Reflection and Consolidation IV

COMMERCIAL LAW

Multiple Choice Questions

1. Which ONE of the following is a correct statement of law?
An agent is a person who acts on behalf of another:
   A. To protect a principal’s goods or services
   B. To promote the sales of his principal
   C. In entering into contracts
   D. To improve a businesses’ performance

ANSWER: C

2. A contract for the sale of goods is one where:
   A. A seller gives goods to another by way of a contract, for safe keeping
   B. Goods are passed to another to use in his business
   C. A seller transfers or agrees to transfer, the property in goods to the buyer for a money consideration called the price
   D. Goods are loaned under a contract of hire to a customer

ANSWER: C

3. Which ONE of the following is correct?
As a general rule, in a contract for the sale of goods, the goods must correspond with:
   A. The expectations of the buyer
   B. The description given by the seller or given on behalf of the seller
   C. That recognized in the trade
   D. That understood to be the description from a course of dealings with the seller

ANSWER: B

4. In a contract for the sale of goods, the goods must be:
   A. Of a satisfactory size and shape
   B. Satisfactory to the buyer
   C. Satisfactory to all involved in its sale
   D. Of satisfactory quality

ANSWER: D

5. Which ONE of the following is not correct.
A regulated consumer credit agreement is one where:

A. A bank provides a loan or overdraft
B. A consumer purchases goods on hire purchase
C. A creditor provides a personal loan to a debtor
D. A creditor provides a business with credit

ANSWER: C

Typical Exam Questions

6. Graham, a dealer, collects and sells rare books. Whilst visiting a local town he notices that Peter has three rare editions for sale in his second-hand bookshop. He negotiates and agrees a price of £500 for each of the rare editions. On the assumption that he will have the books in his possession, he negotiates to sell the first book to Eric for £800. The second book is to be sold to Helen for £600, together with another rare book that Helen is to sell to Graham for £400 (as Graham has a buyer for this book in the sum of £600). The third book, which is the only surviving copy, is to be sold to Richard for the sum of £1000. Graham has now returned to collect and pay for the three books from Peter as agreed. He is shocked when Peter informs him that the sale is off because he has received an offer from Bertram in the sum of £2000 for the set of three books and has agreed to sell them to him.

Explain what remedies, if any, Graham has against Peter.

ANSWER:
This question required candidates to explain whether there was a binding contract between Graham and Peter. It follows therefore that the pre-requisites to a valid contract have to be identified, explained and applied to resolve the case study. If there is a binding contract that has been breached, candidates were required to advise how the breach would be remedied. There is the presence of an offer (a willingness to be bound on specific terms), acceptance of the offer stated without any qualification, consideration (something of economic value) and intention to be legally bound. Given that Graham is a book dealer there is a presumption of legal intention as it is a commercial or business agreement.

The pre-requisites to a valid contract are in place and it is evident that Peter has breached the contract. In reliance on the contract Graham has agreed to sell one book to Eric and another to Helen by way of a part-exchange. In both situations Graham would be looking to seek a remedy for breach because he in turn is now in breach to both Eric and Helen.

The measure of damages Graham would be able to claim may be subject to the ‘remoteness of damage’ test expounded in Hadley v Baxendale and confirmed in Victoria Laundry v Newman Industries.

The application of the ‘remoteness’ concept may mean that Peter could argue that he did not know Graham had agreed to sell the books on. However it is more likely that the assumption could be made that as a dealer he would be selling them on at a profit in the
ordinary course of business. Applying the test of reasonable foreseeability Peter may be liable for the loss of £300 on the transaction with Eric and also the net loss of £300 on the transaction with Helen.

The remaining book is the only surviving copy and damages would not be an appropriate remedy, as the book cannot be obtained elsewhere no matter what amount of money is awarded in damages. An equitable and discretionary remedy is that of specific performance. This requires the person in breach to complete the contract as agreed and it is awarded in cases where rare or unique items, as in this situation, are involved.

The problem is more complicated however, as Peter now has a valid contract with Bertram to sell the three books for £2,000. If Bertram buys in good faith, which is presumed unless otherwise shown, then Bertram acquires a good title. This would of course give Peter the sale proceeds, which amount to £500 more than would have been received from Graham, to pay damages to Graham who would, in his role as a dealer, be able to claim the £500. This complicates the issue even further in that Graham may have difficulty in obtaining an appropriate remedy for the ‘only surviving copy’ if Bertram has good title.

7. Amy and Ben have recently moved into a new house together and have purchased a number of items with which they are not satisfied.

(a) Explain to Amy and Ben why the law implies terms into certain contracts for the sale of goods.

**ANSWER:**

In order to protect consumer when they purchase goods from a seller who is acting in the course of a business, certain terms are automatically put into the contract of sale – implied terms – to give rights to the consumer enforceable through the contract. These key terms include:

- Where goods are sold by description there is an implied *condition* that the goods will correspond with the description (S.13).

- A condition that goods purchased are of a satisfactory quality and fitness for the purpose for which goods of that type are ordinarily used for (S.14).

(b) Advise Amy and Ben on the legal position in the following situations. They purchase:

(i) A duck down duvet from a department store but have now discovered Ben is allergic to the duvet.

(ii) A desk from a second-hand dealer, which was being sold cheaply because, as the seller pointed out at the time of the sale, one of the drawers was broken. They have now discovered that the desk has woodworm.
(iii) A dishwasher bought from their next door neighbour. This breaks down the first time it is used.
(iv) An electric frying pan from their local electric shop, which burns out when Amy uses it to heat up hair removal wax.

ANSWER:

(i) Purchase of the duvet:

- Under the Sale of Goods Act 1979 (the Act) where goods are sold by the seller who sells in the course of a business, the Act will apply. Amy and Ben’s purchase of the duvet from a department store would constitute a sale of goods in the course of a business and therefore come within the Act.

- S13 of the Act implies a condition as to the description of goods. Where goods are sold by description there is an implied condition that the goods will correspond with the description (GRANT v AUSTRALIAN KNITTING MILLS (1936)). A sale of the duvet packaged would constitute a sale by description which means that the duvet must correspond with the description attached. It would appear that it does – being described as ‘duck down’ - with the problem arising from Ben’s unusual sensitivity to the product. There would be no redress under the Act for Amy and Ben.

(ii) Purchase of a second-hand desk:

- Satisfactory quality and fitness for purpose is implied under S.14. As to satisfactory quality, where goods are sold in the course of a business there is an implied term that the goods supplied under the contract are of satisfactory quality. Goods are of a satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account any description, the price (if relevant) and all other relevant circumstances. This definition makes it clear that defects which would render new goods unsatisfactory will not necessarily be unacceptable if they occur in second hand goods, it is a matter of degree. For example in SHINE v GENERAL GUARANTEE FINANCE (1988) it was held that a 20-month-old second-hand car was not of merchantable quality at the time of sale when the buyer later discovered that 8 months earlier it had been written off by insurers, since it had been totally submerged in water for over 24 hours. The implied term does not extend to any matter making the goods unsatisfactory which is specifically drawn to the buyer’s attention before the contract is made, or where the buyer examines the goods and the examination ought to reveal the matter. Goods are of merchantable quality if they were as fit for the purpose for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances.

- Applying this to the desk, as the defective drawer was brought to Amy and Ben’s attention with a price reduction: this would not mean the goods were of merchantable quality in this
respect. However, the discovery of woodworm could render the goods not of merchantable quality in that the desk must be fit for the purpose for which a desk is commonly used and woodworm would be likely to deny this type of common use. This would mean that, in being a breach of condition, it would allow Amy and Ben to end the contract of sale, return the goods and get their money back.

(iii) Purchase of dishwasher:
- In being bought from a neighbour this is likely to fall outside of the Act in not being a sale in the course of a business. There would be no remedy under the Act: Amy and Ben would have to sue under common law contract and seek to show that the goods sold breached the terms of their contract with the neighbour.

(iv) Purchase of electric frying pan:
- Being purchased from a shop, this would be a sale in the course of a business and would come under the Act.
- Section 14 states that goods must be fit for the purpose for which goods of that type are commonly bought. Using a frying pan to heat up wax would not be seen as being a common purpose for such goods and would therefore not allow Amy and Ben to claim under the Act.

8. (a) Explain what consumers must determine before deciding whether they have a statutory claim for breach of the implied terms under Sale of Goods Act 1979, as amended, or the Supply of Goods and Services Act 1982.
(b) Explain what terms are implied into a contract regulated by the Supply of Goods and Services Act 1982, and where services only are involved and there is no formal agreement between the supplier and consumer.

ANSWER:
(a) This question required candidates to explain the difference between the applicability of two consumer pieces of legislation in part (a) and in part (b) an explanation of the implied terms under the Supply of Goods and Services Act 1982.

The determining feature in deciding whether to maintain an action under either of the statutes mentioned in the question is whether the contract involves a sale of goods or the supply of goods or services.

The Sale of Goods Act 1979, as amended, provides under s.2 that a sale of goods is defined as being ‘a contract by which the seller transfers, or agrees to transfer the property in goods to a buyer for a money consideration, called the price’. It is essential therefore that the contract involves ‘goods’ which are defined as being ‘all personal chattels other than things in action and money’. 
The Supply of Goods and Services Act 1982 applies to certain contracts that do not fall within the definition of a sale of goods, even though there might be a transfer of ownership. If the main purpose is one of skilled labour with an ancillary one of ownership being transferred, the 1982 Act applies. In Robinson v Graves a contract to paint a portrait would now be covered as the contract was essentially for work and materials. However in Marcel (Furriers) Ltd v Tapper the supply of a mink jacket, made to the customers specification, was held to be a contract of sale as the materials were not considered ancillary to the work performed because of their high value. 

(b) The Supply of Goods and Services Act 1982 broadly reiterates the terms implied in the Sale of Goods Act 1979. Where goods are supplied the implied terms of title, description, satisfactory, quality and fitness for purpose (ss.2-5) cannot be excluded where the supply is in the course of a business to a consumer. Where the contract is wholly or substantially for the provision of services, there are implied terms that the supplier will carry out the service with reasonable care and skill, within a reasonable time and, in the absence of any contrary agreement, at a reasonable cost (ss. 13-15) but may be excluded if satisfying the test of reasonableness provided under Unfair Contract Terms Act 1977.

PAST EXAMINER’S COMMENTS
This question was poorly answered mainly because candidates did not either read the question properly or were unable to include the appropriate responses in their answer. The first part of the question did not ask for the implied conditions in a sale of goods contract. The question asked candidates to determine whether a party affected by a breach of contract would sue for breach of the Sale of Goods Act 1979 or breach of the Supply of Goods and Services Act 1982. Candidates should have explained the types of contracts that are covered by each Act. Part (b) on the other hand was competently answered.

Although many candidates were able to successfully identify the general areas of remedies for breach of contract within the question, a number did not recognise that there was a contract in the first place because it was verbal only. A number also thought that the three books sold to Bertram could be recovered from him, which is not the legal position as he bought in good faith.

9. (a) Where the buyer is in breach of contract to the seller, the seller may exercise statutory rights against the goods, subject to certain conditions. Explain what those rights are.
(b) The law provides that if a person does not have the title to the goods they cannot pass good title (the nemo dat quod habet rule). There are, however, a number of exceptions to this rule.

Explain how the following statutory exceptions apply in practice:

(i) **Estoppel**

(ii) **Common law or statutory power of sale**

(iii) **Sale of a motor vehicle subject to hire purchase**

ANSWER:

(a) This two-part sale of goods question required candidates to explain the rights an unpaid seller has against the goods in part (a) and an explanation of three exceptions to the nemo dat quod non habet rule in part (b).

A seller will be deemed unpaid where the goods are sold without a stipulation as to credit, or if sold on credit and the credit period has expired, or the buyer becomes insolvent or payment has been made by cheque which has subsequently been dishonoured.

The unpaid seller can exercise the right of a lien (a hold or retention of the goods) until payment is tendered. The right, however, is forfeited where the buyer or his agent lawfully takes possession, or the whole of the price is tendered, or the seller waives the right to a lien, or the goods are in the possession of a carrier.

Stoppage in transit is similar to a lien except that the buyer must be insolvent and the goods are stopped en route whilst in the possession of an independent carrier. The right to stoppage in transit terminates where the buyer or his agent obtains lawful possession, or the carrier acknowledges to the buyer that the goods are now held on his behalf, or if the carrier wrongfully refuses to deliver the goods to the buyer.

The right of resale may apply automatically if the contract so provides. Where not applicable automatically, the right will apply where the unpaid seller gives notice of the intention to sell if payment is not made within a reasonable time, or if the goods are perishable.

(b)

(i) **Estoppel**

If the true owner, by their conduct (i.e. through words or actions), leads the buyer to believe that the person who makes the sale owns the goods, the true owner is estopped from denying the seller’s right to sell Henderson v Williams

(ii) **Common law or statutory power of sale**

By court order where goods are perishable, or there is a falling market and at common law the power of sale of a pledge exists. Statutory powers of sale exist in favour of a pawnbroker, Baillie, an innkeeper or a sheriff.

(iii) **Sale of a motor vehicle subject to hire purchase**

An innocent private purchaser who buys a motor vehicle which is subject to a hire purchase agreement, or a conditional sale agreement, obtains a better title than the
seller, leaving the true owner to sue the unauthorised seller for breach of contract or conversion.

PAST EXAMINER’S COMMENTS
Part (a) of the question was handled extremely well by the majority of candidates who attempted this question. However part (b) was poorly answered in the main, as many candidates clearly did not understand the concept of the three exceptions referred to in the question.

10. (a) Explain the ways in which an agency agreement can be formed, using illustrative examples to support your answer.
(b) Explain in detail the ways in which an agency agreement not governed by the Commercial Agents Regulations 1993 can be terminated.

ANSWER:
(a) This question required candidates to explain the ways in which an agency agreement can be formed in part (a) and the restrictions that may or may not apply on termination of such an agreement.

An agency agreement is generally just like any contract and can be formed:
- verbally, or in writing (e.g. the appointment of an auctioneer);
- it can also be formally established by deed (e.g. power of attorney vested in the hands of a solicitor or relative where a person lives abroad);
- it can also be implied and inferred through the relationship between the Principal and his Agent (e.g. the bank is the agent of its customer for collecting cheques).

The equitable doctrine of estoppel may also indicate the presence of an agency agreement where the conduct of the Principal suggests to a third party that another person (the Agent) has the authority to act for them. This may arise where words or conduct stop the Principal denying the existence of the Agent to the third party. Ratification may also validate the authority of an Agent to bind a Principal in contract. This has a retrospective effect providing that the Principal existed and the Agent must have indicated he was acting on behalf of the Principal. The Agent must however have had some authority to act even though it may have been exceeded and the actions must have been ratified within a reasonable period of time.

(b) The agency agreement, not regulated by The Commercial Agents Regulations 1993, can be terminated by completion of the agreement or through expiration of the agreed time. It can also be terminated by agreement between the parties, by revocation of the agreement by the Principal who should notify the third party of revocation, or repudiation by the Agent. In either of the latter two cases damages may arise for breach. Furthermore, the agreement may be terminated through operation of the law because of:
• death of the Principal or the Agent
• mental incapacity of the parties
• bankruptcy of the Principal and of the Agent if in the latter case the Agent has to use their own money
• the agreement being frustrated (e.g. destruction of the agency property or the agency becomes illegal).

PAST EXAMINER’S COMMENTS
Very popular question and generally candidates scored high marks on this question. There were however, a few candidates who answered part (b) with references to the Commercial Agents Regulations 1993 that the question specifically excluded.

11. (a) There has been considerable concern expressed by the music industry about the downloading from the Internet of recording artists’ copyrighted material. Explain what is meant by ‘copyright’ in the context of intellectual property, with particular reference to how long copyright exists depending upon the ‘property’ involved.

ANSWER: This question required candidates to explain copyright, the remedies available where copyright is infringed and any possible defences to any claim for infringement.
Copyright involves the exclusive right to use one’s own work and by implication the right to stop another from exploiting the skill and labour expended in the production of that work. The Copyright, Designs and Patents Act 1988 provides that the duration of copyright exists until the expiration of a certain period, depending upon the nature of the material. The introduction of the Duration of Copyright and Rights in Performance Regulations 1995 made the following changes; in respect of literary, dramatic, musical or artistic works the period is seventy years from the end of the calendar year the author died, or if computer-generated, when created. In respect of film the period is seventy years from the end of the last to die of the principal director, the authors of the screenplay and dialogue, and the composer of the music created specifically for the film and similarly for broadcast or cable programmes, or sound recording, but fifty years from the end of the year of broadcast or publication. For typographical arrangements of a published edition the period is twenty-five years.

(b) (i) What remedies are available for the owner of copyrighted material if his rights are infringed?
(ii) What defences, if any, are available to a defendant in such an action?
ANSWER:

(i) The remedies available for infringement include damages, being the amount required to compensate for actual harm suffered (e.g. loss of reputation). Alternatively an account of profits can be ordered in lieu of damages that are assessed on the sum of the profit made from the infringement of the copyright material. Further remedies include an injunction which amounts to an interim (temporary) order until such time as a permanent order can be obtained to prevent further infringement. A delivery-up order can also be obtained where the offending goods can be seized and destroyed following the issue of a search order (replacing an Anton Piller order).

(ii) There are a number of defences that can be raised such as:
- fair dealing, which would entail research or private study
- for the purpose of criticism or review
- reporting of current events
- use by licence or short extracts
- use by educational establishments and librarians
- use for the purpose of judicial or parliamentary proceedings.

PAST EXAMINER’S COMMENTS
A reasonably popular question that most of the candidates who attempted it completed successfully. Any mistakes made were in relation to the period of time that copyright existed in relation to the material covered.

12. (a) Explain what is meant by the expression ‘extortionate credit bargain’ and what action, if any, can be taken by the courts in respect of such a bargain.

ANSWER:
This question required candidates to consider the provisions of the Consumer Credit Act 1974 as to ‘extortionate credit bargains’ in part (a) and ‘protected goods’ in part (b). The standard limit of £25,000 for transactions covered under legislation does not apply where either the interest rate is prohibitive or the period for repayment of capital and interest is relatively short.

If the court is satisfied that the agreement is ‘extortionate,’ they can order the agreement be re-opened and make an appropriate order governing its terms. This may arise following an application by the debtor or in response as a defence to a claim made by the creditor. Consideration would however be given to the prevailing interest rates at the time, the age and experience of the debtor, the risk involved and the degree of pressure brought upon the debtor Ketley v Scott

The above principles were highlighted in the recent case of London North Securities v Meadows where a £5,750 loan had spiralled to a debt of £384,000, the interest rate being
34.9%. The sum was a significant amount because interest was compounded on arrears and there was a sum of £40,000 for legal costs.

(b) Explain the term ‘protected goods’, as defined in the Consumer Credit Act 1974 (as amended). What action must a creditor follow if they wish to repossess such goods? What are the consequences of unlawful repossession?

ANSWER:
‘Protected goods’ are defined as being where one-third of the total price for the goods has been paid, then the goods can only be re-possessed by way of a court order. In addition the creditor should have previously served a default notice upon the debtor, specifying the default alleged and the action to be taken to remedy the fault.
Where ‘protected goods’ are wrongly re-possessed, the effect is that the agreement is terminated and the debtor receives back any payments made Capital Finance v Bray. Whether ‘protected’ or not the creditor can only enter premises with a court order.

PAST EXAMINER’S COMMENTS
Candidates who attempted this question were able to demonstrate a sound understanding of the principles involved in both parts and there were no major issues that need to be highlighted.