

**MARK SCHEME for the October/November 2010 question paper
for the guidance of teachers**

9084 LAW

9084/03

Paper 3, maximum raw mark 75

This mark scheme is published as an aid to teachers and candidates, to indicate the requirements of the examination. It shows the basis on which Examiners were instructed to award marks. It does not indicate the details of the discussions that took place at an Examiners' meeting before marking began, which would have considered the acceptability of alternative answers.

Mark schemes must be read in conjunction with the question papers and the report on the examination.

- CIE will not enter into discussions or correspondence in connection with these mark schemes.

CIE is publishing the mark schemes for the October/November 2010 question papers for most IGCSE, GCE Advanced Level and Advanced Subsidiary Level syllabuses and some Ordinary Level syllabuses.

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Assessment Objectives

Candidates are expected to demonstrate:

Knowledge and Understanding

- recall, select, use and develop knowledge and understanding of legal principles and rules by means of example and citation

Analysis, Evaluation and Application

- analyse and evaluate legal materials, situations and issues and accurately apply appropriate principles and rules

Communication and Presentation

- use appropriate legal terminology to present logical and coherent argument and to communicate relevant material in a clear and concise manner.

Specification Grid

The relationship between the Assessment Objectives and this individual component is detailed below. The objectives are weighted to give an indication of their relative importance, rather than to provide a precise statement of the percentage mark allocation to particular assessment objectives.

Assessment Objective	Paper 1	Paper 2	Paper 3	Paper 4	Advanced Level
Knowledge/ Understanding	50	50	50	50	50
Analysis/Evaluation/ Application	40	40	40	40	40
Communication/ Presentation	10	10	10	10	10

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Mark Bands

The mark bands and descriptors applicable to all questions on the paper are as follows. Maximum mark allocations are indicated in the table at the foot of the page.

Indicative content for each of the questions follows overleaf.

Band 1:

The answer contains no relevant material.

Band 2:

The candidate introduces fragments of information or unexplained examples from which no coherent explanation or analysis can emerge

OR

The candidate attempts to introduce an explanation and/or analysis but it is so fundamentally undermined by error and confusion that it remains substantially incoherent.

Band 3:

The candidate begins to indicate some capacity for explanation and analysis by introducing some of the issues, but explanations are limited and superficial

OR

The candidate adopts an approach in which there is concentration on explanation in terms of facts presented rather than through the development and explanation of legal principles and rules

OR

The candidate attempts to introduce material across the range of potential content, but it is weak or confused so that no real explanation or conclusion emerges.

Band 4:

Where there is more than one issue, the candidate demonstrates a clear understanding of one of the main issues of the question, giving explanations and using illustrations so that a full and detailed picture is presented of this issue

OR

The candidate presents a more limited explanation of all parts of the answer, but there is some lack of detail or superficiality in respect of either or both so that the answer is not fully rounded.

Band 5:

The candidate presents a detailed explanation and discussion of all areas of relevant law and, while there may be some minor inaccuracies and/or imbalance, a coherent explanation emerges.

Maximum Mark Allocations:

Question	1	2	3	4	5	6
Band 1	0	0	0	0	0	0
Band 2	6	6	6	6	6	6
Band 3	12	12	12	12	12	12
Band 4	19	19	19	19	19	19
Band 5	25	25	25	25	25	25

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Section A

- 1 'If coherence is to be restored to this area of our law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the grounds of common mistake where that contract is valid and enforceable on ordinary principles of contract law.'
Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd [2002]

Critically analyse the effect of this decision on the validity of contracts induced by common, identical or shared mistake.

Candidates should preface any response to this question by stating the general premise of English Law: mistakes do not invalidate contracts. They should then move on to analyse the application of the doctrine of common mistake and what amounts to a sufficiently fundamental mistake – one that renders performance radically different from what it was supposed to be by the parties involved.

Common mistake must be explained and illustrated and the circumstances under which a fundamental mistake as to the existence (*McRae v Commonwealth Disposals Commission; Couturier v Hastie*) or as to title to the subject matter (*Cooper v Phibbs*) will render said contracts void at common law. Candidates should also explain that Great Peace Shipping was a landmark case because, up until the time of the decision, in this case in 2002, equity provided separate rules which allowed relief in the form of rescission on terms when mistakes as to the quality of the subject matter had been made (*Solle v Butcher; Bell v Lever Bros*).

In the Great Peace Shipping case, the Court of Appeal ruled that there were no separate rules in equity on common mistake and, whilst it recognised that equity had the advantage of flexibility, it recommended that Parliament should legislate on the matter. Until Parliament does, it seems that equitable relief for common mistake is a thing of the past and the flexibility that was available is no more.

Candidates are expected to analyse critically the way in which the law deals with these situations to reach band 4.

- 2 **Explain the difference between express and implied terms of a contract and critically evaluate the tests employed by the courts to decide whether a terms should be implied.**

In order to explain differences, express terms and implied terms need to be defined. Express terms are those terms specifically identified and agreed upon when the contract is made, whether orally or in writing. Candidates should demonstrate recognition of the fact that once the contract gets under way it frequently becomes apparent that it has been made on the understanding that other terms apply too, even though they were neither mentioned orally nor in writing when the contract was made – implied terms – and that frequently leads to problems when breach of contract is alleged.

Candidates must explore the terms that courts may imply in fact or in law. Those implied in fact are those which it is assumed that both parties would have intended to include if they had thought about it and may have omitted by mistake or because they were considered to be so obvious that it did not need to be spelt out. Responses should then go on to assess critically the value of the overlapping officious bystander and business efficacy tests applied by courts to determine whether alleged terms should be implied in the contract.

The officious bystander test was laid down in *Shirlaw v Southern Foundries* and relies on the court imagining parties making their bargain and an officious bystander asking whether a term is part of the contract and the response from both parties being 'Of course it is!'

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The business efficacy test is sometimes known as the doctrine of *The Moorcock* and relies on the courts deciding whether a contract makes sound business sense if the alleged term wasn't part of the contract (*Alpha Trading Ltd v Dunshaw Patten Ltd*).

The tests are subjective and have no scientific basis; is this satisfactory or fair? Because of this subjectivity, attempts to imply terms in fact commonly fail and in *Equitable Life Assurance Society v Hyman*, the House of Lords said that it would only imply such terms where it was strictly necessary.

Candidates are expected to evaluate critically the way in which the law deals with these situations to reach band 4.

3 The bad bargain rule and the speculative damages rule are the two main restrictions on the choice that a claimant may exercise when deciding whether to base a claim for damages on loss of expectation or on reliance.

Explain what you understand by the concepts of expectation loss and reliance loss. Analyse the rules identified in the statement above and assess the extent to which the assertion made is true.

Candidates must introduce their response with an explanation that loss of expectation and reliance loss are the two main ways in which losses arising from breach of contract are calculated by the courts.

The loss of expectation approach aims to put claimants in the position they would have been in had the contract been performed, so if the parties would have suspected a certain result from the contract being performed (e.g. a profit), the damages would compensate for the loss of that expectation.

The reliance loss approach seeks to put the claimant in the position he was in before the contract was made, thus compensating for wasted expenditure and any other loss incurred because a contract has been breached.

The choice of approach rests with the claimant, but he is unable to claim for both expectation and reliance losses (*Anglia Television v Reed*) and there are restrictions on that choice: the bad bargain rule and the speculative damages rule.

The bad bargain rule dictates that if a claimant would have made a loss from the contract, he will be entitled to nominal damages only and will not be entitled to claim expenses on the basis of reliance loss as this would effectively put him in a better position as a result of the breach than if the contract had been performed (*C and P Haulage v Middleton*).

The speculative damages rule limits the use of the reliance loss approach to situations where it is virtually impossible to calculate what profit would have been made by the claimant had the contract been performed. In practice, the courts seem reluctant to conclude that damages are too speculative and do base awards on a certain amount of guesswork (*Sapwell v Bass; McRae v Commonwealth Disposals Commission*).

Candidates are expected to assess whether the rules really do limit choice to reach band 4.

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Section B

4 Consider the extent of Speedy Cleaners' potential liability for the damage to Bethany's clothes.

The principal focus anticipated is that of the communication and validity of contract terms.

Terms only bind parties if they have been made aware of their existence either before or at the time that the contract is made. Terms should be either actually communicated or constructively communicated by this time.

Was the ticket a sufficient means to communicate the existence of terms (Thomson v LMS Rly; Chapelton v Barry UDC)? Did the assistant misrepresent the terms by a half-truth (Curtis v Chemical Cleaning & Dying Co)? Even if adequately communicated, was the term excluding all liability valid, given Unfair Contract Terms Act 1977, S1?

If negligence occurred and the exemption was considered to have been properly and adequately communicated, then liability depends on whether it is considered reasonable for exclusion to be permitted. If not, then damages (mitigation of loss and measure) should be discussed.

Issues must be fully discussed and clear, compelling conclusions drawn.

5 With reference to decided cases, consider Mark's potential contractual liability to Tom and to the garage.

Candidates are expected to give an **outline** of the essentials of a valid contract, with emphasis expected on offers, invitations to treat, revocation and acceptance.

Binding contracts require definite offer and corresponding, unconditional acceptance. There was an apparent firm offer to sell made to Tom which he purported to accept by post. Credit should be given for a discussion of the posting rule and the conditions on which it can apply. If there has been an offer and corresponding unconditional acceptance, a contract has been made. However, Tom knew that the offer had been withdrawn prior to sending his letter of acceptance and the validity of the communication of revocation via third parties needs to be analysed and discussed (*Dickinson v Dodds*).

Candidates must consider possible remedies available to either Tom or to the garage depending on line of argument and conclusions.

The issues must be discussed fully and clear, compelling conclusions must be drawn.

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6 Critically analyse Barbara's legal liability to pay Janice the money offered for the work done by Janice.

Candidate responses should be focused on principles associated with the formation of a contract in general and the intention to create legal relations and the doctrine of consideration in particular.

Candidates should explore the issue of whether or not intention is likely to be presumed in these circumstances. It would appear to be an arrangement between friends which would not ordinarily attract the presumption of intention that the arrangement be legally binding. On the presumption that intention is found, candidates should then move on.

Consideration must be defined (*Currie v Misa* or suitable paraphrase) and explained in order to set the response in context. Candidates are expected to outline the rules of consideration, but should then focus on the rule which says that consideration must not be in the past relative to the promise which it is to support. If Barbara fails to pay Janice the money promised, Janice will have to prove that she gave her valuable consideration for her promise to pay her. The consideration that she gave was the services performed for Barbara while she was on holiday, but these were clearly done in the past relative to the promise to pay. On that basis, any claim would fail (*Re McArdle*).

However, there are exceptions to this rule of consideration. One such exception, exemplified by the cases of *Lampleigh v Braithwaite* and *Re Casey's Patents*, suggests that if services are rendered in circumstances that would give rise to the belief that they will be paid for, a later promise to pay merely fixes the amount and there is no need for further consideration to make that later promise binding.

Candidates should debate this issue and draw a clear, compelling and fully-reasoned conclusion supported by case law references – failure to do so will impact severely on marks awarded, which will be restricted to marks below band 4. Any candidate response founded solely on intention will be restricted to a maximum mark within band 3.