Graduate Diploma in
Purchasing and Supply

Legal Aspects in Purchasing
and Supply

L6-10

LEVEL 6

Senior Assessor’s
Examination Report

May 2010
SECTION A

Q1  Assess the likelihood of Bennett making a successful legal claim against Tally–Tow. (25 marks)

Analysis of the Question

The question was designed to test the implied conditions of both the Sale of Goods Act 1979 and also possible breach of the Supply of Goods and Services Act 1982. It was also the legality of limitation clauses.

Analysis of the Answer

In relation to the defective equipment, answers needed to refer to the conditions implied by section S14 (2) and (3) of the Sale of Goods Act 1979 to the effect that the equipment should of been of satisfactory quality and fit for their purpose. Good answers will provide a definition of satisfactory quality and should include at least some case law. Some credit was gained for reference to the Supply of Goods and Services 1982. Strong answers might have discussed the issue of acceptance and how this would impact on the right of rejection. Answers should refer to when acceptance has taken place under S34 and S35 Sale of Goods Act 1979. This should include Bennett having a right to a reasonable opportunity to examine the equipment to ensure conformity with the contract. An answer needed to address the issues of the limitation clauses contained in the Supplier’s standard terms. The analysis should refer to the incorporation test, the contra proferentum rule and relevant provisions of UCTA 1977, especially S6. Some credit for discussion of economic duress.

Exam Question Summary

Not many candidates achieved good marks. Many fell below the pass mark. Most successfully identified the SOGA 1979 (with a significant minority suggesting SGSA 1982). The implied terms in s.14 were usually identified with an increased number showing awareness of the need to explain satisfactory quality (fewer on fitness for purpose). A small number of scripts included case law on these implied terms. A significant minority at some stage touched on acceptance of goods and the loss of the right to reject. Some even quoted SOGA sections on this issue, most simply explaining the consequences. Another issue was the compromise arrangement with some candidates realising the potential weakening of the legal rights of both parties. A surprising number of candidates did not include discussion of the limitation clauses found in the contract and whether they might be effective i.e. satisfied the various restrictions placed on exclusion clauses by law (reasonable notification, interpretation, passing the requirements of the UCTA 1977). Economic duress was touched upon by a sizeable minority of candidates and marks were gained for appropriate exposition. Some candidates did include discussion of the retention of title clause in this answer and received credit for realising the potential use of this by the supplier.

Few answers appeared to be able to apply the rules of acceptance to the scenario. This is important because of the impact of acceptance of goods (S34 and S35 Sale of Goods Act) on the remedies available to the injured party.
A good number of scripts continue to repeat the facts of the case study, a process that scores no marks.

Q2 (a) Assess whether Tally-Tow can rely on clause 18 to recover the parts of the cable-tow system still in Bennett’s possession. (10 marks)

Q2 (b) Assess whether Sidney has a valid legal claim and if so, against whom. (15 marks)

Analysis of the Question

This question was designed to test the candidate’s knowledge and application of retention of title clauses. It was also testing knowledge of third parties’ rights and in particular the Consumer Protection Act 1987.

Analysis of the Answer

For part (a) an answer should recognise the clause is a Romalpa clause. Good answers were able to link such clauses with S17 and S19 Sale of Goods Act 1979. Good answers also surmised that such clauses usually include a right of entry to premises.

The problems of reclaiming mixed goods should be highlighted (cases such as Re: Peachdart, Hendy Lennox Ltd v Graham Puttick, Armour & Carron V Thyssen or similar may be used). Exceptional answers might also recognise and explain that the actual clause is a ‘rolling’ Romalpa clause.

For part (b), answers might refer to the contractual relationship between the skier and Bennett. Answers should also investigate any third party claims against the manufacturer and the component manufacturer of the equipment.

Whilst some marks were achieved for discussion of negligence, the easier claim would be under the Consumer Protection Act 1987 (CPA). Answers may have referred to the strict liability nature of the Act and the £275 minimum claim. Liability is joint and several and extends to producers, manufacturers, importers, own-branders and suppliers. A definition of a defective product as provided in S3 of the Act would be appropriate. In terms of the exclusion clause reference could have been made to S2 (1) UCTA and/or S7 CPA, the sign being ineffective in these circumstances.

Exam Question Summary

In terms of part (a), many answers recognised Romalpa clauses but often failed to deal with how effective such clauses are when goods have been mixed and lost their identity. Many were able to identify the bailee position possessed by the buyer and the obligations to take reasonable care of the goods in the meantime. Most answers were able to quote the Romalpa case with a smaller number able to summarise the facts suitably. Fewer candidates were able to quote relevant sections from the SOGA 1979 (ss.17 & 19). With some exceptions, most answers just about achieved the pass standard.

In terms of part (b) a number of candidates did refer to the Supply of Goods and Services Act 1982 but often misquoted the relevant section. It is incorrect to state that a service must be of reasonable quality, the service must be carried out with reasonable
care and skill. Any issues of reasonable or satisfactory quality need to be confined to goods not services.

A significant number of candidates tended to see this question as a negligence based one, and produced sound coverage of the requirements of a negligence claim (duty of care, breach, consequent damage). A smaller number identified the ban on exclusions of liability for injury/death caused by negligence – quite a few candidates did not refer to the exclusion notice at all.

A minority identified the CPA 1987 as a possible claim, with even fewer showing any knowledge of the contents of the Act. Given that a significant number of marks were allotted to this theme, it is not surprising that many candidates did not pass this question.

SECTION B

Q3 (a) In the absence of an expressed provision in the contract, assess the legal rules that will determine when ownership of goods passes from the seller to the buyer. (15 marks)

Q3 (b) In terms of exceptions to the Nemo Dat rule, distinguish between a buyer in possession and estoppel (10 marks)

Analysis of the Question

Part (a) was designed to test the candidate’s knowledge of the Sale of Goods Act 1979 and the legal rules in relation to when ownership passes.

Part (b) tested knowledge of certain exceptions to the Nemo Dat rule

Analysis of the Answer

For part (a) answers needed to distinguish between specific and unascertained goods. It was also necessary to explain the five rules under S18. Part (b) of the question required an explanation of two exceptions to the Nemo Dat rule. These were buyer in possession and estoppel. Each of these should be explained especially the requirements of good faith and without notice. Strong answers could mention Romalpa clauses to demonstrate understanding of the buyer in possession exception.

Answers might refer to S21 SGA in relation to estoppel. Cases such as Eastern Distributors v Goldring or similar could support an answer.

Exam Question Summary

This was a very popular question. This was one of the best answered parts of the entire paper, with some candidates obtaining very high marks. However there were a sizable number of papers that whilst displaying an awareness of S18 and the five rules, the explanation of the rules was often patchy and lacked detail and clarity. The most obvious examples of this was Rule 3 where many candidates failed to appreciate that the purpose of the ‘weigh, measure, test’ criteria was to ascertain the price. In terms of rule 4, many answers thought it only applied to specific goods whereas it is more likely to apply to unascertained goods. Knowledge of Rule 5 was also patchy, few answers referred to the ‘unconditionally appropriated’ requirement.
In terms of part (b) it was common to find sound knowledge of the two exceptions to the Nemo Dat doctrine and marks were on the higher side when compared with other questions. A significant proportion of answers identified retention of title clauses as the most important example of sale by a buyer in possession. Some argued that hire purchase was an example – another exception to Nemo Dat, but not appropriate for a buyer in possession. Estoppel was often defined in a sound way, with examples such as Eastern Distributors (or equivalent cases) cited in support.

Q4 (a) Assess the legal restraints on the use of the following types of clauses: Liquidated damages clauses. (6 marks)

Q4 (b) Penalty clauses. (6 marks)

Q4 (c) Force majeure clauses. (9 marks)

Q4 (d) Indemnity clauses (4 marks)

Analysis of the Question

This question was designed to test the candidate’s knowledge of liquidated damages, Force majeure clauses, penalty clauses and indemnity clauses

Analysis of the Answer

An answer should provide appropriate definitions of each type of clause and assess the legal restrictions on their use. For examples, in terms of liquidated damages, a suitable definition would be a genuine pre-estimate of loss made before or at time of the contract. Answers should then provide details of the principles laid down in Dunlop V New Garage to determine the legality of such clauses and to help distinguish each type of clause. Answers also needed to discuss Force majeure clauses. A suitable definition of this type of clauses would be appropriate e.g. excluding or restricting liability for events that occur which are beyond the control of the party who has inserted the clause. An answer may refer to advantages of using such a clause (suspension rather than automatic termination of the contract, allocation of risk and can cover a wide range of circumstances). The main body of the answer should concentrate on the rules governing exclusion clauses such as whether the clause has been incorporated, whether it actually covers the event and S3 UCTA 1977.

Finally, an answer should attempt to define an indemnity clause. Such clauses need to be clear and unambiguous but are not subject to any statutory tests in a business-business transaction. The only exception is where a consumer is involved and here the UCTA 1977 subjects the clauses to a reasonableness test.

Exam Question Summary

Most candidates demonstrated a reasonably good understanding of liquidated damages, penalty clauses and force majeure. Many answers did refer to force majeure being ‘an Act of God’ clause. This is a little restrictive because the clause often covers many other situations other than Act of God.

The main weakness was a failure to develop responses in ways that ensured high marks. The basic concepts were identified, but were not developed appropriately e.g. use of the
tests created in *Dunlop v New Garage* to distinguish LDs from penalties, advantages of including force majeure clauses to avoid the rigidity of the doctrine of frustration. Given that the question asked for restraints on the use of these clauses, very few candidates spent enough time addressing this theme e.g. force majeure clauses are a form of exclusion of liability clause and therefore subject to the UCTA 1977 and the test of reasonableness (as well as the common law tests of reasonable notification and interpretation).

Another weak area was indemnity clauses, there appears to be little knowledge of this type of clause even though they are commonly used. Many answer referred to indemnity insurance which is not the same. Some candidates missed the question altogether. Candidates need to familiarise themselves with indemnity clauses (found in the vast majority of standard-from contracts) and should study S4 UCTA 1977.

**Q5 (a)** Assess the changes made to UK competition law by the Enterprise Act 2002  
(10 marks)

**Q5 (b)** Outline the main forms of registerable intellectual property rights  
(15 marks)

**Analysis of the Question**

**Part (a)** of the question was designed to test the candidate’s knowledge of Enterprise Act 2002 and **part (b)** was designed to test the candidate’s knowledge of intellectual property rights.

**Analysis of the Answer**

For **part (a)**, an answer needed to demonstrate awareness of how the Act changed UK competition law. The changes included the right of the OFT to carry our market investigations, the criminalising of cartels, leniency arrangements, disqualification of directors, super-complaints etc. Strong answers might be able to quote case law relevant to these provisions e.g. *British Airways / Virgin* cartel or the *Marine hose* case or other suitable case references.

For **part (b)**, the three main registerable intellectual property rights (patents, trademarks and registered design) should be highlighted. In terms of patents, the criteria for registration should be explained and the duration of the right once granted. In terms of trademarks, a definition would be expected (any emblem, sign, logo or other sign capable of being represented graphically and capable of distinguishing between the goods or services of one undertaking from those of another undertaking). Examples might include words including slogans, designs, letters, numerals, shape of goods, packaging, sounds, smells or colours. The answer should refer to duration (unlimited but renewable every 10 years and must be used). In terms of registered design, a definition should be provided in terms of shape, pattern or ornament (decoration) applied to an article. Answers should also include the duration of the right.
Exam Question Summary

This was not a popular question. In terms of part (a), only a small number of candidates clearly realised the needs of this question and showed knowledge of the actual reforms introduced by the Enterprise Act 2002. Most answers discussed the main anti-competitive practices (cartels & abuse of a dominant position) and sometimes gave an example of recent infringements but this did not really address the question. Very few were able to achieve a pass mark for this part of the question. Knowledge of competition law including many recent case examples remains weak.

Part (b) of the question was better answered, with most candidates being able to identify patents, trademarks and to a lesser extent registered designs. Some answers blurred into such issues as copyright which does not require registration. Many answers showed a sound ability to identify relevant legislation, provide definitions and examples, and key requirements for successful registration. Some included case law and/or good examples of patents and trade mark claims/disputes. The differing periods of protection were often correctly identified. As a result, some high marks were gained for this aspect of the question.

Q6 Consent is a vital ingredient required for a contract. Assess those factors that may vitiate (invalidate) consent and lead to a void or voidable contract. (25 marks)

Analysis of the Question

This question was designed to test the candidate’s knowledge of vitiating factors and to distinguish between void and voidable contracts.

Analysis of the Answer

There are four main factors that vitiate consent: Mistake, misrepresentation, duress and undue influence. Mistake renders a contract void. The different grounds for mistake should be identified, with possible supporting case law. These grounds may cover mistakes in term of the identity and existence of the subject-matter, mistake concerning the identity of the other party and mistakes in relation to signing documents. Good answers will briefly discuss unilateral, mutual and common mistake.

Another vitiating factor would be misrepresentation making a contract voidable. The different types of misrepresentation should be explained (innocent, negligent and fraudulent) together with possible remedies. Strong answers will discuss the requirement that the injured party must have been induced and provide some case law, e.g. With v O’Flanagan, Dimmock V Hallet, Bisset V Wilkinson, Esso Petroleum V Marsden, JEB Fasteners V Bloom or others. (9 marks)

A third vitiating factor is duress which also makes a contract voidable. Economic duress should be explained in terms of illegitimate commercial pressure / coercion. Cases such as Atlas Express v Kafco, Universal Tankships or others should be use to support an answer. Finally there is also undue influence which normally occurs where one of the contracting parties holds a position of influence over the other. It particularly applies where there is a confidential or fiduciary relationship between the parties. Such relationships include parent / child. Solicitor / client and trustee / beneficiary.
Exam Question Summary

Many candidates were able to obtain high marks for this question by showing a good overall knowledge of the main themes i.e. economic duress, misrepresentation, fundamental mistake & undue influence. The more successful answers included accurate definitions of these vitiating factors with suitable development and use of case law in support. Where this was done, some candidates obtained high marks. A small minority of candidates included all the essentials of contract, including ones where consent was not an issue e.g. illegality, failure of consideration, intention to enter legal relations. It was surprising how many answers referred to legal intention when it is not part of the Level 6 syllabus. Overall, good answers were produced.

APPENDIX:

Syllabus matrix indicating the learning objectives of the syllabus unit content that each question is testing
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