discharge of a contract by operation of law?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: a

Question 2

Which of the following involves the discharge of a contract by agreement?

- One of the parties becomes bankrupt.
- Each party discharges the obligation of the other to perform the contract.
- One of the parties fails to carry out their obligation completely, and the other party accepts this.
- Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: *b*

Question 3

Which of the following involves the discharge of a contract by performance?

- One of the parties becomes bankrupt.
- Each party discharges the obligation of the other to perform the contract.
- One of the parties fails to completely carry out their obligation, and the other party accepts this.
- Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: *c*



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Question 4

Which of the following involves the discharge of a contract by frustration?

- a) One of the parties becomes bankrupt.
- b) Each party discharges the obligation of the other to perform the contract.
- c) One of the parties fails to carry out their obligation completely, and the other party accepts this.
- d) Performance of the contract becomes impossible due to the occurrence of an unforeseen event.

Answer: d

Question 5

Which of the following will not result in the discharge of a contract by operation of Law?

- a) The merger of a simple contract into a formal contract.
- b) The material alteration of a written contract without the consent of the other party.
- c) The death of one of the parties to a contract other than for personal services.
- d) The bankruptcy of one of the parties.

Answer: c

Question 6

Which of the following situations most accurate description of discharge by release?

- a) A new agreement is substituted for the old by the parties.
- b) Both parties abandon their original agreement while it is still executory.
- c) A party who has already performed their obligation agrees to relieve the other party from performing their obligation in return for their doing something different.
- d) A party who has already performed their obligation chooses to relieve the other party from performing their obligation.

Answer: d

24.3 True and false questions

1. An unanticipated event outside the control of the contracting parties is known as a supervening event.

[True]

2. A contract will be discharged if it is performed in accordance with the terms of the contract.

[True]

3. A contract can be terminated by agreement between the parties to the contract.

[True]

4. Where one party is prevented from performing, the other party may regard the contract as at an end.

[True]

5. Contracts of personal services are frustrated and, therefore, discharged by the death of the person who was hired to perform the services.

[True]

6. Where a contract is frustrated, all parties are discharged from their past, present and future obligations.

[True]

Module 25 Remedies for breach

25.1 Essay questions

Question 1

Should there be statutory limitation periods placed upon injured parties to limit the periods during which legal proceedings may be taken to enforce a right under a contract? Discuss.

Answer

This is a matter of personal opinion – But some relevant issues would include the following:

- If the injured party is not motivated to act promptly, why keep the matter open?
- Lengthy delays make gathering of evidence more difficult. Memories fade, things get lost.
- Irrespective of the time when formal court proceedings are actually commenced, early notification of the intention to commence legal proceedings is probably appropriate as it puts the other party on notice and warns them to gather their evidence.
- It is unfair to a person to have the possibility of legal action hanging over them for an indefinite period.

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Question 2

What is the difference between liquidated and unliquidated damages?

Answer

There are two main types of damages, namely, liquidated and unliquidated damages.

Liquidated damages are a fixed amount in the contract and in this instance, the parties generally agree to what should be paid in the event of a breach of the fundamental terms of the contract. However the amount must be reasonable and must be a genuine pre-estimate of actual loss that will flow from the breach. However, where the contract contains a 'liquidated damages clause', it is really an action in debt, instead of an actual court action to recover damages. In this instance the parties have agreed that in the event of a breach, a specific sum will be due and payable and can be sued for, as a debt.

On the other hand, unliquidated damages are awarded when a plaintiff is unable to assess precisely what should be the amount recoverable by way of damages, such as, for example, for pain and suffering or disappointment and here it is left to the court to determine the amount that should awarded to the plaintiff for the losses and damage sustained as a direct result of the breach by the defendant.

Question 3

What does the innocent party have to establish in order for a claim in restitution to be successful? Discuss.

Answer

In order for an innocent party to be able to establish a successful claim for the equitable remedy of restitution, four requirements must be satisfied:

- the defendant has received a benefit and an enrichment, such as for example, an increase in the defendant's wealth or the saving of an expense;
- the benefit was at the plaintiff's expense;
- it would be unjust to allow the defendant to retain the benefit (based on factors such as mistake, improper pressure, duress, compulsion, illegality, failure of consideration, or legislative policy);
and
- the defendant has no defences available to them to rely upon, such as for example, *estoppel*, or purchaser in good faith.

Question 4

Briefly explain the meaning of the following terms in respect to remedies for breach of contract: damages; remoteness of damage and mitigation.

Answer

Damages: refers to the amount paid to an injured party for breach of a condition, warranty or intermediate term by the other party under a valid contract as a result of a breach. The main aim of this monetary compensation (damages) is putting the injured party back in the position that they would have been in, if the contract had been performed properly from the beginning as was intended. Damages are usually nominal damages, being awarded by the court where the injured party's legal rights have been infringed, but no actual loss has been suffered; ordinary damages which is the usual remedy for breach of contract; or exemplary damages awarded where the court consider that the party in default should be punished.

Remoteness of damage: the court must consider whether the loss suffered by the injured party is a usual and reasonably direct consequence of the breach of contract. That is, was the loss suffered reasonably foreseeable as a consequence of the breach of contract and this is a question of fact. Also, the defendant is liable for only those damages which could reasonably have been foreseen, applying the objective test of the reasonable person, as a result of the breach and which occur in the usual or normal course of the business.

Mitigation: additionally to the questions of remoteness and measure of damages, the law imposes a duty upon the person claiming damages (the injured party, the Plaintiff) to take all reasonable steps to reduce or minimise (mitigate) their loss and this is called the duty of mitigation. Thus if plaintiffs, claiming damages fail to take reasonable steps to mitigate or minimise their losses then the amount of damages that they can expect to recover will be significantly reduced. Thus, if the plaintiff is able to avoid a loss, damages will not be recoverable for the potential loss that the plaintiff may have suffered as a result of the breach by the defendant.

Question 5

If the court determines that a plaintiff from the case presented is entitled to monetary compensation for losses sustained as a result of the breach by the plaintiff, what type of damages may be awarded to the successful plaintiff?

Answer

The type of damages that are awarded by the court, will be determined by the seriousness of the breach and whether the contract has specified the amount to be paid in the event of a breach.

Nominal damages are a token amount awarded when the court feels that the innocent party's rights have been infringed but they have suffered no actual loss.

Ordinary or 'real' damages are the usual remedy in contract law and this is compensation in monetary terms for the loss suffered by the innocent party as a result of the breach. Ordinary damages, take two forms:

- general damages which follow as a natural consequence from the breach; and
- special damages which have to be specially proved in court.

Exemplary damages are generally not awarded in contract unless the court feels that it should punish the party in default. However, where the breach of contract has resulted in inconvenience, disappointment or discomfort to the innocent party, the courts have been prepared to award what are termed 'aggravated damages for non-pecuniary loss, such as for example cases involving holiday packages where the facilities or accommodation have been misrepresented.



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Question 6

Catherine engaged a firm of solicitors to obtain an injunction to prevent a former male friend from visiting her and making a nuisance of himself. However, as these are considered routine legal matter, an unqualified litigation clerk was given the file to handle and to prepare the injunction. However, as a result of this negligence by the firm of solicitors and the clerk's incompetence, Catherine was still unable to get the injunction and was still being stalked and harassed over an 8-month period due to the delay by the solicitors firm. This delay caused severe distress and embarrassment for Catherine in her daily life.

Does Catherine have any legal claim against the firm of solicitors for their negligence in the delay of granting her an injunction and fore her current state of 'mental distress and anxiety'?

Answer

This question is concerned with damages and in particular measure of damages.

In determining these types of cases and situations, there are five essential steps that must be taken into account in order to determine whether the injured party will be able to successfully recover damages and in what amount and type.

Step 1: Was there a breach?

From the facts, it is clear that the firm has failed to complete what was agreed to in the contract by using an unqualified litigation clerk to handle her case.

Step 2: Causation

Was the loss suffered reasonably foreseeable as a consequence of the breach of contract? That is, the loss or damage would not have been suffered 'but for' the defendant's breach. From the facts, it seems clear that the damage Henrietta suffered was a direct consequence of the firm's breach.

Step 3: Remoteness of damage

The court must consider whether the loss suffered is a usual and reasonably direct consequence of the breach. This is a question of fact based on determination of the two types of damages. Catherine will be able to recover any loss occurring from the breach of contract in the usual or normal course of things, that is, damage that is or should have been obvious due to delay; and secondly, loss arising from special or exceptional circumstances is only recoverable if the defendant had actual knowledge of the effect of the breach and accepted the risk. That is, the defendant will only be liable for damages that may reasonably be supposed to be in the contemplation of the parties at the time the contract was made.

Step 4: Amount of damages

Once the court has decided the question of remoteness in order to ascertain what quantum and type of damages the defendant should be liable for, the third question to be decided is the measure of damages. The general principle is that the injured party, Catherine in this instance will be placed as close as possible to the position that she would have enjoyed if the breach never occurred. Thus, Catherine must be able to show that she has suffered some loss if she is to recover ordinary damages and while courts will not generally grant damages for anything other than provable losses in certain instances, such as in the current case, the courts will allow claims for anxiety, disappointment, inconvenience, frustration, discomfort and mental distress. Thus, not only should Catherine be able to recover damages for the amount she paid to the firm, but also damages for mental distress and anxiety.

Step 5: Mitigation of damages

The final question to be decided is the question of mitigation of damages, that is, what steps, if any, could Catherine take in order to minimise the damage. From the facts given, there would be nothing that Catherine could do to reduce the damage and thus, the onus is on the defendants, the negligence solicitor's, to prove that Catherine failed to mitigate her losses but as she was solely in their hands, that would be difficult for them to prove.

In conclusion, Catherine will be able to succeed in her claim against the solicitors.

25.2 Multiple choice questions

Question 1

Which of the following statements is the best description of the remedy of 'restitution'?

- a) The injured party is entitled to set aside the contract and be restored to their pre-contractual position.
- b) The party at fault is restrained from breaching the contract or from committing a wrongful act.
- c) The party at fault is directed to carry out their obligations under the contract.
- d) The party at fault has unjustly obtained a benefit at the injured party's expense and is ordered to restore it to the injured party.

Answer: *d*

Question 2

Which of the following statements is the best description of the remedy of 'damages'?

- a) The party at fault is restrained from breaching the contract or from committing a wrongful act.
- b) The party at fault is directed to carry out their obligations under the contract.
- c) The party at fault has unjustly obtained a benefit at the injured party's expense and is ordered to restore it to the injured party.
- d) The injured party is compensated for their loss by putting the parties in the position they would have been in if the contract had been performed.

Answer: *d*

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Question 3

Which of the following is not one of the requirements which must be satisfied before the remedy of restitution will be granted by a court?

- a) The defendant has received a benefit.
- b) The benefit to the defendant was at the plaintiff's expense.
- c) The plaintiff has suffered loss or damage as a consequence of the benefit to the defendant.
- d) It would be unjust to allow the defendant to retain the benefit.

Answer: **c**

Question 4

Which of the following remedies does not require the intervention of the court?

- a) An Injunction.
- b) Claim for rescission.
- c) Claim for restitution.
- d) Claim for monetary compensation (damages).

Answer: **b**

Question 5

In the event of a breach of contract, the injured party has a duty to 'mitigate', which means:

- a) They must take all reasonable steps to transfer the loss to the party in breach.
- b) They must take all reasonable steps to report the breach to the court.
- c) They must take all reasonable steps to prevent the breach.
- d) They must take all reasonable steps to minimise their loss.

Answer: **a**

Question 6

The breach of which type of term will entitle the innocent party to recover damages?

- a) A condition.
- b) A warranty.
- c) An intermediate term.
- d) All of the above.

Answer: **d**

25.3 True and false questions

1. *Quantum meruit* only arises in cases of part performance of the contract.
[True]
2. The main purpose of damages is to enable the innocent party to receive monetary compensation.
[True]
3. Damages are an equitable remedy.
[False]
4. To recover special damages under the rule in *Hadley v Baxendale* the plaintiff must make known to the other party the special circumstances at the time the contract is entered into.
[True]
5. Restitution is based on unjust enrichment.
[True]
6. If the plaintiff cannot show any loss, there is no action available under contract law.
[False]



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Module 26 Types of remedies

26.1 Essay questions

Question 1

Describe the remedy of specific performance?

Answer

Specific performance is an equitable discretionary remedy preventing a party from breaking their contract and it is not available to enforce contracts of personal service.

Question 2

Describe the remedy of Injunction?

Answer

An injunction is a discretionary remedy in equity restraining a party from doing something that may be in breach of a contract and cause harm, damage and distress the a plaintiff, such as in a defamation and taking out an injunction to stop the defamatory publication from being published.

Question 3

Describe unliquidated damages?

Answer

Unliquidated damages are awarded where the plaintiff is unable to assess precisely what should be the amount of recoverable damages.

Question 4

What is the purpose of the equitable remedy of restitution?

Answer

Restitution is sometimes referred to as quasi-contract and means restoration. It can require a defendant to repay to the plaintiff a sum of money equal to the sum received from the plaintiff or, to pay for goods or services received.

The basis of restitution is the doctrine of *unjust enrichment*, which arises in situations where it would be unfair if the defendant was allowed to retain the money or the goods or services without payment.

Question 5

Explain why it is important to have an understanding of the *Limitation Act* or *Limitation of Actions Act* in relation to contracts.

Answer

An injured party can lose their right of action unless they act within a certain time period. This period is known as extinction of remedies and is established in each state by a *Limitation of Actions Act* which determines the time limits within which an injured party must act if they are to maintain an action.

Question 6

Should the courts be able to award damages for anxiety, injured feelings, disappointment or distress as a result of breach of contract, even though the parties cannot estimate subjective mental reactions to the breach? Discuss.

Answer

This is a matter of personal opinion.

However when taking into consideration the different heads or classification of damages mentioned in the question they are actually more applicable and appropriate to torts such as negligence, defamation and nuisance. However, in the context of contract law the nature of the contract may involve some elements of subjective enjoyment, for example a package holiday, in which case then there may be justification for compensation (damages) for failure to experience the enjoyment of the packaged holiday on which there was reliance on the travel agent. However, generally, contracts are for the supply of goods and/or services and if they are not provided as agreed, damages in the normal sense are usually appropriate.

26.2 Multiple choice questions**Question 1**

Which of the following statements is the best description of the remedy of ‘injunction’?

- a) The injured party is entitled to set aside the contract and be restored to their pre-contractual position.
- b) The party at fault is restrained from breaching the contract or from committing a wrongful act.
- c) The party at fault is directed to carry out their obligations under the contract.
- d) The party at fault has unjustly obtained a benefit at the injured party’s expense and is ordered to restore it to the injured party.

Answer: **b**

Question 2

Which of the following statements is the best description of the remedy of 'specific performance'?

- a) The injured party is entitled to set aside the contract and be restored to their pre-contractual position.
- b) The party at fault is restrained from breaching the contract or from committing a wrongful act.
- c) The party at fault is directed to carry out their obligations under the contract.
- d) The party at fault has unjustly obtained a benefit at the injured party's expense and is ordered to restore it to the injured party.

Answer: **c**

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Question 3

Which of the following statements is the best description of the remedy of ‘damages’?

- a) The party at fault is restrained from breaching the contract or from committing a wrongful act.
- b) The party at fault is directed to carry out their obligations under the contract.
- c) The party at fault has unjustly obtained a benefit at the injured party’s expense and is ordered to restore it to the injured party.
- d) The injured party is compensated for their loss by putting the parties in the position they would have been in if the contract had been performed.

Answer: **d**

Question 4

Which of the following statements is the best description of ‘nominal’ damages?

- a) An amount awarded where the court feels that the innocent party’s rights have been infringed but they have suffered no actual loss.
- b) An amount awarded by the court to compensate the innocent party for the loss suffered as a result of the breach of contract.
- c) An amount awarded by the court to punish the party in default.
- d) An amount based upon a genuine pre-estimate of actual loss flowing from the breach.

Answer: **a**

Question 5

Which of the following statements is the best description of ‘ordinary’ damages?

- a) An amount awarded where the court feels that the innocent party’s rights have been infringed but they have suffered no actual loss.
- b) An amount awarded by the court to compensate the innocent party for the loss suffered as a result of the breach of contract.
- c) An amount awarded by the court to punish the party in default.
- d) An amount based upon a genuine pre-estimate of actual loss flowing from the breach.

Answer: **b**

Question 6

In which of the following circumstances would the court be most likely to grant an order for specific performance?

- a) Where the defendant has breached the contract by failing to proceed with the sale of a house.
- b) Where the defendant has breached the contract by failing to proceed with the sale of a new car.
- c) Where the defendant has breached the contract by failing to hire the plaintiff as an employee.
- d) Where the defendant has breached the contract by failing to perform his ongoing duties under an employment agreement with the plaintiff.

Answer: a

26.3 True and false questions

- 1. Restitution is based on unjust enrichment.
[True]
- 2. The main purpose of damages is to enable the innocent party to receive monetary compensation.
[True]
- 3. Damages are an equitable remedy.
[False]
- 4. Nominal damages are the usual remedy in contract law.
[False]
- 5. Exemplary damages are awarded when the court feels that it needs to punish the party in default.
[True]
- 6. Damages are not claimable for disappointment or anxiety.
[False]

Module 27 Agency

27.1 Essay questions

Question 1

How effective is an oral appointment of an agent by a principal?

Answer

An oral appointment of an agent is generally effective. However except in situations where the appointment of the agent is required to be under seal or in writing, an agency relationship can be created orally, however it is always better if right and liability of the agent as between the principia and his or her authority are expressed in writing, such as under a Power of Attorney or Deed of Appointment of Agency.



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Question 2

What is the effect of ratification in an agency relationship between the parties?

Answer

The effect of ratification is that an unauthorised act of an agent is deemed to be binding on the principal once he affirms the unauthorised act, especially in cases where it is beneficial to the principal and the business.

Question 3

Define the three main classes of agents and in your answer give examples of general agents and describe the extent of their individual authority under the agency.

Answer

The three main classes of agents are special, general and universal. Examples of general agents include among others, auctioneers, mercantile agents, brokers (insurance, stock, share, finance), del credere agents bankers, partners, company directors, married women and shipmasters. In respect to the authority of general agents, subject to an agreement which may limit their authority, general agents have the usual authority of agents of their particular profession or situation that they usually possess under the particular circumstances.

Question 4

Explain the purpose and importance in business of an agency relationship.

Answer

The complexity of business dealings especially in today's highly globalised age, means that for profit making and expansion in business and other commercial entities, it is necessary for an individual to deal through others, such as bankers, brokers, auctioneers, factors, commission agents, managers, partners, company secretaries or solicitors, to mention but a few. Thus, where these persons negotiate on behalf of individuals with third parties, they will be their agents. The agency relationship, is thus an exception to the rule of the doctrine of Privity of contract which states that only those persons who were immediate parties to a contract could acquire rights and liabilities under it. In an agency contract there is an extension, or grant, of the contractual powers of the principal to their agent, and arises in partnerships, for those purposes authorised in a prior agreement between them. The agency contract that has been created between the parties can be relied upon against, or by, third parties that have had dealings with the agent.

Question 5

Briefly list and describe the rights of an agent against a principal.

Answer

The rights of an appointed agent against a principal in an agency relationship when conducting business and transacting with a third party or parties for and on behalf of the principal is as follows:-

- The right to payment
The principal must pay the agent the remuneration (payment) fixed or implied by the agreement, plus any necessary expenses incurred by the agent in the course of carrying out the contract. If not, the agent is seen to be a gratuitous agent but even so they are entitled to reimbursement for expenses.
- The right to indemnity and reimbursement
Generally, an agent is entitled to be indemnified against any liabilities, and be reimbursed for any expenses incurred in the course of carrying out the principal's instructions. This right can be lost where the agent's acts are not authorised or ratified by the principal, if the agent breached a duty to the principal, or the caused loss due to unlawful or negligent acts by the agent.
- The right of *lien*
An agent is entitled to retain (lien) the goods of the principal until reimbursement of expenses and commission has been received, but if the goods were acquired by the agent in respect of the particular transaction for which payment has not been made.
- The right of stoppage in transit
Where an agent is responsible for the price of goods bought on the principal's behalf, the agent may be placed in the position of an unpaid seller if the principal were to become insolvent.

Question 6

What is the liability of both principal and agent in an action for negligence in tort?

Answer

In an action in tort, a principal will generally be liable to third parties for any tort committed by their agent, such as negligence or misrepresentation, if the agent has acted within the scope of the agent's *actual or apparent authority* or employment, whether or not the tort was committed for the benefit of the principal. However, there is no liability of the principal, if the agent was engaged in a private venture that was outside the scope of the agency relationship or employment when the tort was committed and was unknown to the principal.

This an agent who acts outside their *actual or apparent authority* may be personally liable for any torts they commit. Also agents may be liable for the tort of *breach of warranty of authority* if they represent, either expressly or impliedly, that they are acting with the authority of the principal when in fact they are not, and a third party acts on the basis of that false representation and accordingly, the third party can sue the agent personally for damages to the extent of the loss they suffered under the false representation.

27.2 Multiple choice questions

Question 1

What is a 'special' or 'limited' agent?

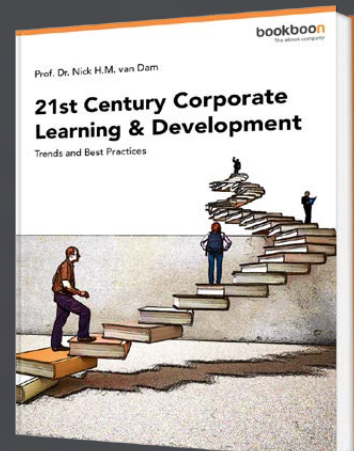
- a) An Agent who can only make a particular type of contract or carry out a particular transaction on behalf of the Principal.
- b) An Agent who can do almost anything on behalf of the Principal which the Principal can do for themselves.
- c) An Agent who can make contracts of a class that are normal for this type of Agency or do some act for the Principal which is part of the Agent's ordinary course of business.
- d) None of the above.

Answer: a

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Question 2**What is a 'universal' agent?**

- a) An Agent who can only make a particular type of contract or carry out a particular transaction on behalf of the Principal.
- b) An Agent who can do almost anything on behalf of the Principal which the Principal can do for themselves.
- c) An Agent who can make contracts of a class that are normal for this type of agency or do some act for the Principal which is part of the Agent's ordinary course of business.
- d) None of the above.

Answer: **b**

Question 3**What is a 'general' agent?**

- a) An Agent who can only make a particular type of contract or carry out a particular transaction on behalf of the Principal.
- b) An Agent who can do almost anything on behalf of the Principal which the Principal can do for themselves.
- c) An Agent who can make contracts of a class that are normal for this type of agency or do some act for the Principal which is part of the Agent's ordinary course of business.
- d) None of the above.

Answer: **c**

Question 4**Which of the following is the best description of express actual authority?**

- a) The principal creates the appearance of an agency by words or conduct that in reality does not exist.
- b) Authority is actually conferred by the principal either verbally or in writing.
- c) Authority is inferred from the conduct of the parties.
- d) Agent is claiming to be the principals legal representative.

Answer: **b**

Question 5

In what circumstances will Bjorn be a principal and Benny be an agent?

- a) Benny has authority to bind Bjorn to a contract with a third party.
- b) Bjorn is paying Benny to perform a task but has no control over how Benny will complete the task.
- c) Bjorn is paying Benny to perform a task and Benny is subject to the control and direction of Bjorn.
- d) Benny is claiming to be Bjorn's legal representative.

Answer: a

Question 6

Which of the following is an example of an agent that is appointed by express appointment?

- a) Adam is entrusted with Peter's property and finds it necessary to do something with it in order to preserve it.
- b) Peter retrospectively affirms the authority of Adam.
- c) Adam and Peter become partners in a partnership.
- d) Peter appoints Adam under a general power of attorney to carry out a particular transaction on his behalf.

Answer: d

27.3 True and false questions

1. A gratuitous agent is entitled to reimbursement of expenses they may incur while acting on behalf of the principal.

[True]

2. A contract must exist between the agent and the third party as well as the agent and the principal for agency law to apply.

[False]

3. The reason for the classification of agents is to determine the actual extent of an agent's authority.
[True]
4. An agent must always act in person.
[True]
5. Partnerships are an example of agency arising by implication or conduct.
[True]
6. Universal agents have the power only to make particular types of contract.
[False]



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Module 28 Agency relationship in business

28.1 Essay questions

Question 1

What is actually meant by the expression ‘agency by ratification’ and what is the effect of such ratification?

Answer

Ratification refers to the act of adopting a transaction by a person who was not bound by it originally. Where the agent has acted without the principal’s authority, but nevertheless appeared to act on behalf of a principal, it is open to the principal to then ratify the transaction. By ratification, the relationship of principal and agent is created retrospectively, thus the principal assumes the benefits and burdens from the time the agent acted. This situation usually arises when the agent has exceeded their authority.

Question 2

What is the nature of the authority that can be granted to a duly appointed agent?

Answer

In most business situations, agents can be vested with one or more of the following authority to act on behalf of the principal:

- Actual authority that arises expressly (written down);
- Actual authority arising by implication (prior conduct or dealings, statute or by the court);
- Apparent or ostensible authority (deemed by the role held and normal business conduct); or
- By ratification, where authority is retrospective (where agent has extended or had not actual authority, the principal has accepted and affirmed the conduct).

Question 3

Andrew who was a stock broker was approached and instructed by Patrick, to sell his stock when the market price reached 80% per unit of stock. However, Andrew failed to sell at 80% but negligently held onto the stock. The stock market then dropped drastically, and Andrew was forced to sell his stock for less than 80%. What can Andrew do? Discuss.

Answer

As a professional and stockbroker Andrew is in a fiduciary relationship with his clients. One of Andrew's duties among others is to follow the instruction of the principal at all times. In this instance Andrew has failed to obey the principal's instructions to sell his stock at 80%. Accordingly Andrew is in breach of his contract and is liable for damages to Patrick for the financial loss suffered as a direct result of his inaction and failure to obey Patrick's instructions as his principal.

Question 4

Paul is seeking your advice on the following matter. His next door neighbour Paula, has gone on extended holidays for several months, travelling to Spain to escape the windy and icy coastal winter in Denmark. Before she left, she asked Paul to 'keep an eye on her house and property' and she gave him the key to the house, so that he could water the indoor plants in her absence and he noticed some glass damage to the sliding doors. A severe storm made a huge crack in Paula's sliding glass door and with a little bit of pressure the glass would just fall down. Paul heard on the radio that more winds and storm were forecast for the area later that day and evening. According, Paul has contacted the local glazier in order to replace the window but he is wondering if he should cancel this agreement with the glazier to replace glass because he is worried that he might become personally liable for the glazier's repair bill in Paula's absence. Unbeknown to Paul, Paula whilst on holidays was in a fatal accident and has died whilst travelling in southern Spain.

Advise Paul of his legal rights and liabilities, while considering the various ways that an agency relationship may be found to exist by the courts in certain situations.

Answer

The question is concerned with agency and authority of the agent in this case Paul. This did Paul have actual authority? Yes he did as Paula gave him the key to her house and asked him to 'keep an eye on her house and property'. Thus it could be argued that this gave Paul the actual authority to act for Paula in all matters concerning her house including repairing and replacing the window. In this instance Paul, would not be liable on the contract, or was his authority only limited to just watering the indoor plants? This raised another question of whether Paul had ostensible authority in the given situation. Paula cannot be contacted (travelling for several months around Spain). Paul has been entrusted to look after Paula's property; also repairing the window which would amount to acting in good faith and in Paula's interests, to save her property, because more storms were forecasts and heavy winds, which would have caused the glass to totally break. No doubt that this would have cause extensive internal damage to the house such as damage to carpets, furniture or even subject to the danger of burglary and theft. Paul may argue that by not acting in such circumstance he might have been seen as acting negligently, and not as a reasonable person would have in the given situation.

The fact that Paula has died operates to revoke any authority that Paul, might have had. Thus a contract that has been entered into after Paula's death will not bind Paula's personal legal representative. This means that a person such as Paul, who acts without authority is liable to a third person, the glazier, for breach of warranty of authority.

In conclusion, you should advise Paul that as a result of Paula's death any work that he gets the glazier to do on the broken glass sliding doors he will be obliged to pay.



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Question 5

A solicitor, Lawrence, had control of a number of local and international companies, including Global Developments Ltd, which purchased, renovated and then resold properties across Europe. The solicitor's articled clerk, Alexander owned a private investment company called Unique Estates, which was also involved in property purchases, renovations and resale. A manager, named Luke was appointed to manage the companies controlled by Global Developments Ltd and under the control of the solicitor, Lawrence agent. Luke often passed on information to the solicitor's clerk, Alexander about properties that Global Developments Ltd was considering buying and or were in fact going to buy, which was in breach of his agreement with the Lawrence, solicitor and his employer. The solicitor's clerk, Alexander, intentionally used that information for the benefit of his own company, Unique Estates, by purchasing those particular properties that he became aware of from Luke, the manager of the companies. Has the Lawrence, solicitor any remedy against either the manager, Luke or Unique Estates? Discuss and explain your answer fully.

Answer

This question is concerned with the agent's duty to maintain confidentiality of information.

If an agent gains access to confidential information while employed by a principal, this information should not be divulged to outsiders nor used for the agent's personal gain, either during or after the termination of the agency agreement. If a third party knows of the breach of fiduciary duty and benefits from it, then the third party would be accountable for the benefit. As in this situation involving Global Developments Ltd and its potential legal action against Unique Estates, solicitor Lawrence, will not have a remedy against Unique Estates unless Lawrence can establish that they, Global Developments, knew that the manager Luke, in fact, did not have the authority to act in the way he did and this is not evident or clear from the given facts.

However, in the given situation, the manager, Luke has breached his duty to maintain confidentiality of his principal's, Global Developments Ltd's, information and if obtained any personal benefit Luke will be accountable for these profits to the principal.

Accordingly in the given facts then, the major remedies that are available to a principal, Global Developments Ltd would include:-

- Taking action under the remedy of rescission;
- refusing to pay the agent a commission (or recovery of any commission if already paid);
- taking legal action (suing) the agent for damages; or
- taking legal action (suing) the agent for recovery of any secret commission paid.

Question 6

The local estate agent, Sam, wrote to a house owner, Anthony, who was keen to sell his property, and therefore accepting an offer from him to become Anthony's agent. In the letter they sent to Anthony, the local real estate agent, Sam pointed out that if he was able to find a 'willing and able' purchaser, he would be entitled to a commission at normal Real Estate Institute rates. The agent, Sam then introduced the owner to Sophie, who said she was prepared to buy 'subject to contract' and 'subject to a surveyor's report'. Subsequently, Anthony received a higher offer from another party and accepted it. When the agent, Sam attempted to claim his commission, he did so by stating to Anthony that he had in fact, introduced a willing and able purchaser. However, Anthony disagreed with Sam, the estate agent and he refused to pay the commission.

Is Anthony the owner correct in this situation in refusing to pay the agent's commission to Sam?

Answer

Yes- Anthony is correct and justified in refusing to pay Sam the agent's commission, as there was no actual sale of the house.

Generally, the principal must pay the agent the remuneration fixed or implied by the agreement. However, if the terms of the agreement are express the agent cannot claim more than what is laid down by those terms. Also, if the contract stipulates payment only on the performance of a particular transaction, such as the actual sale of the house, then a claim for payment does not arise until that transaction actually occurs, and is finalised and also if the agent was instrumental in the actual sale of the house for the owner.

However, in situations where the agent has yet to find a genuine and willing purchaser or introduce a prospective purchaser, no commission is payable unless the person is in fact:

- ready and willing to purchase on the principal's price and terms;
- is able to purchase; and
- in fact purchases by entering into a binding contract on these terms.

The rule that any terms in the contract will be required to be performed exactly is fairly strictly interpreted at common law or business efficacy and fairness. Thus, in order for the agent to be entitled to commission where the contract contains a clause which states the purchaser be 'willing and able' to purchase, the person introduced by the agent to the vendor must be of a genuine person who fulfils exactly the qualifications of the person specified. Thus, until this happens, the real estate agent will not have brought about the event, that is the actual sale of the house, which would entitle him or her to claim the sales commission. Thus the entitlement to commission only arises upon the agent introducing a person who genuinely buys the house and this is the event upon which the entitlement to commission normally arises and if the person introduced is to be 'willing and able' to purchase, they must be able to do so in every way.

In conclusion, the owner is correct in refusing to pay the agent's commission. They have not introduced the ultimate purchaser but rather a prospective purchaser who may, or may not, have subsequently gone ahead with the transaction. By making the contract 'subject to' two conditions, the prospective purchaser demonstrates his unwillingness to enter into an agreement which would have entitled the agents to their commission.

28.2 Multiple choice questions

Question 1

Which of the following is an example of an agent appointed by implication?

- a) Anna is entrusted with Paula's property and finds it necessary to do something with it in order to preserve it.
- b) Paula retrospectively affirms the authority of Anna.
- c) Anna and Paula become partners in a partnership.
- d) Paula appoints Anna under a general power of attorney to carry out a particular transaction on his behalf.

Answer: c

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Question 2

In which of the following circumstances will an agent not be personally liable under a contract entered into with a third party?

- a) Where the Agent has disclosed to the third party that they are an Agent and they have named the Principal.
- b) Where the Agent has disclosed to the third party that they are an Agent and they have not named the Principal.
- c) Where the Agent has executed a deed in their own name.
- d) Both answers a) and b).

Answer: b

Question 3

Which of the following rights does an agent not have unless there is an express or implied agreement that the agent is to have that right?

- a) The right to be remunerated.
- b) The right to be reimbursed for authorised expenses.
- c) The right to be indemnified against liabilities incurred while carrying out the Principal's instructions.
- d) The right to retain possession of the Principal's goods until the Agent has been paid.

Answer: a

Question 4

Which of the following is an example of an agent that is appointed by ratification?

- a) Adam is entrusted with Peter's property and finds it necessary to do something with it in order to preserve it.
- b) Peter retrospectively affirms the authority of Adam.
- c) Adam and Peter become partners in a partnership.
- d) Peter appoints Adam under a general power of attorney to carry out a particular transaction on his behalf.

Answer: b

Question 5

In which of the following circumstances will an agent be personally liable under a contract entered into with a third party?

- a) Where the Agent has executed a deed in their own name.
- b) Where the Agent has not disclosed to the third party that they are an Agent.
- c) Where the Agent is in breach of warranty of authority.
- d) All of the above.

Answer: *d*

Question 6

Which of the following is an example of an agent appointed by necessity?

- a) Angelo is entrusted with Paul's property and finds it necessary to do something with it in order to preserve it.
- b) Paul retrospectively affirms the authority of Angelo.
- c) Angelo and Paul become partners in a partnership.
- d) Paul appoints Angelo under a general power of attorney to carry out a particular transaction on his behalf.

Answer: *a*

28.3 True and false questions

1. The reason for the classification of agents is to determine the actual extent of an agent's authority.
[True]
2. A Partner is an Agent for the Partnership
[True]
3. A Mercantile Agent (Factor) may sell in his own name as though he was a Principal.
[True]

4. An Agent acting after the death of his Principal suffers no personal liability if he is unaware of the Principal's death.

[False]

5. Destruction of the subject matter of the Agency terminates the contract.

[True]

6. Remedies for "secret commission" are dealt with under Common law.

[False]



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Module 29 Partnerships and companies

29.1 Essay questions

Question 1

Is a partnership registered under a business or trade name a company (corporation)?

Answer

A partnership that is registered under a business name such as Unique Constructions of whom the partners are brothers Anthony and Lawrence, is not a separate legal entity (artificial legal person under the law that is a company also often referred to as a corporation).

Question 2

Is every partner in a partnership an agent for every other partner?

Answer

Yes – under the general law of partnership and agency, every partner in a registered partnership is an agent for every other partner whose actions or in action binds all other partners.

Question 3

What is the liability of partners for debts in the partnership?

Answer

Under a partnership whether expressed or implied, partners are individually and personally liable for the debts and liabilities of the partnership business. This is because unlike the case of an incorporated company or corporation (an artificial legal person), due to the concept of limited liability (corporate veil or shield), the liability of members is limited to the amount of their investment, generally any unpaid calls on their shares.

Question 4

Is the partnership relationship one where there is a fiduciary duty?

Answer

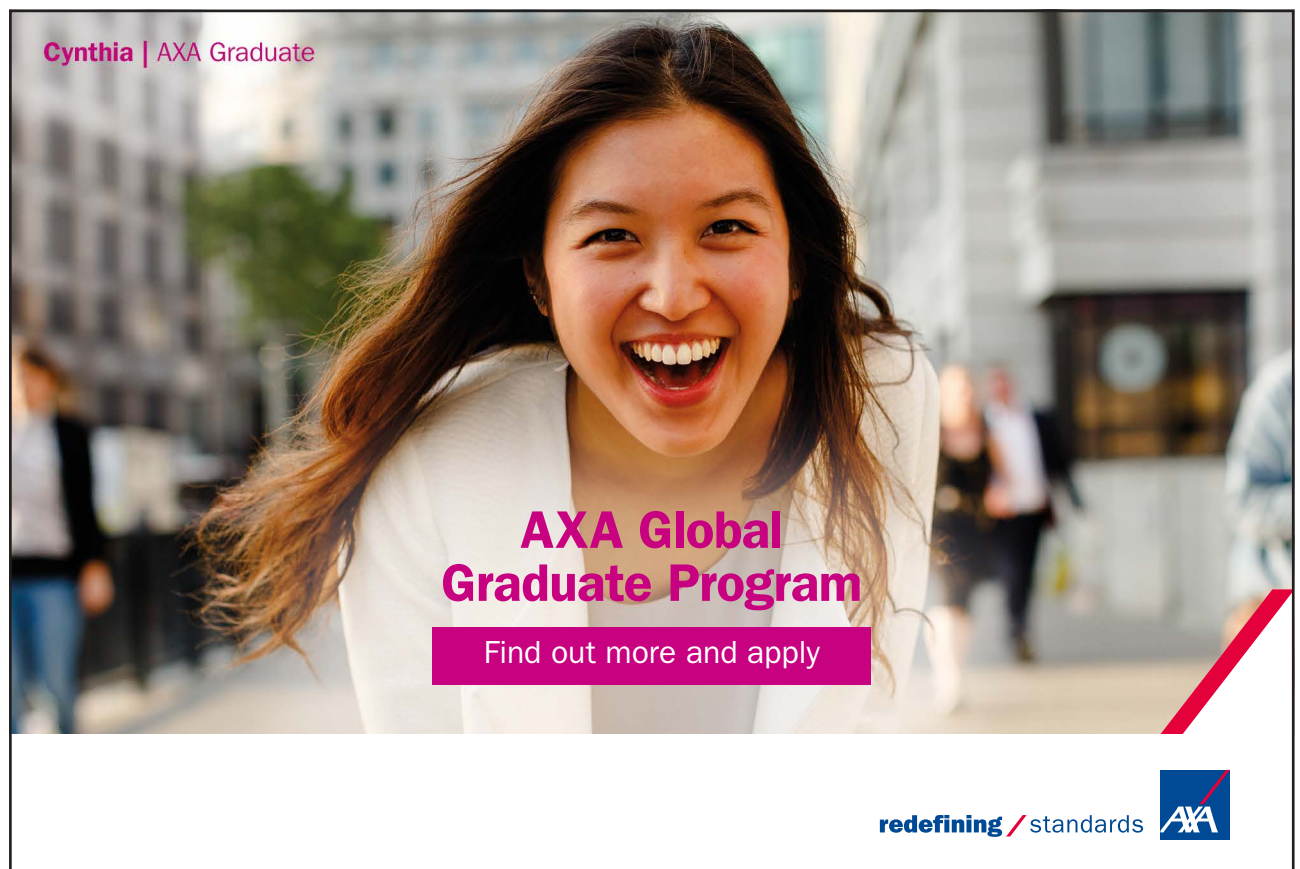
Yes – The fiduciary relationship and duties of every single partner in a partnership or firm are the foundation of the partnership relationship and lasts until there firm is dissolved. Such fiduciary duties include the duty to act in good faith, honesty, integrity, to render true accounts, to account for private profits and refrain from competition.

Question 5

What are the three elements of the statutory definition of a partnership?

Answer

Under general common law and partnership statutory definition of a partnership, a partnership is simply defined as the relationship that subsists on a continuing basis (as distinct from a joint venture which are the same but not continues arrangements) between persons carrying on business in common with a view to making a profit. Therefore the three essential elements that constitutes and deemed by law to the creation of a legal partnership under the law and includes, the carrying on a business; carrying on a business in common; and carrying on a business with a view to making a profit. If any of these essential elements are missing than there is generally no partnership.



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Question 6

In the course of a social gathering of ballet enthusiasts at a Russian Ballet performance in Copenhagen, two long-time friends, Hans and Christian agreed to stage a Swan Lake ballet production with local ballet dancers. One of the friends and party, Hans agreed to receive 60 per cent of the takings from the ballet and that he will pay for the theatre, lighting and advertising; while Christian, the other party agreed to receive only 40 per cent of the takings and to pay for the dancers' fees, costumes and scenery. Is there a partnership or a joint venture in existence between the two friends and parties in this arrangement?

Answer

This issue is concerned with whether or not there is a partnership in existence, and the distinction between a partnership and a joint venture. A partnership is defined as the relationship that exists between persons carrying on business in common with a view to making a profit. Thus, simply put, this relationship does not consist of a partnership but instead is a joint venture.

The main legal issue here is the definition of a partnership. A partnership is defined as the relationship that subsists between two or more persons carrying on business in common with a view to making a profit. The common law definition and statutory definition under partnership acts for consistency and clarity also set out a number of essential partnership rules in order to assist the courts in deciding whether a partnership exists. These partnership rules state that the common ownership of property, and sharing of gross returns or profits are indicative of a partnership but are not of themselves conclusive evidence that a partnership exists.

Therefore, in order to determine whether a partnership exists, all the circumstances must be examined in order to ascertain the following essential elements in a partnership, that is:

- what the intention of the parties was;
- whether or not there was a sharing of profits and losses accompanied by a state of agency;
- whether each has a voice in the management of the business, so that it could be established whether agency has been created between the parties.

If these three partnership elements exist then there is hardly any doubt that the arrangement between the parties is in fact a partnership. However, it should be noted that a person may receive a share of the profits in a variety of ways without necessarily being an actual partner.

In addition to these essential rules pertaining to a partnership arrangement, the statutory partnership acts also set out other essential rules, that are expressed in a manner that will enable the courts to look at the surrounding circumstances and to which actual, 'regard shall be had' of those rules, in determining whether or not a partnership exists in the given circumstances.

Here, the question states and it is evident that the two friends and parties to this arrangement Anthony and Lawrence, are to share in the gross profits of the business (60% for one and 40% for the other) and not the net profits. Additionally, each of the parties have different and separate responsibilities from the given facts. Lawrence, has the responsibility of hire the ballet dancers and paying them their expenses, while alternately, Anthony has the sole responsibility of booking the theatre and paying for the costs associated with its hire, such as lighting and advertising. Also expenses for the ballet production were to be taken as agreed from each of the parties' share of the takings. Consequently, in this situation it was possible for one party to make a substantial profit and the other party to incur a loss.

Thus, in this situation, there is no sharing of net profits and it also appears that neither is the agent of the other as they have separate responsibilities in the ballet production and accordingly, there is no partnership existing between the two parties but instead is a joint venture. Note that in respect to theatre and other forms of entertainment production most arrangements between parties are in the form of a joint venture.

A joint venture is often used to undertake a specific commercial activity or enterprise for joint profit. A joint venture is usually be distinguished from a partnership on the basis that:

- it is usually an *ad hoc* undertaking for a specific time or task;
- it is a separate venture for each of the parties;
- assets in the joint venture are usually held as individual shares by the parties on the basis of tenants in common;
- liability is individual, rather than several;
- profits are received separately, and invoices are usually issued separately and paid individually; and
- the parties can dispose of their interest in the joint venture without the need to assign, as may be the case under statutory partnership acts.

29.2 Multiple choice questions

Question 1

The unauthorised use of another person's registered business name may be:

- a) Passing off.
- b) A breach of trade mark.
- c) Misleading and deceptive conduct under consumer protection legislation.
- d) All of the above.

Answer: *d*

Question 2

In which of the following circumstances are Cain and Abel are most likely to be viewed as partners?

- a) Where Cain and Abel share the gross returns from a business.
- b) Where Cain and Abel share the net profits from a business.
- c) Where Cain and Abel are joint owners of a property.
- d) Where Cain and Abel work together on a single venture.

Answer: b

Question 3

Which of the following activities do not fall within the implied authority of a partner to act on behalf of the other partners?

- a) Employing suitable staff.
- b) Inviting others to join the partnership.
- c) Purchasing goods usually used by the firm.
- d) Receiving payments and giving receipts.

Answer: b

Question 4

Which of the following statements about the rights of partners in a partnership is not true?

- a) Each partner is entitled to claim reasonable remuneration for working for the partnership.
- b) Any partner may take part in the management of the business.
- c) No partner is entitled to interest on their investment in the partnership until net profit has been determined.
- d) A partner is entitled to interest on any money loaned to the business.

Answer: a

Question 5

The letters 'Ltd' after the name of a company is a warning to creditors that:

- a) The company is limited by guarantee.
- b) The liability of shareholders for the debts of the company is limited.
- c) The shareholders have unlimited liability for the debts of the company.
- d) The shareholders have no liability for the debts of the company.

Answer: *b*

Question 6

If notice of their retirement is given to all of the persons who have had dealings with the partnership, a person retiring from a partnership is liable for:

- a) None of the debts of the partnership.
- b) Only the debts of the partnership incurred before they retired.
- c) Only the debts of the partnership incurred after they retired.
- d) All of the debts of the partnership.

Answer: *b*

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29.3 True and false questions

1. Unequal contributions to capital raise a presumption that profits are to be shared unequally.
[False]
2. The existence of a partnership is to be determined from what the parties do, rather than what the parties call themselves.
[True]
3. If a business trades under a name other than the name of the owner, the business name must be registered.
[True]
4. Partners have limited liability in regard to the partnership debts.
[False]
5. Partnerships must be associations formed with a view to profit.
[True]
6. Sharing of profits and losses is complete proof of a partnership
[False]

Module 30 Ethics in business

30.1 Essay questions

Question 1

What is the difference between law and justice?

Answer

Even though there is a difference between the definitions of law and justice, nevertheless the two are closely linked and supplement each other. Thus, an important ideal and concept that is closely identified with law is justice. The word, justice, means ‘that which is right or fair’ and based on the ideals of equity and fairness, which in fact underpins the rule of law.

However, the word ‘justice’ can be a difficult term to define and many definitions have been afforded to this very important and meaning word within law. One example of a good definition of justice is by the English judge, Lord Denning who suggested the following definition:

“It is not a product of intellect but of spirit. The nearest we can go to defining justice is to say that it is what right-minded members of the community – those who have the right spirit within them – believe to be fair.”

In respect to justice, there are different definitions depending in which context that it is being used, such as ‘social justice’, ‘moral justice’ and ‘legal justice’ and it should be noted that coincide together as they are interlinked and also supplement each other. Naturally, it will depend on the situation and the context in which the term is used as to what actual reference and context is attached to it in various situation. For example, the fine for speeding through a red light, is the same whether or not you are rich or poor and accordingly, this aspect of the law, is what is considered as being legally and morally just and fair because everyone within that society is seen to be equal in the eyes of the law. Nevertheless, however, at times justice can be seen as being inequitable or unfair, as the person who is wealthier can more easily afford to pay the fine than the person who is struggling financially and who may be extremely poor.

Question 2

What is insider trading, and why is it so prohibited under the general law and statutory corporation’s law.

Answer

Insider trading is an example of white-collar crime and it is an unethical business practice because many people do not see anything wrong with the concept of insider trading. However insider trading is immoral at many levels and this fact draws attention to the difficulty in establishing ethical business practices, as some people cannot see or even understand why this conduct is prohibited. Insider trading is not an example of taking advantage of a fair business opportunity, but instead it is unethical as fundamentally it is stealing and illegal. In this context, one party has information that is not known to the other party and deliberately kept silent and not communicated. The often confidential and price sensitive information is obtained by the first person solely because of their connection with the company or other person who is aware of the information in relation to a company and its float or other lucrative share market transaction.

Thus, becoming aware and knowing that the price of the shares will increase when the information is made public, those who have that so called 'insider' information, act quickly to buy the shares of a person who does not have that information and does not have the means of obtaining it. The value of the shares does increase after the information is made public. The buying party has, in effect, stolen the increase in value from the selling party. That is why the practice is unethical and why Parliament has made it illegal.

Question 3

What are the business benefits of applying and promoting ethical considerations in business?

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Answer

There are many benefits of applying and promoting ethical consideration in business. Thus, business ethics is about how business affairs are conducted, and acting ethically involves acting in a morally correct and honourable way at all times, especially in business. The attitudes that 'making profits is all that matters' and 'as long as it is legal it is all right' are gradually being replaced by more ethical approaches by companies when doing and transacting business. Even though, ethical business conduct may impose an initial implantation cost on business, that cost may be offset by an increase in public confidence.

Nowadays, community attitudes and standards are changing on many levels such as corporate social responsibility (CSR), social justice as well as environmental and human rights issues when conducting business. Thus, today the wider community is very aware with the advent of traditional news media and social media of business matters and their consequences, especially those that impact on individual members of the community or on social or environmental issues. Thus, if businesses, mainly corporations as they operate more globally in the marketplace do not adopt acceptable ethical standards, then the industry itself via industry codes of practice and conduct as well as parliament is likely to impose essential and required ethical and moral business standards, for example, statutory corporations acts which have set stricter and new standards of conducting business such as for instance, for the independence of auditors as a result of and in response to the many corporate collapses globally as has occurred in recent times.

Additionally, the growth of superannuation and the privatisation of public assets – for example in the aviation industry, telecommunications and mining industries have led to an increase in shareholding by individuals who are concerned about the activities of companies in respect to ethical and moral decision making impacting on social justice, the environment and humans rights issues. Accordingly, such views of the importance of ethics and morals in business and the advent of increased awareness of corporate social responsibility, has encouraged the development of socially responsible (ethical) investment by investors, directly or indirectly through financial institutions such as banks, stock brokers and superannuation funds in many nations.

Question 4

What do you think has been the global impact of a failure of ethical standards by businesses and corporations at domestic and international levels?

Answer

There has been a significant adverse impact of a failure of ethical standards business and corporations at all levels of the global marketplace.

In the past the traditional view of conducting business is that it is often stated by advocates of a *laissez faire* approach to conducting business in the marketplace, that businesses in general but more importantly, corporations, should and are able to regulate itself and that the common view of being free to conduct business is that, what is 'good for business is good for everyone' should be upheld. However, relevant to the times, this traditional view of the concept of economic and financial a *laissez faire* approach, is no longer the best view of the way in which business should and ought to be conducted. Nowadays, due to the concept of 'moral relativism', that is relevant to the times and particular global, economic and social environment, this traditional view and argument is no longer valid. In this context, 'moral relativism' essentially **provides** that moral values (that are linked to ethics and justice) are relative to a particular social, legal and political environment. This concept advocates that inherent moral and related ethical and social values differ from one culture to another as well as one society to another, at any given time and even differ from one individual to another.

Thus, this is especially true today, as a result of many corporate collapses such as for example the global financial market leaders that have collapsed drastically such as, Fannie Mae in the United States and HIH Insurance in Australia among others, thereby causing severe global chaos as well as economic and financial catastrophe. Accordingly the impact of these corporate failures and collapses were not just contained and limited to shareholders and unsecured creditors, but instead due to the domino impact severely impacted on employees, policyholders and claimants under mortgage and insurance policies. Consequently this resulted, for instance within Australian financial and superannuation industry and markets in a major overhaul and restructuring of the insurance industry as a result of the HIH Insurance failure and collapse that was a major cause of an Australian and global insurance crisis, especially within the public liability insurance.

Accordingly, today, as a result of these major corporate collapses around the world there is more of an awareness within the community and the attitudes and standards of these financial industry and markets are rapidly changing as a result of this wider community awareness and knowledge through traditional media such as newspapers, radio and television but nowadays as via the internet through social media which is also impacted on the ways in which business and companies operate and conduct business at an international level as well as locally. The community is now very aware of business matters and their consequences, particularly those consequences that impact on individual members of the community. If business does not adopt acceptable ethical standards, Parliament is likely to impose standards.

Question 5

What are some examples of legal rules that have ethical characteristics when conducting business at a domestic or international level?

This question is concerned with providing some examples of common business situations within partnerships and corporations that often raise significant and at times serious, ethical and moral issues and concerns that should be at all times prevented from occurring or at least minimised as best as possible.

Some examples of legal rules that have ethical considerations include:

- Insider trading (an example of white-collar crime);
- Giving and receiving gifts (where the gift is in reality a bribe and is illegal);
- Conflict between commercial interest and social utility, for example, banks, stock brokers, insurance companies among others;
- Conflict of interest, which must always be declared;
- Unconscionable or unjust conduct (deemed to be legal but are in fact unequitable, unfair and unjust).
- Misuse of limited liability of a company for an improper purpose or to gain a personal benefit such as for example, Fannie Mae and Enron in the United States and HIH Insurance and James Hardies Industries in Australia.
- Tax evasion/tax havens (which is different from legal tax reduction or avoidance/minimisation).



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Question 6

What is meant by 'socially responsible investing' by business and companies?

Answer

Socially responsible investing, that is, ethical and moral investing is investment by companies that trade and operate their business ethically and as a result, directly provide valuable social benefits and are sensitive to the legal, social and political environment. Apart from the usual considerations of the business or company, such as maximisation of profits, adequate returns and security, the socially responsible investor considers whether or not the investment is ethical and socially moral. Therefore, this means among other things evaluating a company or other business institution primarily on its products or services as well as socially responsible government practices.

Thus, the usual guidelines for determining in which company to invest, or not invest, includes considerations as to whether or not the company is associated with, or linked to positive factors such as among other things:

- environmental issues and protection;
- emission and pollution control;
- conservation of natural resources;
- health and safety of the workplace and the community; and
- ethical employment policies.

30.2 Multiple choice questions**Question 1**

The important concept of ethics is closely related to which of the following:

- a) Morals and the application of moral standards.
- b) Acting in a morally correct manner.
- c) Acting in an honourable manner.
- d) All of the above.

Answer: *d*

Question 2

Law within a given society is generally determined by an individual's:

- a) Moral views and standards.
- b) Political views.
- c) Religious and ethical views.
- d) All of the above.

Answer: d

Question 3

Justice which is closely linked to the concept of the law means:

- a) The law handed down by Justices of the Peace.
- b) The law or decision which is right or fair in society.
- c) Anyone can take action in their own hands for a wrong done.
- d) All of the above.

Answer: b

Question 4

The fundamental idea of morals within society are concerned with:

- a) Being good members of society.
- b) Acting in your own best interests.
- c) The distinction between right and wrong.
- d) All of the above.

Answer: d

Question 5

Ethics that are closely linked with morals relate to:

- a) All accepted forms of morals in society.
- b) The treatment of moral questions.
- c) Acting in a morally correct and honourable manner.
- d) All of the above.

Answer: a

Question 6**Why is insider trading unethical?**

- a) Because it is illegal.
- b) Because it is unconscionable for the person with inside information to keep that information to themselves.
- c) Because the person who sells their shares to a buyer acting on inside information has not done so willingly.
- d) Because the buyer of shares who is acting on inside information has effectively stolen the increase in share price from the seller.

Answer: d

30.3 True and false questions

- 1. Moral relativism provides that moral values are relative to a particular environment and argues that moral values can differ among different cultures and society.
[True]
- 2. Acting ethically involves acting in a morally correct and honourable way.
[False]
- 3. Moral values are generally relative to a particular social and political environment.
[True]
- 4. Morals are concerned with the distinction between right and wrong.
[True]
- 5. Ethics relates to morals, the treatment of moral questions and acting in a morally and honourable way.
[True]
- 6. Ethical considerations involve going beyond self-interest in reaching a decision.
[True]