

**MARK SCHEME for the October/November 2011 question paper
for the guidance of teachers**

9084 LAW

9084/32

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.

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

Cambridge is publishing the mark schemes for the October/November 2011 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 arguments 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 The doctrine of promissory (or equitable) estoppel tried to mitigate the unfair effect of the common law rule in Pinnel's case.**
- (a) Analyse why the doctrine was thought to be necessary.**
(b) Outline the limitations to the doctrine's application.
(c) Discuss the extent to which the doctrine meets the aims stated above.

The doctrine of equitable or promissory estoppel must be set in the context of consideration and the rule in Pinnel's case (should be explained), that the payment of a lesser sum than that due does not provide valuable consideration for either express or implied promises to forego the remainder due. This equitable doctrine provides one way of making such a promise binding in situations when it is considered the only just outcome.

Candidates should explain its alleged origins (*Hughes v Metropolitan Railway Co*) and outline the case in which the doctrine was first enunciated in detail: *Central London Property Trust Ltd v High Trees House Ltd*.

Conditions on its application to be discussed are:

- need for a pre-existing contract
- a clear and unambiguous promise not to enforce full contractual or legal rights
- the promisee must have acted in reliance on the promise in the sense that it influenced conduct (*Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*)
- it must be deemed inequitable for the promisor to enforce his strict rights (*D&C Builders v Rees*)
- usually prevents rights from being exercised for a period of time and does not destroy them entirely (*Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*)
- cannot be used to create new rights or extend scope of existing rights already held (*Combe v Combe*).

Candidates must reach clear and concise conclusions to reach band 4.

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2 The postal rule of acceptance no longer serves a useful purpose in the world of modern business communications.

Discuss the reason for the introduction of the rule and critically assess the extent to which you think that the above proposition might be true.

Candidates might introduce responses by explaining the general requirement that the acceptance of an offer is not effective until it has been communicated to the offeror, i.e. until the person who made the offer knows that it has been accepted, and that the postal rule is an exception to it.

Candidates should explain that the reason for the rule is historical, dating from a time when communication through the post was one of a very small number of means of communication for the masses and even slower and less reliable than today.

The rule as set down in *Adams v Lindsell* should be explained and credit will be given for outlining and for explaining and illustrating its application and effect, with reference to suitable case law such as *Brinkibon*, *Henthorn v Fraser*, *Holwell Securities*, *Household Fire Insurance*, *Byrne v Van Tienhoven* etc.

The question also requires focus on whether or not the rule is now out of date, given the myriad instantaneous means of electronic communication, such as email, text messaging, faxes etc. One conclusion that might emerge is that even though the post may be a less attractive means of business communication than it used to be, from the point of view of the formation of a contract, it is still easier to prove that a letter has been posted than it is to prove that an acceptance has been brought to the attention of the offeror by other means.

Candidates are therefore expected to discuss the issue and draw firm conclusions if they are to reach band 4.

3 The requirement of intention to create legal relations seldom gives rise to problems in contract cases.

Explain why the requirement exists and assess the extent to which the above statement is true.

The question requires candidates to consider the importance of the intention to create legal relations in modern contract law.

The crux of the matter is that the law seeks to distinguish between mere agreements, which are not intended to be legally binding, and contracts, which are. In this context, consideration is seen as the sign and seal of a legally-enforceable bargain, so is it relevant that the intention needs to be established too?

Candidates should explain the rebuttable presumptions as regards social and domestic agreements (*Balfour v Balfour*, *Merritt v Merritt*, *Jones v Padavatton*, *Simpkins v Pays*) and commercial agreements (*Esso Petroleum v Commissioners of Customs and Excise*, *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*, *Rose and Frank v Crompton Bros*, *Jones v Vernons Pools*) and then go on to discuss the matter in relation to the linked presence of offer and acceptance and consideration.

Candidates are expected to discuss the issue and draw firm conclusions if they are to reach band 4.

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Section B

4 Mistaken identity.

**Xavier fails to pay Yasmina for the motorcycles and disappears.
Discuss the legal position of (a) Yasmina and (b) Xavier's customers.**

It is anticipated that candidates will recognise that there is an issue here with the formation of a contract. Essentials of a valid contract may be outlined by way of introduction only but limited credit will be given.

Candidates should identify the fact that, historically, there has been considerable debate as to whether apparently validly formed contracts can become void or voidable if the required consensus ad idem has been undermined by operative mistake, actionable misrepresentation or by duress or undue influence. Focus should then be turned to misrepresentation and unilateral mistake, which should be defined, explained and illustrated by reference to case law.

Candidates should recognise the general rules of caveat emptor and caveat vendor and the attitude of the law towards those who do not look out for their own interests and are consequently misled or mistaken.

Candidates should recognise the potential application of the Nemo Dat rule and that ownership in goods passes to the innocent purchaser who buys in good faith from the seller whose own title to goods is voidable by reason of fraudulent misrepresentation. That said, attention should be drawn to unilateral mistake and the fact that that this historically rendered contracts void and no ownership rights passed (*Cundy v Lindsay*, *Phillips v Brooks*, *Lewis v Averay*), hence leaving property recoverable even from innocent third party purchasers. The House of Lords decision in *Shogun Finance v Hudson* should then be outlined and it should be explained that the House had to make a choice: either to uphold the approach adopted in *Cundy v Lindsay* and overrule the decisions in *Phillips v Brooks Ltd* and *Lewis v Averay*, or to prefer these later decisions to *Cundy v Lindsay*.

The latter course was preferred for a combination of reasons. It was in line with the direction in which, under the more recent decisions, the law had been moving for some time. It accorded better with basic principle regarding the effect of fraud on the formation of a contract. It seemed preferable as a matter of legal policy, as between two innocent persons the loss was considered to be more appropriately borne by the person who takes the risks inherent in parting with his goods without receiving payment. This approach fitted comfortably with the intention of Parliament in enacting the limited statutory exceptions to the proprietary principle of nemo dat non quod habet.

General, all-embracing and ill-focused responses are to be awarded a maximum mark within mark band 3. A clear, compelling conclusion should be drawn.

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5 Celebration dinner and dance.

Advise the hotel as to their legal liability in respect of these two claims.

Candidates should contextualise the problem by saying that terms do not bind contracting parties unless incorporated into the contract. The ways in which incorporation might take place (by signature, by reasonable notice or by a course of dealing) should then be identified and explained. The problem hinges on whether reasonable notice was given to incorporate the exemption clause into the contract. In general, notice of the existence of such terms must be given either before or at the time that the contract is made and if notice is contained in a document like a ticket, then the document must be one in which a person might expect to find terms of contract mentioned. Was this the case with the respective parties?

It would appear that two contracts were made: one to attend the dance and one to have belongings looked after. Did the different tickets have a contractual status, since they were of two types? The differences should be discussed. Whilst the ticket for the dance itself might be deemed to be of a contractual nature, would the cloakroom ticket? Were the terms relevant to both contracts suitably communicated?

Cases such as *Olley v Marlborough Court Hotel*, *Thornton v Shoe Lane Parking* and *Chapelton v Barry UDC* should be explored, the decisions applied to the problem and clear, compelling conclusions drawn.

Responses limited to factual recall of principle will be restricted to marks below band 4.

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6 Discharge of debt issue.

Consider Morris' potential contractual liability towards UpinaFlash.

Candidates should contextualise their response by explaining that special rules apply to contractual duties regarding debts. If money is owed and the debtor is unable to pay in full, that debtor will sometimes offer to pay a smaller sum on the condition that the entire debt is discharged. Even if the creditor agrees to this arrangement, it is only binding if the debtor provides consideration by adding some extra 'horse, hawk or robe', i.e. some extra element. The facts of *Pinnel's Case* may be outlined. Candidates should recognise that this approach has been confirmed in much more recent case law too (*Re Selectmove Ltd*; *Williams v Roffey*). Candidates who deal with exceptions to the rule should be awarded appropriate credit.

Candidates should recognise that the rigid application of this common law principle can prove rather harsh in certain circumstances and that in such circumstances equitable doctrines have been developed in mitigation. One such doctrine is promissory estoppel.

The doctrine as expounded by Lord Denning in *Central London Property Trust Ltd v High Trees House Ltd* must then be addressed and the conditions on which its application rests explored, i.e. pre-existing contractual relationship, a promise to forego strict rights (*China Pacific SA v Food Corp of India*), reliance on the promise (*Hughes v Tool Metal Manufacturing*) and inequitable to enforce strict legal rights (*D& C Builders v Rees*; *Re Selectmove*).

Candidates are also expected to evaluate the limits on the doctrine's scope. Promissory estoppel cannot be used to create entirely new rights or extend the scope of existing ones; it is a 'shield and not a sword' (*Combe v Combe*).

Candidates must apply principle to the facts of the case in question. Could the signing of the receipt indicate a discharge of the original contract and act as consideration for the agreed payment? Do the principles of equitable estoppel thus apply in this case at all? And, if they do, did UpinaFlash freely forego rights in the strict sense or was the promise 'extorted' by implied threats of receiving nothing?

Responses limited to factual recall of principle will be restricted to marks below band 4.