

Question 1

On page 9 of the casebook, a paper by Professor Brian Coote is reproduced. In it, he refers to the 'secret paradox'. What does he mean by this expression and how does he resolve it? Do not use quotes; the answer must be in your own words. (7 lines)

The paradox centres on what constitutes consideration for an executory bilateral contract. Consideration might lie in the promises made before formation, but without a contract, it is said that these promises, being merely words, have no obligations attached to them. However, consideration cannot lie in the obligations imposed on the parties after formation either, as consideration is a prerequisite to that formation. Coote argues that promises are more than words, and they make you assume a level of obligation. The exchange of assumptions of legal contractual obligation provides for the consideration.

Question 2

It is said that contract law takes an objective approach. What does this mean and provide an example of this approach? (4 lines)

It means that words and actions are to be interpreted from the perspective of a reasonable person in the position of the person to whom they are addressed. An example is the test for whether there is an offer; it examines whether a reasonable person in the position of the offeree would construe it as an offer.

Question 3

The following question is asked on page 24 of the casebook: A Ltd agrees to provide cleaning services to B Ltd for three years. The contract contains a provision to the effect that either party may terminate the contract by giving the other three months' notice in writing. C Ltd offers to provide the services for a lower price than A Ltd is charging. Does a requirement of good faith apply to the termination right? Will A Ltd be successful if it seeks an injunction (order) to prevent B Ltd terminating the contract? (20 lines)

Good faith, according to Carter and Peden in C&H s1.27, is a concept inherent in the law of contracts. If you subscribe to their view, that good faith is a concept inherent in the law of contracts, there is no need to find it as an implied term in the contract. However, even if the courts disagree and wish to find it as an implied term, the article notes that the effect of the decisions of *Renard* and *Hungry Jack's* is to place all termination clauses under good faith. Now, it is generally accepted, as noted in the article, that good faith entails honesty, from which, the authors claim, comes any element of reasonableness. You are only required to act reasonably to satisfy the requirements of good faith, only if it is a requirement of honest conduct. Hence, when B tries to terminate the contract with A, by giving adequate notice, B acts honestly and in accordance with the agreement, and satisfies the requirement of good faith.

It does not appear that A will be successful if it seeks an injunction against B, because there is nothing unfair or unjust about the exercise of B's termination rights. Presumably, when A and B forged the contract, it had been in their contemplation when they created such a clause, and there is a reasonable expectation that such a clause would be used for such a purpose; B has acted in the spirit of the contract, according to the contract, and in an honest manner.

Question 4

A contract requires the parties to reach an agreement which is made for valuable consideration. It is also said that the parties must intend to contract. One way of determining whether the parties have reached an agreement is by using the tools of offer and acceptance. On page 32 of the casebook, an offer is described as 'the indication by one person to another of his or her willingness to enter into a contract with that other on certain terms'. On page 172 of the casebook (para 4.1), it is said that offer, acceptance and consideration alone are not sufficient, there must also be an intention to contract. Do you think this statement is correct, in particular, do you think there is a difference between the intention required to make an offer (as defined in the law of contract) and the requirement of an intention to contract. (Hint: have a look at the judgements in Carlill's case at pages 35-40 of the casebook and see if you think the court there treats this issue as involving two distinct intentions). (15 lines)

The intention required to make an offer appears to differ from the requirement of an intention to contract. By examining the judgements in Carlill's case, it is possible to see that an intention to contract is determined (objectively) from the offer document itself and the acts of the offeror, whereas primarily the intention to make an offer is evidenced by the document itself. However, they are closely related; logically, if one intends to contract, one must also intend to make an offer to create that contract, and if one intends to make a contract, one must have a contract in contemplation – but they are different things. For example, as the existence of an offer is determined by a reasonable person in the position of the offeree, Lindley LJ notes that the words clearly form a promise, and Bowen LJ notes that the words had to have an effect in creating an offer. On the other hand, once they used the reasonable person to look at offer objectively, they resort to analysing such things as actions (the deposit of £1000) and the consideration, which if it exists in both directions, indicates strongly an intention to contract due to the mutual benefit.

Question 5

On pages 33 and 34 of the case book there is an extract from the *Boots Cash Chemists* case. At the top of page 34, Somervell LJ refers to a 'formidable' difficulty identified by the Lord Chief Justice. If you assume that the price on goods which are sitting on a shelf in a store does constitute an offer, do you think that the difficulty identified here is really formidable or could it have been overcome? (12 lines)

No, I do not believe that the difficulty is truly formidable. Sommervell raises the issue that once a customer places an item into the receptacle the customer is bound by contract to purchase the goods so selected; the customer is said to have accepted the offer made by the seller by taking the goods off the shelf. However, this is not necessarily so. There is no reason why we cannot construe the situation as being that the customer merely considers the offer when he or she takes the item off the shelf (analogous to examining a house before purchase) and finally accepts the offer when he or she reaches the counter. This is a possible interpretation of the situation using offer-acceptance analysis that allows the customer to replace or discard goods before reaching the checkout.

Question 6

Consider the evidence that Mahoney JA takes into account in the *B Seppelt and Sons Ltd v Commission for Main Roads* (pages 41-46 of the casebook) in determining whether an offer has been made. Do you think he was correct in taking into account all the matters he refers to? (Hint: test the reliability and legitimacy of the evidence against the principle which determines whether a statement is an offer). (13 lines)

Mahoney JA states that he looks at what the law considers the intentions of the parties in deciding whether an offer has been made. Although *prima facie*, this kind of analysis appears to go against the objective reasonable person test for the existence of a contract, he construes what intentions he believes a party should have seen in the letters from the other party. For example, he takes into account the fact that a transaction involving a large city block is unlikely to be dealt with by exchange of letters; a reasonable person in their position would have construed that such communications would not be offers, but merely part of ongoing negotiations. Furthermore, in many instances, such as with the vendor's letter dated 14 March, he examines the wording of the document to conclude that the letter does not conclude a final contract. This evidence in the form of the vendor's letters gives an indication as to their interpretation of letters from the Department, as to whether an offer was construed. However, unlike the first piece of evidence, this does not take into account the reasonable person test.

Question 7

Read *Butler Machine Tool Co Ltd v Ex-Cell-O- Corp* on pages 52-55 of the case book. Is there a difference between the approach of Lord Denning and Lawton LJ? (12 lines)

The two judges' approaches differ. Denning believes that the traditional offer-acceptance model is no longer acceptable and analyses the set of documents as a whole, whereas Lawton analyses the documents using offer-acceptance. Denning's main approach is that in a case where we have a battle of the forms, you consider the party that fired the winning shot; in this case, he found that the "decisive document" came from the buyers, as it spelled out under what terms the transaction would be carried out under. Lawton, however, finds that the sellers' offer was killed by the buyers' counter-offer, which was

accepted by the sellers; he referred to an external standard to determine whether the terms of the original offer were “materially altered”. While both approaches purport to be objective, Denning’s idea of finding the decisive document is open widely to interpretation and provides less certainty than the formulaic offer-acceptance model used by Lawton.

Question 8

Read *Felthouse v Bindley* on pages 60-61 of the casebook. On page 61, the following question appears: “What would John Felthouse’s position have been if the horse had been kept out of the auction but the uncle then refused to take the horse?” Provide a short answer to this question. (12 lines)

Firstly, there was an offer from the uncle to his nephew – a reasonable person in the position of the nephew would consider that the message from the uncle was an offer. Although acceptance by silence is not acceptable, if the nephew communicated his acceptance using a means that would be no less effective than a lack of communication (practically any means of communication), then his acceptance would be effective. Since consideration for both parties is clear, there is then a contract between the uncle and the nephew for the nephew to sell his horse to his uncle. If the nephew had not communicated his acceptance before being told by the uncle that he did not want the horse, then the offer is revoked and there is no contract. Thus, assuming that the nephew communicated his acceptance of the offer, and that the offer was not revoked, there is a contract between the nephew and the uncle, so it would be a breach of the contract if the uncle does not take the horse.

Question 9

Read *Masters v Cameron* on pages 109-112 of the case book. If parties enter into an agreement which they intend to be immediately binding but make that agreement “subject to contract” in the sense that they intend to later replace the agreement with another agreement, which of the three categories of “subject to” agreements set out in *Masters v Cameron* would this fall under? (9 lines)

Prima facie, the phrase “subject to contract” indicates that the parties do not wish to enter a binding agreement immediately. However, in this case, the parties intend to be immediately bound, which suggests that the phrase “subject to contract” has been used inappropriately, and takes on the more benign meaning that their agreement will be replaced by a later one, with the first agreement having effect as of now. As there are no suspended terms, this suggests the 1st category. The difficulty here then is that this category does not permit alterations of the agreement. Depending on how the second agreement differs from the first, this case may not fit neatly into any of the three categories. (But even if they are close, the agreement will change, at least grammatically).

Question 10

Distinguish between invitation to treat and offer. Give examples to illustrate the distinction. (8 lines)

An offer is an indication by one party to another of their willingness to be bound to a contract on certain terms without further negotiations, whereas an invitation to treat is a request to others to bring forward an offer or to commence negotiations. For example, goods on display in a shop comprise an invitation to treat (*Boots Cash Chemists*); everyday experiences indicate that neither buyer nor shop-owner intend to be bound at that point. Instead, such a display invites you to go to the counter and make an offer when you have made up your mind and intend to be bound. Another example is an auction – the auction is an invitation to treat, and the auctioneer makes offers.